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OBSTACLES TO THE CREATION OF A PERMANENT WAR CRIMES TRIBUNAL

CHRISTOPHER L. BLAKESLEY

From time to time, a need arises to prosecute individuals who commit war crimes. A permanent war crimes tribunal may be appropriate to satisfy this need, but only if it meets certain protective criteria. While surveying the problems inherent in past war crimes tribunals, this article addresses procedural and structural foundations upon which a permanent international criminal tribunal could be established.¹

General Problems for the Establishment of a Permanent Tribunal

Individual liability for war crimes is difficult to enforce and is unlikely to be accepted uniformly by states.

Individual criminal responsibility is the cornerstone of any international war crimes tribunal. Nuremberg Principle I provides that "[a]ny person who com-

1. The author would like to thank Professor of Law John S. Baker of Louisiana State University for much of the section on the permanent tribunal threat to state sovereignty, and some of the discussion of separation of powers. Professor Baker is opposed to the creation of a permanent war crimes tribunal. Portions of this article were adapted from Professor Blakesley's report, *On the Ad Hoc Tribunal For Crimes Against Humanitarian Law in the Former Yugoslavia* (1993). Professor Blakesley would also like to thank Anthony D'Amato, M. Cherif Bassiouni, Roger S. Clark, Jim Nafziger, Frank C. Newman, Jordan Paust, Alfred P. Rubin (who has serious reservations about the current approach, see his piece, "International Crime and Punishment," 33 *The National Interest* 73 [1993]), and Edward Wise, for valuable comments, suggestions, corrections, recommendations, and help in the preparation of that report. They corrected many errors and made this a worthwhile enterprise. I am sure there are still many remaining errors. They are mine. Most of that group is in favor of a permanent international criminal court, if it meets minimum standards of human rights protection. See generally the following recent works on the subject: Theodore Meron, "The Case for War Crimes Trials in Yugoslavia," 72 *Foreign Affairs* 122 (Summer 1993); Report, *International Meeting of Experts on the Establishment of an International Criminal Tribunal* (Herman Woltring, General Rapporteur, Vancouver, British Columbia, Canada, 22-26 March 1993); David Weissbrodt, Penny L. Parker and Alya Z. Kayal, "The Forty-Fourth Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Special Session of the Commission on Human Rights on the Situation in the Former Yugoslavia," 15 *Hum. Rts. Q.* 410 (1993); Payam Akhavan, "Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order," 15 *Hum. Rts. Q.* 262 (1993); David S. Gualtieri, *Draft, Comparison of Proposals for an International Criminal Tribunal* (DePaul University International Human Rights Law Institute, 22 June 1993).

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mits an act which constitutes a crime under international law is responsible therefor and liable to punishment."² Acts by heads of state or other government officials, even if committed in an official capacity, may not constitute an immunity defense to or mitigate criminality.³ These officials, therefore, could also be held responsible for offenses committed pursuant to their orders. Additionally, liability for criminal negligence may be imposed on a person in a position of authority who knew, or had reason to know, that his or her subordinates were about to commit a war crime, and who failed to take whatever action was necessary and reasonable to prevent, to deter, or to repress its commission.⁴ The same liability must hold for failure to prosecute those who commit such offenses.⁵ Will nations unilaterally agree to such liability? If not, are they liable pursuant to customary international law or general principles? Who or what institution will be able to impose this liability on them?

A permanent tribunal challenges the sovereignty of the individual member-states of the United Nations.

Crimes under international law and those under domestic law are not mutually exclusive. The jurisdiction of any international criminal tribunal would be co-extensive in some areas with domestic courts. Under certain circumstances, for example, murder may be a crime under both domestic and international law. While a permanent international tribunal would be unlikely to pursue ordinary killings falling within domestic jurisdiction, the extent to which it theoretically could do so — and therefore the amount of discretion left to it to determine its own jurisdiction — would depend on whether and to what extent the court's subject matter jurisdiction was specifically limited. For example, the statute creating the Ad Hoc Tribunal for Crimes Against Humanitarian Law in the Former Yugoslavia (hereafter, the "Ad Hoc Tribunal") purports to limit that tribunal's jurisdiction. Nevertheless, the statute appears to have expanded the scope of humanitarian law, which traditionally followed the Hague and Geneva

2. The Charter and Judgment of Nuremberg recognize five principles: I.) as indicated in the text; II.) "The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crimes from responsibility under international law"; III.) "The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment"; IV.) "The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires"; V.) "Any person charged with a crime under international law has the right to a fair trial on the facts and law." "Nazi Conspiracy and Aggression Opinion and Judgment, Nuremberg, 30 September 1945," reprinted in 41 *A.J.I.L.* 186-218 (1946); see also J. Spiropoulos, "Special Rapporteur, Formulation of Nuremberg Principles," 2 1950 *Yrbk. Int'l L. Comm.* 181, 191-193.

3. See, e.g., Secretary-General's Report on the Tribunal for the former Yugoslavia, Pursuant to para. 2 of S.C. Res. 808 (1993) (hereafter "Secretary-General's Report"), at para. 55. See also, Jordan J. Paust, "Aggression Against Authority: The Crime of Oppression, Politicide and Crimes Against Human Rights," 18 *Case West. Res. J. Int'l Law* 283, 284-85 (1986).

4. See, e.g., Secretary-General's Report, at para. 56. On this standard, see also, Jordan J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 *Mil. L. Rev.* 99, 147-83 (1972), and the numerous cases cited therein.

5. Secretary-General's Report, at para. 56.

rules,⁶ by adding some crimes not included in the Hague and Geneva Conventions. By expanding the definition of humanitarian law, the scope of the tribunal's subject matter jurisdiction has also expanded.

The combination of an expanding scope of humanitarian law and a permanent court with more general jurisdiction than an ad hoc tribunal suggests inevitable conflict between the proposed international tribunal and domestic criminal courts. Article 9 of the Ad Hoc Tribunal statute provides for concurrent jurisdiction of the international tribunal and domestic courts, but gives the international tribunal primacy. Article 10 particularizes that primacy. While this arrangement may well be appropriate in the particular circumstances in the former Yugoslavia, the primacy of a permanent tribunal may be unacceptable to some U.N. member states.

Both the Nuremberg Trials and the Ad Hoc Tribunal address war crimes. But for the fact that in both instances, agents of the sovereign itself were engaged in widespread violations of international humanitarian law, the creation of a criminal tribunal with international jurisdiction would not have been deemed appropriate, even on a short-term basis. This accommodation may not be extended to a permanent war crimes tribunal, where subject matter jurisdiction may tend to expand. A permanent tribunal, once established, would quite predictably operate in a different fashion. Freed from the strict limits of ad hoc jurisdiction, it could interpret its own jurisdiction as it deemed necessary. In the United States and European Community, such primacy has meant that the "higher court" seeks to assert its superiority in fact over lower courts of the affected states. As the higher court extends its jurisdiction, the sovereignty of the affected states has historically been eroded. How would the jurisdictional relationship between domestic courts and a permanent tribunal affect state sovereignty?

The structure of a permanent tribunal based on the continental model would conflict with American Constitutional protection of liberty.

While more familiar concerns about the guarantees of individual liberty are addressed below, the conflict between the continental model and the U.S. Constitution's principle of separation of powers must also be addressed. This bedrock principle was understood by both supporters and opponents of the Constitution to be the essential guarantee of liberty. According to the principle, drawn from the eighteenth century French philosopher Montesquieu, there can

6. The Hague Convention of 1907 (Hague IV), (18 October 1907, *Respecting the Laws and Customs of War on Land*, 36 Stat. 2277; T.S. 539) and associated regulations, which are now part of customary international law, attempted to provide the (*jus in bello*) rules of warfare. The four Geneva Conventions of 1949 updated this and also reflected customary international law. These form the basis of humanitarian law. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, TIAS 3362; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, TIAS 3363; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, TIAS 3364; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, TIAS 3365.

be no liberty unless the legislative, executive, and judicial powers are separate from each other.

In the Ad Hoc Tribunal, which follows the continental model, the court has a judicial organ and a prosecutorial organ. While it is specified, as discussed below, that these two organs be independent of each other, American Constitutional experience casts doubt on the efficacy of such "parchment barriers." Traditional American Constitutionalism distrusts the good intentions of fellow citizens in positions of power, insisting instead upon institutional barriers to contain their ambitions. That distrust would be greater in a permanent international war crimes tribunal because of the mixture of legal and cultural backgrounds. The absence of structural protections based on separation of powers may be acceptable in an ad hoc tribunal whose competence is narrowly circumscribed by statute, but their absence is unlikely to be universally acceptable for a permanent tribunal.

Complicating Factors

The problems facing a permanent war crimes tribunal are many and varied. The Nuremberg and Tokyo trials were prosecuted by the victorious Allies against Nazi and Imperial Japanese conduct. The offenses were not applied to the Soviets, who also committed pre-arranged "acts of aggression" in their invasions of Poland and the Baltic States, and whose treatment of ethnic or national minorities could well have been considered to fit any definition of "crimes against humanity."⁷ Nor were they applied to the bombing of Dresden, Tokyo, Hiroshima, or Nagasaki, or to other Allied conduct including treatment of prisoners and submarine warfare. The offenses were drafted to apply only to the defeated enemies.

No doubt, one can now draft offenses in a neutral fashion, avoiding the restrictive language of Nuremberg which made those trials appear hypocritical. If done, however, the law must apply to leaders of *every* nation. Professor Alfred Rubin notes: "[u]nless the law can be seen to apply to Israel's leaders as well as to leaders of various Arab factions, to George Bush (who ordered the invasion of Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait), it will seem hypocritical again."⁸

Will a permanent tribunal have the resources and capability to try the mass of war crimes that occur around the world? If not, how will a permanent tribunal be impartial in deciding which offenses to prosecute and which to ignore? If the "law" is not to be applied to all persons against whom there exists equivalent evidence, the tribunal's verdicts may be perceived as political manipulation rather than justice.⁹

Will the tribunal prosecutor have the capacity to bring charges against

7. Rubin, "International Crime," *supra* note 1.

8. *Ibid.*, 74.

9. Alfred P. Rubin, "Remarks, on the Ad Hoc Tribunal for the Former Yugoslavia," 87 *ASIL Proceedings* 32-35 (1993).

citizens of his or her own nation or its "allies"? If the prosecutor is a person chosen by the General Assembly, will the Western powers be satisfied? If chosen by the Security Council, will the Third World be satisfied? Is there any acceptable way to limit the discretion of the prosecutor?¹⁰ If a tribunal were created by convention, could the nations of the world agree on a prosecutor and judges?

Similarly, will the permanent tribunal be supported, even, or especially, if it is evenhanded when it decides which offenses to prosecute? Can a permanent tribunal be created that can prosecute all significant war crimes and not offend the nations which must support it? This problem relates to sovereignty and whether nations, through their governments, will abide sending their high governmental or military officials to the tribunal for prosecution. If they do not, the tribunal will appear impotent. What can the international community do to nations who refuse to cooperate? What about any U.N. forces who committed war crimes? Would the tribunal prosecute them? Perhaps most seriously, there is no assurance that such a tribunal would *deter* war crimes. Indeed, could the tribunal avoid sending the message that, once a country engages in war, it *must* do anything to eliminate the evidence of war crimes?¹¹ This would not be the message the tribunal wishes to send.

If one focuses on the current legal order and the practicalities of international law, one may wonder whether the creation of a permanent war crimes tribunal is feasible or even whether it is inherently inconsistent with that law and that order.¹² Would such a tribunal achieve its goals or actually be inimical to them? Would it risk establishing a legal system wherein war criminals are neither effectively prosecuted nor the victims and witnesses protected? Would the human rights and civil liberties of the accused individuals be protected?

Historical and Conceptual Background¹³

Efforts to establish an international criminal tribunal are not new, although they have intensified recently.¹⁴ One wonders whether this history of so many

10. *Ibid.*, 34.

11. Rubin, "Remarks on Yugoslavia," 33-34.

12. Rubin, "International Crime," *supra* note 1.

13. This brief history is adapted from M. Cherif Bassiouni and Christopher L. Blakesley, "The Need for an International Criminal Court in the New International World Order," 25 *Vand. J. Transnat'l L.* 151 (1992).

14. See authority cited below and David S. Gualtieri, "Report, Comparison of Proposals for an International Criminal Tribunal," Report from the DePaul International Human Rights Law Institute (1993) (hereinafter "DePaul Draft Report"). This report analyzes and compares the various Draft conventions or statutes, presented by Professor Bassiouni, through the auspices of the Association Internationale de Droit Pénale, M.C. Bassiouni, "Draft Statute International Criminal Tribunal," 9 *Nouvelles Études Pénale* (1992) (hereinafter "The Bassiouni Draft"); the CSCE Draft; the Italian Draft; the French Draft, and the International Law Commission Draft. "Report of the Committee of Jurists, Submitted by France," U.N. Doc. S/25266 (1993); "Report of the Commission of Jurists Submitted by Italy," U.N. Doc. S/25300 (1993); *Projet de Statute du Tribunal Pénal International*, (Assoc.Int'l de Droit Pénal, Bassiouni 2d ed. 1993), U.N. Doc. S/25307 (1993), "Proposals for an International War Crimes Tribunal for the Former Yugoslavia, by Rapporteurs" (Corell, Türk, Thune) per, CSCE Moscow Human Dimension Mechanism to

attempts and so few successes suggests that the time is ripe for a permanent tribunal, or that a complete change in the international system is required before one will succeed. Professor Cherif Bassiouni reports that "the first prosecution for initiating an unjust war is reported to have been in Naples, in 1268, when Conradin von Hohenstaufen was executed for that offense."¹⁵ The "modern" idea of establishing an international criminal court could be said to have been launched in 1899 with the Hague Convention for the Pacific Settlement of International Disputes.¹⁶

The 1919 Versailles Treaty was another early step toward establishing a war crimes court.¹⁷ The face of the treaty provided for the prosecution of Kaiser Wilhelm II for a supreme offense against the "international morality and the sanctity of treaties" and for war crimes charged against German officers and soldiers.¹⁸ Also in 1919, the Allies established a special commission to investigate the responsibility "for acts of war" and crimes against "the laws of humanity." The Report of the Commission contained the following conclusion: "All persons . . . who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."¹⁹ This provision was developed in response to the killing of an estimated one million Armenians by Turkish authorities and the Turkish people, supported or abetted by the state's public policy.²⁰ There can be no doubt that those who committed such atrocities knew they were committing a crime.²¹ Moreover, a review of some state practices and of the views of scholars demonstrates that there was an understanding that crimes against humanity existed.²² The opposition of the United States however,

Bosnia-Herzegovina and Croatia, 9 February 1993. See also, "Report of the International Meeting of Experts on the Establishment of an International Criminal Tribunal" (Vancouver, British Columbia, Canada, 22-26 March 1993).

15. M. Cherif Bassiouni, "International Law and the Holocaust," 9 *Cal. W. Int'l L. J.*: 201, 206 (1979); Beres, "Iraqi Crimes in International Law: The Imperative to Punish," 21 *Denv. J. Int'l L. & Pol.*: 335, 337, n 12 (1993); see also, Remigiusz Bierzanek, "War Crimes: History and Definition," in M. Cherif Bassiouni and Ved Nanda, eds., *A Treatise on International Criminal Law* (Springfield, Ill: Thomas Publishing Co., 1973), 559, 560; Jordan J. Paust, "Aggression Against Authority: The Crime of Oppression, Politicide and Crimes Against Human Rights," 18 *Case West. Res. J. Int'l L.*: 283, 283-84 (1986), and n 7; Christopher L. Blakesley, *Terrorism, Drugs, International Law and the Protection of Human Liberty*, ch 1, 2, 4 (1992).

16. Hague I, signed at The Hague, 19 July 1899, 26 *Martens Nouveau Recueil* (2d) 720; 32 Stat. 1779, T.S. No. 342 (entered into force, 4 September 1900).

17. Treaty of Peace Between the Allied and Associated Powers and Germany, 28 June 1919, 11 *Martens Nouveau Recueil Des Traités* (3d): 323.

18. *Ibid.*, Art. 227, 228, 229.

19. "Report of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War, Conference of Paris 1919," Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32 (1919), reprinted in 14 *A.J. I.L.*: 94 (Supp. 1920). See gen., Dadrian, "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications," 14 *Yale J. Int'l L.*: 221 (1989).

20. *Ibid.*

21. See gen., Blakesley, *Terrorism, Drugs*, supra note 14, ch 1 and 2.

22. See, e.g., B. Wright, *History of the United Nations War Crimes Commission* (London: H. M. Stationery Office, 1948), 35 (the governments of Great Britain, France, and Russia had condemned the massacres of Armenians by Turks in 1915 as "crimes against humanity and civilization"); see also, Robert Lansing, "Notes on World Sovereignty," 15 *A.J.I.L.*: 13, 25 (1921) (former U.S.

prevented the Commission's report from including this type of conduct among the offenses that an international criminal court would prosecute. Subsequently, the Treaty of Sèvres, which was the 1920 Treaty of Peace between the Allies and the Ottoman Empire,²³ provided for the surrender by Turkey of such persons as might be accused of crimes against "the laws of humanity," but unfortunately, in 1923, the Treaty of Lausanne²⁴ gave them amnesty.

Between the two world wars, a wave of terror swept Europe, mostly in connection with nationalist claims in the Balkans. In 1936, Adolf Hitler emphasized the international community's inability to prosecute or sanction crimes against humanity when he said, "And who now remembers the Armenians?"²⁵ Indeed, it is particularly revealing that he would preface his policy of exterminating Jews, Gypsies, and Slavs by revealing that the absence of interest by the world community in effectively prosecuting such conduct, and in creating appropriate international structures to enforce this proscription, gave him the comfort of knowing that he might succeed in genocide, as others had in the past. In 1937, the League of Nations adopted a Convention Against Terrorism; an annexed Protocol provided for the establishment of a special international criminal court to prosecute such crimes.²⁶ India was the only country to ratify the Convention, which never entered into force.

After World War II, it became obvious that crimes against peace, war crimes, and what became known, with the London Charter of 8 August 1945, as "crimes against humanity" had been committed.²⁷ The London Charter established the International Military Tribunal (IMT) at Nuremberg, which was designed to prosecute major war criminals in the European Theater. In 1946, a similar

Secretary of State writing that the slave trade had become a "crime against humanity"; C. Norton, ed., *III Orations and Addresses of George William Curtis* 208 (1894) (George Curtis remarks that slavery is a "crime against humanity"). These references supplied by Jordan Paust in "On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts," 10 *Mich. J. Int'l L.* 569, n 172 (1989).

23. The Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), 10 August 1920, 15 *A.J.I.L.* 179 (Supp. 1921). See gen., David Matas, "Prosecuting Crimes Against Humanity: The Lessons of World War I," 13 *Ford. Int'l L. J.* 86 (1989).

24. Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), 24 July 1923, 28 *L.N.T.S.* 11, reprinted in 18 *A.J.I.L.*

25. J.F. Willis, *Prologue to Nuremberg* (Westport, Conn.: Greenwood Press, 1982), 173, citing to Sir G. Ogilvie-Forbes report of August 1939, with enclosures of Hitler's speech to Chief Commanders and Commanding Generals, 22 August 1939, Great Britain, Foreign Office, E.L. Woodward et al, 3d series, 9 vols. *Documents on British Foreign Policy, 1919-1939* (London: H. M. Stationery Office, 1949-55).

26. Convention for the Creation of an International Criminal Court. Opened for signature at Geneva, 16 November 1937, *League of Nations O.J. Spec. Supp.* No. 156 (1938). League of Nations Doc. C.547(I).M.384(I).1937V (never entered into force), reprinted in 7 *International Legislation* 878 (1935-37) (M. Hudson ed., 1972). M.D. Dubin, *International Terrorism: Two League of Nations Conventions, 1934-1937* (1991).

27. "Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis" (London Agreement), 8 August 1945, 82 *U.N.T.S.* 279 59 Stat. 1544, E.A.S. No. 472 (entered into force, 8 August 1945), and the annexed Charter of the Military Tribunal (Nuremberg). See gen., Telford Taylor's excellent personal memoir of the Nuremberg trials, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992).

international military tribunal was established in Tokyo to prosecute major Japanese war criminals in the Far Eastern theater.²⁸

Since World War II, there have been many examples of conduct that would fit the Nuremberg principles and which could have been tried in a war crimes tribunal. During the Vietnam War, atrocities were committed by both sides.²⁹ The depredations of the Khmer Rouge in Cambodia are infamous.³⁰ The Iraqi Air Force appears to have bombed villages in Kurdistan with both mustard gas and nerve gas.³¹ The former Soviet Union is alleged to have booby-trapped dolls belonging to Afghan Mujahideen children.³² The macabre list could go on and on.

In 1989, the General Assembly urged consideration of the establishment of an international criminal court.³³ This recommendation was predicated on growing international concern for drug trafficking, and an initiative taken in 1987 by the Soviet Union, which proposed the development of such a tribunal in order to investigate acts of international terrorism. The International Law Commission (ILC) was requested to prepare a report and, in 1990, proposed the creation of an international criminal court.³⁴ The Sixth Committee of the General Assembly subsequently addressed the issue in 1991, and proposed that the issue be studied further.

On 8 April 1993 the International Court of Justice (ICJ), in response to the suit filed by Bosnia and Herzegovina, called upon Serbia and Montenegro to "immediately . . . take all measures within their power to prevent commission of the crime of genocide . . . whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial, or religious group."³⁵ This was an interim decision, wherein the Court noted that facts were still in dispute. It was also unable to render a decision in relation to disputed rights falling outside the ambit of the Genocide Convention.

28. International Military Tribunal for the Far East: (a) Special Proclamation: Establishment of an International Military Tribunal for the Far East; (b) The Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946 (General Order No. 1), as amended 26 April 1946, T.I.A.S. No. 1589, reprinted in C.I. Bevans, ed., *4 Treaties and Other International Agreements of the U.S.A., 1776-1949* (Washington: U.S. Government Printing Office, 1968), 20.

29. See Telford Taylor, *Nuremberg and Vietnam* (Chicago: Quadrangle Books, 1970).

30. See R. Kiljunen, ed., *Kampuchea: Decade of the Genocide* (London: Zed Books, 1984); Michael J. Bazylar, "Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia," 23 *Stan. J. Int'l L.* 547 (1987).

31. *CNN World News*, 24 March 1988, showing videotape of the slaughter.

32. See Senate Committee on Foreign Relations and House Committee on Foreign Affairs (Joint Comm. Print.), *Country Reports on Human Rights for 1984*, 99th Cong., 1st sess., 1985, 1159-69.

33. For the evolution of U.N. efforts, see M. Cherif Bassiouni, "The Time has Come for an International Criminal Court," 1 *Ind. Int'l & Comp. L. Rev.* 1 (1991). See also John B. Anderson, "An International Criminal Court an Emerging Idea," 15 *Nova L. Rev.* 433 (1991).

34. See Report of the International Law Commission, 42nd Session, U.N. G.A.O.R. Supp. No. 10(A/45/10) 20 July 1990: 36-54.

35. "Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia [Serbia and Montenegro]*), request for the indication of provisional measures, (1993) I.C.J. Reports 3, 32 I.L.M. 890 (1993) (wherein Bosnia and Herzegovina filed suit against Serbia and Montenegro "for violating the Genocide Convention" and other illegal conduct in violation of customary international law).

The creation of the Ad Hoc Tribunal for crimes against humanitarian law was the culmination of several earlier Security Council resolutions adopted in reaction to reported depredations in the former Yugoslavia. In early 1992, Resolution 771 called for preliminary investigations. Resolution 780 of 6 October 1992 created a "War Crimes Commission," which analyzed the information garnered by the earlier investigations, conducted its own investigations, and reported its findings to the Secretary-General. Subsequently, the Secretary-General recommended that the Security Council create the Ad Hoc Tribunal. On 11 February 1993, the Security Council adopted this recommendation and called for the creation of the Ad Hoc Tribunal in its Resolution 808.

Security Council Resolution 808, paragraph 1, provides: "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Thus, the temporal and territorial jurisdiction of the Tribunal are limited to conduct since 1 January 1991 in the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters.³⁶

The Legal Basis and Authority to Establish a Permanent Tribunal

The usual and most appropriate method for establishing an international criminal tribunal would be a convention, whereby nations would establish the court and approve its statute.³⁷ All member states would likely be under a binding obligation to take whatever action is required to enforce the statute under the U.N. Charter, Chapter VII.³⁸

Article 41 of the U.N. Charter provides: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures." Article 42 adds: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." The argument is that if the use of

36. Secretary-General's Report, at paras. 60-63; Article 8 of the Statute.

37. For the Ad Hoc Tribunal for the former Yugoslavia, see Secretary-General's Report, para. 19; Charter of the International Military Tribunal or London Charter, 59 Stat. 1544, 1546 (1945). The Secretary-General suggested, however, that the treaty approach would be too long and arduous; drafting an instrument and obtaining the required ratifications for entry into force would not be reconcilable with the urgency expressed by the Security Council in Resolution 808 (Secretary-General's Report, at paras. 20-21). Thus, it was recommended that the authority or legal basis for the tribunal be predicated on Chapter VII of the U.N. Charter, which covers Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. The creation of the tribunal would be a "measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression."

38. Secretary-General's Report, at para. 23.

force is allowed as a "measure" under Article 42, *a fortiori*, the creation of an ad hoc international criminal court should also be allowed. In "the particular case of the former Yugoslavia, the Secretary-General believes that the establishment of the International Tribunal by means of a Chapter VII decision would be legally justified, both in terms of the object and purpose of the decision [as indicated in the purpose statement in his report] and of past Security Council practice."³⁹

The Ad Hoc Tribunal for the former Yugoslavia provides a contemporary example of the application of international law for war crimes prosecution. The Secretary-General's Report relating to the atrocities there noted that the creation of the Tribunal for the prosecution of the alleged breaches of international humanitarian law will apply existing law, including the Geneva Convention of 12 August 1949, and that the Security Council would not be creating law or purporting to legislate.⁴⁰ Is this assertion accurate? Where, besides in the Geneva and Hague Conventions, would these crimes be found? Would they be found with sufficient clarity to satisfy due process concerns? Would the Secretary-General's assertions hold for a permanent war crimes tribunal?

Specific Tribunal Characteristics

Propriety

A tribunal will only be acceptable if it proceeds in a manner that is beyond reproach. Basic notions of fairness and human rights in relation to investigation, prosecution, and trial are paramount. Any tribunal unscrupulous in protecting the accused from abuses and deprivation of civil liberties would be a dangerous institution. Justice Jackson summed up the importance of this point in his opening statement during the Nuremberg Trial.

Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes [*a problem not faced by the Ad Hoc Tribunal for the former Yugoslavia*].⁴¹

39. Secretary-General's Report, at paras. 24, 27 (noting for example, Security Council Resolution 687 [1991] and subsequent resolutions relating to the conflict between Iraq and Kuwait).

40. Secretary-General's Report, at para. 29.

41. See notes 33-36 and accompanying text. The problem has already arisen in relation to the conviction and issuance of death sentences by a Bosnian military court of two Bosnian Serbs for war crimes. Their confessions may have been coerced. See "Bosnia Convicts and Sentences to Death 2 Serbs," 9 *Int'l Eng. L. Rptr.* 147 (1993); John F. Burns, "2 Serbs to be Shot for Killings and Rapes," *New York Times* 31 March 1993, A6, col. 4; David B. Ottaway, "Bosnia Convicts 2 Serbs

. . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁴²

International Human Rights Law provides the minimum standards for protection of an accused person. Increasingly, U.S. requests for extradition and hand-overs under Status of Forces agreements have been overridden by international and foreign courts, which have ruled that international human rights provisions take precedence. In two of the cases, concerns over capital punishment in the United States have resulted in litigation in which courts outside the United States have held that turning persons over to states with the death penalty would in certain circumstances violate provisions of international human rights conventions.⁴³ International human rights conventions contain analogues to many of the protections guaranteed by the U.S. Constitution, including the right to fair trial, to "equality of arms" and access to court,⁴⁴ to the presumption of innocence,⁴⁵ to the right to confrontation, and to the right to counsel of choice. Though some of the international human rights protections meet, and even exceed, U.S. Constitutional standards, some do not. Article 20(1) of the Statute for the Ad Hoc Tribunal provides that the "[t]rial chambers shall ensure that a trial is fair and expeditious and that proceedings are rendered in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The accused's Geneva Law and human right to consult a lawyer and to have adequate time to prepare a defense must be ensured. To be acceptable, this protection must be applicable to the entire trial process.

Subject Matter and Territorial Jurisdiction

Article 4 of the Statute for the Ad Hoc Tribunal for the former Yugoslavia provides for jurisdiction over the crime of genocide, and Article 5 covers "crimes against humanity," which includes "*other inhumane acts*."⁴⁶ The Statute takes some license on "crimes against humanity," adding some crimes that are not included in the Geneva Convention (IV). Perhaps at one time, the phrase "other inhumane acts" was imprecise, and would have posed a potential problem

in War Crimes Trial," *Washington Post*, 31 March 1993, A21, col. 1.

42. Justice Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, *Opening Statement*, delivered 20 November 1945, quoted in Telford Taylor, *The Nuremberg Trials*, 167-69.

43. Known as the "death row syndrome." For background on the cases, see, e.g., *Soering v United Kingdom*, 11 *Hum. Rts. L. J.* 3-35 (1990); Steinhardt, "Recent Developments in the Soering Litigation," 11 *Hum. Rts. L. J.* 1073 (1990).

44. European Convention on Human Rights, Article 6(1).

45. *Ibid.*, Article 6(2).

46. Statute, Article 5 (i).

vis-à-vis the principle of *nullum crimen sine lege*.⁴⁷ It is necessary that whatever conduct is covered be clearly and explicitly "proscribed by relevant international law."⁴⁸ With some 22 categories of international crimes, representing 314 international instruments enacted between 1815 and 1988, none of which properly defines in criminal law terms the offenses proscribed nor the elements thereof, it is necessary that the offenses be codified or otherwise clearly defined. If not, their vagueness will violate notions of due process.

Articles 2 through 5 of the Statute, in order to be more specific, provide for jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.⁴⁹ The Secretary-General noted that only crimes which have clearly and beyond any doubt become part of customary law may be prosecuted.⁵⁰ These laws include the law applicable in armed conflict as embodied in the Geneva Conventions of 12 August 1949 for the protection of War Victims; the Hague Convention (IV) of 18 October 1907, Respecting the Laws and Customs of War on Land, and the Regulations annexed thereto;⁵¹ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;⁵² and the Charter of the International Military Tribunal of 8 August 1945.⁵³ The Secretary-General spells out these various offenses in paragraphs 37 through 49 of his report.

It should be noted that no reference is made in the Statute to Protocols I and II to the Geneva Conventions.⁵⁴ This omission raises the additional question, which will commonly be at issue, of whether the conflict on the territory of the former Yugoslavia is international or internal. If it is internal or not "armed conflict," and Protocols I and II are not incorporated, or not otherwise part of customary international law, then only Common Article 3 of the Geneva Conventions applies. Common Article 3 mentions nothing of rape or other offenses that are specified in Articles 2 through 5 of the Statute of the Ad Hoc Tribunal.

A related problem is whether conduct must have been "committed in armed conflict." Both the Nuremberg and Tokyo Tribunals required that "crimes against humanity" be committed "in execution of, or in connection with"

47. No crime without law. A similar maxim is *nulla poena sine lege* — no punishment without law.

48. See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 27-31 (1942); quoted in "I.M.T. at Nuremberg, Opinion & Judgment," reprinted at 44 *A.J.I.L.* 172, 220 (1947).

49. On crimes against humanity, see gen., M. Cherif Bassiouni, *Crimes Against Humanity* (1992); and Roger Clark, "Crimes Against Humanity," in Ginsburgs and Kudraivstev, eds., *The Nuremberg Trial and International Law* ch 7 (1990).

50. Secretary-General's Report, at paras. 34, 35.

51. Convention (No. IV) Respecting the Laws and Customs of War on Land with Annex of Regulations, done at The Hague, 18 October 1907, entered into force, 26 January 1910, T.S. No. 539.

52. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (9 December 1948).

53. Charter of the International Military Tribunal, 59 Stat. 1544 (1945).

54. Protocol I, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, 16 *I.L.M.* 1391 (1977); and Protocol II, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, 16 *I.L.M.* 1442 (1977).

another crime in the relevant Charter of the Tribunal.⁵⁵ This is a serious problem, which caused the Nuremberg Tribunal *not* to prosecute for those offenses committed in Germany against German nationals or residents prior to 1939. The definition of "armed conflict" is nuanced and difficult. I would argue, however, that certain offenses, even not committed during armed conflict, are established as international crimes against humanity in customary international law, but this distinction would pose serious problems for a "War Crimes Tribunal."

International conventions that purport to create international "crimes" have been a problem in an arena where "crimes" are usually poorly defined. Crimes against humanity were explicitly recognized in the Nuremberg Charter and Judgment, and in Control Council Law Number 10.⁵⁶ These rules have become part of customary international law and, indeed, articulate "general principles of law recognized by civilized nations."⁵⁷ Note that "rape" was *not listed* in the Nuremberg Charter, but *is listed* in Law No. 10, which (attempting to delimit rape as a crime only when specified) further deleted "in execution of or in connection with any crime within the jurisdiction of the Tribunal." Furthermore, the phrase "[a]trocities and offenses included *but not limited to* [murder, etc.]" was substituted to expand the range of crimes qualifying as "crimes against humanity."⁵⁸ The Secretary-General argues that these offenses include crimes aimed at any civilian population, and are prohibited regardless of whether they are committed "in an international or internal armed conflict."⁵⁹ Other inhumane acts of a "very serious" nature, proscribed by relevant international law, refer to willful killing, torture, and rape, committed as part of a widespread or systematic attack against any civilian population for political, racial or religious

55. See Nuremberg Charter, Article 6(c); Tokyo Charter, Article V(c). Control Council Law No. 10 eliminated this required connection, but the subsequent trials in national tribunals were split over whether Law No. 10 incorporated the Charter. See discussion in James C. O'Brien, "Current Developments: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," 87 *A.J.I.L.* 639, 649 (1993).

56. See para. 47 of S/25704. Letter from Justice Frank C. Newman to Professor Blakesley, 21 September 1993. After the Nuremberg Trials proper, 12 additional trials, for some 185 defendants, were held in Nuremberg from 1946-1949. These trials were called "Subsequent Proceedings" to distinguish them from the initial IMT at Nuremberg. The Subsequent Proceedings were held by the Military Government of the American and French Zones of Occupation in Germany, pursuant to Control Council Law No. 10, promulgated on 20 December 1945, by the "Control Council of the Four Occupying Powers in Germany." Control Council Law No. 10, "Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity," was designed to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Control Council Law No. 10 is reproduced in *VI Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, 1946-1949 XVII* (Washington: U.S. Government Printing Office, 1952). Matthew Lippman, "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany," 3 *Ind. Int'l & Comp. L. Rev.* 1 (1992). See also, Yoram Dinstein, *The Defense of "Obedience to Superior Orders" in International Law* (Leyden, Netherlands: A.W. Sijthoff, 1965), 162-63. The American Trials are found in several volumes of *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1951).

57. See paras. b and c, Statute of the International Court of Justice.

58. Thanks to Justice Newman for this.

59. Secretary-General's Report, para. 47.

grounds. Does "very serious" as found in paragraph 48 of the Statute really differ from "serious"? Does Article 5's phrase "in . . . armed conflict" mean *during* armed conflict? Has the Ad Hoc Tribunal really avoided the dilemma faced by the Nuremberg and Tokyo Tribunals?

In the conflict in the territory of the former Yugoslavia, such inhumane acts as "strategic" rape have been lumped together with so-called "ethnic cleansing." Widespread and systematic rape and other forms of sexual assault, including forced prostitution, should probably be given separate recognition.⁶⁰ The Ad Hoc Tribunal will have the authority to prosecute persons responsible for the following crimes when committed in an armed conflict and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts.⁶¹ It remains to be seen whether that Tribunal will be able to obtain the persons of the accused, acquire sufficient evidence, and successfully prosecute those brought to trial. It remains further to be seen whether a permanent tribunal could do so.

How would a permanent tribunal's jurisdiction be worked out? This is a serious problem. The most efficient approach internationally would be to have exclusive jurisdiction in the tribunal for the named offenses. The least efficient approach would allow the state of the nationality of the defendant or the state on whose territory the offense occurred to have primacy. The Ad Hoc Tribunal for the former Yugoslavia opted for concurrent jurisdiction.⁶² While concurrent, the Ad Hoc Tribunal's jurisdiction is also primary, so that at any stage of the procedure, the Tribunal may formally request the national court(s) to defer to the Tribunal's competence.⁶³ The Tribunal's rules of procedure and evidence govern the specifics of this concurrent relationship. The problem with this approach, of course, is the diminution of state sovereignty. States would tend not to become parties. Would nations run the risk of having their nationals sent to be tried by judges possibly from enemy or rogue nations? On the other hand, a more limited approach would make the court dependent on recalcitrant leaders of states which had been involved in the violations. Either way, a permanent tribunal would face serious problems.

Rights of the Accused

It is axiomatic that any international tribunal must fully respect all of the internationally recognized standards regarding the rights of the accused at all stages of the proceedings. It would seem that this means *at least* the rights contained in Article 14 of the International Covenant on Civil and Political Rights. Would these be sufficient? These rights include:

60. *Ibid.*, para. 48.

61. *Ibid.*, para. 49, indicating Article 5 of the Statute. The Tribunal may prosecute these crimes, regardless of whether the crimes could be domestically prosecuted.

62. This is the case with the Ad Hoc Tribunal for the former Yugoslavia. Secretary-General's Report, *supra* at paras. 64-65; See "U.N. Secretary General Issues Draft War Crimes Tribunal Statute," 9 *Int'l Enf. L. Rptr.* 172, 174 (May 1993).

63. *Ibid.*

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate the counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so requires, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
 - (g) not to be compelled to testify against himself or to confess guilt.

Extradition. There must be an extradition treaty (or an analogue) and implementing legislation. The U.S. Supreme Court has held that extradition is not possible without an applicable extradition treaty. Thus, it is necessary that some form of an extradition-type treaty be entered into and that it receive the advice and consent of the Senate. It will be necessary that the treaty call for the "extradition" (or other legal rendition) of a fugitive to the tribunal for trial. Would this be an extradition? Is extradition the appropriate vehicle? Whatever it is called, would a rendition be an extradition, as called for by U.S. jurisprudence, when a fugitive is being sent to an international tribunal rather than another state? These are questions that will likely be answered in the affirmative, but may have to be addressed by the courts in the United States. This problem may be obviated by the promulgation of a law that provides for extradition or rendition to the tribunal.⁶⁴ This law could authorize the rendition and cover the incidents and issues relating to that rendition. It could be argued that the U.N.

64. This is what the ABA Task Force calls for. Report of the American Bar Association Section of International Law and Practice Task Force on War Crimes in Former Yugoslavia (Proposed Final Draft, 22 June 1993), xii.

Charter, via the above-mentioned provisions and Article 25 thereof, could function like an extradition treaty.⁶⁵ Could such a law even require certain protections for the accused? It could be considered, at least, as a treaty-based mechanism for the rendition of individuals. One must ask whether this approach will be upheld under the Supreme Court jurisprudence, if a fugitive were to be requested from the United States.

The Supreme Court has insisted on an extradition treaty because the relevant statute so requires.⁶⁶ A statute alone, therefore, may be sufficient for extradition (assuming that a *prima facie* case is established for surrender). A statute is necessary because of the principle that individuals cannot be apprehended without general legislative authorization. It is certainly necessary in the United States that there be enabling or implementing legislation for this to work. Apparently, the Council of Europe is working on model implementing legislation for Europe.

In order to bring an individual accused of war crimes to trial in countries of the common law tradition, sufficient evidence to establish "*probable cause*" must exist.⁶⁷ Probable cause relates to the decision to arrest or to hold a person over for trial or to extradite him to serve an already extant conviction and sentence.⁶⁸ Europeans often disagree with the use of the probable cause standard for extradition, and may oppose it for a war crimes tribunal.

The principle of non-bis-in-idem. This principle, whereby no person shall be tried twice for the same offense, must be incorporated into the statute of any war crimes tribunal.⁶⁹ Thus, given the primacy of the Tribunal's jurisdiction, subsequent trial before a domestic court should be forbidden. Even this principle poses problems. What should happen if: (a) the characterization of the act by the national court did not correspond to its characterization under the tribunal statute, or (b) considerations of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts?⁷⁰ Should the Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court? If so, would this

65. Article 25 states, "The Members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the present Charter."

66. Title 18, U.S. Code, § 3181.

67. See Barbara J. Shapiro, *Beyond a Reasonable Doubt and Probable Cause* 103 (1991); L.R. Beres, "Iraqi Crimes and International Law: The Imperative to Punish," 21 *Denv. J. Int'l L. & Pol'y* 335, 341, n 24 (1993).

68. See Blakesley, *Terrorism, Drugs*, supra note 14, at 217, et seq. (standard of proof in extradition, etc.) The *prima facie* standard of evidence is a bit more stringent. It provides that if the evidence "stood alone, uncontradicted and uncontrolled by any defensive matter, it would be sufficient to justify a conviction on trial." See Barbara Shapiro, *Beyond Reasonable Doubt*, supra note 66, at 95, citing Thomas Starke, 1 *Practical Treatise of the Law of Evidence* 554 (10th ed. 1876), which quoted Chief Justice Shaw of the Massachusetts Supreme Court, charging a grand jury with this standard. Beres, "Imperative," supra note 15, at 341, n 24.

69. Secretary-General's Report, supra at para. 66.

70. Secretary-General's Report, para. 66.

violate *non-bis-in-idem*? Would the Tribunal's taking into consideration the extent to which any penalty imposed by the national court has already been served resolve the problem?⁷¹

Article 10(2)(b) of the Ad Hoc Tribunal for the former Yugoslavia indicates that retrial may take place if the "national court proceedings were not impartial." This language probably refers to a situation of the kind suggested by the clause's next phrase, which speaks of the accused being "shielded from international criminal responsibility." Would a new prosecution violate *non-bis-in-idem*? There may be situations where the International Tribunal would be more protective of the human rights of the accused than would be a given domestic court, which may not be "impartial" or "well-disposed." Take, for example, the worries of Justice Jackson, the chief U.S. prosecutor during the Nuremberg Trials noted earlier, and more recently the trials of two Bosnian Serbs sentenced to death for war crimes in Bosnia-Herzegovina.⁷² The defendants were convicted after confessing, although their confessions were not corroborated, were withdrawn, and the defendants claimed that they had been given under torture and repeated beatings. Scars and markings found on their bodies were consistent with the claims of torture.⁷³ Even if these individuals actually committed the crimes, can the international community afford the alleged method of arriving at the "truth"?

The substantive defenses to war crimes must be maintained.⁷⁴ *The superior orders defense* acknowledges that soldiers must obey their superiors.⁷⁵ Obviously, if superior officers have the power to inflict punishment, pain or death on a soldier who refuses to obey, duress may be involved, although *duress* is actually a separate defense. In addition, the American Bar Association (ABA) Task Force on the Ad Hoc Tribunal for the former Yugoslavia recommended that superior orders should be a legitimate defense if "a defendant acting under military authority in armed conflict did not know the orders to be unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful." It is hard to conceive, however, of a situation in which the grave breaches covered by the statute of a war crimes tribunal would not be understood to be illegal.

Duress is traditionally a separate defense from superior orders.⁷⁶ It would

71. *Ibid.*, para. 67; Statute, Article 10, *Non-bis-in-idem*.

72. See "Bosnia Convicts and Sentences to Death 2 Serbs," 9 *Int'l Enf. L. Rptr.* 147 (April 1993); John F. Burns, "Two Serbs to be Shot for Killings and Rapes," *New York Times*, 31 March 1993, A6, col. 4; David B. Ottaway, "Bosnia Convicts 2 Serbs in War Crimes Trial," *Washington Post*, 31 March 1993, A21, col. 1.

73. See note 41, *supra*.

74. These defenses are detailed and analyzed in Anthony D'Amato, "National Prosecution for International Crimes," in M. Cherif Bassiouni, ed., 3 *International Criminal Law* (Dobbs Ferry, N.Y.: Transnational Publishers, 1987), 169, 172-78.

75. On the superior orders defense, see gen., Dinstein, *The Defense of Superior Orders*.

76. See, e.g., Paust, "My Lai and Vietnam," *supra* note 4, 169-70; Blakesley, *Terrorism, Drugs*, *supra* note 15, ch 1, 2.

likely be considered only a mitigating factor when combined with the superior orders defense, where superior orders are conjoined with circumstances of coercion or lack of moral choice.⁷⁷ Other standard criminal law defenses, such as minimum age or mental incapacity, for example, would be determined by the Tribunal itself.⁷⁸ Certainly, criminal liability would obtain for complicity in such crimes.⁷⁹

In the case of the former Yugoslavia, the ABA Task Force has recommended that mitigation due to duress should be the *only* type of mitigation allowed under superior orders. This recommendation is sound, but as duress is a distinct defense, it should be separated from the superior orders defense. The mistake-of-law type of superior orders defense should be eliminated and duress retained. It is true that the aspect of the superior orders defense that gives rise to the lack of "moral choice" is a duress-like defense. This relationship was recognized at the Nuremberg Trial, although literally excluded in the London Charter. A second aspect or type of superior orders defense is that based on "ignorance of the illegality." The U.S. Military Field Manual formulates its mistake-based superior orders defense on that basis.⁸⁰ Should both types of defense be allowed if a war crimes tribunal were created, or should only duress be allowed, as the ABA suggests?

The right of confrontation. *Ex-parte* affidavits or video-taped depositions should not be admissible in trial, because their use is inconsistent with the right of the accused to "examine, or have examined, the witnesses against him."⁸¹ This right is protected under Article 21(4)(e) of the Statute of the Ad Hoc Tribunal, although unfortunately that article does not include the right to confrontation, which is broader than the specific right to cross-examine. The Ad Hoc Tribunal's article, taken verbatim from Article 14(3)(e) of the International Covenant on Civil and Political Rights, would likely be used in a permanent war crimes tribunal. Is this right the same as that of a defendant to confront the witnesses against him? Does it include the concomitant right to cross-examine those witnesses? The ABA Task Force⁸² concludes that the right *is* concomitant to cross-examination. This relationship is *not self-evident*, however, especially given the broad "civil law" practice of allowing the judge to do the questioning (not always so vigorously as the Anglo-American trial attorney). Moreover, during the Nuremberg Trials, where cross-examination was actually allowed, it was generally ineffective because of defense counsels' lack of experience.

However, there is *serious tension* between the preliminary and essential re-

77. See, e.g., Secretary-General's Report, para. 57.

78. *Ibid.*, para. 58.

79. For the standards involved and elaboration, see, e.g., Paust, "My Lai and Vietnam," *supra* note 4, 166-69, and the numerous cases cited therein.

80. The mistake-based defense excuses or mitigates liability when a reasonable person would not have known the conduct was illegal; duress excuses or mitigates liability when coercion eviscerates moral choice.

81. Article 14(3)(e), International Covenant on Civil and Political Rights.

82. ABA Report, 59.

sponsibility of a tribunal to ensure a fair trial that comports with *due process* and the *obligation to protect victims and witnesses*. To provide protections for the accused, as discussed above, without adequate safeguards for victims of war crimes, rape, and torture risks not only severe psychological harm to those victims, but even jeopardizes their very lives and those of their family members. The perpetrators of such crimes often have militia or other forces available to intimidate or harm the witnesses and victims. In the case of the former Yugoslavia, the ABA Task Force suggested that any derogation from the principle *against the use of ex-parte* affidavits should be limited to permitting their use as corroborative evidence in cases involving sexual assault against women, and that an *ex-parte* affidavit might be used at the investigatory stage, but not at trial.⁸³

Professor M. Cherif Bassiouni has strong reservations about the use of the U.S. model of confrontation and cross-examination without adequate safeguards for rape and torture victims. First, these procedural safeguards may be easily abused and cause distortion of the "truth-seeking" process. Second, the U.S. model disregards the legitimate rights and interests of the victim-witness. Third, the model assumes that other mechanisms in society will protect the victim-witness, which is unlikely in an international tribunal. Finally, the model lends itself to the further victimization of witnesses, including assassination and other forms of reprisals and harassment. Hence, while it is clear that human rights norms require some sort of "confrontation-type" examination (or the right to "have examined"), there is disagreement over what that means and should mean in the international tribunal context. Whatever approach one takes presents serious problems.

In a meeting held under the auspices of the International Scientific and Professional Advisory Council (ISPAC) in Spain on 3 May 1993, several recommendations were made with a view to protecting victims and witnesses while still providing for the accused's right to confrontation.⁸⁴ Suggested protections included adding the following passage to Article 21 (*Rights of the Accused*) paragraph 4(e) of the Statute for the Ad Hoc Tribunal: "With regard to child witnesses this examination will be restricted to questions through the Tribunal only. In other cases where the International Tribunal considers it appropriate for the protection of the witness, it may similarly restrict the questioning." Article 18 (*Investigation and Preparation of Indictment*) paragraph 3 was to be amended to include: "The views and concerns of victims shall be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the other rules of the International Tribunal." Further, it was recommended that the Tribunal

83. *Ibid.*, at vi.

84. Recommendations to elaborate on the victim's role in the International Tribunal are contained in the Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) (S/25074, 3 May 1993), emanating from a Colloquium on "Prevention of Victimization, Conflict Resolution, Protection and Assistance for Victims," organized by the International Scientific and Professional Advisory Council of the U.N. Crime Prevention and Criminal Justice Program (ISPAC), under the auspices of the Onati International Institute for the Sociology of Law (held in Onati, Spain, 12-16 May 1993).

"[take] into account the victims' needs for privacy and their special sensitivities. For example, screens or facilities for giving evidence from a separate room and separate waiting areas for defence and prosecution witnesses can be provided for protection. In this context, child victims should be offered special protection and interview procedures." These recommendations are to be taken into consideration in drafting the *Rules of Procedure and Evidence* and the general administrative structure of the Ad Hoc Tribunal, based on the notion that the United Nations ought to be prepared to incorporate the essence of its *Declaration on Victims* into this effort.⁸⁵ These improvements should also be applicable to any permanent tribunal. The artistry and wisdom with which this is done will weigh heavily on the success or failure of the tribunals.

Even if done well, would these safeguards be sufficient for the victims, the witnesses, and the accused? Providing some of the traditional Anglo-American safeguards for the accused without establishing serious protective measures for victims will simply ensure that no victims will come forth, or if they do, that the risk of harm will be significant. Not including them will render the tribunal suspect. The international community would run the risk of facing another fiasco such as that at the Leipzig Trials.⁸⁶ The result may be no serious or important convictions, but plenty of trauma for the victims and witnesses.

Standard of proof for conviction. The reasonable doubt standard has been the controlling standard for conviction in common law nations for over 200 years.⁸⁷ The perception and understanding of this standard in the United States is that the evidence be sufficient to establish that there is no reasonable hypothesis or explanation of the evidence other than that of the defendant's guilt. It is a difficult burden to meet, as it should be when a person's life or liberty is at stake. The equivalent standard was recently applied by the Israeli Supreme Court in the *Demjanjuk* case. "Civilian" countries,⁸⁸ on the other hand, generally are

85. Letter from Professor Roger Clark to Christopher Blakesley, 24 September 1993. See also, "International Conference for the Protection of War Victims: Declaration for the Protection of War Victims, and Concomitant G.A. Resolution on the High Commissioner for the Promotion and Protection of All Human Rights," 33 *I.L.M.* 297 (1993).

86. The *Leipzig Trials* (1921-22) were the first major international attempt to punish war criminals. See "German War Trials: Report of the Proceedings Before the Supreme Court in Leipzig," 16 *A.J.I.L.* 628 (1922) (note that they were tried before German tribunals); C. Mullins, *The Leipzig Trials* (1921); Bassiouni and Blakesley, *The Need for an International Criminal Court*, *supra*, at 154, n 11; James F. Willis, *Prologue to Nuremberg* (1982); Telford Taylor, *Anatomy of Nuremberg*, *supra* at notes 27 and 42; V. Dadrian, "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications," 14 *Yale J. Int'l L.* 221, 315-17 (1989). They essentially failed. The Allies succumbed to political considerations, which were allowed to thwart efforts of the prosecution. The German defendants were cheered as they left the tribunal, while the Allies were derided and mocked. See also, the failure of the Turkish Trials (relating to the courts martials of perpetrators of the Armenian genocide), e.g., R.G. 256, 867.00/27, R.G. 59, 867.4011/408; Takvimi Vekay, No. 3493; *Journal d'Orient* (Istanbul) 23 April 1919, cited and discussed in Dadrian, "Armenian Case," *supra* this note, at 296-315.

87. Beres, "Imperative," *supra* note 15, at 340, n 24; John Locke, *An Essay Concerning Human Understanding* (London: Thomas Basset, 1690).

88. The term "civilian" is used here to denote those nations which derive their legal systems from the "civil code" tradition, which began with the French *Code Napoléon*.

opposed to it, although on the continent, even the great German Lutheran jurist, Baron Samuel Pufendorf (1632-1694), linked the concept of "*conscience*" (similar to the French notion of "*intime conviction*") to notions of moral certainty and of proof beyond a reasonable doubt.⁸⁹ "Modern" "civilian" states do not follow this model, and would oppose its adoption for a war crimes tribunal. Not adopting the reasonable doubt standard will cause problems for countries of the common law tradition.

Appellate and Review Proceedings

A war crimes tribunal will not be viable or appropriate unless it provides meaningful appellate review. The Secretary-General's Report on the former Yugoslavia and the associated Statute recognize the fundamental nature of the right to appeal, as incorporated in the International Covenant on Civil and Political Rights.⁹⁰ Thus the Ad Hoc Tribunal will have an appellate process whereby a person convicted (or the prosecution) will be able to appeal errors on questions of law that would invalidate the decision, and on errors of fact which would occasion a miscarriage of justice.⁹¹ The Appellate Chamber may reverse, affirm, or revise the decisions of the Trial Chambers⁹² by way of decision rendered publicly and accompanied by a reasoned opinion, to which other opinions, either concurring or dissenting, may be appended.⁹³ The decision of the Appellate Chamber is final.⁹⁴

The fact that there is but one level of review is problematical. Also, would allowing the prosecution more than an interlocutory appeal of errors of law, which would trigger a new trial for the same offense, violate the principle against double jeopardy? It would seem so. To comport with the protection against double jeopardy, the tribunal should allow this prerogative.

Organization and Composition of the Permanent Tribunal

An international war crimes tribunal would likely be organized along the lines of a continental court, as was the Ad Hoc Tribunal. It would be composed of a judicial or adjudicative organ, a prosecutorial organ, and a secretariat.⁹⁵ The prosecutorial organ would investigate allegations, prepare indictments, and prosecute persons allegedly responsible for committing the relevant violations. The tribunal would have Trial Chambers, where the Judicial Organ would hear cases, and an Appellate Chamber for appeals. The Chambers could be composed of a number of (say, eleven) independent judges, no two of whom would

89. Samuel Pufendorf, *Of the Law of Nature and Nations* (C.H. Oldfather & W.A. Oldfather, trans., 1688); Beres, "Imperative," *supra* note 15, at 341, n. 24. Pufendorf, along with other classic international law publicists including Grotius, Suarez, and de Vattel, contemplated the transnationality of justice.

90. Secretary-General's Report, para. 116.

91. *Ibid.*, para. 117; Statute, at Article 25.

92. Statute, at Article 25.

93. Secretary-General's Report, at para. 118.

94. *Ibid.*

95. Secretary-General's Report, *supra* at para. 69; "Draft War Crimes Tribunal Statute," *supra* at 175.

be nationals of the same nation.⁹⁶ Three judges should serve in each of the two Trial Chambers and five would serve in the Appellate Chamber.⁹⁷ Professor Ed Wise has noted that it would have been much easier and less expensive to follow the old Anglo-American tradition of a single judge riding circuit. Unfortunately, this approach is not generally accepted around the world. The Secretariat would be the administrative arm of the tribunal to service the other two branches.⁹⁸

A judge should oversee and rule on the sufficiency of indictments, to decide whether an accused will be bound over for trial.⁹⁹ That judge should not sit on a trial panel. This is appropriate for purposes of protecting the integrity of the system, but it poses problems in relation to availability of judges at the trial stage. When judges have decided on the indictment, they should be disqualified to hear the trial. Given the large number of indictments and, hence, the likely large number of trials, this will certainly cause logistical and time-delay problems with trials. In fact, since they sit in panels, when one member of a panel is disqualified from hearing the trial, the whole panel is so disqualified. In this sense, it might have been better to have totally separate panels: one available only for preliminary matters and another for trials.

The ABA has recommended that Ad Hoc Tribunal judges be removed for cause upon a supermajority vote of the Security Council, and that no member of the Security Council have a veto over any removal decision.¹⁰⁰ The Task Force also wisely recommended that two or more alternate trial judges and one alternate Appellate judge be appointed, to avoid inflexibility.¹⁰¹ Will either the majority of the General Assembly or the "major powers" be amenable to such a rule for a permanent tribunal?

Continental Justice Systems and Protection of the Accused

While continental criminal justice systems have built-in protections for individuals accused of crime, even in the best of circumstances they are not as expansive as the constitutional protections in the United States. The defendant will be deprived of fundamental fairness (in the U.S. sense of substantive due process), equal protection, effective assistance of counsel, the right of confrontation, and other rights. Without the application of these protections, the U.S. Constitution and courts require the convictions to be overturned. Accordingly, there may be serious difficulty participating in the creation of a system that does not comport to U.S. Constitutional mandates, then sending U.S. nationals to be prosecuted therein. Thus, a serious tension exists between the criminal justice models competing for adoption in a war crimes tribunal.

The French system for protection of the accused is similar to other systems

96. Statute, *supra* at Article 11(A)(1) [Composition of the Chambers].

97. *Ibid.*, at Articles 11, 12.

98. Secretary-General's Report, at para. 69.

99. See ABA Section of International Law and Practice Task Force, *supra* note 82, v.

100. *Ibid.*

101. *Ibid.*

in Europe. The French criminal investigation in the usual *non-absentia* prosecution is undertaken, theoretically, by either a *juge d'instruction* (investigating judge) or a *procureur* (prosecutor, who is trained in exactly the same way and has the same authority and responsibility as a sitting judge). Indeed, the *procureur* is called *un magistrat debout* or standing judge. The system is designed with the goal of providing a prosecutor who is sensitive to his or her obligation to protect civil liberties as well as to protect the state against criminals. The protections are built into the person and office of this judicial official. In reality, the *police judiciaire* (who are actually the regular police, functioning as "judicial," or investigative, police) conduct the actual investigation in most cases, under the supervision of the *procureur*. Much of the evidence is obtained without counsel being available to the defendant, until he or she formally becomes a "suspect." The protection of counsel is thus provided much later than in the U.S. system, because the judicial official provides the protection.

In some very serious and sensitive prosecutions, the investigation is conducted by the *juge d'instruction* who, at least in theory, is not a prosecutor at all. Thus, the protection of the accused is built into the investigative stage, through the person and expertise of the *juge d'instruction* or *procureur*. This protection is based on trust. A serious problem with this approach, from the U.S. Constitutional perspective, is that the American system assumes that any investigator (even a judicially trained one) will eventually develop a theory of the case and will be influenced by that theory. While this influence is understandable and normal, the U.S. system recognizes it and protects against the dangers it poses by allowing vigorous defense counsel to represent the defendant from the early stages of the investigation. Continental systems are based on the good faith efforts of governmental officials and the police; the U.S. system is not dependent on trust, but calls for zealous, independent defense. Adoption of either system will cause problems for the other.

Another problem with the European model is the use of the *dossier*. The dossier is the entire package of documentary evidence obtained during the investigation. Though it includes reports and records of all investigations, examinations, and statements of expert and other witnesses, much of it is in the form of simple police reports, written by the investigating officer. It is all admissible in a continental trial (although most of it would not be admissible in a U.S. trial). Indeed, the dossier is not only available to the chief judge, but is heavily utilized and relied upon by that judge in running the trial and rendering the ultimate decision. The trial, therefore, is generally very brief. Although the judge allows the defendant to make a statement and to pose questions to witnesses upon whose testimony the documents are often based, in many instances, by the time the actual trial begins, the conviction is virtually assured. Thus, the essence of a continental trial (including the protections of the accused and the ultimate conclusion, the "objective truth" of whether the accused committed the offense), takes place at the pre-trial stage.

The jury system in Europe is also unlike that in the United States. The French jury, for example, is generally made up of nine individuals. There is also a three-judge panel, including the chief judge, who deliberates and votes with the

jury.¹⁰² It is possible that the lay members of the jury, not being lawyers and deferring to the social and legal authority of judges, may be influenced by the three-judge panel and by its control over deliberations. The chief judge, being armed with the entire dossier, certainly has the power and authority to influence the jury's deliberations and their ultimate *intime conviction*.

A judgment of conviction in Europe is not required to be based on the "reasonable doubt" standard. A continental judge or jury, rather than determining that the evidence must rule out all other reasonable hypotheses except guilt, must simply arrive at an "intimate conviction" (*une intime conviction*) that the individual committed the crime alleged. This means simply that the trier of fact must *know* in his or her heart that the defendant committed the offense. The judge's *intime conviction* of guilt or innocence is based on that judge's thorough knowledge of all the evidence in the dossier. There are virtually no restrictions on the type of evidence allowed into the dossier and eventually into trial. The impact of the dossier being available to the judge, whether or not each witness is presented at trial for testimony, is tremendous.

Trial in absentia. Some continental Europeans have argued for the use of the trial *in absentia*. The Nuremberg Charter specifically provided for such trials.¹⁰³ This provision would certainly accommodate the difficulty such a tribunal would face in being able to obtain custody of persons accused of war crimes. Trials *in absentia*, however, would be anathema to common law systems. Some of the arguments against trials *in absentia*, presented below, apply to continental criminal justice systems in general.

In a trial *in absentia*, the defendant, in addition to his absence, has neither a right to a jury¹⁰⁴ nor a right to counsel *at any time*.¹⁰⁵ The French *Cour d'Assises* (the French Court in which serious crimes — analogues to U.S. felonies — are tried), for example, simply verifies that the formalities were met,¹⁰⁶ then renders its decision. No witness is heard and only written documents of the dossier are consulted.¹⁰⁷ In addition, the dossier remains available for any subsequent trial.

Even the human rights protections mandated by international law as applied through the French and other continental legal systems for regular trials (albeit probably inadequate for U.S. Constitutional purposes) are *not available* for trials *in absentia*. Most nations abrogate prior convictions *in absentia* and allow a new trial once custody of the defendant is obtained. The abrogation of the prior conviction *in absentia* and the retrial of the defendant, however, *do not* address

102. Jean Pradel, 4 *Procédure Penale* §§ 37-42, 53-61 (1987).

103. Nuremberg Charter, Art. 12, annexed to the London Agreement on War Criminals, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279. A trial *in absentia*, of course, is a trial without the presence of the accused.

104. The French jury, in any event, is not the equivalent to that in the United States. See discussion above.

105. French *Code de Procédure Pénale*, Arts. 630, 632, para. 4.

106. French *Code de Procédure Pénale*, Art. 632, para. 3.

107. See generally, the discussion in Gaston Stefani and Georges Levasseur, *Procédure Pénale* (1990), § 682, 639, at 877-88.

the deficiencies of trial *in absentia* nor erase the human rights violations associated with the procedure.

Protections of the accused in his "new trial." European law generally requires that a conviction *in absentia* be purged or abrogated when the "convicted" individual is returned for a "new trial." But the impact of the prior conviction *in absentia* is enormous. The "retrial" in the continental systems of a person already convicted *in absentia* is devoid of any constitutional protections compatible with U.S. standards. Thus, no assurance that the individual sent to the tribunal would be accorded due process *compatible with U.S. standards* could be made.

The problems are in the nature of the continental system, the nature of a continental trial, and the record of prior conviction as it is used in that trial. Although the formal conviction is abrogated, the dossier is retained and is available for use in the new trial. This may mean, if a given witness is not available to be presented in open court, that the impact of the evidence exists, without opportunity to cross-examine or even to confront all witnesses against the defendant. Moreover, the judge absolutely controls and presents the case, ultimately participating with and affecting the jury. The judge presents the evidence, calls the witnesses, and questions them in a manner consistent with his or her vision or theory of the case. Thus the judge, though "objective," will not necessarily provide the same rigorous challenge to the witnesses that a zealous advocate does for his or her client in the United States. This reality, coupled with the influence of the dossier, make it clear that the protections afforded a defendant under U.S. Constitutional standards are simply not available in the trial in continental systems, especially when the trial follows a prior conviction *in absentia*. It is likely that a war crimes tribunal would follow the European model. This choice would prove difficult for the United States and other common law nations to accept.

Sending an individual to the tribunal for trial will be analogous to extradition. Furthermore, the United States, if it participates, will have contributed to the creation of a tribunal that will be constitutionally deficient. Can the Treaty Clause of the Constitution (Article 7, § 2) justify U.S. participation in a tribunal that does not meet due process standards? A trial must proceed in a manner that is beyond reproach from the point of view of fairness and the protection of human rights. If U.S. courts are not scrupulous in protecting accused individuals from abuses and deprivation of civil liberties, Americans will ultimately be unwitting participants in such violations, condemning the viability and integrity of the U.S. extradition process, tainting American cooperation in criminal matters, and eroding U.S. Constitutional principles.

Justice Jackson's statement regarding fairness in investigation and prosecution, quoted above, applies to a war crimes tribunal today. Americans compromise themselves when they deliver someone up for prosecution in a system that does not comport with U.S. standards of justice. Trial after a conviction *in absentia* is certainly one of those situations, but so may be a trial in the first instance. First, for conviction, the standard of proof "beyond a reasonable doubt," discussed above, must be required. Yet, it is not the standard on the

continent and its omission is especially harsh for a trial involving a conviction *in absentia*. Second, in either situation, no counsel would be present at many critical stages of the procedure. Similarly, *ex-parte* affidavits, police reports, and other evidence non-admissible in a U.S. trial, taint an original trial or retrial even further. The use of this evidence is inconsistent with both the U.S. Constitution and the right of "confrontation" in Article 14(3)(e) of the International Covenant on Civil and Political Rights,¹⁰⁸ which the United States has just recently ratified.

Can a permanent war crimes tribunal proceed in a manner that the United States can accept and that brings credit to the international legal system? It must be, and must be perceived to be, effective in obtaining and prosecuting perpetrators of crimes in a manner that guarantees the international human rights protections afforded accused individuals. Dangers abound: difficulty in obtaining evidence in a manner that comports with protections guaranteed accused persons; difficulty in obtaining custody of accused individuals; difficulty in protecting victims of the atrocities while obtaining meaningful and usable evidence against accused persons.¹⁰⁹ Many other crucial problems face a war crimes tribunal. Their proper resolution is indispensable.

Conclusion

This paper has attempted to present a balanced analysis of the problems facing the creation of a permanent war crimes tribunal. The problems are daunting, especially from the perspective of a U.S. civil libertarian. Inherent problems of such a tribunal's encroachment on sovereignty prevent some scholars from accepting the possibility of its existence at all. The inherent tension between effectively obtaining custody of, gathering evidence against, and prosecuting those accused of war crimes creates another imposing set of problems and barriers. Is it possible to avoid having the tribunal become a political tool? If so, is it possible to ensure that the tribunal will be able to obtain custody of fugitives to prosecute in sufficient numbers to make it meaningful? If not, it will be perceived as being a hollow shell. If it is able to obtain sufficient numbers of accused individuals, will it be able to prosecute and convict them while protecting their rights and those of the victims and witnesses? Will the exercise be substantive and important for the protection of human rights and the prevention and prosecution of war crimes and other crimes against humanity, or will it be a symbolic gesture? If it is a symbolic gesture, will it promote or detract from those laudable goals?

108. "International Covenant on Civil and Political Rights," 999 U.N.T.S. 171, 6 *I.L.M.* 368 (1967).

109. For example, there is an inconsistency between the defendant's right to cross-examine witnesses against him, pursuant to Article 21(4)(e) of the Statute and the victims' and witnesses' right to be "protected" in "appearing before the Tribunal" under Article 22. See also, *ibid.*, Article 20(1).

