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1994

### Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia

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#### Recommended Citation

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**PROSECUTING AND DEFENDING VIOLATIONS OF GENOCIDE AND  
HUMANITARIAN LAW: THE INTERNATIONAL TRIBUNAL FOR THE  
FORMER YUGOSLAVIA**

The panel was convened at 8:30 a.m., Thursday, April 7, by its Chair, Monroe Leigh, who introduced the panelists and commentators: Larry Johnson, United Nations Office of Legal Affairs; Jordan J. Paust, University of Houston Law Center; Christopher L. Blakesley, Louisiana State University Law Center; Steven J. Lepper, Office of the Chairman, U.S. Joint Chiefs of Staff; Michael P. Scharf, New England School of Law; and Frank C. Newman, Boalt Hall School of Law, University of California at Berkeley.

**REMARKS BY MONROE LEIGH\***

As you know, the UN Security Council has established an international war crimes tribunal for the former Yugoslavia. There is a great deal of controversy about how it will be organized and carry out its functions. There have been criticisms even of the basis on which it has been established. Some contend that it is impossible for the United Nations to prosecute people for war crimes, including the leaders of various factions, while at the same time trying to negotiate a peaceful settlement to the dispute.

There are also vestiges of the Nuremberg process to consider. Let me briefly review some of the criticisms of that process. Article 3 of the charges at Nuremberg referred to violations of the laws of war established in the Hague Regulations of 1907 and the Geneva Conventions of 1929. These were the easiest to prove. Eighteen of those so charged were found guilty and two not guilty. The next charge was "crimes against humanity," intended to cover the "big guys" as well as the "little guys." This was criticized as "creating new law," and in some quarters has been considered invalid. Of the seventeen so charged, fifteen were convicted, two acquitted. The next charge was that of crimes against the peace. This, too, was criticized on the grounds that no particular treaty imposed individual criminal sanctions and that this therefore was also new law. Finally, there was the conspiracy charge—perhaps the most controversial, at least in Europe, because it is virtually unknown in the European civil law tradition.

**REMARKS BY LARRY JOHNSON\*\***

I have been asked to address the evolution of the statute and the tribunal itself. Basically, the Security Council established this tribunal because of a sense of frustration. Its previous calls to halt the atrocities and ethnic cleansing had gone unheeded. These calls had begun as early—or as late—as July 1992. The role of the NGOs and the media proved critical because they brought public pressure to bear upon governments, and the Security Council reacted to pressure. It expressed grave alarm at continuing reports of widespread violations of international humanitarian law within the territories of former Yugoslavia, including mass forcible expulsions; deportation of civilians; imprisonment and abuse of civilians in detention centers; deliberate attacks on noncombatants, hospitals and ambulances; impeding the delivery of food and medical supplies to the civilian population;

\* Steptoe & Johnson, Washington.

\*\* United Nations Office of Legal Affairs, New York.

wanton devastation and destruction of property; and ethnic cleansing. The Security Council demanded that all parties refrain from committing these violations of humanitarian law. The Council reaffirmed the obligations of the parties to honor the 1949 Conventions, but went on to say that persons who ordered or committed grave breaches of the Conventions (later, this was extended to activities considered serious violations of international humanitarian law) were to be held individually responsible for such breaches.

Despite these resolutions, the atrocities continued. The Council responded by establishing the "780 Commission" (from Resolution 780) in October 1992. Resolution 780 asked the Secretariat to establish an impartial commission of experts to examine and analyze information that had been submitted by governments and other sources. This commission was to present its conclusions to the Secretary-General and the Security Council. Conclusions were to be based on evidence of grave breaches and other serious violations of international humanitarian law. The commission's report, delivered in early February 1993, concluded that these atrocities were in fact occurring. It stated further that the establishment of an international criminal tribunal would be consistent with the commission's own work.

Two weeks later, in late February, the Security Council decided in principle (Resolution 808) that such a tribunal should be established. The Council requested that the Secretary-General submit within sixty days a report on all aspects of this matter. Another key factor in this Resolution was the inclusion of the "magic language" of chapter VII—that this ongoing situation of atrocities constituted "a threat to international peace and security." It was thus at this point that the Council flagged the possibility of taking enforcement action, since its previous resolutions were not being observed. France took the lead in this campaign, together with the United States and the United Kingdom. The immediate goal of the Secretariat was to produce a comprehensive, self-contained statute acceptable to everyone, that would not have to go to any working group for laborious review, article by article. What was wanted was something fast and effective; the need for quick action, however, raised the issue of the legal basis for such a statute. Normally, it would involve the drafting of a convention by governments, followed by their normal acceptance and ratification procedures—a very time-consuming endeavor.

It became quite clear in consultations that many members of the Security Council believed this statute could be established by the Security Council itself as an enforcement measure under chapter VII. Most immediately, the Secretariat had to address applicable law, the tribunal's structure and the statute's legal basis. Hiding in the background was the question of what role, if any, the General Assembly should play in formulating the statute. In those sixty days, there was a basically open-door policy: comments and suggestions were submitted by both governments and NGOs. On May 3, the Secretary-General presented his report, which dealt with all aspects. The Secretary-General himself decided that there would be *no* options—that is, that the statute would be complete and self-contained. The main point then was to try to get the applicable law right within the sixty allowed days and to create a basically feasible structure. The Security Council did not discuss the statute article by article. In the end, it adopted the statute without change and without any detailed public discussion. Interpretive statements by various countries (including the United States) were placed in the record.

The selection of the tribunal's judges was accomplished through an electoral process: They were nominated *sui generis* by the Security Council, which, in

private meetings, had winnowed down a list of candidates to twenty-two. The process then became a public one, with the General Assembly electing the eleven judges who would ultimately serve on the tribunal. This process was completed by September 1993, and the tribunal met for its opening session in November. It met again in February and adopted its rules of procedure and evidence.

#### APPLICABLE SUBSTANTIVE LAW

*By Jordan J. Paust\**

The former Yugoslavia was a signatory to several relevant treaties, including the United Nations Charter; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions and the 1977 Protocols thereto; the 1966 Covenant on Civil and Political Rights; the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the 1989 Convention on the Rights of the Child. Such treaty law remains binding on the former nationals of the former state, either by formal declarations of the new states or by general rules of state succession.

Additionally, several relevant rules of customary international law are binding on all nations, and they remain obligatory for the former nations of Yugoslavia as well. Today, such law includes the prohibition of genocide and war crimes, criminal sanction responsibilities recognized in the Geneva Conventions, and many of the basic rights of the human person evidenced in the 1966 Covenant on Civil and Political Rights, including several due process guarantees for the accused. Thus, whether or not norms reflected in multilateral treaties retain their applicability through their basis in relevant treaty law, several remain applicable as customary international law and, indeed, as customary *obligatio erga omnes*. The prohibition of genocide also is a well-recognized example of a peremptory norm *jus cogens*. Several violations of fundamental human rights in times of armed conflict or relative peace are also recognizably included; thus, *jus cogens* norms reflected in the Geneva Conventions and the 1966 Covenant pertain as well. As the Interim Report of the UN Commission of Experts recognized, "applicability" of fundamental human rights norms and the prohibition of genocide is further assured by "their character as peremptory norms of international law."

Although the Statute for the International Criminal Tribunal incorporates some of these norms directly, each is relevant at least indirectly as international law that can supplement the full meaning of the crimes identified in the Statute. Four general categories of international crimes are listed: (1) "grave breaches" of the 1949 Geneva Conventions; (2) other "violations of the laws or customs of war"; (3) "genocide"; and (4) "crimes against humanity." The report of the Secretary-General on the Statute and Competence of the Tribunal noted that each of these involves "rules of international humanitarian law which are beyond any doubt part of customary law," having stressed that such customary laws also include the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land and the Annex thereto, as well as the Charter of the International Military Tribunal (IMT) at Nuremberg.

Article 2 of the Statute of the tribunal contains a general list of grave breaches of the 1949 Geneva Conventions, but the tribunal is directed to the conventions by the phrase "acts against persons or property protected under the provisions

\* University of Houston Law Center.

of the relevant Geneva Convention.” Thus, Article 2 used both the list of crimes and the incorporation-by-reference approaches found elsewhere in international criminal law. In case of any inconsistency, here or with respect to other crimes, it is the evident intent of the Drafters to follow customary international law—a law that remains as background for interpretive purposes in any event.

In a recent article in the *American University Journal of International Law and Policy*,<sup>1</sup> I demonstrate how the Geneva Conventions apply to the international armed conflict in Bosnia-Herzegovina; that common Article 3 is also applicable as a minimum set of prohibitions and that breaches of Article 3 can reach the “grave breach” provisions of the Conventions; that other specific portions of Geneva law are applicable, especially Articles 13 and 16 of the Civilian Convention; and that such law, as well as other customary international law, proscribes genocidal “ethnic cleansing,” related strategies of forced starvation of civilians, intentional attacks on civilians and civilian centers, and rape—especially rape used as a tactic of war.

Article 3 of the Statute incorporates violations of the laws or customs of war. It lists five general types of prohibition, but expressly covers all violations of the laws of war and notes that the list is not exclusive. For this reason, the tribunal should consider any law-of-war treaty ratified by the former Yugoslavia and, of course, the customary laws of war more generally; these include violations of customary Geneva law not amounting to “grave breaches” as such. As the 1956 U.S. Army Field Manual No. 27-10 affirms, “[e]very violation of the law of war is a war crime.” The competence of the tribunal under Article 3 is therefore broad indeed.

Article 4 of the Statute provides that the International Tribunal “shall have the power to prosecute persons committing genocide as defined in paragraph 2” therein, which definition mirrors precisely that contained in Article II of the Genocide Convention and, as the Secretary-General’s report notes, that considered beyond doubt to have become part of customary international law. In this sense, the Statute of the tribunal is another historic recognition of the elements of genocide. Relevant U.S. legislation and attempts at reservations or understandings during U.S. ratification of the Genocide Convention are still completely opposed, and they certainly should be ignored by the tribunal.

Article 5 of the Statute attempts to reflect customary law documented in the Charter and the Judgment of the Nuremberg Tribunal concerning “crimes against humanity,” but it is notably imperfect. In the Nuremberg Charter, two basic types of crimes against humanity were listed: (1) those involving “acts committed against any civilian population”; and (2) “persecutions on political, racial or religious grounds” (IMT Charter, art. 6(c)). The same two categories appear in the 1950 Principles of the Nuremberg Charter and Judgment adopted by the International Law Commission (ILC), and there were two categories in the Tokyo Charter. Article 5 of the Statute changes the Nuremberg phrase “committed against” (which, in the 1950 ILC Principles, reads “done against”) to “directed against,” a phrase that may require a slightly higher threshold of *mens rea*; and it adds three relevant acts (“imprisonment,” “torture” and “rape”), although each is most likely covered by the Nuremberg phrase “other inhumane acts.”

What is strange, however, is that Article 5 of the Statute fuses both types of crimes against humanity into one, thus attempting to change what the Secretary-General expressly recognized as customary international law found in the Charter

<sup>1</sup>9 AM. U. J. INT’L L. & POL’Y 499 (1994).

of the IMT. Instead of being a separate category of crimes against humanity, as they were under the Nuremberg and Tokyo Charters, "persecutions" of individuals or groups must also be "directed against any civilian population" to be covered by the Statute and, thus, within "the power" of the International Criminal Tribunal. It is evident, therefore, that in addition to a jurisdictional competence concurrent with, but secondary to, that of the Tribunal (under Article 9 of the Statute), states retain an exclusive competence over certain crimes against humanity involving persecutions of individuals or groups that are not "directed against any civilian population." This gap in coverage could be covered by an amendment to the Statute, and it should be addressed by those drafting the Statute for a permanent International Criminal Tribunal.

Finally, Article 7 of the Statute lists and incorporates customary individual responsibility for both principals and complicitors, noting the normal lack of immunity for officials and those who receive illegal orders.

MR. LEIGH: Is there a conspiracy charge in the Statute?

PROFESSOR PAUST: There is no general provision in the Statute for a conspiracy charge per se. However, the Statute allows the prosecution of those who "planned, instigated, ordered, committed, or otherwise aided and abetted" in criminal offenses, and Article 4 does address conspiracy to commit genocide. In this sense it is different from Nuremberg.

#### REMARKS BY CHRISTOPHER L. BLAKESLEY\*

Let me begin my discussion of the procedural aspects of the War Crimes Tribunal by noting that the Tribunal is walking a tightrope. One possibility it faces is that no one will be prosecuted because the rules could be so difficult that their requirements cannot be met. At the other extreme, there is the possibility of a rush to justice—a kangaroo court or a railroad job. Another resulting problem would be convictions of lower echelon soldiers only, where no officers are prosecuted. Noting that the Nuremberg judges faced a similar tension, Justice Jackson observed:

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 the trial will commend itself to posterity as fulfilling humanity's aspirations to justice.<sup>1</sup>

The rules of procedure adopted by the current War Crimes Tribunal are an interesting mixture of common law and civil law approaches to criminal trials and investigations. The problem seems to come at the point at which those two systems meet. The critical question is whether the judges, the prosecuting attorneys and the defense attorneys understand the *essence* of a given procedural rule that has its source in a foreign system.

The possibility of cross-examination is an example. Cross-examination is allowed—I was astounded to find this out when I read the rule. The Statute itself calls for the right to confront, or have confronted, the witnesses against you. The

\* Louisiana State University Law Center.

<sup>1</sup> Justice Robert A. Jackson, Chief Counsel for the Prosecution in the Nuremberg trials, *Opening Statement*, delivered Nov. 20, 1945, quoted in TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 167–69 (1992). See detailed analysis of this whole subject in Christopher Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 F. WORLD AFF. 77 (1994).

Court rules, however, allow “*cross-examination*.” That is very interesting. I have always thought it very important that cross-examination be allowed, but will defense attorneys and non-common-law counsel know how to do it? Cross-examination was allowed at the Nuremberg trials—the problem there was whether those who were charged with the task were capable of doing it. I think that many who cross-examined in the Nuremberg trials did not know how to cross-examine. Italy recently adopted cross-examination, and maybe Dr. Cassese, president of the Tribunal, was instrumental in having this included. But even in Italy, cross-examination is not going well, because the cross-examiners are not adequately trained. Perhaps a service the Tribunal could provide is that of educating those civil law attorneys who will practice before the Tribunal in the art of cross-examination. In addition, the sitting judges have a broad charge to question witnesses.

Right to counsel (Rules 42 and 63) is also an interesting mixture. Basically these rules provide that after a person is a suspect, he or she has a right to counsel. The question is: What defines a suspect? Rule 42 defines “suspect” as “a person concerning whom the prosecutor possesses information which tends to show that he may have committed a crime over which the tribunal has jurisdiction.” That’s fairly broad, and so triggers a broad right to counsel. Subsequently, in Rule 63, it becomes clear, however, that the right to counsel really does not obtain until one is indicted formally. Moreover, all the language relating to right to counsel focuses on questioning by a prosecutor. I don’t suppose that means police or other investigators at an earlier stage. Thus, the right to counsel obtains *after* it is too late to be effective. If it applies to police questioning, it is salutary; if it doesn’t, it’s a problem. I do not want to disparage civil law systems; they have protections built in because they have a judge overseeing the investigatory stages of prosecution (at least theoretically, although I am skeptical about how effective this is in practice). But the judge certainly has an obligation to protect the defendant as well as the state and to establish exculpatory as well as inculpatory evidence. Generally, the prosecutor is a trained judge with the same dual obligation. I suppose the Tribunal’s prosecutor has the same obligation, and indeed there are rules that suggest such. The problem here is that all the evidence is gathered prior to a person’s “becoming a suspect.” This problem is compounded further by the situation in former Yugoslavia, because all the evidence lies in an area where no investigator has control. Investigatory teams are out there developing evidence without any protection. This is a heroic job—and a terrible problem.

Finally, rapes, sex offenses and torture are so horrific that if one allows the protections that normally one would want to allow criminal defendants, there is the risk of psychologically destroying victims who have already been devastated. Furthermore, normal rules of courtroom procedure may even put these victims’ lives at risk. We can never forget that in this situation, witnesses and victims live in an area where militia and paramilitary groups have power over the territory. There are provisions in these rules that stipulate that names will not be disclosed, but that is not sufficient. Moreover, how will victims be protected when they come in to testify? Where are they going to be housed? What about when they return home? Questions remain as to how to protect the victims’ psychological well-being and indeed their very lives.

Jordan’s point is a very interesting one. One way it may be possible to solve part of that problem (but not all of it) is to focus on those who ordered, aided, abetted or promoted these crimes of “quintessential terrorism.” These are cases where rape and sexual violence were more than a tactic. The crimes comprised a strategy meant to terrorize, demoralize, expel or destroy a whole society: geno-

cide by rape. It seems to me that we should pursue the perpetrators who planned and developed that strategy. Of course, not having a "victor's justice" at this point poses a significant obstacle to this goal.

**REMARKS BY STEVEN J. LEPPER\***

During the past year, the United States Government has dedicated significant time, energy and resources to the establishment and development of the International War Crimes Tribunal for the Former Yugoslavia (hereinafter, the Tribunal). The Tribunal, as an important milestone in the development of international humanitarian law, is worth the effort. Because so much rides on its success—for example, the future credibility of the laws of war as well as efforts to establish an international criminal court—the United States and other like-minded governments have been doing what they can to help it get off the ground. My remarks here today will focus on just one small segment of that support: the contributions of the Department of Defense (DoD).

As an occasional teacher, I appreciate the intense academic interest the Tribunal has attracted over the past year. As the first international effort to enforce the laws of war since the Nuremberg and Tokyo trials following World War II, it is to be hoped that this Tribunal will herald a new era of interest in and adherence to those laws. Depending upon how we and others approach it, it will also serve as an example of how seriously we intend to enforce them in the future. After allowing Saddam Hussein to escape justice in the wake of his many war crimes, it is especially important that this new attempt to bolster the laws of war succeeds. Whatever happens, it is clear that this Tribunal adds a new dynamic to international humanitarian law that will be studied in considerable detail in the future.

DoD's interest in the Tribunal is more narrow and arguably more practical than that found in either the academic community or any other part of our government. Today, I would like to address two specific aspects of that interest. First, if it succeeds, we think the Tribunal will have a positive long-term contribution to international law. It has the potential to put "teeth" into the laws of war—a development welcomed by forces, like ours, who regard those laws as the cornerstone of all military operations. However, if its proceedings are not widely considered fair and just, or if it simply stalls due to a lack of political resolve, the Tribunal may actually be a step backward. Second, given our view that the U.S. military's interests are best served by the Tribunal's success, we are fully committed to do what we can to ensure that success. In the next few minutes, I will discuss both these goals and the steps DoD has taken to advance them.

*DoD's Interest in Ensuring the Tribunal's Success*

The U.S. military sees two primary benefits to this Tribunal's success. First, it promises to contribute greatly to the enforcement of the laws of war, particularly the 1949 Geneva Conventions. Second, it has the potential to update and enhance the Nuremberg and Tokyo precedents and thereby serve as a significant step toward the establishment of an international criminal court or future ad hoc war crimes tribunals.

*Enforcement of the Laws of War.* Since the aftermath of World War II and the prosecution of its war criminals in the Nuremberg and Tokyo war crimes trials, the only enforcement of the international laws of war has occurred in national

\* Office of the Chairman, U.S. Joint Chiefs of Staff.



courts. For example, the famous *Calley* case during the Vietnam War involved the U.S.'s unilateral application of the laws and principles of war to its own military members.<sup>1</sup> While these and other national attempts to infuse credibility into the international humanitarian legal regime have been but small steps toward universal adherence to the rule of law, for every small step forward there have been numerous large steps backward. Perhaps the biggest, most recent step backward was the world's failure to bring Saddam Hussein to justice. His unprosecuted war crimes convey the clear message that he and others like him may violate the laws of war with impunity. This Tribunal provides us an opportunity to change that message.

Some of our military's interests in the enforcement of the laws of war are selfish and simple: first, in our experience, the most effective armies have been those that follow those laws; second, those laws are also intended to protect us. One of the basic principles of the laws of war is the concept of "military necessity." When used in target selection, this rule dictates that a commander may attack only those places the destruction of which will likely achieve a significant military advantage. Civilians do not qualify as a target under this criterion. Bluntly put, the army that shoots civilians wastes ammunition. It is far more effective to use that ammunition to destroy the enemy's capacity to wage war. The laws of war are therefore also laws of military economy and efficiency.

We are equally concerned about our enemy's adherence to the laws of war because it determines how well those laws will protect us. A question commonly asked by young military men and women during their mandatory laws-of-war instruction sessions is why we must follow the laws of war when no one else seems to. Military effectiveness is one answer. Another is that by our example we hope to influence our enemies to also follow those laws. This latter reason is driven home by pointing out that each of us who wears a uniform is a potential prisoner of war, and therefore subject to the Geneva Prisoner of War Convention upon capture. In principle, the extent to which our enemies follow the Geneva Prisoner of War Convention will depend in part upon how well we follow it. In reality, though, this is sometimes a ridiculous proposition, unsupported by history. For example, neither the North Vietnamese nor the Iraqis cared one bit about how we treated their soldiers we captured. And they simply refused to abide by the Geneva Convention principles as regards their treatment of our people taken. As long as the leaders of these and similar regimes escape justice, they will continue to violate the law and treat our military members in their captivity as brutally as they treat their own populations.

We hope this Tribunal will signal an end to flagrant and widespread violations of the laws of war. While this may be too much to hope for, especially in the short term, we support the Tribunal because it might at least bring to justice those in the former Yugoslavia whose brutality deserves punishment. To the extent it will also deter future such violations of international humanitarian law, we will also achieve that long-term goal.

*The Tribunal's Precedential Value.* This Tribunal is a new data point through which we might be able to chart a rough course from Nuremberg and Tokyo to the future. Despite the skepticism of many who view such international courts as contrary to national government interests, that future likely will include the establishment of a standing international criminal court, additional ad hoc war

<sup>1</sup> United States v. Calley, U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

crimes tribunals, or both. Like it or not, this Tribunal is a blueprint for such future international courts.

We feel that due process is the key to the Tribunal's precedential value. The Nuremberg and Tokyo war crimes trials are so far removed from this Tribunal that they provide at most only a precedent for the idea of international prosecution of war criminals. Much has changed in international law and warfare since World War II so that few principles from those trials are relevant today. Notions of due process and fairness have evolved over the past fifty years to the point where prosecutions conducted in post-World War II fashion would probably not comport with national criminal justice standards or international civil rights norms. The extent to which this Tribunal will be embraced as a vehicle for future enforcement of international humanitarian law depends greatly on how well it adheres to these standards and norms. Few civilized nations will be willing to employ a similar international mechanism in the future if its processes violate the very laws it is established to enforce. In this context, the Tribunal's success depends on how fairly it dispenses justice. We have translated this standard for success into terms the military understands: How well would it protect the rights of U.S. military personnel appearing before it?

This goal—making the Tribunal a forum in which we would be comfortable having our own people prosecuted—has motivated DoD to engage actively in the Tribunal's development. It is a practical perspective from which we must view any effort to establish any international court. Because we have so many personnel and families stationed outside the United States, DoD has as much a stake in the development of a standing international criminal court as any other United States Government agency. Similarly, because DoD is the only agency that will ever actually engage in armed conflict, we have an even greater interest in preventing any U.S. servicemember accused of a war crime from having to face a politically motivated international tribunal devoid of due process. Thus, our vigilance over, and interest in, this Tribunal rests partially on a selfish desire to protect our own people. We have set our standards so high that we are confident any tribunal good enough for us will also be good enough for the rest of the world.

#### *DoD's Contributions to the Tribunal's Success*

In pursuit of one of the most important measures of this Tribunal's success—the extent to which we and the rest of the world will regard its proceedings as fair, just and supportive of international humanitarian law—DoD has taken several concrete steps.

*1. Proposed Rules of Procedure and Evidence.* Our most important contribution to date was our year-long leadership of an interagency task force formed to draft proposed rules of procedure and evidence. In the UN statute establishing the Tribunal, the Security Council empowered it to write its own procedural and evidentiary standards and rules. DoD felt that of all the actions undertaken in its formation, this exercise would have the greatest impact on the Tribunal's actual practice. To ensure that our views on due process and fairness were presented clearly to the judges as they drafted their rules, we drafted our own. We hoped our suggestions might guide and influence them in their monumental task. We were generally successful: 80 to 90 percent of the Tribunal's final rules are derived from principles articulated in our proposal. In our view, both the Tribunal and its rules are on a solid course toward becoming valuable precedents in international law.

One widely recognized right afforded anyone accused of a crime is the right to

confront accusers. In American jurisprudence, that right is enforced in a number of ways. One way is by cross-examination. In this mechanism peculiar to an adversarial system of justice, the accused, usually through his or her attorney, is able to test the veracity, recollection and accuracy of the courtroom testimony of an accuser or other witnesses. In civil law countries, such questioning is generally done only by judges. For several reasons, we felt an adversarial process better suited war crimes trials. First, the Tribunal Statute commissioned a prosecutor to compile and present evidence to the judges. To us, fairness dictated giving the accused the authority to present his or her own case. Second, we thought the judges would be burdened enough with the responsibilities of sitting in judgment of serious crimes under unfamiliar and largely untested laws. To also assign them the role of interrogating witnesses might stretch them too thin. In the end, the judges accepted our proposal and adopted an adversarial process.

Another right enjoyed by Americans accused of crimes is the requirement that the prosecutor prove their guilt beyond a reasonable doubt. Conspicuously absent from the Tribunal Statute was any mention of a burden of proof necessary to support conviction. One of our first drafting tasks was to fill this huge gap. We proposed—and the Tribunal judges ultimately accepted—the requirement that guilt must be proved beyond a reasonable doubt. This was a major accomplishment. Although this principle is not universal, having such a burden of proof imposed on the prosecutor satisfied us that the Tribunal would weigh and evaluate the presented evidence more rigorously than might be expected in a system without clearly defined thresholds separating guilt and innocence.

Among the suggestions rejected by the Tribunal was our thought that some sort of immunity or plea bargaining mechanism should be instituted. The meticulous recordkeeping that made Nazi war crimes relatively easy to prove is apparently not among the proclivities of war criminals in the former Yugoslavia. Thus, rather than approaching these cases from the top officials down to their subordinates, it is likely that the prosecutor will have to prosecute the “small fish” first and work up from there. Our experience with organized crime convinced us that such tools as plea bargains and offers of immunity would help the prosecutor get the “big fish” more easily and effectively.

Another proposal the Tribunal did not accept was the superior orders defense. The principle that soldiers may be excused of liability for crimes they commit pursuant to the orders of their military superiors is found in both international and national jurisprudence. In an attempt to exclude it as a possible defense, the Tribunal Statute limited the effect of superior orders to mitigation of punishment, not complete avoidance of guilt. The United States, in its Explanation of Vote on the Statute,<sup>2</sup> expressed the view that the superior orders defense, as it exists in the U.S. Uniform Code of Military Justice (UCMJ),<sup>3</sup> might still be available to accused offenders appearing before the Tribunal. Under the UCMJ, an accused may be excused of criminal liability for an offense he or she was ordered to commit unless the accused knew or should have known the order was unlawful. An order to commit a crime is unlawful.

The superior orders defense strikes an important balance in military law between the need to hold military members accountable for their crimes and the need to enforce discipline. Unless it provides soldiers some assurances that carrying out orders will not subject them to criminal liability, the military invites constant

<sup>2</sup> Press Release, USUN 75, May 25, 1993.

<sup>3</sup> 10 U.S.C. § 47 (1984).

questioning or violation of orders. On the other hand, soldiers must be held individually accountable for their actions. We do not want superior orders to absolve them of responsibility for all their crimes. In the United States, the superior orders defense both defines and balances these competing interests. It requires soldiers to consider the nature of the orders they are given and establishes their duty not to obey those they know or should know are unlawful.

Two examples will illustrate why this defense must remain a part of our jurisprudence. First, on their face, simple orders to guard a prison camp and protect prisoners from harm are lawful. If the soldier to whom the order is given knows that the prison houses prisoners of war (POWs), the orders are even sanctioned by the 1949 Geneva Convention on the Protection of Prisoners of War (GPW). Indeed, one characteristic identifying the soldier as a lawful combatant is the fact that he (or she\*) is subject to the orders of his superiors; he is obliged to follow orders to comply with the Geneva Conventions.

Second, suppose several persons, clearly noncombatants, are brought into the camp. Would the soldier's orders to continue to guard and protect them continue to be lawful? Since the GPW contemplates the possibility that noncombatants might be temporarily considered POWs, the answer is probably yes. Several days later, however, suppose a number of prisoners are led to a room inside the prison and executed by lethal gas. The guard knows nothing about it. The orders simply to guard the camp are still lawful unless the guard should have known of the acts. One night, however, the soldier sees several fellow guards line up some POWs against a wall and shoot them. At that point, the orders to keep the prisoners from escaping might be unlawful; the guard's "duty" might at that point make him an accessory to the crimes committed in the camp.

These examples point out both an important principle and a problem. The principle is that the same international law that establishes war crimes also demands that military members must follow orders. The problem is that at some point those requirements diverge. As the example illustrates, that point occurs as soon as the soldier knows or should know that what he is being ordered to do is a crime. This objective and subjective standard is generally translated into a military rule with two critical aspects: Although soldiers have a duty *not* to obey clearly unlawful orders, there is an underlying presumption that orders should be obeyed. Doing away with the superior orders defense actually reverses this presumption and imposes on soldiers the duty to obey only clearly lawful orders. Under such a rule, soldiers will no longer be able to rely on any orders they are given, discipline will break down, and soldiers may refuse to follow even those orders intended to protect noncombatants or to enforce international humanitarian law. In other words, our fear is that the Tribunal's refusal to accept the superior orders defense will effectively undermine each soldier's responsibility to follow lawful orders. It substitutes for individual responsibility and obedience the possibility that soldiers will simply not follow orders at all. Our long experience suggests that an undisciplined force is far more likely to commit war crimes than a disciplined one.

In summary, with a few exceptions the procedural and evidentiary rules adopted by the Tribunal are designed to balance the rights of accused offenders against the international community's needs to enforce international humanitarian law. If they work as planned, we are confident that the Tribunal will garner praise for its fairness. We also hope this process of implementing procedural rules will con-

\* For ease of readability, all references to "he" or "his" should be interpreted as meaning "he/she" or "his/her."

vince the International Law Commission that a similar effort is necessary as part of its work on the International Criminal Court.

2. *Contribution of Personnel.* DoD's second major contribution to the Tribunal is its offer of two judge advocates and four military criminal investigators to assist the Tribunal prosecutor in the investigation, assembly and ultimate prosecution of war crime cases. Because war crimes are essentially military crimes, we felt it absolutely necessary that military attorneys acquainted with concepts of command responsibility and obedience to orders serve as an integral part of the prosecution team. A team with such experience and expertise will be better able to determine who is and is not a war criminal.

3. *Code of Crimes.* Finally, we have begun drafting a proposed code of crimes. The Statute establishing the Tribunal lists the kinds of international humanitarian law violations over which it has jurisdiction. Neither that document nor the substantive international law from which those crimes are derived, however, discusses their elements in sufficient detail to help the prosecutor or the judges determine what facts must be proved to convict an alleged offender. The clear, effective definition of these offenses is just as important to the Tribunal's precedential value as the establishment of fair procedural and evidentiary rules.

The code of crimes has yet to be introduced fully into the interagency drafting process. It remains a product of the DoD drafting group. Our overall objective once again was to propose a body of definitions for offenses listed in the Tribunal Statute under which we would be comfortable having our own personnel prosecuted. To arrive at such a document, we drew heavily from the UCMJ and 1984 Manual for Courts-Martial (MCM).<sup>4</sup> As perhaps the most comprehensive military criminal code in the world, the UCMJ is perfectly suited for application to war crimes that, after all, are also essentially military crimes. The elements of proof outlined in the MCM are similarly excellent sources of some war crimes elements.

Other sources consulted to arrive at a draft code of crimes included Pictet's Commentaries to the 1949 Geneva Conventions.<sup>5</sup> Since the Conventions themselves provide no insight into what a prosecutor must prove in order to sustain a conviction for offenses they contain, our reference to contemporaneous writings provided us at least some idea of the Drafters' concerns. The Nuremberg and Tokyo war crimes trials also provided some useful information.

We hope the Tribunal and prosecutor will welcome this effort with equal enthusiasm. Recent conversations with the Deputy Prosecutor give us some reason for optimism. Also, the fact that work on the International Criminal Court has included drafting a code of crimes reinforces that such a document is needed here. I encourage you to keep your eyes open for future developments.

### *Conclusion*

DoD's work on the War Crimes Tribunal for the Former Yugoslavia has been important and rewarding. Not only have we had considerable positive impact on the Tribunal's structure and process; our continuing participation in its practice will, we hope, mold it into an acceptable and effective model for future war crimes tribunals. DoD's focus on and concern for due process will help make the Tribunal one before which we would feel comfortable having our own personnel prose-

<sup>4</sup> Exec. Order No. 12,473, Manual for Courts-Martial, United States (1984), amended by Exec. Order No. 12,484 (1984), 12,586 (1986), 12,708 (1990).

<sup>5</sup> See, e.g., JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Int'l Comm. of the Red Cross, 1960).

cuted. If we are successful, the lessons learned will also form a useful foundation for efforts to establish an international criminal court.

It is not an understatement to say that the whole world watches the War Crimes Tribunal with anticipation. Whether or not it ultimately conducts war crimes trials, every step in its evolution is significant. At most, this court, like the Nuremberg and Tokyo courts before it, will provide a just conclusion to brutal war. At least, it will pave the way toward more effective future efforts to impose the rule of law upon international and internal armed conflicts. Whatever the result, the American people can be proud of the role their government has played in this most important development of international humanitarian law.

Mr. LEIGH: Let me pose some questions for some of the speakers to be thinking about. I would ask Professor Paust to talk about what protections there are in the Statute against *ex post facto* laws—one of the criticisms of Nuremberg. Professor Blakesley, would you talk about the tensions between the provisions in the Statute which guarantee parties a right to examine witnesses testifying against them, but at the same time charge the Tribunal with protecting not only the lives of the victims and the witnesses but also their identity? And Larry Johnson: I would ask how you are going to get this off the ground! I understand that the prosecutor named last December has since resigned, and as far as I know, the Secretary-General has not chosen a new prosecutor. Without a new prosecutor, nothing can move. In addition, there is the question of how you can prosecute when you do not yet have anyone in custody. Let me now turn to our commentators.

COMMENTARY BY MICHAEL P. SCHARF\*

As Attorney Adviser for UN Affairs at the State Department (1992–1993), I would like to offer certain insights into the resolutions leading up to the Yugoslavia Tribunal, the Tribunal's Statute and its Rules of Procedure. Let me begin by mentioning two interesting aspects of Resolution 771, which contained the earliest list of acts deemed by the Security Council to constitute violations of international humanitarian law. This list was purposefully written in the language of news accounts rather than using the legal terminology of the Geneva Conventions. The intent was to draft the resolution so as to enhance its deterrent value in the former Yugoslavia. Another thing this resolution did, which is new and which scholars have not yet focused upon, is that it specifically includes the crime of impeding the delivery of humanitarian aid as a war crime for which people have individual accountability. This *not* something that is included as a grave breach of the Geneva Conventions, and might therefore provide the underpinnings for a newly recognized category of war crime carrying individual responsibility. This formulation later appeared in Resolution 794 on Somalia.

Turning now to the Statute, the United States and other members of the Security Council were not completely satisfied with everything that Larry Johnson and his colleagues in the UN Office of Legal Affairs had come up with, although they did a terrific job, especially given the immensity of the task and the time constraints. The United States in particular was afraid, however, that if we opened the Statute to renegotiation, everyone would have amendments and the good work that the Office of Legal Affairs had done would be undermined. As Mr. Johnson mentioned, the United States came up with the idea of modifying the Statute through

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interpretive statements made by the members of the Security Council. The first thing the United States tried to do was to get all the members of the Security Council to agree upon one official interpretive document that would be in essence a protocol to the Statute. But no one was going to buy that. They thought that would take too long to negotiate. So the next thing the United States did as a fallback was to have the United Kingdom France and Russia make interpretive statements on three or four key areas that were similar to that made by the United States. The problem here is that these countries did not use exactly the same language in their respective statements, so there may remain questions as to what they were agreeing upon. Also, the United States went beyond statements that were made by the other three permanent members and made what it characterized as several other clarifications, but it is not clear that the other members shared those comments.

The United States then turned to the rules as a way of trying to codify its interpretive statements. This is where Col. Lepper and his colleagues at the Pentagon came in. Draft proposals for the rules sought to address three areas of concern that have already been alluded to by other panelists. One was the Statute's failure to expressly include the Additional Protocols to the Geneva Conventions in the Tribunal's jurisdiction. These were seen as applicable in the former Yugoslavia because Yugoslavia was a party to the Protocols and the successor states have succeeded to them, even if they did not constitute customary law. Also, there was the concern that the Statute failed to limit crimes against humanity to political, ethnic, racial or religious motivations, and therefore might be changing the customary international law in that respect. And finally, as Monroe Leigh mentioned, there was the failure to recognize superior orders as a defense under any circumstances (whereas customary international law does seem to indicate that there are certain limited circumstances where superior orders *are* a defense, and not simply a mitigation of punishment). The Report of the ABA Committee of which Mr. Leigh was the Chair expressed some discomfort regarding the U.S. approach of trying to modify what was not in the Statute through interpretive statements and through the rules rather than through a new Security Council resolution. The ABA here was very prescient. The Tribunal, it turns out, rejected each and every effort to modify the Statute through the rules, because the Tribunal judges believed this went beyond the scope of their authority in writing an instrument intended to address strictly procedural and evidentiary issues. It was not necessarily that they disagreed with these interpretations, although it remains to be seen whether the judges will accept them.

Let me mention a few things about the rules themselves and address a few gaps that Professor Blakesley's insightful remarks brought up, and also add to what Col. Lepper has said. He and his colleagues proposed that plea bargaining be included in the rules. This is not something that other countries around the world have accepted as practice, nor, therefore, that the Tribunal's judges thought appropriate, especially in light of the gravity of the kinds of crimes people were being accused of in the former Yugoslavia. Then, Col. Lepper and his colleagues had the idea of a rape shield rule. This was a very good suggestion, because there needed to be some protections to encourage victims of rape to come forward. In Col. Lepper's proposal, certain exceptions were stipulated to the rape shield provision. These were not incorporated into the rule adopted. Instead, the judges adopted a very broad provision that makes completely new international law and prohibits anyone from using the consent defense. It says that evidence of prior sexual behavior cannot be taken into account at all, and it provides that no corrob-

oration of a victim's testimony shall be necessary to convict for rape.<sup>1</sup> Further, Col. Lepper's group came up with the idea that there should be nondisclosure of sensitive information that a country provides the Tribunal. This was rejected by the Tribunal out of concern for the rights of the defendant. And finally, it was France—not the United States—that suggested that the rules should provide for in absentia trials under certain circumstances. The Tribunal offered a very interesting modification of that. There are no trials in absentia, but Rule 61 provides for a “super-indictment.” When a prosecutor is unable to get hold of the defendant, he or she can bring the case and all the evidence to the attention of the judges, who can rule that there were reasonable grounds to conclude that the person committed the crime and make this information publicly available.

COMMENTARY BY FRANK C. NEWMAN\*

I want to be sure that we do not get caught in the trap of “this is Nuremberg all over again.” It is *not* *deja vu*. Nearly half a century has passed. Much has been done since Nuremberg that should not be ignored. We are not starting there and building as if this were the next Supreme Court decision to be written upon this subject. It is much bigger than that. We also should not get entangled in the current history of the problems that arose while these documents were being written. Justice Frankfurter once said he did not subscribe to the rule, “Only when the legislative history is unclear do you look to the words of the statute”! We have to start with the words of this Statute, and we have to *assume* them to be fair and just, unless we want immediately to start an amendment process. And, given the recent history, we should not be rushing anxiously to the Security Council for amendments or further discussion of whether the General Assembly should have some part in this matter.

From my point of view, the basic guarantees of “fair and just” are the personnel of the court. I know only three of them, but I believe that those three are among the top ten who might have been chosen for their interest in fairness and justice. One of the reasons is that they have spent many years of their lives—indeed, decades—working productively on human rights developments within the United Nations.

As to things that still need to be thought about, we must recognize that there has been almost no discussion of *civil* penalties. I cannot believe that even The American Society of International Law is sucked into this infatuation with—or addiction to—criminal punishment. I thought we had learned since World War II that the most effective punishments in our world are civil, not criminal. Instead, we tend to be stuck with all the jurisdictional problems of criminal jurisprudence. While these are important, it is like having everyone in the American public currently insisting on “three crimes and you’re out.” It is more likely that we are going to get laws enforced here in the United States with civil rather than criminal penalties. I am glad we are having criminal trials. Fortunately, there are civil penalties inhering in these rules; the major one relates to indictment. “Suspects” have been mentioned in the press, but there are also others who can be charged. There are many fair proceedings concerning when one can indict, but there is also a provision that indictments can be publicized, and that is going to be the big penalty. Everyone seems to be worried about how we will get hold of the defen-

<sup>1</sup> The Tribunal later amended the controversial rape shield provision to bring it in line with the text proposed by the United States.

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dants, but I am more concerned that we exploit the indictments adequately so as to help penalize those indicted through civil measures. That includes measures like banishment; and I would also like to see pictures of those indicted on post offices everywhere reading "Wanted!"

The worst thing about the development of the Tribunal is that not enough attention has been paid to the genocide aspect of the problem—it has been hidden in the euphemism of "ethnic cleansing." We have ignored the victims, and the main aim of human rights work is to help victims—past as well as future victims. Fortunately, some provisions in these rules do reflect that concern. Even the Security Council has a sentence under Article 24, dealing with penalties, that stipulates that "in addition to imprisonment, the trial chambers may order the return of any property or proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." The Tribunal then has two pages of very important rules dealing with restitution of property, but more importantly with compensation. If we use the experience being developed with the Iraqi tribunals dealing with compensation for damages caused by the Iraq war, we will really be able to help people. This may be the most important precedent for the new war crimes tribunal to establish—that its task is not solely putting people in prison but also compensating victims.

#### DISCUSSION

Professor BLAKESLEY: I will address the question of cross-examination and the potential it has for affecting the witnesses and victims. Rule 75 provides the following: The chamber, on its own motion or at the request of either party, or the victim, or witness, shall order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. Of course, the rights of the accused include cross-examination. The subsequent set of rules includes nondisclosure: The court may order measures to prevent disclosure to the public or the media. This is a proviso that could have a very unfortunate effect upon the protection of witnesses because it is so explicitly limited. It does not prohibit disclosure to the defense or to the cross-examiner. I do not suppose, however, that it excludes mechanisms that may be figured out to allow cross-examination while yet ensuring nondisclosure of identity to the cross-examiner (i.e., closed-circuit television with the face blocked out, or any other measures available in modern technology). I am concerned as to how the victims and witnesses will be protected.

Dean Newman's suggestion that we focus on civil remedies is very interesting. I know that Alfred P. Rubin has argued that approach for many years, for example, as regards the Iranian airbus incident. That may be a way of resolving these situations without imposing so much danger and trauma upon the witnesses.

It seems to me that there has been a certain confusion regarding two aspects of superior orders. If the defendant committed an act under duress—for example, with a gun more or less held to his head—he has one defense; it is quite another if he argues that he did not know that what he did under orders was a crime. In the Bosnian situation, few offenses are such that a defendant could usually claim ignorance of their criminality. There may, however, be certain circumstances in which duress should be considered as a mitigating factor, if not a defense.

Professor PAUST: First of all, I agree with the U.S. interpretation regarding the tension between lawful orders and superior orders. We were concerned about that when I was in the military in the Vietnam era. It seems to me that an interpreta-

tion is appropriate because of the tension between lawful and unlawful orders. The “knew or should have known” standard is consistently borne out in the cases that have already addressed this, especially the *Calley* case. So there is a lot of precedent here for the tribunal to utilize.

With respect to Monroe Leigh’s question about the defense that did not work at Nuremberg, or in the Eichmann trial—the so-called *nullem crimen sine lege* or *sine jus* defense—the ex post facto concern: I think that Frank Newman has adequately addressed this. Much has been done since Nuremberg, and the Secretary-General’s report was quite cautious indeed in focusing upon those crimes having an undisputed basis in customary international law. The first three undoubtedly do have that base. The Geneva Conventions are custom-based, but are also treaty-based. As such, they reach the former nationals of Yugoslavia. The same is true of many of the treaty-based laws of war. Here, however, the court will have to look at the different laws of war and decide which are and are not custom. The prohibition of genocide, again, is a well-recognized rule of custom. Questions remain concerning some of the particulars with respect to crimes against humanity. “Crimes against humanity” had an early recognition as a concept, long before World War II. A former U.S. Secretary of State as far back as the 1920s wrote in the *American Journal of International Law* about slavery as a crime against humanity. This and other offenses were recognized as crimes against humanity after World War I. Thus, the conception of this offense is well established. The details, however, are not always so firmly established.

With respect to Christopher Blakesley’s comment about the need to educate counsel about cross-examination, this is not really a job for the Tribunal. Under the rules, the Registrar will assign defense counsel. So it is the Registrar who will have to consider the question of competence. I note that there are two elements within Rule 44 that concern competence for persons who might be defense counsel. One of the possibilities is that university professors will be defense counsels. What is more intriguing is the question whether there will be assigned a coordinator of defense counsel—a lead defense counsel, or teams of defense counsel. I think that is possible, because the rules are flexible enough to allow that.

Another concern that has been mentioned is immunity for testimony, or plea bargaining. And that is out—an omission that could hamper securing the testimony that will be necessary to convict some of the accused. I do not know whether it should be deleted in the future, in connection with a more permanent international criminal tribunal. Perhaps not.

As to the question of rape and consent as a defense, I am really concerned. I am of course quite opposed to rape, and Professor Blakesley is quite right that this type of rape is most egregious, especially as it is being used as a tactic or strategy in a campaign of ethnic cleansing. Even so, it is just as bothersome from a defense or human rights point of view, if consent would not be a defense to rape.

Mr. JOHNSON: I would like to highlight the fact, at least in my own view, that many of the issues that have been raised about applicable law, such as superior orders, must be dealt with in the context of chapter VII; that is, the provisions of the Statute were drafted within the context of chapter VII and this will be determinative for the future. This statute was in this sense *imposed* on states. This is an enforcement measure decided by the Security Council. States have no choice about whether to accept it or not to accept it. Given that context, a conservative approach was taken as to what the application law is, because no one believed the Security Council could or should enact new substantive law. So the idea behind

a conservative approach was to take the position that the Security Council could establish a tribunal, and that it would be binding on all states as long as that tribunal was implementing existing law. Of course, it is a matter of judgment as to what one considers existing customary law to be. This chapter VII context must be borne in mind in the future. Various interpretive statements by the United States, France, Britain, Russia and others in the Security Council took some issue with the idea that this tribunal would have absolute primacy. Certainly the Chinese and the Brazilians raised very basic reservations concerning the competency of the Security Council to establish such a tribunal pursuant to chapter VII enforcement mechanisms. The Chinese in particular insisted that this whole endeavor violated the basic principle of state sovereignty. But, when the time came to vote, all fifteen hands went up, and they went up high. In the prevailing political environment, and in spite of reservations, in spite of unhappiness with the statute from political, legal or technical points of view, it would not have been wise to have indicated some hesitancy about going after people who have committed such crimes. The Islamic Conference was very much in favor of this statute; it was not simply a project of the French, British and Americans. The Islamic Conference was wholeheartedly in favor of acting quickly and expeditiously.

As to how to get this going, I want to echo what Frank Newman said: This is not Nuremberg. This is not a victor's tribunal, and that has a down side: It does not have its hands on the people implicated—the accused are not in its custody. Nuremberg for the most part did not have that problem. Also at Nuremberg there was a lot of documentary evidence. The Axis powers maintained files indicating just about everything they ever did. So at Nuremberg there was no problem in securing written evidence. The current situation does not offer the same pool of written evidence. Using only oral evidence could mean Muslim women testifying to rape in open court, and this is not an inviting thought for them. So there are serious problems that will have to be addressed.

As to how to set up the Tribunal: The prosecutor, as Mr. Leigh indicated, was a Venezuelan appointed by the Security Council in December. Within several months, he resigned. Before resigning, he recommended the appointment of a deputy prosecutor. This deputy, from Australia, took office on February 17 and is coordinating with the 780 Commission in Geneva on how they can turn over the evidentiary information they have collected to date. This has led to a new problem: funding. Those of us who are lawyers—and especially human rights lawyers—may think this Tribunal is a wonderful idea. But if you deal with administrative and budgetary people, they ask, “Why are you paying these judges this amount of money?” “Where are your cases, and where are your defendants?” “How can we justify spending this money?” After one presentation before a UN budgetary committee, at which the groundbreaking importance of this Tribunal for international law was stressed, one administrative official's first question was, “Will these prisoners be traveling business or economy class?” The Secretary-General originally requested a two-year budget of approximately \$30 million. He was given \$5.5 million for six months, and that ends in June. The Secretary-General has requested the balance of the original sum for the remaining year and a half, and the budgetary committee will most likely give us money for another six months—another \$5.5 million. This makes it rather difficult for a prosecutor to go out and hire tenacious investigators and deputy prosecutors. So I appeal to you, when you go back to your communities, to support this Tribunal, because there may well be some negative comments in the press (the same press that

helped to create the Tribunal in the first place). In order to give this Tribunal life, we need to give it some time and some money.

#### OPEN DISCUSSION

ERIKA B. SCHLAGER:\* What, if anything, in past UN practice can guide the Tribunal, and if necessary the Security Council, as they seek to enforce the orders of the Tribunal, particularly the order to surrender certain defendants to the judicial process?

Mr. JOHNSON: Not very much. I do not want to go into the question of the Security Council attempting by chapter VII resolution to force Libya to turn over the individuals suspected in the Lockerbie bombing, but that's the way it might go if the Tribunal had difficulty with a recalcitrant state. Were a state to prove resistant to turning over suspects to the Tribunal, it would report this to the Security Council. The Council in its wisdom would then decide how to enforce the order. But there is very little practice in this particular area of trying to force a state to surrender persons.

BRYAN MACPHERSON:\*\* Professor Blakesley, if prosecutions are limited to the superiors who directed the crimes, is there not a danger that the lower level defendants (generally Serbian soldiers) might be tried by Bosnian courts that would be biased against them?

PROFESSOR BLAKESLEY: I did not mean to suggest that the prosecution be limited to those who gave the orders. I only suggested that this might be a workable approach in terms of protecting the victims or witnesses in certain situations. There are already rules that provide for nations to prosecute. It's just that this Tribunal has primacy. Furthermore, if the Tribunal finds that a national prosecution was either too harsh and unfair, or on the other hand was too lenient, the Tribunal may be able to refer the case to the Security Council, suggesting a sanction upon that nation.

Professor PAUST: To supplement that, the Tribunal under Article 9 of the Statute has primacy—the authority at any time to “pull out” the prosecution of a defendant from a nation-state. Already Germany has arrested an accused. I don't know if the Tribunal will exercise its primacy over Germany, or whether it would be politically wise to do so. But that is up to the Tribunal. This Tribunal is unusual also because it has the power of the Security Council behind it as a chapter VII Tribunal. That means that it has the power to compel witnesses, to compel the production of evidence, to compel the production of the bodies of reasonably accused persons. These are very significant powers. They will probably be lacking in a permanent international criminal tribunal failing treaty agreements stipulating such broad powers.

EDWARD M. WISE:\*\*\* I am concerned about the continuity problem that may evolve between the Tribunal's cases. What is most horrendous about these crimes is their systematic quality, yet people have been talking as if individual defendants will be on trial. There appears to be no conspiracy charge. Regarding the possibility of trying the higher-ups, you still have to prove the crime of which they're allegedly an accessory. Yet because there is a right to confrontation—which suggests that all the evidence will be oral because it's not documentary—in every case the same things will have to be gone through over and over again. Has there been any thought given to carrying evidence forward from one trial to another?

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Mr. LEPPER: Your question blends in with the discussion of whom the Tribunal will likely target. When we proposed a rule of limited immunity—a plea bargaining provision—we did so because we felt that on the basis of the kind of evidence available, and of the 780 Commission, this would most likely be a *reverse* Nuremberg situation, where it would be necessary to start with the guards in the prisons whose names and faces were recognizable to the victims, and work our way up. We wanted to provide for some limited immunity so that we could get the “big fish.”

As far as the conspiracy charge is concerned, I think the statute and the rules of procedure are written broadly enough to allow us to prosecute conspirators. We could prosecute complicitors for aiding and abetting, and superiors on the grounds of command responsibility (for having given the orders). I think that there will be much evidence applicable to many different trials, and that this core of evidence will be used for a number of different prosecutions. There is a very complicated web of conspiracy here that implicates a lot of people.

JON M. VAN DYKE:\* Is it the view of the United States that the 1977 Geneva Protocols are customary international law?

Professor SCHARF: The United States does not completely accept this proposition. But the facts that Yugoslavia was a party to the Protocols and that Bosnia succeeded to them were seen as determinative in the Bosnia situation. It is therefore considered fair to apply the Protocols to violations occurring there, whether or not the Protocols reflect customary international law.

SHERYLN ADLE:\*\* We hear much about the broad range of sexual assaults against both male and female victims. Are there any specific elements necessary to qualify as rape?

Mr. LEPPER: This poses a problem because the precise elements of rape have not been established yet for purposes of the War Crimes Tribunal. To date, the Tribunal has simply established that consent is not a defense.

BENJAMIN B. FERENCZ:\*\*\* As a former Nuremberg prosecutor, I was one of the first to work in the area of war crimes for the U.S. Army. Please allow me to comment on certain points not raised today: (1) Consider the consequences of inaction. Failure to punish crimes encourages criminality. The world community cannot be paralyzed by fear or complexity. The trials *will* be fair. The United States and others will see to it. (2) The Security Council has power now to obtain the arrest of accessories and the production of documents and evidence. (3) Restitution and compensation models can be found in the German Government precedents since World War II. (4) This Tribunal must be a step toward a permanent international criminal court to close the gap in the world legal order. Crimes against humanity are not limited to the territories of the former Yugoslavia. They continue everywhere and must be stopped now.

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