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# Bosnia, War Crimes, and Humanitarian Intervention

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# BOSNIA, WAR CRIMES AND HUMANITARIAN INTERVENTION\*

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## I. INTRODUCTION

MR. CASSEL: We are on the eve of the half-century anniversary of modern international human rights law, which began with the creation, in 1943, of the U.N. commission of experts to investigate the war crimes by the Nazis, with the United Nations Charter in 1945, and with the Nuremberg tribunal. In these last fifty years, international human rights law and the institutions for implementation of that law have developed from almost nothing to a complex body of law that justifies more courses in a law school curriculum than one has time to teach. We have seen: the Universal Declaration of Human Rights in 1948; the international covenants on civil and political rights and economic, social and cultural rights in 1966; and a whole array of special conventions on such topics as torture and genocide. There are now international enforcement bodies, some of which are surprisingly effective at the global level and at the regional level, especially in Europe and, to a lesser degree, in the Americas. During the same period of

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time, what is called humanitarian law, which differs conceptually from human rights law in that it focuses primarily on the rights of civilians and other vulnerable people in war, has become much more developed and institutionalized through the Geneva Conventions of 1949 and the Geneva Protocols of 1977.

Despite this development, we are now witnessing in Europe, in full view of the world's press and TV cameras, the most inhuman atrocities on that continent since World War II.

The United Nations Security Council has expressed its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia. These violations include mass killings, massive organized and systematic detention and rape of women, and the continuance of the practice of ethnic cleansing, often for the acquisition and holding of territory.

This does not complete the list. As anyone who reads the papers knows, there have also been reports of the destruction of entire towns, the deliberate targeting of individuals by snipers, and the targeting of hospitals and other institutions.

The most important response to this in human terms might have been, but has not been, some form of effective intervention. That has been stymied. Militarily, we are told that intervention is a quagmire. Economically, it is too expensive; politically, it is unsupported; and morally, it is not our fight. Let the Europeans take care of it; it is in their backyard.

Whatever position one might take on the question of intervention, there ought to be no debate on one issue. That issue is the need to investigate and prosecute the crimes against humanity which are being committed on a daily basis in the former Yugoslavia, mostly by Serbs, but also in lesser numbers by Croats and Bosnian Muslims. Exemplary prosecutions of these crimes could be accomplished at a tiny fraction of the cost of military intervention. The case for prosecuting these crimes is much stronger, and the arguments against doing so infinitely weaker, than the arguments with respect to military intervention.

In practice, the world community has recognized the distinction. The very same United Nations Security Council that has to date refused to intervene militarily in Bosnia, has taken several steps toward the investigation and prosecution of war crimes. Intervention began in July 1992 with an open invitation letter to the governments and the non-governmental and intergovernmental organizations of the

world concerned with human rights to "please keep tabs on war crimes and violations of humanitarian law in Yugoslavia" and "let us know at the U.N.," and, "By the way, all you people out there in the former Yugoslavia doing these things, you should be aware that what you're doing is illegal and you will be held personally responsible."

When that did not work and some more huffing and puffing did not work, the United Nations Security Council, last October, escalated to the stage of creating a formal commission of experts to receive all of the reports that it had invited, analyze them and make recommendations to the U.N. about what to do about them. Then, finally and most recently, the Security Council authorized the creation of an international tribunal to try war crimes in Yugoslavia.

Despite these steps, the real commitment by the United Nations to the investigation and prosecution of the reported atrocities is shaky, if not shameful. Both of the institutions referred to, the commission of experts and the war crimes tribunal, were developed too late to save many lives or to intervene effectively. They have been, at least to date, grossly underfunded. It is fair to say, based on the record to date, that they are more fig leaves for the purpose of mollifying public opinion, or perhaps diplomatic bargaining chips, than they are genuine efforts to investigate and punish war criminals.

The commission of experts was established last October. It was the first international commission of inquiry to look into war crimes since the World War II commission fifty years earlier. It has five distinguished members, among them Cherif Bassiouni at DePaul University in Chicago. The chairman is Frits Kalshoven, an internationally recognized authority on humanitarian law from the Netherlands. A military lawyer from Canada, William Fenrick, is a member. A judge from Senegal, former judge of the World Court and one of the most distinguished international lawyers in the world, Keba Mbaye, is on the commission. The president of the Norwegian Institute of Human Rights, Torkel Opsahl is also on the commission. So certainly the criticisms of the commission and its work have little to do with the members. They are distinguished members, and if the U.N. were to commit to taking action, it would certainly have the team in place that would be capable of doing a good job.

What is wrong? Until very recently, this commission of distinguished members with such an important task, a task which requires a serious investment of resources if it is to be done credibly, was essentially given no money. The United Nations paid for the members to travel from their respective homes to Geneva once a month to meet.

They provided them with administrative staff in Geneva so that they would have somebody to answer their mail and forward their reports, and that is it.

Attorneys and litigators know what it means to investigate and litigate a significant case, let alone tens of thousands of cases of murders, massacres, systematic rape and so on. If an experienced civil rights litigator or criminal lawyer were to attempt to investigate or prosecute the hundreds and thousands of war crimes in Yugoslavia in a serious way, he or she would have to send lots of investigators over to Yugoslavia to interview witnesses. They would have to provide them with translators. They would have to be prepared to cover travel costs, staff costs, translation costs, transcript costs, make things get written down, take photographs, get real evidence, and develop their case.

It is not easy to prove someone guilty beyond a reasonable doubt of a crime, let alone a war crime, and one cannot do it by getting hearsay reports third and fourth hand from witnesses whose whereabouts may be unknown. One wants to move quickly because the evidence is literally being destroyed on a daily basis. The witnesses are being killed and dispersed, and the very site of the investigation is Bosnia, in which accessibility to the outside world is constricting on a daily basis. It would be very difficult to actually carry out an investigation, but it would not be difficult at all for any experienced litigator to know how to do it.

However, the United Nations and its commission of experts are essentially doing none of this. The commission does not have one single investigator in Bosnia or anywhere else. The evidence is being destroyed, testimony is growing stale, and the task of the prosecutor is becoming more difficult every day.

The commission has done a couple of things, but both of them on the initiative of private organizations with very little help from the United Nations. First, Professor Bassiouni, who was appointed by the commission as its special rapporteur on fact-finding, has established, with private foundation support, a documentation center at DePaul University, where all of the reports that come to the United Nations from governments, NGOs and intergovernmental organizations, come into our offices, get reviewed by a staff of lawyers, law students and analysts, and get placed into a computerized database. There should be a good paper trail of all the paper that has been generated concerning the conflict.

However, prosecuting a war crimes case is not a paper case, rather it is a people case. So as pleased as everyone is at De Paul for collating all of this paper information, it is no substitute for a serious investigation in the field.

Second, Physicians for Human Rights, an international humanitarian organization based in the United States, took the initiative to go to Vukovar in Croatia to do some forensic investigation of a mass grave site there. The U.N. was at least willing to cooperate with that.

The situation has started changing somewhat. The Canadian government has now contributed \$200,000 to the commission of experts. The government of the United States has now pledged, but not yet delivered, \$500,000. The Canadian government, under Commander Fenrick, will be leading a small delegation to Bosnia for on-site fact-finding later this month, assuming there is any Bosnia left. All of this means that if anyone has been under the delusion that the United Nations has been minding the store, that the evidence is being collected, and that the case is being prepared, then that delusion cannot stand up very long when confronted with the reality of what the U.N. is doing.

Recently, the Security Council upped the ante by creating an international war crimes tribunal. This will be an eleven-member international court with a chief prosecutor and a staff assigned to it. It will most likely be located either in the Hague in the Netherlands or in Geneva, and its mission will be to prosecute serious violations of humanitarian law occurring in the former Yugoslavia for the period since January 1, 1991.

Legally speaking, the war crimes tribunal has the advantage of having been created not by treaty and by agreement of participating countries, but rather by the United Nations Security Council under Chapter 7 of the U.N. Charter as an enforcement action to maintain international peace and security. The legal result of this is that, under the U.N. Charter, every member of the United Nations has a legal duty to cooperate and support the efforts of the Security Council enforcement action.

The early signs with respect to the tribunal are not very encouraging. The first concern is delay. The war crimes have been going on in Yugoslavia now for a couple of years. We still do not have a tribunal or a prosecutor. At the current pace, under the plans and the bureaucratic realities of the United Nations, it appears that we will probably not have a prosecutor effectively in place until October, no operational

court until early next year, and who knows how long it will be before we have any actual trials.

More fundamentally, though, there is concern about the resolve of the United Nations, in particular the Security Council, to support the tribunal and the prosecutor. Nominally, the prosecutor is supposed to be independent. That is, he is not to take orders from any government. But in fact, some of the winds that are coming from inside U.N. headquarters in New York seem to suggest that there may be concern on the part of certain members of the Security Council if a prosecutor were to just crash headlong into doing his job and actually go after the senior war criminals, the top military officers, and the government officials of the entities involved, without taking into account the diplomatic necessities of the moment. It will be a real success if we are able to find a prosecutor who is really allowed to do his job by the United Nations.

None of this should come as a great surprise because we are speaking about concerns based on human rights, not the rights of governments, and the United Nations is an organization of governments, not of human beings. We cannot really expect an organization of governments to take the initiative to defend the rights of humans. If we really want to see something done about crimes against humanity, ethnic cleansing and the rest, it is up to us and the organizations which represent our interests to demand that both our government and the United Nations put their high-minded rhetoric into down-to-earth practice.

## II. WAR CRIMES

MS. FIELDING: This presentation examines the history of the laws of war and the effort made through international law to prevent war crimes and to punish those responsible for war crimes. Under the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (hereinafter "the Statute of the International Tribunal"), the International Tribunal has the power to prosecute persons for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity.<sup>1</sup> The history of crimes against peace as well as war crimes and crimes against humanity is discussed even though the Statute of the International Tribunal

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1. S.C. Res 827 (May 25, 1993), *reprinted in* 323 I.L.M. 1203 (1993).

adopted by the Security Council on May 25, 1993 does not include crimes against peace in the crimes to be prosecuted.

Human rights law addresses the relationship between the state and that state's nationals particularly in times of peace.<sup>2</sup> The law of armed conflict addresses the relationship of the state and aliens, particularly during times of war.<sup>3</sup> The law of war developed along two distinct lines: The law of the Hague and the law of Geneva.<sup>4</sup> The law of the Hague restricts the conduct of warfare during armed conflict, and the law of Geneva addresses the protection of victims of war during armed conflict.<sup>5</sup> These two distinct lines intertwine as to a number of legal concepts.<sup>6</sup>

#### A. GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949

The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was the first of a series of treaties protecting victims of war.<sup>7</sup> The Geneva Conventions of 1906, 1929 and 1949 provided updates of the protections of the sick and wounded in the armed forces on land.<sup>8</sup> The new protections were made applicable to naval warfare by the Hague Convention of 1907.<sup>9</sup> In 1929 the first convention relative to the protection of prisoners of war was enacted.<sup>10</sup> While the Hague regulations of 1899 and the Hague regulations of 1907 addressed the treatment of civilians, they failed to provide the protections civilians needed during World War I.<sup>11</sup>

The four Geneva Conventions, adopted at Geneva on August 12, 1949, set forth standards of conduct to which belligerent nations must

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2. Major Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 10 (1984).

3. *Id.*

4. *Id.* at 11.

5. *Id.* While the Geneva conventions protect victims, they also have an "affirmative impact" on the conduct of war. Howard S. Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 326 (John Norton Moore et al. eds., 1990) [hereinafter Levie, *The Laws of War and Neutrality*].

6. *Id.*; Murphy, *supra* note 2, at 11.

7. Levie, *supra* note 5.

8. *Id.* See Murphy, *supra* note 2, at 13.

9. Murphy, *supra* note 2, at 13.

10. *Id.*

11. *Id.* at 14.



adhere in treatment of specific categories of people under the circumstances of war.<sup>12</sup> In the aftermath of the destruction of life and property in World War II, the International Committee of the Red Cross revised the Prisoners of War Convention and the Conventions of the Sick and the Wounded (on land and at sea) and drafted for the first time a convention which protects civilians during hostilities.<sup>13</sup>

Article 2, which is common to each of the four conventions, makes the conventions applicable to declared war and to armed conflicts, whether or not each of the belligerents recognizes that a state of war exists.<sup>14</sup> Article 2 also makes each of the conventions applicable to occupations, whether partial or total, and even though the occupation has not been resisted.<sup>15</sup>

In addition, Article 3 of each of these conventions makes the conventions applicable to internal conflicts and guarantees victims in civil wars general humane protections.<sup>16</sup>

Compliance with the Geneva Conventions is aided by the obligation of state parties to enact penal sanctions for violations of grave breaches.<sup>17</sup> States are obligated affirmatively to search for those guilty of a grave breach and, when located, to prosecute or extradite.<sup>18</sup> The trial of the accused must offer the judicial safeguards given under the Third Convention to prisoners of war.<sup>19</sup> Grave breaches are listed in each convention, while simple breaches include all other possible breaches.<sup>20</sup>

The grave breaches include the following:

1. willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health;

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12. *Id.* at 23; The First Geneva Convention protects those members of the armed forces on land who are sick or wounded. The Second Convention protects the wounded and sick members of naval forces and those who are shipwrecked. The Third Geneva Convention protects the rights of prisoners in the control of a belligerent party to the convention. The Fourth Convention protects civilians or those who are not combatants and do not engage in hostilities. *Id.* at 23-24.

13. WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW, CASES AND MATERIALS* 971 (1962).

14. First, Second, Third and Fourth Geneva Conventions of 1949, art. 2; Murphy, *supra* note 2, at 20.

15. Murphy, *supra* note 2.

16. *Id.* at 22.

17. Waldemar A. Solf, *War Crimes and The Nuremberg Principles*, in *NATIONAL SECURITY LAW* 376 (John Norton Moore et al. eds., 1990).

18. *Id.*; Murphy, *supra* note 2, at 27.

19. Solf, *supra* note 17; Murphy, *supra* note 2, at 27.

20. Solf, *supra* note 17, at 376.

2. extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
3. compelling a prisoner of war to serve in the forces of the hostile power, or willfully depriving him of the rights of fair and regular trial prescribed by the Convention;
4. the unlawful deportation or transfer or unlawful confinement of a civilian; and
5. taking civilians as hostages.<sup>21</sup>

Although not included as grave breaches to be prosecuted under the Statute of the International Tribunal, Protocol I adds to the grave breaches under the laws of war. If perpetrated willfully and if causing death or injury to physical or mental health, the following are grave breaches;<sup>22</sup>

1. willfully causing death or serious injury to body or health by:
2. making the civilian population or individual civilians the object of attack;
3. launching an indiscriminate attack affecting the civilian population or civilian objects or an attack against works or installations containing dangerous forces (dams, dykes, nuclear electric power generating stations), knowing that it will cause civilian casualties, excessive in relations to the concrete and direct military advantage anticipated;
4. making non-defended localities or demilitarized zones the object of attack; and
5. making person the object of attack in the knowledge that he is hors de combat;
6. the perfidious use of the Red Cross emblem.<sup>23</sup>

Under Protocol II, these safeguards cover victims of internal conflicts.

#### B. VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

The Statute of the International Tribunal also provides for prosecution of violations of laws or customs of war and notes that the Hague Regulations by 1939 and article 6(b) of the Nuremberg Charter are recognized as customary international law. Violations address the manner and method of conducting warfare and prohibit:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

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21. *Id.*; First, Second, Third and Fourth Geneva Conventions, Common Arts 50/51/130/147. The Statute of the International Tribunal includes these as grave breaches of the Geneva Conventions of 1949. S.C. Res. 827 (May 25, 1993), *reprinted in* 323 I.L.M. 1203 (1993).

22. *Solf, supra* note 17, at 377.

23. Protocol I, art. 85(3); *Solf, supra* note 17, at 377.

- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.<sup>24</sup>

### C. *CRIMES AGAINST HUMANITY*

The International Military Tribunals at Tokyo and Nuremberg indicted war criminals under basically three crimes: crimes against peace, crimes against humanity and war crimes.<sup>25</sup> Crimes against peace include the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"<sup>26</sup> War crimes, as defined in the Nuremberg Charter, are violations of laws and customs of war and include "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>27</sup> Crimes against humanity include "murder, extermination, enslavement, imprisonment, torture, rape, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."<sup>28</sup>

Particular note should be made of the crime of torture. Torture is listed specifically in the Statute of the International Tribunal under Article 2 as a grave breach of the Geneva Conventions of 1949 and Article 5 as a crime against humanity. The 1899 Hague Convention

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24. Statute of the International Tribunal, art. 3, S.C. Res. 827, (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993).

25. Murphy, *supra* note 2, at 28.

26. *Id.* at 42.

27. LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 361 (1987).

28. *Id.* The Statute of the International Tribunal adds imprisonment, torture and rape to this list. S.C. Res. 827 (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993).

and the 1907 Hague Convention outlaws torture.<sup>29</sup> Article 3 of the 1949 Geneva Conventions makes torture a grave breach.<sup>30</sup> In addition, the 1977 Protocols I and II outlaw torture through Article II of Protocol I and Article 5 of Paragraph 2(e) of Protocol 2.<sup>31</sup> The 1984 Torture Convention bars torture in times of both war and peace.<sup>32</sup>

While the designation "crimes against humanity" was first used in Article 6 of the Nuremberg Charter, Bassiouni notes that the concept of "crimes against humanity is present throughout the history of the laws of war."<sup>33</sup> Note that the prologue to the 1907 Hague Convention states that "the belligerent remain under the protection and the rule of the principles of the laws of nations as the result from the usages established among civilized peoples from the laws of humanity and the dictates of the public conscience".<sup>34</sup>

The acts which constitute "crimes against humanity" do not differ materially from the acts which constitute war crimes. However, war crimes are crimes perpetrated against foreign nationals during times of war, while crimes against humanity involve crimes perpetrated against nationals of the same state as the offenders.<sup>35</sup> Punishment for crimes committed against those of the same nationality as the perpetrator is a significant advancement in the development in the laws of war.<sup>36</sup>

The International Military Tribunal ("IMT") rejected the arguments that international law is limited to regulating conduct of states and does not punish individuals and that there is no individual responsibility for those who carry out state action.<sup>37</sup> The IMT notes that, "Individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities; and only by punishing individuals who omit such crimes can the provisions of international law be enforced."<sup>38</sup> International law imposes international duties on the individual which take

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29. *Id.* at 323.

30. *Id.*

31. *Id.*

32. *Id.* at 326.

33. M. CHERIF BASSIOUNI, *Crimes Against Humanity in International Criminal Law* 147 (1992).

34. 1907 Hague Convention, pages 6-8 of the Preamble reprinted in BASSIOUNI, *supra* note 33, at 167.

35. BASSIOUNI, *supra* note 33, at 179.

36. *Id.*

37. HENKIN ET AL., *supra* note 27, at 362-363.

38. BASSIOUNI, *supra* note 33, at 207.

precedence over his obligations to the state so that he has no immunity from punishment when the state violates international law.<sup>39</sup>

Crimes occurring in the former Yugoslavia include murder and extermination. Murder of civilians during war is a crime under treaty and customary laws of war.<sup>40</sup> Bassiouni describes "extermination" as "murder on a large scale."<sup>41</sup> The 1899 Hague Convention, the 1907 Hague Convention, the Fourth Geneva Convention and Protocol I prohibit murder of civilians but they do not define "murder." Each of the four 1949 Geneva Conventions state, "Grave breaches shall be those involving any of the following acts if committed against persons or property protected by the convention: willful killing . . ."<sup>42</sup> Willful killing is addressed in the Genocide Convention. In Article 2, the Genocide Convention states that "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:

- A) Killing members of the group.
- B) Causing serious bodily injury or mental harm to members of the group.
- C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- D) Imposing measures intended to prevent birth within the group.
- E) Forcibly transferring children of the group to another group."<sup>43</sup>

Bassiouni notes that the Genocide Convention is limited in that acts must be perpetrated with the intent to destroy and argues that political and social groups should be protected as well.<sup>44</sup>

The international war crimes discussed above are considered customary international law. The ICJ in the Nicaragua case referred to the Geneva Conventions as customary international law, particularly Articles 2 and 3. The Nuremberg principles are considered customary international law and were unanimously adopted as international law by U.N. resolution.<sup>45</sup>

39. HENKIN ET AL., *supra* note 27, at 362.

40. BASSIOUNI, *supra* note 33, at 290.

41. *Id.*

42. *Id.*; Geneva Conventions of 1949; Geneva I, art. L, Geneva II, art. L.I; Geneva III, art. CXXX; and Geneva IV, art. CXLVII.

43. Genocide Convention, art. II, *reprinted in* Bassiouni, *supra* note 28, at 292. Also punishable under the Statute of the International Tribunal under Article 4 is "genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide." S.C. Res. 827 (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993).

44. BASSIOUNI, *supra* note 33, at 292.

45. The UNGA adopted resolution 95(1) on December 11, 1946. HENKIN ET AL., *supra* note 27, at 364.

#### D. CONCLUSION

In conclusion, the history of the development and application of the crimes set forth in the Statute of the International Tribunal is extremely significant in establishing the meaning of the crimes. Some take the position that the crimes should have been defined further in the Statute. However, it would be self-defeating and detrimental to attempt facile definitions of the crimes. Further, this position ignores the reality that it may be difficult for nations, even the permanent five, to agree on the precise language necessary to define the crimes. A resulting delay in establishing the Statute would have signalled to the world community that the Security Council lacked the resolve to hold perpetrators accountable for war crimes. Further, the authority and legitimacy of the Tribunal's decisions rest in no small part on the legitimacy of the law on which it bases its decisions. The respect accorded the process inherent in the development of the customary international laws of war and the binding nature of them are the guarantors of the legitimacy of the law on which the Tribunal will base its decisions. The Tribunal should enjoy the ability to utilize the full history of the development and application of the crimes prosecuted in making its determinations.

#### III. UNITED STATES POLICY IN BOSNIA

MS. BURKHALTER: It is important to talk more about United States policy and some of the pertinent policy questions. It has been very interesting to hear the former panelists describe all of the new activity in the realm of international human rights law. For example, the first war crimes tribunal possibility since Nuremberg. This is something that all human rights activists and lawyers can feel great about. However, there is an interesting contradiction when one sees the U.N. more involved in peacemaking and in finding new Security Council resolutions at a time when the Bosnian government, which probably represents the largest number of victims, has said in recent days, "Please leave. Go away altogether. U.N. involvement is making things dramatically worse for us. We would be better off without the embargo and without international involvement at all." The Bosnian foreign minister made this very clear. The Bosnian government means it. Anyone who has looked at the physical and human destruction of Bosnia over the last year and a half, while the international community continued their active and vigorous engagement on all fronts, can be sympathetic with the Bosnian foreign minister's cry to the international community: "You have handed us over to the Serbs. Please

leave now." The fundamental contradiction between this sense of churning activity on all of these fronts and what is actually happening on the ground is what my remarks will address.

One of the questions that gets asked is "whose fight is this?" The United States can, from a strategic and security standpoint, legitimately state that it is not their fight. That is unlike the case of Somalia, where the United States armed and aided an extraordinarily abusive government whose extreme depredations throughout the 1980's laid the groundwork for the destruction of the country, thus giving the United States government a moral responsibility to take some action to renumerate that crisis. The United States does not have a similar moral implication in the destruction of the former Yugoslavia. It is also not in our backyard and it is not a security threat to us. There are a number of perfectly respectable reasons why the United States has said: "This is not our fight." We do not yet live in a world where the humanitarian intervention concept has any particular resonance, particularly from a party that is very far flung and has no implication in the abuses themselves. It has no particular resonance in the United States security community and it does not have resonance with the United States public.

One of the reasons why the United States has not played a role, and one of the reasons why there is no countervailing weight in the United States Congress, is that, for the most part, this is not an issue of concern to the American people. The cards and letters are not coming in. Members of Congress have opinions on the matter, but they are varied.

One can not even identify a United States policy position towards the former Yugoslavia with any one political party or with any wing of a political party. This is because people who might have been called extreme conservatives when it related to Grenada, Panama, El Salvador and Guatemala are the partisans of the most active intervention, while traditionally conservative Republicans, who were very eager to see United States military might used in tiny countries close to home, want absolutely no part of this fight or anything in between. However, there is no congressional counterweight because the American population has no strong opinion regarding what should be done, or whether our government should become engaged.

This makes this humanitarian situation dramatically different from Somalia. The real reason the United States intervened in Somalia in a humanitarian effort was that there was an outpouring of pressure from members of the United States public to members of

Congress. Most of the pressure came from humanitarian groups. The relief groups, the refugee groups and, to some extent, the human rights organizations put maximum pressure on members of the House and Senate, who played a critical role in keeping pressure on the Bush administration for well over a year. Finally, when it became abundantly clear that the United Nations was too incompetent to get the job done in Somalia, the United States decided to do the job for them. The significant role the United States Congress played in pressuring the executive branch is the key to why the United States eventually agreed that Somalia was their fight and that they had an investment in the situation. This was the right decision, at least in part because the United States had a lot to do with why the situation was so bad. This is not the case in the former Yugoslavia.

So whose fight is this? The United States has decided, for a variety of reasons, that it is NATO's fight rather than the United States' fight. However, considering that the United States has always dominated NATO and that NATO has always been a creature of the United States, it is slightly disingenuous for the United States to tell NATO to do this alone and to tell them that they need to, for the first time in forty years, take collective action to deal with an extremely difficult security and humanitarian situation. NATO, for a variety of reasons, refused to take action. NATO decided that it was not their fight, the United States has decided that it is NATO's fight, and nothing is happening.

Is peace worth it at any cost? What is the relationship between the peace process, the attempts to negotiate an end to the war, the attempts to provide humanitarian assistance and the attempts to provide protection for the victims? The United Nations negotiators, people who supposedly have enormous integrity and who supposedly believe passionately that the shooting must be stopped, have delivered a solution with no integrity at all—The Vance-Owen peace process. Mr. Vance, who came out of the bitter experience of the Vietnam War, has placed his personal integrity and his significant diplomatic skills on the line to try to get the fighting stopped and the conflict resolved peacefully. The bad news is that it did not work. The United Nations' insistence on continuing the negotiation process in trying to achieve peace at any cost has been an integral part of what has gone wrong with international engagement in Bosnia.

The question of when to stop negotiations until some kind of enforcement of, or some kind of compliance with, agreements have occurred is very tough. It is a very tough call for the traditional peace



and human rights communities in this country. This is probably part of the reason why we have not had an upsurge of grass-roots interest in this whole conflict. Everyone wants to see the peace process work, including the negotiators. The bitter reality is that throughout the last year and a half, while the Bosnian peace was being negotiated, Bosnia was completely dismembered. The aggression continued throughout the peace process, even as the Serbian negotiators sat at the table and signed documents that they never meant to comply with. They signed the documents and went right back out in the field and did the reverse.

One can see how this has affected United Nations operations in the field. There is absolutely nothing wrong with the United Nations mandate in terms of the operating instructions for the UNPROFOR troops, both in Croatia and in Bosnia. They are instructed to use any means possible, which is precisely the same language that was used in the Gulf War to justify United Nations protection of Iraqi-Kurdistan. This is the model for a successful human protective effort. The rules of the road are fine for the United Nations forces that are there. The real problem is that the rules do not have any enforcement behind them. When the Europeans complain about U.S. air strikes because their people are on the ground and are vulnerable, they are right. It is an absolutely respectable position to take. In the Iraqi-Kurdistan situation, what keeps the Iraqis from overrunning Kurdistan is not the 500 United Nations troops on the border, but rather the overflights and the absolute certain knowledge that something is going to come at them from the Incirlik Air Base in Turkey. They had a taste of it during the Gulf War and they know that there will be an international penalty. The 500 troops on the border are there to act as a trip wire rather than to shoot. The reason that agreement has worked to date is the certainty of response and reprisal, something that is not present in the case of Bosnia. In Bosnia, there are tens of thousands of UNPROFOR soldiers, but there is no certainty of response if they are killed or shelled. One can be contemptuous at Europe's position. However, in light of the fact that there is no certainty of an international response in the event that large numbers of UNPROFOR troops are fired on, one cannot blame Europe for not playing a braver role than they have.

Some of the UNPROFOR units have actually been very brave. There are several examples of United Nations people exhibiting great courage. The British are very good and have attempted, at great personal risk, to protect some of the civilians. However, these attempts are not consistent and they are very high risk.

Then there are the other forces in the United Nations operation. The Ukrainians are in their barracks and they are drunk. The Egyptians refuse to go out there. It is a United Nations operation, however, the rules themselves are not where the problem lies.

One of the things that has held up a really effective response in Bosnia has been that the United Nations just keeps talking. Security Council resolution after Security Council resolution is passed. One of the great casualties of the whole United Nations engagement in Bosnia is that the integrity of Security Council pronouncements is zero because they are flaunted at will on a regular basis. For example, it is obvious to everyone in the world that the Serbians, Croats and Bosnians were supposed to have brought all of their heavy weapons under United Nations command. Not a single weapon is under United Nations command today. When the Security Council orders something that is not carried out, what does that say about the international system? It is not the fault of the soldiers on the ground. It is not the fault of the international community when Security Council resolutions are disrespected, when fighting continues despite two hundred separate cease-fires, and when Serbian forces refuse to withdraw their blockades of starving towns and other options are not considered.

This gets us to where we are today. The international community has not been ready to demand that something else be done and they are not ready to demand it now. The Clinton Administration, unfortunately, signaled early on that their policy on Bosnia was going to be the same as President Bush's policy on Bosnia. As early as February, Secretary of State Christopher gave a major speech on Bosnia in which he announced that the Clinton Administration's policy on Bosnia is Bush's policy on Bosnia. In other words, no policy. Secretary of State Christopher did announce that the administration would send Reginald Bartholemew, senior diplomat, to join in the negotiations process.

This actually had some potential. If Bartholemew, or any U.S. diplomat, had become involved with the Vance-Owen process and had suggested that things be done differently, it may have been very helpful. The thing to have done was to have gone back to the Vance-Owen process, wipe the slate clean, and start over with only human rights and humanitarian affairs on the agenda rather than territorial outlines or the future of greater Serbia. It should have also been made very plain what the consequences for breaking a human rights agreement would be. Surely our negotiators in the Pentagon, working with our

NATO allies, would have been able to come up with some credible threats that could have been implemented at a fairly low cost.

If the United States entry into the diplomatic process had yielded that, it might well have been worth having. However, as near as one can tell, nothing changed about the Vance-Owen process. This was essentially the Bush policy and the Clinton Administration's policy until just a few weeks ago. The Clinton Administration, rather than coming up with a policy and moving forward with it, just announced what the policy would be. The Clinton Administration announced that the policy would be the lifting of the arms embargo on Bosnia and air strikes by the United States against Serbian battlements. The policy was announced and Europe did not like it. As a result, we backed down and went away embarrassed. The United States was not willing to do something that Europe did not like.

Europe did not like it for a very good reason. There are no United States troops on the ground that are going to get hurt if aerial overflights and aerial bombardment makes the war hot on the ground. European lives are on the line.

When Europe said "no," the United States took back its policy and there was an enormous crisis. Then NATO came up with an alternative—the protection of safe enclaves. If this were actually carried out, it would be an acceptable policy. However, the issue is the same. If there are not enough troops on the ground to protect people where they are, then it is the same as what we have already. Possibly worse, because it looks like open season on anyone who is not in a safe enclave. Without the kind of military might and political will that has been absent from this entire conflict to date, the safe enclaves are no better than anything else that we have seen.

If we were to do things differently, what would we want to see? At this point, there are no good policy options at all.

The time to save Bosnia was at the end of the Croatian war when it was obvious what was going to happen to Bosnia. If a marker had been drawn in the sand and if a large contingent of United Nations forces had been placed in Bosnia at that time, then Bosnia may have been saved and negotiations about borders could have begun.

It was not realistic to think that Bosnia could have kept the borders it named for itself from the former Yugoslav Republic. It was obvious that the Serbs were going to get some of that territory. However, it was still possible to imagine, articulate and define a respectful and viable country of Bosnia. Unfortunately, given the level of atrocities from neighbor to neighbor, it was too late.

Most human rights activists know that a multiethnic society will not be possible for a very long time. At this point, the entire concept of a multiethnic Bosnia or Serbia is gone.

What can we do differently? The Iraqi-Kurdistan model is still a good model to apply.

We should see military intervention for humanitarian purposes, but inevitably it is going to have to be large enough to carry out reprisals in the event that it is not possible to deliver assistance or protect the civilians. There has to be some effort at punishment of the perpetrators. That takes us further than the mandate of my organization, Human Rights Watch would probably have us go.

If we had such a policy and were prepared to draw the line, then we could go back to the negotiating tables. Humanitarian intervention would do more than just feed the victims and prevent war crimes. It would have large political consequences in terms of the behavior of the Serbs at the bargaining table, because they would see the extent of U.S. and international resolve.

A major impediment to successful humanitarian intervention in Bosnia has been that no country wants to see their troops get chopped up. The United States does not want to see it, Britain does not want to see it, and France does not want to see it. If other countries do not see it as endangering their security, then we do not see it as endangering our security and we do not want to lose American troops. The only answer is a volunteer United Nations force. A standing United Nations force that takes volunteers. There are many countries that will come up with volunteers. Demobilization is the human rights question in many countries around the world. Soldiers need jobs. Professional soldiers need jobs. There is real potential for a volunteer United Nations force. It is something that has been talked about. The Secretary General has talked about it. Sir Brian Urquhart, formerly the head of United Nations peacekeeping, has made a proposal in the most recent edition of the New York Review of Books. It is the only answer to breaking the awful impediment to any country that wants to put troops in danger and carry out the mandate that is required of them to save lives.

