Panel 3

Law and War in Former Yugoslavia

Jonathan Bush, moderator
Panelists: Anthony D’Amato, Richard Goldstone, Michael Scharf, Ed Vulliamy

Jonathan Bush:  
Shall we shuffle toward our seats, maybe we could begin the next session? We’ve heard a few panels from the earlier international tribunals, and now it’s my very good fortune to moderate at the panel that will address the issues of the first modern-era international criminal tribunals. We have four very distinguished speakers we’ll hear in the following order. I’ll introduce them all now and then they can get on with it.

The first will be Ed Vulliamy, who is the correspondent for The Guardian and an observer to many of the developments that we will be discussing in the former Yugoslavia. Second will be Professor Michael Scharf, who teaches at New England School of Law and was formerly with the Office of the Legal Advisor of the State Department and the author of a number of books about the Yugoslav tribunal. Third, we’ll hear from Professor D’Amato—excuse me, I want to get it right— the Leighton Professor of Law at Northwestern and the defense lawyer in one of the recent cases in The Hague. And our fourth and final speaker will be Justice Goldstone, the former chief prosecutor at The Hague tribunals.

With no more further ado.

Ed Vulliamy:  
Thank you, thank you. I need to beg your indulgence in advance for having to depart at 4:30, which gives me the advantage of avoiding your questions, I suppose.

We talked earlier about wars being between armies and the terrifying prospect that the men proscuted by William Caming, whose hand I have had the honor to shake, would be the last war criminals. They certainly will never be the last war criminals, unfortunately for the human race, but the idea that they will be the last to be labeled as “war criminals” is a terrifying prospect.

Bosnia was not a war in that sense. It was a war in which the civilian population was its raw material. Their removal— the removal for the most part of the Bosnian Muslims, but others, too— either by death, deportation, terror, or whatever, was the raw material of the war. The civilians were not living around the targets of the war, they were the targets of the war— the innocent women and children. And in the aftermath of that war, which I saw at closer range than my peace of mind would now like, I’ve become interested in this word “reckoning”— let’s give it a capital R. That’s something we do after the death of a loved one, or when a love affair breaks up, but above all after historical calamity, when it means to stare history in the face to understand not just what happened, but why, and in some way to come to terms with it. It’s personal for the victims and the perpetrators, it’s diplomatic, it’s military, and it is legal in many ways, as well.

Now I grew up, as many of us in this room, in the generation that was taught by the achievement of people like William Caming at Nuremberg, to believe that the bullies of history need not triumph. My father fought in that war, and I think we grew up with this idea that the Reckoning was possible and just.

I’ve reconsidered the poem “The Ancient Mariner” recently. I used to sympathize with the
Then we have the laws that are being applied at The Hague. It’s not for me to talk about The Hague in the present distinguished company, except to say that it’s an extraordinary institution. There are maybe even little slices of it that even Justice Goldstone wasn’t able to see. The sight of people assembling around a rather lavish breakfast in a Dutch hotel meeting each other for the first time since the Omarska concentration camp was closed. Indeed, coming there myself and recognizing a woman that I had last seen in another camp at Trnopolje. It’s an extraordinary institution, extraordinary inasmuch as the people who came there to be listened to by very few people outside the courtroom were bearing witness to a bitter kernel at the core not only of Bosnia’s war but of our time and were asked to identify people and to point at people, in this case Dusko Tadic, who they knew from that place at that other time.

I’m going to keep to my ten minutes. My question to you and to the panel is this: Can the legal Reckoning be a Reckoning if it is alone? Is it enough just to be able to apply the laws of war and say, “Well, it’s all right now”? It was very strange for me personally to spend so many years of my life opposed, frankly, to the United States intervention in Vietnam, only to be in Sarajevo or wherever hoping the F-16’s would come in tomorrow morning and simply stop this. I don’t think that Reckoning is happening. It was pretty bizarre, frankly, to be told by people who had never seen people blown to bits on the streets of villages in the countryside or Sarajevo that we had somehow made all this up about those camps, that it was fabricated in some way. It was even bizarre that this historical pornography was adopted as rather chic in the salons of London.

In Rwanda— I don’t know about Rwanda, but it seems to me bizarre that everything that General Dallaire told the United Nations about what was upon that country was considered by the United Nations to be inadmissible, that the Belgian attempts to glean the information from him were not in the interests of that organization.

The spirit of Nuremberg, as I understood it growing up in that generation whose fathers had defeated the Third Reich, was that the law had its part in something wider. Colonel Crane earlier talked about crossing the moral line. Where is the moral line 200
miles down the road from Venice? With a fair wind you could get from Sarajevo to Trieste in under 12 hours. Where is the moral line? Is genocide okay politically? Apparently so. Diplomatically, politically it’s not only okay, it’s rewardable politically and diplomatically. It’s not okay legally, however, but that doesn’t seem to be enough to provide the Reckoning, which is the difference between—and I’m stealing a phrase from Justice Goldstone—the difference between peace and an interval between now and the resurrection of hostilities. For me, the Reckoning is wider. I worry that the law is only part of it. For me, the betrayed promise was better encapsulated not so much in the laws of war, which we will no doubt want to talk about, but in that great pair of words of the anti-fascist movement in the 1950s, “Never again.” Unfortunately, some pale imitation did happen again and will no doubt happen again. I do so hope that those prosecuted by William Cuming were not the last war criminals.

Michael Scharf:

Thank you. An expanded version of my remarks is available in a review on the table outside of this office. I have an upcoming article in The New York University Law Journal, and it is now in page proofs, and I made 50 copies. So if you fall asleep now, you can catch it later.

My speech today is going to be a bridge between our discussion of Nuremberg and using Nuremberg as a model to judge the Yugoslavia tribunal, and I suppose indirectly the Rwanda tribunal and the permanent International Criminal Court. With all of the importance of Nuremberg, which we heard today, the Nuremberg legacy has also been a tarnished one. As Jon said this morning, there have been four main criticisms of Nuremberg: first of all, that it was victor’s justice; second, that there were political decisions that governed whom to indict and later whom to give clemency to; third, that it was an application of ex post facto laws; and finally, that the Nuremberg trials and the Tokyo trials were full of procedural irregularities. In fact, many people have, subsequent to Nuremberg, come out and said that Nuremberg was not the ideal of justice. Let me just quote Supreme Court Justice William O. Douglas, who a couple of years after Nuremberg said, “I thought at the time and still think that the Nuremberg trials were unprincipled.” So the Nuremberg legacy has not been above reproach.

In 1993, after nearly 50 years of talking about creating a new Nuremberg, the international community finally got down to it. Dusting off the old Nuremberg charter, they created in its face the Security Council Ad Hoc Tribunal for the Former Yugoslavia. The first trial before that tribunal began in 1997. The book that I’ve written focuses on that trial and analyzes the background of the creation of the tribunal and all the politics that went into it. This fellow on the cover of the book was the subject of the first trial. His name was Dusko Tadic. He is a Serb pub owner, a karate instructor, and part-time visiting sadist to concentration camps. He looks an awful lot like Dustin Hoffman, and don’t let looks fool you.

At the time the Yugoslavia tribunal was created and they launched on their first trial, the judges were very keenly aware of the need to avoid the tarnished legacy of Nuremberg. They said repeatedly in their annual reports, “We have to do better.” The importance to them of avoiding the tarnished legacy of Nuremberg was very concrete. First of all, in order for the tribunal to continue to get funding, the rest of the world had to support it as something worthwhile. Secondly, in order for countries to cooperate with the tribunal in terms of turning over evidence and indicted people, they needed those countries to support the tribunal. Third, as NATO began the policy of every once in a while apprehending indicted people, you needed American support in particular and the support of the other countries in NATO to continue that more aggressive policy. Fourth, in terms of its goal of serving to create reconciliation and peace in Yugoslavia, if the tribunal was seen as flawed, peace would not result. Finally, with respect to using the Yugoslavia tribunal as a model for a permanent International Criminal Court, if the Yugoslavia tribunal turned out to be broken beyond repair, then so, too, would countries view the International Criminal Court.

Has the Yugoslavia tribunal avoided the shortcomings of Nuremberg? Let’s look at several of them in order. First of all, victor’s justice. Originally the Yugoslavia tribunal was seen as something that could avoid victor’s justice, since it was created by the Security Council, representing all the countries in
the world and not just the victors in an armed conflict. However, while the Yugoslavia tribunal was being created and before the first trial broke out, the Security Council actually did take sides and it actually engaged in a mini-armed conflict authorizing massive bombing of Serbia, one party in the conflict. Also, the judges of the Yugoslavia tribunal turned out to be, four of them out of the eleven, from countries that were majority Muslim populations. No judge on the Yugoslavia tribunal was from a country that had supported Serbia; and Russia, which was such a country, had its candidate defeated on the grounds that he would be too pro-Serb. So in fact you have a little bit of the victor’s justice criticism lingering in the background, although it’s not as obvious as with Nuremberg. And it would be ameliorated if you had had a permanent International Criminal Court already standing with the judges pre-elected.

Second is the question of political decisions. I’ll let Justice Goldstone talk about that, but I do call your attention to the fact that there still has been no indictment of Milosevic, either public or private, and many people, myself included, have raised the issue of how is that related to politics. Is it simply a question of still missing the evidence?

Third is the question of ex post facto law. In its first decision in the Tadic case, the trial chamber and later the appeals chamber approved of the application of the laws of war in internal armed conflicts against an individual. At the time, the ICTY had taken the position that only grave breaches could be applied in an international criminal tribunal for individual accountability. So this was new and exciting law for those who want to push the envelope and want to see more accountability. It ended up being a very important decision, because in the Yugoslavia tribunal’s decision in the Tadic case, they acquitted him of all the grave breaches charges, and he was only convicted, as far as war crimes, of war crimes in an internal armed conflict under this new novel interpretation. Some would say, especially defense counsel, that if a new tribunal is going to create new law, they ought to apply it prospectively, not retroactively. So you have a little bit of that flavor of ex post facto laws.

The biggest problem, though, I see was that there were many kinks in this new set of procedures as applied in the Tadic case, and I think it is fortunate that the tribunal began with somebody who was a low-level thug and that there was tons of evidence against him, so that the kinds of things I’m going to talk about are probably harmless error. And yet they do represent principles that were violated and that need to be improved before the tribunal turns to the more important and larger cases.

The first is, lacking enough money to have a witness protection program, the tribunal decided to grant certain witnesses anonymous status. That means they would not tell the defense counsel or the defendant who they were, the most important of which was a witness named L, who ended up being a very important witness. He claimed in testimony that Dusko Tadic had ordered him to rape several people and to kill several people, and that he saw Tadic himself kill several people at the Trnopolje camp. Later in the trial, the prosecution came forward to the judges and said, “You know what? It turns out Witness L made up the whole case, the whole story. We now withdraw him as a witness for truth.” Now had the defense counsel known of Witness L’s identity, that’s something they could have explored through cross-examination, that’s something that in a U.S. court the Supreme Court requires; but that’s something that the Yugoslavia tribunal did not require.

Second, there was an awful lot of hearsay evidence that was allowed. Hearsay evidence is evidence where somebody who has made the statement is not in court, but rather someone who has heard the statement is repeating it for the court. The problem is, in general, hearsay evidence is fairly unreliable. The person who is supposed to have made the statement has not taken an oath, he’s not before the court, he’s not subject to cross-examination, the judges cannot see him for signs of untruthfulness; and therefore in the United States hearsay is only allowed usually with unavailable witnesses when there are indicia of reliability. Here in the Yugoslavia context, if you peruse the final judgment, over 90 percent of the evidence that is cited comes from hearsay evidence, and that’s a little bit troubling.

Next, there was a variance between the judgment and the indictment. Although the prosecutor amended the indictment twice, he never put in the specific charge that a particular person saw Dusko
Tadic slice the throats of two Muslim policemen next to a church. Although that was not in the indictment, that is the only killing that Dusko Tadic is convicted of, and the sentence, which is 20 years, in the sentencing judgment says, well, mostly because of the killing. In the United States you cannot be convicted of something that’s not in the indictment. The indictment does have a general persecution count, but although it refers to specific incidents, it never mentions this particular incident.

Next, there’s the problem of bystander liability. In a famous case in the Boston area, which is the subject of the movie The Accused, in which Jodie Foster got the Academy Award, a bunch of people who stood around a bar and egged on a couple of people who raped a woman were indicted because they were there in the room under the theory of bystander liability. They were indicted. They ended up not being convicted, but the indictment was on the theory that they participated by egging on the rapists. In the Tadic case, some of the charges that were proven, the only proof was that he was in a room when people were tortured. The prosecutor said in the context of Yugoslavia that should be enough, and the judges accepted that. And that goes way beyond the U.S. conception of what it takes to be responsible. Again, there was so much other evidence that Tadic was a bad guy and was beating up people, it doesn’t really trouble me other than as a matter of principle.

Finally, the Yugoslavia tribunal allows the prosecutor to take an appeal, something that in the United States is not allowed under the theory of double jeopardy. The theory is that the defendant can appeal, but the prosecutor only gets one bite at the apple because the prosecutor, with his superior resources, can basically beat down the defendant through repeated appeals. Should we be evaluating the Yugoslavia tribunal through the eyes of American jurisprudence like I just did, or is this an [absolutely] wrong way of looking at Yugoslavia, since it is not a U.S. court, it is an international court?

The rules of procedure that were adopted by the Yugoslavia tribunal were modeled mostly after a U.S. proposal. The judges have said this reflects the adversarial approach. Once the Yugoslavia tribunal decided to model itself on the adversarial approach of [the] U.S., it had to go beyond the human rights requirements of the International Covenant on Civil and Political Rights and give the defendant all of the rights that the adversarial approach requires, and that’s something that it has not done.

Also, the first trial of Dusko Tadic was beamed throughout the world and in the United States, just like the O. J. Simpson case, through Court TV, and what you saw when you watched the trial was an American federal district judge from Texas presiding. You saw three out of the four prosecutors who spent 99 percent of the time arguing the case on loan from the U.S. government, from the Justice Department and from the military JAG. You saw the defense counsel who were educated and trained by the American Bar Association. What you saw looked an awful lot like a U.S. court. And then to see some of the things that you’re used to being violated, I think, was troubling for a lot of people who actually sat down and watched the trial.

Nuremberg has in fact been judged over time by the U.S. standards, even though it was not a U.S. court, and it was found lacking. Because of that, the International Criminal Tribunal for Yugoslavia and the Permanent Court have said you must do better. My thesis is that they’ve got some ways to go. Thank you.

Anthony D’Amato:

Some people have said that I look a little bit like Dustin Hoffman, which means I must look a little bit like Dusko Tadic. Whether I’m a movie star or a war criminal I’ll leave to you.

In working on the Kovačević case at The Hague— he was the first Serb to be indicted for genocide— naturally I had occasion to look up and refresh my recollection of the crime of genocide. My client died in the detention center seven weeks ago, which means I can now speak about this subject, genocide, without fearing that the prosecution might be getting a transcript and then holding something I said against me.

Genocide we can find in the Bible, it’s really one of the oldest horrible crimes. But it’s also the newest in the sense that it was only defined as a crime in 1948 at the Genocide Convention. Genocide was mentioned in the Nuremberg tribunal, but it was not part of the indictment. Genocide was not a crime at all before 1939. We know that because Joseph Stalin committed vast genocides against his own
people in the 1930s, and any genocidal campaigns that Hitler undertook against Jews and other minorities in Germany prior to 1939 were ruled out of bounds by the International Military Tribunal. They only counted those kinds of heinous crimes as those that had to have occurred during wartime and in occupied countries.

Genocide was first made up as a word by a man named Raphael Lemkin in a book that no one reads anymore published in 1944; so the word was actually coined in 1944. But right away genocide became such a striking concept that its use was overblown almost immediately. As early as 1951, Paul Robeson and William Patterson submitted a petition to the United Nations charging "genocidal crimes of federal, state, and municipal governments in the United States against 15 million African-Americans." So the word "genocide" was already used in an explosive context.

But very recently, Rudolph Rummel, a very well-known political scientist, gave the following instances in a speech he gave in Israel: the Jewish Holocaust (fine); South African apartheid (that's genocide?); government policies letting one race adopt the children of another race (that's genocide?): The denial of ethnic Hawaiian culture by the American-run public school system in Hawaii (another example of genocide?). So you can see that the word began to lose its value as a coin, began to get cheapened. Even in Raphael Lemkin's book in 1944, he described the Jewish Holocaust so lengthily, and said all of that was genocide— the persecutions, the press campaigns, the deportations, all of those things— that genocide became this very vast, elusive, and amorphous, vague concept.

At the Eichmann case in 1961, where Eichmann was tried and convicted, genocide was also used in this expansive sense. Up till then there really wasn't much harm legally, because there's no doubt that Eichmann committed genocide and there was no doubt that the Nazis committed genocide if they had been charged with that. In 1948, the Genocide Convention undertook to define the crime of genocide, and its definition was imported exactly word for word into the Yugoslav tribunal, the Rwanda tribunal, and the new ICC as well. No words changed. Genocide is authoritatively defined as "any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial, or religious group as such." And then it specifies such acts as killing, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, and other things like that.

The important part is "destroy in whole or in part a national, ethnical, racial, or religious group as such." And I think one reason we find this so heinous is not only that it is done, but how would we ever like to be killed because we're a member of a national, ethnical, racial, or religious group, when very little voluntariness often is associated with membership in those groups? And that's the reason people want to kill you? It just seems like it's somehow the most heinous crime you can imagine.

What about a political group? Why isn't political in there? It says, "national, ethnical, racial, or religious group." Why not a political group? Well, a good reason, I think. It was proposed that political groups be included. But imagine what it would mean if we had political groups included in the definition. Every war, according to Clausewitz, is an extension of politics by other means. Every armed conflict, your opponents are the people who are politically opposed to you, the enemy. To say that genocide is destruction of a political group might extend to broadening the notion of genocide so that it includes the prohibition of any kind of warfare at all. Some people might say that's pretty good, we don't want warfare; but the whole problem of the laws of war is to make wars a little less horrible for people who are innocent. That includes civilians, it includes soldiers who lay down their arms, it includes wounded people. So the notion of genocide would be destroyed if you use political groups.

In addition, how do you define who's a member of a political group? Are you a liberal, a conservative, a Republican, a Democrat? Do you switch from one to the other? It's very hard to know what that is. So political groups are not included, but these other groups are.

We talked a little bit earlier, the panelists, about the specific intent that's required. The statute says, "committed with intent to destroy in whole or in part a national, ethnical, racial, or religious group as
such.” It seems to me that even if the word “intent” were not there in that statute you’d still need specific intent, because what you’re talking about is what’s the motive of this person? Is this person’s motive to kill this victim because he’s trying to destroy the group of which this individual is a part? “Destroy in whole or in part a national, ethnical, racial, or religious group as such.” So in other words, if you drop an atomic bomb on a city and there are predominantly Muslims or Japanese in that city, unless your intent was to destroy that group, it’s not genocide to drop the atomic bomb. It may be a war crime, but genocide is an attempt to destroy a particular group. In Hitler’s case, it was absolutely clear. That’s exactly what he said in Mein Kampf that the Germans should do.

But it gets much more difficult and interesting when we get to Bosnia. In Bosnia, you know, you had a three-cornered situation: the Muslims, the Croats, and the Serbs. Many of us in this country think these groups were at war with each other per se. It’s not really true. They were all trying to expand their territory and expand their sphere of influence, but it is not exactly true to say that the Serbs were fighting against the Muslims as such, or the Muslims were fighting against the Serbs as such— at least I would have said this defending my client— but for the particular reason that there were Muslims who served in the Serbian army, there were officers who were Muslims, there were many intermarriages between Muslims and Serbs. The question was one of loyalty; it wasn’t one of what group do you belong to, although, if you were a Muslim, prima facie you might be belonging to the Muslim group who was an enemy to the Serbs. But from the Serb point of view it wasn’t conclusive that you were an enemy; you could be a friend.

It’s reminiscent of the U.S. Civil War. You might say anybody with a Southern accent is a rebel, and you use that test. But that wouldn’t be right because there would be some Yankees with Southern accents, and there would be some rebels without Southern accents. To employ the Southern accent test would have been misleading from the point of view of a recruiter of soldiers in the Civil War, and the same thing was true of Yugoslavia. That doesn’t mean there wasn’t genocide in Yugoslavia, but it seems to point [out] a difficulty of proving that the war in Yugoslavia was a genocidal war per se. I think that much easier to prove in the Rwanda case, although you’re going to find out tomorrow— there will be a panel on that, and all to the good.

“Ethnic cleansing”— that term has been used a lot. Is ethnic cleansing genocide? If it is, the prosecutor would have an easy case against Serbs, because it’s very hard to say there was no ethnic cleansing; the Yugoslavs themselves to some extent said there was ethnic cleansing. What do we mean by ethnic cleansing? The greatest historical example of ethnic cleansing that I know of occurred after World War I. It was the movement of vast numbers of populations, resettling the Ottoman Empire into states like Iraq, Iran, etc. Large numbers of people were moved under the auspices of the League of Nations. They were given a voucher for the homes they left and a voucher they could pick up at the other end if they wanted to move, or they could stay where they were. And there were plebiscites and everything else. A huge amount of what you would call ethnic cleansing [occurred] under the auspices of the League of Nations. A war crime? Hardly. Ethnic cleansing doesn’t have to be a war crime, movement of people doesn’t have to be a war crime or a crime against humanity, and it certainly doesn’t have to mean genocide. Moving people may sometimes be the only way to avoid conflict. If people can absolutely not get along with each other, and you have a vote— and the majority, you get this city; the minority, you can stay there if you want but you might as well ship out— that’s not genocide.

Paul Szasz, who’s in the audience here, I think said it properly in his Cornell article, where he talked about the neutrality of ethnic cleansing as a concept. It’s a neutral concept. You can engage in ethnic cleansing by killing the minority of people, but then it’s genocide. But you can engage in ethnic cleansing the way the League of Nations did and it’s not genocide.

Finally, the trickiest part— one or two more minutes— do you need a plan for genocide? Many people say you have to have a plan. The Wannsee Conference, for example: clearly Hitler and his associates had a plan. Was there a plan in Yugoslavia? Well, as you pointed out, it’s not that easy to find out. Milosevic might very well be able to deny at the high-
est levels a plan, and then we'd have to work on that. Can there be genocide without a plan? You know, this requires a certain amount of thinking about. Maybe there can. People in the field can be engaging in genocide even though it's not part of a plan coming from above. How can this happen?

There was a recent case, Nikola Jordic, a Serbian who was prosecuted for genocide in Germany, in the German High Court, very recently and convicted of genocide. He was a Serbian who went to Serbia and became one of those sort of thugs who went around and beat people and sometimes killed people. He was part of a gang of thugs, of Serbians. The army would usually let these thugs in first because the army didn't want to take any chances. So the gang would move in and brutalize a town, and the army would come in and clean up. So he was one of these paramilitary advance groups, and what he did was he shook these people down. If there was a Muslim, he said, "I'm going to kill you. What's your life worth?"

"I have a hundred dollars."

"That's not enough. Do you have any more at home? Go home and get it, I'll come with you."

And Jordic was carrying one of these purses around where he just had stacks and stacks of money that he was extorting from people; and once in a while, when people didn't give him money, he shot them. He was convicted of genocide. Were his activities against Muslims as a group? It's pretty clear that they were because those were the only victims that he shook down. He didn't try to shake anybody else down. He was just willing to go with the flow and commit these crimes in order to enrich himself. But no one was telling him to do this.

In Goldhagen's *Hitler's Willing Executioners*, you read about the Order Police, who were sent into Poland to kill Jews—to find Jews and kill Jews. The Order Police were people who weren't physically fit to be in the army, so they used them for this other purpose. The most amazing thing I found about that description by Goldhagen was that when these police people that had only been trained for about six weeks for their job arrived in Poland, they said, "Well, guess what, our job now is to go around and kill Jews."

"Oh, do we have to?"

“No, as a matter of fact, if you don’t want to kill Jews, you can stay back and guard, just be a guard here at the headquarters; or you can go back to Germany if you don’t like the idea. We don’t want anybody who doesn’t feel like doing this."

So what happened was a few people actually left, went back to Germany, got other jobs. No recriminations. Some people just didn’t want to do it, so they stayed back; some people liked it so much they brought along their girlfriends, who helped them do it. But it was so voluntary that you would say these people are not actuated by any command to do this. It wasn’t that Hitler said, “You have to do this”; Hitler said, “You don’t have to do this.” That’s why the title is *Hitler’s Willing Executioners.* Were these Order Police guilty of genocide? I would say clearly yes. So it’s interesting you can find that the crime might exist even at levels that we’re not used to thinking of, maybe even where there’s no plan or where there’s a disavowal of a plan. That’s important as these cases unravel in Yugoslavia and Rwanda. Thank you.

Richard Goldstone:

I must confess to be tempted to respond to some of the points which my fellow panelists have made, but I’m going to resist the temptation and carry out the request, adhere to the request that came from Peter Maguire, who suggested I should deal with a number of issues practical issues that cropped up during my period as chief prosecutor in The Hague. He sent me a note suggesting I should talk about why Karadzic and Mladic were indicted during the war and to say something about the problems in getting and collecting intelligence information, particularly from the United States intelligence community, which was obviously highly important to the work in the Prosecutor’s Office in The Hague. Then he said what do you regard as your greatest triumph and what was your greatest disappointment? So those are the four topics which Peter suggested and which I’ll talk about very briefly.

Firstly, why Karadzic and Mladic during the war? The simple answer is, that was the mandate we were given. The Security Council of the United Nations set up the tribunal in the middle of the war knowingly and intentionally, hoping that the tri-
bunal’s work would in fact help to restore peace and help to remove what the Security Council had determined was a threat to international peace and security. Clearly, from a political point of view, there were strong arguments against issuing indictments against Karadzic and Mladic, particularly Karadzic, the then president of the Republika Srpska. The argument being: He’s the man, if there’s going to be peace agreed to, he’s the man who’s going to have to represent one of the three warring parties. If he’s indicted as a war criminal, what’s the point in talking to him and can you really expect him to sit at the table and talk about cease-fires, let alone peace? But that was the decision that was taken politically by the Security Council, and when the judges were appointed and when the prosecutor was appointed, our work was to do the work that was given to us by the statute of the Security Council. If we weren’t going to do that, then we had no right, it seems to me, to have accepted an office under that statute.

Nonetheless, to deny the politics would be less than real, and it would be less than frank to say that certainly those of us who were leading the work of the Prosecutor’s Office didn’t take the politics of the situation— not into account, in the sense that it influenced who was indicted or when people were indicted, but we obviously kept an eye on what was happening on the ground. The politicians— I have no doubt if the leaders of the negotiating countries were to have voted in 1995 as to whether that was a good time to indict Karadzic and Mladic, that probably there would have been an overwhelming no. Fortunately, we didn’t conceive it to be our duty to consult the politicians. We weren’t politicians ourselves, nor did we have political advisors in our office. When the evidence was sufficient in our view to justify an indictment, an indictment was issued and it was confirmed by one of the judges in the trial chambers, because it was under the statute, unlike an American procedure. Really, while Professor Scharf made a number of telling points, it wasn’t simply an adversarial system that we’ve adopted. Some of the continental procedures were adopted, and this was one of them. In the United States or the United Kingdom or the Commonwealth countries, the prosecutor alone decides when to issue an indictment; under the rules of the Security Council for the Yugoslavia and Rwanda tribunals, the prosecutor prepares an indictment, but it only becomes a valid indictment when it’s been confirmed by one of the six judges in the trial chambers of the tribunal. [After the indictments] were issued, the then Secretary General of the United Nations, Boutros Boutros-Ghali, said to me, “Had you asked my advice, I would have told you not to indict Karadzic and Mladic until after the war had ended.”

I said to him, “That demonstrates the wisdom of the Security Council in making it improper for me to have consulted you in the first place.”

The second question, an interesting one, is the intelligence-gathering by the Prosecutor’s Office. It obviously didn’t take long for us to decide that we needed, to the extent we could get it, information gathered by the intelligence communities of the major powers, and obviously and particularly the United States. With satellites taking photographs 24 hours a day, and airplanes flying at high altitudes, of what was happening on the ground, being able to intercept telephone conversations and radio communications— it was obvious to us that there must be a wealth of information there. Very soon after I took office, I opened a dialogue with the leaders of the United States State Department and the intelligence agencies to try and find out whether we were going to be in a position to get that information.

The greatest difficulty we had to overcome was an interesting situation that arose in the Prosecutor’s Office in the tribunal. Anybody who has prosecuted will understand the unusual dilemma that the prosecutors in The Hague, or in Arusha for the Rwanda tribunal In any national situation, the people who investigate crime are the police. When they finish their investigation, or when they think they have sufficient information, they hand it over to the prosecutor. If there’s information the police have obtained that they don’t want the prosecutor to use, they just don’t give it to the prosecutor at all. If there’s information from an informer and they don’t want the informer’s identity to become public, they don’t use that information. In some cases, no doubt, the police in fact abandon prosecutions because they don’t want the information sources to become public.

In the case of the international tribunals, and the same will be true in the International Criminal
Court, the prosecutor is both the investigator and the prosecutor. The prosecutor directs the information gathering and is the prosecutor in the technical sense. The rules provided originally that any information the prosecutor obtained had to be handed over to the accused as part of the fair trial proceeding immediately after the defendant appeared before the trial chamber and pleaded to the indictment. This made it impossible to get any information in confidence, because if the United States or the United Kingdom or any other government, the French government, gave us information in confidence, it couldn’t be accepted in confidence in good faith by the prosecutor, knowing that if the information was used to indict somebody it would have to be handed over to the defense immediately. For that reason the rules were changed by the judges at my request, and in terms of the amended rules, if information was received by the prosecutor in confidence, the rule now says it may not be handed over to anybody, including the judges themselves, without the consent of the party that provides the information. This put the information giver into a position where that government retained control at all times of that information. The judges could exclude the information if the source wasn’t disclosed, and it was a question of marrying the necessity of getting confidential information on the one hand with fair trials on the other. That was the basis on which information was obtained and formal agreements were entered into between the prosecutor and the United States government dealing with the provision of intelligence information.

This became a very public issue during 1995, when I sent a letter, a confidential letter, to the State Department complaining that some of the requests we’d put in for information were taking too long to answer. Let me be explicit here. Most of the information we requested was requested not to prepare indictments or to use to prosecute people; it was used really to save us a great deal of unnecessary waste. You can imagine that the prosecutor of a war crimes tribunal is a sitting duck for false information, false reports, false trails coming from governments, from non-governments, from all sorts of people, and if we would have had to follow up every one of these trails a lot of them would have been a tremendous waste of resources. Frequently a request would go in to the intelligence community of one of the important nations saying, “We’ve got this information. Is it worth following up?” And you’d get an answer, “Forget it.” That was useful, without the intelligence giver giving any information other than “don’t follow it up”—that was useful. It doesn’t mean we were bound not to follow it up, we may have had other information which made it look worthwhile. But it was a useful indication.

I sent a letter to Washington complaining that there was a long time-lapse between requests and getting answers, and frequently, by the time we got the information, it was already water under the bridge, it was of no use to us anymore because it had become irrelevant. That letter complaining about the time lag was leaked to The Washington Post by no doubt a friend of the tribunal somewhere in the State Department. That caused a huge furor in Washington, and I arrived that week to find that all the nerves of the Washington State Department and intelligence community were convulsively flexing and hitting off in all sorts of directions.

One of the problems was that The Washington Post and the United States media played this up on the basis that the complaint coming from me was that we weren’t getting information. The complaint was that we weren’t getting it in time or sufficiently speedily to be able to make it of use. The result was very satisfactory, because there was so much publicity given to this that the United States administration really set up a far more efficient group of people. The reasons for the delays were simply that insufficient people had been put on the job, and the result of the leak of that letter was that the number of people was increased ten- or twenty-fold in the relevant offices in the United States.

I mention these things— I think they’re relevant— because I think they demonstrate the sorts of practical problems that one is dealing with on the ground in a prosecutor’s office. I don’t say it in any sense critically, but it’s not only the sort of theoretical concepts that some of the panelists have for good reason dwell on.

Very briefly, because I’ve already exceeded the ten minutes, I think the most important success, in my book, of the Yugoslavia tribunal and now the Rwanda tribunal is that, notwithstanding some of the
important criticisms that have come from Michael Scharf, they have demonstrated, I believe, beyond any question that international courts can put on fair trials, or sufficiently fair trials, to justify the process moving forward. And that wasn’t a given. Many people, many serious people doubted, for good reason, whether it was possible at all, as we approach the twenty-first century, for an international tribunal to mount a fair trial. I think that the jury has come back generally from the international community—and I know Michael agrees basically, notwithstanding [that] no trial can be perfect, no system can be perfect, and it’s very important that there should be the criticism because the system should be improved where it can be improved, and for that reason, anybody involved should welcome the sorts of criticism that have come from Michael Scharf in particular, and to deal with them and improve. The judgment—I have no doubt that he will agree—is that basically fair trials have been put on in the Yugoslavia and Rwanda tribunals.

The greatest disappointment to me has been the amorality of political leadership, particularly in the major Western nations, with regard to war crime. The fact that at the bottom of their agenda are the interests of the victims. The victims are just not generally on the agenda of political, and particularly not of military, leaders in the important nations.

Jonathan Bush:

Thank you very much. Before throwing it open to questions, would the panel like to...

Michael Scharf:

Can I ask a question of Richard Goldstone, the answer of which you’ll all find very interesting—I know I will. It concerns this question of whether international tribunals are a theater of justice. And it’s the question of the tension between trying to get a conviction and the other goals of an international tribunal such as education, deterrence, and reconciliation.

In the Tadic case there was a lot of criticism that the first several weeks of the trial were deadly boring because they put on this James Gow, an historian, who went through in monotonous detail the history of Yugoslavia for the first several weeks, rather than starting the case with all of the most atrocious types of eyewitness testimony that would have really gotten the world’s attention at a moment when the world was focused on the tribunal. As a result, the first day of the trial there were 300 people—all these media people—watching the trial, and at the end of the first three weeks there was only Ed Vulliamy in the courtroom when I went there to visit, and people were turning out, and you lost the educational function of the tribunal.

Also relevant in the Dokmanovic case, a recent case that would have linked Milosevic to the crimes of the Serbs in Vukavar-Croatia, they had had the entire trial of Dokmanovic, they were about to issue the judgment, and then he has basically erased history by killing himself, and the judges decided that they could not have a judgment, and therefore there is no evidentiary record for historians to look at of the link between Milosevic and Vukavar. They both raise the same question of the role of the tribunal: Is it an ordinary court, or has it got some separate purposes that require some differences?

Richard Goldstone:

I think both. I must say—and perhaps I shouldn’t say—I don’t believe it was a sensible decision to run James Gow, the first witness, for weeks. That was a decision that was taken by the senior prosecutor running the trial. And let me say that I took a very conscious decision as chief prosecutor not to interfere with prosecutions. You can’t expect senior expert prosecutors to have a chief prosecutor breathing down their necks. If people prosecute, they weren’t interfered with at all. I’ve got no doubt that’s the only sensible approach.

I think you’ve got to keep your eye on the educational aspects as well as on the strictly prosecutorial, strictly legal aspect because that’s an important role which any international war crimes tribunal has to play. The same would be true, but to a lesser extent, of national prosecution. I think a sensible prosecutor—Any public trial is theater, and any prosecutor, I think any good prosecutor, knows that. It’s theater where the audience is not usually the general public, although Court TV has changed that to an extent. But the theater audience in a normal trial, and certainly in a jury system, the jury, and in a non-jury system, the judge or judges—I have never had any doubt as a
commercial lawyer, because that’s what I was before I went on the bench. I’d never prosecuted ever— but it seemed to me that the worst thing that any trial lawyer does is put a judge to sleep. If you put a judge to sleep, you’re going to lose your case. I think, Michael, I think it’s both.

Jonathan Bush:

Let me throw it open to the audience. There must be lots of questions.

Paul Szasz:

As to a discussion of genocide, I think I agree with the trend of Mr. D’Amato’s presentation, but there’s considerable doubt about whether the ethnic cleansing as carried out in Yugoslavia is genocide, as in the meaning of the ‘48 convention. I have no doubt that what happened in Rwanda is genocide, as in the meaning of the ‘48 convention; but for the reasons that Mr. D’Amato indicated, I think there is considerable doubt whether what happened in Yugoslavia— this ethnic cleansing—constitutes genocide.

This raises a legal point. That is, the ‘48 convention was written 50 years ago. Can it have evolved? Can you say, all right, it meant that in ‘48 because of Raphael Lemkin’s book on the basis of the Holocaust. He not only wrote that book, he drafted the genocide convention really and sold it to the General Assembly, the first example of an individual doing something like that, and he did it according to the Holocaust. Can you say that the notion of genocide has evolved meanwhile, as I’ve heard some judges informally argue?

The problem is that the evolution did not take place in a state like this or in courts; it took place basically in journalism. So that I think is an important question that this tribunal will have to face.

Now it is interesting, of course, that it is not only this tribunal that will have to face it, but also the World Court, the International Court of Justice, because the same actions are the subject of the suit that Bosnia brought against the Federal Republic of Yugoslavia, accusing the latter of encouraging genocide within Bosnia. Of course, there are various other defenses possible, but the court may have to decide whether whatever happened in Bosnia was geno-

cide. They also have to see whether it is attributable to Yugoslavia. So at least potentially we have here the situation where the war crimes tribunal defines genocide and the World Court will not, or possibly vice versa.

I say I don’t think the same problem arises with respect to Rwanda because there I think what happened is classical genocide in the ‘48 sense— that is, an intentional wiping out of a population— while in Yugoslavia it may just be an intentional moving of a population. The question might be put this way: There were a number of Muslims. That community was wiped out, there no longer are any Muslims [there], but they were by no means all killed. A few were killed, and that accelerated the movement of the rest out of the area. So in a sense the Muslim community has been destroyed, and intentionally destroyed; but it was not done by actually killing all of its members, but by moving most of its members. That, I think, is the issue of genocide that will have to be decided both by the World Court and by the Yugoslavia tribunal.

Mr. Scharf regrets that the Yugoslavia tribunal is not more American than it is, and I must say I regret the opposite; I regret that it has become too much American. The system— as displayed recently, of course, in the O. J. Simpson trial, but in a number of others— has become very much simply a duel between lawyers. Whoever has a better lawyer is likely to win, and the crime you’re then convicted for is the crime of having the worst lawyer. You can see some of that already arising in the Yugoslavia tribunal, this very extensive motion practice, this blizzard of rulings and orders and so on that are handed down by the court.

You mentioned the use of hearsay evidence as being generally unreliable. The answer [to] that is that in the European system, you value each piece of evidence according to what it’s worth. Some hearsay is worse than other hearsay. Some is better. The general banning of hearsay under U.S. law, with some very, very technical exceptions, is a peculiarity of U.S. law. U.S. law admits eyewitness testimony even if the eyewitness is someone who didn’t know the person accused, saw him once in the dark fifty yards away rushing across the scene. That [they’ll] admit as direct evidence.
I really think that the court will do better if we struck a good balance between the European inquisitorial system— to some extent, of course, as has been pointed out— and the excessively adversarial American system.

Michael Scharf:

First of all, your comment reminded me of a story that I've never told anybody publicly, but I think enough years have gone by now that I will do it at this very prestigious forum. If you all remember back to 1991-1992, there was a big controversy at the State Department about whether to call what was going on in Yugoslavia genocide or not. A number of high-level State Department officials resigned for the first time in protest since the Vietnam War. It was a huge controversy. The story behind that is that there was a U.N. resolution in the General Assembly and a resolution that we wanted to take to the Human Rights Commission on the situation in Yugoslavia, and the question was, Could we call it genocide? The State Department policy people and the desk officers wanted to call it genocide. It fell on me as the Legal Advisor for U.N. Affairs to do a memo to the Secretary of State weighing the pros and cons of calling it genocide. At the moment my memo was going around for clearance, Elie Wiesel came and gave a speech to the State Department. It was the first time in all the time I was there that the entire State Department went to that giant auditorium in the basement that's usually locked up and dark to listen to somebody. Wiesel said to us, "Look, what's going on in Yugoslavia is awful, and you're doing the same thing you did in World War II, you're ignoring it. You have to intervene, you have to do something."

The question came up, "Mr. Wiesel, is it genocide?"

And he said, "No, no, no, no, no." He said, "Genocide is particular to what happened to the Jews in World War II. This is 250,000 people, it cannot be equated."

That happened at the exact same time the State Department was considering my memo on whether to call it genocide or not. Ultimately the memo took a cautious, conservative view that there was not any evidence yet that we had—and I don't know what the CTA had—but what we had from our reporting from our consulates and our embassies to indicate that people had the specific intent to eliminate the Muslims in whole or in significant part. After Srebrenica, I think it's an easy case. You invade Srebrenica, you kill up to 10,000 people because they're Muslims—that's genocide. No wonder you had the superseding indictment on genocide right after Srebrenica. But that wasn't the situation back then.

A year later we went back to the Secretary of State and we said, "We now think we have enough evidence to call it genocide." But Warren Christopher was a really cautious person, and so when he testified before Congress he said, "There are acts tantamount to genocide." We have no idea why he qualified it that way, because his lawyers were saying, go ahead and use the g-word—and he wouldn't do it.

But this is important. The label "genocide" has political as well as legal overtones, and it really could have coalesced U.S. public opinion into taking a more forceful response in Bosnia and maybe avoided Srebrenica and some of the other things if we had called it genocide earlier. Isn't that amazing, though? Here we have unquestioned atrocities occurring in Yugoslavia, and yet you need to expand a word in order to get political support for a position. That's kind of awful, isn't it? But that's the nature of language sometimes. Genocide is a word that has a very emotional connotation, and it really resonates. I think the Jewish community in particular would have all of a sudden come out of the woodwork and said, "What's going on in Bosnia is like what happened to us in World War II, we need action." And they didn't. The Jewish community was conspicuously silent during Bosnia.

Question:

With respect to your very good point that the tribunal is already too American and Scharf's trying to push it even further, I think the problem is that once you adopt the American adversarial approach you have to have all the bells and whistles of that very technical approach. You can't do it halfway. It's like being a little bit pregnant. Therefore they may have made a mistake originally going in that direction, but once they went in that direction, I think they have to follow through to its logical conclusion.
Richard Goldstone:
Can I disagree strongly? I think an English lawyer or an English law professor would say exactly the same thing as you say because the English system, the South African system, [and] also adversarial, and there are many rules in the American court that we think are ridiculous and we haven’t adopted them. Why we have to use the United States adversarial system rather than the British or the Australian or the South African seems to me to be a little bit subjective and not objective.

Michael Scharf:
However, all those adversarial systems would not allow anonymous witnesses. Hearsay is maybe a different category...

Richard Goldstone:
That’s a good example. In many adversarial common law systems now hearsay evidence is admitted. That’s one of the examples I would use.

Anthony D’Amato:
Another answer to Paul Szasz. One reason I like to take international cases is that they really help my classroom teaching. I could see the uses of the word “ethnic cleansing” in the very case I was in. My co-counsel was of the opinion that we should object every time the word “ethnic cleansing” came up. It’s not a legal term, it’s prejudicial, it should be thrown out. But ethnic cleansing was so common in the parlance of the witnesses that I took the opposite approach. I said no, let’s let “ethnic cleansing” in and simply say there are benign ethnic cleansings and there are bad ethnic cleansings, and the word doesn’t really point one way or another. We never quite resolved that, but it’s interesting that even in the litigation situation you can have some of the issues that Michael just said he had in the State Department.

Gary Solis:
As for the quality of lawyers being too much of an issue, many people who’ve looked at the My Lai issue have said that one of the biggest differences between Calley and Medina is not the facts, but that Medina had F. Lee Bailey then at the height of his powers and Calley didn’t. There you are.

Question:
I was going to cite Canada on appeal, prosecutorial appeal, and Canada’s so close but always invisible.

Question:
I’m wondering about the effectiveness of a court that doesn’t have any enforcement mechanisms of its own, specifically the Yugoslavia and Rwanda courts and possibly also the ICC. The ability to apprehend will force states to surrender evidence and witnesses. If you rely on the Security Council, you’re pretty much at the mercy of a political body, and I’m wondering what sorts of things you would want the Security Council to do to facilitate the situation in the Yugoslavia court, and also what recommendations you have for the ICC.

Richard Goldstone:
Obviously that’s the greatest single problem facing any international tribunal. If you look at municipal systems, no judges, no courts in any country have the power of the sword or the power of the purse. They have to rely on the executive arm of government to carry out their orders. In the municipal system it’s not usually the judges who issue indictments, but the prosecutor. But if the people don’t go and arrest people, then there are going to be no trials. For that reason an international tribunal has to rely on the political will of individual governments to carry out the orders and the requests of the international tribunal. That’s the gap. What’s worrying is that the two ad hoc tribunals are acting under peremptory Security Council resolutions. They couldn’t be in a stronger position in international law or politically than the ad hoc tribunals. They’re sub-organs of the Security Council itself, and under Chapter VII of the charter of the United Nations, every member of the United Nations is obliged by the charter— which is a treaty, maybe a super-treaty— to carry out the instructions.

And what happens when they don’t, when the Federal Republic of Yugoslavia says we’re not going to arrest? Initially, when Croatia said we’re not going to arrest, the Security Council did nothing. When the president of the tribunal complained, they got the president of the Security Council to make a statement regretting and calling on the government
to do something. But they took no enforcement action at all, and it's particularly worrying in light of an international criminal court, which is not going to always... Sometimes, hopefully, it will act on the Security Council mandates and have peremptory powers. But until there's the political will on the part of governments— and it's not too bad, because some governments did carry out, did arrest. For the Rwanda tribunal, the Rwanda tribunal has a good record of arrests. A number of African countries— Cameroon, Kenya, Zambia— arrested people indicted by the Rwanda tribunal. Switzerland, in the case of the Yugoslav tribunal, not too bad. The government of Bosnia and Herzegovina arrested two of their own Muslim citizens and had them transferred. Austria, Germany certainly come to mind; they did carry out arrests. The United States is still, I think, playing a difficult game with regard to the Rwandan man in Texas. Is he still in Texas?

Question:

No, they apparently got him.

Richard Goldstone:

It's not too bad, but your point is correct. Until there's sufficient political will by a sufficient number of governments— that will really depend on governments not wanting to become pariahs, and the hope is if enough members of the United Nations ratify the treaty, and particularly if the United States' attitude changes— and this is something that I'm going to talk about later this afternoon— there is some hope. I don't think it's all doom and gloom.

Martin Garbus [?]:

I'll just add one thing. Richard and I were co-authors among other authors of a report released last year about how to strengthen and make the Yugoslavia and Rwanda tribunals work. One of our recommendations is that the Security Council ought to pass a resolution freezing the assets of anybody who has been publicly indicted by the Yugoslavia or Rwanda tribunals. The precedent is Haiti. They froze the assets of people who were both part of the regime and supported the regime in Haiti until they left power, so you have Security Council precedent for that. We talked to Dave Sheffer about it at length. And Sheffer reported back to us that he took the proposal to the Security Council and, for a variety of reasons that do not seem to me to be persuasive, the other countries did not favor it, and so he dropped the ball on it. I think at a minimum we ought to do that, especially with people like [K?], who continues to bankroll a mercenary force out of funds apparently in a Cyprus bank account. And why aren't those frozen?

When I arrived at the tribunal, I saw this one big building, and I said inside this building they investigate, they indict, they arrest, they try, they convict, and they execute. Wow. That's quite a lot of power when you're looking at it from a defense counsel's point of view.

Jonathan Bush:

If I can, as moderator, maybe take the role that Ed Vulliamy might say, we're looking here for things that might strengthen international tribunals, might it also be the reverse? Again, to use the obvious benchmark, a longer time has gone since the establishment of these courts than the entire Nuremberg process from start to finish. The urgency of people like Ed Vulliamy on the ground, which may account for a lot more than resolutions, is gone, and I don't know which way. Are we on an upward or a downward trajectory of compliance? I don't know. Any other questions? We have time for, let's say, two more. The two in the back.

Question:

I have two questions. First, the two points about the plan, that there was no actual Serbian plan for either genocide. A lot of people would refer to the memorandum— I don't know if you are familiar with the memorandum, the memorandum of the Serbian Academy of Art and Science before the war as some kind of plan for genocide?

Second, Mr. Goldstone, what are the legal justifications for forcing the arrest of war criminals, regardless of the fact that they're indictable criminals?

Anthony D'Amato:

There's that document, and then there's that statement of Karadzic on television where he said an entire people might disappear. Both of those things are
indicative of a genocidal kind of plan. At the same time we have to ask what leaders of the country a) knew about it; b) participated in it. The television thing was pretty well known, so you might have to say that that’s a hard one to beat. But on the plan you talk about, how many people participated in it, was it actually carried out? Because on the other side of that ledger, you have Milosevic and Karadicz and a lot of the other leaders issuing a whole lot of documents telling people, “Do not commit war crimes. If you do, we’re going to catch you and we’re going to prosecute you, these are the things you can’t do.” There was a tremendous amount of knowledgeable things coming from the top down, things you never hear of. Hitler never did that. These people—maybe they had good legal advisors—but they certainly had a lot of statements to that effect, so they would say that those statements which are issued to people in the field, they were given verbally, written, tons of them, counter any internal documents that might have been written for political purposes. At least these are the arguments.

Now, what do I really think? I really wish the case had gone on, because I was really in a position of someone who wanted to learn a great deal about this and was learning something every day.

Richard Goldstone:

A short answer to your question is there’s no legal justification at all for not arresting anybody whom either of the tribunals has indicted as suspected war criminals. It’s an obligation on all governments, and it’s an obligation, too—and still is—on the international forces; it was an obligation to arrest. It was fudged in the Dayton Agreement, and one learns this now from Richard Holbrooke’s book, but it was the Pentagon who objected to a positive obligation being put in the Dayton Agreement for the NATO forces to go out and arrest. I must say it’s completely unacceptable for any democracy, and possibly the leading democracy, to have that sort of policy dictated by the military. I don’t believe it’s their business. It’s one of the shameful aspects of the International Tribunal for the Former Yugoslavia that the NATO troops who’ve got the legal power—and that’s unquestioned, nobody questions their legal power in international law to go and arrest—that’s politics, it’s a policy decision that the orders have not been given. As I say, that’s ignoring the interests of the victim.

Question:

We don’t want to lose one soldier, but we want to double the defense budget. Go figure.

Question:

Would there be any difference in a democracy if the view came from an isolationist Senate? There may be legitimate reasons within our system—I mean you’re not going to get an active profile past Jesse Helms at next year’s appropriation. And it’s democratic.

Richard Goldstone:

I think there’s a difference. I think I’d have the same criticism of it on the merits of the decision, but it’s the Senate’s business to advise the President. At the end of the day it is a political decision, I think.

Question:

Will you comment on the political or other reasons for the sealed indictments and what force they might have in the future?

Richard Goldstone:

A lot of fuss has been made against sealed indictments. Firstly, it’s common virtually in every country in the world not to announce who has been indicted until they’ve been arrested if there’s fear that they’re going to evade arrest. It’s a very common system. I don’t think it’s unfair; I don’t think it’s unjust. I don’t think it’s undemocratic. And it started when I was prosecutor. We had a number of indictments that were sealed. Under the rules of both U.N. tribunals, the minute a single trial judge has confirmed an indictment of the prosecutor, it has to be made public unless—at the request of the prosecutor—the judge issues an order sealing the indictment, allowing it to be kept non-public until an arrest has been carried out.

Question:

It is because of a lack of confidence in NATO?

Richard Goldstone:

No, no. On the contrary, I don’t think there’s any great confidence in their intent to carry out arrests, but that’s not the reason for the sealed indict-
ments. The reason for the sealed indictment is to make it easier to arrest people who don’t know they’ve been indicted and don’t go underground.

Peter Maguire:

I’m just curious about—any of you can answer this—what the impact will be on the legacy of that court if the two big political leaders, Karadzic and Mladic, are never brought to trial and remain outstanding. I remember when they were first indicted arguing with journalists, and they’d say, “Well, they’re in an open-air prison, it’s only a matter of time, it’s only a matter of time.” But now we’re, what, three years into it since they’ve been indicted. Their power base has eroded certainly, but they’re survivors if nothing else.

Question:

Fortunately, we have both Rwanda and Yugoslavia at the same time, because Rwanda has been a much greater success. Almost all of the big-wigs in Rwanda. The legacy will be looked at simultaneously. I think, so it’s not just Yugoslavia. If it was only Yugoslavia, I think this would be highly troubling. It’s as if you had Nuremberg without Goering. It’s not that these people have cheated the trial by committing suicide; they’re just cruising through checkpoints and showing up at their ordinary places, and NATO just doesn’t have the political will to go and apprehend them.

I just had an interview with General Nash, who used to be the NATO commander of IFOR. He said when he left, at the time he left, and he still thinks this is the situation, Mladic is still very powerful and they would be crazy to go after Mladic. But he thinks that Karadzic is ripe for the picking. And so I’m still optimistic that any time now we’re going to see Karadzic brought to justice, dead or alive.

Jörg Friedrich:

I have some trouble with the definitions of the genocide conventions, which is to me a sort of perfect crime. You refer to the impossibility to include political deaths. We know this problem from Cambodia. I [remind] you at the beginning, when it was clear to them, it was the Soviet Union that [was] opposed to this definition and out of very clear reasons. It would have [applied] to the inner struggle in the Soviet Union in the 1930s and the Ukraine. And this is the favorite genocide of states. And so they kept their hands free to do that. In cases where genocide happens, it doesn’t appear to be genocide. Either it’s a sort of civil war or it is political genocide. When it happened in Rwanda, what was it, genocide? No. It was civil war. So, when it happens it’s not genocide. Once indicted, it’s already happened, and whom can you get?

Important is the concept of the intent. Who has the intent to annihilate the people? For instance, if [Karadzic?] cleared the situation in Srebrenica he may say, well [...], I will try to kill as many male inhabitants of the city as possible [...]. That may be a war crime or not, but it’s difficult to prove.

Michael Scharf:

That’s an important point. If you’re looking at this from the point of view of constructing a viable international law of individual accountability, you have war crimes which include killing innocent civilians, which perfectly cover that aspect. But to call it genocide... All I’m arguing, and I’m willing to be persuaded by your good intervention, all I’m really arguing is if you expand it too much, so that it covers things that you’re already covering, you really lose sight of that particular thing that genocide is. For example, I would say genocide is going on right now in Iran against the B’hai. The genocide against the B’hai is clearly on the basis of their religious affiliation, it has nothing to do with politics, and it’s terrible, and it’s something that the world should be condemning. But we don’t need genocide as a concept in order to add it to war crimes in the situation you’re talking about, because that’s already covered by a lot of the other things. Just calling it genocide not only expands the concept to make it so over-inclusive that it may not be very useful, but it also could blind us to situations like the Iranian situation, where there is true genocide going on and it ought to be stopped, but people don’t seem to care.

Jonathan Bush:

Our hardworking panel has been put through its paces and Justice Goldstone has to speak before us in a few minutes. So it remains only for me to ask you to join me in thanking the three who are here and Ed Vulliamy as well.