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THE UNITED NATIONS' WAR CRIMES TRIBUNALS: AN ASSESSMENT*

*by Justice Richard Goldstone***

Dean MacGill, Professor Janis, ladies and gentlemen. I have been asked by Professor Janis to concentrate during the next thirty minutes on the utility of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"). I understand that Professor Sohn, who will follow, will talk about the history of war crimes tribunals. In particular, he will concentrate on the legacy of war crimes tribunals and will discuss the differences between the International Military Tribunals, i.e., the Nuremberg and Tokyo tribunals set up after the Second World War, and the ad hoc criminal tribunals set up by the United Nations in 1993 and 1994 for the former Yugoslavia and Rwanda respectively.

Let me begin by saying that I think the tribunals can and are serving a number of important purposes so when we talk about the utility of the tribunals we need to understand their utility in a broad sense.

The first point I think that needs to be made is that the ICTY presents the opportunity to create an important positive precedent for the creation of a permanent criminal tribunal. What the experience of the ICTY over the last two and a half years or so has shown is that such an international criminal tribunal can work. In many ways much of the frustration experienced by many of us working at the tribunals, and I am sure that Judge Cassese will support me in this point, is based upon the knowledge that with sufficient political will on the part of the international community, the tribunal indeed could effectively carry out its mandate, and in the long term do much to encourage the establishment of a permanent international criminal court. If we did not believe this then I think we would not feel the very deep frustration that we do.

The second important point to be emphasized is the enormous contribution that the two ad hoc tribunals have already made to the develop-

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ment of both substantive and procedural international humanitarian law. Humanitarian law, a body of law with a very noble and important purpose, has a very long history and there have been a number of important developments in this body of law over the last century. However, the contributions made to the development of this body of law by first the International Military Tribunals, and now, the two ad hoc tribunals, probably stand out as the most significant.

It became blatantly clear in the aftermath of the Second World War that the old laws of war, the law of the Hague and the law of Geneva, were insufficient to prevent the kind of horrors of war that they were designed to prevent. In particular, the Holocaust led to the realization that the traditional approach of humanitarian law which focused upon the rights of nations but failed to set out rights of individuals was hopelessly inadequate in protecting innocent civilians during times of war. It showed that it is not sufficient simply to discourage war and encourage countries to be democratic, but that individual rights had to be safeguarded. This understanding was to become the very foundation of the United Nations Charter which recognizes fundamental individual freedoms and human rights. It was also to become the foundation upon which the Universal Declaration of Human Rights and all subsequent international human rights instruments were to be based. Of particular importance in this regard was the adoption of the Genocide Convention in 1949. The very fact the international community recognized the need for such a Convention and came up with the legal concept of genocide tells its own story. It is an abhorrent thought that there was even a need for a law which criminalizes the physical destruction of a people or part of a people.

The recognition by the Nuremburg and Tokyo tribunals of the existence of crimes against humanity was perhaps the most significant development of the law to come out of the experience of the International Military Tribunals. It was the first time that international law recognized that there could be crimes which, because they shocked the conscience of humankind to such a degree, have an international effect, and therefore cannot be confined to national borders but must invoke international jurisdiction. It was a recognition that in such cases the whole of humankind, and not simply nationals of a state where the crimes happen to have been committed, have a concern to bring perpetrators to justice. More recently we saw the expansion of the concept of crimes against humanity with the adoption of the Apartheid Convention which declared apartheid a crime against humanity. The jurisprudence of the ad hoc tribunals is serving to reinforce and develop the concept even more.

So we can see that, especially since the Second World War, the legal framework existed but it was never enforced. For almost fifty years after the Nuremburg precedent, there were no attempts by the international community to bring war criminals to account and to punish them. It is because of this fact that the precedents set in establishing the tribunals are so significant, and it is for this reason that the establishment of the ad hoc tribunals has really captured the imagination of international lawyers. While some may have envisaged the eventual creation of an international criminal court, it was never really contemplated that such a court or body would be created other than by an international treaty (a long and drawn out process). Certainly few would have imagined that the first international criminal tribunal to be set up since Nuremburg would be created by the Security Council under its Chapter VII powers.¹

This failure since Nuremburg to enforce international humanitarian law meant that the experience and benefits gained from the International Military Tribunals were never given practical implementation. In particular, the very important lesson learned from Nuremburg and Tokyo was of the need to individualize guilt. In bringing culprits to account, enforcement of the law serves the very important purpose of avoiding a collective guilt syndrome: avoiding laying guilt upon a whole people, ethnic group or nation because of the misdeeds and manipulation of perpetrators associated with the particular group. I believe strongly that in some senses the biggest beneficiaries of the Nuremburg trials were the German people themselves. Credible evidence presented at the Nuremburg trials established the guilt of the Nazi leaders beyond a reasonable doubt. Through the criminal trial process, focus was placed upon the accused as individual criminals or leaders and not as representatives of the German people. I have little doubt that Germany would have had far more difficulty in coming to grips with its sordid World War II history but for the fact that those leaders were brought to trial.

This lack of individual accountability, it seems to me, has been a large part of the problem in the former Yugoslavia. Certainly on the few visits that I have made to the former Yugoslavia, I have been struck with the fact that every single time I am there I am given a history lesson before any meeting begins. Whether it was with the Ministry of Justice, or with non-governmental organizations, a meeting would always begin with a history lesson. If I was unlucky, the history lesson would begin in the 15th century. If I was lucky, it would begin after the Second World War. This dwelling upon history, this need to settle scores that go back, in some peoples' minds, 500 years, is in large measure a consequence of

1. See, S.C. Resolution 827 (1993).

trying to forget the past, pretending that it did not exist and trying to get on with the future. The cyclical incidences of terrible bloodshed in the former Yugoslavia show that this attempt at collective amnesia does not work. Where there have been violent, systematic human rights abuses, a society simply cannot forget. Such atrocities cannot be swept under the rug. One cannot build a secure and peaceful future upon such a foundation of unacknowledged, unaccounted for human rights violations. Although it may seem as if people do forget on the surface, deep in their psyches, people do not forget that easily. And so, if victims' calls for justice go unheeded, people begin to take the law into their own hands. And when they do, they simply perpetuate yet another cycle of violence. Thus the legacy continues, as it has in the Balkans for centuries and in Rwanda for many decades.

This brings me to another important point: the use of propaganda. In Rwanda, the colonial power reinforced, perpetuated, and, in some instances, created differences and grudges between Tutsis and Hutus which were then distorted and manipulated through the use of propaganda by modern politicians for their own evil political purposes. Through the use of propaganda, whole classes of victims were demonized and dehumanized. The same happened in the former Yugoslavia where the media was harnessed by political leaders and used to implement a virulent anti-ethnic group propaganda campaign. This process of dehumanizing the enemy and instilling acute fear and prejudice is instrumental to the commission of the type of mass and systematic atrocities which we have seen in Rwanda and the former Yugoslavia and which we saw in Nazi Germany, Cambodia and in numerous other historical examples. Without the conscious manipulation of hatred and mass hysteria, the conditions for such mass and systematic crimes do not exist.

In the remaining time, let me try and give you my own rough balance sheet of the international criminal tribunal for the former Yugoslavia. In the time available I cannot hope to give a comprehensive account of the achievements and work of the tribunal. But what I will try to do is give you my own subjective account of what I think should be emphasized. Perhaps, as I leave my office in the Hague and return to South Africa to assume my seat on the Constitutional Court there, it is a useful time for me to be doing this.

First, let me deal with the positive aspects. What are the successes and gains that have been made by the ICTY to date? I would like to say that I am not going to be dealing with them in any order of importance. I think that they are all important, and I would not like to put them into any order of priority.

Let me start with the enormous strides that have been made by the tribunals in the development of the normative law. There has been substantial progressive development of humanitarian law as a consequence of the establishment of the ICTY. Of real importance are developments in the law with respect to gender offenses. From my very first week in office, from the middle of August, 1994 onwards, I began to be besieged with petitions and letters, mainly from women's groups, but also from human rights groups generally, from many European countries, the United States and Canada, and also from non-governmental organizations in the former Yugoslavia. Letters and petitions expressing concern and begging for attention, adequate attention, to be given to gender related crime, especially systematic rape as a war crime. Certainly if any campaign worked, this one worked in my case, because it definitely made me much more sensitive, concerned and determined that something should be done about the proper investigation of allegations of mass rape in the former Yugoslavia and Rwanda. In the case of Rwanda, what really impressed upon me through its horror was the wide scale repetition of the allegations.

In attempting to address these concerns, it became blatantly clear that insufficient attention had been paid over the years, particularly in the years since the Second World War, to gender related crime. Existing humanitarian law is severely deficient when it comes to gender related crimes. It is evident that this body of law has been drafted by men for men. What we have had to do is to take the law and use it creatively in order to address gender related crimes. Thus in the case of grave breaches of the Geneva Conventions, we have charged rape as inhuman treatment, or in some cases as torture. There is no separate or distinct provision for rape as a grave breach under our Statute. In respect of crimes against humanity, rape is one of the enumerated acts so we have been able to charge it as such (this is the only direct reference to a gender related crime in our Statute). At times, depending upon the context and if the facts justified it, despite the existence of rape as an enumerated act for crimes against humanity, we have considered it more appropriate to charge rape and sexual assault as torture.

The ICTY is setting an important precedent in respect to gender related crimes because it is the first time that systematic mass rape is ever being charged and prosecuted as a war crime. A very different attitude prevailed at Nuremburg. Nuremburg was a different era, an era in which the prosecutor was too embarrassed by the idea of prosecuting rape and was of the view that it would be too sensitive an issue to read out at public hearings the details of gender related crime, particularly rape committed by the Nazis. So this is an important movement forward.

Another important development in the area of substantive law is the movement that is being made by the tribunals towards eliminating the gap in international humanitarian law between international and internal armed conflicts. Traditionally, international humanitarian law has always distinguished between international wars and internal ones, largely seeing international wars as its concern. This distinction has been made for very obvious political reasons. Governments facing insurgents, guerrillas, freedom fighters, or whatever you wish to call them, did not want the international community interfering in the manner in which they conducted themselves towards these internal movements in an internal armed conflict. This is really an unacceptable position as was made clear in the decision of the appeals chamber in the Tadic Jurisdiction Motion case. In the twentieth century, millions of people have been killed, raped, tortured or displaced as a result of internal wars. Very often, internal wars are the most brutal, and very often, they are the wars which have the most devastating effect upon civilian populations. As the appeals chamber pointed out, it makes no sense to protect people from murder, rape and wanton destruction in the case of an international war but not to do the same merely because there is no involvement of another state, because the war does not cross borders. If the concern of humanitarian law is to save lives, then it makes no sense at all for this distinction to prevail. What the appeals court did was to emphasize that international humanitarian law is moving away from a traditional, state-centered approach towards a human rights-orientated approach. In interpreting the substantive jurisdiction of the ICTY, the appeals chamber has emphasized this human rights-orientated approach as much as is possible within the confines of the existing framework of the law that it has been called upon to apply.

So there have been important positive developments in the law as a result of the jurisprudence and practice of the ICTY. This is not unusual. Without courts the law does not develop, or at least it certainly does not develop quickly enough. It is precisely because international humanitarian law was largely an academic subject between Nuremburg and the establishment of the tribunals that one saw little progressive development of the law during this time. The law was given very little opportunity to be put into practical effect and thus to be developed.

The second important area of success is in the broader educational field. Here I do not mean education simply in the sense of formal education, although this does come into it, but I mean wider, popular education. Perhaps for the first time, international humanitarian law has become an internationally debated subject. This seminar, and many others all over the world, would not have taken place if the Security Council had not established the ICTY. International humanitarian law was taught in a few

military colleges and in some law schools, but not on any widescale basis. It certainly was not on the main stream curricula of many universities, but today it is beginning to be taught widely. And it certainly was not talked about in the media. Today, it is difficult to pick up a newspaper without seeing or reading some reference to one or another aspect of the laws of war. Largely because of the tribunals, war crimes have become a subject which is debated in private homes for the first time ever really, or at least certainly since the Second World War. This educational impact was evident last year when the Croatian government launched Operation Storm in the Krajina. Statements were made publicly by Croatian leaders exhorting the Croatian army to protect civilians and not to breach international humanitarian law and not to commit war crimes. The fact that this was done is important. The extent to which these calls were heeded is a matter on which I would not like to comment because it is the subject of an investigation in the prosecutor's office in the Hague at the moment. But the point that I do want to make is that the law of war for the first time is present in the minds of some, if not all, political and military leaders who find themselves in a position of making war. So the tribunals have had a broad educational influence.

The third area of success, and it is a very important one philosophically, jurisprudentially and politically, is the impact that indicting some of the top level Bosnian Serb leaders had on the Dayton peace process. Without the indictment of Dr. Karadzic and General Mladic, there would have been no Dayton Agreement. If, especially in the aftermath of Srebrenica, Dr. Karadzic had been free to attend Dayton, I think there is little doubt that the peace agreement would not have eventuated. I made this point two weeks ago at a meeting in New York. It was a large meeting and I was not aware of all the people who were present. Interestingly enough, Ambassador Sacirby, who is the Bosnian Ambassador to the United Nations, and the former Bosnia-Herzegovinian Minister of Foreign Affairs, was at the back of the audience; he stood up and confirmed that, without any doubt, had Dr. Karadzic been free to go to Dayton, the Bosnian government would not, in the aftermath of Srebrenica, have attended the Dayton proceedings.

This, I think, is an important point because it debunks the theory that has been popular in some quarters that the work of the Tribunal has inhibited and interfered with, as opposed to promoted, peace. It was suggested that our work was adversely affecting the negotiation process. In my view this was a very short sighted approach. If one is talking about short term cease-fires, short term cessation of hostilities, it could be that the investigation of war crimes is a nuisance. But if one is concerned with real peace, enduring and effective peace, if one is talking about

proper reconciliation, then, in my respectful opinion, there is and can be no contradiction between peace and justice.

Recently, I was referred by the Dean of the University of Notre Dame Law School in Indiana to a message in a homily that was given by Pope Paul XI on January 1, 1972, for World Peace Day. He called his message "if you want peace, work for justice." I think this message is extremely accurate. The fact is that if any political or military leader is indicted by a respected, criminal justice system, national or international, they will be replaced. It has happened in the United States. Nobody attacked the prosecutors who investigated Watergate, and said, "what are you doing to the United States, investigating its president," or "what are you doing to the Republican party, investigating its leader." When President Nixon was forced to resign, there were other leaders ready to take over, ready to lead the country. And when the Bosnian Serbs were forced by the indictment of Dr. Karadzic to be represented by somebody else, it was taken care of. In this instance they were represented by President Milosevic. And if it had not been him, they would have appointed or elected another leader. There is never a shortage of leaders in any country. There are always people who are prepared to take over leadership. And if people are indicted and/or found guilty, then they are no longer fit to lead, and should not be accepted by the international community as such.

Another heartening aspect of the tribunal is its truly international composition. When one compares the international composition of the tribunal with that of the Nuremburg tribunal, we can see that tremendous advances have been made. For the first time in history we have a truly international prosecutor's office, an office consisting of not only American lawyers and investigators, or only British, French or Russian staff as was the case with the prosecutors' offices at Nuremberg. Rather, at the ICTY and the ICTR, each tribunal has eleven judges, five of them (the appeals chamber judges) common to both, working together as an international bench. We have a prosecutor's office at the ICTY which is represented by almost forty different states. One hundred and eighty people from all these different states are working together and building up a completely new jurisprudence.

Also of great significance is the positive relationship that has been forged between the tribunal and a number of governments. This is not something that is apparent because we are talking about things that go on behind the scenes in the sense that they are not public acts. We took the view very early on when I arrived at the Hague that our investigators should not go to any foreign country without the knowledge and consent of governments. We are not a private law firm who can put a partner on an aeroplane to Paris or Washington to meet in a hotel with a witness.

From an international prosecutor's point of view, that is not appropriate. For this reason we have had to establish high level contacts with ministers, with senior bureaucrats and civil servants in many, many countries. We have developed such contacts with virtually every country in Europe and North America, and in respect to the Rwanda tribunal, many countries in Africa. Our investigators have also gone to Asia—to Thailand, the Philippines and Malaysia, and also to Australia. All these meetings, and there have been hundreds of them, occurred as a consequence of contacts with governments. Our contacts with the United States government in particular, have been important with respect to the intelligence community, not only in Washington. We have also had contact with the intelligence community in Paris and London and many other countries. This is all important when it comes to reviewing the success of the tribunal because it shows that governments can learn to work with an international tribunal. This has never really happened before and so it is a learning experience for all concerned. It is an important movement forward.

Our experience in this respect proved to be really helpful very recently to the preparatory committee of the international law commission of the United Nations, the committee charged with putting together a draft treaty for a permanent criminal court. They met in New York in August, 1996, and two senior members from my office in the Hague spent a week with them. We received unanimous reports afterwards that their meetings with the committee had been very constructive. They were able to give very practical advice, relying upon day to day experience in our office. Because of their unique background as the only people in the world who have had practical experience in an international prosecutor's office, they were able to offer a unique perspective.

These are just some of the more important positive contributions already made by the tribunal. Obviously it is too early to assess whether or not the tribunal has been a success in the very direct sense of carrying out its assigned mandate, i.e, that of prosecuting war criminals responsible for serious violations in the former Yugoslavia. Ultimately, the tribunal will be judged on this basis, and rightly so in many respects. The tribunal and the international community that set it up, must, in the final analysis, be held responsible to the hundreds of thousands of victims in the former Yugoslavia who have legitimate expectations that justice should be done. Unfortunately, all too often, however, it is the victims who are sacrificed over and over again. At the moment it is my greatest fear that because of a lack of sufficient political will on the part of the important powers, the interests of these victims ultimately will not prevail. There is a great danger that if more of the 74 people who have already been indicted are not arrested and transferred into the custody of the tribunal, especially the

more senior political and military leaders like Dr. Karadzic, the tribunal will be shut down. So far we only have seven indictees in detention. The other 67 are still walking free. Soon it will be difficult to continue to justify the existence of the tribunal if more people are not arrested and tried. But here I would like to emphasise a point which I hope will help clarify a popular misconception. It is not within the power, and indeed it is not the function of the tribunal, to arrest indictees. The tribunal is a judicial organ with limited powers, just like that of any other ordinary court. All we can do is indict and try those persons who are handed over to our custody. No prosecutor's office and no judges in the world can do more than that. Prosecutors and judges cannot go out and arrest people. That is a matter in this particular case to be taken care of by the governments of states. It is the responsibility of the international community to use its resources and power to arrest indictees. No international court has ever, or ever could in my view, be given its own police force, or its own army to invade the sovereign territory of states in order to arrest. This simply is not going to happen and would never work.

But this does not mean that the international community is not in a position to ensure, through sufficient political commitment, that arrests take place. With a strong political commitment, this could happen. If sufficient political pressure had been brought to bear on governments in the former Yugoslavia, arrests would already have taken place. This has been illustrated by the experience of the Rwanda tribunal. Some African countries were reluctant to cooperate in the arrest and transfer of indictees to the Rwanda tribunal. Political pressure was placed on these countries and they have since cooperated. Kenya is an obvious example. The President of Kenya, President Daniel Arab-Moi, issued a strong statement last year in which he said that Kenya would not support the tribunal. As a result of this, there was an outcry by the United Nations Secretary General and the OAU. Two weeks ago, Kenya made its first arrest for the Rwanda tribunal. So far the ICTR has indicted 21 people, 13 of whom have now been detained. Some of these indictees include high level people like Colonel Theoneste Bagasora, a former chief of the cabinet in the Ministry of Defence. This illustrates that political pressure can and does have an effect.

In the case of the former Yugoslavia, no one questions the competence of IFOR, the force responsible for implementing the Dayton Agreement, to arrest indictees. The competence of IFOR is recognized in its own policy. IFOR's policy has been to arrest people only if they stumble across them during the ordinary course of their duty. This policy, as flawed and inappropriate as it is, at least recognizes the fact that they have the power to arrest. It also indicates that it is a policy question, not a

legal question, that is preventing a 60,000 strong force of the most highly trained troops in the world, from arresting indictees. It cannot be seriously suggested that it would be too dangerous for IFOR to arrest some of these 67. It is a political question and it is a political failure that after two years of issuing indictments, only seven out of the 74 indictees have been arrested. If this does not change in the coming months, then I am afraid this could strike a fatal blow, not only to the credibility and life of the tribunal, but also to the future implementation of international humanitarian law.

If these tribunals do not succeed because of a lack of political support, people will, with some justification, question how a permanent criminal tribunal could work. If the ad hoc court does not work, what hope is there for a permanent court to work? So, there is a lot riding on the success of the Yugoslav tribunal and the Rwanda tribunal, even though in Rwanda there is a very different situation and different considerations apply. For these reasons, we need to continue to apply public pressure which, in my view, can help. Without continued public pressure from the human rights community, nationally and internationally, the ICTY would not have been established. Without continued public pressure it would not have been funded, and without further public pressure, it is not going to succeed because of a lack of political will. Thank you very much.

RESPONSE TO QUESTIONS:

1. Well, I think the questions that you raise are very important and some of them go to the heart of the problem that I think the International Law Commission has been grappling with in relation to a permanent international criminal court. At the heart of it, I think, as Professor Crawford recognized, is the question of state sovereignty. Governments hate giving up sovereignty. This is exemplified and illustrated by the fact that even in respect to the worst crimes known to humanity, the most serious war crimes, governments still object to giving up sovereignty to the extent of having to hand over their citizens for trial to an international court. It is the reason too, I think, that very seldom extradition applications succeed. Governments do not like sending their citizens, even for the most terrible crimes, for trial to foreign jurisdictions. This brings me to my personal view which is that we must go slowly. I think if we want to get too much too quickly, we are going to end up with nothing. It seems to me that firstly the jurisdiction of an international permanent court must be narrowed. It must only deal with the worst kinds of war crimes. Secondly, I have been driven to the conclusion, very reluctantly, that the international community is not ready to have a completely independent

prosecutor and a completely independent tribunal. I cannot see the members of the Security Council, including the United States, being party to the creation of an institution over which they have no control at all. But it seems to me better rather to have an imperfect, or less than perfect, permanent court, than not have one at all. Let me say one final thing—what my South African experience has certainly taught me is the important deterrent of quick investigation. This was one of the problems with the Yugoslav and Rwanda tribunals: they were too late to serve that purpose. But if one had a permanent prosecutor, even if that prosecutor needed some political trigger, as long as the prosecutor was independent when the trigger was pulled, if this was done quickly enough, the institution of an investigation could act as an important deterrent. If there was a report in the prosecutor's office today that in the Middle East and northern Ireland, anywhere you like, there were alleged war crimes and an investigator could go there tomorrow, or next week, and interview the Minister of Defence, or the head of the army, or the colonel on the ground and say, "Look here, I am an investigator from the permanent criminal court, allegations have been made that war crimes have been committed, I want to take a statement from you." You just have to do that twice or three times, and people are going to take heed.

2. Well, I could try and begin to address these questions, but I really need about two and a half hours to do justice to each of them. I will try and deal with both in two and a half minutes. The first question is what case can be made out for a more proactive policy concerning arrests. I think I am qualified to speak to this question because I have been trying to make this case for a while now. The first point I would make is that we need to look at this question from the perspective of the victims. Victims in the former Yugoslavia have been played with by the international community for all too long now. When the tribunal was set up this finally signalled an acknowledgement by the international community of the horrors these people had suffered. The establishment of the tribunal gave them hope that finally justice might be done. In fact, it created an expectation of the highest form of justice—justice to be accomplished through an international institution. They felt acknowledged and recognized by the international community. Then eighteen months went by before a prosecutor was appointed, and I can imagine how this dealt a blow to their hopes. Finally, a prosecutor was appointed in August, 1994. In November, 1994 the first indictments were issued and confirmed, resulting in the issue of arrest warrants. But months went by and no arrests. The response, understandably, of these victims (and many others) was, "How is it that people who have been indicted for the commission of the most se-

rious crimes are still allowed by the international community to roam free?" Then the Dayton meeting and the Dayton Agreement recognized the obligation of parties to the agreement to obey arrest warrants and orders issued by the tribunal. IFOR was established to implement the Dayton Agreement. But IFOR's policy—and here one needs to distinguish between the military force itself and its political leaders because it is really the political bosses at NATO who make the policy—the policy referred to earlier of only making arrests when stumbling upon indictees during the ordinary course of duty. This is like asking for these indictees to fall into their laps. Whoever made this policy was either shortsighted or not serious because there is no way that it could be hoped that arrests would eventuate under this policy. I am not sure which it was. Needless to say, not a single arrest has taken place, and none, in my view, are going to take place as long as this policy persists. Once again, I ask you to consider this from the perspective of the victims. Expectations have been raised and expectations have not been met.

Looked at from the point of view of morality, of justice, and from the point of view of the credibility of international institutions, I believe a very strong case can also be made for the need to pursue an active policy of arrests. The very credibility of the Security Council itself is at stake. The warrants of arrest are issued in pursuance of binding Security Council Resolutions passed in accordance with its Chapter VII powers.² What effect will it have upon the credibility of the Security Council if it stands idle and watches its own mandatory resolutions being ignored? It is very difficult, given all of these arguments, in my view, to justify a weak, half-hearted arrest policy. The problem is that I think this first question is really very bound up with a point you raised in your second question: the point of the body-bag syndrome. None of the parties who have sent troops to the former Yugoslavia believe they can survive the political fallout of losing soldiers in combat there. This is a problem which has to be faced up to. My own personal view is that if a government is going to take this approach it should not send troops in the first place. Sending troops to a foreign conflict zone is an inherently dangerous endeavour. But if you are going to do it, then do it properly. Do not raise expectations which you are not prepared to fulfill. That is worse. Somalia went wrong. My response to this is get it right the second time. Because you did something badly the first time around does not mean you should abandon the idea of subsequent attempts. If this philosophy reigned we would still be in caves. It is because of trial and error that the human race has developed. If we are going to shy away from responsibility, we are

2. Resolution, *supra* note 1.

never going to succeed. Unfortunately, some powers are all too willing to shy away from this responsibility. To illustrate this, let me give you an example of an encounter I had with a former European Prime Minister in my first week of appointment. This former Prime Minister asked me, "Why on earth have you taken this ridiculous job?" I replied, "Because I think it is important that war criminals are brought to justice." And he responded, "Not really. In my view, if people in other countries want to go and kill each other, let them get on with it, it has nothing to do with me or my government." That is the extreme view. Of course, there are always views which straddle the middle. As long as there is no political will, the military will call the tune. And if the military is calling the tune, they will do as little as possible in these circumstances. Again, I do not say this in criticism of the military. If I was a general responsible for my troops, I would limit them to the minimum that they need to do to carry out their mandate. So it is the mandate and the way in which it is interpreted by those with the political power to do so, and not so much the actions of the enforcers themselves, which must be looked to in the first instance.