MARKUP ON A RESOLUTION URGING THE GOVERNMENT OF UKRAINE TO ENSURE A DEMOCRATIC, TRANSPARENT, AND FAIR ELECTION PROCESS LEADING UP TO THE UPCOMING PARLIAMENTARY ELECTIONS; AND HEARING ENTITLED "THE U.N. CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA: INTERNATIONAL JUSTICE OR SHOW OF JUSTICE?"

MARKUP AND HEARING

BEFORE THE

COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MARKUP OF

H. Res. 339

FEBRUARY 28, 2002

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MARKUP ON A RESOLUTION URGING THE GOVERNMENT OF UKRAINE TO ENSURE A DEMOCRATIC, TRANSPARENT, AND FAIR ELECTION PROCESS LEADING UP TO THE UPCOMING PARLIAMENTARY ELECTIONS; AND HEARING ENTITLED "THE U.N. CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA: INTERNATIONAL JUSTICE OR SHOW OF JUSTICE?"

THURSDAY, FEBRUARY 28, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, DC.

The Committee met, pursuant to call, at 11:20 a.m. in Room 2172, Rayburn House Office Building, Hon. Henry Hyde (Chairman of the Committee) presiding.

Chairman HYDE. If we could come to order, please.

We have the pleasant task of introducing a new Member to the Committee, and it is a great pleasure to welcome Representative Mark Green of the State of Wisconsin.

Mark attended the University of Wisconsin, Eau Clare; received his law degree from the University of Wisconsin Law School at Madison. He served in the Wisconsin State Assembly for 6 years. He and his wife Sue have three wonderful children.

Mark, we all welcome you to the Committee and look forward to your contributions.

[Applause.]

Mr. GREEN. Mr. Chairman, it is a great honor indeed. I look forward to working with you and all the Members of the Committee. It is a real honor to join this Committee.

Mr. LANTOS. Mr. Chairman.

Chairman HYDE. Mr. Lantos.

Mr. LANTOS. May I just add from the Democratic side a warm welcome to a new colleague. We are delighted to have you.

Mr. GREEN. Thank you, Mr. Lantos. Thank you.

Chairman HYDE. By direction of the Republican Conference of the Committee, I have a motion at the desk which I will ask Ms. Bloomer to read.

Ms. BLOOMER. Mr. Hyde moves that Mr. Green be assigned to the Subcommittee on East Asia and the Pacific, and the Subcommittee on Europe.

Chairman HYDE. Without objection, the motion is agreed to.

Pursuant to notice, I now call up H. Res. 339, relating to the upcoming election in the Ukraine.

[The resolution, H. Res. 339, and the amendment in the nature of a substitute follow:]

IV

107TH CONGRESS
2D SESSION

H. RES. 339

Urging the Government of Ukraine to ensure a democratic, transparent, and fair election process leading up to the March 31, 2002, parliamentary elections.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 29, 2002

Ms. SLAUGHTER (for herself, Mr. HOEFFEL, and Mr. SMITH of New Jersey) submitted the following resolution; which was referred to the Committee on International Relations

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RESOLUTION

Urging the Government of Ukraine to ensure a democratic, transparent, and fair election process leading up to the March 31, 2002, parliamentary elections.

Whereas Ukraine stands at a critical point in its development to a fully democratic society, and the parliamentary elections on March 31, 2002, its third parliamentary elections since becoming independent more than 10 years ago, will play a significant role in demonstrating whether Ukraine continues to proceed on the path to democracy or experiences further setbacks in its democratic development;

Whereas the Government of Ukraine can demonstrate its commitment to democracy by conducting a genuinely free and fair parliamentary election process, in which all can-

didates have access to news outlets in the print, radio, television, and Internet media, and nationally televised debates are held, thus enabling the various political parties and election blocs to compete on a level playing field and the voters to acquire objective information about the candidates;

Whereas a flawed election process, which contravenes commitments of the Organization for Security and Cooperation in Europe (OSCE) on democracy and the conduct of elections, could potentially slow Ukraine's efforts to integrate into western institutions;

Whereas in recent years, government corruption and harassment of the media have raised concerns about the commitment of the Government of Ukraine to democracy, human rights, and the rule of law, while calling into question the ability of that government to conduct free and fair elections;

Whereas Ukraine, since its independence in 1991, has been one of the largest recipients of United States foreign assistance;

Whereas $154,000,000 in technical assistance to Ukraine was provided under Public Law 107–115 (the Kenneth M. Ludden Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 2002), a $16,000,000 reduction in funding from the previous fiscal year due to concerns about continuing setbacks to needed reform and the unresolved deaths of prominent dissidents and journalists;

Whereas Public Law 107–115 requires a report by the Department of State on the progress by the Government of

Ukraine in investigating and bringing to justice individuals responsible for the murders of Ukrainian journalists;

Whereas the disappearance and murder of journalist Heorhiy Gongadze on September 16, 2000, remains unresolved;

Whereas the presidential election of 1999, according to the final report of the Office of Democratic Institutions and Human Rights (ODIHR) of OSCE on that election, was marred by violations of Ukrainian election law and failed to meet a significant number of commitments on democracy and the conduct of elections included in the OSCE 1990 Copenhagen Document;

Whereas during the 1999 presidential election campaign, a heavy proincumbent bias was prevalent among the state-owned media outlets, members of the media viewed as not in support of the president were subject to harassment by government authorities, and proincumbent campaigning by state administration and public officials was widespread and systematic;

Whereas the Law on Elections of People's Deputies of Ukraine, signed by President Leonid Kuchma on October 30, 2001, was cited in a report of the ODIHR dated November 26, 2001, as making improvements in Ukraine's electoral code and providing safeguards to meet Ukraine's commitments on democratic elections, although the Law on Elections remains flawed in a number of important respects, notably by not including a role for domestic nongovernmental organizations to monitor elections;

Whereas according to international media experts, the Law on Elections defines the conduct of an election campaign

in an ambiguous manner and could lead to arbitrary sanctions against media operating in Ukraine;

Whereas the Ukrainian Parliament (Verkhovna Rada) on December 13, 2001, rejected a draft Law on Political Advertising and Agitation, which would have limited free speech in the campaign period by giving too many discretionary powers to government bodies, and posed a serious threat to the independent media;

Whereas the Department of State has dedicated $4,700,000 in support of monitoring and assistance programs for the 2002 parliamentary elections;

Whereas the process for the 2002 parliamentary elections has reportedly been affected by apparent violations during the period prior to the official start of the election campaign on January 1, 2002;

Whereas monthly reports for November and December of 2001 released by the Committee on Voters of Ukraine (CVU), an indigenous, nonpartisan, nongovernment organization that was established in 1994 to monitor the conduct of national election campaigns and balloting in Ukraine, cited five major types of violations of political rights and freedoms during the precampaign phase of the parliamentary elections, including—

(1) use of government position to support particular political groups;

(2) government pressure on the opposition and on the independent media;

(3) free goods and services given in order to sway voters;

(4) coercion to join political parties and pressure to contribute to election campaigns; and

(5) distribution of anonymous and compromising information about political opponents:

Now, therefore, be it

Resolved, That the House of Representatives—

(1) acknowledges the strong relationship between the United States and Ukraine since Ukraine's independence more than 10 years ago, while understanding that Ukraine can only become a full partner in western institutions when it fully embraces democratic principles;

(2) expresses its support for the efforts of the Ukrainian people to promote democracy, the rule of law, and respect for human rights in Ukraine;

(3) urges the Government of Ukraine to enforce impartially the new election law, including provisions calling for—

(A) the transparency of election procedures;

(B) access for international election observers;

(C) multiparty representation on election commissions;

(D) equal access to the media for all election participants;

(E) an appeals process for electoral commissions and within the court system; and

(F) administrative penalties for election violations;

(4) urges the Government of Ukraine to meet its commitments on democratic elections, as delineated in the 1990 Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE), with respect to the campaign period and election day, and to address issues identified by the Office of Democratic Institutions and Human Rights (ODIHR) of OSCE in its final report on the 1999 presidential election, such as state interference in the campaign and pressure on the media; and

(5) calls upon the Government of Ukraine to allow election monitors from the ODIHR, other participating states of OSCE, and private institutions and organizations, both foreign and domestic, full access to all aspects of the parliamentary election process, including—

(A) access to political events attended by the public during the campaign period;

(B) access to voting and counting procedures at polling stations and electoral commission meetings on election day, including procedures to release election results on a precinct by precinct basis as they become available; and

(C) access to postelection tabulation of results and processing of election challenges and complaints.

○

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H. RES. 339 AS REPORTED BY THE SUBCOMMITTEE ON EUROPE

Strike the preamble and text of the resolution and insert the following:

Whereas Ukraine stands at a critical point in its development to a fully democratic society, and the parliamentary elections on March 31, 2002, its third parliamentary elections since becoming independent more than 10 years ago, will play a significant role in demonstrating whether Ukraine continues to proceed on the path to democracy or experiences setbacks in its democratic development;

Whereas the Government of Ukraine can demonstrate its commitment to democracy by conducting a genuinely free and fair parliamentary election process, in which all candidates have access to news outlets in the print, radio, television, and Internet media, and nationally televised debates are held, thus enabling the various political parties and election blocs to compete on a level playing field and the voters to acquire objective information about the candidates;

Whereas a flawed election process, which contravenes commitments of the Organization for Security and Cooperation in Europe (OSCE) on democracy and the conduct of elections, could potentially slow Ukraine's efforts to integrate into western institutions;

Whereas in recent years, incidents of government corruption and harassment of the media have raised concerns about

the commitment of the Government of Ukraine to democracy, human rights, and the rule of law;

Whereas Ukraine, since its independence in 1991, has been one of the largest recipients of United States foreign assistance;

Whereas $154,000,000 in technical assistance to Ukraine was provided under Public Law 107–115 (the Kenneth M. Ludden Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 2002), a $16,000,000 reduction in funding from the previous fiscal year due to concerns about continuing setbacks to needed reform and the unresolved deaths of prominent dissidents and journalists;

Whereas the presidential election of 1999, according to the final report of the Office of Democratic Institutions and Human Rights (ODIHR) of OSCE on that election, was marred by violations of Ukrainian election law and failed to meet a number of commitments on democracy and the conduct of elections included in the OSCE 1990 Copenhagen Document;

Whereas during the 1999 presidential election campaign, a heavy proincumbent bias was prevalent among the state-owned media outlets, members of the media viewed as not in support of the president were subject to harassment by government authorities, and proincumbent campaigning by state administration and public officials was widespread;

Whereas the Law on Elections of People's Deputies of Ukraine, signed by President Leonid Kuchma on October 30, 2001, which was cited in a report of the ODIHR dated November 26, 2001, as making improvements in

Ukraine's electoral code and providing safeguards to meet Ukraine's commitments on democratic elections, does not include a role for domestic nongovernmental organizations to monitor elections;

Whereas according to international media experts, the Law on Elections defines the conduct of an election campaign in an imprecise manner which could lead to arbitrary sanctions against media operating in Ukraine;

Whereas the Ukrainian Parliament (Verkhovna Rada) on December 13, 2001, rejected a draft Law on Political Advertising and Agitation, which would have limited free speech in the campaign period by giving too many discretionary powers to government bodies, and posed a serious threat to the independent media;

Whereas the Department of State has dedicated $4,700,000 in support of monitoring and assistance programs for the 2002 parliamentary elections;

Whereas the process for the 2002 parliamentary elections has reportedly been affected by violations by many parties during the period prior to the official start of the election campaign on January 1, 2002; and

Whereas monthly reports for November and December of 2001 released by the Committee on Voters of Ukraine (CVU), an indigenous, nonpartisan, nongovernment organization that was established in 1994 to monitor the conduct of national election campaigns and balloting in Ukraine, cited five major types of violations of political rights and freedoms during the precampaign phase of the parliamentary elections, including—

(1) use of government position to support particular political groups;

(2) government pressure on the opposition and on the independent media;

(3) free goods and services given by many political groups in order to sway voters;

(4) coercion to join political parties and pressure to contribute to election campaigns; and

(5) distribution of anonymous and compromising information about political opponents:

Now, therefore, be it

Resolved, That the House of Representatives—

(1) acknowledges the strong relationship between the United States and Ukraine since Ukraine's independence more than 10 years ago, while understanding that Ukraine can only become a full partner in western institutions when it fully embraces democratic principles;

(2) expresses its support for the efforts of the Ukrainian people to promote democracy, the rule of law, and respect for human rights in Ukraine;

(3) urges the Government of Ukraine to enforce impartially its newly adopted election law, including provisions calling for—

(A) the transparency of election procedures;

(B) access for international election observers;

(C) multiparty representation on election commissions;

(D) equal access to the media for all election participants;

(E) an appeals process for electoral commissions and within the court system; and

(F) administrative penalties for election violations;

(4) urges the Government of Ukraine to meet its commitments on democratic elections, as delineated in the 1990 Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE), with respect to the campaign period and election day, and to address issues identified by the Office of Democratic Institutions and Human Rights (ODIHR) of OSCE in its final report on the 1999 presidential election, such as state interference in the campaign and pressure on the media; and

(5) calls upon the Government of Ukraine to allow election monitors from the ODIHR, other participating states of OSCE, and private institutions and organizations, both foreign and domestic, access to all aspects of the parliamentary election process according to international practices, including—

(A) access to political events attended by the public during the campaign period;

(B) access to observe voting and counting procedures at polling stations and electoral commission meetings on election day, including procedures to release election results on a district-by-district basis as they become available; and

(C) access to observe postelection tabulation of results and processing of election challenges and complaints.

Chairman HYDE. Without objection, the Chair is authorized to obtain the consideration of the resolution, H. Res. 339, as amended, by the Subcommittee on Europe on the suspension calendar at the next available opportunity.

The Committee meeting stands adjourned, and the Committee now convenes for its noticed hearing.

[Whereupon, at 11:21 a.m., the Committee was adjourned.]

The Committee met, pursuant to call, at 11:21 a.m. in Room 2172, Rayburn House Office Building, Hon. Henry Hyde (Chairman of the Committee) presiding.

Chairman HYDE. The Committee will now convene for its noticed hearing.

However, before proceeding to the Committee hearing, I would like to take this opportunity to advise the Members that tomorrow will the end of an era for this Committee. Nancy Bloomer, whose warm smile, dedication to the work of the Committee and professionalism have been a major asset to the Congress, will be moving on after more than 26 years of loyal service. I think she started here when she was 7 years old. [Laughter.] Not only are we going to miss a wealth of her institutional knowledge about the Committee and the House, we will miss her kindness and her effectiveness.

I cannot be sad because I know she is moving on to a splendid opportunity in the private sector, and she will continue to do the Lord's work. So we wish her God speed, and I know I speak for the entire Committee when I give her my sincere thanks for a splendid job and very well done.

[Applause.]

Mr. LANTOS. Mr. Chairman.

Chairman HYDE. Mr. Lantos.

Mr. LANTOS. Just as a point of order, if in fact she has been with the Committee for 26 years, I would like all of my colleagues to join me in child labor legislation which will prevent such atrocities from occurring in the future.

Thank you, Mr. Chairman.

[Laughter.]

[Applause.]

Chairman HYDE. We will now adjourn the meeting and will commence the hearing.

The International Criminal Tribunals for the former Yugoslavia and for Rwanda were established 8 years ago to bring to justice perpetrators of genocide, war crimes and crimes against humanity in the former Yugoslavia and Rwanda. These tribunals have enjoyed the strong support of the United States Congress and the United States Government.

The Yugoslavia tribunal alone has received approximately $20 million over the years in voluntary contributions from the United States—that is to say, contributions above and beyond what we have been required to contribute to the tribunal. And those required U.S. contributions have also been substantial, currently almost $25 million per year for the Yugoslavia tribunal and almost as much for the Rwanda tribunal.

In addition, we have detailed to them some of our finest government lawyers, including our witness today from the Department of

State, Ambassador Prosper, as well as criminal investigators and other experts.

Eight years into this exercise I thought it appropriate to convene this hearing to assess how well the tribunals are doing, and I have to say that in preparing for this hearing I have learned of some very unexpected problems.

We all know that in one of those strange turns of fate, the principal victims of the Rwandan genocide, the Tutsis, wound up in charge of the new government of that country. I would have expected the Tutsi government of Rwanda to be the strongest supporter anywhere of an international tribunal created to punish those who killed almost one million of their fellow Tutsis, but nothing could be farther from the truth.

Apparently relations between the Rwandan government and the Rwandan tribunal have ranged from frosty to hostile over the years. This is a great mystery to me and suggests that something is not as it should be with this tribunal.

In the case of the Yugoslav tribunal, we are all pleased that former Serbian President Slobodan Milosevic is now on trial for the crimes he appears to have committed. But serious questions have been asked about whether we helped or hindered the democratic evolution of Serbia by bringing Milosevic before the tribunal in the way we did.

And while we an our allies signaled a willingness to let democracy collapse in Serbia if Milosevic was not extradited, we have not been willing to run any risks ourselves to capture certain other well known indicted war criminals in Bosnia, where we have both the capability and the legal authority to arrest them.

I realize it is not fair to criticize the Yugoslav tribunal for decisions that have been made in Washington and other Western capitals, but I believe these inconsistencies are manifestations of an underlying problem. The Yugoslavia tribunal exists for a single purpose, and that is to dispense justice.

Our interests in the former Yugoslavia go well beyond justice, however, to include peace, stability, national reconciliation and democratic development. The Yugoslav and Rwandan tribunals are the international embodiment of that slogan we often see on bumper stickers, "No peace without justice." The problem is that this slogan is demonstrably untrue. To see that this is so, we need only to look at the situation today in such post-conflict societies as South Africa and El Salvador, where peace was restored not by prosecutors seeking to punish wrongdoers, but by truth and reconciliation commissions and general amnesties.

There are many other issues that I hope we can touch on today, such as whether the Yugoslavia tribunal has jurisdiction to prosecute Americans for our military actions in Kosovo in 1999; whether the tribunals could be better managed; and the degree to which political considerations have colored prosecutorial and judicial decision-making within the tribunals.

Finally, I think it might be interesting to explore the question of why the United Nations is not seriously considering establishing similar tribunals to address war crimes in countries like Cambodia, Sierra Leone, and East Timor, and what that tells us about the perceived success of the two existing tribunals.

But I will stop here, and am pleased to recognize our Ranking Member, Mr. Lantos, for any opening comments he may have.

Mr. Lantos.

Mr. LANTOS. Thank you very much, Mr. Chairman, and as always I find myself in strong agreement with many of the points you have just raised.

I want to thank you for scheduling this hearing on questions on how to bring perpetrators of genocide crimes against humanity and gross human rights violators to justice.

Mr. Chairman, the last century saw the most awful violations of human rights on a scale unknown in human history. As a witness to the holocaust at close range, I saw one of the darkest moments of mankind. Yet to the shame of all civilized people we did not learn from that horrendous experience and gross violations of human rights continue throughout the rest of the twentieth century and into this one.

In Rwanda, ethnic violence led to mass slaughter of over half a million to a million people and triggered a regional conflict that has yet to subside.

In the former Yugoslavia, ethic cleansing claimed hundreds of thousands of lives and led to as many as a million displaced persons.

During East Timor's occupation, the Indonesian military and their local militias may have killed hundreds of thousands of citizens, destroyed as much as 80 percent of that embryonic country's infrastructure.

And in Sierra Leone, a brutal civil war triggered horrible human rights abuses, leaving thousands dead and many more thousands of innocents maimed.

Tragically, many of these abuses were committed by young people brainwashed into perpetrating these dreadful crimes.

And in our own country, Mr. Chairman, suicide terrorists have snuffed out the lives of innocents from around the world whose only mistake was to be at the wrong place at the wrong time.

In this new century, I believe, Mr. Chairman, we must find ways to prevent yet more repetitions of these manmade disasters. Part of the answer is diplomatic or military intervention by the international community to prevent such catastrophes from recurring. But part of the answer is to make sure that future perpetrators of similar barbaric actions know that they will be held accountable for their crimes.

Mr. Chairman, the U.N. tribunals on Yugoslavia and Rwanda have had their share of successes. The former Prime Minister of Rwanda, Jean Kambanda, has been convicted of genocide, the first such conviction ever. And as we speak, the President of former Yugoslavia and then Serbia, Slobodan Milosevic, is in the dock for unspeakable acts that were committed to advance his lust for power.

Crimes against women have been recognized as crimes against humanity, as they should be, and the wrongdoing of countless others has been brought to light by these institutions.

In my mind there can be no question that this kind of international justice has an important role to play in the 21st century, particularly in cases of failed states and in post-conflict states

where national institutions and the political culture are incapable of establishing accountability.

I want to repeat this, Mr. Chairman, because I think it is so important for us living in a society under laws where it is so difficult to envision societies where there is no legal framework. I believe that international justice has an important role to play in our century, particularly in cases of failed states and in post-conflict states where national institutions and the political culture are incapable of establishing accountability.

However, we have learned much since the Yugoslav tribunal was established 8 years ago. We need to improve the current tribunals and make sure that any future tribunals do not make the same mistakes. We should also be prepared to experiment with so-called mixed tribunals that combine international and national justice. Indeed, tribunals in Sierra Leone and Cambodia may help those countries develop their shattered judicial institutions and help pave the way for the rule of law.

Finally, with great respect and great affection, Mr. Chairman, I believe I must mention the elephant in this room that many may not want to talk about, the International Criminal Court. Mr. Chairman, I know that you are strongly opposed to the establishment of that institution, and I deeply respect your opinion on that matter. But it is clear to me that the International Criminal Court is going to become a reality and it will become a reality soon. I hope that this hearing will help also for us to understand what mistakes need to be avoided as that institution comes into being.

Thank you very much.

Chairman HYDE. Thank you very much, Mr. Lantos.

Without objection, any Member who wishes to insert an opening statement into the record may do so at this point or at a subsequent point.

Before I introduce our distinguished witness, I would like to remark to the Committee. One of the most difficult jobs in Congress is chairing a Committee, a large Committee with a limited amount of time, with Members of less seniority who get no opportunity to ask questions, hearing after hearing after hearing.

I am intimately familiar with that because I spent 20 years in the Minority, and I resented it, and there are Members of this Committee who resent not being given the opportunity. I do not know how else to do it fairly. We do it by seniority, seniority ought to account for something. We do it by when you get here to the meeting, and if a lot come at the same time we then look at seniority. But there has never been an effort or attempt on my part to foreclose anybody from asking questions.

Some of you may think otherwise, some of you may even think there is a conspiracy to deprive you of the opportunity to launch your incisive questions. Not so. I do not even ask questions myself so we have more time for the Members to ask questions, but the Members do not adhere to the 5-minute rule. And I have been less strict than I ought to be in imposing that. I should follow the rules. But Members make long speeches and then ask 12 hard questions when their time is reduced down to a thirtieth of a second, and of course the witness wants to answer the question, and witnesses from witness to witness are more prolix than others. And so some-

one instead of taking 5 minutes takes 35 minutes, and other people are shortchanged.

So I am going to strictly enforce the 5-minute rule, giving a little flexibility to my friend Tom Lantos because he is so cooperative, but I am just pleading with you to ask questions. If you do not want to ask questions, make a statement. Do whatever you want to do with your 5 minutes, but give somebody else a chance to ask their questions too. But there is no plan or plot to deprive less senior Members from an opportunity to ask questions.

Mr. LANTOS. Mr. Chairman.

Chairman HYDE. Yes, sir.

Mr. LANTOS. Mr. Chairman, may I just say on behalf of Democrats on the Committee that you have handled your job as Chairman with extraordinary fairness and objectivity, and wonderful humor, and we on our side have no complaints whatsoever.

Chairman HYDE. Well, I thank you very much.

Now I am very pleased to introduce our distinguished witnesses today. We welcome Pierre-Richard Prosper, who was appointed by President Bush in July of 2001 to be U.S. Ambassador-at-Large for War Crimes Issues, where he advises the Secretary of State on U.S. efforts to address serious violations of international humanitarian law, including genocide, crimes against humanity, war crimes committed in areas of conflict throughout the world. He also coordinates U.S. support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and assists in the creation and operation of other mechanisms to bring violators of international humanitarian law to justice.

Ambassador Prosper has served for several years with the prior Ambassador-at-Large, covering war crimes issues in the State Department, where he was detailed from the Criminal Division of the Department of Justice. He also served as war crimes prosecutor for the United Nations International Criminal Tribunal for Rwanda, where he won significant cases for the prosecution.

Ambassador Prosper has worked in narcotics and drug enforcement on an international basis and has been a U.S. attorney and deputy district attorney in California. He was born in Denver, Colorado, and graduated from Boston College and the Pepperdyne University School of Law. He has received distinguished alumnus awards and others from Pepperdyne University, Harvard Law School and Boston College.

We welcome you to the Committee, Mr. Ambassador. And as you begin your testimony, I would ask that you take about 5 minutes to summarize your opening remarks, as your full written statement will be included in the record.

Please proceed.

STATEMENT OF THE HONORABLE PIERRE-RICHARD PROSPER, AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES, U.S. DEPARTMENT OF STATE

Ambassador PROSPER. Thank you, Mr. Chairman, Members of the Committee. I thank you for this opportunity to discuss the work of the United Nations International Criminal Tribunals for Yugoslavia and Rwanda. This hearing comes at an important time in the history of the two tribunals which have been in existence

since the early nineties. It also comes at a time when the world is making dramatic advances in achieving accountability for grave atrocities and war crimes.

Leaders throughout the world can no longer expect to employ their might ruthlessly and remain above the reach of the law. And citizens worldwide are starting to feel that they are no longer at the mercy of forces of brutality or that justice is nothing more than an unattainable abstraction. States that protect human rights and guard against war crimes are now becoming the norm. The rule of law is beginning to prevail over evil.

Nowhere is this more evidence than today in Trial Chamber III in The Hague. Slobodan Milosevic, who only a year and a half ago was the President of the Federal Republic of Yugoslavia, is now answering for his actions. The examination of his individual responsibility will hopefully remove any misperception of collective guilt of law-abiding Serbs. The rule of law is also strengthened by the trials in Arusha, Tanzania where the first-ever judgment for genocide was handed down and where a former head of state pled guilty for his part in the massacres.

The United States remains proud of its leadership in supporting the two ad hoc tribunals and will continue to do so in the future. Their work is important and has greatly contributed to justice for the victims of war crimes and to ending impunity for those who would orchestrate and commit genocide.

To date, the International Criminal Tribunal for the former Yugoslavia has indicted 117 persons, 67 persons have been brought into custody, 26 have been convicted, five acquitted, 11 are currently standing trial, and one is awaiting judgment. At the International Criminal Tribunal for Rwanda, 76 have been indicted, 57 have been brought into custody, eight have been convicted, one acquitted, and 17 are currently on trial.

These efforts show that the tribunals are on the path to success. However, despite these achievements, we recognize that there have been problems that challenge the integrity of the process.

In both tribunals, at times, the professionalism of some of the personnel has been called into question with allegations of mismanagement and abuse. In both tribunals, the process, at times, has been costly, lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims.

To address these abuses, we have aggressively engaged both the United Nations in New York and directly with the tribunals. This engagement is producing results. We are now seeing the U.N. headquarters and the tribunals taking action to remedy these wrongs.

The U.N.'s Office of Internal Oversight Service has launched an investigation and will issue a report this spring. We successfully obtained approval for on-site auditors at both tribunals last fall and expect them to be in place shortly. Additionally, the tribunal for Rwanda is ahead of her sister tribunal and has taken steps to cure a problem that has plagued both tribunals, and that is fee-splitting.

With new rules in place, the tribunal for Rwanda has ongoing efforts to investigate abuses. Just recently, on February 6, the tri-

bunal dismissed a Scottish defense attorney after evidence of abuses were found and reported him to his home bar association for disciplinary action.

Mr. Chairman, Members of the Committee, the goal of this Administration is to see the tribunals reach a successful conclusion. That means the tribunals need to remain within the spirit of the founding resolutions and pursue those who bear the greatest responsibility. We recognize that the tribunals were not established to judge each and every violation of law that occurred during the conflict. And they were not designed to completely usurp the authority and, more importantly, the responsibility of sovereign states. In establishing these organs, the Security Council clearly envisioned the shared responsibility of local governments to adjudicate some of these serious violations. And it is this shared responsibility that will lead us to the successful conclusion we seek.

As a result, this Administration is calling for action. We have and are urging both tribunals to aggressively begin to focus on the end-game and conclude their work by 2007 or 2008, a time frame we have stressed and to which officials from both tribunals have referred.

We are calling on the regional states to do their part: to cooperate fully with the tribunals' investigation and prosecutions. We are aggressively engaging the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Croatia at the highest levels to remind them of their international obligations to transfer all at-large indictees to The Hague. This is an obligation that must be honored. It is an obligation that must be fulfilled.

Not until accused architects of genocide such as Radovan Karadzic and Ratko Mladic go to The Hague will we be at the doorstop of normalization in the Balkans. These individuals cannot outwait the pursuit of justice and will not remain beyond the reach of the law. We have the requisite patience and are committed to holding them to answer before the tribunal.

We are engaging the government of the Democratic Republic of the Congo and other states. We are pressing for the genocidaires wanted for the 1994 massacres in Rwanda to be apprehended and transferred to the U.N. Tribunal. Not until these organizers are brought to justice will peace in the Great Lakes region of Africa begin to take hold and a true healing process begin.

We are soliciting our allies to enlist them in this cause. We have restated our commitment and determination to use the breadth of means at the disposal of the United States Government to see the indictees of both of these tribunals brought to justice in a timely fashion.

We are also pressing the governments in the former Yugoslavia to accept their responsibility, and are working with the government in Rwanda to hold accountable the mid and lower level perpetrators. The lower level perpetrators in both of these regions do not get a free pass. We do not want to see an abandonment of the state's responsibility and are encouraging appropriate domestic judicial and administrative action.

The United States stands prepared to assist the states in rebuilding their shattered judicial systems to make them capable of dispensing truth-based justice and establishing systematic respect for

the rule of law. As part of this commitment, we are jointly exploring creative approaches such as the Rwandan gacaca system that is designed to deal with the seemingly untouchable mass of offenders.

Mr. Chairman, in your letter requesting me to testify on these matters you asked me to address the future of these efforts. Since taking post as Ambassador-at-Large for war crimes issues I have often been asked what kind of future we see. I have been asked whether the events of September 11th have changed our view toward the permanent International Criminal Court—it has not.

As with the previous Administration, we oppose the Rome treaty and will not send it to the United States Senate for advice and consent to ratification. We are steadfast in our belief that the United States cannot support a court that lacks the essential safeguards to avoid a politicization of justice.

We believe that the ICC treaty is just that, a treaty, and it should not have jurisdiction over a non-party state. This does not mean that we intend to forego our historical position of leadership in pursuing accountability and justice on the world stage.

We will continue to seek a world where every state fulfills its responsibility to safeguard the law. When war crimes do occur, we look first to a state's domestic system for action. We believe, as I testified before the United States Senate Committee on the Judiciary last fall, that:

> "The international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and Cambodia. International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may step in through the Security Council or by way of consent on an ad hoc basis . . . Our goal should be and this Administration's policy is to encourage states to pursue credible justice rather than abdicating their responsibility. Because justice and the Administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times."

In the years ahead, the United States will continue to lead the fight to end impunity for genocide and crimes against humanity. We will help create the necessary political will. We will continue to seek to bring justice as close as feasibly and credibly possible to the victims in order to create a sense of ownership and involvement. We will work with the Rwanda and Yugoslavia tribunals, the Special Court for Sierra Leone, and elsewhere, and we will stress that all parties have a responsibility on this road to justice.

For this noble cause to be successful, for justice to endure, the international community, the tribunals, and the regional states must coordinate, accept their role and individual responsibility, and go down this arduous road together.

With our strong support of these efforts, we will continue to overcome obstacles, achieve accountability for the perpetrators, and se-

cure the rule of law. In passing milestones and creating an environment where there is not a dependency on international mechanisms, we will bring justice to the victims and restore confidence in domestic institutions in societies throughout the world.

I thank you and I am available for your questions.

[The prepared statement of Ambassador Prosper follows:]

PREPARED STATEMENT OF THE HONORABLE PIERRE-RICHARD PROSPER, AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES, U.S. DEPARTMENT OF STATE

Mr. Chairman, members of the committee, I thank you for this opportunity to discuss the work of the United Nations International Criminal Tribunals for Rwanda and the Former Yugoslavia. This hearing comes at an important time in the history of the two Tribunals which have been in existence since the early nineties. This hearing also comes at a time when the world is making dramatic advances in achieving accountability for grave atrocities and war crimes.

Leaders throughout the world can no longer expect to employ their might ruthlessly and remain above the reach of the law. And citizens worldwide are starting to feel that they are no longer at the mercy of forces of brutality, or that justice is nothing more than an unattainable abstraction. States that protect human rights and guard against war criminals are now becoming the norm. The rule of law is beginning to prevail over evil.

Nowhere is this more evident than today in Trial Chamber III in The Hague. Slobodan Milosevic, who only a year and a half ago was president of the Federal Republic of Yugoslavia, is now answering for his actions. The examination of his individual responsibility will hopefully remove any misperception of collective guilt of law-abiding Serbs. The rule of law is also strengthened by the trials in Arusha, Tanzania where the first-ever judgment for genocide was handed down and where a former head of state plead guilty for his part in the massacres.

The United States remains proud of its leadership in supporting the two ad hoc Tribunals and will continue to do so in the future. Their work is important and has greatly contributed to justice for the victims of war crimes and to ending impunity for those who would orchestrate and commit genocide. To date, at the International Criminal Tribunal for the former Yugoslavia 117 have been indicted, 67 persons have been brought into custody, 26 have been convicted, 5 acquitted, 11 are currently standing trial, and one is awaiting the judgment of the court. At the International Criminal Tribunal for Rwanda, 76 have been indicted, 57 have been brought into custody, 8 have been convicted, one acquitted, and 17 are currently on trial.

These efforts show that the Tribunals are on the path to success. However, despite these achievements, we recognize that there have been problems that challenge the integrity of the process. In both Tribunals, at times, the professionalism of some of the personnel has been called into question with allegations of mismanagement and abuse. And in both Tribunals, the process, at times, has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims.

To address these abuses, we aggressively engage both with the United Nations in New York and directly with the Tribunals. This engagement is producing results. We are now seeing the UN headquarters and the Tribunals taking action to remedy these wrongs. The UN's Office of Internal Oversight Services has launched an investigation and will issue a report this spring. We successfully obtained approval for on-site auditors at both Tribunals last fall and expect them to be in place shortly. Additionally, the Tribunal for Rwanda is ahead of her sister Tribunal and has taken steps to cure a problem that has plagued both Tribunals: fee-splitting.

With new rules in place, the Tribunal for Rwanda has ongoing efforts to investigate abuses. Just recently, on February 6, the Tribunal dismissed a Scottish defense attorney after evidence of abuses were found and reported him to his home bar association for disciplinary action.

Mr. Chairman, the goal of this Administration is to see the Tribunals reach a successful conclusion. That means the Tribunals need to remain within the spirit of the founding resolutions and pursue those who bear the greatest responsibility. We recognize that the Tribunals were not established to judge each and every violation of law that occurred during the conflicts. And they were not designed to completely usurp the authority and, more importantly, the responsibility of sovereign states. In establishing these organs, the Security Council clearly envisioned the shared responsibility of local governments to adjudicate some of these serious violations. And it is this shared responsibility that will lead us to the successful conclusion we seek.

As a result, this Administration is calling for action. We have and are urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007–2008, a timeframe that we have stressed and to which officials from both Tribunals have referred.

We are calling on the regional states to do their part: to cooperate fully with the Tribunals' investigations and prosecutions. We are aggressively engaging the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Croatia at the highest levels to remind them of their international obligation to transfer all at-large indictees to The Hague. This is an obligation that must be honored. It is an obligation that must be fulfilled.

Not until accused architects of genocide such as Radovan Karadzic and Ratko Mladic go to The Hague will we be at the doorstep of normalization in the Balkans. These individuals cannot out-wait the pursuit of justice and will not remain beyond the reach of the law. We have the requisite patience and are committed to holding them to answer before the Tribunal.

We are engaging the Government of the Democratic Republic of the Congo and other states, pressing for the genocidaires, wanted for the 1994 massacres in Rwanda, to be apprehended and transferred to the UN Tribunal. Not until these organizers are brought to justice will peace in the Great Lakes Region of Africa begin to take hold and a true healing process begin.

We are soliciting our allies to enlist them in this cause. We have restated our commitment and determination to use the breadth of means at the disposal of the U.S. government to see the indictees of both of these Tribunals brought to justice in a timely fashion.

We are also pressing the governments in the former Yugoslavia to accept their responsibility, and are working with the government in Rwanda, to hold accountable the mid and lower level perpetrators. The lower level perpetrators in both of these regions do not get a free pass. We do not want to see an abandonment of the state responsibility and are encouraging appropriate domestic judicial and administrative action.

The United States stands prepared to assist the states in rebuilding their shattered judicial systems to make them capable of dispensing truth-based justice and establishing systematic respect for the rule of law. As part of this commitment, we are jointly exploring creative approaches such as the Rwandan *gacaca* system that is designed to deal with the seemingly untouchable mass of offenders.

Mr. Chairman, in your letter requesting me to testify on these matters you asked me to address the future of these efforts. Since taking post as ambassador-at-large for war crimes issues I have often been asked what kind of future we see. I have been asked whether September 11th has changed our views toward a permanent International Criminal Court—it has not.

As with the previous U.S. Administration, we oppose the Rome treaty and will not send it to the United States Senate for advice and consent to ratification. We are steadfast in our belief that the United States cannot support a court that lacks the essential safeguards to avoid a politicization of justice.

We also believe that the ICC treaty is just that, a treaty. It does not and should not have jurisdiction over a non-party state. This does not mean that we intend to forgo our historical position of leadership in the pursuit of accountability and justice on the world stage. We remain committed.

We will continue to seek a world where every state fulfills its responsibility to safeguard the law. When war crimes do occur, we look first to a state's domestic system for action. We believe, as I testified last fall before the United States Senate Committee on the Judiciary, that:

> The international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and Cambodia. International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis . . . Our goal should be and this Administration's policy is to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times.

In the years ahead, the United States will continue to lead the fight to end impunity for genocide, crimes against humanity, and war crimes. We will help create the political will. We will continue to seek to bring justice as close as feasibly and credibly possible to the victims in order to create a sense of ownership and involve-

ment. In our work with the Rwanda and Yugoslav Tribunals, the Special Court for Sierra Leone, and elsewhere, we will stress that all parties have a responsibility on the road to justice.

For this noble cause to be successful, for justice to endure, the international community, the Tribunals, and the regional states must coordinate, accept their role and individual responsibility, and go down this arduous road together. With our strong support of these efforts, we will continue to overcome obstacles, achieve accountability for the perpetrators, and secure the rule of law. In passing milestones and creating an environment where there is not a dependency on international mechanisms we will bring justice to the victims and restore confidence in domestic institutions in societies throughout the world.

Chairman HYDE. Thank you, Ambassador.

Mr. Lantos.

Mr. LANTOS. Thank you very much, Mr. Chairman.

President Bush has repeatedly stated that he will pursue the war against international terrorism against regimes that harbor international terrorists and rogue regimes like Iraq that develop weapons of mass destruction. And I have strongly supported him in this adventure and intend to do so until the last international terrorist cell is destroyed and the last regime is changed which harbors international terrorists.

In this context, may I ask you, Mr. Ambassador, what the Administration's policy is regarding the establishment of an international war crimes tribunal for Iraq to cover the crimes by Saddam Hussein and other Iraqi officials in both the 1980s and the 1990s and into this century?

One of the most horrendous images that all of us carry with us is a Newsweek cover of some years ago showing a group of Kurdish women, Iraqi citizens, and their small children in colorful clothes after they were gassed by Saddam Hussein and his henchmen at the village of Halabja.

What specifically is the Administration doing now that we are talking about Iraq, Iran and North Korea as regimes that will have to pay the consequences of their actions in terms of terrorism, harboring terrorism, and developing weapons of mass destruction? What specific measures is the Administration taking now to prepare a tribunal for Saddam Hussein?

Ambassador PROSPER. Thank you, Mr. Lantos.

I can begin by saying that we do believe that Saddam Hussein and his top lieutenants, if you will, need to be held to answer for their actions over the last 10 years.

Mr. LANTOS. Twenty years.

Ambassador PROSPER. Twenty years. We do believe that there have been serious atrocities committed and we do believe that they need to be investigated. In fact, we have taken steps to collect information regarding the abuses that have occurred.

I currently have detailed to my office two individuals who are specifically focused on this issue, and are collecting information, evidence and witness statements to be used at the appropriate time.

We are in the process and we are having discussions with allies and friends on this matter, and we do believe that there needs to be a forum created to address this issue in order to hold accountable the perpetrators of these abuses.

We also recognize and believe that in order to achieve true justice and accountability there must be a change in government in

Iraq. When that occurs, and only when that occurs will true justice be brought to the people. So we are working hard. It is an effort that my office is involved in on a daily basis, and we hope to be able to use the information soon.

Mr. LANTOS. Mr. Ambassador, if I understand you correctly, you are implying the establishment of an ad hoc tribunal to deal with Saddam Hussein when the time comes. Am I correct in this?

Ambassador PROSPER. What I am stating is that we will definitely be looking for some sort of mechanism to create this, and I think it is difficult at this time to say precisely what that mechanism may be.

For example, if there is a regime change in Iraq and a credible government comes into place, then I think at that point we can look at the domestic institution to take the lead responsibility on this issue and assist that institution where it is needed. So I do believe it is dependent upon the future, if you will.

What we are doing is we are taking steps to prepare because we do believe there must be accountability.

Mr. LANTOS. Well, surely a successor regime is unlikely to be as well organized as is the regime in Serbia. Yet we insisted on having Milosevic go to an international tribunal. And I really am wondering what the rationale is for a preference for ad hoc tribunals to be established as the need arises when it is so palpably obvious that a permanent international criminal court is an infinitely more efficient method of dealing with this problem.

Chairman HYDE. The gentleman's time has expired.

Mr. Leach.

Mr. LEACH. Well, I want to pursue the criminal court from a little different angle. All of the discourse in the development of it related to a series of very discrete international crimes such as crimes against diplomats. It was understood that one of the crimes that might be considered by an international court might be war crimes, but there are a series of discrete crimes, narco trafficking, all covered by international treaties.

Of all the countries in the world whose diplomats are vulnerable today to international crimes, it is the United States of America, and to deny the option of an international criminal court for a crime against diplomats seems to me to be folly.

Why the United States would object to the option, and it is always optional to bring drug traffickers before an international criminal court, I do not know. And I am wondering if you have some explanation for this. And I would stress by background, because the public is not widely focused in on this issue, the International Court of The Hague only adjudicates disputes between states. We are seeing with terrorism sub-disputes that involve states somewhat but not totally. And so there are other kinds of crimes. Terrorism is a kind of a crime. And why we would not want to have this as an alternative for this kind of crime is bewildering.

And can you explain that?

Ambassador PROSPER. Yes, thank you, Mr. Leach.

Mr. LEACH. And I might say this is the position of the last Administration as well. I mean, this is not unique to this Administration.

Ambassador PROSPER. I think your question shows the complexities that surround international justice. The efforts underway to create the permanent International Criminal Court are limited to the prosecution of genocide, crimes against humanity and war crimes. It does not address, as you refer, to crimes against diplomats, terrorism or——

Mr. LEACH. But that was very much on the agenda for discussion, in which the United States leadership, I always thought, was vacant, now, granted, this is all several years ago, as well as the procedures by which one can bring these crimes.

But please proceed.

Ambassador PROSPER. Yes. Well, I believe it was not only the United States. I think the difficulty was incorporating all these other offenses into an international mechanism.

The idea and the preferred approach is to have each state use its unilateral powers and authorities to regulate these problems. For example, when we look at the terrorism today and the coalition against terror, what we have done is we have asked the international community to come together, to use all the unilateral tools they have at their disposal to address these problems. This is a more effective and more efficient approach.

We need to obviously coordinate, but it gives a broader reach. And when we get into crimes such as narcotics, the ideal or preferred approach is to get each state to do what it is supposed to do and exercise its responsibility.

Mr. LEACH. I appreciate it. My time has expired, Mr. Chairman, but I would only stress that this is an optional approach, an extra technique, and one that does not necessarily bring the counter-reactions which unilateral approaches often do.

Chairman HYDE. Mr. Chris Smith of New Jersey.

Mr. SMITH OF NEW JERSEY. Thank you very much, Mr. Chairman. And Mr. Ambassador, welcome.

There have been some reports that Kosovo Albanians might be indicted by the tribunal. I wonder if you could shed some light on that.

We have heard rumors and *The Wall Street Journal* carried a rather significant piece today about the Administration's idea of shutting down the tribunals or at least trying to get a timetable once Karadzic and Mladic have been arrested.

My concern is that some of the worst of the worst exist in Vukovar. I was in Vukovar weeks before it fell, while it was under siege, and what they did to those poor people is reminiscent of the Nazis. The Vukovar still have not been brought to justice.

Ambassador PROSPER. Yes.

Mr. SMITH OF NEW JERSEY. And thirdly, very briefly, the ICTR is proud of the fact that it convicted former Rwandan Prime Minister Kambanda of genocide, but I understand that this conviction came only as part of a plea bargain. One of the conditions was that the family of Mr. Kambanda would receive asylum in the United States.

Have we in fact provided asylum to family members of persons who planned the Rwandan genocide, and if so, what was the justification for this practice?

Ambassador PROSPER. Thank you.

Regarding the question of Kosovo, the Prosecutor Carla Del Ponte has indicated that she is investigating the activities or the conduct of the Kosovo Albanians, and there may be some indictments forthcoming. I am not in the position to comment in greater detail on that. It will be for the prosecutor to take whatever actions she deems appropriate.

The Wall Street Journal did reflect one of the views that we have, which is that Karadzic and Mladic must go to The Hague. This tribunal cannot move toward closure because of Karadzic and Mladic. The Vukovar three are notable offenders who also need to be brought to justice in the Hague.

We have asked the prosecutor to work with the states, to determine where the line of responsibility needs to be drawn, where does the tribunal's work end and the state's responsibility pick up, because we do recognize that the tribunal cannot address all of these violations. We are hopeful that this will happen and we are prepared to assist in any way we can.

Regarding individuals, family members, witnesses, whatever it may be from the tribunals coming to the United States and receiving some sort of refugee status, I am not prepared to comment in an open session as to the details of who may be here for protection or witness protection type of issues. I could do so in closed session, if necessary.

But we do and we have taken steps in the past to bring people here. We have screened them and we know that they as individuals are not responsible for abuses.

Mr. SMITH OF NEW JERSEY. I have some remaining time. With regard to the Prime Minister, that would have to be conveyed to us in closed session?

Ambassador PROSPER. Yes.

Mr. SMITH OF NEW JERSEY. Thank you, and thank you, Mr. Chairman.

Chairman HYDE. Thank you.

Mr. Payne.

Mr. PAYNE. Thank you very much, Mr. Chairman.

Mr. Ambassador, sorry that I did not get an opportunity to hear your testimony. I am trying to browse through your written report.

I just have a question regarding the Rwandan Tribunal. I have looked at the numbers as I browsed through about the Yugoslavian tribunal: under 17 had been indicted, 67 brought to custody, 26 had been convicted, five acquitted, 11 are currently standing trial, one is awaiting judgment.

Now for Rwanda, 76 have been indicted, 57 have been brought into custody, eight have been convicted, one acquitted, 17 are currently on trial.

Could you explain what the apparent difficulty or the slowness in the Rwandan tribunals, and has any kind of, to your knowledge, corrective practices been instituted?

Ambassador PROSPER. Well, I think this is an important question. I think both tribunals early on were plagued with difficulties that are associated with the start-up. We have to recall that they were starting from scratch. It was easier for the ICTY in The Hague to begin because of the general infrastructure that exists in The Netherlands.

It was more difficult in the Rwanda context because, firstly, in Rwanda they were setting up operations, if you will, in a post-conflict state that was still trying to get back on its feet. It was also setting up an actual court in Arusha, Tanzania, that did not have the necessary infrastructure, and a lot of the materials had to be brought in.

In the tribunal for Rwanda, when it began, it began with a strategy of pursuing trials against single individuals which proved to be ineffective, which also led to the delay. Now the tribunal for Rwanda has taken steps to have multiple defendant trials. And as you refer to, 17 persons are currently on trial before three trial chambers. Our hope is that this will increase the efficiency and the speed of the process.

Mr. PAYNE. Thank you. I visited the Arusha courts several years ago, and at that time they were changing prosecutors and trying to streamline the procedure.

However, there was always a question as related to the Rwandan situation. I might let you know, first of all, that I am an opponent of the death penalty in any situation, and I know that the international tribunal also supports having no death penalty, which I think is very, very good and the way it should be.

However, in Rwanda, where other trials are going on, I think the death penalty is in the law of the state, and it seems that the so-called "Big Fish," as they call them, the intahamway, the genocidaires, are in Arusha, supposedly, and others who are being tried in Rwanda, and I believe several have gotten the death penalty in the past.

I wonder whether you have any feeling of what the leadership, the political leadership of Rwanda, the RPF and President Kagame, has there ever been any discussion about the two systems?

Ambassador PROSPER. Well, I think in general the fact that the leadership is being tried in Arusha and the smaller fish are being tried in Rwanda and may receive a more severe penalty has always been an issue of discussion, and at times a source of tension.

I think what happens in Rwanda not only with the government but the people, the biggest complaint that I hear is that the justice is not reaching the people. This is one of the concerns we have with both tribunals, is that the outreach needs to be greater so that the individuals who are truly affected by the conflict can actually see justice occur and feel the justice.

This is one of the reasons why our policy is to look first to a state system to see if we can enhance that and reinforce that and create domestic participation in order to give the ownership and the feeling of contributing to justice.

I do believe that the main sentiment in Rwanda is that the justice is a little removed from the society.

Chairman HYDE. The gentleman's time has expired.

Mr. PAYNE. Would you yield for just a——

Chairman HYDE. I am sorry. Do you ask unanimous consent for another minute?

Mr. PAYNE. Yes, I am asking for——

Chairman HYDE. Without objection, so ordered.

Mr. PAYNE. Thank you.

Then let me ask you just quickly, has the United States agreed to turn over—there was a problem of a big fish in Texas where our extradition policies did not work? If you could quickly tell me that. And secondly, the Gachacha, what do you think about that system, real quickly, in a minute. You know, I do not want to violate the Chairman's relinquishment of 1 minute. So in a minute, please.

Thank you, Mr. Chairman.

Ambassador PROSPER. Mr. Ntakirutimana was transferred from Texas to the tribunal, and is currently in court on trial, and the hope is that the trial will finish some time in early fall. GACACA is something that we are looking at, and we are willing to work with the Rwandan government to support because it is important. We need to find some sort of way to address the actions of the mass number of perpetrators.

Chairman HYDE. Thank you.

The gentleman from California, Mr. Rohrabacher.

Mr. ROHRABACHER. I would be happy to yield Mr. Payne 1 minute of my time if he has a follow-up question that he would like to ask the witness.

Mr. PAYNE. Thank you very much. I would take just one more minute.

The current incarceration number in Rwanda, I think, exceed about 100,000. Do you think that the GACACA will really speed up getting these prisons to be less in number? I mean, do you see this being a fast process?

Ambassador PROSPER. Well, that is the goal of the GACACA process, and that is to spread the responsibilities of administering justice to the community. The more the community can be involved, hopefully, the more individuals that can be processed through. It is our hope and I believe it is the government of Rwanda's hope that this will help reduce the numbers, I think, that are up to 120,000 persons in custody as we speak.

Mr. PAYNE. Thank you very much.

Mr. ROHRABACHER. Okay, reclaiming my time. You mentioned the death penalty, and by the way, let me just note that I am not against the death penalty, especially for people who have been convicted of crimes that cause the death and torturous deaths of tens of thousands of people, like Mr. Milosevic if he is indeed convicted. I guess I am not supposed to say whether or not he should be convicted. But let me just say this.

If Mr. Milosevic is convicted, considering the magnitude of his crimes against the Croatian and Bosnian people, the Kosovars, and yes, against his own Serbian people, I would find it appropriate that he be executed and not simply be given free room and board for the rest of his life.

Your reaction?

Ambassador PROSPER. Well, my reaction is that if Mr. Milosevic is convicted for his actions in Bosnia, Croatia and Kosovo, he needs to feel the firm weight of the law.

The U.N. tribunal does not allow for the death penalty. The maximum punishment that Mr. Milosevic can receive is life imprisonment, and it will be for the judges to determine whether or not life imprisonment is the appropriate sentence. Our view would be that if he is found guilty, again, he must be punished for his conduct.

Mr. ROHRABACHER. Well, when you take a look at people like Mr. Milosevic who perhaps have the characteristics of Adolph Eichmann and Osama bin Laden personified in one personality, there are tens of thousands of people who are out there who have lost family members, people who are crying out for justice. I have visited that region many times, and I happen to believe that if it wasn't for the personality of Mr. Milosevic in play in that system that better forces, people with better hearts may have prevailed, but instead we had this evil force at place in such a powerful position.

I would hope that we send a message with your tribunal, and I am very pleased. At least we see him being dragged before the court of humanity now, to answer publicly for these heinous crimes that he has been associated with. But let us hope that there is a deterrent. I do not think that the possibly of life in prison deters these type of monsters, and there are monsters like this around. Whether it is Saddam Hussein or Mr. Milosevic, perhaps it would be better in cases like this, if they are found guilty, to turn them over to their own governments. I am sure Saddam Hussein's people would not give him life in prison, or that his life might be very short in prison, so it might be better to go in that direction.

Who will hold Mr. Milosevic, by the way, if he is found guilty? Who will take care of him for the rest of his life?

Ambassador PROSPER. For both tribunals, what they do is reach agreements with states to accept these individuals and house them. I cannot predict where Mr. Milosevic will go. He is in a facility right now, but he may go to another European state and——

Mr. ROHRABACHER. Maybe there is a Bosnian jail that might accept him, or a Croatian jail that might accept him.

Chairman HYDE. The gentleman's time has expired.

Mr. ROHRABACHER. Thank you very much.

Chairman HYDE. Mr. Paul, the gentleman from Texas.

Mr. PAUL. Thank you, Mr. Chairman.

I want to thank the Chairman for pointing out that we have seen some shortcomings in the International Criminal Tribunal in Rwanda and the reservations that he and actually the Administration have about the International Criminal Court, which I think is justifiable. But I also would maintain that the International Criminal Court in Yugoslavia is probably a model for what we can expect from the International Criminal Court. I would have a lot more reservations about the determining justice at The Hague when you realize that they can use anonymous witnesses, secret testimony—even a pro-international criminal court Web site reports that there is no due process, and that there is no right to trial by jury. So our constitution is thrown out.

When Milosevic was taken hostage and sent over, it was done because we sent a lot of money to the current government, and for no other reason. When the court, the constitutional court of Yugoslavia looked at this, they ruled that it was not constitutional. So you can see what will happen to our constitution when we have the International Criminal Court.

Now, there has been 52 countries who have endorsed the international criminal court. When there is 60, the assumption is going

to be made by the signature that we put on the treaty at Rome that it will apply to us all.

Now, you have indicated that we do not expect to have that apply to us because we are a non-party state. I think that is really dreaming a bit because I believe that they are going to do what they want.

I would think that the only way is to make it clear to the world whether or not we are going to be part of the international criminal court, which if we follow what the proceedings are going on The Hague, it is closer to a kangaroo court with no sense of justice. I just cannot believe that there is so much faith and belief in these courts and that we are going to translate that into a permanent court, and then say, well, we are going to be in limbo. We are not going to remove our signature, but we are not going to be a party state, and then pretend to be a good member of the international community, but at the same time say, yeah, if we want to go after Milosevic, we will. But if we want to go after NATO, we will not because there were many, hundreds, many thousands of people killed after NATO bombing versus the two or three thousand killed before that, so you cannot just go by numbers of killings.

So I think we are setting ourselves up for some serious trouble. I would like to get an opinion from you about how we can get out of this limbo state, and whether the President has ever considered removing our signature from that treaty to make it clear to the world that when those 60 signatures occur we do not want to have any part of the International Criminal Court.

Ambassador PROSPER. Well, the President has made clear the fact that we oppose the International Criminal Court for the same reasons the prior Administration opposed it. We are in the process of conducting a high level policy review on this very subject to determine how to implement the opposition, and what steps need or should be taken.

I am not prepared to comment on what we may do, but what I can say is that in making this decision the President has all the interests, the national security interests in mind.

Mr. PAUL. It seems to me that the President is trying to make this decision, but under our constitution treaties should have no weight whatsoever unless the Senate ratifies them. And here we are worrying about it and there is reason to worry about it, and yet we do not say, well, will the Senate ratify it or not, and that is when the decision is made.

I would think that we should think more in terms of getting the proper ratification rather than saying, well, will the President accept part of this or not. Hopefully, we will come around to that position.

Ambassador PROSPER. Well, we recognize the concerns. We are making our position known that we are not sending it up for advice and consent to ratification, because we do believe that the only way to be bound by the treaty is to be a party to the treaty.

Mr. PAUL. Thank you.

Chairman HYDE. The gentleman's time has expired. I will ask one question, and then we will get to the next panel.

I am sorry, Ms. Davis, the gentlelady from the First District of Virginia, the mother of Presidents.

Ms. DAVIS. Thank you, Mr. Chairman.

I apologize, Mr. Ambassador, I was not here to hear your remarks. I have tried to read through it very quickly, and hopefully this question has not been asked of you already.

Is it true that defense counsel on both the ICTR and the ICTY have been providing kickbacks to their clients from their U.N.-paid legal fees, and in effect, subsidizing the war criminals out of the U.N. budget?

We provide defense counsel to indigent defendants in the United States, and this so-called fee-splitting has never been a problem here. So why is it a problem in the U.N. system? And are U.N. reimbursement rates too high relative to the countries where the tribunals operate, thereby inviting abuses?

Ambassador PROSPER. The question on the issue of fee-splitting is a problem in both tribunals, and we recognize that. It came to light through an investigation conducted by the United Nations on this issue. They did determine that there were not significant safeguards or procedures in place to prevent this from happening.

This is something that we have taken seriously and have taken firm actions in letting the tribunals and the U.N. in New York know that we are gravely concerned by this, and that we demand and are looking for action.

Fortunately, we are starting to see some action. The tribunal for Rwanda has taken corrective measures on at least one defense counsel, and others are under investigation. I was informed that the tribunal in the Hague is in the process of hiring an investigator to do this exact same thing.

The reason behind it is difficult for me to say—why it occurs and why there is the fee-splitting. It would require getting into the mind of the offenders here. But what we do know is that we do need to pay attention to this, and we need to engage the tribunals to ensure that they take the steps necessary to not only hold accountable those who engage in this activity, but also to prevent it from happening so that the money is not misused.

Ms. DAVIS. Thank you, Mr. Ambassador. Thank you, Mr. Chairman.

Chairman HYDE. Thank you very much. I will quickly ask one question.

After Operation Allied Force in Kosovo in 1999, the International Criminal Tribunal for the former Yugoslavia carefully evaluated charges that the United States committed war crimes during the course of that operation. Ultimately the tribunal announced it had found no evidence of U.S. war crimes, and therefore would not indict any Americans, which showed good judgment on their part.

Would the ICTY in fact have had jurisdiction to indict Americans for war crimes during that operation? If that is so, what can we do in the future to make sure such tribunals are not given jurisdiction over our armed forces personnel?

Ambassador PROSPER. Mr. Chairman, when the events in 1999 began, we were aware that an argument could be made that the tribunal would have jurisdiction over our actions and over NATO's actions.

The United States Government, in conducting this campaign, took great care, recognizing this issue, and our practice was and

our targeting was to be precise and to follow the law so that we would not find ourselves under the jurisdiction substantively of the court. And this is exactly what we did.

When the allegations were waged, we took them for what they were. We believe that they were groundless, that there was no substantive base for it. We made our position clear. We made our position known. And fortunately, the prosecutor agreed with us.

As far as future instances, I believe that because we are not in a state of armed conflict within the former Yugoslavia, that the tribunal does not have jurisdiction over any actions of our forces that may be in the area.

Chairman HYDE. Very well.

Well, we have another panel to go, and time marches on. But it has been a very instructive morning, and we wish you great luck in your very difficult and important tasks. Be assured we want to be cooperative with you, and we will be in touch with you from time to time when questions arise.

Ambassador PROSPER. Thank you very much, and thank you for your attention to this matter.

Chairman HYDE. Thank you, sir.

I would like to welcome our second panel.

Professor Jeremy Rabkin has been a faculty member at Cornell University in its department of government for more than 20 years and has served as a visiting professor at Harvard University. Professor Rabkin is active on the Board of Academic Advisors of the American Enterprise Institute, and on the Board of Directors of the Center for Individual Rights. He is a well published author of numerous books, and articles on law, sovereignty and judicial issues. He is well known as an international lecturer and well known to the Congress where he has appeared frequently as a witness.

We welcome you today, Professor Rabkin.

Larry Hammond is a practicing attorney with the Phoenix Firm of Osborn Maledon, where he specializes in criminal defense, health care, antitrust, civil rights, and Commercial and False Claims Act litigation. He has been admitted to the U.S. Supreme Court, U.S. Court of Appeals and the U.S. District Court. He has been active in many professional and civil associations, including the American Bar Association's Task Force on War Crimes in the Former Yugoslavia. He served as deputy assistant attorney general in the Office of Legal Counsel, and as an assistant special prosecutor at the U.S. Department of Justice. Mr. Hammond is well published in the area of criminal justice issues. He received is Juris Doctor and Bachelor of Arts from the University of Texas, where he was editor in chief of the Texas Law Review, and was a recipient of the Order of the Coif.

We welcome you today, Mr. Hammond.

And our last witness is the Honorable Patricia Wald, who has been a judge for the International Criminal Tribunal for the Former Yugoslavia, chief judge of the District of Columbia Circuit Court of Appeals, and assistant attorney general at the U.S. Department of Justice. She has practiced public interest law and served on national and local criminal policy commissions; has been Vice President of the American Law Institute, and active with judicial and legal organizations connected with the ABA. She is and

has been active in many other related organizations throughout the years as well as with numerous universities, where she has earned honorary Doctor of Law Degrees and numerous other awards. She is a well known author of several books on criminal law, administrative law, mental health, women's law and poverty law. She is a graduate of the Yale School of Law and has found time in her busy career to raise a family of five children.

We welcome you today, lady and gentlemen, and we will start with you, Professor Rabkin.

STATEMENT OF JEREMY RABKIN, PROFESSOR, DEPARTMENT OF GOVERNMENT, CORNELL UNIVERSITY

Mr. RABKIN. Thank you.

My prepared remarks are a little bit professorial, and I would like to be a little less tempered because I think we are all being a little too complacent about this.

To start with, we have been talking about this as if it is something rather routine which just may have some glitches, and I do hope the Committee focuses on how very weird this is. You have to go back before the 1990s about 500 years to find real precedent for what we are doing in these tribunals. I think before the 1990s the one real precedent that I can think of is the Spanish Conquistador Piesaro going into Peru and trying the king of the Incas on his own authority as a conquistador.

And this is a very, very weird thing. For hundreds of years states have acknowledged to each other that they do not have criminal jurisdiction over what another state does within its own boundaries.

Having set up these tribunals because we were not sure what else to do and really because we were not willing to use force in a serious way, I think we have created dangerous precedents which are gaining momentum. I certainly agree with Mr. Lantos. One of the elephants here is the ICC.

The Europeans say to us, well, you supported these ad hoc tribunals. Why do you not support the general tribunals? And of course the real answer, one of the real answers is we are not willing to be judged by an international tribunal. Well, if we are not willing to be judged ourselves by an international tribunal, why are we imposing this on other people? And that is a very, very good question which nobody discusses because I do not think there is a very good answer. In the meantime it creates momentum for things like these national prosecutions where countries like Belgium think that they ought to be judge of the world and just go around saying you are bad and we are going to try you. You are, too, and we are going to try you.

You may think, if you want to, that this is a touching display of concern for humanity. I do not think so. Mr. Lantos alluded to his experience during the war. He might remember.

The Europeans in recent years have not been extremely sympathetic to Israel; quite the contrary. They view Prime Minister Sharon as a war criminal and somebody who ought to be put on trial. Just recently the Belgians have talked about indicting Shimon Peres, one of the most inoffensive people in the world or certainly one of the most unthreatening.

I think it is something that we all ought to pause over before we get deeper into this. Do we want to say that the world has so much consensus that we can have a free-floating criminal law that is up in the sky, which anyone who wants to can just pull down and apply to whoever he wants to apply it to?

If you say, well, no, wait a minute, we did not mean that and you back off a little bit, where are you?

Well, if you cannot apply your own criminal standards to a third country that you have no connection with, I do not understand why the Security Council can do it, and that is something we ought to be a little bit disturbed about. If the Security Council can do it to someone else, could it do it to us?

Well, probably not, because we have a veto, but then again you might have a different Administration which has a different policy on this. Or if you say the Security Council can do it, why cannot just some other group of countries do it?

We heard Ambassador Prosper testifying that, yes, we feel that this should be done in cooperation with national courts. What does it mean, cooperation with national courts? We told the Serbs you cannot have this trial yourself. We will not even let you begin. We will not even let you see whether you can do it. We are just going to reach in and grab Milosevic because we want to try him.

I think once you have set up a super national tribunal like this, all of your incentives, as people said about special prosecutors in the United States, are to go for the sensational case, not to be cooperative, but to be just making a splashy prosecution somewhere.

Let me say one last thing which I think we really should focus on. I believe this was our founding principle, and maybe what I am saying sounds doctrinaire to you, but after all, our country was founded on a doctrine, which is that every sovereign state is responsible for itself.

But putting aside doctrine, we are now in a situation in which we are trying to mobilize other countries to help in the war on terror, and what we are saying to those other countries is you are responsible for what is going on in your territory. If you are harboring terrorists on your soil, you are our enemy. I think it is very weird for us to be saying on the one hand you have to live up to your obligations as a sovereign state to control your territory, and on the other hand we do not take sovereignty seriously. Whenever we want to we just set up an international tribunal that sits over your head and reaches down and fixes what we think might be wrong with your system of justice.

I apologize if this sounds really too abstract, but I think we are missing the big picture by focusing on fee-splitting.

Thank you.

[The prepared statement of Mr. Rabkin follows:]

PREPARED STATEMENT OF JEREMY RABKIN, PROFESSOR, DEPARTMENT OF GOVERNMENT, CORNELL UNIVERSITY

Thank you for inviting me to testify on this matter. I should say at the outset that I have never had any official connection with international tribunals nor with American government policy toward these tribunals. I cannot even claim to have followed the operations of these tribunals in any great detail. My knowledge of their workings comes largely from what has appeared in public media. My sole claim to comment here is that, as a university professor, I have devoted a good deal of time

to studying the history and theory of international law and I hope I can, on this basis,bring a somewhat wider perspective to the committee's inquiry.

I do understand that a congressional hearing cannot be an academic seminar. I want to talk about the general theory of international justice, but to show that this is really worth the committee's time, let me start by noting three obvious, practical problems with these tribunals which enthusiasts for international justice are sometimes prone to forget.

First, then, if there are international criminal tribunals, there will be constant risk of their asserting jurisdiction over Americans, including American military servicemen and policy making officials. We did not have this problem at Nuremberg in 1945, because the tribunal in that case was established by the occupying powers in Germany and, in the exercise of these powers, expressly limited the tribunal's jurisdiction to Axis criminals.

When we negotiated the establishment of a war crimes tribunal for the former Yugoslavia, however, we agreed that its jurisdiction would extend to all war crimes committed in the region—including those by NATO forces. And after the air war over Kosovo, we indeed witnessed the spectacle of the prosecutor cross-examining top NATO officials to determine whether their choice of bombing targets constituted a "war crime," as Amnesty International and other advocacy groups had charged. There was no indictment in this case, but the question is whether we want international prosecutors looking over the shoulder of American decision makers in future wars. It is hard for us to urge international tribunals for others while resisting their application to our own people.

Second, the existence of these tribunals can complicate our diplomacy. In the mid-1990s, when attention was focused on the conflict in Bosnia, the United States (and our European allies) negotiated extensively with Serb President Milosevic and these negotiations produced the Dayton Accords which brought some measure of peace to Bosnia. I don't mean to endorse that negotiation or its results but merely to remind you that it is hard to negotiate with someone when he is under indictment. The fact is that Milosevic was later indicted for crimes already well known at the time of the Dayton negotiations. If we wanted to negotiate with him then, we had reason to be glad that the war crimes prosecutor had not yet targeted Milosevic. But it is clearly a great difficulty to leave the decision about prosecution to an independent, international bureaucrat, with no responsibility for larger stakes in the region.

The third and most important practical point is that each tribunal risks becoming a precedent for the next. In Yugoslavia, the tribunal was imposed by the Security Council in the midst of an ongoing war, in which some of the participants were already independent states and the underlying ethnic conflicts threatened to spill over into other states in the region. In retrospect, the Hague tribunal does not seem to have been effective in limiting the ongoing conflict. But it was at least plausible, at the outset, to think the mission of the tribunal had something to do with international peace.

Only a year later, however, the Security Council established a second tribunal for Rwanda—where there was no serious threat to international peace, because the regime that perpetrated such horrifying genocidal murders had already been overthrown (without help, by the way, from the United Nations or the "international community"). And then the UN became involved in drawing up plans for new tribunals in Sierra Leone and Cambodia—again where there was no comparable danger of international conflict.

After several ad hoc tribunals were established (or planned), advocates insisted there must be a permanent criminal tribunal, so a UN sponsored conference in 1998 launched plans for such an institution—the International Criminal Court. It has much wider authority than anything we had contemplated at the outset and no real connection to international peace. It is simply there to assure justice for the world, at least regarding the worst crimes. Its prosecutor is not accountable to any political authority and its charter gives it the right to act, even where national authorities have acquitted the accused in a prior trial or provided a pardon or amnesty. It is quite an extraordinary institution, but Europeans seem to be quite enthused it. And they can't see why the United States, having supported previous ventures in international justice, should now object to this one.

So let me now turn to general principles. The international tribunals established in the 1990s were a sharp departure from the practice that prevailed for several centuries. I can't pretend that any one deviation from this practice—or from the doctrines behind it—must always have terrible results. But we really should think more carefully about our general principles before getting engaged in detailed negotiations over new tribunals—including a reformed ICC.

First, then, legal justice can't simply be reduced to punishing the guilty. If it could be, we could save ourselves a lot of time and trouble and simply organize assassina-

tion squads to execute those who deserve capital punishment. I don't say this lightly. We have all seen movies in which victims of some atrocity track down the guilty party and exact revenge on their own—and a good screen writer can always make us cheer for the revenge. We have all heard that Israeli intelligence tracked down all those responsible for the killing of Israeli athletes at the 1972 Munich Olympics and left their corpses in hotel rooms across Europe. I don't even say such acts of retaliation always deserve moral condemnation. We might think of them as necessary evils or acts of war. But we don't sanction them in public and we don't call them legal justice.

Who, then, is authorized to impose legal justice, in the sense of criminal liability? Before the 1990s, it was almost universally conceded that only sovereign states can impose criminal justice. And one reason is that only a sovereign state has the requisite legal institutions and wields the necessary force to ensure that criminal justice is enforced in a reliably systematic way. We would have chaos if everyone could take justice into his own hands and we would have lots of injustice, not only because mistakes would be made, but because justice would tend to fall on the weak while the strong escaped.

This points to one of the central problems with international tribunals. They do not have force to ensure anything like reliable enforcement. This was not the case in Nuremberg (or in simultaneous war crimes trials in Tokyo) where the homeland of the evil-doers was entirely occupied and controlled by the prosecuting powers, who were, in fact, exercising sovereign powers over their defeated enemies. But it is notorious that in Yugoslavia, the NATO powers, even while on the ground in Bosnia, did very little to apprehend suspects wanted by the tribunal in the Hague. And why? Because they did not want to risk their own troops in firefights with armed criminals, because they were not, in fact, committed to governing this territory fully and directly. The Rwanda tribunal has had a seemingly opposite problem, stemming from the same cause—the perpetrators are all in custody but the tribunal has not had the resources to mount trials for more than a few of them because the same outside powers which created the tribunal do not care enough (or do not trust the tribunal sufficiently) to give it the necessary resources to administer full-scale justice.

So, international tribunals are bound to be exercises in symbolism rather than systematic justice. They will mount what are, in effect, show trials where one famous figure is meant to symbolize the evil done by others, since it is too much trouble or too dangerous to pursue those others, case by case. Prosecutors will be continually distracted by concerns about publicity and attention and scoring points, since their own legitimacy is so much more tenuous than that of a normal domestic prosecutor. They will have many of the problems associated with our "special prosecutors"—who tend to become too special. Their incentive is to go after the most famous rather than the most guilty.

For somewhat related reasons, international criminal justice risks violating principles underlying the procedural norms of legal justice. Even when standards of criminal liability are spelled out in some detail in statutes, they derive much of their meaning and moral authority from the practices and expectations of the particular community where they apply. That is why, in our system, the accused has the right to a jury trial—so the jury may reflect the expectations and understandings of the relevant community. The Sixth Amendment guarantees the right to a jury drawn from the same state and district in which the crime occurred—on the assumption that the local perspective is highly relevant to the fair understanding of the crime or to understanding the actual facts of the particular case. I don't say our system is the only valid approach. But international justice goes to the opposite extreme—purporting to apply the expectations and understandings, not of a particular community, but of the world at large. And in the case of the Yugoslav tribunal, to apply them retroactively.

Perhaps the underlying problem can be seen most clearly, however, if we focus on the alternate face of prosecutorial power—the power to pardon. So let me elaborate this point at some length and apply it to our experience in Yugoslavia.

Every constitutional state makes provision for a pardon power in its criminal justice system. This is a frankly political prerogative, which is why it is vested in our elected president and in parliamentary systems, vested in an accountable political minister, such as the Home Secretary in Britain. Neither the ad hoc tribunals for Yugoslavia and Rwanda, nor the proposed International Criminal Court, makes any provision for a pardon power. In fact, they all are designed to circumvent pardons or amnesties that might be accorded by national authorities. The international tribunals can't have a pardon power because they must pretend that they are altogether aloof from political considerations.

But this is the heart of the matter. Legal justice is not and cannot be altogether aloof from political considerations. What we mean by legal justice is what a political community is prepared to enforce. And a political community has to concern itself with more than mere justice in the individual case. A normal government has to enforce its laws to show that they really are law and that a reliable government stands behind them. But a normal government must also concern itself with conditions of peace and order, as well as justice. So there must be some authoritative means for reconciling justice—in the moral sense—with other demands on the community.

Stated abstractly, this may sound rather crass. But it is not a matter of cynical realpolitik. You find exactly this argument in *The Federalist No. 74*, where Hamilton notes that both "humanity and good policy . . . dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." He then cites, as one example, the consideration that "in seasons of insurrection or rebellion, a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth."

If you think Alexander Hamilton is too tainted with realpolitik, let me cite the authority of Heinrich Rommen, who explains in his sober, neo-Thomist study, *The State in Catholic Thought* (1945) that "the object of political authority is . . . the common good" and the "right of pardon and amnesty therefore belongs to political authority." So he says it "is an unmistakable token . . . of true statehood [even among 'the members of a federation'] that their highest executives retain the right of pardon."

American history offers striking illustrations of the principle. After the Civil War, for example, almost all Confederate officers and leaders were pardoned. This included officers accused of ordering the massacre of black troops in the Union army, rather than allowing them to be taken prisoners—a horrifying aspect of Confederate policy, for which President Lincoln had rightly threatened the death penalty during the war. Perhaps the subsequent amnesty was too lenient. But we would have been rightly outraged at the suggestion that outside powers or some international authority could improve on what our own government had determined to do. At any rate, the same thing was done in almost every new democracy emerging from communist oppression or military rule—or from racial apartheid—in the past two decades. Everywhere, new democracies were launched with general amnesties, as a way of securing support from supporters of the previous government and allowing the new government to make a fresh start.

In Yugoslavia, however, we have done the opposite. Milosevic was overthrown and a new democracy established. We had every reason to encourage the new democracy. As it happens, the new leaders were prepared to conduct their own trial of Milosevic. Unlike other dictators, he did not give way voluntarily in a negotiated transition so there were no promises made to him of amnesty. But western countries—including ours—insisted that Milosevic must be tried in the Hague.

We brushed aside the fact that Serbia's own constitutional court held this was improper. We brushed aside the fact that Serbia's newly elected president, Vojislav Kostunica, the man who unseated Milosevic, a former constitutional law professor (and translator of *The Federalist Papers* into Serbo-Croatian), held the extradition to be improper. In fact, opponents of extradition were not just making excuses. Serbia, like Germany and Italy, has a long-standing law against extraditing its own nationals to foreign courts. In the summer of 1914, Serbia tried to accommodate Austrian demands following the assassination of Arch-duke Ferdinand, but one of the few demands Serbia felt bound to refuse was the extradition of suspects in the assassination plot. Serbia risked—and got—a world war, rather than give up on this principle. We brushed this aside, too, if we even bothered to notice it.

The new democracy in Serbia has not collapsed, so we have not paid the worst price—yet. But surely we are not helping the new democracy by insisting that Serbia's former president be tried by foreigners in a distant location. Rather, we give credibility to the charge that the new government is simply a pawn of NATO, owing its very existence not to a people's movement in Serbia but to outside force. Meanwhile, for all our insistence on trying Milosevic in the Hague, we have let others, with perhaps more blood on their hands, continue to roam freely in Bosnia. Milosevic is our symbol.

But for whose benefit do we make this symbolic prosecution? It is hard to see any way in which this symbol strengthens prospects for peace and democracy in the Balkans. Rather, we seem most concerned to strengthen the prestige of the court in the Hague. Why is that a greater priority than working for future stability in the Balkans?

We do not pressure Saudi Arabia to extradite Idi Amin, the butcher of Uganda. We do not press the French to extradite former Haitian dictator Jean-Claude

Duvalier. We are content to let many other former leaders live out comfortable retirements. Perhaps this is callous. Or perhaps it is prudent. But our very different approach in Yugoslavia suggests that the mere existence of an international tribunal makes us think that international justice, in that case, must trump every other consideration—even if it is very partial justice which does little to secure peace and future respect for justice, where we should be trying to strengthen a new democracy.

Even putting the matter in terms of democracy may be a bit too pious—or a bit too optimistic. We are now in the midst of a global effort to crush international terror networks. In that effort, we emphasize to every state that it must act as a responsible state—it must assert control of its own territory and be responsible for those who plan or launch terrorist operations from that territory. We cannot possibly establish a global police force to inspect every state. We must rely on actual governments. In this context, more than ever, we need to strengthen the sense of state accountability—that is, in old fashioned terms, the principles of state sovereignty. We do the opposite when we pretend that there is some hovering presence that will assure international justice through international institutions.

We can, of course, strengthen international cooperation in the fight against terrorism—and other crimes—through extradition treaties. We can provide assistance to developing states which do not have well developed judicial systems. But it is one thing to provide assistance and quite another to take over the role of the state in question. International institutions have no more obvious role in supplanting national courts than they do in supplanting national police. Everyone seems to recognize the difficulty in inserting outside policing forces into a sovereign state. It seems to me a fundamental misunderstanding to think that inserting international courts is something easier or less threatening. It sends the same message of state incompetence and generates the false expectation that "justice" can be served from above and outside, as something that answers not to local necessities but to international ideals.

And if this is fine for a troubled state, why not for others? I said at the outset that a practical objection to international tribunals is that they risk extending their jurisdiction in ways that threaten the United States. Let me emphasize here that the challenge is one of principle, as well. If we talk ourselves into thinking that these tribunals are quite appropriate for some states, then why not for us? We would be safer—and more honest—if we acknowledged that legal justice necessarily implies a sovereign authority. If a state is thought to be so disordered that it can't administer its own justice, the remedy is not an outside court but a new government. And if no new government can be established, the remedy is colonial control. If we shrink from that, we should not fool ourselves that we have done something genuinely useful or effective by giving powers to international lawyers in the Hague.

Chairman HYDE. Thank you, sir.

Mr. Hammond.

STATEMENT OF LARRY A. HAMMOND, ATTORNEY AT LAW, OSBORN MALEDON, P.A.

Mr. HAMMOND. Thank you, Mr. Chairman, and Members of the Committee.

I believe, as do others, that there is cause for serious concern about the operation of the existing tribunals at both The Hague and Rwanda, and I share Mr. Lantos' concern that what we learn with these tribunals will inform and indeed may not inform decisions with respect to the ICC.

In the few moments I have, rather than repeating my remarks from my prepared statement, I would ask to focus on one very small but terribly important issue, and that is the role of the prosecutor in these tribunals. I would like to focus particularly on the role of the prosecutor at the ICTY.

Chairman Hyde, several years ago you were the proponent of legislation that is now the law in this land that governs the conduct of Federal prosecutors. It is known by your name, the Hyde Amendment. It is an important piece of legislation in this country because what it tells Federal prosecutors in our system is that they

must indict with care, and that they must be prepared to provide the information necessary so that the accused can have a fair trial.

Your remarks in support of that legislation are eloquent, and I think they apply in full force, and maybe even in greater force with respect to the activities of these tribunals.

I would ask us all to consider and to look with care at what is happening in the prosecutions, particularly the prosecutions at the ICTY. I am pleased, particularly pleased to be sitting next to Judge Wald, who I have known for many, many years. I think she has been a bright light on this tribunal at The Hague. But I would ask anyone who wants to study carefully the questions about the operation of these tribunals to read her most recent opinions, opinions that came down shortly before she left.

There is no substitute for getting down to the details. It is critically important when asking the question, do these tribunals do justice, which, Mr. Chairman, you said is their goal, to find out what actually happens in the trials. One reading Judge Wald's opinions in which she reversed three convictions and acquitted, she and her panel of five judges, three gentlemen who had been convicted and sentenced to very long terms, one cannot help but have grave concerns about whether information necessary to the defense in these cases is being produced in a timely and appropriate manner.

I will not go into detail on that, but I would urge anyone who is interested in this question to read those opinions and ask yourselves how is it possible that the evidence that results in the acquittals of gentlemen convicted of crimes that would put them in prison for up to 25 years became known and available only after their trials—a haunting, and I would suggest to you a most difficult question.

I would also invite us to look at some of the indictments that have come down from this tribunal. I am particularly disturbed about the indictment of Croatian General Gotovina. I would ask that people read that indictment and see for themselves what is there. That indictment involves events that occurred right at the end of this war, at a time when that part of western Croatia was awash in American military personnel, American political personnel, journalists from around the world; and what we have is an indictment that charges a general with conduct that is flatly contrary to, entirely inconsistent with published reports from American sources.

You need only do one thing: Take the Gotovina indictment, read it, and then read Richard Holbrooke's book which covers the same events occurring at the same time, and ask yourself how is it possible that the tribunal at The Hague through its prosecutor has indicted a general and has accused him of forcefully deporting, forcefully displacing 150,000 to 200,000 Serbians from the Krajina region, at the same time that there are witnesses galore to that conduct? How is it possible that this indictment can say that there was a massive artillery attack on the city of Knin at a time when American and journalists from around the world were there?

One would expect that a responsible prosecutor before handing down any indictment, and if it were an indictment in this country, I guarantee you the Department of Justice would have looked very

carefully at this question of what evidence do you have that these events actually occurred.

We have a biography written by Frances Hartman, the Press Secretary at *The Hague*, in which she describes events occurring at that same time in a much, much different way than this indictment does.

This causes me great anxiety and I hope it causes anxiety for others who want to answer the question, is this tribunal doing justice? Are the people who are brought before that tribunal getting the kind of fair trial that we all believe they deserve?

Thank you.

[The prepared statement of Mr. Hammond follows:]

PREPARED STATEMENT OF LARRY A. HAMMOND, ATTORNEY AT LAW, OSBORN MALEDON, P.A.

I am grateful to the Committee for affording me this opportunity to appear and to provide my observations about the operation of the International Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). I wish that I could open my remarks with a glowing endorsement of the workings of these Tribunals. Sadly, I cannot. Anyone who cares about assuring basic due process and fairness must be concerned about recent events involving the trial and appellate chambers of these Tribunals. For the reasons I will summarize briefly in this testimony, there is cause for concern that the rights of those charged with crimes have been subordinated to the larger political objective of gaining convictions and maintaining cooperative relations with Governments affected by the Tribunals. At a time when there is growing international concern about the establishment of criminal tribunals to address acts of terrorism and wrongdoing, there is heightened need to assure that these tribunals command respect of nations like the United States that are committed to fair trials and due process of law. There is reason for concern that to date these existing Tribunals have fallen short of fulfilling this goal.

Before summarizing these concerns, I will briefly provide to the Committee my background as it might be relevant to the issues discussed here. In 1993, I was invited to serve on an American Bar Association Task Force engaged in an effort to recommend rules to govern the prosecutions that might be brought at the Hague. Several members of the Task Force expressed concerns about basic due process issues arising from the anticipated structure and the proposed rules that would govern the ICTY. While some changes were embraced by the ABA and the State Department in commenting on the proposed rules, most of these concerns were not. I believe that I was asked to join the Task Force because of my experience during the Carter Administration at the Justice department. From 1977 to 1980, I served as Deputy Assistant Attorney General in the Office of Legal Counsel under Attorneys General Griffin Bell and Benjamin Civiletti. During the last year of the Carter Administration I worked on matters in connection with the Iranian Hostage Task Force. The absence of any international criminal tribunal to prosecute the hostage-takers in Tehran was an always-present reality in dealing with that crisis—a reality that caused me (and many others at that time) to hope for the creation of an international criminal court.

Since leaving Justice, I have remained a believer in the creation of an international criminal court. I am a criminal defense lawyer, but nothing in my professional experience has caused me to doubt the importance of such courts. It has always been evident to me, however, that central to any system of ordered criminal justice is the institution of aggressive, honorable and independent prosecutors and judges who truly regard themselves as independent and free to apply the law without political concern. Much of what disturbs me about the operation of the ICTY and ICTR concerns the roles and responsibilities of judges and prosecutors. As a young lawyer I was honored to work for Archibald Cox and the Watergate Special Prosecution Force. That experience informs many of my opinions about the seminal importance of independent judges and prosecutors in assuring that doing justice is more important than gaining convictions.

It is also of overarching importance that prosecutors and judges retain an independence from each other. This structural separation inheres in our Constitutional system and is often taken for granted. The same is not the case in many countries that employ the Civil Law tradition. I have had occasion to work with the Lawyers Committee for Human Rights on a project that gave me exposure to the Turkish

judicial system—a system very much within the Civil Law tradition. The close alliance of judge and prosecutor we observed in Turkey is reflective of the structures of both the ICTY and ICTR. That alliance accounts for much of what disturbs me about these Tribunals.

Let me begin with the role of the Tribunals themselves. While all of us like to think that courts are created to see that justice is done in specific cases, it was evident from the creation of the Hague Tribunal that it would be seen as having a different purpose. Recall that the ICTY was established under Chapter VII of the United Nations Charter as an "enforcement measure" to restore peace in the former Yugoslavia. The Security Council had made a specific finding that violations of international humanitarian law had constituted a "threat to peace" in the region. From the beginning, then, the ICTY was established to carry out a specific political purpose: to restore peace. This purpose is evident. Note the official name of the Tribunal: "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." There may be nothing wrong with the purpose, but it is not one that should guide a court that exists to assure just trials. There is no hint of any presumption of innocence, or of the possibility that persons brought before the Tribunal might not be "responsible for serious violations" of law.

This is not to say that the judges and prosecutors serving these Tribunals are indifferent to questions of due process, but in reality there exists an always present pressure to gain convictions. To a great extent these Tribunals are subjected to pressure to convict—a pressure that is fueled by the presumption evident in virtually every pronouncement of the present Chief Prosecutor. This prosecutorial and judicial attitude is predictable given the history and funding for these Tribunals. Both the ICTY and the ICTR must annually seek funding from the United Nations General Assembly. As anyone familiar with the process of fundraising will know, increased funding is very much related to whether the project for which funding is sought will be successful. Again, it is difficult to imagine that the ICTY could successfully obtain a budget increase by convincing the General Assembly that it was successfully acquitting people brought before the Tribunal. Indeed, the opposite is true: the arguments made in recent years to the General Assembly often focus on the "success" of the Tribunal in apprehending and convicting those accused by the Prosecutor of war crimes. In addition, the two ad hoc tribunals bear the burden of being the precursors to the ICC. The success or failure of the ICTY and ICTR could have a great impact on the establishment of the ICC. Acquittals would not have the effect of creating momentum for the establishment of a permanent court.

Apart from questions of funding, these Tribunals are subject to pressures from the countries and political factions they must count on for the development of evidence. Because the tribunals do not have a police force, an intelligence service, or an ability to gain immediate and unfettered access to the territory they are investigating, the ICTY and ICTR are very much dependent upon the cooperation of governments and international institutions. For example, the tribunals have no ability to make arrests, gather intelligence data, or secure a crime site for investigation. Without the cooperation of NATO and countries from the region, the ICTY and ICTR would be unable to fulfill their mandates.

These pressures understandably cause the Tribunals to want to protect witnesses secured through the cooperation of affected governments—often at the expense of the right of the accused to confront his accuser. This was a problem foreseen by members of the ABA Task Force. Rules that allow witnesses to testify anonymously, and procedures that permit the prosecution to withhold information that might allow the accused's attorneys to investigate the credibility of key witnesses, were implanted in the structure of the courts from the outset, and the results have been as one might expect—disturbing. For example, in the *Tadic* case, the first case before either tribunal, the ICTY Trial Chamber allowed the prosecution to call witnesses whose true identities were withheld not only from the public, but from the defendant and his attorneys. Only later was it discovered that two anonymous witnesses against Mr. Tadic had lied about their identities to the Trial Chamber and in fact had been coached by the secret services of the Bosnian government.

In the *Kordic* trial, public criticism of the slow pace of most trials at the ICTY led the Trial Chamber to allow the prosecution to script its questions with its witnesses on direct examination. Furthermore, the prosecution was allowed to lead its witnesses by asking a series of "yes or no" questions. In the case of *Prosecutor* v. *Furundzija*, most of the testimony in the case (including that of accusing witness) was held in closed session and outside of public scrutiny. To this day, none of the testimony that is relevant to Mr. Furundzija's guilt or innocence is available to the public.

Perhaps the clearest example of political pressure influencing the ad hoc tribunals is the *Barayagwiza* case before the ICTR. In that case, the defendant had been held for three years without charge. Finally, defense counsel filed a motion seeking the release of the accused on the basis that his right to a speedy trial without delay had been violated. The Appeals Chamber of the ICTR (which is the same Appeals Chamber for both ad hoc tribunals), after hearing the arguments, granted the defense motion and ordered that the accused be released. In so doing, the Appeals Chamber held that "nothing short of the credibility of the tribunal is at stake, and to allow these proceedings to continue would amount to a travesty of justice." Because the Appeals Chamber is the highest authority at either Tribunal, this decision was final and no further appeal could be taken.

Immediately, however, politics intruded into the work of the Appeals Chamber. The government of Rwanda, which sought Barayagwiza's conviction, immediately protested and declared that it would no longer cooperate with the ICTR. Indeed, Rwanda denied visas to all members of the Office of the Prosecutor, which made it impossible for the Prosecutor to conduct investigations in Rwanda or to prepare for trial. In short, without Rwanda's cooperation, the work of the ICTR would come to a halt.

The Prosecutor, despite the fact that the decisions of the Appeals Chamber are final, brought a motion on the basis that she had "new evidence" which would cause the Appeals Chamber to reconsider. In reality, this was nothing more than an excuse so that the Appeals Chamber, in light of the political firestorm that had resulted, could reverse itself. Ms. Del Ponte made no secret that this was her real motive, and she made this clear in her argument to the Appeals Chamber. *The Washington Post* reported her comments as follows:

> "Whether we like it or not, we must come to terms with the reality that our ability to continue our investigations depends on Rwanda," she told the five-judge panel. Without the help of the country where the genocide occurred and so many witnesses reside, "we might as well open the doors to the prison."

"It is my hope," she said in closing, "that Barayagwiza will not be the one to decide the fate of this tribunal. . . ."

No secret was made of the fact that political considerations, and not necessarily the law and due process, required that the Appeals Chamber reverse itself.

Surprisingly, this view was not only espoused by the Prosecutor, but by the Chief Judge of the ICTR herself. In an article that appeared in *The Washington Post* on March 10, 2000, Judge Navanathem Pillay made perfectly clear the point that I too wish to make: due process rights of the accused are often viewed as secondary to the political considerations surrounding the Tribunals. Judge Pillay admits that "public opinion" influences the work of the ICTR, and that due process rights do not necessarily fit into the political purpose of the ICTR (and presumably the ICTY). After hearing the arguments, the Appeals Chamber reversed itself and ordered that Mr. Barayagwiza continue to be held in custody for trial before the ICTR. It seems that the political considerations discussed by Carla Del Ponte and Judge Pillay did take priority over the due process rights of the accused.

Let me pause here to make clear the essence of my concern. I would not advocate that persons accused of serious crimes be released on what the world community might see as technicalities. My concern goes to the fundamental roles and responsibilities of judges and prosecutors. Unless principles of evenhanded justice are seen to animate the decisions of these Tribunals, they will be stripped of the moral authority necessary to successfully prosecute and convict the guilty.

Some might wish to claim that the Barayagwiza case is not reflective of the true nature of these Tribunals. A signal test of whether these international Tribunals will place due process above the goal of getting and upholding convictions is unfolding this year before the ICTY in the appeal of a Bosnian Croat General named Tihomir Blaskic. This appeal deserves close attention. General Blaskic was tried in an extraordinarily lengthy trial of a series of war crimes. The case against him rested on the belief that he enjoyed command responsibility over forces in the field that committed atrocities against civilians and non-combatants. The most celebrated of the charges involved the deaths of approximately 100 Bosnian Muslim civilians in the village of Ahmici during a raid in April, 1993. He was convicted based on assertions that he controlled these events. He received a 45-year sentence. The defense sought to prove that in fact the military General had no command authority over those who committed these unlawful acts. At trial he was unsuccessful. His case is now on appeal.

Stunningly, however, the Prosecutor withheld exculpatory evidence in the *Blaskic* case and is using the same evidence to proceed with the prosecution of another man named Dario Kordic. Mr. Kordic was prosecuted for his role in the same massacre

under a theory that Bosnian operatives under his control—and reporting directly to the highest levels of the Government of then President Franjo Tudjman—carried out the crimes. Evidence developed by the prosecution in the *Kordic* case was not provided to the defense in the *Blaskic* case. That evidence revealed decisionmaking chains of command that bypassed Blaskic and may well have been unknown to him. It is difficult not to conclude that Prosecutors deliberately concealed evidence in order to win a conviction over Mr. Blaskic.

Whatever mystery may have surrounded this seemingly inconsistent set of prosecutions was exposed to public scrutiny in the Spring of 2000 when Franjo Tudjman died and previously secret and now famous archives were found in the basement of the Croatian intelligence services. This is not the time to go into the emerging details of these files, except to say that they cast serious doubt on the theory of the ICTY's prosecution of General Blaskic. What is most disturbing from a due process standpoint is the question why every shred of information and evidence in the hands of the prosecutors that might relate to this issue was not freely disclosed before, during or after the trial of General Blaskic. While the archives may have been unknown before early 2000, it now appears that much was known by the prosecutors and was regarded as reliable—indeed, reliable enough to be used as evidence in the *Kordic* case. The *Blaskic* appeal deserves close attention by those who wish to assess whether our international Tribunals are capable of dispensing justice.

Another case recently indicted by the ICTY—this one involving alleged war crimes said to have occurred at the end of the war in Croatia—also deserves close attention. The ICTY Prosecutor has indicted General Ante Gotovina in connection with crimes alleged to have been committed by Croatian military forces against Serbian civilian populations in the Krajina region. In the last days before the ceasefire that led to the Dayton Conference, the Croatian Military engaged in an offensive known as Operation Storm. As with the case of General Blaskic, serious questions remain with respect to whether the acts alleged were in fact undertaken with General Gotovina's knowledge and authorization, but of even greater interest are questions with respect to whether the events in question were part of a military operation undertaken with the cooperation and knowledge of the United States.

One need only read two documents to see the uncomfortable questions: (1) the indictment of General Gotovina, and (2) the memoir of Richard Holbrooke, entitled *To End A War*. If it is true that the General is a war criminal, it may well also be true that our Government is complicitous. Even if not complicitous, it is absolutely clear that our Government and our military and intelligence personnel in the Krajina region in August of 1995 have information relevant to the case—and possibly critically important to the General's defense. Journalist Roy Gutman's *Newsweek* article from August 27 of last year lays bare much of this apparently delicate problem. The disturbing article, entitled *What Did the CIA Know*, catalogues the close engagement of U.S. military and political resources in the Croatian offensive (copy attached.) The question this information raises is much like the question that should have surfaced in the *Blaskic* trial. How far is the prosecution and the ICTY willing to go to see to it that the accused has access to information so that he may defend himself? I cannot begin to predict whether the United States Government would turn over intelligence information if it were demanded—as it should be—but if information and witnesses from the United States military and diplomatic establishment are not made available there should be no prosecution. The pressures discussed above make one wonder whether the ICTY will have the courage to say that the rights of the accused should dominate over the political goal of obtaining convictions.

The name of the Chairman of this International Relations Committee is associated with one of the most important recent enactments designed to govern the conduct of prosecutors in the American federal prosecutorial system. The Hyde Amendment, enacted in 1997, is designed to assure that federal prosecutions are "substantially justified"—that is, that individuals are not indicted and pushed through our judicial system unless a careful evaluation has first been undertaken by an independent prosecutor. This A mendment, which authorizes an award of attorneys fees to the accused in cases of meritless prosecution, is supported by strongly worded remarks from Congressman Hyde. He asked questions that might with equal justification be asked of those who would prosecute war crimes before the ICTY and the ICTR. Is there a potential that prosecutors will "keep information from you that the law says you must disclose?" Will prosecutors be tempted to "hide . . . exculpatory information to which you are entitled?" Is it possible that a prosecutor may "wrench somebody out of their job and their home and put them on trial as a criminal" in a case that lacks substantial justification?

Again, the Gotovina indictment affords what may be suitable and distressing examples of the need to ask similar questions about ICTY prosecutorial decisions.

Paragraph 20 of the Gotovina indictment charges that the General is responsible for a "large-scale deportation"—a "forced displacement"—of an "estimated 150,000–200,000 Krajina Serbs." Amazingly, that very charge is contradicted by the Prosecutors' own spokeswoman, Florence Hartman. Ms. Hartman published a book in 1999 in which she wrote that Milosevic, not Croatia, ethnically cleansed the area in question: "It was Belgrade that evacuated the Serbs from Krajina and led them to Banja Luka and northern Bosnia. This was done so that Belgrade could later justify holding on to these Bosnian territories during future peace negotiations over Bosnia and Herzegovina."

One might argue that a prosecutor is not bound by the public statements of her official spokesperson, but my concern is that such blatant inconsistencies evidence a lack of prosecutorial care and attention to accuracy. The Gotovina indictment affords a second example. The last paragraph of the indictment (Paragraph 44) alleges that "Croatian forces [said to be under the command of General Gotovina] directed a massive artillery assault on Knin" (the city described by the Serbs as their "capital"). Where did this accusation come from? At least three American journalists who were in the region on the day of the supposed "massive artillery assault" saw no evidence of one. It is a reasonably safe assumption that had there been such an assault the destructive effects would have been evident. It may be even safer to conclude that no investigator or prosecutor from the Hague visited Knin to assess artillery damage. A federal prosecutor in the United States, mindful of the Hyde Amendment, would surely not bring charges of this portent without careful evaluation. A prosecutor acting on behalf of an international tribunal can operate on no lower standard of justification.

The recent history of the cases like the *Gotovina, Blaskic* and *Barayagwiza* cases suggests that, indeed, proceedings that disserve due process can happen at the Hague and in Rwanda. Unless a fair trial—one in which the accused is given full access to all information in the hands of the prosecution or within his grasp—is assured, there will be little cause to support this Tribunal and even less cause to place confidence in the International Criminal Court yet to come into existence. The world and the United States need these courts. They perform critical roles, but they cannot be embraced and respected unless they exist as a first priority to secure justice, rather than to secure convictions.

I have read and considered the recent appellate decisions authored by former Court of Appeals for the D.C. Circuit Judge Pat Wald in her capacity as a member of the ICTY. These opinions, especially the case handed down in October of 2001 known as *Prosecutor* v. *Kupreskic, et al*, deserve careful attention. Judge Wald is plainly a judge who appreciates the seminal importance of due process and full disclosure. Readers of her opinions will be struck by her respect for fairness when, for example, her opinion urges "extreme caution when assessing witness' identification of the accused made under difficult circumstances." At a time in the United States when the cause of wrongful conviction seems often to surround faulty eye-witness identification, it is comforting to see that at least one appellate Tribunal at the Hague appreciates the dangers of witness testimony that has not been subjected to full examination. These rulings are cause both for optimism and concern. Optimism, because they reflect a maturing Court coming to recognize that there may be something more important than convictions. Concern, because Judge Wald has concluded her two-year term and will no longer be there to check the prosecutors and the judges less inclined to withstand public criticism. Judge Wald's remarkable appellate handiwork also calls to mind one of the fundamental deficiencies in the structure of these Tribunals. The absence of a separate and independent appellate court remains a serious shortcoming. It is unrealistic to believe that many judges who must interact and cooperate with their trial and appellate judicial colleagues on a daily basis would have the courage displayed by Judge Wald to reject and reverse their colleagues in the Trial Chamber. Several members of the ABA Task Force urged that this obvious flaw be remedied. I am sorry that the argument did not prevail. We would have had a better court, one in which the accused could have greater confidence that errors at trial would genuinely receive evenhanded appellate review.

Plainly, the two Tribunals now in existence are at a crossroads. Their performances to date can be most fairly characterized as mixed. How they perform in the near term will inform our judgments about whether the International Criminal Court concept is one achievable in conformance with American principles of fairness. A first step would be the establishment of a principle of full disclosure and full cooperation in gathering relevant evidence. Whether that evidence is already in the hands of the Tribunal—as some of it apparently was in the *Blastic* case—or in the hands of cooperating Governments—as it apparently is in the *Gotovina* case—the watchword of these Tribunals should be that every effort will be expended to make

sure that all facts are known to the accused. Due process and a fair trial requires nothing less.

CONCLUDING OBSERVATION

Much of what the world hears about these tribunals is wrapped up in the highly visible, and sure to be long-running, trial of Slobodan Milosevic. The daily reports of the savagely disrespectful and inappropriate behavior of Mr. Milosevic deserve sharp rebuke from the world community. But if the ICTY is to merit the respect denied it by this defendant, it must establish by example that it is above politics and exists truly to see only that justice is done. Experience over the early years of these Tribunals, in my judgment, leaves open the question whether international courts, and those who serve them as judges and prosecutors, have the will to take the steps and make the sometimes unpopular choices required when justice and due process, rather than convictions, are the overarching goals.

Chairman HYDE. Thank you very much.

Judge Wald.

STATEMENT OF THE HONORABLE PATRICIA M. WALD, JUDGE, INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, 1999–2001; U.S. COURT OF APPEALS FOR DC CIRCUIT, 1979–1999; CHIEF JUDGE, 1986–1991

Judge WALD. Thank you, Chairman Hyde.

I would like to just make my remarks informally, knowing that my written testimony will be incorporated into the record and would just dwell on a few points that have been raised by the previous witnesses, if I may.

I do want to point out that among the ICTY's achievements, I cannot speak with any knowledge about the Rwandan tribunal because I have not been a part of it, nor indeed have I visited it.

But I would point out that the figures of 91 indicted, 31 tried, 14 appeals completed, 29 either in trial or awaiting trial are not insubstantial considering that this was a new tribunal and no trials occurred for the first 3 years.

I also want to point out that many of them are high level military and civil leaders. Two were the Presidents of the autonomous Serb Republic, the third, of course, was President Karadzic, and we do not have Milosevic yet, but at the next level the ICTY has made substantial in-roads in terms of the military generals just below Milosevic and the civic leaders who participated, allegedly, in these horrible events.

Now, the tribunal, as we all know, was a response to a horrified world which, due to the conscientious efforts of some wonderful journalists, put those horrors virtually in our living room in the years of 1992, 1993. They were referred to by the President of the U.N. as the worst atrocities since World War II, millions expelled from their homes through ethnic cleansing, hundreds of thousands imprisoned in a very near approximation, if not a total equivalent of the concentration camps of World War II, an estimated 50,000 rapes in Bosnia.

But I want to point out that at that point, at that point and certainly for a substantial time afterwards if there was to be any response in terms of legal accountability, there was no place to go except the creation of an ad hoc tribunal.

It is unfortunately true that the governments of the countries involved, that would be Bosnia, that would be Serbia, that would be Croatia, were unwilling or unable, certainly in the case of Bosnia,

to do anything about that. Now, even as recently as 2 weeks ago I was in Bosnia, and we had a conference there about defense counsel who appear both before the ICTY and before national courts to prosecute the war crimes.

The ombudsman for Bosnia who is appointed pursuant to the Dayton Accords made it very clear that the courts of Bosnia are beginning to take over many of these prosecutions, but I read an AP dispatch yesterday that said that 62 of the cases which had come to the prosecutor, the prosecutor had sent back to the Bosnian authorities to be tried in the local Bosnian courts. So some of that is happening now.

But at the time the Bosnia court infrastructure had been almost totally disseminated by the war. I mean, they had lost up to half of all their judges because the Serbian judges went up into the hills with the Serbian forces. The Bosnian judges, some of them stayed. Sarajevo was shelled for several years. There were simply no national courts that could take charge, and I think that may be replicated, not in all countries, but that is why we have to look at these tribunals on a one-to-one basis and see what the need is for them vis-a-vis national courts.

Everyone in this room, I think, is agreed, the optimal solution is for a national jurisdiction, if it is both willing and able to take over the prosecution of its war crimes, should do so. But we must remember that the Croatian government, at least until the change to President Mesic from President Tutsman, as well as the change from Milosevic to the new Serbian government, there certainly was not going to be any war crimes prosecutions undertaken.

Now, one might say, okay, we will wait, I mean, wait it out, as it were. I would just like to raise one example of why I think the world and the United States has progressed beyond that point.

One of the cases that I had sat on during my 2 years there was the massacre at Shrebeneza. The massacre at Shrebeneza involved 25 to 30 thousand Muslim inhabitants of the so-called safe enclave, the U.N. safe enclave in Shrebeneza. The 25 to 30 thousand are really the good part of the story, almost. They were women and children who were just thrown onto buses willy-nilly, and dispatched in quite bad conditions, but fortunately dispatched out of the territory into Muslim-held territory so that they were not killed or badly injured.

But there were seven to eight thousand young Muslim men of military age but predominantly civilians, who were attempting themselves to escape toward Muslim-held territory, who were captured and within 1 week, within 1 week they were executed. Four thousand of those bodies have been exhumed, but in such bad condition that identities can only be made for, I think, several hundred.

And, in fact, this was done within 1 week, and this was about 6 months prior to the Dayton Accords, while preparations were being made for the Dayton Accords to go ahead. As that progress continued, within 2 months the original mass burial graves, which were all up and down this 100 mile territory, were themselves gone back into. All of the bodies were scooped up into trucks, and then they were taken to more remote locations for mass secret burials.

Now, if we were to wait 5, 10 years, it is virtually sure that much, that most evidence would be lost, and many of these crimes would simply not ever be punished in any kind of tribunal.

The second part of that is that many of the witnesses we saw in that particular trial would not have testified in the local courts in the ensuing 5 or 6 years because they were terrified. In some cases there were real threats of retaliation from the villages and the people of opposite viewpoints.

So that I think if we really are serious about the legal accountability for the most serious crimes, and I admit we are not going to be able to try them all, then I think we have to look at each situation, and I am convicted that in the case of the ICTY tribunal it was a very justifiable and perhaps the only way. I think any notion of a truth and reconciliation commission at that point would have been out of the question. The war was still going on. There is a truth and reconciliation commission which is being brought into Bosnia at this time.

Very briefly, I want to just take my second and final point, and that is whether or not in my opinion the trials are fair, whether there is justice being dispensed at the Yugoslavia tribunal.

I have not been a cheerleader for the tribunal. Anybody who has read my decisions and some of the written work knows that, based upon my own 20 years experience in our own Federal system, I have been a critic of certain of the procedures.

However, I will tell you that overall I think that the trials are fair. Now, the fact that I presided over the appeal which exonerated, not exonerated, I am sorry, but which reversed the convictions of three, I make two points on.

One, it certainly was not unique to me. There were five judges on that panel, none of whom disagreed with that. They were from Italy, Malaysia, Colombia, and China.

But the other thing is that I cannot tell you how many times during my 20 years on the DC Circuit I reversed convictions by the trial bench which I think is one of the finest trial benches in the country. I am simply pointing out errors do occur in trials, and I do not think the fact that some errors occurred in this one condemns the entire system.

Obviously, and I am concluding, I cannot go into all of the details of the various cases which have been identified. In fact, my experience as a judge would suggest I would never draw a conclusion about whether a piece of material put out by the ABA Committee here made such a fuss about it, rightly so. There was a good dissent by one of the judges on the tribunal. It has never happened again to my knowledge.

The second point I would like to make is the secret evidence. A survey by the victim and witnesses unit, which handles all of the witnesses at the ICTY, and I can make this available to the Committee staff if you wish, shows that only 1 percent of almost a thousand witnesses who have come to The Hague since 1997 or 1998, 1 percent have been heard in closed session. And closed session means that a video tape is kept of the proceedings, but the press and the public are not allowed to see that.

Now, it does not mean it is secret forever. The court, the same court or another panel of the court can subsequently lift that. In

fact, I have been involved in proceedings where we did lift the veil off of prior secret proceedings.

So I think it would be unfair to go away with an impression that there is a wide, wide scale of secret hearings held.

As far as the prosecution withholding evidence from the defense, again, I would not venture to conclude on any one basis. I would say that in my experience with 2-year-long trials, which were run by American prosecutors secunded from our own Justice Department, who had long records in the Justice Department, one as a 10-year public defender in California, I saw no evidence of such.

And I will just point out that, yes, there is a lot of new evidence that comes in after trial is completed because the Croatian government is just now opening up its archives which were closed to both sides for years and years and years. And so you are getting lots of new evidence which comes in later, and which the appeals court has a rule allowing to come into the record. That happened in the Kupreskic case and was one of the examples.

We were satisfied, the panel in the Kupreskic case was satisfied that that evidence, which did help us to change our mind, was unavailable at the time of trial.

I think I will conclude there.

[The prepared statement of Judge Wald follows:]

PREPARED STATEMENT OF THE HONORABLE PATRICIA M. WALD, JUDGE, INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, 1999–2001; U.S. COURT OF APPEALS FOR DC CIRCUIT, 1979–1999; CHIEF JUDGE, 1986–1991

INTRODUCTION

Chairman Hyde, Congressman Lantos, Committee Members, thank you for inviting me to testify at your hearing on the UN Tribunals for Yugoslavia and Rawanda. I returned a few months ago from two years service on the International Criminal Tribunal for the Former Yugoslavia (ICTY) after twenty years on the U.S. Court of Appeals for the District of Columbia. I am not personally familiar with the operations of the Rawandan Tribunal. The Yugoslav Tribunal has been in existence for almost nine years and I believe its history and accomplishments are a worthy subject for informational hearings. I am pleased to share my observations on the Tribunal's successes and problems, and to offer recommendations for improvement.

THE ACCOMPLISHMENTS OF THE ICTY

The ICTY was established by a United Nations Security Council Resolution in 1993, as a 14-member court on which no country could have more than one judge. The judges are nominated by their respective countries for four-year terms and elections made by the U.N. General Assembly. Subsequent amendments to the ICTY Statute have enlarged the court to 16 members and provided a corps of 27 *ad litem* judges who come to the Hague for one or two trials but do not enjoy all the privileges of full-time judges. The mandate of the Tribunal is to prosecute and try individuals for war crimes, crimes against humanity and genocides (as defined in the Statute) committed on the territory of the former Yugoslavia since 1991. Indictments are brought by the Prosecutor who is chosen by the Security Council. The Tribunal is authorized to impose prison sentences up to life but not the death penalty; those sentences are served within the prison systems of several nations with whom the Tribunal has formal arrangements. The Tribunal has no police force of its own and must depend on the cooperation of States (and SFOR) for arrests, access to documents, and compulsory production of witnesses. The Statute mandates such cooperation from all States but in practice cooperation is not always forthcoming. The Tribunal is organized into three trial Chambers and an Appeal Chamber which also hears appeals from the Rawandan Tribunal, (ICTR) located in Tanzania. Judges sit in trial panels of three on individual cases. The Statute provides for an independent Office of the Prosecutor (OTP) and a Registry to provide logistic support for the Tribunal, *i.e.* filing, translation, defense services, press and public rela-

tions, legal assistance and security. The ICTY currently has over 1,000 employees and a budget of over 100 million dollars annually.

What has the Tribunal accomplished in its nine years? It has indicted 91 defendants publicly (there are an unpublicized number of secret indictments), completed the trials of 31 of whom 29 have been convicted or plead guilty and 2 acquitted), completed the appeals of 14 of whom 11 are either serving or about to serve prison sentences (3 defendants' convictions were reversed on appeal). 11 defendants are currently in trial and 18 in pretrial proceedings. The majority of these in trial or awaiting trial are in detention at the Hague and a few are on provisional release to their home States.

Of course the bare statistics do not tell the whole story. Apart from former Yugoslav President Slobodan Milosevic, now on trial, several other high-ranking military and civic leaders accused of war crimes or crimes against humanity committed during the 1991–95 conflicts involving Slovenia, Bosnia, Croatia, Serbia and later Kosovo have been apprehended or voluntarily surrendered to the Tribunal. These include General Radislav Krstic Commander of the Drina Corp. who has been found guilty of genocide in the Srebenica massacres of up to 8,000 young Muslim men in one week in 1995, Croatian General Tihomir Blaskic found guilty of the dawn massacre of the village of Ahmici in which 100 Muslim inhabitants were slaughtered and their homes destroyed, General Galic who allegedly oversaw the shelling of civilians in Sarajevo, and numerous mayors and police chiefs of cities and villages in Bosnia who planned or implemented the expulsion of unwelcome ethnic groups from the territory and the imprisonment of thousands of civilians in inhumane conditions in the so-called "collection centers" that sprang up throughout Bosnia in 1992. It is unfortunately true that two of the most notorious indictees, President Radovan Karadzic of Republica Serbska, the Bosnia Serb Republic and Ratko Mladic former Commander of the Bosnia Serb army, remain at large, but it is nonetheless difficult to deny that a significant number of the civic and military leaders in the conflict—on all sides—who are accused of committing or permitting those under their supervision to commit crimes against the laws of war, humanity, and genocide have been brought to the Hague to stand trial. Even critics of the Tribunal would, I believe, admit that a strong signal has been sent that national leaders may not with impunity violate the laws of war and the rights of innocent civilians and not undergo the risk of substantial punishment. Except for the Nuremberg and Tokyo Tribunals in the brief period immediately following World War II and a few scattered national court prosecutions for war crimes in the interim 50 years, that risk was not present before.

I am however, aware of the position of some critics of the international tribunals that the task of bringing war criminals to justice is better left to the individual states from which the perpetrators come or where they may be apprehended under ordinary laws of international jurisdiction.

Actually there is widespread agreement among international commentators and criminal practitioners that whenever local courts can and will conscientiously undertake the task, war crime perpetrators should ordinarily be tried in national court. Indeed the ICTY itself contemplates such a scenario as it winds down and is currently investigating when and under what conditions some of its current caseload might be devolved onto State courts. And the Rome Statute creating the permanent International Criminal Court (ICC) is built around a principle that its jurisdiction is secondary in most instances, triggered only if the relevant State courts cannot or will not assume responsibility for the prosecutions. As you undoubtedly know, the OTP at the ICTY already operates under the so-called Rules of the Road whereby the prosecutor may send potential ICTY cases to the States rather than pursue them in the Tribunal itself. It is true that as originally established the ICTY could take a case which fell in its jurisdiction away from a national court and it did so once. But to my knowledge that has not again happened.

The crux of the matter however is that often the relevant States are not capable of pursuing their war criminals during or immediately after wars or internal conflicts. Their own judicial infrastructure has frequently been so damaged in terms of resources, personnel and facilities that there is no possibility they can prosecute major war crimes in the immediate future. This was certainly true of Bosnia at the time the ICTY was established and to a degree it is still true. War crime prosecutions, especially against top leaders who have planned or executed countrywide strategies of abuse, are enormously complex, expensive and time consuming. Many of the ICTY prosecutions, such as the Srebenica genocide, followed five year field investigations in which hundreds of witnesses had to be interviewed, thousands of documents seized or accessed, and exhumations of mass burial sites conducted and the scattered body parts of thousands of victims collected, analyzed, and identifications attempted. There was no way Bosnian authorities in the mid-nineties—or even

now—could conduct major endeavors on this scale. And yet if these investigations had to wait until the recuperating war torn countries had the facilities to undertake them, potential witnesses and documents would likely be lost and graves vandalized or robbed.

In the cases of other Balkan countries, most exhibited no desire to pursue war crimes until their internal politics changed, several years after the ICTY began operations. In many of those countries, war criminals indicted at the Hague were still "homeland heroes". I was in Sarajevo two weeks ago at a conference dealing with the training of counsel who practice before both the ICTY and domestic courts in war crime trials. There the Ombudsman for the Federation of Bosnia/Herzegovina, appointed pursuant to the Dayton Accords, said publicly that the Federation simply did not yet have the resources or the substantive law in place, nor even the fundamentals of legal education to take over the job of prosecuting the bulk of war crimes. Bosnia as well as other countries in the region have to pass new laws to define war crimes in their national codes and to provide for the protection of victim-witnesses; they have to train prosecutors and defense counsel to perform new functions in investigating and prosecuting novel theories of criminal responsibility. Some war crimes are in fact being prosecuted already in a few courts in the Federation but the national system cannot take over the bulk of the Hague-type prosecutions for at least several more years—and then it will need an infusion of resources to do an adequate job. A report on the situation in Republica Serbska (the Bosnian Serb region) similarly predicts a 2-year minimum before prosecutors and courts can take over any sizeable number of prosecutions and adds that political ambivalence toward such prosecutions is still a fact of life in that region. Croatia under its new government has begun some important war crime prosecutions, but this has been a development only of the past year or so. There are numerous estimates of how many potential war crime prosecutions are involved in the Bosnian and Kosovo conflicts; they range from 20,000 to 50,000. Assuredly neither the international courts nor the domestic ones can handle all or even most of them in the near future, if ever. And that may be one of the sad legacies of any war. But the Bosnian situation indicates that a realistic look must be taken at the particular situation in each country that has been involved in an international or internal conflict to assess its capability to pursue justice for victims of war crimes before relegating all war crime prosecutions to its national courts. In some cases that would be the equivalent of denying accountability altogether to the gravest violations of international humanitarian law. I recognize that war crime tribunals are not the only answer or necessarily the best one in every situation—truth and reconciliation commissions have played a valuable role in countries in the transition from war and tyranny to peace and democracy; and hybrid international/national tribunals have proved useful in others. My point is that there are many situations where a war torn country cannot pursue accountability for war criminals through its own system in the aftermath of war and some form of international war crimes tribunal may be the only realistic alternative. I am satisfied that this was the case when the ICTY was set up. After listening to hundreds of witnesses who suffered hideous assaults on their bodies, minds and souls yet found the courage to come to the Hague to testify against their accused violators, I cannot imagine that the bulk of them would have testified willingly in their local courts which in many cases were located in villages and towns still populated and in some areas dominated by forces sympathetic to the alleged wrongdoers rather than to their victims. I am convinced the ICTY filled a critical void in that respect, that no national courts were prepared or able to fill.

Having said this, I must agree however with those commentators who say that international criminal tribunals should concentrate on the so-called "big fish", the military and civic leaders who planned, initiated and were in charge of executing the major campaigns and strategies that violated laws of war and humanity—the generals who approved shellings of civilians, who oversaw executions of civilians and prisoners of war, who set up the terrible detention camps, who expelled ethnic groups from territories or towns they captured. The mid-level and lower level individuals who participated in war crimes—soldiers, guards, aides—should be for the most part handled in national courts, even if that involves unfortunate delay. In that sense, I agree that too many of these mid-level violators may have been indicted by the ICTY. Historically this is understandable because in the early years of the Tribunal, the major war criminals in the Balkan conflict had not been apprehended or surrendered. When they finally did begin to come under ICTY custody, the pipeline was to a degree already filled with the earlier indictments of less prominent war criminals. Conditions were quite different at Nuremberg a half century ago—captured Nazi leaders were already in custody—the main trials were over in about a year and up to a thousand lesser violators were tried subsequently and separately in single judge trials by the four Allied Command members in their own tri-

bunals. I think so far as future ad hoc international criminal tribunals are concerned, more thought should be given at the inception to achieving a goal of trying a realistic number of the most serious offenders within a finite number of years, after which the national courts (or a permanent ICC) would take over. Perhaps, as suggested by Ambassador Prosper in an earlier speech, guidelines as to which types of indictees should be included in the category of serious offenders designed for the international tribunal could be agreed upon between the drafters of Tribunal statutes and the prosecutors from the start.

I will allude only briefly to some other accomplishments of the Tribunal. Foremost is the development of vital concepts of international law such as whether an international conflict is necessary to the invocation of certain provisions of the Hague and Geneva Conventions, what are included in war crimes, what can be identified as the "customary" law of war, what constitutes genocide and many more issues which had heretofore been discussed only in treatises and among diplomats. We all know from our domestic experience how often it is essential that a statute be interpreted by courts in order to apply its provisions legitimately to a variety of different factual situations. The same is true for international law: for example until the Tribunals appeared in the scene, the Genocide Convention drafted in 1948 (ratified by the United States in the mid-eighties) had been interpreted only by a few national courts, not always consistently. It required interpretation to apply its provisions to situations like the ethnic cleansing campaigns in the Balkan wars. The ICTY (along with the ICTR) has produced a substantial corpus of coherent international law on war crimes and crimes against humanity as well as genocide—something that a few random decisions in national courts could not. It is only by accretion of case law interpreting ambiguous parts of treaties or "customary law" that coherent, consistent and predictable norms of law are established that can govern the future behavior of leaders in war time. A second example of its contribution in this regard is the Tribunals' pathbreaking decisions as to the status of rapes, sexual violence, and sexual enslavement as crimes of war and crimes against humanity when committed in the context of a widespread campaign against civilians. An estimated 50,000 rapes were committed in wartime Bosnia, as part of a campaign of terrorism against civilians or inside the prison camps. For the first time in history an entire war crimes prosecution at the ICTY was devoted to crimes against women. From my reading of the international journals, the commentators generally agree that the advent of the Tribunal has ushered in a giant step forward in the elucidation and clarification of what international law means and requires in time of war.

The Tribunal has also pioneered in the creation of procedural rules for an international court composed of judges who speak different languages and come from different legal cultures. This is a difficult task and I do not suggest the ICTY has achieved final success in this area. The Rules of Procedure and Evidence reflect a mix between the common law adversarial mode of trial with which we are familiar in this country and the civil law inquisitorial mode practiced on the European continent. The mix of those two modes at trial is a hard task to pull off and entails trial and error—the ICTY's Rules have been amended many times since 1994. Nonetheless, they represent a substantial starting point for future courts, ad hoc or permanent. I suggest some form of international criminal court will be around for some time to come, and it is unlikely that any one country's system will be adopted exclusively, but rather that parts of one system will have to be melded with parts of another. Although those of us from a particular country are most comfortable with our own procedures, as judges on an international court, we must always ask the basic question: are the courts' procedures basically fair and conducive to a legitimate trial even if they do not represent my own preference. Although I have many problems with the ICTY Rules, I can still answer the basic question in the affirmative. Defendants are guaranteed under Article 20 of the ICTY Statute virtually the full panoply of rights included in the International Covenant of Political and Civil Rights: the trials are public (though they may be closed for testimony implicating a State's security or for extreme cases of danger to a witness); the defendant receives notice of charges in his own language and the right to counsel, a right not to incriminate himself, and advance receipt of more of the prosecution's evidence than is provided in our own Federal Rules of Criminal Procedure, also a right to present his own witnesses and evidence and a right to appeal. In my experience, the judges with whom I have sat have been impartial and thoroughly independent. As a side comment, I would venture to say that the internal criminal rules of some national courts in the region I have visited are far less in accord with our notions of due process, and, were I or someone close to me to be brought before a court outside the United States, I would prefer the ICTY to some of those I have seen in the region. The proceedings of the ICTY are televised for public consumption in the Balkans so that its transparency throughout the region is assured.

The Tribunal has also produced a protocol for witnesses who are in danger of retaliation in their home territories that allows them to testify with some comfort; it includes a special Victim Witnesses Unit that arranges their travel and lodging in the Hague, sometimes escorts them there personally, provides in appropriate cases for pseudonyms, voice and face distortion onto and in extreme cases for closing the proceedings. Over 1,000 witnesses have come to the Hague, almost half of whom would not do so without some protection or assistance, and could not have been forced to because of the absence of binding subpoena power on the part of the Tribunal. This witness protocol is being adopted in several national systems for the first time to implement their own war crime prosecutions.

PROBLEM AREAS AT THE TRIBUNAL

While I have few doubts about the fairness of the trials at the ICTY, there are significant problem areas. Trials have taken too long, averaging over a year and some taking two years or more. The Tribunal's President and judges are acutely aware of the problem and have taken steps to shorten trial time; these include a pretrial phase in which the pretrial judge attempts to streamline the issues that must be tried, sees if concessions or admissions can be made or types of proof agreed upon that do not require live witness testimony. New powers have been given to the judges in the Rules to insist on a limit to the number of witnesses and the length of their testimony. The addition of the ad litem judges means that 6 trials can be held simultaneously, two each day in the three courtrooms available. All this should help cut down trial time.

Some of the length of trials is due to special problems inherent in an international court. The translation into 3 languages of all proceedings, especially witness direct and cross-examination, probably lengthens normal trial time up to 50%. Thus, a prosecutor will ask a witness a question in English (or maybe French). That question must be translated into Serbo-Croat for the witness to answer. The answer in turn must be translated back into English and French for the judges to hear, for the prosecutor to continue his line of questioning or for the defense attorney to engage in cross-examination. There are sometimes disputes over the translations and in trials with hundreds of witnesses the process inevitably takes time that cannot be reduced. Witnesses often come from far away and since they cannot be forced to appear schedules must be adjusted to some degree to their convenience. The sheer volume of evidence necessary to document movements of hundreds of people over many months and the paucity in some cases of written documentation means a large number of fact and expert witnesses must be heard.

Nonetheless, I believe that certain structural changes could increase the speed of trials:

1. Assignments of judges are now made to chambers rather than to cases from a central calendar. That means in some cases, as happened to me in my first few months at the Tribunal, a newly arrived judge has nothing to do until the other two judges in her chamber finish prior judgments. More fundamentally in future Tribunals, thought might be given as to whether three trial judges must sit on all cases; there is of course no jury and the continental practice is to have one professional judge and two lay judges. But candidly having three professional judges sitting every day for a year on a trial struck me as a questionable use of judicial resources. I recognize that for perception reasons it may be unwise to have a single judge from one country decide alone the fate of a high profile leader of another country, but there may be intermediary ways in which one judge can take testimony upon which all three will decide the case, as magistrates often do in our federal courts, or some defendants might agree to a single judge trial for quicker scheduling. The Control Council No. 10 order that authorized the hundreds of trials of mid-level Nazis after the main Nuremberg trial used single judges.

2. I also think that assigning legal assistants directly to the judges rather than to the Chambers as they now are, would facilitate decision-making. Legal assistants are organized in a somewhat bureaucratic fashion under a chief legal officer, answerable ultimately only to the presiding judge of the chambers, who parcels out research and drafting assignments. I believe decisions could be accelerated if one or more of the judges were given the responsibility of producing draft decisions and the legal assistants were assigned directly to individual judges. In general, I thought there were too many interns and legal assistants coming and going, the direct usefulness of whose work in the final judgment sometimes eluded me. I am comparing the experience to my D.C. Circuit experience where law clerks work directly for the judges and are selected and evaluated by them with no bureaucratic intermediary.

3. The Tribunals have three separate organs—the Office of the Prosecutor (OTP), the Court, and the Registry which basically services the court and the prosecutor. In our federal system, of course, the Administrative Office of the U.S. Courts works directly for and under the federal judiciary. The independence of the Registry at the ICTY to which the court must make all requests for support makes it more difficult for the court to get what it needs when it needs it, be it translators, supplies, priority services; they must be negotiated for. There is a coordinating committee on which all three branches sit, but I still find it anomalous that the court and the administrative arm serving the court are on a par with one another. In general, it seemed to me that while some parts of the Registry were understaffed, i.e., the Victim Witnesses Unit, others such as the security service which basically guards only the courthouse building were overstaffed. Were the judges to have a stronger say in the allocation of personnel and resources I suspect the Registry could be slimmed down considerably and the overall costs of the Tribunal which represent a major component of all non-peacekeeping costs of the UN could be reduced. The unhappiness of the UN with the expenses of the Tribunal is well known; it has reportedly refused to consider any more ad hoc tribunals that replicate the ICTY model. Therefore, revised and more economical structures are important factors to consider if more ad hoc Tribunals are created.

4. In contrast, defense counsel are in need of more attention. Many are not trained in the techniques of cross-examination used in ICTY proceedings or even in the Rules used in the courtroom. This engenders delay. The facilities for their work at the Tribunal are minimal—most are away from their offices and need access to computers, copiers, faxes, libraries. The norms of ethical behavior and the disciplinary mechanisms for ethical violations have been sketchy until recently; since defense counsel come from many different legal systems they do not bring a common set of ethics or legal practices to their work. Rigorous and independent counsel are essential to a fair trial, and the morale, integrity and efficiency of the defense counsel at the ICTY need to be given more attention.

5. I have said publicly in the past, and repeat, that in assigning presiding judges in complex trials, attention should be paid to the judges familiarity with and experience in the courtroom. I do not undervalue the contribution of international law scholars to the Tribunal's work, but a complex trial is primarily given over to the day-to-day decisions on the admissibility of evidence, the legitimacy of witness questions, the objections of opposing counsel etc. A judge with trial management skills and experiences can move a trial faster and more efficiently than one without that training and, frankly, with a prospect of fewer errors that could cause reversal on appeal. I am pleased to note the new ICC requires a majority of judges to have criminal procedure experience of some kind.

CONCLUSION

You will note that these observations pertain mainly to the efficiency not to the fairness of the ICTY proceedings. In the main, I was impressed during my two years with the integrity of the judges and their devotion to a fair result and with the idealism and dedication of many staff members. I have little doubt that the Tribunal will find its rightful place in history for its pioneering steps in translating international norms of war and humanity into enforceable tenets of accountability, in developing and clarifying amorphous doctrines of international law, and in conducting fair trials for those responsible for some of the worst abuses of human rights since World War II.

Thank you for this opportunity to present my views.

Chairman HYDE. Thank you very much.

Mr. Lantos.

Mr. LANTOS. Thank you, Mr. Chairman. Let me thank all three witnesses.

Unlike the three of you, I am not a lawyer, which allows me to ask some very naive questions. I find your argument, Mr. Hammond, specifying a flawed indictment singularly unimpressive. If in fact I would have a dime for every flawed indictment in our own judicial system, I would be a very wealthy man, and the fact that you can point to a flawed indictment is just a fact of life. I mean, it is regrettable. Every time there is a flawed indictment it is re-

grettable. It does not address the issue of what do you do when horrendous crimes are committed and the national judicial authorities are either nonexistent or the political situation is such that they are incapable of bringing these criminals to justice. That is the issue we are dealing with.

I could not care less how many flawed indictments you can point to in this country, abroad, or by the international tribunal. That is a non-relevant item.

I also must say, Professor Rabkin, that while I enjoyed your presentation very much and I would like to take a course with you. Let me just say I am sure that the criticism of international criminal tribunals, much of it is justified.

You went back 500 years to find a precedent. I do not believe in progress in all fields, but one of the great steps forward that I have noticed in recent years is that human rights has trumped sovereignty. Hitler's gas chambers were functioning within the national jurisdiction of the Third Reich, but Nurenberg demonstrated that there is a higher authority than the sovereignty of Nazi Germany, and I suspect the Nurenberg trials did a very useful job.

So the notion that at long last mankind has evolved to the point where human rights trump sovereignty, that you cannot just gas Kurdish women because you do not like Kurds. You cannot just torture and eliminate Romas because you do not like Romas; that there is an international voice which comes in and expresses itself in a judicial context, I find extremely heartening and a sign of major progress.

Now, I was very much impressed, Judge Wald, as I have been over the many years that I have followed your work, with your testimony, and I think you hinted at several places in your observations what to me is the fundamental item here.

National jurisdictions in many situations of this kind are either unwilling or unable to render justice. Under those circumstances the culprits either go free or there is some international mechanism that brings them to justice. I would be the first one to admit that clearly there are flaws. This is a new science. This is a new mechanism. Any international mechanism by its very nature is profoundly flawed.

But what is the alternative? What is the alternative if you know the Balkins as well as I do?

There is no local judge, there is no local prosecutor who will have the guts to prosecute mass murders because his family will be killed. So what do you do with the mass murderers? Do you just say too bad, you go free, or do you find a Judge Wald in The Hague and see to it that some justice is done?

I think you need to address the fundamental question which I do not believe the two of you gentlemen have done. What do you do when horrendous crimes are committed and the national justice system is nonexistent, incapable, intimidated, terrified, incompetent, you name it? What do you do then?

And do not talk to me about flawed indictments. I stipulate there are flawed indictments. I am dealing with a generic issue. What do you do with mass murderers? What do you do with mass rapists? What do you do with the things that we discover in Yugoslavia every day, the mass graves? Do you tell the local prosecutor to go

after that? His wife and his daughter will be killed within 24 hours.

That is the issue you need to address; not one single flawed indictment. I would be delighted to have any of you react.

Chairman HYDE. If I could, because we are at the end of our hearings and my friend has asked such a provocative question, the ultimate provocative question, I would add to your interrogatory, at the same time guaranteed due process of law to the defendants and help them, immunize them from the hysteria that might well surround their being put on trial.

It is one thing to say you are a war criminal and you need a forum to be tried, but there is another aspect of that same problem that says due process of law. You have a right, you are innocent until you are proven guilty. You have a right to confront your witnesses. You have a right to subpoena people. Or do we just sweep that aside because we lack the institutions to do it, and we say you're going to go on trial before this establishment, which may or may not know a thing about constitutional rights as we understand them in America? A very complicated question.

But in any event I would love to hear your answers to Mr. Lantos' questions. Shall we start with you, Mr. Rabkin?

Mr. RABKIN. If you want to go that way. Let me just say a couple of quick things.

You are right, I rest my case. [Laughter.]

You are right on this one point, which is there are circumstances in which national governments will not do justice on their own. I do not quite understand why we are focusing all of this on the Balkins. The national government which has killed more people than any other in history probably is the government of China.

President Bush just went there. He is exchanging pleasantries with them. He is shaking their hands. We are saying that it not actually the people there right this minute who have done this, but it is the people who arranged for the people who are there now to be in power. What are we going to do about that?

I think the honest answer is nothing. Okay?

Now let's look next door at Russia. Let us look at all the former Soviet Union. We did not insist that there had to be justice even though there were horrendous, horrendous atrocities, and I am not saying we were right in China and we were right in the USSR to ignore this. I am just saying we should first admit that your challenge is not quite so devastating as it sounds because the truth is we have learned to live with hair-raising injustice in other places because we do not run the world. Okay? That is the first thing.

The second thing is if you ask what can we do about it, well, I think sending in lawyers is not really one of the great contributions. One of the things we have not really got into focus about Rwanda is we allowed nearly a million people there to be slaughtered. Judge Wald mentioned Shrebeneza. What happened there? There were thousands of people slaughtered. Why? Because the U.N. said this is a safe harbor, come on here and we will protect you. And then when these people were attacked, the Dutch troops said, oh, sorry, we are busy, we do not want to take any risks. Right?

What you ought to be putting in focus is yes or no, are we willing to use force, because when you reach into a country and say we are going to try your leaders, for 500 years people have understood that to be an act of war. And we are now saying no, it is not an act of war, and we do not actually want to have war because we do not actually want to use force, we just want to kind of make a gesture.

What we actually have done in Rwanda is to protect the perpetrators of the genocide. We did nothing to stop the genocide, and afterward what we have effectively done is rushed in there to protect the people who did it. Okay? We have nothing to be proud of there.

It may be true that there are a number of cases in Yugoslavia where we can feel satisfaction that somebody who really deserved to be punished is going to be punished, and it may well be true, I do want to admit this, it may well be true that some of those people would not have been punished otherwise. But the fact is, and it is a very important fact, we are not even waiting to sift through this and find out. We are saying we are in it, we are having fun, we are satisfying ourselves, and so let us keep going.

And the most sensational trial of all is the one that is just starting now against Milosevic, and there it just is not true that we know he would not have been tried. As a matter of fact, we had a lot of reasons to think he would have been tried because the people who came to power came to power by overthrowing him, and they represented a lot of people in Serbia who were very angry at him. So we hear over and over again from Judge Wald and Ambassador Prosper and everybody else in this, of course want to have cooperation, of course this is a joint thing, but it turns out to be a cooperative and a joint thing in which the outsiders are in the driver's seat. The outsiders follow their own agenda. And their own agenda mostly is making themselves look good.

There is no way around that if you bring outsiders into it. All I am saying, and I think it is a serious point, we should take a deep breath and say how much do we want to let this loose in the world, the idea that outsiders can come in, not through a war, not taking full responsibility for the territory, which is what we did in Germany and in Nurenberg. I mean, that is different. We were running the country. We were the sovereigns of the country. We said so on the first day of the trial, we are in charge. That is why we are doing this trial. If you do not like it, too bad. You surrendered unconditionally. We are now in charge.

What we are doing in Yugoslavia is totally different. It is saying we are going to sit on the sidelines. We are not actually going to protect the people who go to Shrebeneza. We are not actually going to take responsibility for what happens in Kosovo, even when we have troops on the ground. We are going to be a little lean and a little loud, and anyway sovereignty is not serious because it is compatible with being a little lean and a little loud.

Do we want a world which is organized in that way? I think if we say yes, we are happy with the world organized in that way, two things follow: One is this cannot go on much longer without people saying why is not American accountable just like everyone else, so there is going to be more momentum to try Americans, and

that is trouble, and it is particularly trouble when we are trying to fight a war by our own standards and not by the standards of people in Europe. That is one.

And the second thing is it is going to hurt a lot of small countries. Some of them may deserve to be hurt. Some of them do not deserve to be hurt. And I am not saying this to appeal to you. I am saying it because it is one of my concerns. Israel is going to be one of those countries.

If you look at humanity, if you look at the U.N. when they get together to do justice, they go to South Africa and they organize a Nurenberg rally, and everybody stands up and says let us talk about international racism. There is one practitioner up in the entire world that we need to focus on, it is Israel, Israel, Israel.

It is not a good thing to let loose into the world this doctrine that everybody is responsible for everybody else, and whoever is strong enough just sets up a tribunal and goes and tries whoever he wants to. That is a very dangerous thing for the world, and I think the United States ought to be using its influence to say, wait a minute, hold on a minute. The norm ought to be every country is responsible for itself. And if there are exceptions, we want to articulate very carefully what they are, which we have not done, I do not think, in Rwanda or in Yugoslavia.

Chairman HYDE. Mr. Hammond.

Mr. HAMMOND. Thank you. Mr. Lantos, I will be brief and direct.

My point was not that there is one flawed indictment. My point is that in order for a tribunal like this one to gain and deserve the respect of the world community it must be one that gets down to the details of doing justice, of providing due process of law, of taking extraordinary care.

My concern is that there is example after example after example of situations in which that is not happening. I said in my remarks, and I will stand by them, I am not an opponent of the ICTY. I was not an opponent of it when I served on the ABA task force. I am not an opponent of it now. I am not an opponent of an international criminal court in concept.

What I am an opponent of is an organization that is designed to convict, that does not care when someone is wrongfully charged. Let me give you one example from this country, a very quick one.

You undoubtedly know about the Department of Justice's Office of Special Investigations, OSI, an office that for many years deserved tremendous respect in this country for the prosecutors and what they did. And as you may well remember, they made the decision to advocate the deportation of a man known as Ivan the Terrible so that he could be tried for tremendous war crimes at Trablinka. He was supposed to be the killer of Trablinka. Remember him?

We deported him to Israel. We did not turn over, OSI did not turn over information in its possession showing that in fact he might not be Ivan the Terrible but an entirely different Ivan. He went to trial in Israel and was eventually acquitted.

My point is this: What has happened to the respect of OSI? A court of appeals in this country at the same level of Judge Wald's court, the Sixth Circuit, has handed down a blistering opinion saying the work of those prosecutors does not deserve the respect of

our country, and I believe that is true. And what has happened is that some very good prosecutors, very good men working on important projects have had their respect, the respect that we need if we are going to do these jobs, tarnished. And I believe the same thing will happen to this tribunal.

When evidence is withheld, as it has been in some of these cases, when prosecutors hand down indictments that if they did any kind of reasonable investigation they would know are without merit, we have a problem. We cannot just pretend that there is due process of law. We must look at it carefully, and we must ask ourselves are we really doing all we can. And my thesis is we are far from that.

Chairman HYDE. Judge Wald.

Judge WALD. A few remarks. Professor Rabkin, certainly the ad hoc tribunals have been criticized for the so-called selectivity. I mean, you pick out this particular conflict and do it, and then—why did you not do one there. There is no easy answer to that. Even his preferred solution of military intervention is always going to be a selective decision made upon big basic global policy grounds that I am not equipped to second guess. Do we send the military expedition into this country and not that country?

I will say on the concept of a criminal court, an international criminal court, I am not expert in the details, even the details of why we are not backing one. But the concept of one would in some ways diminish that particular criticism, because it would be drawing upon whatever charges came from all around the world rather than making a decision to go and set up a tribunal in one place rather than another.

I do want to refer to your particular concern, Chairman Hyde, on due process, and tell you that when I first got over to the tribunal after my experience in the Federal courts here a lot of things did surprise me. There are differences in the rules of both the tribunals from those of the Federal rules of criminal procedure under which we operate here.

But I think that if we are ever to be involved in any of these international courts, tribunals of any sort, we must recognize first we are never going to be able to exactly replicate our system. The jury system, while I think extremely highly of it, is not a system which is practiced in most parts of the world. And I think most of us would not say you cannot get justice in France, or Italy, or Germany because they do not have a jury.

I think I came to see, drawing deep down on what I thought were the most basic fundamentals to a fair trial, that I do believe that those are in place in the rules. All the rules basically of the European Convention on human rights, as far as the rights of the accused, not a jury trial, but all kinds of rights to present the defense, to be informed of the charges against you, rights to counsel, guilt beyond a reasonable doubt, rights to appeal, et cetera, are there.

Now, I do think, in answer to Mr. Hammond, that I would give way to nobody in the fact that I griped continually that none of these institutions will work without good people. Our own courts do not work unless we get good people into them, as you legislators are fully aware of your responsibility in part, at least the Senate's responsibility in part, about that.

The same is true over there. There has to be a high level of concern about who the prosecutors are, who the judges are, and who are all of the aids. There is no getting away from that. That to me is the only answer that I know of as to whether a particular indictment is not as good as it should be, the same way as it is in our own country.

Hopefully, with experience, and I think even in the 2 years I was over there, with the griping of people like me, things did get better. People did concentrate, maybe a little bit more, on certain aspects of it. But I think that due process is a term which we must realize. We have to define the most basic parts. We cannot have everyone of our 150 rules of Federal criminal procedure exported in toto.

Chairman HYDE. Well, I agree with you, Judge Wald, but I also wonder what you do with those annoying words, "No person shall be deprived of life, liberty or property without due process of law."

Now, those are wonderful words. They make a promise to every person in the United States. And to leave that to a Syrian court or a Bangladesh interpretation of due process with different culture, different history, different traditions, different everything, I do not know how you reconcile guarantee of due process under our constitution.

Judge WALD. Well, one answer, for one thing, to a certain degree you can never get an absolute guarantee from any risk. Two things: One if an American citizen or even an American serviceman goes to some foreign country and allegedly commits a crime there, okay, he is going to be tried by that foreign government.

Chairman HYDE. Sure.

Judge WALD. And he is going to be tried according to the rights that are given by that foreign government.

I do have to tell you that for 10 years I traveled extensively in that part of the world myself on behalf of the American Bar Association before I went on to the international court, so I have been in many of those national courts. I would tell you that, frankly, were some member of my family to be caught in such a predicament I would much prefer that he or she be tried at The Hague than in several of the other courts that I went to there.

The second thing is due process. We all know it is a term that has evolved and been interpreted many, many ways. We extradite people to foreign lands on occasion. We certainly have the structure in place in our own government to extradite people, American citizens to be tried in foreign countries which have different systems.

So I am just saying that I think that there are traditionally some exceptions to the notion that our down home version of due process, which I still think is the best in the world, make no mistake, simply cannot be replicated in every single circumstance. But we do have the right, we do have the right to demand that the basic elements of fair trial be in any international tribunal which we support.

Chairman HYDE. Very well. I think we can go on on and on. This is an utterly fascinating and consequential issue, and maybe an imminent issue.

But Mr. Smith has asked if he might ask one more question, and so with modest reluctance I recognize Mr. Smith.

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

Judge Wald, let me just ask you a few more questions.

Judge WALD. Surely.

Mr. SMITH OF NEW JERSEY. A few days ago I met with President Kostunica, and pressed him to be more cooperative. Obviously, a condition of the U.S. foreign aid is based on whether he cooperates or does not cooperate with AID. If he does, the money will flow and move his government forward in the direction of democracy. And you pointed out the reluctance of some of the "homeland heros," as you called them in your testimony, to cooperate.

Judge WALD. Yes.

Mr. SMITH OF NEW JERSEY. I think that may still exist in Serbia or Yugoslavia. But he did raise the criticism, as did others. The speaker met with him, and I hear that in Belgrade, some of the defendants in The Hague spent an inordinate amount of time awaiting trial. We know that a speedy trial sometimes is a euphemism, but hopefully there is an effort to do so.

Could you shed some light on that problem? How long are these people waiting?

Judge WALD. Yes. Of all of the criticisms which have been voiced today vis-a-vis "rights of defendants," I honestly think this is the most serious one, and I will tell you what I know about it.

I do not have the exact figures, but my impression and I think it is fairly accurate is that when I left the tribunal in November most defendants who were on trial had been in detention for between 2 and 2½ years. Now, a special case like Milosevic kind of got put up to the head of the line. But the rest of them had been there for approximately that period. In Rwanda, I think it is even longer.

Now, this was a concern of the tribunal, and let me tell you very rapidly what is being done to try to bring that period down, and too why I think inherently trials are going to take longer over there no matter what we do.

First of all, the U.N. did provide for a core of 29 ad litem judges in the last 2 years. Ad litem judges means they just go over there for a couple of trials. They do not get a regular long term, but they are able to sit on the trials, and as you know the trials are done by panels of three judges, so they make up the three judges.

So right now the tribunal could not operate any more trial than it is because there are only three courtrooms, and these courtrooms have to be high-tech courtrooms because you have simultaneously everything going in three languages, Bosnia-Croat, French, and English, including the witnesses, the prosecutors, the judges, et cetera, so that we now have, my understanding is, six trials going, one in the afternoon and one in the morning.

The President of the tribunal, if I remember correctly, believes that or has scheduled it so that anybody who was in detention about the time I left would begin trial or the immediate pretrial period getting ready for the trial within 2002. I hope I have that right, but that is my memory, because everybody is very worried about this.

I have always said I thought there were some things more said publicly. I thought that care ought to be taken, perhaps more care, to assigning experienced managerial trial judges to run complex trials; not to say they may not be fair, but they are going to be

more efficient if you have somebody with that kind of background and experience. I am hoping somebody will pay attention to that.

They have put a lot more emphasis on pretrial management, to bring things down. And the last thing they have done is they have begun to release some defendants provisionally, those that surrendered initially and where the government, and in fact the Serbian government in the case of Mrs. Plafsik, and the Croatian government and some other cases where they will absolutely send their representative to the tribunal and guarantee that these people will be supervised in their home territory and that they will return for trial, so that that practice is beginning to pick up.

Interestingly enough, Madeleine Albright submitted an affidavit in favor of the provisional release of Mrs. Plafsik, who is now provisionally released to Serbia.

There is a certain amount of inherently longer time that it takes for trial for these cases. The translation itself, just what I have emphasized, every word, every direct question, every cross-examination raise the time up to 50 percent. The trials are very complex, and witnesses have to come from a long way.

Mr. SMITH OF NEW JERSEY. Would your idea of plea bargaining, and you pointed out the New York Times article——

Judge WALD. Yes, that is a very interesting question. Everybody thinks probably there is a little plea bargaining going behind the scenes, but there is no regularized system of plea bargaining akin to ours which, as we all know, accounts for 95 plus percent of all of the convictions that take place in the country.

I have said publicly that I thought that in order to reduce the backlog, especially for the mid or lower level defendants, a rational transparent system of plea bargaining might make a great deal of sense to finish things up quickly for some of the less notorious. And I know that we have had some guilty pleas, and you know, evidence would suggest, although I am not in the prosecutor's office, that some bargaining must have taken place in order to bring them about.

I think it is a sensible suggestion. I hope they will give thought to it.

Mr. SMITH OF NEW JERSEY. Thank you.

Chairman HYDE. Mr. Payne, do you have any questions or have we exhausted your curiosity.

Mr. PAYNE. No, I probably have exhausted yours, but I do have a question, and I will keep it within the 5-minute limit.

Mr. LANTOS. Will my friend yield for a unanimous consent?

Mr. PAYNE. I certainly will.

Mr. LANTOS. Mr. Chairman, I ask unanimous consent that the written testimonies of Louise Mushikiwabo, an expert on international criminal tribunal for Rwanda, and David Stoelting, Chair of the International Criminal Law Committee of the American Bar Association, be made part of the record.

[The information referred to follows:]

PREPARED STATEMENT OF LOUISE MUSHIKIWABO

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA SHOULD BE MORE EFFICIENT BUT DESERVES CONTINUED SUPPORT

My name is Louise Mushikiwabo. I was born and raised in Rwanda, where I graduated from the National University of Rwanda's Foreign Languages department. In 1986, I received a scholarship from the University of Delaware to pursue graduate studies in French and Conference Interpretation. After graduation, I moved to the Washington area where I have been working in Public Relations.

As a direct beneficiary of the work of The International Criminal Tribunal for Rwanda, I would like to appeal to you, Mr. Chairman, Members of the Committee, to ensure that the International Criminal Tribunal for Rwanda urgently takes necessary steps to remedy its many shortcomings and fulfill its mandate effectively. From the beginning, the ICTR has been a disappointment to many Rwandans due to its remoteness from the people it is meant to serve, its desperately slow pace despite its huge budget, its lack of expedience concerning genocide masterminds, and, more important for the victims, insensitivity towards their plight.

Despite all of this, however, I feel that the work of ICTR is critical. The time has come for the ICTR to be pressured and reminded of its mandate, and I appeal to your Committee to do so. I am afraid that the ICTR weaknesses that have been observed for six years now might bring Security Council members and other powerful players to ask for the termination of the tribunals' activities, or the enforcement of an uncertain phasing out procedure, leaving many international criminals on the streets of foreign capitals while their victims despair for the justice expected, no matter how little.

In the wake of the shooting down of President Juvenal Habyarimana of Rwanda on April 6th, 1994, members of the Rwanda army and the Hutu militia, the Interahamwe, went on a deadly rampage across the country, slaughtering members of the Tutsi ethnic group and any moderate Hutus who might have sympathized with them. Over the next three months, they murdered somewhere between 800,000 and a million people, including most of my family.

My life was turned upside down. In a country where impunity had allowed a portion of the population to believe that they could get away with murder, I decided to pursue justice for my family, relying on international law. I came from a middle-class Tutsi family with no political ties until 1991, when one of my brothers, a University professor named Lando Ndasingwa, decided to join the pro-democracy movement. Eventually he became the government's Minister of Labor and Social Affairs, and was the only Tutsi in the cabinet when the genocide started. He had been active in trying to facilitate the return of Tutsi refugees living in the Diaspora as well as the recovery of their basic rights. He was always vocal on behalf of equal treatment for the country's minority groups. Thus, I feared that he might be one of the Interahamwe's primary targets. My fear was borne out.

As news reports trickled in that the Interahamwe were hacking people to death with machetes, I feared the worst. I was on the phone day and night with my family. But early in the morning Washington time on April 7, the phone lines to all of my relatives in Rwanda went dead. The following day I read in a wire story that my brother was missing and presumed dead. I was devastated. But what I did not know was that my brother was not the only one I lost.

As best as I have been able to piece together, this is what happened. In the first days of April, my mother went for an extended visit with my brother at the home he shared with his Canadian wife and their two children. The home was located in the Kimihurura neighborhood, not far from a base of the Presidential Guard, the Rwandan military elite unit. Knowing the sensitive position my brother and other moderate politicians were in, the UN Mission in Rwanda had placed armed guards in front of their homes. But, on the morning of April 7, as elements of the Presidential Guard approached, the Ghanaian blue helmets stationed at my brother's house fled. Within the hour, the soldiers entered the house and murdered everyone inside: my brother, his wife, their seventeen year-old daughter, fifteen year-old son, our mother and another nephew who was visiting.

Across town, Rwandan soldiers entered my sister's house and ordered her and her husband to go to the police station for questioning. Belgian UN troops took her children to a near-by school called ETO for safekeeping, where about 3,000 people had sought UN protection. My sister and her husband were subsequently released, and went into hiding with some Hutu neighbors for about a month. Their children, however, would not be so lucky.

The Belgian peacekeepers were ordered to evacuate Rwanda and, on April 11, they left the ETO school, leaving the 3,000 people inside to fend for themselves

against the Interahamwe. As soon as they left, the killers entered the school and immediately targeted my nephew Safari Habimana. With the killers in hot pursuit, my nephew ran toward a nearby house for shelter, but the owner slammed the gate closed and refused to let him in. The Interahamwe hacked him to death on the spot. The 3,000 others who had been hiding in the school fled about two kilometers up Nyanza Hill, but the Interahamwe soldiers soon found and killed them, too, using machetes, sticks, hand grenades, and guns.

Interahamwe soldiers led by the local mayor, also burst into the home of my other brother. He begged them not to kill him with machetes, so they agreed to shoot him, but only if he could pay for the bullets. He did not have much cash on him, so he offered them his refrigerator, an iron, and several other appliances. Satisfied, they led him outside and shot him. His children, who recounted this story to me, managed to escape and hid in nearby farms for several days before the Rwandese Patriotic Front rescued them. His wife, however, got separated from the children during the escape. Her remains were found two years later in a nearby house that was burnt by the Interahamwe. A young man suspected of taking part in my brother's murder managed to escape prison 2 years ago and is living, unbothered, with family in Paris.

A few months after the genocide, the UN Security Council set up the war crimes tribunal (ICTR) to prosecute those responsible for committing the atrocities in Rwanda. It goes without saying that I, and many other Rwandans, had felt betrayed by the United Nations inaction before and during the genocide. Nonetheless, I had high expectations for the International Criminal Tribunal for Rwanda (ICTR). However, I was to be sorely disappointed.

To begin with, the United Nations established the Tribunal not in Rwanda where victims of the genocide could follow proceedings, but across the border in Arusha, Tanzania. Although this was done for security reasons, the remoteness meant that ordinary Rwandans would remain totally unaware of the legal process taking place. To make matters worse, the Tribunal announced that it planned to conduct its trials in English and French, not Kinyarwanda (the language of Rwanda), so that even if Rwandans wanted to follow the trials, they could not. Thus it seemed the ICTR was operating with total disregard for Rwandans by ignoring the importance of our language and culture.

The international community and the media in particular are to blame for their indifference and lack of attention which allowed the ICTR to operate in a dysfunctional manner without being checked, making one step forward and two backwards.

Nonetheless, I was thrilled when, a year after its creation, the ICTR issued its first indictments. Despite the fact that the man who killed my brother and his family was still at large, I hoped that he would be captured soon. However, my fellow Rwandans and I were appalled when we heard about how the accused would be treated in UN custody. At a time when most Rwandans were living in poverty and struggling just to get enough to eat every day, those responsible for the genocide were living in spotlessly clean facilities, were served three meals a day, and had access to telephones, the Internet, and a gym. We also learned that their families were given UN protection. More shocking than anything else was the fact that some detainees in Arusha had access to the latest HIV–AIDS treatment while the surviving raped women back in Rwanda, possibly their victims, had very little medical attention.

Sometime in 1999, ICTR announced that it was going to release Jean-Bosco Barayagwiza, one of the masterminds of the genocide. Apparently the United Nations had violated his rights by holding him in detention for too long before he was able to appear before the court. I could not even dare explain what that meant to many friends and relatives in Rwanda who called and wrote to ask me what was going on. The United Nations had done nothing to protect us from the Interahamwe's deadly rampage, and now it was releasing one of the men responsible for it. For me, Barayagwiza's release held a particular irony because I had successfully sued him in Federal District Court in New York back in May 1994, under the *Alien Tort Claims Act.*

I was able to pursue some form of justice through the American courts, yet a court set up by the United Nations specifically to prosecute war crimes in Rwanda seemed unable to mete out justice. My disappointment with ICTR culminated in the fall of 1998, when I found out that on February 17, 1994, a UN military intelligence officer sent a memorandum to the commander of the troops in Rwanda, General Romeo Dallaire, informing him of a plot to assassinate two prominent Rwandans who had been involved in the peaceful transition of power in 1994. One was Joseph Kavaruganda, then president of the Constitutional Court of Rwanda. The other was Lando Ndasingwa, leader of the Liberal Party, my brother. That meant that the UN mission knew that my brother had been targeted for assassination as early as Feb-

ruary 1994, but did not inform him. And not only that, but when ICTR investigators interviewed my sister and me in January 1996 about our brother's death, they didn't tell us what they knew. We have not heard from them since.

Mr. Chairman, members of the Committee, for seven years now, an ex-Rwandese army officer, Captain Cedeslas Kabera, who murdered my brother and his entire family is still at large, probably in the Democratic Republic of Congo. Although his arrest, along with many other suspected war criminals, is the subject of a State Department's reward program, I appeal to you to exert pressure on the appropriate authorities for his arrest and trial. If for nothing else, the symbolic nature of this man's trial would bring some solace to my family.

It is laudable that the ICTR has established several precedents in international law, which may have implications for courts in Rwanda and elsewhere. It has helped tone down the revisionism of Hutu extremists who still believe that the extermination of Tutsi people from the surface of the earth is a minor offense, if that. It is therefore my sincere hope that the International Criminal Tribunal for Rwanda, under your careful watch, can begin to set standards in the prosecution of crimes as grave as genocide, and send a strong message to world dictators that their barbarism will not be tolerated.

Yes, local justice is very important indeed, and it should be given resources to function properly, but a word of caution is in order: where a genocide is planned and orchestrated by the State against its citizens, local justice would make perpetrators prosecutors and judges in their own trial or simply render fair trials impossible. In the case of Rwanda, luckily, the State machinery that planned the genocide was dismantled and a new judiciary was put in place. An international tribunal that is perceived as independent and out of the control of the State in question is a better tool for justice when it comes to serious violations of humanitarian law . I believe that it is only in the context of an international court with the power of an international arrest warrant that the Kaberas and the Milosevics of this world can be brought to justice.

Thank you Mr. Chairman. Thank you members of the Committee.

PREPARED STATEMENT OF DAVID STOELTING ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is David Stoelting, and this Statement is filed on behalf of the American Bar Association. I am a lawyer in private practice in New York City. I also serve as Chair of the Committee on International Criminal Law, and Co-Chair of the Blue Ribbon Working Group on Terrorism, of the ABA's Section of International Law & Practice.

I thank the Committee and the Chairman for the opportunity to comment on the important issues being addressed in today's Hearing concerning the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") (collectively, the "Tribunals"). My comments support the continuation by the United States Government of its exemplary support for the ICTY and the ICTR.

The American Bar Association, with more than 400,000 members throughout the United States and abroad, has for a decade supported the work of the ICTY and ICTR. Through the Central and East European Law Initiative (CEELI), and its sister organization, the Coalition for International Justice, the ABA assists the Tribunals by documenting war crimes, securing financial and in-kind support, training defense counsel and conducting public outreach programs. In addition, in 1993 and 1995, a Special Task Force of the ABA's Section of International Law & Practice (chaired by former State Department Legal Adviser Monroe Leigh) issued two books on the jurisdiction, structure and functions of the ICTY.

THE RECORD OF THE TRIBUNALS

The remarkable achievements of the Tribunals have greatly exceeded initial expectations. In recent years, the Tribunals' caseload has markedly increased, with many high-level defendants in custody. More than thirty persons have been tried by the ICTY, and eleven persons are currently on trial, including former Yugoslavian President Slobodan Milosevic. The ICTR now has in custody a significant part of the leadership that organized the 1994 Rwandan genocide.

Most importantly, the Tribunals apply strong due process protections for defendants. These protections are set forth in the Tribunals' basic statute and rules of evidence and procedure, which have provided a model for trials of international crimes by national courts and international criminal tribunals, such as the Sierra Leone

Special Court. The sterling integrity of Richard Goldstone, Louise Arbour and Carla del Ponte—the three jurists to have served as Chief Prosecutor since 1993—demonstrate that an international criminal tribunal can function effectively and free from undue political influence.

The many groundbreaking rulings on substantive issues of international criminal law also have been significant. These landmark decisions include rulings on the crime of genocide, the definition of crimes against humanity, the application of war crimes law in internal conflicts, and rape as a war crime and crime against humanity. The Tribunals' respected body of international criminal jurisprudence also has been relied upon by other courts worldwide.

The costs of the Tribunals are reasonable considering the vast scope and enormity of the crimes being prosecuted, and are consistent with the costs of similar large-scale prosecutions of international crimes undertaken by national governments. In recent years, a number of internal reforms have been instituted that further enhance the Tribunals' ability to complete their mission.

AMERICAN PRACTICE AND POLICY SUPPORTS THE ICTY AND ICTR

Bedrock principles of American law and policy favor the criminal prosecution of perpetrators of genocide, crimes against humanity and war crimes. The crimes being prosecuted by the ICTY and the ICTR, moreover, are recognized by the United States as crimes that "clearly contemplate international as well as national action against the individuals involved. Proscription of these crimes has long since acquired the status of customary international law, binding on all states." Amicus Curiae Br. of the United States in *Prosecutor* v. *Tadic*, at 20 (ICTY July 25, 1995).

As this Committee is well aware, the United States played a strong leadership role in the creation of the Tribunals by the UN Security Council in 1993 and 1994. For nearly a decade, Congress and the Executive Branch have recognized that the Tribunals play an essential role in establishing the rule of law in societies that have experienced the most horrific crimes under international law. There is a moral imperative as well, which compels the drive for justice for the victims of these heinous crimes. As Secretary of State Eagleburger stated in December 1992, at a time when Serb forces had overrun most of Bosnia, governments have "a moral and historical obligation not to stand back a second time in this century while a people faces obliteration."

These principles favoring prosecution for international criminals have been reflected in decades of practice. After World War II, the United States persuaded the victorious allies that the principles of justice for all and the rule of law required trials of the vanquished enemy. In the famous words of United States Supreme Court Justice Robert Jackson, who served as Chief Prosecutor in the Nuremberg trials: "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntary submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

Three prominent American lawyers have served with distinction as judges on the Tribunals: Gabrielle Kirk MacDonald, Patricia Wald and Theodor Meron. Numerous other American lawyers have served the Tribunals in the Prosecutor's Office and as defense lawyers.

Congress has been critically important in the prosecution of international crimes. In particular, Congress has played a constructive role in applying financial incentives to cooperation with the Tribunals. Indeed, it was only after Congress established a firm deadline for the surrender of former President Milosevic that he was transferred to the ICTY by the Yugoslavian government. Since 1993, the Congress has approved substantial funding for the Tribunals, as well as the provision of equipment and the secondment of personnel.

In 1986 and 1988, Congress passed legislation asking the President to explore the creation of international criminal tribunals to prosecute terrorists, drug traffickers and international criminals. In 1996, Congress passed a law permitting "the surrender of persons, including United States citizens" to the ICTY and the ICTR, and the U.S. has cooperation agreements with the Tribunals. Last year, following lengthy legal proceedings in the federal courts, the United States surrendered a high-level indictee to the ICTR that had been apprehended by the FBI in Texas. The State Department, pursuant to legislative authorization, also offers substantial rewards for information leading to the arrest of persons indicted by the ICTY and the ICTR. Congress should be commended for its generous and bipartisan support for the Tribunals.

The policy in favor of prosecution also arises from treaty obligations. The United States is a party to the Genocide Convention, which in Article VI mandates that persons accused of genocide be prosecuted by national courts or by an "international

penal tribunal." The four Geneva Conventions to which the United States also is a party identify certain international crimes as "grave breaches" that require punishment. National or international courts may prosecute these crimes: the House Report on the War Crimes Act of 1996, which criminalized certain acts as required by the Genocide Convention and the Geneva Conventions, stated that "[p]rosecutions can be handled by the nations involved *or by an international tribunal.*"

THE FINITE TRIBUNALS

The Tribunals were not created to be permanent institutions. Consideration, therefore, should be given to how and when to conclude the work of the ICTY and ICTR. The Chief Prosecutor, in fact, has already done so in her recent Report to the Security Council.

Proposals that the Security Council should establish a date certain to close down the Tribunals, however, may be premature. Setting an arbitrary date in the future for the cessation of the Tribunals might have unintended consequences, such as providing a disincentive for governments to cooperate with the Tribunals. It also might provide comfort to those indictees still hoping to avoid prosecution, such as Messrs. Mladic and Karadic, the architects of the Bosnian genocide.

An appropriate target date for the conclusion of the Tribunals' work should depend on the progress of their caseloads. The crimes being prosecuted by the Tribunals are the worst crimes facing the international community. These prosecutions should be permitted to proceed, with the necessary support and resources, until all reasonable efforts to punish the perpetrators have been realized.

CONCLUSION

I urge Congress to continue its vigorous, bipartisan support for the important work of the Tribunals. The ICTY and the ICTR represent an extraordinary milestone toward the achievement of basic goals accepted by all Americans: the advancement of rule of law in transitional societies and accountability for international criminals. The Tribunals also are a product of the best in American judicial values, and the continued legitimacy and success of the ICTY and ICTR over the past eight years has to a significant extent resulted from the many Americans that have worked as judges, prosecutors, defense lawyers and supporters.

The title of today's Hearing is "The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?" There should no doubt that the answer to this query is that the Tribunals are without question a constructive force for international justice.

Thank you.

Chairman HYDE. Without objection, so ordered.

Mr. LANTOS. Thank you.

Chairman HYDE. Mr. Payne.

Mr. PAYNE. Yes, thank you, Mr. Chairman. I certainly listened to your testimony, and certainly to the response of the Professor. I have a question though, Professor.

I looked at your testimony and you mention that we did not press Saudi Arabia to extradite Idi Amin, the butcher of Uganda, and we did not press the French to extradite former Haitian dictator Jean-Claude Duvalier, and therefore I guess that was wrong.

In your opinion, what do you think? Do you think that we should have done that?

And secondly, maybe my question more gets into—I am trying to maybe paraphrase what I got—is that it is always like a laissez-faire attitude. You know, problems all around. We should not really impose on other countries. The world is big. And so whatever happens somewhere happens.

I mean, could you kind of clarify your stand?

Mr. RABKIN. Yes. What you said at the end was very appealing to me. The world is big and we are not in charge of it.

I do think there are some really exceptional circumstances where something is going on that is so horrifying that of course we are

concerned, and then we have to think what can we do, what will be the consequences and the costs of our doing it, and we have to make a political calculation. One of the things which really bothers me about these tribunals is that it is a way of pretending that there is no real serious political responsibility to figure out what to do, what will be the costs, and what will be the consequences. And I think in that way this is really symptomatic of the 1990s, in which not just the Clinton Administration, but I think much of the world said the Cold War is over, the Iron Curtain has come down, now relax. And then we look up and we see actually there is horrible blood letting in the Balkins, there is genocide in Rwanda.

And instead of thinking in a real focused, serious way what are we prepared to do about it, what actually we can do about it, what will be the cost, what will be the consequences, we say, oh, this is a problem for international justice, let us send in some lawyers, and that is not a serious response.

I am not saying this is criticism of Judge Wald, but to ask a judge to come in and review how many prosecutions there were, how many convictions were there, how many appeals, that is not a serious response to policy.

I am sure that if not this Committee, some other Committee has had a lot of hearings about the war on drugs or the war on terror or some other thing that we call a war, and we would not be satisfied with a judge saying, well, there has been a bunch of prosecutions or there has been a bunch of convictions. We would want to know what has actually happened, what is actually happening. Have we stopped the flow of drugs? Have we diminished the number of terrorist attacks? And of course, we would want to know what is actually happening in these countries. Are we strengthening democracy in the Balkins?

I do not know. I am not pretending I am an expert. What is actually happening in Rwanda? Are we helping to push forward national reconciliation? I know that sounds absurd when there has been genocide. But the fact is these people have to live with each other. So what is happening there?

And the answer is I do not know, but it does not seem to be the responsibility of this tribunal even to think about it. What that reflects is our government does not want to think about it, so we hand it off to a bunch of lawyers and we say, hey, treat it legalistically, and that is a little bit crazy. It is a very, very exceptional circumstance in which we would be intervening in another country. And before we do it we ought to think about what do we want to achieve. And as I said, what are the costs, what are the consequences? We should not be legalistic about it, and we sure should not be delegating it to international lawyers—nothing against people studying international law, but what I mean is people who are not under our control. We have a lot of resources. We have a lot of leverage, a lot of influence. Let us think about what are we doing with it.

Instead of that we say, well, there is a bunch of guys in The Hague and they are on top of it. Really? Who are they? How could they be on top of it? What are we talking about? I think it is fundamentally unserious, and that is what bothers me.

Mr. PAYNE. But I am also trying to find out, do you feel that it is the responsibility of the world, and when we talk about the world, you know, that is once again, a big place? What I am trying to say, if there is no justice, if there is no law, if there is no one to try to keep some sort of peace or tranquility in the world, and then the world gets horrible situations. I am a firm believer that we should step in when we, the U.S.—there really is just one super power. I mean, we are the world, and make no mistake about that.

But it seems to me that it would be like maybe Washington, DC without a police force, what would happen. I do not know, or Appalachia, West Virginia. There has got to be some law, someone to say you just cannot go and kill 4,000 women because you do not like their religion, or a million people in Rwanda. And someone—and I think it is we—we are the world power, with 30 percent of its resources, so at least we are a third of the power of everybody else put together through a vehicle like the U.N. or international courts of justice. Maybe they are too weak, maybe they should be strengthened. But there has got to be someone to say enough is enough.

Mr. RABKIN. Could I just emphasize one thing?

Mr. PAYNE. Yes.

Mr. RABKIN. Just in the last few seconds you were saying, well, it would be as if there were no police, and policing is the part to focus on, because the court is nice, you know, afterwards you have a trial, but the crucial thing is the policing. We are not serious about the policing for very, very good reasons, because it is—you know, oh, boy, you know, that is a big commitment to make.

And also, when we think about countries in the future, do we want to police Afghanistan right now? And the answer is, well, no, not really. Okay, if you are not serious enough to be policing, then you should ask yourself what business do you have judging.

And just one last quick thing.

Mr. PAYNE. All right.

Mr. RABKIN. This is what everyone—this is about Nurenberg. We did not say in Nurenberg, well, we will set up a court and then go home. We were policing it. We were controlling it. We were actually in charge because we were real, real serious about saying we are going to control this situation now. If we are not willing to control, we ought to be very, very cautious about letting some lawyers have the decisive say.

Mr. PAYNE. Well, I knew we would agree on something if you talk enough. [Laughter.] I think we then see eye to eye that perhaps the after-the-fact situation about sending in some judges and a few prosecutors is sort of just a little bit too little, too late.

Mr. RABKIN. Absolutely.

Mr. PAYNE. In Rwanda, a million people could have been saved——

Mr. RABKIN. Right.

Mr. PAYNE [continuing]. If the small contingent of U.N. forces were not suggested to leave, but to have been reinforced. But there was a reluctance on the part of the U.N. to have more forces there because the U.S. was a billion dollars behind in paying the dues for our peacekeeping assessment. We said we do not like the formula, we do not like to pay a third of peacekeeping, the cost is too

much. So the U.N. that has to depend on dues-paying countries, and our responsibility for peacekeeping was about a third, or 30 percent, we are down to 25 now, I think we are down to 20, they had no money. And so the dollars were the overriding factor of not having peacekeepers in Rwanda or the few there they withdrew, in other words.

So I agree that I think there has to be a world police force that should be trained, that should go in, that should not only try to keep peace, but to make peace if it is necessary. You have got a million people being slaughtered on television, as we saw rivers banked up not because of beavers biting trees and clogging up the waterways, but the bodies could not flow anymore; and so you had dams backing up water because seven-eight hundred thousand bodies were thrown around.

I mean, there has got to be some way that the world has to know that enough is enough. We will go in there. We will straighten it up, whoever the "we" are. We have got the U.N. in New York. Someone has to be the policemen, and I think we are derelict in our responsibility when we do not support a strong operation of doing justice.

President Bush said no longer will the weak countries be overrun by the big countries.

Mr. RABKIN. I will go you one better. We did not need the U.N. We could have done this ourselves, and I think the fundamental thing was not the money. I think the fundamental thing was we just had this bad experience in Somalia where some Americans got dragged through the streets and everyone was upset, and the Clinton Administration saying, oh, no, not that, we do not want to be involved in Africa, and we do not want anyone else involved either because they we might get dragged in.

And I think that that in retrospect was horrible misjudgment.

Mr. PAYNE. Absolutely.

Mr. RABKIN. A shame and a disgrace to the United States. But let us again be clear, the world is a big place. There are a lot of other people with guns. We may be the last remaining super power. That does not mean we have the capacity, let alone the commitment, to take responsibility for the whole world, so we have got to think somewhat cautiously and carefully about what are we prepared to do and when.

And I keep saying over and over, you are not going to get out of that by handing it off to somebody in The Hague, and I do not think you are going to get out of it by handing it to someone in New York, I mean, the U.N.

Very quickly this is going to come down to what is the United States prepared to do, and then we have got to think about it, and it is not automatic, and it is not simple.

Judge WALD. Could I add one partial answer?

Mr. PAYNE. Yes, please.

Judge WALD. I do not want to go away from this hearing leaving the impression that at least I agree with Professor Rabkin that these courts are just an excuse for not doing something more serious. It may be that occasionally that is true, but I do think that the United States has gone around the world preaching, rightfully so because I have also done it myself, the rule of law; that the rule

of law is something that is not just our province to have, but it is something we want to see in the infrastructure of all other countries.

So I think that regardless of whether or not we have conquered the country as we did before the Nurenberg trials, or whether we have not yet given in to the notion that terrible, terrible injustices and violations of international law and war crimes can happen with no vindication anyplace, I think that that is a separately justifiable reason for having these courts.

I am not suggesting there are not cases we should have gone militarily when we did not, or anything else. But I do not agree with Professor Rabkin that every time you look at a court you say, oh, they have just sent in some lawyers and a few judges to fool around till we decide whether we are going to take it seriously enough to send in the soldiers. You had only to see those thousands of witnesses who had been the victims of many of these crimes, and the war was over, but they longed desperately for some sense of vindication someplace.

Mr. PAYNE. Right. And Mr. Smith, I will conclude, but I agree that if Mobutu knew that he would have to go to trial somewhere for stealing $10 billion from an impoverished country, maybe he would have thought twice about it. There has to be some way to step in and to eliminate these people.

Sierra Leone should not go by the way, where people allowed hands to be chopped off to show that they are difficult and tough people in the army, and keep the citizens under control. If there were some trials where people had to pay the penalty, then maybe they would think more about that. I do know there was a high cost of things, as the professor mentioned. But you know, in the last budget we decided to wait until next year's budget. We are spending, every 24 hours, every time your heart beats in 24 hours, a billion, one hundred million dollars a day for military and defense and homeland security, a billion, one hundred million. That is just this year. Wait until we put the 40 billion more in there next year. It is going to be about a billion, three hundred million dollars every single day. I mean, not prescription drug plans, not housing, not education, schools to be built. We have got to be protected and we have got to have a secure home land, but we are going to spend a billion, one hundred million every 24 hours, 365 days every year, and that is the lowball this year; wait till next year.

So you know, I just think that we ought to be able to train someone else if we do not want to go in. But I have been to the courts, and I think they do serve a very useful purpose, and I think that they in very difficult situations have done an outstanding job, even in Rwanda where it has been very slow.

And so I guess I had better yield. Mr. Smith treats me better, he is from New Jersey, than Mr. Hyde does, but I will not take advantage of the Jersey tie. I yield back the balance of my time. Thank you.

Mr. SMITH OF NEW JERSEY. Just for the record, Mr. Payne and I chaired the International Operations and Human Rights Subcommittee for 6 years and we had many, many human rights hearings, including on Rwanda. As a matter of fact, we had the Delaire hearing when we talked about that infamous fax that had been

sent, and the fact that it was not acted upon by then head of peacekeeping for the United Nations, Kofi Annan, or his staff, and a preventable tragedy unfortunately became one of the most horrific events in history.

One of the things we very often ended up doing was finishing up hearings, he and I, hours after everyone else has left. But I just have a couple of final questions, and your remarks and your insights are very useful to the Committee, and we thank you deeply.

As a matter of fact, Judge Wald, one of the hearings that we did have was on Shrebeneza. We had a series of hearings and brought in survivors, brought in the actual person who did the translation services who lost his entire family, and I do think that we cannot make right what was done, no doubt about it. The safe enclaves were anything but safe. They became an area where people were mustered and brought together for further exploitation and killing.

But my one question is ad hoc versus permanent tribunal, and I know, Mr. Hammond, you mentioned that you are not necessarily against the Rome statute. But it seems to me that there are inherent weaknesses in having a systematized presence with prosecutors who are constantly hailing from countries as we have seen at the U.N. human rights meetings that go on in Geneva. I have been there a number of times, where you have people sitting in judgment, looking for ways to put monkey wrenches into the process so that their collective human rights abuses will not be exposed or held accountable.

It seems to me the same countries coughing up and offering, proffering prosecution, seems more likely it is to be compromised in the long run, at least that is my belief, and you might want to respond to that.

But I would like to ask a very specific question with regard to allocation of resources, and you know, as we know, the ICTR will spend almost $90 million per year. It will dispose of about 150 to 200 alleged cases of genocide. The government of Rwanda, by contrast, has a budget last year of less than 6 million to try something on the order of 110,000 to 115,000 genocide suspects that are held in its jails. As a matter of fact, we spend more on defense counsel, and I am for that, I believe, like Chairman Hyde pointed out, people are entitled to due process rights.

But when you talk about the allocation of resources, we are not doing enough. I do not think, as a country, we are helping Rwanda. What is your sense on that? It seems to me that those 115,000 folks are not going to get, nor are those who lost loved ones, the kind of justice they are looking for in Rwanda.

Mr. HAMMOND. Mr. Smith, let me respond to the first part of your question, and I will leave the budget questions to Judge Wald.

The question of whether we have an ad hoc or permanent tribunal raises in my mind a very important question. Do you have, and by you I mean the United States Government as an example, do you have the commitment to follow through? To me, that is a major issue with everyone of these tribunals, and an advantage of having an ad hoc tribunal is that you can ask that question in a focused way.

You can say to the American government if we are going to have an ad hoc tribunal at The Hague, for instance, are we committed,

sincerely committed to doing the things that you have to do when it is your tribunal; most pointedly, providing information.

When someone is indicted, for all the reason we talked about today, there is a high premium on getting it right, not only so that we do not convict the innocent but so that we do not wind up having a tribunal that loses respect.

So in order to do that one thing that has to happen is people have to cooperate, and our government has to cooperate. If we are going to assure fair trials when there is American information available, as there is in the case I talked about earlier, with tremendous amounts of information available from the American government, we ought to be willing to say we will make that information available so that somebody can get a fair trial.

It is harder, and I understand this, it is harder to ask the American government to do that across the board. It is hard to say we are going to provide information that may deal with sources and methods or maybe in some other way privileged in any case that comes along, and I can appreciate that. So there is a good reason to have a more focused tribunal.

But whatever you do, when we decide in the name of international justice to prosecute someone, we ought to have the backbone to stand behind that. If that means producing information and producing witnesses, I have heard all of this talk about what a terrible thing it would be if American political figures had to go testify. Why is that? There is no reason why we should be ashamed or afraid to have our witnesses go and testify. It is not an indignity. People testify all the time. And if they have relevant information, it ought to be heard. And if we are not prepared to do that, then we should not be convicting these people.

Mr. SMITH OF NEW JERSEY. Thank you.

Mr. RABKIN. Could I just add one thing about the ICC?

Mr. SMITH OF NEW JERSEY. Yes.

Mr. RABKIN I think it is fine if they testify. Americans, I think it is fine if President Clinton testifies. He has got a lot to testify about, I think. What is not okay is to have him indicted by an international tribunal. And I would just say this descriptively, I believe most of the American population would be outraged, there would be immense pressure on the United States Government to resist an international trial of a top American official, look that in the face and then say, how are we imposing this on other people, and that is very awkward and a serious problem.

Mr. SMITH OF NEW JERSEY. Judge Wald.

Judge WALD. Two very brief remarks.

One, in terms of the ad hoc versus the full time. As you pointed you, one at least theoretical advantage of a regular one is you will not have all of the start-up costs, all of the start-up—not necessarily mistakes, but all of the trial and error kind of business.

Another one will be the prioritization because the prosecutor and the tribunal, and I will point out something here that—and I am not an expert on the proposed ICC, but what little I know—the tribunal itself, the judges have more control over whether an indictment goes forward than they do in either of these two ad hoc tribunals. In both of these ad hoc tribunals, which we presently have,

it is the prosecutors call, pure and simple, unless the judge says you do not have enough evidence to make out a prima facie case.

In the ICC, the tribunal will have more power about saying whether to go ahead with a prosecution or not, and the prosecutor and the tribunal will have to prioritize from all around the world insofar as charges are made. They are going to have to say, well, this is more important to do than that. We cannot do everything kind of thing, whereas your example, Professor Rabkin, comparing this process to the special prosecutor in the United States, one of the criticisms—I will not say whether I agree with it or not—one of the criticisms of the special prosecutor was, gee, if you say you are a special prosecutor of John Doe, boy, you are going to work hard to find out something against John Doe.

A little bit of that has on occasion been used as a basis of criticism for the tribunals, especially in the middle and lower level when they did not have enough big fish that they had actually apprehended. That would, I think, be less so in an international criminal tribunal.

The only other point I want to make us that the ICC, as I understand it, will have something that neither of these tribunals have, and which I think is a good idea, and that is the principle of complementarity—I am not sure I pronounced it correctly. In both of the tribunals now, once the tribunal has jurisdiction of something it has the primary jurisdiction. It can even take something away, although in our case it has only done it once from a local or national tribunal, but it has priority.

Now, in the proposed—not proposed, but the ICC, which will come into operation as I understand in a few months, that is not so in that the tribunal will get jurisdiction only if it can show or it can be demonstrated that the national country which would normally have the jurisdiction to prosecute this crime is either unwilling or its infrastructure is so palpably bad that people could not trust it to do it. I doubt the second would ever been found to apply to the United States.

Mr. SMITH OF NEW JERSEY. Again, on the allocation of resources, does anybody want to touch on that?

Judge WALD. I just do not know Rwanda. I mean, if I spoke from——

Mr. SMITH OF NEW JERSEY. Okay, you said that earlier.

Judge WALD. Yes. If I spoke from the ICTY, I would say, yes, if you sent me in there to be an inspector general or something, I would find some places where I think you could cut personnel or where you could speed this up.

Mr. SMITH OF NEW JERSEY. Or ratchet it up on the other end.

Judge WALD. Yes. Yes, you are right.

Mr. SMITH OF NEW JERSEY. Monies to the prosecutor.

Judge WALD. Right.

Mr. RABKIN. Could I just make one response to that?

Mr. SMITH OF NEW JERSEY. Yes.

Mr. RABKIN. It is very awkward if you have an international tribunal to say, well, Rwanda is a different place so we are going to have a different standard, but it would have been extremely appropriate for Rwanda to say we are a different place, so we are going

to have a different standard, and that is one of my big concerns about this.

I mean, the international community, which did nothing to protect people while the genocide was going on, then turns around and says, oh, we are going to do the trials for you, and they do it in a very expensive way and a very formalistic way, and a way that actually impedes justice there.

The question we ought to be asking is not is it costing too much money. I think the money is all just small potatoes compared to our defense budget. Mr. Payne, I totally agree with you on that. I mean, when I say cost, I mean the political cost; the cost in terms of our policy. And in those terms we are not making people better off in Rwanda.

Just what the cost of having international tribunals there, it seems to me from the outside—I do not claim to be an expert, but the cost there is not dollars wasted. Forget that. The cost is that here is a country with literally gaping wounds, and we just perpetuate that year after year after year to satisfy our outsider standard of how justice should be done, and that is not helpful to them. If it is not helpful to them, who are we trying to help?

Mr. SMITH OF NEW JERSEY. Would any of you like to add anything before we conclude?

Thank you for your very extensive insights that you provided to this Committee, and without any further ado, Mr. Payne, now the hearing is adjourned.

[Whereupon, at 1:50 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE CHRISTOPHER H. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, I want to thank you for holding this important hearing. This is a topic, the Yugoslav tribunal in particular, on which I have spent a great deal of time. Those of us who have served on the Helsinki Commission—from both House and Senate—have been among those first to view what was taking place in the former Yugoslavia in the 1990s as genocide, to learn from firsthand accounts of the crimes against humanity taking place there, and to call for justice, including the indictment of Milosevic for the crimes he now stands accused of having committed.

The subtitle of this hearing is: "International Justice or Show of Justice?". While our Administration and expert witnesses can elaborate on this question, I will start with the preliminary answer that the ad hoc tribunals are both. As a Member committed to the protection of human rights, I believe that justice for the sake of justice does exist and should be pursued. It cannot simply be a show. Justice, however, cannot be isolated in a vacuum but must equally be shown to bring some closure for surviving victims and to vindicate the innocent and wrongly accused, be they an individual, a group or a whole people in whose name atrocities were committed. We can hope that the exercise of justice would deter would-be war criminals elsewhere.

The real issue before us today is whether these two ad hoc tribunals, both of which the United States has supported, indeed live up to our expectations of them.

The establishment of these ad hoc tribunals, I believe, set a positive precedent for human rights around the world. For the first time since the Nuremberg and Tokyo trials following World War II, those who committed "serious" and "grave" breaches of international humanitarian law, in places where domestic justice cannot possibly be sought, were nevertheless to be held accountable in a court of law. In both instances, the international community was responding specifically to a particular event—genocide—in which the culprits felt they would go unpunished. Similarly, in both instances, there was no other recourse but a call for justice at the international level. Even then, this was only a part of a larger, and unfortunately belated, effort to stop the killing.

Given this positive precedent, Mr. Chairman, it would be sad if flaws would lead the tribunals to fail or keep others from being formed. I am willing to listen to honest critiques of these two tribunals, as well as ways to fix them. Justice on an international level will never be as perfect as it should be, and there are, of course, other ways to respond to specific crises where war crimes, crimes against humanity and genocide are being committed. I am thinking here of everything from military intervention to truth commissions. Ad hoc tribunals are only one of many tools available to the international community, and they are a relatively new tool.

While some issues we will discuss today may have relevance to those surrounding an International Criminal Court, it would be wrong to emphasize flaws in the ad hoc tribunals as a way to build arguments for or against the more controversial permanent court. The two types of courts are different in many, critically important ways, and I feel I can logically support one while opposing the other.

I hope this hearing will make evident the continuing and strong support of the United States for the ad hoc tribunals, and a commitment by the Bush Administration to support them for as long as their work may reasonably take. Indicted individuals and political leaders should not conclude that if they stall in cooperating with the tribunal they will outlast our commitment to them. This would signal that we would tolerate some to escape justice for the horrific crimes they have committed. Of course, we should strongly encourage the tribunals to intensify their efforts to ensure that their work is completed in a timely and efficient manner. I

agree, however, with Chief Prosecutor Carla del Ponte's observation: "It is neither credible nor honorable to give support for the war against terrorism while not doing everything possible to bring to justice those responsible for genocide in Rwanda, for Srebrenica and other massacres. As with the fight against terrorism, we delude ourselves if we think there is a quick and low-cost solution that does the job properly."

Mr. Chairman, we should use the conditionality Congress has placed on assistance to Serbia, where persons indicted for major, indisputable crimes like those committed in Vukovar and Srebrenica continue to reside, and where access to information and officials to build and defend cases is known to be limited. Belgrade should be made aware that cooperation with the tribunal must be full. A similar policy must also be applied to those in the Republika Srpska entity of Bosnia or any other place where indicted persons may reside. If present, international forces should capture these individuals, but local authorities have the first responsibility.

Mr. Chairman, the international community could have acted sooner to stop genocide in both Bosnia and Rwanda. In both cases, the international community's conscious decision not to intervene facilitated the commission of monstrous crimes and made our tasks that much more difficult when we did intervene. The ad hoc tribunals not only helped to bring us back from that moral abyss but to move us forward a step or two. Hopefully, today's hearing will lead to efforts that would give the phrase "Never Again" ever greater meaning.

PREPARED STATEMENT OF THE HONORABLE CYNTHIA A. MCKINNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, thank you for calling this important hearing today. I would like to thank our witnesses for coming before us today. The administration of international justice is critically important to us all.

The creation of the two international tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—was an important symbol for those of us who hoped it would mark a new international commitment to hold war criminals accountable for their crimes.

Despite expending years of effort and hundreds of millions of dollars, many of us believe that the Tribunals have not lived up to expectations. Many now view the Yugoslavia Tribunal as having become overly politicized and a mere political weapon of the West. Meanwhile, allegations of corruption, mismanagement, and prosecutorial bias have plagued the Rwanda Tribunal.

Mr. Chairman, I would like to focus my remarks on Rwanda because I believe that the ICTR is particularly in need of close examination.

We must recall with shame how the world turned a blind eye to genocide, allowing Hutu extremists to commit one of the greatest slaughters of the last century. In just 100 days, roughly one million men, women, and children were exterminated in 1994—all under the nose of the United Nations, the western world, and our own government.

Meanwhile, since the formation of the International Criminal Tribunal for Rwanda (ICTR), little real justice has been meted out to the victims of these horrendous crimes. Many of the key offenders remain free and many of those in UN custody in Arusha show no sign of being prosecuted any time soon. Also, allegations of widespread mismanagement, corruption, and prosecutorial bias have tarnished the ICTR nearly since its inception.

Since it was formed in November 1994, the ICTR has spent approximately $300 million, and convicted and sentenced only 7 offenders—about $40 million per conviction. By way of comparison, the ICTY, during the same period, has spent not much more—approximately $475 million—and has produced at least 35 convictions. The ICTR has just over half the staff (700) of the ICTY (1200), but has an annual budget that is roughly 90% ($86 vs. $96 million) of its Yugoslavia counterpart. Moreover, whereas the Rwandan government is attempting to dispose of the more than 120,000 genocide-related case on an annual budget of $5.6 million, the ICTR spends more than 15 times that much to dispose of a tiny fraction of these cases. Clearly, the ICTR's problems are not due to a lack of resources.

At the same time, two independent inquiries conducted by the United Nations Office of Internal Oversight confirmed many of the allegations regarding incompetence and corruption, leading to a series of high-level sackings and redeployments. The ICTR has also been accused by many of prosecutorial bias and of taking sides in the current Great Lakes crisis. Recent reports of improvements in the functioning of the ICTR are encouraging but progress remains slow and insufficient.

The ICTR may be faulted for what it has not done as much as by what it has. Its record of inaction is equally disturbing.

Last year, I convened a special hearing to receive testimony from a former FBI supervisor, Jim Lyons, who had served as a commander with the ICTR. Lyons testified that the ICTR and senior UN officials have evidence of Kagame's role and that of his security forces in the 1994 shooting down of the Presidential aircraft killing Rwandan President Habyarimana and all on board. What has the ICTR done to pursue this?

Or the report from Nick Gordon in the April 21, 1996 edition of the Sunday Express newspaper ("Return to Hell"), in which he recounts how thousands of Hutu civilians were killed and then incinerated in Kagame-operated death camps?

Or that of the Rome-based Catholic Church news agency MISNA that Rwanda was using its prison population as forced slave laborers in eastern DRC to mine coltan (while our own U.S.-based mining corporations were profiting from the minerals extracted by this Rwandan slave labor)?

Or the accusations that Rwandan troops under the command of the General Kagame slaughtered an estimated 4,000 Hutu civilians at the Kibeho refugee camp in 1996?

Or the testimony heard last year before this very Committee from the International Rescue Committee (IRC), that an estimated 3,000,000 civilians have now died in eastern DRC as a result of Rwanda and Uganda's combined 1998 invasion?

Or the numerous other findings by Amnesty International, Human Rights Watch, and the UN's own Special Rapporteur Roberto Garreton that Rwandan troops, under Kagame, have slaughtered countless civilians both in Rwanda and in the DRC?

Nothing. On all of these counts, nothing.

No consequences. No outrage. No meaningful action by the international community. There is, in effect, no justice.

And from our own government? More silence.

Indeed, the current Bush Administration has continued the previous Administration's policy of appeasement of Kagame and grants him audiences in this very city, despite his record of war crimes.

Just two weeks ago, a Rwandan Colonel by the name of James Kabarebe—a man accused of personally committing atrocities in eastern DRC—was the guest of the Bush Administration here in Washington. Contrast this with the State Department's announcement this week that it would bar Zimbabwean President Mugabe and 19 of his top officials from entering the U.S. for election-related violence and intimidation.

The irony, of course, is that as war criminals file in and out of Washington, we are supposed to be waging an all-out "war against terrorism."

But the line between irony and hypocrisy is indeed a thin one.

Following its aerial bombardment of Yugoslavia, Amnesty International accused NATO of serious violations of the laws of war in its conduct during Operation Allied Force in 1999. Not surprisingly, NATO summarily dismissed the allegations and the ICTY refused to investigate the matter. No justice there for the hundreds of civilians killed in the NATO bombing raids. These and other shattered lives can simply be written off as "collateral damage."

Thus, while we prosecute selected figures before the ICTR and the ICTY and threaten the same for war crimes committed in Sierra Leone, Cambodia, Iraq, and Sudan, we ignore others when they are committed in Colombia, DRC, the Middle East, the Republic of Georgia, and elsewhere as "self-defense," "national security," or, lately, as part of the "war on terrorism."

Has the pursuit of international justice been trumped by strategic and political expediency? Apparently it has, as our own government continues to oppose the International Criminal Court and the Rome Treaty primarily because of the prospect that Americans might be brought before it. Reports that the Bush Administration is now working to eliminate the ICTR and ICTY altogether will only reinforce the perception that the United States is interested in international justice and human rights only to the extent that these can be used as a political weapons.

So what are the new standards of international justice in the world?

That if you're a first world military and economic power you can drop cluster bombs on civilian neighborhoods, or blow up civilian trains on bridges, or destroy the power or water supply of others with impunity?

But if you're not a member of this elite club (or one of its allies), then you face U.S. and UN sanctions, are branded a "war criminal" or a "terrorist," or are lumped into an "axis of evil"?

Exactly how many standards of justice are there?

Perhaps the more pressing question is: what will be the future of international justice? Ostensibly, global enforcement of international human rights standards ostensibly are in the hands of the United Nations and its international justice institu-

tions. But given the global economic, military, and political realties of today, will the UN, the international criminal tribunals, and other institutions simply become instruments of American unilateralism and a means for powerful states to coerce weak states into selective compliance?

Thank you, Mr. Chairman. And I look forward hearing from our distinguished panelist, particularly on how we can improve the prospects for meting out justice, not only in Rwanda and the former Yugoslavia, but in all areas of the world where the strong victimize the weak.

PREPARED STATEMENT OF THE HONORABLE RON PAUL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Mr. Chairman, for holding this hearing on the important topic of the International Criminal Tribunals for the former Yugoslavia and Rwanda. For Americans, the most important aspect of these international criminal tribunals is that they are the model for the U.N.'s International Criminal Court. Indeed, it is the perceived need to make these *ad hoc* tribunals permanent that really led to the creation of the ICC in the first place. This permanent U.N. court will attempt to claim jurisdiction over the rest of the world within the next few weeks, as it has claimed that ratification by 60 countries confers world jurisdiction upon it.

This means that even though the United States has not ratified the treaty—though it was signed by President Clinton's representative at midnight on the last day—the Court will claim jurisdiction over every American citizen, from President Bush on down. The Bush Administration has admirably stated its opposition to the International Criminal Court, but it unfortunately has taken no proactive measures to "unsign" Clinton's initial signature or to make it known that the United States has no intention of cooperating with, providing funding to, or recognizing any authority of this international court. The clock is ticking, however, and the day of reckoning is close at hand.

This court is every American's worst nightmare. Currently, there are no protections for either U.S. military personnel or civilians from the tentacles of this International Court. This means when it claims jurisdiction, you, I, or any of our 240,000 military personnel stationed across the globe can be kidnaped, dragged off a foreign land and be put on trial by foreign judges, without benefit of the basic protections of the American legal system, for crimes that may not even be considered crimes in the United States.

Pro-life groups in America have already expressed concern that the Court's claimed jurisdiction over "enforced pregnancy" could make it criminal for groups to work to restrict access to abortions—or even reduce government funding of abortions. The pro-ICC Woman's Caucus for Gender Justice has already stated that countries' domestic laws may need to be changed to conform to ICC Statutes. Former Assistant to the US Solicitor General, Dr. Richard Wilkins, said recently that the ICC could eventually be used to try "the Pope and other religious leaders," because issues such as abortion and homosexuality would ultimately fall within the Court's jurisdiction.

Supporters of the International Criminal Court are quick to say that the Court is modeled on the Nuremberg tribunal set up after World War II, but nothing could be further from the truth. Nuremberg was a trial initiated and prosecuted by sovereign nations. It was a reassertion of national sovereignty over the crimes of a regime that disregarded the concept, that saw other sovereign countries as merely "living space" for their own people. As one analyst recently wrote, ". . . the Nuremberg tribunal, unlike the Hague tribunal, was not really an international tribunal at all. The judges quite specifically stated that the act of promulgating the Nuremberg charter was 'the exercise of sovereign legislative power of the countries to which the German Reich unconditionally surrendered.' There was no pretense that the 'international community' was prosecuting the Germans."

The International Criminal Court is to be modeled after the tribunals dealing with Rwanda and Yugoslavia, that is a fact. Knowing how these tribunals operate should therefore terrify any American who loves our Constitution and our system of justice. In the Yugoslav and Rwandan tribunals, anonymous witnesses and secret testimony are permitted; the defendant cannot identify his accusers. There is no independent appeals procedure. As one observer of the Hague in action noted, "the prosecutor's use of conspiracy as a charge recalls the great Soviet show trials of 1936–1938. In one case, the Orwellian proportions of the Prosecution mind set was revealed as the accused was charged with conspiring, despite the admitted lack of evidence . . . It is not the destruction of evidence but its very absence which can be used to convict!"

Indeed in the showcase trial of the ICTY, that of former Serb leader Slobodan Milosevic, chief prosecutor Carla del Ponte told the French paper Le Monde last year that no genocide charge had been brought against Milosevic for Kosovo "because there is no evidence for it." What did the Court do in the face of this lack of evidence? They simply disregarded a basic principle of extradition law and announced that they would try Milosevic for crimes other than those for which he had been extradited. Thus they added two additional sets of charges—for Bosnia and Croatia—to the indictment for Kosovo. The Kosovo extradition itself was nothing more than bribery and kidnaping. Milosevic was snatched up off the streets of Serbia after the United States promised the government it had helped install millions of dollars in aid. That national sovereignty was to be completely disregarded by this international tribunal was evident in its ignoring a ruling by the Yugoslav Constitutional Court that extradition was illegal and unconstitutional. Yugoslav officials preferred to put Milosevic on trial in Yugoslavia, under the Yugoslav system of jurisprudence, for whatever crimes he may have committed in Yugoslavia. The internationalists completely ignored this legitimate right of a sovereign state.

Supporters of the International Criminal Court, like the World Federalist Association, claim that ICC procedures are in full accordance with the Bill of Rights. They aren't. One pro-ICC website sponsored by the World Federalist Association, attempting to dispel "myths" about the Court, perhaps unintentionally provided some real insight. In response to the "myth" that the ICC is unconstitutional, the website argues that "The Rome Treaty establishing the International Criminal Court provides *almost* all the same due process protections as the U.S. Constitution. Every due process protection provided for in the Constitution is guaranteed by the Rome Treaty, with the exception of a trial by jury." Since when is "almost all" equal to "all?" Either the Rome Treaty provides all the protections or it does not provide all the protections, and here we have by its own admission that the ICC is indeed at odds with American due process protections. So what else are they not telling the truth about? Another claim on the World Federalist Association website is that the ICC is that the rights of the accused to a presumption of innocence is guaranteed. Interestingly, on the very same website the accused Slobodan Milosevic is referred to as a "criminal." Not very reassuring.

It is very convenient for supporters of this International Criminal Court that the high profile test case in the Yugoslav tribunal is the widely reviled Slobodan Milosevic. They couldn't have hoped for a better case. Any attack on the tribunal is immediately brushed off as a defense of Milosevic. It is illustrative for us to take a look at how the Milosevic trial is being prosecuted thus far. After all, today it is Milosevic but tomorrow it could be any of us. And with the Milosevic trial, the signs are very troubling. We have all seen the arrogance of the judge in the case, who several times has turned off Milosevic's microphone in mid-sentence. Thus far, the prosecution has attempted to bring as witnesses people who are on the payroll of the tribunal itself, as in the case of Besnik Sokoli. Other witnesses have turned out to have been members of the Kosovo Liberation Army, which is the armed force that initiated the insurgent movement within Yugoslavia. Remember, Milosevic was extradited for Kosovo and for Kosovo only, but the weakness of the case forced the Court to add other charges in other countries. Now, after Milosevic has shown himself adept at cross-examination, the prosecution is seeking to have the judge limit Milosevic's ability to cross-examine the prosecution's witnesses. This in itself flies in the face of our system of evidence law, which allows the defendant nearly unlimited ability to cross-examine a witness as long as it is relevant to testimony.

Mr. Chairman, these international tribunals and the International Criminal Court that they spawned are bad for America and bad for the rest of the world. The concept of a permanent criminal court, run by un-elected bureaucrats, third rate judges, and political hacks, and answerable to no one, undermines everything that free peoples should hold dear. It is about American sovereignty, the sovereignty of our American legal system, but that is not all. It should also be important for Americans that the sovereignty of the rest of the world be maintained as well, as when sovereignty is undermined anywhere by an un-elected international body, it is under threat everywhere.

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