Fordham International Law Journal

Volume 27, *Issue* 4 2003 *Article* 7

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Abstract

The capture of Saddam Hussein alive is of course a cause for rejoicing. His crimes were massive. He left hundreds of thousands of victims in Iraq; the Shiites who dared to oppose him, the Kurds against whom he committed a most terrible genocide. The question now and the subject of this talk is what to do in order to bring him justice. Having captured him and some of his chief lieutenants, how should they be brought to justice? Broadly speaking, there are four options. The first is a wholly domestic trial in Baghdad before Iraqi judges. The second option would be a hybrid international/domestic court of the form that is now operating in Sierra Leone. The third option is a treaty-based multinational court. The fourth and final option would be an ad hoc tribunal established by the Security Council under Chapter VII of the United Nations Charter, on the lines of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Those then are the four options.

EXCLUSIVE PRESENTATION ON SADDAM HUSSEIN

THE TRIAL OF SADDAM HUSSEIN: WHAT KIND OF COURT SHOULD PROSECUTE SADDAM HUSSEIN AND OTHERS FOR HUMAN RIGHTS ABUSES?*

*Justice Richard Goldstone***

Good evening and thank you very much for that very warm introduction on a very cold evening. I am also surprised at how many of you braved the weather, or will still be braving the weather, to be here this evening.

The capture of Saddam Hussein alive is of course a cause for rejoicing. His crimes were massive. He left hundreds of thousands of victims in Iraq; the Shiites who dared to oppose him, the Kurds against whom he committed a most terrible genocide. The question now and the subject of this talk is what to do in order to bring him justice. Having captured him and some of his chief lieutenants, how should they be brought to justice?

Broadly speaking, there are four options. The first is a wholly domestic trial in Baghdad before Iraqi judges. Such a trial could also conceivably be held outside Iraq in consequence of a treaty or by the exercise of universal jurisdiction. That may, in the case of countries in the Middle East, require special domestic legislation, but from a jurisprudential point of view it is a

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* This Article was originally given as a lecture entitled *Justice in Iraq: the Trial of Saddam Hussein* at the Fordham University School of Law on Thursday, January 15, 2004 for the Crowley Program in International Human Rights at Fordham Law School.

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possibility. I do not believe it to be a practical one at this point, but it should not be left out of account.

The second option would be a hybrid international/domestic court of the form that is now operating in Sierra Leone.[1] That court has sometimes incorrectly been referred to as an "international court." It is not. It is a domestic Sierra Leonean court with international involvement through an agreement between Sierra Leone and the United Nations. Similarly, in Kosovo, there are now domestic courts staffed by increasing numbers of international judges and international prosecutors. I will return to what is rather a sorry story with regard to the Kosovo courts.

The third option is a treaty-based multinational court. The Nuremberg War Crimes Tribunal was such a court. Again, it is incorrect to refer to Nuremberg as an "international court." The four victorious powers "pooled" their respective domestic jurisdictions.[2] The four powers decided that they would do together what they otherwise could do on their own. Each of those powers obviously had the right under international and military law to put Nazi leaders on trial in their own courts. In the Japanese tribunal there were more than the four countries, but it was nevertheless a pooling of domestic jurisdictions.

I would mention that that the new International Criminal Court is similarly constituted. It is a pooling of the domestic jurisdictions of the ninety-two countries that have thus far ratified the Rome Treaty.[3] In effect, they have decided that alleged war criminals they could put on trial in their own courts, they are happy to send for trial to the International Criminal Court. I would mention in passing that the objection of the United States that the International Criminal Court is somehow something new and contrary to international law is simply wrong in my view. If an American citizen commits an offense in my country, South Africa, the courts of South Africa can put that person on trial. Similarly, if I commit an offense this evening in Manhattan, I am

1. Agreement Between the United States and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Aug. 14, 2000, U.S.-Sierra Leone.

2. Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945.

3. Rome Statute of the International Criminal Court, July 17, 1998, art. IV [hereinafter Rome Statute].

amenable to the criminal jurisdiction of the appropriate American court. The ICC is a pooling of such jurisdictions.

The Lockerbie trial is an unusual illustration of a treaty-based multinational court. The treaty between the United States, the United Kingdom, and Libya provided for the Libyan accused appearing before a Scottish court sitting in the Netherlands.[4] Jurisdiction was exercised under that treaty.

The fourth and final option would be an ad hoc tribunal established by the Security Council under Chapter VII of the United Nations Charter,[5] on the lines of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Those then are the four options.

The International Criminal Court is not an option as it does not have jurisdiction in respect of offenses committed prior to the July 1, 2002.[6] Moreover, neither Iraq nor any other relevant country has ratified the Rome Treaty. Therefore, the International Criminal Court would simply not be relevant to the topic that we are now considering.

Before beginning to answer the difficult and complex issue of which of the relevant options should be exercised with respect to Saddam Hussein, it is necessary to reference the history in order to give context to the discussion. It begins, as all of these discussions usually do, with Nuremberg. It should be borne in mind that it was the United States' insistence that led to the decision to put the Nazi war criminals on trial at all. Winston Churchill wanted to line them up and summarily execute them. Stalin would have been happy to go along with that. He had, after all, been doing it for years. The French were ambivalent. It was Henry Stimson, the then-Secretary of Defense, who convinced President Truman, who in turn convinced the other leaders of the victorious Nations, that the Nazi war criminals, notwithstanding the terrible crimes which they had committed, should be given a "fair" trial, by the standards of those days. The basis, as I have explained already, was treaty based. The four powers pooled their jurisdictions.

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4. Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands, Sept. 18, 1998, Neth.-U.K., N. Ir., 38 I.L.M. 926, 926-27.

5. U.N. CHARTER art. 39, para. 1.

6. Rome Statute, *supra* note 3, art XI.

The judges came from the victorious powers, the Nations of the victims of the crimes charged. This was, as has frequently been alleged, victors' justice. This is one of the negative legacies of Nuremberg. Then, too, there was certainly no equality of arms. It was not a fair trial by today's standards and the prosecution had everything going for it. They had thousands of investigators and the top lawyers from the four countries, whereas the defendants really had very puny arms in comparison.

I like to add a caveat in voicing these criticisms of Nuremberg. It is not really fair to criticize Nuremberg by today's standards. By the standards of 1945 that there was a trial at all was a huge step forward. Moreover, it was not that unfair of a trial. There were acquittals of some of the defendants. I suggest that one should test the fairness of courts not by their convictions but by their acquittals. I always feel rather satisfied when there are acquittals in the Yugoslavia or the Rwanda Tribunal because I think that is the best indication that the system is working efficiently and fairly. What is important for present purposes is that the laws applied at Nuremberg have now become customary international law. They were unanimously approved and adopted by the General Assembly in 1948.[7] The recognition of crimes against humanity has led to the development of universal jurisdiction in domestic and international courts.

By "universal jurisdiction," I mean a jurisdiction that many courts now have to put people on trial for the worst possible offenses, regardless of where the crime was committed. Normally, courts only have jurisdiction over persons who commit crimes within their territorial jurisdiction. Again, if I commit an offense in Manhattan, I cannot be put on trial for it in Canada or even in my own country. For huge war crimes, for genocide, for grave breach provisions of the Geneva Conventions,[8] for violations of the Torture Conventions,[9] and now contraventions of many conventions dealing with terrorism, there is universal jurisdiction

7. G.A. Res. 95(1), U.N. Doc. A/64/Add.1, at 188 (1946).

8. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. XLIX; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. L; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12 1949, art. CXXIX; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art CXLVI.

9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1984, art. VII.

conferred upon domestic courts.[10] People can be put on trial for those crimes in whatever country they may be apprehended, regardless of where the crime was actually committed and no matter how tenuous the connection is between the country applying universal jurisdiction and the country where the crime was committed.

The Genocide Convention[11] is interesting in this context because it did not create universal jurisdiction for the worst of crimes. It provides in express terms that those who commit genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[12] So the drafters of the Genocide Convention in 1948 assumed, naively as it turned out, that there would soon be an International Criminal Court. Unfortunately it took more than fifty years for that to happen. The Nations that met in Geneva in 1949 at the behest of the International Committee of the Red Cross were more realistic. They decided that universal jurisdiction should be conferred on domestic courts to try people for grave breaches of the Geneva Conventions.[13]

There was this interregnum between 1948 and 1993 when the United Nations Security Council established the Yugoslavia Tribunal. During that period, there were many attempts to set up an International Criminal Court, but the Cold War in effect made it impossible. The Soviet Union and China were certainly not prepared to consider setting up an international court and the United States also was never eager to push for one. Every now and then the International Law Commission of the United Nations was instructed to draft a treaty setting up an International Criminal Court.[14] They did so. The drafts never went very

10. *See, e.g.*, Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. III; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. IV; International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, art. VI; International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, art. X.

11. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948 [hereinafter Genocide Convention].

12. Genocide Convention, *supra* note 11, art VI.

13. *See supra* note 8 and accompanying text.

14. *See* International Law Commission, Conventions and Other Texts, *at* http://www.un.org/law/ilc/convents.htm.

much further than unimportant committees of the United Nations and they ended up gathering dust in some dark archive either in Geneva or in New York.

It was the awful events in the former Yugoslavia that led the Security Council, to the surprise of international lawyers and the international community, to set up the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and in turn, in November of 1994, the International Criminal Tribunal for Rwanda("ICTR").

Now, there can be no question that had the Rwanda genocide occurred prior to the war crimes committed in the former Yugoslavia, there would not have been an International Criminal Tribunal for Rwanda. There can be no doubt that the major Western Nations demanded the Yugoslavia Tribunal because the terrible crimes that were committed, particularly in Bosnia, were committed in Europe. They were crimes committed by people with fair skins, and blond hair, and blue eyes in the backyard of Europe, where it was supposed never to happen again.

In addition the Cold War had come to an end, the Berlin Wall had come down in 1989, and that too made it easier. Russia and China were prepared in that window of opportunity to go along with what became a unanimous resolution of the Security Council setting up the Yugoslavia Tribunal.[15] There was, in addition, the "CNN factor," as it is called. There were those horrible photographs broadcast around the world, photographs that reminded people in Europe of the Nazi concentration camps in the Second World War. So all of these factors came together and resulted in the Security Council, in May 1993, setting up the Yugoslavia Tribunal.

In April of 1994, in the aftermath of the Rwanda genocide, the new Rwandan Government, which had put an end to the genocide, requested the Security Council to set up an International Criminal Tribunal for Rwanda.[16] From personal contact with the Rwandan leaders I was left in no doubt that they wished for a tribunal very different from that of the former Yugoslavia. Their country had been destroyed and with it their criminal justice system. Ninety percent of their judges had been murdered in the genocide. Over 90% of their prosecutors had been mur-

15. S.C. Res. 827, U.N. Doc. S/Res/827 (1993).
16. S.C. Res. 955, U.N. Doc. S/Res/955 (1994).

dered in the genocide.[17] What they wanted was an international court to replace their smashed judicial system. They wanted a court, sitting in Rwanda, working with their government, putting on trial the people responsible for the genocide.

The Security Council was not prepared to do that. Let it be said immediately that it was for good reason. They did not see how an international criminal court could be established without making it independent. There was no way the European powers would have agreed to the death penalty. And, if the trials were to be fair, they could hardly be held in Kigali with hundreds of thousands of people baying for blood. You could not expect there to have been security for judges who may have acquitted those accused, let alone for the witnesses or the defense counsel.

I am sometimes asked if this does not have the perverse effect of giving the fairest trials to the worst offenders and leaving the low level bureaucrats, who are not shielded from the death penalty, to the mercy of whatever is left of the domestic court system.

The problem of the death penalty really had no solution. President Bizimungu, at our first meeting said to me, "If I was an abolitionist, if I did not believe in the death penalty, this is hardly a good time to tell that to my people." He added that he was not an abolitionist. "Imagine, in the face of a genocide, going to your people and saying that this is the time we should abolish the death sentence." He said that he would not have survived ten minutes as president.

All of this is obviously relevant with regard to trials in Baghdad. In the case of both the Yugoslavia Tribunal and the Rwanda Tribunal, the Security Council decided that those courts could not sit in the countries where the crimes were committed and I have no doubt that that was a correct decision. There was no way in 1993 or 1994 that the International Criminal Tribunal for the Former Yugoslavia could have sat in Sarajevo or Zagreb or Belgrade. It just would not have been possible. Which of the three capital cities would one have chosen? Whichever of the three was chosen would have been completely unacceptable to

17. United Nations High Commissioner for Human Rights Field Operation in Rwanda, The Administration of Justice in Post-Genocide Rwanda, U.N. Doc. HRFOR/Justice/June 1996/E (1996).

the other two countries. What sort of security would there have been for international judges? Who would have staffed them? There would have been a multiplicity of irresoluble problems had they gone that route. Similarly with Rwanda, as I have said, it just would not have been possible to have the trials in Kigali in the aftermath of the genocide.

There can be no question that criminal trials should ideally be held where the crimes were committed. It is very important for courts, especially criminal courts, to be accessible to the victims, so that the victims can feel part of the process. But that is not always possible.

We were fortunate in South Africa. The investigations, the international inquiries by the Commission that I headed for three years, could be held literally where the crimes were committed.[18] There were really no serious security problems. In fact, it amazed many international visitors that we had no security procedures at all. There were not even metal detectors. Moreover, the hearings were not in court buildings. We did not want the people coming there to feel that these inquiries were still a part of the apartheid system. We used local halls and we made it as accessible to the public and as public-friendly as possible. We were lucky that the situation in South Africa enabled that to be possible.

This was not possible with the Yugoslavia or the Rwanda Tribunals. So the Yugoslavia Tribunal was put in The Hague, a long way from the places where the crimes were committed. In the case of Rwanda, it was a little closer. Arusha in Northern Tanzania is at least a neighboring country that is not too far as the crow flies, though it is still rather inaccessible. Oftentimes the quickest route between Kigali and Arusha was via Brussels or Amsterdam. This logistical problem was only resolved when the Norwegian Government generously gave us a charter plane to fly the twenty or twenty-five minute journey between Arusha and Kigali.

These problems of distance are serious. I am happy there is

18. In 1991, I was appointed to head the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, which I believe to this day was the necessary first step to reconciliation in my home country of South Africa after the apartheid years. *See* RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 25-58 (2000). *See also* ANNUAL SURVEY OF SOUTH AFRICAN LAW 1991: THE GOLDSTONE COMISSION 661 (1992).

a young human rights activist in the audience tonight who in fact investigated these problems with regard to the Yugoslavia Tribunal. She and a fellow student at Tufts University conducted a very efficient and useful survey after consulting with many people in Bosnia to find out what effect the Yugoslavia Tribunal was having on them.[19] Their conclusions were not very optimistic. The victims felt that were far too remote from where the trials were being held. Their conclusions reinforced the views I held about the importance of trials being accessible to victims.

It was more serious in Rwanda where the Government did not like the international tribunal. Having requested the establishment of the Tribunal, it rejected it because of its remoteness and the absence of a death penalty. It cast the only negative vote against the resolution setting it up. To its credit, however, that Government cooperated with the Prosecutor with regard to investigations, certainly during my term of office. Remember this was in the months immediately after this vote by the Security Council and was probably the most difficult period. The security of the members of my office and the investigators who had to go into the field was never a serious problem. I always admired the Rwandan Government for having cooperated in that way, providing us with accommodation, with offices, and so forth.

Let me say too at this point that the successes that there have been (and there have been important successes of both the Yugoslavia and Rwanda Tribunals) would not have been possible and neither of those Tribunals would have got off their feet and become operational but for the assistance of the United States. It was the Clinton Administration that made it possible and, again, I speak from personal experience. It was the human and financial resources to The Hague and Arusha at the expense of the American people that made it all happen.

One of the consequences of not having the United States on-board with the International Criminal Court is that this important assistance will be absent. Many of the defendants who "voluntarily" came from Croatia would never have come but for the United States' threats to have World Bank loans withheld.

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19. Kristin Cibelli & Tamy Guberek, *Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International Criminal Tribunal for the Former Yugoslavia* (Project of the Education and Public Inquiry and International Citizenship at Tufts University 2000).

Milosevic himself would not be on trial in The Hague at the moment had the United States not threatened to withhold $1.2 billion of aid. It was that that convinced Prime Minister Djindjic of Serbia to hand over Milosevic.[20] It was the United States' push that made a huge difference to those two Tribunals.

The United Nations Tribunals have had important successes. The first is they have proved that international courts can put on fair trials. This was not a given. Many people seriously doubted whether you could get judges, prosecutors, and lawyers from all over the world and make such a court work efficiently and fairly. Could there be new international processes and procedures that would work? Well, it has. It is now no longer questioned.

There are really no serious criticisms that I have seen or read of the fairness of the trials being held in Arusha or The Hague. There have been criticisms about their length and their expense. These are problems. There is only one way of putting on criminal trials, however, and that is to have fair procedures. If it takes time, there is no alternative. Obviously, one would like to see shorter trials, but if they are going to be unfair, what is the point? In my view, either you have fair trials or you do not have trials at all, and especially so in international courts. That is a political problem. People who do not like the Tribunals criticize them for their expense. It should be borne in mind, however, that the cost of bombing for one week in the Kosovo war would pay for both Tribunals for a year.[21] So expense is a relative issue.

Secondly, the work of the Tribunals put an end to the false

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20. *See* Matthew Kaminski, *Serbia Turns Milosevic Over to U.N. Court*, WALL ST. J., June 29, 2001; Gordon Cramb & Judy Dempsy, *Yugoslavia Gets £900m Reward: Handover of Milosevic Prompts Immediate Pledge from International Conference*, FIN. TIMES (LONDON), June 30, 2001, at 1.

21. For the biennium of 2002-2003, the U.N. General Assembly appropriated U.S.$262,653,700 to the operations of the ICTY. *See* Tenth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, at ¶¶ 332-34, U.N. Doc. A/58/297-S/2003/829 (2003). For the biennium of 2002-2003, the U.N. General Assembly appropriated U.S.$177,739,400 to the operations of the ICTR. *See also* International Criminal Tribunal for Rwanda: General Information, *available at* http://www.ictr.org/. The estimates for the cost of the air campaign in Operation Allied Force are U.S.$2.3 - 4 billion, which at the low end factor out to be approximately U.S.$270 million per week. *See Total Cost Of Allied Force Air Campaign: Preliminary Estimate*, Center for Strategic and Budgetary Assessments Study, June 10, 1999, *available at* http://www.csbaonline.org/.

denials that accompanied the commission of the war crimes. I remember so well in the cases of both Yugoslavia and Rwanda, many people denied that genocide or crimes against humanity were committed. The Bosnian Serb Government in Pale, in particular, denied that these crimes were being perpetrated. Wherever you get heinous criminality they are invariably accompanied by denials on the part of the perpetrators. With regard to Rwanda, I recall visits in my office in The Hague from serious legal scholars coming from Brussels or Paris coming to explain to me that genocide did not occur. They said it was a spontaneous eruption, tribalism in Africa, and not planned at all. I remember, too, that in the early months we were very careful not to use the word "genocide." Pressure came from the State Department in Washington. They did not want to use the word "genocide" because it would attract certain international obligations. That aside, there were many people who simply did not believe it.

In South Africa, one of the most important gifts from our Truth and Reconciliation Commission was that it stopped the denials. Until 1994, the majority of white South Africans preferred not to believe that these things happened. It was uncomfortable to accept that these crimes had been committed in their name and for their benefit. It was the mass of evidence from over 21,000 victims and 7000 perpetrators that effectively stopped the false denials.

Perhaps the best example of ending denials comes from the Yugoslavia Tribunal. Dragan Erdemovic was a Croatian who fought in the Serb Army. In his evidence before the Tribunal, he confessed to having shot and killed at least 70 of the some 8,000 innocent Muslim men and boys slaughtered at Srebrenica in 1995.[22] When the allegations were first aired about the massacre, the Bosnian Serb leaders Karadzic and Mladic denied it. They said, "This did not happen." When Erdemovic arrived in The Hague and made public that there was a mass grave, the response from Pale and the Bosnian Serb Army was, "No, no, we deny there's a mass grave there; and, if there is, it will contain the war dead from battles fought years ago. We deny there was a massacre in 1995 at Srebrenica." When the mass grave was ex-

22. Pre-Trial Transcript of Dragan Erdemovic, May 31, 1996 (ICTY 1996) (IT-96-22-PT).

humed forensic medical evidence established that death had occurred on or about the dates of the events in Srebrenica. Virtually all of them were male, men and boys, all found with their arms bound and tied behind their back. That is not the way people are killed in battle. The denials stopped. In Rwanda, the mass of evidence that has been meticulously found has established beyond question the careful planning that went into the genocide of April 1994. So these Tribunals are important.

Successes aside, there is an interesting lesson to be learned from international and local justice in Kosovo. In 1999, the United Nations Mission, UNMIK, set up a system of international policing but used only local Kosovo judges in the courts. Very quickly it became clear that those judges were biased against Serb defendants and many travesties of justice took place. Only in 2000, the following year, did UNMIK appoint one international judge and one international prosecutor to sit in the court in Mitrovica. This is a divided city where there are Serbs in the one half and Muslim Kosovo Albanians in the other. That did not work because the international judge sat with two other local judges and was outvoted. The international prosecutors could hardly even come to grips with the huge caseload that built up. Eventually, later in 2000, there were hunger strikes by Serb defendants and that led to the appointment of international judges and prosecutors to serve in all five districts of Kosovo, and one international judge on the Kosovo Supreme Court. This was still insufficient. The courts and prosecutors were not acting without bias. It was only late in 2000 that the United Nations set up courts in Kosovo that had a majority of international judges. They were also given the right to re-investigate some cases that had been improperly abandoned by local prosecutors. This has been a very frustrating process. If it proves one thing, it is that if you are going to have a new transitional system in operation, get it right from the beginning. Do not do it incrementally and in a way that makes the criminal justice system really fall into disrepute. I think that this is an important lesson for the future, whether in Iraq or anywhere else.

There is a third success of the UN Tribunals. Many people ask if these two Tribunals have had any deterrent effect. It is always difficult to prove deterrence. How do you prove what crimes would have been committed but for a particular court or but for a particular criminal justice system being in operation?

But there is anecdotal evidence of deterrence. Prior to the launch of Operation Storm, the Croatian leadership publicly acknowledged their human rights obligations to civilians.[23] That notwithstanding, it emerged that the Croatian forces did attack civilians and did commit war crimes.[24] It is not possible to prove whether more civilians would have been attacked but for that awareness that a court in the Hague could hold them to their word.

More compelling perhaps are the statistics.[25] In World War I, roughly 95% of the casualties were soldiers.[26] In World War II, it became 50%.[27] World War I was still old-fashioned from a war point of view, where armies fought armies. In World War II, armies fought armies but they also fought civilians. Whether it was the Nazi blitz bombing of London and Coventry, or the fire bombing of Dresden, Hamburg, and other German cities, or the dropping of the atomic bomb on Hiroshima and Nagasaki, the Second World War made innocent civilians the intended victims of those massive bombing campaigns. And so it was not surprising that it became 50%. In the Korean War, it became 84% civilian victims.[28] In Vietnam, 90% of the victims were civilian. In over 200 civil wars since the Second World War, certainly over 90% of the victims have been civilians.[29] So this is a horrible aspect of a bloody second half to the twentieth century.

For the first time, this was reversed by the democracies in their bombing campaigns in Kosovo. Seventy-eight days of bombing, massive bombing, claimed under 500 civilian victims.[30]

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23. *See, e.g.*, John Pomfret, *Battle Could Hasten Long War's Conclusion — On Fighters' Terms*, WASH. POST, Aug. 5. 1995, at A1.

24. Indictment, Prosecutor v. Ivan Cermak & Mladen Markac (ICTY 2004) (IT-03-73-I).

25. In June 2003, a bill was put before the U.S. Congress that made a finding as to the precipitous increase in civilian casualties though twentieth century conflicts. *See* Women and Children in Conflict Protection Act of 2003, H.R. 2536, 108th Cong. § 201(1) (2003).

26. *See* WORKING FOR RECONCILIATION — A CARITAS HANDBOOK at 1 (1999) [hereinafter WORKING FOR RECONCILIATION].

27. *Id.*

28. *See* Max Born, *What Is Left to Hope For*, BULL. OF ATOMIC SCIENTISTS, Apr. 1964, at 4.

29. *See* CHRISTER ALHSTRÖM, CASUALTIES OF CONFLICT: REPORT FOR THE WORLD CAMPAIGN FOR THE PROTECTION OF VICTIMS OF WAR (1989). As this report spells out, "victims" include both those, who are casualties of conflict as well as those displaced.

30. *Civilian Deaths in the NATO Air Campaign*, Human Rights Watch Report, vol. 12, No. 1(D) (2000).

This was something new. I do not believe that that would have been the position but for the work of the Yugoslavia Tribunal. It is common knowledge that the NATO countries involved had military lawyers sitting with the military commanders, telling them what were and were not justifiable military targets. Civilian lives were spared. For the first time in modern warfare, certainly since before the Second World War, there was a great concern to protect civilians.

In the United States' bombing in Afghanistan of the Taliban, there was again great publicity given to the orders to avoid civilian casualties and regret expressed when civilians were killed in error. It may have been negligence but there was no intention on the part of the United States Army and Air Force to target civilians. Their intention was to protect civilians. In Iraq it was more difficult because of the vicious war on the ground. Nevertheless, every measure was taken within reason not to attack innocent civilians. This is a success of the Yugoslavia Tribunal and, to an extent, the Rwanda Tribunal. On the other side, war crimes continue to be committed, whether it is in Africa or in Asia or in many other parts of the world where that deterrent effect has not been felt. But a start has been made.

With that background, let me turn to the question as to what should be done with Saddam Hussein and his lieutenants. What is hoped to be achieved by their trial? One cannot start looking for solutions until one identifies the goals.

First and foremost it must surely be to bring justice for the victims; justice for the hundreds of thousands of victims of genocide and other war crimes committed since 1968 when Saddam Hussein assumed the leadership of Iraq. Not only victims in Iraq but one should not leave out of account the many hundreds of thousands of war crimes committed by Iraq in its war against Iran. So we are dealing with both domestic and international crimes.

A second goal must be to bring acknowledgement to the victims. Why do families of loved ones want a court trial? It is not to tell them what happened. They know that. They know the facts. They want an official acknowledgement, a public acknowledgement. It is important and often crucial for the healing process to begin. From my own observations of the South African Truth and Reconciliation Commission, the healing pro-

cess of many victims was not possible until they received that public acknowledgement in front of the television cameras and the media generally. Obviously not all victims respond in this way. However, that acknowledgement is important to many victims cannot be disputed.

Thirdly, a trial of Saddam Hussein should serve as a deterrent, at least in the Middle East. If this sort of war criminal is put on trial, it must have a positive effect. I have no doubt that some leaders in the world and particularly in the Middle East may be deterred from committing terrible war crimes in the future.

Those seem to me to be the most important goals to be achieved by bringing Saddam Hussein and his lieutenants to justice. It is hardly necessary to say that revenge by the United States should be the last reason for putting Saddam Hussein on trial.

The goals I have mentioned cannot be achieved unless the trial is both in fact and in perception scrupulously fair. You cannot provide that acknowledgement and bring justice to the victims unless they believe that the process has been a fair one. A fair trial, in turn, cannot be held unless there is adequate security for the judges, the defendants, the witnesses, and counsel, both prosecution and defense. A fair trial cannot be held if the judges are not independent and are not competent. A fair trial cannot be held in the absence of meticulous preparation by the prosecution and competent defense counsel.

One of the early problems that I had as Chief Prosecutor for the Yugoslavia Tribunal was my concern for adequate defense for Tadic, the first war criminal we put on trial. At that time, the United Nations was not prepared to pay for more than one defense counsel for an accused. So a list was drawn up and given to Mr. Tadic in the U.N. prison outside The Hague. Tadic looked down the list, saw what looked like a Russian name, Mikhail Vladimiroff, and he thought that would be a good idea because a Russian would be pro-Serb. Mr. Vladimiroff, however, did not speak a word of Russian. His grandfather had immigrated to the Netherlands. Fortunately, Mr. Vladimiroff was a most competent criminal lawyer practicing in The Hague. The judges, however, had decided on an adversarial, common law kind of trial, where cross-examination was essential. Mr. Vladimiroff had never cross-examined in his life, because on the continent you

do not have cross-examination; the judges run the trial and ask the questions. Mr. Vladimiroff realized that he would not have been able to manage.

At about that time, I received a visit in The Hague from Mark Ellis, who was then the founding director of the American Bar Association's Eastern and Central European Law Initiative ("CEELI"). He asked me how the American Bar Association could help me, the Prosecutor. I said the best way the American Bar could help the Prosecutor was to provide adequate defense for the defendants. That appealed to him. To cut a long story short, the ABA hired two British barristers from the criminal bar and they joined Vladimiroff and conducted the cross-examination of the witnesses. But for that, Tadic's trial would not have been a fair one. He would have had to rely on a completely inexperienced counsel.

It is very important that Saddam Hussein should be offered a competent and adequate defense team. Of course, there might be a problem if Saddam Hussein takes a leaf out of the Milosevic book and decides to be his own attorney.

Let me add that it would be a great shame if anger or haste or politics were allowed to dictate these decisions. If the haste to get a trial is going to be the yardstick, then it is going to be a hopeless situation. I was recently on a panel on a BBC World Radio program on this topic. The other two members of the panel were the Political Editor of the London Times and a minister in the new Governing Council in Baghdad. The Iraqi minister was asked by a very bright interviewer on the BBC how the trial should look. The Minister was adamant. He said that Saddam Hussein has to be brought to trial in front of Iraqi judges in Baghdad, which must be done soon and that the trial must be swift. He said that Saddam Hussein must not be allowed to use it as a platform for propaganda. The interviewer responded by asking whether that would that be consistent with a fair trial. The minister said that it was not really a relevant question because the people of Iraq have already condemned Saddam Hussein. They have already found him guilty. I could not help but intervene and said, "Well, that includes the judges." There was no response. But of course that is the problem with this sort of victors' justice.

Given the situation in Iraq at the moment, to put on a trial

in Baghdad today is just beyond any thought. How can you have a trial with bombs going off daily, people being attacked daily? How can you expect a court to sit in Baghdad and be able to operate and have a fair trial? Moreover, there have been no independent courts sitting in Iraq since 1968. For thirty-five years there have been no regular courts sitting. There are, I understand, a handful of judges who are still there who were judges before 1968. They may be appropriate. I do not know enough about them to be able to comment but certainly there cannot be more than a tiny pool of judges who may qualify. Then, there have been no independent prosecutors in Iraq for thirty-five years. I certainly have not heard of any pool of independent prosecutors who are available.

One has got to have courts sitting in judgment over Saddam Hussein that will have the respect and confidence of all of the people of Iraq. It is no use appealing to only one sector, either for Saddam Hussein or against Saddam Hussein. That is not the sort of trial that is going to achieve any of the goals to which I have referred.

With the United States' assistance, some of these problems may be solved. If this court is in fact or in perception a front for the United States, that is obviously going to be self-destructive. It is not going to bring any substantial justice to the victims. And the international community, certainly outside the United States and possibly the United Kingdom, is simply going to reject it. It would be a recipe for failure.

If there are local judges in Iraq who would be appropriate, I do not see that they can be appointed until there is an independent and hopefully democratic government to appoint them. Judges appointed by an American appointed governing council will not earn the confidence or respect of the broad public in Iraq or anywhere else in the region. It would be shameful if the trial of Saddam Hussein was left open to the criticism of being victors' justice.

It follows that there cannot be a fair trial in this situation without international involvement. By all means use Iraqi judges. If the security situation allows it, by all means, and that is the first prize, hold the trial in Baghdad. I doubt whether that is practical politics in the coming year or two. I hope I am wrong. If I am wrong, I will be very happy that a situation obtains in

Baghdad where a trial can be held there that will be fair, that competent defense counsel and witnesses will feel secure in putting up a defense for Saddam Hussein and that prosecutors and judges will feel secure in conducting their work.

Clearly, the most sensible route would be for the United States to request the Security Council to set up an international court for Iraq and clearly, they have the competence to do it. If the United States requested it, there can be no question that all of the Members, the Permanent Members and the Non-Permanent Members, would go along with it. It would be sensible because it would have the appearance and the fact of being independent. The present United States Administration could ensure that all of their fears about international courts are resolved. The United States could require the Security Council itself to select the judges and prosecutors. With the exercise of its veto, the United States could certainly ensure that judges and prosecutors do not come from inappropriate countries. But that is not going to happen because the Bush Administration will have no truck with any international court.

The outcome is in the power of the United States. Saddam Hussein is in their custody and they cannot be compelled to hand him over for a trial that is not just and fair. I would suggest that they should not hand him over for trial to any court which does not meet the standards for which this country has stood: looking after the interests of victims and witnesses and the application of the rule of law and fair and due process.

A third alternative is a hybrid domestic tribunal, the Sierra Leone or Lockerbie type of tribunal. Again, if that is done, as in Sierra Leone, the U.N. involvement would be essential as you cannot have independent courts being set up in this situation by the United States or even by the present Governing Council. Where should the court sit? Ideally it should be in Iraq and if not in Iraq, as close as possible to Iraq. I am not sufficiently acquainted with the possibilities in the region, but clearly there are good judges from the Islamic world who could be brought into the process, with or without Iraqi judges. There are competent and experienced judges in Egypt, in the Emirates, and elsewhere in the region.

What should Americans do about it? What should you do about it? Americans should pressure their government to take

all necessary steps to ensure a fair trial. Surely that is not too much to ask of the American government. I would have thought not many years ago that it would have been too obvious even to debate that there should be a fair trial in a situation where the United States is calling the shots.

The strength of democracy is that if there are enough of you, you can make a difference. That is why the Bush Administration changed the rules for military commissions. I have no doubt that it is only because of protests from within the United States community. The American Bar, the Association of the Bar of New York, and many other groups, including human rights organizations, were all horrified at the rules that were first promulgated in November of 2001 and they were drastically amended in March of the following year. The later rules may not meet the demands of human rights activists but they are incomparably more appropriate and conducive of fair trials.

There appears to be little media concern about a fair trial for Saddam Hussein. What you say does make a difference and I suggest it is something about which you should speak out.

Let me conclude by repeating that the decision with regard to these issues is very much in the hands of the United States. Saddam Hussein is in their custody and they should not hand him over for trial unless satisfied that that trial will comply with the standards to which I have referred. Those are the standards in respect of which the United States, historically and traditionally, has been justifiably proud and for which it has been admired by the democratic world.