

# **Some Thoughts on International Courts: From Nuremberg to the Hague and Points East**

by

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## **A. A Short Primer on International Criminal Courts**

International criminal courts have become a staple of foreign relations and diplomacy. Our newspapers, television, journals of opinion are suffused with commentaries on their creation, their ongoing trials, their new-issued indictments, and especially in our country, on a relentless debate as to whether they are a true instrumentality of world peace or a sinister threat to the rights of our citizens.

Until the post-World War II Nuremberg and Tokyo Tribunals – which were actually military tribunals staffed by judges from the Allied countries – there had never been an international criminal court dealing with the crimes of war. Despite the noble, avowed objective of bringing to account the perpetrators of crimes against humanity and genocides, and despite procedures that provided a reasonably full panoply of rights to defendants, the Nuremberg proceedings were labeled by critics as “victors justice” on the basis that the Allied partners had fashioned the Tribunals to their own ends – chosen the judges and prosecutors, tailored the rules of procedure, defined the crimes and fixed the punishment. Within a year of the war’s end, the top 24 Nazi defendants had been tried, 18 convicted, 3 acquitted, and 11 executed. The Tokyo military trials following Nuremberg, employed looser rules of procedure and evidence, and were even more severely criticized by historians and legal commentators, including dissenting members of the Supreme Court in the Yamashita case, in which, nonetheless, a majority of the

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Court upheld the fairness of the military tribunal proceedings that resulted in Admiral Yamashita's execution for crimes committed by his troops hundreds of miles away.

In the 50 years after World War II, there was a steady accretion of developments in the realm of international public law. The United Nations was formed, a series of International Conventions were entered into in an effort to block repetition of the terrible events that had given rise to World War II: among them the Convention Against Genocide, the Geneva Convention on treatment of POWs and civilians in armed conflicts, and the Convention against Torture. The International Law Commission, a U.N. creation, was tasked with drafting a charter for a permanent international criminal court, though for decades its labors seemed largely without practical purpose. Wars – notably Korea and Vietnam – came and went; a few nations placed ex-Nazis on trial in their own courts for crimes committed against their own citizens – Adolf Eichmann in Jerusalem, Klaus Barbie in France – but there were no offspring of Nuremberg until an outraged international community, steeped in first-hand reports from intrepid journalists of unimaginable barbarities of the Bosnian conflict of the early 90s, of prison camps reminiscent of World War II concentration camps, of secret mass graves of the victims, demanded some kind of retribution, something, that is, short of sending troops to stop the conflict. The result was establishment by the Security Council of the United Nations in 1993 of an international criminal court located at the Hague to try individuals – not States – for war crimes, crimes against humanity, and genocide on the territory of the former Yugoslavia from January 1, 1991 forward. Today, the Yugoslav War Crimes Tribunal has 16 full-time judges from 16 countries, and a corps of 27 ad litem judges, chosen by the UN's General Assembly after nomination by U.N. member countries. The prosecutor is selected by the Security Council; trials are held before panels of three judges pursuant to rules adopted by the judges combining common law and civil law modes of trial, the rights of defendants guaranteed by the International Covenant on Civil and Political Rights are honored. There is a seven-member appeal chamber to which trial verdicts can be taken; and prison sentences can be imposed up to life (but no capital punishment). All U.N. members have a duty to turn over indictees, as well as relevant evidence and

witnesses, to the Tribunal. The United States played a leading role in setting up the Tribunal and contributed personnel and money generously to it. Two U.S. judges have been Presidents of the ICTY; I was a member from 1999-2001. In 1994, a year after establishment of the ICTY following the horrendous genocide in Rwanda in the civil war between the Hutus and Tutsis and the much criticized failure of the U.N. or the U.S. to intervene, a similar Tribunal was set up in Arusha, Tanzania to try the perpetrators of the crimes of that war, much against the desires of the Rwandan government. Though glacier-like in startup (no trials were held for three years because no indicted defendants were handed over) the Yugoslav Tribunal picked up speed by the late 90s. To date, it has tried and convicted over three dozen defendants. For the first time in history, a sitting President, Slobodan Milosevic, has been placed on trial, and numerous top-level civic and military leaders of Serbia and of the Bosnian-Serb, Bosnian-Muslim, Croatian and Kosovar sectors of the Former Yugoslavia have been tried and convicted. The ICTY and Rwandan Tribunals are expected to complete these proceedings by the end of the decade – each tribunal currently employs over 1,000 personnel and costs over \$120 million a year to operate. The Rwandan Tribunal has throughout its tenure been troubled by poor administration and active opposition from the Rwandan government; its record of completed trials (about 15) is much lower than the Yugoslav Tribunal. This is regrettable since hundreds of thousands of Rwandan arrestees languish in national jails compelling the country to adopt a wide-scale system of indigenous tribal courts, called gacacas, to dispense communal-type justice for lesser war crimes.

It is commonly acknowledged within the international community that there will be no more ICTY and ICTR-type ad hoc courts; the U.N. cannot afford them and they are widely perceived as ponderously slow, bureaucratic, and increasingly remote in time and understanding from the local populace of those countries that were actually involved in the war and from whom evidence, ever more stale with the passing of time, must be drawn to support the indictments.

Academics and other commentators have, however, generally been kind to the decisions of both courts; between them they have created an enormous body of law and precedents applying to concrete factual circumstances doctrines and theories of humanitarian law formerly confined to treatises and the speculations of scholars.

Revitalized by the “ad hoc” courts, the international community in the 1990s intensified its efforts to create a permanent international criminal court that did not need be reinvented for each new controversy. Throughout the decade, more than 130 nations conferred on successive drafts of the Rome Treaty setting up such a permanent court. The United States, until the last, was particularly active in the negotiations for this new international criminal court. It would be a creature not of the U.N. but of the nations -- State Parties, they were called -- that joined together to form the Court. Those countries recognized that they would inevitably be ceding to the new entity some piece of their sovereignty over war crimes and crimes against humanity committed by their own nationals. In the end, it was that jurisdiction -- more specifically its potential application to U.S. citizens -- that caused the United States to withdraw from negotiations in 1998. The United States pressed for an explicit limitation of the court’s jurisdiction over any State’s nationals (where jurisdiction had not been conceded) to referrals by the Security Council – where, of course, the United States retained veto power. The vast majority of the other nations committed to the new court, however, thought such limitation would render the court a weak hostage to global politics. They voted to give it jurisdiction in all cases involving war crimes, crimes against humanity, and genocide where the country of nationality of the accused, or the country on whose territory the war crime was committed, was a State Party to the Rome Treaty (or consented to the court’s jurisdiction). The Treaty, as finally signed and later ratified by over 90 countries, did, however, contain a strong safety check on any forfeiture of sovereignty by signatory nations: no case could be investigated or tried at the ICC if the State whose national was accused undertook

to do an investigation or prosecution of the charge on its own unless the Court's prosecutor could demonstrate to a panel of judges that that country was not able or willing to conduct a genuinely fair and impartial inquiry. Still, this so-called "complimentarity" doctrine which had been designed, in part, to disarm U.S. opposition was not good enough for the U.S. which, after a midnight signing by President Clinton, reneged when President Bush took office. The U.S. has since vigorously opposed any relationship with the court, seeking rather to persuade ICC signatory nations to enter into bilateral agreements with the U.S. that they will not send U.S. nationals to the new court. These agreements, it has been reported, have been forged under U.S. threat of withholding monetary and military aid or other forms of assistance to those countries that resisted. So far over 50 countries have acceded, causing deep resentments among ICC-signatory countries especially the European Union. In any event, despite U.S. opposition, the ICC is up and running since July 2002. Its judges and prosecutor have been selected, its rules of procedure and definitions of crimes drafted. Reportedly over 500 submissions – candidates for screening by the prosecutor and the pretrial chamber of the court – were waiting in its inbox on opening day. (The prosecutor has since dismissed over 100 including many involving the U.S. and the Iraqi war as not within its jurisdiction. The ICC will take cases only where the alleged war crimes or crimes against humanity occurred after its establishment in July 2002, and where either the victim or the accused the country in which the crime occurred has joined the Court or agreed to its jurisdiction; this rules out pre-war crimes committed by Saddam Hussein against his own people or wartime crimes since neither Iraq nor the U.S. has joined the court). The costs of the ICC will be borne by the Assembly of the State Parties that have joined the court; the UN Security Council may make referrals to the court and may interpose a delay of 12 months in any case presented to the court. The world is waiting to see what happens next. Supporters of the court, both in the U.S. and abroad, express a fervent hope that if it performs well – fairly and efficiently – a future U.S. Administration will reevaluate the current die-hard opposition to it, which is articulated largely in a fear that politically-

motivated or vindictive prosecutions would be brought against U.S. soldiers or leaders out of foreign animus to the U.S.' super-power status.

In the meantime, other international court models are emerging. Typically these so-called "hybrid" international courts are established in the aftermath of a civil war at the scene of the conflict and utilize a mix of judges and legal systems. Some of these "hybrid" courts are set up as stand alone courts and some as special parts of the national court system authorized to try both domestic and international law violations according to a blend of national and international law and procedure; they are financed partly by the host nation itself and partly by international donors or through U.N. assessments. Unlike the Yugoslav and Rwanda Tribunals, they are not pure U.N. creations; rather they are set up under the nation's own laws and memoranda of understanding are negotiated with the U.N. to assure their independence, impartiality, and fair procedures. In general, the United States has not opposed and in some cases has affirmatively cooperated with these hybrid courts on grounds, it appears, that the prospect of any American coming before the courts is slight.

The Special Court for Sierra Leone is the most advanced example of this genre. Its establishment by the Sierra Leone government followed a decade-long civil war in that impoverished country (Sierra Leone ranks last among 172 countries in the U.N.'s human development index), a war notorious for its 200,000 dead, its brutal mutilations of victims, its 7,000 child soldiers and an equal number of child victims (many of whose arms and legs had been savagely cut off and the stumps carved with the initials of the warring factions.) In January 2000, the U.N. and the Sierra Leone government signed an agreement on how the new Special Court would operate; it would use a mixture of international and local judges, prosecutors and laws, it would prosecute only those "bearing the greatest responsibility" for the atrocities (a few dozen defendants); and it would conclude proceedings within three years. Already nine indictments have come down, including

one blazoned in the media all last summer against the then President of neighboring Liberia, Charles Taylor, charging that he had provided arms to the Sierra Leone rebels in exchange for "blood diamonds" mined by slave labor under the direction of the Sierra Leone rebels. The U.N. has chosen a U.S. Pentagon official as the chief prosecutor, an Australian as the chief judge, and a British official as the registrar; the deputy prosecutors are Sierra Leonians and foreigners. The United States is footing one-third of the costs of the tribunal (roughly \$56 million annually) and the fiscal and logistical operations of the court are monitored by a group of major international donors, including, in addition to the United States, the United Kingdom, Netherlands, Canada, Lesotho and Nigeria. Despite rudimentary conditions – unreliable telephone and electrical service and daunting safety risks -- a conscious decision was made to locate the court in Sierra Leone, the venue of the victims of the war so as to make its presence felt on the people of that benighted country. The court also aims to leave as its legacy a 12-acre court complex and an internationally trained cadre of prosecutors and defense counsel to bolster a national justice system generally regarded as abysmally inadequate.

Sierra Leone-style international justice was designed to be quicker and cheaper than at the Hague although plainly it is more dangerous for the participants. Reportedly all notes are required to be shredded after each staff meeting of prosecutors for fear of retaliation against potential witnesses if their identities are leaked. There have been delays in desperately needed funding from donor countries and the indictment of Charles Taylor has produced a decidedly ambivalent reaction among the leaders of African nations, some of whom accuse the prosecution of undermining their national and regional interest in peace by unveiling the indictment while Taylor was attending a peace conference in Ghana. Still, many high-level Sierra Leone military and civil leaders have also been indicted, and the concept of legal accountability for wartime crimes has been raised to a level of visibility there for the first time. If the tribunal succeeds, Sierra Leone citizens will witness first-hand the rule of law holding senior officials accountable for the

devastation of their small country. Indeed, the Sierra Leone court has been touted in the Wall Street Journal as a "model" for the trial of Saddam Hussein and the top echelon of Iraqi officials.

Promisingly too, after six years of frustrating negotiations, Cambodia appears poised to establish a hybrid tribunal to try those few still-living Khmer Rouge leaders who were responsible for the horrendous massacres and other atrocities of 1975-79. This breakthrough comes after repeated withdrawals of U.N. negotiators from the talks because of doubts about the bona-fides of the Cambodian negotiator's intent to set up a truly independent and impartial court. Many of the indigenous NGOs in Cambodia, harboring like doubts, continue to press for a completely independent international tribunal subject to international standards. Cambodia's own judicial system is widely perceived as corrupt and weak and, in the words of Human Rights Watch, "unable to deliver justice to those whose human rights were violated." The few local terrorist trials that have been held in national courts have lacked fundamental due process; human rights groups there are reportedly under continual threats of arrest and physical harm, mob violence is frequent and torture is widespread. The hybrid tribunal, however, is backed by the United States, France, Japan and Australia; predictably opposed by China. If it comes into being, it will have both international and Cambodian judges, co-prosecutors and co-investigators and will be among the first international tribunals to employ civil-law based inquisitorial type procedures rather than the mixed common law/civil law modes used in earlier international courts.

The "half a loaf is better than none" supporters of the Cambodian Tribunal rationalize, as one has said, that "Some of the worst mass killers of our times are living freely now in Cambodia, playing with their grandchildren and tending their flower gardens. They should be put on trial." But some U.N. negotiators and other skeptics worry that Cambodian law will take precedence over international standards and local judges intimidate their international counterparts, reducing the U.N.'s role to that of "technical assistance provider to a Cambodian court." "Is a seriously flawed trial,

they ask, better than no trial at all." Cambodian judges -- hand-picked by current political leaders, described in one newspaper article as "hoary old politicians with Leninist training" -- would dominate in numbers, few if any trained Cambodian lawyers have survived that country's violent purges, and a decade of international funding of judicial reform efforts, including notably USAID, has produced little tangible progress. Still, a hope is expressed by many human rights activists in Cambodia that the Tribunal may not only bring some kind of closure to the victims of the murderous Khmer Rouge regime, but provide a model for reform of the national justice system as well. But it is a very tentative hope.

## **B. Why Do We Need International Courts?**

Today, the widespread efforts to establish these new international criminal tribunals face a persistent question -- why after centuries of wars do we need international courts at all? The query may seem naive, but many authorities, including some in high places inside the U.S. Government ask it seriously. Why not, as the Russians and British suggested at one point after World War II, take the worst war criminals out and summarily shoot them. Justice Jackson, the Chief Prosecutor at Nuremberg answered:

I have no purpose to enter into any controversy as to what shall be done with war criminals either high or humble. If it is considered good policy for the future peace of the world ... then let them be executed. But in that case let the decision to execute them be made as a military or political decision.

Of course if good faith trials are sought, that is another matter. I am not as troubled as some over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases but cases also try courts.

You must put no man on trial before anything that is called a court under the forms of judicial proceedings if you are not willing to see him freed if not proved guilty.

Fifty years later, much of the civilized world accepts the need for some mechanism of legal accountability for those who violate the laws of war or commit crimes against humanity. Most also believe that public accountability for the worst violators is a prerequisite for national reconciliation after wars and internal conflicts, lest the unpunished wrongs suffered by innocent civilians continue to fester. Proponents feel the explosive growth after World War II of international humanitarian law governing the conduct of warring factions and nations, and especially those rules designed to prevent abuses against innocent civilians, will amount to little without forums in which the law can be articulated and developed and applied to specific real-life contexts. And, finally, the advocates assert that the trial and punishment of notorious tyrants will have a deterrent effect on future despots (through candor compels a recognition that we have as yet little evidence this is so.)

Critics of international courts contend that sovereign nations can and should try their own war criminals -- this appears to be the tack currently favored by the U.S. in Iraq for Saddam Hussein and his confederates. Yet, it is widely acknowledged that a country decimated by internal conflict usually does not have the resources -- or the will -- to bring complex and costly prosecutions requiring extensive investigative efforts to document war crimes for trial. The courts, judges, lawyers, and prosecutors may be non-existent or so tied to former regimes as to undercut the appearance or even the reality of a fair trial. This was true in Germany after World War II.

Indonesia is a recent case in point. After the outbursts of violence by Indonesian-supported militia groups against civilians in East Timor who had voted for independence in the 1999 UN-initiated referendum -- episodes in which at least 1,000 East Timor civilians were killed -- the Indonesian government under pressure from the U.N. set up an ad hoc tribunal in Jakarta to bring those responsible to account. International NGOs and the U.N. High Commissioner for Human Rights, Mary Robinson, had earlier

pressed for an international tribunal because of the corrupt state of the Indonesian justice system generally. Nonetheless, in January 2002 the President of Indonesia appointed 18 non-career Indonesian judges and 24 prosecutors to staff an ad hoc court for human rights. The court's jurisdiction however, was, limited to a handful of cases occurring in two months of 1999, though the violence stretched over a far longer period, and the new court was given unrealistically short time limits to undertake and complete investigations, prosecute cases and file appeals. Indictments were brought against the Governor of East Timor, the East Timor police chief, and a number of military officers, but the highest Indonesian ranking military officer, widely believed most complicit in the violence, General Wiranto, was not indicted. The trials were considered a travesty by many outside observers. Only four East Timorian witnesses and no U.N. observer witnesses were called. The prosecutors made no attempt to reveal the role of higher-up Indonesian officials in arming and orchestrating the militia groups that committed the massacres. The few defendants convicted of killing UNHCR staff received initially sentences of only 10-15 months. In one case, prosecutors argued that the Court should acquit a high-ranking military commander implicated in the rampages on grounds of his polite demeanor in the courtroom, his failure to obstruct the proceedings, and his receipt of a medal for loyal service. The Indonesian judges themselves have little experience or training in international humanitarian law. There are virtually no witness-protection measures, and militia supporters of the accused have been bussed in to demonstrate noisily outside and sometimes even inside the courtroom. Of the 18 officials tried to date 12 were acquitted. Of the five convicted, the highest sentence has been 10 years. All remain at large pending appeal. Interpretations of relevant international humanitarian law by other international tribunals have been disregarded in favor of narrow constructions of the crimes charged, and the conflict has been portrayed by the prosecution as one arising out of tensions among East Timor factions rather than having been inspired by the Indonesian military.

By way of some contrast, the U.N.-operated provisional government of newly liberated East Timor -- at the time headed by Sergio de Mello, the tragic

victim of the recent U.N. bombing in Baghdad, -- set up its own special panel to prosecute abuses committed against its citizens in the same 1999 independence referendum and earlier crimes against humanity committed during the Indonesian rule of East Timor. The Serious Crimes panel is staffed with two international judges and one native East Timor judge and there is a separate appeals chamber. The prosecution has issued 65 indictments involving 301 defendants and so far rendered 35 convictions including a dozen against militiamen for attacks on civilians during the post-referendum rampage. This court, too, has had start-up problems but its work has been more generously regarded by international observers until recently when an appellate panel came down with a very problematical decision convicting a defendant of genocide when the trial court had acquitted him.

Indonesia is not an isolated example of a government reluctant to investigate or prosecute what many nationals still think of as "homeland heroes." Serbia, until Milosevic's fall, was one; Croatia until the change of government from Tujman to Mesic another, and the Srbska Republica (the Serbian sector of the Bosnian Federation) has still taken no effective steps to prosecute war criminals; it has not turned over Serbs indicted by the Hague Tribunal, most notably President Karadzic and General Mladic who reside there at least part of the time. Bosnia has, eight years after the war ended, created a special court to try war crimes -- but estimates its current capacity at a few dozen cases, a fraction of the prospective defendants. On the basis of this recent experience, a case can certainly be made for the need for international courts if the major violators of war crimes are to be held criminally responsible in anything approaching a timely fashion.

### **C. What Are the Downsides of International Courts?**

Most of the theoretical arguments against international courts derive from their asserted incursion on national sovereignty. A nation's criminal justice system is indeed one of the most important expressions of its values and culture. The rights of an accused (or victim or witness) are an intrinsic part of a nation's civil liberties, often embedded in

its basic constitution or charter. How the nation defines criminal conduct, the punishments for such conduct, the procedures for determining guilt and innocence, go to the root of a country's identity. Its citizens and lawful residents rely on these provisions to protect them from arbitrary arrest and detention at the hands of its officials. In the U.S., the notion of handing over nationals to a judicial body which we do not control, whose judges and prosecutors come from other lands, whose laws and processes we have not made or approved seems unattractive and even repugnant to some.

Yet, we and most other countries have already had to recognize exceptions to the absolute right of each sovereign country to control the criminal accountability of its nationals. It is accepted international law that if one of our nationals goes abroad and commits a crime on the territory of another nation, she can be tried and punished according to the rules of that country. We also enter into mutual pacts with other countries that we will extradite our nationals to be tried for crimes committed against their laws. The United States, by supporting the Hague and Rwandan Tribunals, recognized that the United Nations had authority to establish an international court to try nationals of any country for certain violations of the law of nations committed during a specific time period in a specific place. In the charters of those Tribunals there was no exemption or immunity for U.S. citizens. These precedents would seem to support the legal validity of a group of countries joining together, as the Assembly of State Parties has now done in the ICC, to grant jurisdiction to a court to try certain international war crimes and crimes against humanity, which the individual member States would have jurisdiction to try in their own right. The United States reportedly would not have opposed ICC jurisdiction limited to referrals from the Security Council on the same theory that supports the U.N.-created ad hoc tribunals, *i.e.*, that a body like the U.N., to which all States, including the United States, belong, can bind its members to processes of an international court. Is it so different for several countries to agree to create a court to try cases that their countries could have prosecuted as individual States under well-established tenets of international law?

The real politik objections to the ICC appear to be the more formidable ones, at least for the United States. Prosecutors and judges from other cultures with values different from our own-it is argued-may find culpable and punish actions our own courts would not; more candidly, they may be motivated by vindictiveness against the United States. Moreover, it is argued, if American military or civil officials were brought before a court of foreign judges, even though ultimately acquitted of wrongdoing, they might be forced in making their defense to reveal and submit basic strategies of war or foreign policy to the critical judgment of other countries. Of course, the same dilemma is faced by leaders of other nations who came before the international courts that we support, but, it is said, they are mostly leaders of defeated nations or, as in the case of the Yugoslav Tribunal, the tribunal is itself an accepted part of the settlement of the conflict. Yet, the 137 nations-most of them our friends and allies-who have signed the Rome Statute and over 90 who have ratified it appear willing to take this risk.

It is, of course, never possible to dispel all risks of frivolous and vexatious suits being brought in the ICC, but they do appear minimal even for Americans who acknowledgedly play a super power role in wars and peacekeeping operations around the world. The strong emphasis incorporated in the ICC's complementarity principles -- allowing countries whose nationals are accused to conduct their own investigations and prosecutions -- should reassure the U.S. opposition. That right would be available to the U.S. to ask for a deferral of any ICC prosecution in order to conduct its own inquiry, and the authority exists for the Security Council to require a postponement of any case for at least a year. To override these protections if, for example, the U.S. asked for dismissal, the prosecutor and pretrial chamber of the ICC (as well as its appeal chamber) would all have to enter into a vendetta against the United States to declare that the courts of the U.S. were not willing or able genuinely to investigate an alleged war crime in order to allow a case to go ahead in the ICC. The scenario is made even more unlikely by the identities of the ICC's 18 judges (most from friendly countries who have prior judicial records of integrity) and of the prosecutor, a respected Argentinian reformer,

who has taught law at Harvard, Stanford, and Chicago, who has already announced the dismissal on the basis of lack of jurisdiction of over 100 petitions, many involving United States personnel, arising from the Iraq conflict.

No assessment of the U.S.' present intransigence towards the ICC is complete without consideration of the tradeoffs between joining and remaining aloof from this first permanent international criminal court ever created. If the United States came on board, it would play a major role in appointing the ICC's main personnel, interpreting the law that will be applied, and selecting the cases that will be heard. But as of now, the court proceeds without the participation of the United States and we send a strange message to the rest of the world that we will support international bodies but only so long as they do not apply to us.

Moreover, based on my experience at the Hague court, the absence of the United States has serious implications for the future efficacy of the ICC. It means that the United States will not provide essential evidence or witnesses even in cases that do not involve our own nationals as defendants. Because of its superior technological surveillance status, that could be a critical loss -- in the Srebrenica massacre case on which I sat, among the most valuable evidence we received were the satellite imagery pictures from U.S. intelligence of Bosnian Muslims lined up for execution on back roads and remote fields and of newly-worked earth of mass burials sites days even hours later. These pictures helped locate the sites and their grisly contents, giving the lie to Serbian claims that the more than 7,000 victims had been killed in combat. Expert American military analysts also contributed enormously to the prosecution's case. Cases before the ICC in which American witnesses or expertise could be critical may well be lost if there is no way to obtain their testimony.

Opposition is sometimes voiced in the U.S. that the procedures of the ICC do not provide the fundamental due process guarantees our country holds indispensable for its own trials. Yet, all of the international tribunals so far except possibly Cambodia -- and certainly the ICC, have adopted the main principles of the International Covenant on

Civil and Political Rights to which the United States is a signatory. There are admittedly some aspects of Anglo-Saxon jurisprudence that are not included, principally rights of jury trial, against double jeopardy, and hearsay (none of which, incidentally, are allowed defendants in the rules for U.S. military tribunals authorized for non-citizen perpetrators of war crimes since 9/11). Having sat on two year-long trials at the Hague under such rules, I can attest that I did not feel at any time the defendants were not receiving a basically fair trial. Of course, fair procedure is a justifiable concern and as new ad hoc tribunals like Cambodia or possibly Iraq are set up, great care must be taken that fundamental tenets of a fair trial are honored. Ironically, in cases where the tribunals are situated at the locus of the crimes, this may create the anomaly of war criminals having far more rights and protections than ordinary defendants in domestic criminal proceedings. (This, in fact, is what happened in Rwanda.)

A related issue is the interaction between the law that international tribunals proclaim and the domestic law of the defendant's home courts. Although the kinds of crimes over which all the tribunals established so far have jurisdiction are basically the same: crimes against the laws of war, crimes against humanity, genocide, and grave breaches of the Geneva Conventions, the definition of the elements of those crimes and the evidence deemed sufficient to prove them may differ among the international courts themselves as well as between national and international courts. What it takes to "aid and abet" a war crime or crime against humanity will not always be viewed in the same way by every court. This disparity, of course, occurs whenever an American is tried in a foreign court. Some of the newer ad hoc international hybrid courts, e.g., Sierra Leone and prospectively the Cambodian court, will try both national and international crimes so that harmonizing their internal interpretations may occur. But international criminal law, though uniform in theory, undoubtedly may provoke different results in different tribunals around the world until finally harmonized by the persuasive effect of the best-reasoned cases and international peer pressure .

Indeed, one major sticking point has already arisen. The charters of both the Hague and Rwandan Tribunals and of the Sierra Leone statute declare unequivocally that a current head of state is not immune from its processes. President Milosevic was indicted while still the President of Serbia and the Sierra Leone prosecutor has indicted Charles Taylor, the President of neighboring Liberia, for arming the rebels who perpetrated the worst war crimes against Sierra Leone civilians. Yet an International Court of Justice ruling has said a sitting head of state cannot be arrested pursuant to the powers of another country or an international court. This anomaly has yet to be resolved.

Finally, these international courts generally stand alone; they are not part of a single system of courts with a hierarchy of review courts (although many have an appeal chamber). Some don't recognize precedent in their own courts, let alone that of other courts. There are inevitably discrepancies among the courts in their rulings and interpretations. Increasingly, the courts do look at and cite each others' rulings, if found persuasive, but it is an unpredictable process. And, unlike national courts which always to some extent take account of and react to national moods and national authorities. (The courts follow the elections, Mr. Dooley said.) International courts have no such relationships-except perhaps for the hybrid courts that are part of a national court system. Much emphasis was placed initially on international courts being independent but their isolation from the normal social and political context of courts may carry correlative risks of imperious actions that must be attended to.

But the biggest problem in my view for stand-alone international courts is their lack of power to make anyone do anything. They can ask sovereign states to turn over an indictee -- and under the ICTY and the Rome Statutes, the States are pledged to do so -- but they have no sure-fire way to make the national courts do so if they balk. Hence, a large number of indicted persons are still roaming free in Bosnia and Serbia. The courts cannot make witnesses appear or governments turn over essential evidence. An enormous amount of time and effort is now spent convincing governments to produce suspects and evidence; only good will, often in short supply, or threats of

aid cut-offs in the singular case of the United States -- are available to fill the enforcement gap.

#### **D. Conclusion**

Post-Nuremberg international criminal courts are only a decade old. They come in different shapes and sizes. They learn from each other--indeed there is now a quasi-formal process of passing on from older to newer tribunals documents called "Lessons Learned" about how to avoid past mistakes. The wholly-owned and controlled U.N. tribunal model exemplified by the Yugoslav and Rwanda courts is definitely a thing of the past--too expensive, too slow, too remote in time for much impact on the populace involved in the war crimes being tried. The site-specific tribunals like Sierra Leone, East Timor, and hopefully Cambodia hold some promise of faster and less expensive trials and greater potential for outreach to the people to explain how and why the tribunals are operating. Some optimists believe that the due process requirements imposed by international standards and some of the staff training and even physical assets of the special courts will become a legacy to resource-starved national justice systems. The controversial International Criminal Court is *sui generis*; ratified by more than 90 countries and located in the Hague, it will be the court of last resort when national courts can't or won't try their own war crimes perpetrators. It is just beginning operation and is especially challenged to overcome the opposition of the United States, which, by dint of threatened military aid cutoffs, has elicited from over 50 countries' bilateral agreements not to refer any U.S. citizens to it under any circumstances.

International courts perform differently in many ways from their national counterparts. But they are all required as a condition of U.N. approbation to adhere to fundamental due process protections akin to those found in the International Covenant on Civil and Political Rights; their larger problems are access to sufficient funding -- that is, their reliance on donations from other nations to supplement their national funds; not enough well-trained judges, prosecutors and defense counsel,

and not enough cooperation from governmental leaders in their own or neighboring countries whose interests may be hostile to dispensing justice to war crimes perpetrators.

There are, nonetheless, essential values in international courts. They give credibility to proceedings against higher-up officials that national courts may not be able to bestow. They assure monitoring and transparency to proceedings that help guard against bias or abuse of process. Although debate continues, a substantial segment of the international community is convinced that truth and reconciliation bodies, valuable though they may be, are often not enough to satisfy a deep human need for accountability for the most vicious abuses committed against innocent civilians by powerful leaders heretofore effectively immune from legal process. Victims and their families need to see that the highest level officials responsible for mass violations of human rights are tried and if found guilty punished in a fair process; they may then be better able to cope with reconciliation and communal reparations for lesser officials.

Yet, this whole international court movement may fail if the courts do not conduct their proceedings in a fair, efficient and transparent way. So much is at stake for the United States as well as the rest of the international community in the success of these tribunals. We in America have learned laws must not simply be enacted; more critically they must be vigorously enforced to make a difference in the lives of ordinary people. The same is true for international law. The United States, at Nuremberg, led the way; of late, in its rejection of the ICC, it has faltered, but it has not abandoned the cause of international justice, and many of us still look forward to the resumption of U.S. leadership down the road.

In a recent interview, Justice Sandra Day O'Connor remarked that as a result of technology and globalization, the world is becoming smaller and smaller and we have to learn to live together in it. That is a simple but enormously powerful truth. I believe, and we all can hope, that fair trials and just punishment for the worst offenders against the innocent victims of international and internal conflicts will help bring about that day,

and that evolving concepts of international courts – still work in progress – will make a substantial contribution to the end.