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### Remarks Made at Pace University School of Law on October 23, 1993

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## DR. ROY S. LEE†

The question posed is "Should there be an international tribunal for crimes against humanity?" My answer is a definite yes. Let me state the reasons.

First, I should like to point out that the development of international law in the past century has been moving towards that direction. The creation of an internationally-constituted permanent tribunal to prosecute and punish international crimes is, in my view, a natural progression of a process which we started a long time ago.

Prior to the 18th century, the conduct of war was largely unregulated. Excesses and acts of brutality were the normal course of action in war. The first national code of conduct of war was only introduced in 1863 by Frances Lieber for the United States armies.<sup>1</sup> This was then followed by two international instruments: the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field;<sup>2</sup> and the 1874 Brussels Declaration concerning the laws and customs of war.<sup>3</sup> These instruments merely articulate certain standards which were recommended for States to adopt. The concept of violation or war crimes was non-existent.

More elaborate international instruments concerning laws and customs of war only emerged at the 1899 and 1907 conferences.<sup>4</sup> These so-called Hague Rules were intended to be applied by the States themselves; there was no third party enforcement. In this sense, they were self-regulating. Mechanisms for dealing with violations were still at an embryonic stage, let alone the question of prosecution and punishment.

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<sup>1</sup> President Lincoln Gen. Orders No. 100, Instructions For The Government of Armies of the United States.

<sup>2</sup> 22 Stat. 940 (Senate Accession March 16, 1882).

<sup>3</sup> Final Protocol: Rules of Military Warfare, Aug. 27, 1874, *reprinted in A.J.I.L.*, supp. 1:96.

<sup>4</sup> Hague Convention, No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907. 36 Stat. 2277, T.I.A.S., No. 539.

Prosecution and punishment of war criminals became a reality only in 1945 when the Allied Forces set up the International Military Tribunals to prosecute and punish the major war criminals of the Axis. Several characteristics of the Tribunals should be noted: (a) they were constituted by the victor states to prosecute and punish war criminals of the vanquished; (b) the Tribunals had no jurisdiction over war criminals of the Allied Forces; (c) they were instituted after the war, long after the crimes had already been committed; (d) the judges and prosecutors were also appointed by the victor States. I mention these characteristics only to facilitate a comparison with the subsequently developed tribunals, to which I shall now turn.

Under the 1949 Geneva Conventions for the Protection of War Victims,<sup>5</sup> States parties are legally obligated to enact legislation necessary to provide effective penal sanctions for persons committing any of the grave breaches laid down in the Conventions. Each contracting party is also under an obligation to search for persons alleged to have committed, or to have ordered to be committed "grave breaches", and to bring such persons, regardless of their nationality before its own courts or to hand over for trial such persons to another contracting party. Grave breaches include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation, taking of hostages and extensive destruction and appropriation of property items.<sup>6</sup> Thus, under the 1949 system, penal sanctions have been introduced to prosecute and punish grave breaches in the court of the contracting parties concerned. This is still a self-executing system since the penal sanctions are to be applied by the contracting parties concerned and in their own courts.

In comparison to the Nuremberg type, the Geneva system has made important advancements have been made. First, a universal jurisdiction has been created over the grave breaches. Second, such jurisdiction may be exercised at any time when such breaches have been committed. Third, penal sanctions are to apply to all violators whether or not they belong to the victorious or the vanquished. These are important departures from the Nuremberg type.

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<sup>5</sup> 75 U.N.T.S. 287 (Aug. 12, 1949).

<sup>6</sup> *Id.*

Let us now turn to the recent International Tribunal for the Prosecution of Persons Responsible for serious violations of International Humanitarian Law committed in the territory of the Former Republic of Yugoslavia since 1991, created in 1993 by the Security Council pursuant to its resolution 827 (1993) (hereinafter referred to as the International Tribunal).<sup>7</sup> Here again, we have made some advancement. First, this Tribunal, the first of its kind, was created out of an international rage at the widespread violations of international humanitarian law occurring in former Yugoslavia. It represents a manifestation of the world community at the tragedies committed in Yugoslavia. It is therefore different from the previous types, which were instituted either by the victor states or by the parties involved. Second, it is an international tribunal in that its eleven judges were elected by the General Assembly on behalf of the world community, not by the parties involved. Third, it was established under chapter VII of the UN Charter.<sup>8</sup> This means that the Tribunal is endowed, through the Security Council, with enforcement measures under which Member States are required to comply with its request for judicial assistance. Fourth, while the Tribunal is a subsidiary organ of the Security Council, its work is to be conducted in accordance with its Statute.<sup>9</sup> Hence, it is a judicial body independent of political considerations and is not subject to the authority or control of the Council, or of the parties to the conflict.

Be that as it may, it should be noted at the same time that this tribunal is an ad hoc one, its duration is limited to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and its jurisdiction is also limited to crimes committed in that territory since 1991. Consequently, its competence is limited in time, in subject matter and in the territory to which it applies.

I would now like to turn to the fourth type of tribunal which is emerging and is being framed by the International Law Commission (ILC). It may be recalled that in 1948 the General Assembly called upon the ILC to consider the desirability of

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<sup>7</sup> U.N. SCOR, U.N. Doc. S/25704, reprinted in 32 I.L.M. 1163 (1993). (Hereinafter Statute of the Tribunal).

<sup>8</sup> U.N. CHARTER art. 7.

<sup>9</sup> Statute of the Tribunal, *supra* note 7.

creating an international criminal court for the trial of persons charged with genocide.<sup>10</sup> In 1950, the Commission called for the establishment of such an institution but the drafting of its statute was deferred pending agreement on a definition of aggression and a Draft Code of Crimes Against the Peace and Security of Mankind.

While the definition of aggression was adopted by the Assembly in 1974,<sup>11</sup> the Commission was not requested to resume its work on this issue. In 1989, the Assembly revived the question of setting up an international criminal jurisdiction in response to a proposal from Trinidad and Tobago that an international mechanism be developed with jurisdiction over international drug traffickers.<sup>12</sup> The General Assembly requested the ILC to consider this question in the context of the "Draft Code of Crimes against the Peace and Security of Mankind."

The Commission has now produced a 67-article draft statute of an international criminal court,<sup>13</sup> and has submitted it to the General Assembly. The institution currently envisaged by the ILC is a permanent one consisting of a judicial organ i.e., the "Court" or "tribunal", a prosecutorial organ called "procuracy", and an administrative arm called the "registry". This permanent institution could be created by a multilateral treaty to which all States become parties. There would be a panel of eighteen judges to be elected by the States parties on the basis of a set of criteria. The prosecutor and his deputy are also to be elected by the States' parties. States, upon becoming parties to the treaty, would be free to confer jurisdiction on the court over such crimes as genocide, grave breaches, unlawful

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<sup>10</sup> G.A. Res. 260B, U.N. GAOR, 3rd Sess., 178 mtg. U.N. Doc. A/760, (Dec. 9, 1948).

<sup>11</sup> G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

<sup>12</sup> Letter from the Permanent Representative of Trinidad and Tobago to the Secretary General, which requested the inclusion in the agenda of the 44th session of the General Assembly of a supplementary item entitled "International Criminal Responsibility of Individuals and Entities engaged in illicit trafficking in narcotic drugs across national frontiers and other international criminals' activities: establishment of an international criminal court with jurisdiction over such crimes." (Aug. 21, 1989) (A/44/195).

<sup>13</sup> S.C. Res. 808, U.N. SCOR, 3175th mtg. (1993) (*Deciding to establish Tribunal*); S.C. Res. 827, U.N. Doc. S/25626 (1993) (*Approving Statute for the Tribunal*).

seizure of aircraft, apartheid and hostage-taking as defined and dealt with in various existing international legal instruments.<sup>14</sup> But each State party would also be allowed to confer jurisdiction on the court in respect of other international crimes not listed above.

ILC has suggested several alternative ways for States to confer jurisdiction on the Court. One possibility would be to allow each State party to make a special declaration indicating the kind of crimes to be covered; another way is to allow States to select from a list of crimes embodied in the instrument. Under the ILC draft, the Security Council would also be able to use the court. This is to save it from establishing ad hoc tribunals as the Security Council did in the case of former Yugoslavia.

According to the ILC draft, the filing of a complaint by a State party, for example, would trigger the preliminary phase of the criminal procedure. There would be guarantees for trial and impartiality of the tribunal. The court would pronounce judgements and impose sentences. Procedures for appeal against judgement or sentence would also be provided. These are the characteristics of the kind of tribunal proposed by ILC. It is an emerging type likely to be adopted by the General Assembly. In my view, such a permanent, international institution endowed with criminal jurisdiction over a wide range of international crimes would represent a further development from the previous and existing tribunals.

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<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 75 U.N.T.S. 31, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 75 U.N.T.S. 85, 6 U.S.T. 3217; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Dec. 9, 1948, 75 U.N.T.S. 287, 6 U.S.T. 3516; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 11 U.N.T.S. 3; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 10 I.L.M. 133, (1971); International Convention on the Suppression and Punishment of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973); 1015 U.N.T.S. 243, *reprinted in* 13 I.L.M. 50 (1974) International Convention against the taking of Hostages, G.A. Res. 146, 34 U.N. GAOR, Supp. (No. 46) 245, U.N. Doc. A/34/46 (1980), *reprinted in* 18 I.L.M. 1456 (1979).

The above brief survey shows that we have been moving, though slowly but steadily, towards an international criminal court. During the initial period, we had no standards for governing hostilities. Every nation was free to do what it liked. In the second period, we created certain basic standards but the observance of such standards was purely voluntary and self-executing. In the third stage, we moved from standard-setting to taking action against violations. Examples included the Nuremberg trials and the Geneva system of 1949 through the Nuremberg-type and the Geneva-Convention type, we have progressed in 1993 to the ad hoc tribunal for the former Yugoslavia. We are now in a fourth stage. All facts seem to point to the creation of a permanent institution along the lines proposed by the International Law Commission.

The existence of the first three types plus the fourth emerging type makes plain that the answer to the question posed is yes. Their existence powerfully demonstrates the fact that the community of nations has felt the need to do more than enunciate rules and establish standards that must be obeyed. The need is recognized to *hold* people to those rules and standards, and for punishing them for violating those standards. Thus, it seems to me, the establishment of an international criminal jurisdiction is a logical development of international law and an inevitable natural progression of the world civilization.

I now turn to the second part of my presentation. Here, I would like to respond to some of the criticisms put forward against creating an international criminal tribunal in general, and against the International Tribunal created by the Security Council for the former Yugoslavia in particular. These arguments will be dealt with here.

First, it has been argued that the subject matter is always highly political. Out of political necessity, the top political leaders may have to be excused even though they may be suspects of criminal offenses. It would not be meaningful, it is hence argued, if an international criminal tribunal could only prosecute and punish the middle or low ranking officers.

Reference has thus often referred to the case of the former Yugoslavia. It has been contended that only a political solution can bring peace to the Balkans and that a solution can only be found through negotiations with the existing leaders of the re-

spective entities now in Yugoslavia. Since some of them are allegedly the prime suspects of ordering war crimes, genocide, and crimes against humanity, those leaders would not sign on to any peace plan unless they would be exempted from possible prosecution and punishment. If, to obtain a peace settlement, prime suspects would have to be exempted, the International Tribunal would serve no useful purpose.

It should be pointed out that it was Mr. Vance and Lord Owen who first proposed and persuaded the Security Council to create a tribunal to prosecute and punish war crimes in Yugoslavia. It would not be fair to assume that they, in fact, intended to exonerate the leaders. Let me also refer to Article 7, subparagraph 2 and 3 of the Tribunal's Statute.<sup>15</sup> Article 7 of the Statute deals with "individual criminal responsibility". Subparagraph 2 clearly stipulates that "the official position of any accused person whether a head of State or Government or as a responsible government official, *shall not relieve* such person of criminal responsibility nor mitigate punishment."<sup>16</sup> Accordingly, under the Statute, no head of State or Government may be exempted from criminal responsibility. Nor shall their position be used to mitigate punishment.

Subparagraph 3 further provides that any punishable act committed by a subordinate does not relieve his superior of criminal responsibility.<sup>17</sup> This means that no head of State or Government can be exempted by invoking their official position or by blaming their subordinates.

In my view, it is only proper that all persons who participate in the planning, preparation, or execution of war crimes in the former Yugoslavia should be individually responsible. Such persons should include heads of state, government officials and persons acting in official capacity. A plea of head of state immunity or an act committed in the official capacity of the accused must not constitute a defense or be allowed to mitigate punishment. Article 7 of the Statute makes that quite clear.<sup>18</sup> I submit that this rule is, in fact, consistent with the Nuremberg principle and forms part of customary international law. Con-

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<sup>15</sup> Statute of the Tribunal, *supra* note 7.

<sup>16</sup> Statute of the Tribunal, *supra* note 7.

<sup>17</sup> Statute of the Tribunal, *supra* note 7.

<sup>18</sup> Statute of the Tribunal, *supra* note 7.



sequently, I do not think that this argument can be used to deny the creation of the international tribunal.

Another argument put forward against the creation of an international tribunal is that in the absence of an international police force, it is impossible, physically, to bring the war criminals, particularly high-ranking officials, to trial. Reference has again been made to the situation in the former Yugoslavia: the territory and population of the former Yugoslavia continue to be controlled by the governments and authorities concerned; there are real difficulties in gathering evidence, interviewing the victims and visiting places where war crimes are allegedly committed. The execution of any order from the International Tribunal would have to rely on the territorial States or authorities concerned. Since the latter are unlikely to cooperate, the accused cannot be seized, and there is no way to conduct any on-site investigation. Consequently, there would not be any significant prosecution or trial.

It should be noted that according to the Statute of the Tribunal, the Prosecutor has the full responsibility to initiate investigation *ex-officio* or on the basis of information obtained from any source, particularly from governments, UN organs, inter-governmental and non-governmental organizations. He shall assess the information received or obtained and decide whether there is sufficient basis to proceed. Upon the completion of the investigation, if the prosecutor has determined that a *prima facie* case exists, he would prepare the indictment which shall be reviewed by a trial judge, who shall decide whether to continue or dismiss the incident.

Upon confirmation of the indictment, the judge may, at the request of the Prosecutor, issue an order or warrant for the arrest, detention, surrender, or transfer of persons. Since the Statute of the Tribunal was adopted by the Security Council under Chapter VII, this means that the Statute is automatically binding and enforceable in all the territories of the member States of the United Nations. Consequently, any order or indictment for arrest, detention, surrender or transfer of persons issued by the Tribunal are also automatically binding on all Member States. The critical effect is that once such an indictment or order is issued, the indicted person becomes a prisoner of the world. States would be legally obligated to arrest and

detain them and hand them over to the Tribunal. If the territorial State which the accused is in chooses not to comply with the warrant, they are physically prevented from moving outside that State, for if they do, they will be arrested and detained by other States. If the accused is a head of state or government, it will almost be impossible for them to conduct any diplomacy effectively. They would become an international outcast. They would be arrested, detained and tried if ever they step outside their country. The Statute of the Tribunal has thus created a procedure which can be used effectively to constrain the accused persons even if they cannot be arrested, detained or tried immediately. While this is still far from perfect, it is no different from our experience under the national system when criminals are not captured.

A third argument often put forward against the creation of the Tribunal is that punishment does not deter or prevent crimes. Opponents have contended that criminologists have long established that punishment has little value in preventing crimes. War criminals, it is argued, are usually motivated by their political conviction and no punishment, however severe, could change their minds. Again, they refer to the present situation in the former Yugoslavia as an example.

To punish the criminals is certainly one of the purposes for creating an international tribunal, but it should not be the only purpose. Much broader and important objectives are at stake.

For the longest time, international law has been criticized for its lack of enforcement; it has not been regarded as law by some. While I believe that international law exists on its values and that the want for more effective sanctions does not negate the validity of international law. The creation of a permanent international tribunal would be a step forward and would help to strengthen international law.

Since World War II, numerous atrocities and war crimes have been committed. Numerous reports and investigations have been publicized. But with the exception of the Nuremberg and Tokyo trials, none of the other findings went through an international *judicial process*. It is certainly *not* my intention to downgrade the value of those reports and investigations. The point is that short of a judicial process, the findings are always subject to challenge. This is the first time since 1945 that a

competent *international* tribunal on behalf of the world community will be making pronouncements through a *judicial process* on the illegality of acts committed. Here lies the value and justifies, in my view, the existence of an international tribunal.

In light of the above, I have no hesitation in responding with a positive yes.