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Conference Convocation

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WAR CRIMES TRIBUNALS: THE RECORD AND THE PROSPECTS

CONFERENCE CONVOCATION

M. CHERIF BASSIOUNI
CHARLES N. BROWER
CLAUDIO GROSSMAN
DIANE F. ORENTLICHER
TINA ROSENBERG
THE HONORABLE DAVID J. SCHEFFER
PAUL WILLIAMS

* * *

CLAUDIO GROSSMAN
PROFESSOR OF LAW AND DEAN, WASHINGTON COLLEGE OF LAW

Dear friends, on behalf of the faculty, staff, and students of the Washington College of Law and the American Society of International Law, which is co-sponsoring this event, I would like to welcome you all to our institution.

I have asked Professor Diane Orentlicher, the director of our War Crimes Research Office and a co-director of our Center for Human Rights, to say a few words. Professor Orentlicher is the driving force behind this event. She is a committed scholar and activist in the area of war crimes and impunity. The result of her work has been truly remarkable. You might know her as a scholar. As a teacher, she has inspired many law students. I would like to invite Professor Orentlicher to share with us what the conference expects to accomplish in the next day.

* * *

DIANE F. ORENTLICHER

PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW

Claudio has asked me to say a few words about what we hope to accomplish in this conference; I will be very brief.

This conference has three core aims. First, the war crimes Tribunals established by the United Nations Security Council now have a rather rich track record and it seemed that it would be productive to take stock, with the front-line participants in the Tribunals, of what we have learned from their early experiences.

Second, with preparations now underway for a permanent International Criminal Court, it seemed that it would be especially useful at this time to mine the experiences of the Yugoslavia and Rwanda Tribunals for lessons that may productively guide the work of diplomats meeting in New York this month and those who will convene this summer in Rome to draft the statute for the permanent court.

Finally, we wanted to find a significant way to recognize that the Tribunals, whose key officers and staff have joined us this week, are in a meaningful—but surely elusive—sense *our* Tribunals. The Rwanda and Yugoslavia Tribunals were created by the United Nations to seek justice, not only on behalf of the survivors of “ethnic cleansing” in Bosnia and of genocide in Rwanda, but also on *our* behalf. The crimes that they prosecute are very literally crimes against humanity, crimes against universal conscience. But, unlike most courts, these two Tribunals pursue their task far away from most of the people in whose name they act. For the next day at least, we hope to bridge that distance and gain a better, deeper understanding of the Tribunals from the individuals who have undertaken a critical task on our behalf.

We are extremely fortunate to have as our guests the top leadership of both the Yugoslavia and Rwanda Tribunals.

Those of us who have already had the opportunity to meet Judge McDonald, Justice Arbour, Bernard Muna, Judge Pillay, and their colleagues know that the Tribunals have been blessed with some extraordinarily able leadership. It is my great privilege and pleasure to welcome them tonight.

I would also like to extend a special welcome to several alumni of this law school. It was students who involved the law school in the work of the Tribunals through the establishment of the War Crimes Research Office three years ago. Several former students who played a leading role in that effort, including Bogdan Ivanisevic and Frederick Holtz, have returned for this conference from as far away as Yugoslavia and Bosnia. I am delighted that they could be here.

I would also like to acknowledge with special appreciation the contributions of three other recent graduates of this law school—Rochus Pronk, Brian Tittmore, and Patricia Jones. Although they were unable to be with us this week, Rochus and Brian provided extraordinary stewardship of the War Crimes Research Office during its early years. That so many leading officials of the Yugoslavia and Rwanda Tribunals agreed to participate in this conference is, I believe, in no small measure a tribute to the high quality of the work that Rochus, Brian, and students working with them have undertaken for the Tribunals through the War Crimes Research Office. Finally, Patricia Jones's contributions to the preparations for this conference have been countless and indispensable.

Thank you and welcome.

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DEAN GROSSMAN: Dear friends, today we are celebrating the founding of the Washington College of Law. We were created 102 years ago by two pioneering women, at a time when women were neither admitted to law schools nor able to practice law in many jurisdictions.

Our founding mothers believed that legal knowledge and a commitment to fairness were essential to achieving equality for women. Moving forward with this tradition, every year we celebrate and proclaim the validity of the message of our founding mothers: that today, as in the past, legal knowledge and commitment to fairness are fundamental to promote important values of human dignity and equality. If Emma Gillett and Ellen Spencer Mussey were here today, I am sure they would be proud to see this conference on war crimes taking place.

They would also be proud to know that since its inception in September of 1995, the War Crimes Research Office of our school has

provided the Office of the Prosecutor for the International War Crimes Tribunal for the former Yugoslavia and Rwanda with legal research and analysis on international humanitarian and comparative criminal law projects.

With the guidance of Diane Orentlicher and other faculty members, a group of approximately thirty students have worked to provide the Tribunal with legal knowledge and comparative analysis. That effort has resulted in twenty-six projects that have been invaluable for the Tribunal.

We are also proud to be able to explore the ways we can further promote individual responsibility and accountability. In this region, Yugoslavia and Rwanda seem far away, but as a member of the Inter-American Commission on Human Rights, I have seen international crimes and impunity in this hemisphere. As Gabriel Garcia Marquez said when he accepted the Nobel Prize for Literature, with those who have been killed in this hemisphere during this century, we could create a new country, like Norway, and yet the phenomenon of impunity continues.

The Inter-American Commission recently visited Colombia, for example. Three hundred and fifty people were killed for political reasons during the short one-week stay of the commission. No one was prosecuted or punished.

Until we are certain that international crimes will be prosecuted and punished, justice will not be done. This affects not only the Colombians, but it affects all of us. It affects us not only because of our values, but also because of the amount of attention and resources that the international community must devote to these man-made tragedies to the detriment of other efforts such as responses to natural disasters.

The War Crimes Tribunal project in the law school would not have been possible had it not been for Diane Orentlicher and the co-directors of the Center for Human Rights and Humanitarian Law, Bob Goldman and Herman Schwartz, as well as numerous students. I cannot fail to mention that some of the most interesting ideas in this law school are the result of student initiative. Sixty percent of the students of this institution study law because they want to build a better world. It is motivating to recognize that our students treasure the powerful forces of ethics and law.

We are honored to welcome two distinguished guests who were prosecutors in the Nuremberg trials fifty years ago, Mr. Drexel A. Sprecher and Mr. Benjamin Ferenze. The principles established through their work continue to be a guiding force for all of us.

Also, Natasha Candish, one of the strongest voices for human rights in Bosnia today, is here with us.

In addition, I would like to recognize the Honorable Patricia Wald of the United States Court of Appeals for the District of Columbia.

Finally, it is my great pleasure and honor to introduce Charles Brower. Charles Brower is a partner in the law firm of White and Case, the current President of the American Society of International Law, and a leading specialist in international arbitration.

As President of the Society, he has devoted the Society's important resources and time to celebrating the 50th anniversary of the International Bill of Human Rights. His leadership and participation are one of the reasons we are having this conference.

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CHARLES N. BROWER

PRESIDENT, AMERICAN SOCIETY OF INTERNATIONAL LAW

Good evening. I want to say that in the few minutes I have been here this evening, I am reminded what an outstanding law school you have, and particularly what an extraordinary dean you have. Dean Grossman is the first dean of a law school, in recent memory, to walk up to me and address me in Dutch. I learned that he spent nine years in the Netherlands at the University in Amsterdam, and therefore, of course, is most highly qualified in international law.

It is most fitting that in this year, the fiftieth anniversary of the Genocide Convention and also the Universal Declaration of Human Rights, the Washington College of Law of the American University and the American Society of International Law have joined in sponsoring this "Conference on War Crimes Tribunals: the Record and the Prospects."

For the Society, this conference, as Dean Grossman mentioned, continues a focus on human rights issues, which we have had during this anniversary year. This focus was reflected earlier this month in a

conference we co-sponsored at the United Nations, under the leadership of the American Bar Association and others, that was addressed by Secretary General Kofi Annan, Elie Weisel, and the former dean of this law school, your own Thomas Buergenthal.

That focus is also finding expression in Society regional programs this month and next at Washington and Lee University School of Law and the University of Denver College of Law, as well as at our Annual Meeting here in Washington.

That focus is to be further sharpened this Friday when I will be presenting the Society's Goler T. Butcher Medal for Excellence in International Human Rights Law to the President of the International Criminal Tribunal for the former Yugoslavia, Judge Gabrielle Kirk McDonald, who is present this evening.

In continuation of this human rights anniversary focus, it is my honor now to introduce your principal speaker.

I start by underscoring the obvious fact that until just a few months ago, the United States had never had anything like an Ambassador-at-Large for War Crimes Issues. The very creation of that post by the Clinton Administration constitutes a very large step forward on the road we are all pledged to tread. I may add that I deeply suspect that our speaker this evening had something to do with that step being taken.

He was the natural choice to undertake those very serious responsibilities. He embodies what is for me an ideal combination of serious experience as a practicing lawyer, a committed scholar, a persuasive publicist, a political realist, and a diplomat. This impressively eclectic record has been accumulated through seven years of practice with Coudert Brothers in the United States and abroad, and through graduate studies, research, and teaching at such little known universities as Harvard, Oxford, and Georgetown. He has held senior positions at the Council on Foreign Relations, the Carnegie Endowment for International Peace, and the House of Representatives' Committee on Foreign Affairs, as it was then still known, and finally, for the last five years, as a close associate of Secretary of State Madeleine Albright.

It gives me great pleasure to present to you Ambassador David J. Scheffer.

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THE HONORABLE DAVID J. SCHEFFER
UNITED STATES AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES

U.S. POLICY ON INTERNATIONAL CRIMINAL TRIBUNALS

I want to begin by thanking the Washington College of Law and the American Society of International Law for their foresight in convening this conference at a time when developments are rapidly unfolding for the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as for negotiations for a permanent international criminal court. The stellar cast of speakers at tomorrow's meetings is a veritable who's who of those who have made historic contributions to the work of the war crimes tribunals and are committed to their success. Many of you are in the audience tonight and I want to express my personal admiration for your dedicated service to international justice.

It may well be said in future years that 1998 was the year international criminal justice came of age. The long march from Nuremberg and Tokyo has been arduous, particularly for those who sustained their hope for an international court through the decades of war and atrocities which followed World War II. But in this year, the two ad hoc international war crimes tribunals expect to hold eleven trials of individuals indicted for genocide, war crimes, or crimes against humanity with staffs and budgets that finally reflect the international community's long-term commitment to their work. And this summer, after three and one half years of review by experts from the Member States of the United Nations, a statute for a permanent international criminal court will be presented for adoption by governments at a diplomatic conference in Rome.

Tonight I want to set forth United States policy on international criminal tribunals and the challenges that arise from them. Secretary of State Madeleine Albright is determined that the United States continue its leadership in the pursuit of international justice. She joins the President in recognizing the unique moment in history fac-

ing this generation of Americans. We cannot, and we will not, let war criminals set the agenda for the twenty-first century.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The United States has played the pivotal role in the international community's support for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), as well as its predecessor, the Commission of Experts on the Former Yugoslavia. We have provided \$54 million in assessed payments and more than \$11 million in voluntary and in-kind contributions since 1992, when the Commission was launched by the Security Council. These payments and contributions, including scores of seconded expert personnel, far exceed those of any other nation. Recently, the United States contributed \$1 million for construction of the largest courtroom at the Tribunal in collaboration with the Dutch government. This month Secretary Albright also announced the contribution of \$1.075 million for Tribunal investigations in Kosovo, for much-needed translation services, and for the "rules of the road" project. United States troops in Bosnia have played significant roles, either directly or in support capacities, in the apprehension of four indictees. Special Representative Robert Gelbard has been instrumental in negotiating the voluntary surrender of ten other indictees to stand trial before the Tribunal.

In the last year, the number of indictees taken into custody in The Hague has more than tripled, from eight to twenty-eight. Many of those indicted for genocide who were at large a year ago are no longer at large. We recognize that our work is not finished, and that much more needs to be accomplished. We share the impatience and frustration arising from the fact that some of the major indictees, including Radovan Karadzic and Ratko Mladic, remain at large. But, their day before the ICTY will come; there are no deals to cut. If either were to surrender, his trial in The Hague will be fair, and he will ensure his safety and the safety of those around him. The Administration will continue to keep its options open to seek the prosecution of all indictees in The Hague.

In this respect, federal law has required since last year that the Secretary of State determine where the "competent authorities" in a country, entity, or canton have failed "to take necessary and signifi-

cant steps” to apprehend publicly indicted war criminals, with the consequence being the termination of United States bilateral aid and non-support of multilateral aid unless the Secretary waives the restrictions. That determination has been made with respect to Republika Srpska and Serbia-Montenegro. In some instances, she has exercised her waiver authority for Republika Srpska in order to further the overall objectives of the Dayton Peace Accords and promote the more moderate leadership in Banja Luka.

The United States government carefully vets each United States bilateral assistance project to see that it will not benefit publicly indicted war criminals. We are working hard to make this procedure work. While we do not have the same power over multilateral assistance projects, we work carefully with international lending financial institutions to minimize the likelihood that any assistance will go to publicly indicted war criminals.

One issue that receives little public attention is the critical need for tens of thousands of Croatian Serb refugees to return to Croatia. One key to their return is removing fear of domestic arrest on war crimes charges arising from the conflict between Croatia and Croatia’s ethnic Serbs between 1991 and 1995. That political imperative is critical to reconciliation in the region and to the acceptance of Croatia as a modern European nation. Ethnic cleansing by exclusion can be as destructive as ethnic cleansing by expulsion. Croatia recently said it was granting official amnesty to 13,575 Croatian Serbs, but they have so far refused to confirm that their amnesty extends to all ethnic Serb refugees from Croatia. We find the misguided methodology employed by the Croatian authorities lacking in the key requirement to restore confidence in the minds of those Croatian Serbs who wish to return to their homes. One important role for the ICTY is to help prevent war crimes charges from being used as a political weapon that prevents people from returning to their homes. Primary jurisdiction for war crimes charges remains with the ICTY, and we will continue to press Zagreb to work closely with the Tribunal.

Despite United Nations approval of the full budget request for 1998 for the ICTY, we have recognized through our recent voluntary contributions the need for additional resources in The Hague. But even more support is likely to be needed before the next budget request is submitted later this year, particularly as more indictees arrive

to stand trial. The United States is addressing the need to form a new chamber of judges in the Tribunal to handle the expanding trial work in a manner that accords with the due process rights of the defendants. ICTY President Gabrielle Kirk McDonald has sought this additional support. We recognize that any such expansion would necessitate an increase in the staff and resources of the Office of the Prosecutor and of the Registry. For example, we want to see the Victim and Witness Unit adequately staffed. Therefore, the financial resources required for expanding the ICTY will be substantial, and additional expert staff will need to be employed or seconded in a timely manner. We will continue to press the United Nations Secretariat and other governments to take a common-sensical and logical approach to the entire secondment issue so that the unique mandated requirements of the two ad hoc tribunals can be met.

Also on the issue of resources, there is a related point I must make. At the very moment in world history when the United States can make the critical difference in waging peace, by joining with others to enforce international law, advancing vital national security interests, and bringing war criminals to justice, our credibility and our influence with other governments is needlessly and foolishly at risk. The failure of the United States to pay its United Nations debts for years has had severe repercussions in the exercise of American foreign policy. As Secretary Albright has said, we are the indispensable nation, but we cannot go it alone. We were pleased last year to receive bipartisan support for legislation that would put us well on the way to satisfying our obligations at the United Nations. Unfortunately, final passage of this bill was blocked by a small group of House members who wanted to hold the legislation hostage over an unrelated issue. The American people must not let this happen again. As we insist that reform at the United Nations goes forward, the United States has a responsibility to pay our debts to the United Nations.

We are also working to help with efforts to deploy a multinational team of investigators to Kosovo at the Tribunal's request. The failure of Serb authorities to issue visas for the investigators shows once again the extent to which Belgrade obstructs the Tribunal's work. That at least three top indictees of the Tribunal live freely and openly in Serbia remains one of Serbia's more blatant violations of its obli-

gation to cooperate with the Tribunal. This lingering situation only adds more bricks and mortar to the "outer wall of sanctions."

As for the work of the ICTY, we can say at this time that, under the skilled leadership of Justice Louise Arbour, the Chief Prosecutor, and President McDonald, the ICTY's course is set and its sails are unfurled. We must ensure that the weather remains fair and the winds strong so that those who navigate the Tribunal can complete their pioneering journey.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Justice Arbour also serves as Chief Prosecutor of the International Criminal Tribunal for Rwanda ("ICTR"), and Judge McDonald presides over its Appeals Chamber. The United States strongly supports the ICTR. We have made \$31 million in assessed payments to date and \$4.3 million in voluntary cash and in-kind contributions. We actively sought, and were pleased the United Nations General Assembly approved, the full budget request for 1998 for the ICTR. Twenty-three of thirty-two publicly indicted persons are in custody at the ICTR's headquarters in Arusha, and four of those are now being prosecuted in three trials. Of those indictees in custody, many are the top leaders of the 1994 genocide. Prosecution and defense have rested in the trial of Jean-Paul Akayesu and the judges are deliberating. We fully expect that further investigations will lead to more indictments and trials.

President Clinton said last week in Kigali that the United States will "continue to pursue justice through our strong backing for the ICTR. The United States is the largest contributor to this tribunal. We are frustrated, as [are the Rwandan people], by the delays in the tribunal's work, and we know we must do better. Now that administrative improvements have begun, however, the tribunal should expedite cases through group trials and fulfill its historic mission."

We have encouraged officials of the ICTR to examine carefully the merits of group trials and to do everything possible to better manage the conduct of the trials and the workloads of the judges so that defendants are tried in a timely manner. The needlessly slow trial work, despite all of the handicaps and hardships endured by the Tribunal, has tarnished the credibility of the Tribunal and created

significant difficulties for the Rwandan government as it seeks to promote reconciliation and to dispose of its own colossal caseload of approximately 130,000 suspects.

If it can indeed be shown that the genocide of 1994 was orchestrated by a group of leaders from a cross section of society acting as conspirators, and they can be prosecuted as a group, not only would the efficiency of the ICTR's work be significantly improved and defendants tried more quickly, there would be a powerful, Nuremberg-like signal sent to the people of Rwanda. They would see the way in which men and women conspired, at the highest levels of Rwandan society, to unleash a genocidal assault. The lesson of Arusha will, we hope, help shape a better future for Rwanda.

President Clinton said in Kigali that, "We are prepared to help, among other things, with witness relocations so that those who still fear can speak the truth in safety. And we will support the war crimes tribunal for as long as it is needed to do its work, until the truth is clear and justice is rendered." In these respects, we will be working on witness relocation agreements with both ad hoc tribunals. Also, we stress that the mandate of the ICTR will continue until its work is done, and we fully expect that it will take a number of years to accomplish that.

The United Nations Inspector General recently released his second report on the management and work of the ICTR. He identifies progress in the work of the Prosecutor and Deputy Prosecutor, an anticipated "busy and crowded trial calendar" for the judges, and considerable shortcomings (mixed with some progress) in the Registry of the Tribunal. The United States finds much merit in the Inspector General's overall assessment and we hope that the Registry, in particular, will improve its performance dramatically in the months ahead. There simply is no justification for further inefficiencies or administrative gridlocks.

Here in the United States, the ICTR indictee, Elizaphan Ntakirutimana, was re-arrested one month ago after he was released from detention on December 17 by a Federal Magistrate Judge in Laredo, Texas. The State and Justice Departments worked closely with Prosecutor Arbour, Deputy Prosecutor Muna, and Registrar Okali to re-file our request that Ntakirutimana be transferred to Arusha to stand trial for genocide and other crimes. The United States firmly

believes that the legislation implementing its cooperation agreement with the Tribunal is constitutional and that probable cause exists to transfer Ntakirutimana to Arusha. We will continue to pursue this case vigorously in federal court.

I do not want to leave this focus on the ICTR without emphasizing the great importance of President Clinton's acknowledgment in Kigali last week regarding the genocide of 1994 and the use of refugee camps afterwards as safe havens for the genocidiaries. The President said that we did not immediately call the crimes by their rightful name, genocide, and that we did not act quickly enough after the killing began. The President pledged "to increase our vigilance and strengthen our stand against those who would commit such atrocities in the future," in Rwanda or elsewhere. He called for preventative efforts and for quick actions to minimize the horror when it is unleashed.

The United States recognizes in the future:

- We need to heed the warning signs of genocide.
- Officially-directed massacres of civilians of whatever numbers cannot be tolerated, for the organizers of genocide must not believe that more widespread killing will be ignored.
- "Neutrality" in the face of genocide is unacceptable, and must never be used to cripple or delay our collective response to genocide.
- The international community must do everything it can to respond quickly enough to confront genocidal actions.

The consequences of genocide are not only the horrific killings themselves, but the massive refugee flows, economic collapse, and political divisions which tear asunder the societies that fall victim to genocide. The international community pays a far higher price coping with the aftermath of genocide than if it were prepared to defeat genocide in its earliest stages.

Our Great Lakes Justice Initiative, which the President advanced in Kigali and Kampala last week, is the most ambitious effort to address justice priorities at the domestic level in the history of that region. We hope it will help shore up the capabilities of local authorities to advance the rule of law in that troubled region and deter future

acts of genocide or other violations of international humanitarian law. The Initiative also will address the needs of the ICTR.

A PERMANENT INTERNATIONAL CRIMINAL COURT

President Clinton and Secretary of State Madeline Albright have long called for the establishment of a permanent international court, and they want it done by the end of this century. Last week, in Kigali, the President pledged that "the United States will work to see that it is created."

As head of the United States delegation negotiating the permanent court, I am keenly aware that the road to Rome remains steep. But the critical need for a permanent court, and the vital role the United States can play in its establishment and operation, compels our best efforts.

The Clinton Administration believes that a core purpose of an international criminal court must be to advance a simple norm: countries should bring to justice those who commit genocide, crimes against humanity, and war crimes, or turn suspects over to someone who will, such as an impartial and effective international court.

Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court. The permanent court must ensure that national legal systems with the will and ability to prosecute persons who commit these crimes are permitted to do so, while guaranteeing that perpetrators of these crimes acting in countries without competent, functioning legal systems nonetheless will be held accountable.

In that spirit, the United States delegation introduced a proposal last week that would strengthen the principle of "complementarity" that requires deferral to capable national judicial systems. The United States proposal states that when a matter (that is, a situation in which crimes within the jurisdiction of the court may have been committed) has been referred to the Court, a State may step forward and commit itself to investigating its own citizens or others within its jurisdiction who may be suspects for commission of crimes in that matter. If the Prosecutor defers to that State, then there should be a certain period

of time to allow the State to take the lead, following which the Prosecutor can challenge the State's performance if it proves lacking.

On the other hand, right at the outset the Prosecutor may decide that the requesting State's legal system has collapsed or is unavailable, or it is unable or unwilling to genuinely investigate and prosecute the suspects. Under those circumstances, the Prosecutor may seek the views of the Court to uphold or deny the decision to override State jurisdiction. The issue could be appealed to the Appeals Chamber, where a super-majority number of the Appeals judges would need to approve the Prosecutor's decision to launch investigations. We anticipate that expedited procedures for the judges' actions could be formulated in the Rules of the Court.

This proposal is extremely important to the United States government. In our view, it takes account of our interest in protecting against unwarranted prosecutions of our nationals, as well as nationals of other responsible members of the international community, while ensuring the prosecution of those who should be brought before an international tribunal. Our proposal also seeks to honor a fundamental tenet of the principle of complementarity, namely, that at the outset of a referral of an overall matter, a State can seize the opportunity to enforce the law itself provided it is capable and willing to do so. Other governments are examining this proposal closely and the non-governmental community is beginning to comment on it.

Because of its responsibilities for international peace and security, the United Nations Security Council must have an important role in the permanent court's work. The jurisdiction of the court will involve many conflicts that are properly being addressed by the Security Council. The court cannot be used to undermine the Council's critical work. Governments need to agree on how to preserve this vital role for the Council while pursuing justice.

The Security Council also should be able to refer armed conflicts or atrocities to the court for investigation and direct all countries to cooperate with the court if necessary. The Council may need to assist the court with the enforcement of its orders.

Many governments and non-governmental organizations seek a prosecutor who can self-initiate investigations and seek indictments against anyone anywhere. Justice Arbour has spoken eloquently in support of this proposition. However, we believe there must be rea-

sonable limits on the prosecutor's scope of action and reasonable procedures which will activate the prosecutor's powerful duties.

We have proposed that first a State Party to the treaty or the Security Council must refer an overall matter to the court. Then, provided the crimes are sufficiently grave, the prosecutor would be free to investigate the situation and prosecute alleged perpetrators. This would mirror the Yugoslavia and Rwanda Tribunals and ensure that the prosecutor has the necessary backing to get the job done. If neither any State Party nor the Security Council believes that a situation should be referred to the Court, that speaks powerfully against the need or wisdom of court involvement.

At this session of the Preparatory Committee, the United States delegation has been particularly concerned about complications in negotiating the fundamental stages of the criminal process. The draft statute before us (the Zutphen draft) is a procedural tower of Babel. We, along with a number of other delegations, believe it is imperative to develop a straightforward, simplified procedure that can stand as a common vision for delegations from a variety of jurisdictions and legal traditions. Absent that, there was growing concern among responsible States, including the United States, that either we would find the procedural problems unraveling the Rome Conference or we would have a court whose procedures at best would be confusing and at worst irrational.

For example, there needs to be a single method for arrest of a person based upon an independent judicial determination of probable cause. In lieu of two or three different concepts in the negotiations about how one confirms or formalizes charges, there needs to be a form of preliminary hearing that satisfies civil and common law jurisdictions alike. Between those two stages, procedures for arrest and surrender by national authorities needs to be controlled by provisions of the statute which require much higher levels of agreement. While such issues may not be the grist of public debate, they are the gut of the Court's statute and negotiators' most time-consuming endeavor. The outcome of this proposal remains open, but the reaction so far has not been very encouraging.

What hard realities—beyond theory—must we all consider in connection with the negotiations for a permanent international criminal court? First, the permanent court must not handcuff governments that

take risks to promote peace and security and undertake humanitarian missions. It should not be a political forum in which to challenge legitimate actions of responsible governments by targeting their military personnel for criminal investigation and prosecution. Human rights groups advocating speedy military interventions to save human lives should be most sensitive to this reality. Otherwise, ironically, a permanent court would undermine efforts to confront the worst assaults on humankind.

Many countries shoulder the burden of international security. The United States military, in particular, is called upon to carry out mandates of the Security Council, to help defend our allies and friends, to achieve humanitarian objectives, to combat international terrorism, to rescue Americans and others in danger, to prevent the proliferation or use of weapons of mass destruction, and to defend our national security from a wide range of threats. Other governments participate in our military alliances or in the United Nations or other multinational peacekeeping operations. Our armed forces are deployed globally and need to be able to fulfill their legitimate responsibilities without unjustified exposure to criminal legal proceedings.

The second reality that we must recognize is that an international criminal court stands a good chance of being established in the near future, indeed by the end of this century as the President has sought. It is imperative that the United States continue to play a leading role in the negotiations. A permanent international criminal court of this character would issue indictments and decisions that would help write laws of war for the next century and thus influence the law governing the conduct of United States military forces. So we care about this process for very important reasons. If such a court is to succeed, it will need the United States as its strongest pillar of support. It has demonstrated time and again that when its diplomatic, economic, or military clout is needed to achieve the aims of international justice, the world looks to the United States for assistance.

The President and Secretary Albright regard the establishment of the Yugoslavia and Rwanda war crimes tribunals as one of the most important advances we have made in establishing the rule of law and international accountability for some of the worst crimes of the late twentieth century. The opportunity now before us—to create an effective international criminal court—should deter a recurrence of

some of these crimes in the next century, and bring to justice those perpetrators who must not rule our future.

Thank you.

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M. CHERIF BASSIOUNI

PROFESSOR OF LAW, DEPAUL UNIVERSITY; VICE CHAIRMAN, UNITED NATIONS
GENERAL ASSEMBLY'S PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT

Thank you very much. As a panel commentator, I will address Ambassador Scheffer's speech, and also make some personal observations.

In his introduction, Paul Williams alluded to the difficulty in bringing about harmony in the positions of various agencies of the government, and to fashion a policy towards something as new, and to some extent as potentially controversial in Congress, as the establishment of a permanent International Criminal Court. The words of Charlie Brower are to that extent self-evident. This is why Dave Scheffer's task is almost a "mission impossible." But his scholarly approach, diplomacy, and personal kindness have been instrumental in moving certain rigid positions within the government, and in raising consciousness about the importance of international criminal justice, and establishment of a permanent International Criminal Court ("ICC").

Dave's position is subject to criticism from many sectors and he is at times in difficulty no matter what he does. If he too is forthcoming, some quarters in Congress will be unhappy. If he is not, non-government organizations will be unhappy. And in all events he has to contend with different governments who may not take too well to certain United States positions.

The nature of the American political process is complex, and representing the interests of different agencies, such as the Department of Defense, the Department of Justice, the National Security Council, and the State Department is not an easy task.

Ambassador Scheffer has to deal on the one hand with American policy at the highest level of public visibility, as expressed by the eloquent speeches of the President and the Secretary of State. On the

other hand, he must move from this higher level of generalities to the levels of specificity in dealing with representatives of several agencies whose concerns and interests are narrower and surely diverse. Thus, for example, Department of Justice representatives are more interested in the ICC's rules of procedure and evidence while those from the Department of Defense are more interested in guarantees that no American military personnel will ever be prosecuted by the ICC. Navigating between the higher planes of generalities contained in the President's speech at the University of Connecticut and at the United Nations, and the narrower concerns of certain agencies is also made a more difficult task if the President does not decide to convert his speeches into policy and make all concerned government agencies follow suit. Without that, the United States position is likely to fall down to the lowest common denominator of what various agencies insist on.

The questions that we have to ask ourselves are what do we want to accomplish at this stage, and what is it that we would like to see ripen in the future. Looking at Drexel Sprecher—a man who spent five years at Nuremberg, dealt with major war crimes, and was part of something that was brand new, I am reminded of the words of Robert Jackson, to the effect that Nuremberg was only the beginning. The ICC too is going to be the beginning of something that will ripen some day into an effective system of international criminal justice, but it will take time and painstaking hard work to achieve that result. I am sure that Judge McDonald, Judge Pillay, Prosecutor Arbour, Deputy Prosecutor Muna, and those who are involved in the Yugoslavia and Rwanda Tribunals, also believe that their institutions are another step in the course of that history.

If we look at the establishment of the ICC as just another step in the course of the history of international criminal justice, we will be heartened by some things and disheartened by others. As I sit with Ambassador Scheffer and others in the Preparatory Committee meetings at the United Nations and contemplate the significance of what we are doing in the context of history, I feel uplifted. But then when I witness what it takes to put a text together, I am saddened to see how great endeavors can be trivialized by the political concerns of government representatives. My conclusion is that the most important thing to keep in mind is the type of foundation that we need to build in order to allow the institution we are to establish grow.

This is why we should ask ourselves not how to begin with an institution that has all the characteristics we would like it to have, but whether that institution will have the capacity for growth and development that will allow it, in time, to earn the credibility and respect that will bring about the type of institution that we aspire to having.

If we look at the history of legal institutions in every civilization, we will see that all legal institutions have started in a modest way, grew with experience, acquired credibility, obtained public support, and then acquired their place among the lasting institutions of these civilizations. That is the approach we need to follow with the ICC and I believe that such an approach will probably garner the greatest support among governments.

As to one of the specific issues Ambassador Scheffer addressed, namely, the role of the Security Council. The question, I believe, is whether the Security Council should have a role, because it should have a role, but what role. That role should not however extend to the ability of interfering with the Tribunal's work, and that means that the Security Council shall not have veto power on investigations or prosecutions. That is a level of politicization that we should categorically reject. But, the Security Council must be able to refer cases to the court, and in certain cases, where peace and security may truly be at risk, it should be able to request postponement of investigations and prosecutions for a specific period of time. I must however add that, within the ICC, as with every system of justice, the selection of the Prosecutor, the judges, and the Registrar are more important than most rules of procedure that we can devise. If we choose competent people with the right kind of judgment, integrity, and common sense, many of the problems that we may now anticipate or apprehend will resolve themselves whenever they may arise.

Another issue raised by Dave is whether the court will be saddled with triviality. I do not think that will be the case for I can hardly think of a trivial genocide or a trivial crime against humanity. It is possible however to imagine a war crime that is trivial if it occurs in isolation. However, if we are dealing with serious war crimes—with grave breaches of the Geneva Conventions that are recurring or are a part of a policy—and the system of national justice or military justice does not deal with these crimes, or does not want to deal with them,

then it is necessary to intervene. In such circumstances, I do not think we are dealing with questions of triviality.

I also think it is unfair to say that if the court has a leeway in interpreting war crimes, that will be rewriting the law of armed conflict. I realize this is something that, at times, has to be said to placate those in the Defense Department who are fearful that the court would open new horizons in the law of armed conflict, but surely a careful drafting of the definition of war crimes can take care of this concern.

Lastly, if the rules on complementarity are well crafted, it will be very unlikely that the Prosecutor can exceed his or her authority. Concerns about a "rogue" prosecutor are groundless. Thus, it is reasonable to assume that, if war crimes are well defined, complementarity is followed, and the role of the prosecutor is subject to judicial safeguards, the risk of abuses are practically nil. My conclusion is that the concerns of the United States are overstated and that the interests of the United States in having a ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents of the ICC.

I would now like to shift my focus from what Ambassador Scheffer said, to some of my concerns. The major set of questions that I believe face the future ICC is how to assure its dependence and its effectiveness. This includes an effective prosecutor who has the ability to control staff and resources and who should not be encumbered with all of the tedious bureaucratic United Nations procedures. The United Nations is the world's greatest institution, but it was not created to run this type of action-oriented institution. It was created to bring together states to dialogue and to resolve conflicts and it does that as well as member states allow it to.

While sitting in New York with diplomats discussing the text of the future ICC statute, I frequently think of my experiences in the former Yugoslavia as Chairman of the Commission of Experts, and of the bureaucratic and financial difficulties I encountered. This tends to make me look at things in a different way than do diplomats and other experts who do not have that type of investigatory and prosecutorial experience. Thus, the issue as I see it is not whether we will have a court, but whether the court will be effective in light of its worldwide task.

Turning to the larger picture, we must recognize that enormous progress has been made in the last few years, thanks in part to the United States, and to Secretary Albright, who has taken a very strong lead on the issue of justice.

Between 1992 and 1994, the questions of international criminal justice, accountability, and post-conflict justice have become a new priority with many governments, and also within the United Nations. The Secretary General speaks of it and expresses his commitment to the establishment of an ICC as do other within the system. Recently Assistant Secretary General Alvaro de Soto convened a meeting of experts to discuss accountability issues in peace negotiations. But there is still so much more to do in connection with accountability and post-conflict justice issues on which the United Nations is lagging behind. But now it is clear that justice is part of the political process. Justice is no longer in contra-position to peace and it is no longer either justice or peace; now it is both justice and peace, because you cannot have one without the other. In large measure, this positive development is due to the growing influence of international civil society, which neither governments nor the United Nations can ignore.

We can ask whether the glass is half full or half empty. Do we want more? Of course, we want more. We always want more, but I think that we have to realize that building on a strong foundation will help us achieve a better result in the future—and if that means more time to convince more governments, then we should make the effort to strive for as broad a consensus as we can achieve.

I would like to say something in conclusion, which brings us back to a high level of discourse. There is a difference between those of us who work exclusively in academia or policy or who look at questions of justice and accountability from an intellectual perspective, and those whose work puts them in direct contact with these issues. What we perceive in the intellectual arena is frequently far from what actually goes on in reality. One of these distinctions is understanding the difference that people make, and sometimes that even one person makes.

It is sometimes truly extraordinary to see how individuals can make a significant difference that has far-reaching effects and yet how little this human element figures in the intellectual analysis and

policy debates about justice-related issues. For example, without Roy Gutman—who was the first journalist to raise the warning flag about prison camps, the tortures, the genocide, and the rapes—there would have been little attention paid to what was happening. At its turn, this paved the way for the Commission of Experts, which I chaired, to investigate and document these and other crimes and to call on the Security Council to establish an ad hoc tribunal, and the rest is history.

Another one of my personal experiences occurred in Sarajevo in April of 1993 after 2,400 shells fell on the city between the 29th and 30th. On that day I spoke to a man who is a true hero, Fred Cuny, who died later trying to bring relief to Chechenya. Fred was the one who during the siege brought water to Sarajevo and opened the tunnel that brought so much humanitarian aid and respite to that beleaguered city. He spoke to me of another hero, who among his many feats, broke out of Sarajevo, then completely surrounded, in bitter cold weather with knee deep snow in some areas, to bring relief supplies to the starving city of Gorazde, about 50 kilometers away. The city had been besieged for a long period of time and was with food or medical supplies. Representing a relief agency, he went around town and gathered every horse, donkey, and mule he could find, and loaded them with whatever supplies he could get. He took a few volunteers and crossed three different enemy lines in the conditions described above, and brought needed supplies to the people of Gorazde. From what I hear, when he returned his only regret was that he lost a few mules and horses on the way back.

This hero is sitting right here. He is Bill Stuebner and I would like to recognize you, Bill, for what you have done.

People like Bill, Fred, and Roy are the few who make a difference.

People like you who attend this conference and support the creation of the ICC also play an indispensable role in the process because you bring to it the public support that is indispensable to the establishment and later to the success of the ICC.

In conclusion, I wish to truly thank Professor Orentlicher and Dean Claudio Grossman, the Washington College of Law of the American University, and all of you for your efforts in supporting this very important endeavor of international criminal justice, and more particularly, the establishment of the ICC.

Since World War II, we have had some 250 conflicts that resulted in 170 million casualties. Yet, in almost all of these cases, the perpetrators have benefited from impunity. A number of people here who have studied the issue—Diane Orentlicher, Neil Kritz, Priscilla Hayner, Paul Williams, and others—will tell you that most of the time, the card of justice was negotiated away in favor of a political settlement. I think that the institution of a permanent International Criminal Court will simply remove that card from the hand of the political negotiators, while at the same time, strengthen their negotiating hand since they will not be able to grant *de facto* immunity.

Fifty years from now, when some of the younger ones in this room will still be around, they will be able to say that the journey, which started at the Versailles Peace Treaty in 1919 then moved to its high point in Nuremberg in 1945 and went through Tokyo in 1946, and later Yugoslavia and Rwanda in the nineties, finally reached its conclusion in 1998. Maybe then the world may be a better place because we have benefited from the lessons of the past and because so many, for so long, have worked so hard to achieve international criminal justice.

Thank you for the opportunity to share with you these thoughts.

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TINA ROSENBERG

EDITORIAL WRITER, *NEW YORK TIMES*

Good evening. I am very honored to have been asked to share the podium with Ambassador Scheffer and Professor Bassiouni, two people whom I admire so highly. I am also honored to be here in the presence of so many distinguished people who are doing such truly exhilarating and important things in the field of accountability and punishment for international crimes. I will be very brief, as an editorial writer should be, and give you not really a legal perspective, but a more political perspective, although Professor Bassiouni did cover many political questions as well.

I think that one of the reasons this year is so exciting is that we think of the Nuremberg and Tokyo Tribunals as such landmarks in

the field of international law because they sparked serious advances in the field, such as the Genocide Convention, the Geneva Conventions, and the various international covenants that we now know so well. The International Criminal Tribunals for the former Yugoslavia and Rwanda also provide the hope of not only advances in international law similar to Nuremberg and Tokyo, but advancements in the enforcement of international law, where Nuremberg unfortunately failed to follow through.

It was not Nuremberg's failure. It was the failure of the international community to follow up after Nuremberg. We had the Cold War then. We do not have the Cold War now. Times are different. I think there is a lot of hope that the Tribunals can start us on a road where international law is actually enforced in practice.

The United States, of course, and Ambassador Scheffer particularly, have made a tremendous contribution to that. I particularly want to note his dedication to the Rwanda Tribunal, which, unfortunately, in the United States' debate, tends to get lost at the expense of the Yugoslavia Tribunal. The United States' role in setting up the Tribunals has been noted correctly here and the work then-United Nations Ambassador Albright performed was extremely important, as was the work of Ambassador Scheffer. The United States has contributed a tremendous amount of expertise, dedication, political pressure, staff, and money. Those things should be noted.

The United States is also making a big contribution in the development of the permanent International Criminal Court. I do not think anyone can seriously question whether the United States is committed to establishing a permanent International Criminal Court. It has played a tremendous role in proposing solutions to some of the thornier problems, and I want to note particularly the United States position on the application of the International Criminal Court to crimes against women, which I think deserves praise.

However, I would like to focus on one of the aspects of Ambassador Scheffer's presentation that Professor Bassiouni also noted. I find it remarkable that in a forum of this type, that while discussing the advances that have been made in international law, we spend so much time talking about the United States Pentagon. I want to focus on that issue a little bit. I think the United States is posing a danger and I know that this is absolutely not Ambassador Scheffer's doing.

He is, I assume, doing everything possible to fight against this tendency. I think there is the danger that the United States is seen by the world as the proponent of a type of international justice that could be called "everybody but us." There are several different examples that one can point to, including some that the Ambassador pointed out. The first example is our failure to pay our United Nations dues, which is a little off the subject. The second example is the United States' position on the land mines treaty, which ended up isolating us.

Relevant to today's discussion, the United States has been extremely helpful in the establishment of the Yugoslav Tribunal in every way but one. It has declined to put any American soldiers at risk in order to arrest persons on the indicted list who might fight back. There have been some arrests. Those are tremendous, but there certainly should be many more.

I am glad Ambassador Scheffer is impatient about the fact that Radovan Karadzic is free. I wish President Clinton were more impatient about that fact also. The more serious problem of "everybody but us" justice arises when we talk about the International Criminal Court. Again, this is a perception that I think has been formulated over a period of time about the role of the United States, which has been in some ways a valuable and useful one for the court. However, the United States has continued to adhere to a position that says we will not allow United States soldiers to be touched by an International Criminal Court.

Both Professor Bassiouni and Ambassador Scheffer have talked about this, and I find it remarkable. I find it remarkable that the President does not feel that he can say to Secretary Cohen and to the Pentagon: "This is our decision. The United States is a world leader, and, as you have heard in the speeches of the President and Secretary Albright, we believe in punishing international crimes and demanding international accountability. We will not decline to play a leading role because of concerns that, under some possible permutations of the court that nobody thinks are particularly likely, there might be an adverse effect on the United States' military personnel."

I want to mention a couple of places where this comes up. One that was detailed today is the role of the prosecutor and the Security Council's control of the court's docket. Of course, everyone agrees

that the Security Council should be able to refer situations to the International Criminal Court. The question is whether the prosecutor also be able to refer situations. Up until this point, the United States' position is that the prosecutor should have no such power. I am hoping, as I think many others are hoping, that this position will change.

If we are to assume that the International Criminal Court will be a malicious organization that will be used to pursue spurious cases against United States military personnel, I am not sure why the United States should be interested in supporting it at all. It should instead work to stop something like that from happening. I think in supporting an International Criminal Court, one must assume that it is going to be run by people of good will, and one should let them do their work. There is no point in setting up a court and then giving it a handicap. In this particular case, the perception that the court will be subject to too much control by the Security Council is a very serious handicap.

Another point that Ambassador Scheffer mentioned very briefly was the United States position on complementarity. Here, I want to raise an issue that has not been discussed, the problem of investigation. One position of the United States is that when the International Criminal Court is interested in a particular case but the state involved wants to conduct its own prosecution, the International Criminal Court would not be permitted even to open its own investigation. I think this is a serious mistake. We all know how easy it is to hide evidence and to block investigators from entering. While it is absolutely right and proper to give the national judicial system every possibility to resolve the matter, it is not right and proper to allow nations to block every investigation, because that, in the end, could make it completely impossible to prosecute a case.

My assessment of the United States role is that I wish that the beautiful, exhilarating speeches of the President and Secretary Albright were backed with the political courage to say that we will not have a court that does not apply to the United States. If the government seriously supports the creation of an effective court, as Ambassador Scheffer and others stress, then it would take a very different position. A position that would not invite the other nations of the world to look at the court as something that the United States has de-

signed for its own purposes. That, I think, would be a serious handicap.

Thank you.

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AUDIENCE QUESTIONS

PROFESSOR WILLIAMS: We now have time for a few very quick questions or comments from the floor.

AUDIENCE MEMBER: I am Brian McPherson and I wonder if Ambassador Scheffer could comment on the prospects of anything being ratified by the Senate, especially in view of Senator Helms' recent press release or letter to you on the issue.

AMBASSADOR SCHEFFER: Yes, it was a letter to Secretary Albright. I just think it would be premature for us to comment on the prospects of ratification at this time. I think we have to see the text that is finally agreed upon in Rome before we have any basis to know what those prospects are.

AUDIENCE MEMBER: My name is Peter Quilter. There are many actors already existing in the world. Dean Claudio Grossman mentioned his own membership on the Inter-American Commission on Human Rights. There is an equivalent in Africa, in Europe, and there are many other actors in this business already.

My question is: Is any thought being given to profitable linkages that could be created between these actors already working and the criminal court?

PROFESSOR BASSIOUNI: Your question is indeed a very important question. Let me answer it from a different perspective. I think what we need is a whole array of accountability mechanisms to deal with the range of violations of human rights that go all the way to the more serious ones like genocide crimes, crimes against humanity, and war crimes. We need to have an overall policy approach at the international level for what these mechanisms should be. How do we integrate the truth commissions, the compensation commissions, the various modalities that we can think of, in terms of various methods of accountability?

It is not true that prosecution is sometimes the only solution or the best solution. Sometimes when you seek to achieve reconciliation, you may want to have some prosecutions, while not depending entirely upon prosecutions as the means for achieving reconciliation. In other cases, it may be the only tool you have, but certainly prosecution is not enough. What about compensation? What about truth commissions? What about other mechanisms? I think that what we need to do is step back from our pursuit of the creation of this type of accountability mechanism and determine what else we need.

Professor Reisman once wrote an article in which he analogized the accountability mechanism to a toolbox. I think it is a good analogy. We need a toolbox with different types of tools that can be used in different types of situations. If we do that—then I think you will find that the mechanisms that you spoke of—the commissions and courts on human rights in various regions, can fit into this overall policy approach, the same approach exists in national legal systems, the administrative courts, civil courts, criminal courts, and constitutional courts. They are all part of a system of redress in the society. But, we have not thought of this approach at the international level, so how do we fashion an international justice system for redress that can also achieve the ends of reconciliation and peace? That is the issue.

If we focus everything on the punitive aspect of an International Criminal Court, I think we are going to find that this modality will carry with it a great deal of weaknesses and we will therefore need to find ways around it. That is why we need alternative as well as complementary processes so that we do not undermine the integrity of the criminal process.