Holocaust, Genocide and the Law

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Chapter 1: Introduction

1. Food For Thought

"In Germany first they came for the Communists and I did not speak out - because I was not a Communist.

Then they came for the Jews and I did not speak out - because I was not a Jew.

Then they came for the trade unionists and I did not speak out - because I was not a trade unionist.

Then they came for the Catholics and I did not speak out - because I was a Protestant.

Then they came for me - and there was no one left to speak out for me."

Pastor Martin Niemoller

(1892-1984)

"I come from people who gave the Ten Commandments to the world. Time has come to strengthen them by three additional ones... Thou shalt not be a perpetrator; thou shalt not be a victim; and act never, be a bystander."

Professor Yehuda Bauer

January 26, 2000

The only thing necessary for the triumph of evil is for good men to do nothing.

Edmund Burke

Long is the way and hard, that out of hell leads up to light.

John Milton, Paradise Lost

"The Nazi murder of the Jews was unique because never before has a state decided and announced, on the authority of its responsible leaders, that it intended to kill in its entirety, as far as possible, a particular group of human beings, including its old people, women, children and infants, and then put this decision into action with every possible instrument of state power."

Eberhard Jackel, German Historian

To attain its heavenly Hell on earth the German dictatorship launched a war that engulfed the whole world, Over 35 million people were killed, more than half of the civilians. On the battlefields 1 out of every 22 Russians was killed, 1 out of every 25 Germans, 1 out of every 150 Italians and Englishmen, and 1 out of every 200 Frenchmen. The human cost of 12,191 days of war surpassed the losses of any previous war in the world. That war brought death to nearly 6 million Jews, to 2 out of every 3 European Jews. Though one-third of them managed to survive, though the Jewish people and Judaism have outlived the Third Reich, the Germans nevertheless succeeded in irrecoverably destroying the life and culture of East European Jewry.

Lucy Davidowicz, The War Against The Jews: 1933-45

" World War II is a story of how 'a grossly delusional view of the world, based on infantile fears and hatreds, was able to find expression in murder and torture beyond all imagining. It is a case-history in collective psychopathology, and its deepest implications reach far beyond anti-Semitism and the fate of the Jews."

Norman Cohn, Warrant for Genocide (1966)

(a study of European anti-Semitism in the years before World War II).

2. Death By Government - R.J. Rummel

DEATH BY GOVERNMENT, R. J. Rummel, Foreword by Irving Louis Horowitz, Transaction Publishers 1997, New Brunswick (U.S.A.) and London (U.K.)

Chapter 6

20,946,000 Murdered

The Nazi Genocide State

If I should find a Ukrainian who is worthy to sit with me at the table I must let him be shot.

---Reichskommissar Erich Koch

Regardless of the massive [murders]… by the Soviets or communist Chinese, the only government mass murder that the world remembers and our school books describe is the Nazi genocide of the Jews in which "6 million" were slaughtered. But even this count ignores the vast number of other people the Nazis exterminated. Overall, by genocide, the killing of hostages, reprisal raids, forced labor, 'euthanasia,' starvation, exposure, medical experiments, terror bombing, and in the concentration and death camps, the Nazis

murdered from about 15,000,000 to over 31,600,000 people, most likely closer to 21 million men, women, handicapped, aged, sick, prisoners of war, forced laborers, camp inmates, critics, homosexuals, Jews, Slavs, Serbs, Czechs, Italians, Poles, Frenchmen, Ukrainians, and so on. Among them were 1 million children under eighteen years of age.[footnote omitted] . . . Not only were critics and opponents eliminated as a matter of course, but any serious potential opposition was prevented by simply exterminating the top leaders, intellectuals, and professionals. Aside from Jews, the Germans murdered nearly 2,400,000 Poles, 3,000,000 Ukrainians, 1,600, 000 Russians, and 1,400,000 Byelorussians, many of these the best and the brightest men and women. Including Jews, nearly one out of every six Poles or Soviet citizens under Nazi rule was killed by them in cold blood.

. . . .

Aside from actual or potential critics and opponents, throughout occupied Europe the Nazis used terror and reprisal to maintain control and to prevent attacks on Germans. The clandestine killing of a German soldier could mean the roundup and execution of all the men in a nearby village, the village's total destruction, and the deportation of all the women and children to a concentration camp. Dozens and even hundreds of hostages would be shot in retaliation for sabotage. In some occupied areas in which the Nazis had to contend with well-organized and active guerrilla units, they applied a simple rule: 100 nearby civilians would be massacred for every German soldier killed; 50 for every one wounded. Often this was a minimum that might be doubled or tripled. Vast numbers of innocent peasants and townsfolk were thus killed. . . . Millions were slaughtered in Poland and the Soviet Union.

But above all, people were machine-gunned in batches, shot in the head at the edge of trenches, burned alive while crowded into churches, gassed in vans or fake shower rooms, starved or frozen to death, worked to death in camps, or simply beaten or tortured to death because of their race, religion, handicap, or sexual preference.

Consider the account of an Einsatzgruppe (a mobile SS killing squad) at labor, as declared under oath by Hermann Friedrich Graebe, a director and chief engineer of a branch of the Josef Jung Construction Company of Solingen. While visiting the firm's projects at Dubno in the Ukraine, he heard about the mass killing taking place at a construction site. Going there to see for himself, he witnessed the following.

"I saw great mounds of earth about 30 meters long and 2 high. Several trucks were parked nearby. Armed Ukrainian militia were making people get out, under the surveillance of SS soldiers. The same militia men were responsible for guard duty and driving the trucks. The people in the trucks wore the regulation yellow pieces of cloth that identified them as Jews on the front and back of their clothing.

The people from the trucks - men, women, and children were forced to undress under the supervision of an SS soldier with a whip in his hand. They were obligated to put their effects in certain spots: shoes, clothing, and underwear separately.... Without weeping or

crying out, these people undressed and stood together in family groups, embracing each other and saying good-bye while waiting for a sign from the SS soldier, who stood on the edge of the ditch, a whip in his hand, too. During the fifteen minutes I stayed there, I did not hear a single complaint or a plea for mercy. I watched a family of about eight: a man and woman about fifty years old, surrounded by their children of about one, eight, and ten, and two big girls about twenty and twenty-four. An old lady, her hair completely white, held the baby in her arms, rocking it and singing it a song. The infant was crying aloud with delight. The parents watched the group with tears in their eyes. The father held the ten-year old boy by the hand, speaking softly to him: the child struggled to hold back his tears. Then the father pointed a finger to the sky and, stroking the child's head, seemed to be explaining something. At this moment, the SS near the ditch called something to his comrade. The latter counted off some twenty people and ordered them behind the mound. The family of which I have just spoken was in the group. I still remember the young girl, slender and dark, who, passing near me, pointed at herself, saying "twenty-three." I walked around the mound and faced a frightful common grave.

Tightly packed corpses were heaped so close together that only the heads showed. Most were wounded in the head and the blood flowed over their shoulders. Some still moved. Others raised their hands and turned their heads to show they were still alive. The ditch was two-thirds full. I estimate that it held a thousand bodies. I turned my eyes toward the man who had carried out the execution. He was an SS man; he was seated, legs swinging, on the narrow edge of the ditch; an automatic rifle rested on his knees and he was smoking a cigarette. The people, completely naked, climbed down a few steps cut in the clay wall and stopped at the spot indicated by the SS man. Facing the dead and wounded, they spoke softly to them. Then I heard a series of rifle shots. I looked in the ditch and saw their bodes contorting, their heads, already inert, sinking on the corpses beneath. The blood flowed from the nape of their necks. I was astonished not to be ordered away, but I noticed two or three uniformed post men nearby. A new batch of victims approached the place. They climbed down into the ditch, lined up in front of the previous victims, and were shot.

On the way back, while rounding the mound, I saw another full truck which had just arrived. This truck contained only the sick and crippled. Women already naked were undressing an old woman with an emaciated body; her legs frightfully thin. She was held up by two people and seemed paralyzed. The naked people went behind the mound.

The next morning, returning to the construction, I saw some thirty naked bodies lying thirty to fifty yards from the ditch. Some were still alive; they stared into space with a set look, seeming not to feel the coolness of the morning air, nor to see the workers standing all around. A young girl of about twenty spoke to me, asking me to bring her clothes and to help her escape. At that moment we heard the sound of a car approaching at top speed; I saw that it was an SS detachment. I went back to my work. Ten minutes later rifle shots sounded from the ditch. The Jews who were still alive had been ordered to throw the bodies in the ditch: then they had to lie down themselves to receive a bullet in the back of the neck."[12]

Such mobile killing squads eventually murdered over 1 million people guilty of nothing more than their religion; another some 350,000 were probably killed by the army, antipartisan units, higher SS and police, in Ghettos, or while fleeing. [13] This does not even take into account the trainloads of mainly Jews, but also sometimes of Gypsies and other "undesirables," murdered in Nazi death camps.

The primary such death camp was Auschwitz in Poland. After arrival by train, the Jews and others were passed one-by-one before camp doctors who would choose on the spot those fit enough to work - in seconds one's fate was determined. The doctor's thumb motioning to the right meant work and life, at least for awhile, even for those destined for medical experiments; to the left meant death in hours. Unaware of their fate, those sent left first had their luggage taken away and then were separated into groups of men and women. They were led to the extermination camp (Auschwitz II or Birkenau), sometimes while being entertained by a symphony orchestra of prisoners.

When they reached the halls in front of the gas chamber they saw signs reading "Wash and Disinfection Room." Inside they were made to strip, being told that they would a have to take showers. Their valuables and clothes were collected, for which they got receipts. Presumably as a health measure, women had their hair cutoff. Finally, under the stern orders of guards, all were crowded into the "shower room." Those that became suspicious and hesitated were driven inside with whips and rods. The doors were closed and locked. Once trapped inside, most victims could see that death was minutes away. The false shower facilities did not work, and from outside the lights were all turned off.

The powerful poison gas (Zyklon B, or hydrogen cyanide) was brought to the gas chamber by a Red Cross vehicle, and an SS man wearing a gas mask carried the gas containers to the building, lifted a glass shutter over a latticed entrance, and emptied the contents into the chamber. Nearby, the political chief of the camp started his stopwatch.

[12] Poliakov 1971, 125-26.

[13] Hilberg 1961, 767.

3. The War Against The Jews - Lucy S. Dawidowicz

THE WAR AGAINST THE JEWS l933-1945, BANTAM BOOKS, NEW YORK, 1975, p. 402.

The Final Solution in Figures

No one can establish with certitude the exact number of Jews murdered in the course of the Final Solution. The first estimate, made at the Nuremburg trials in 1945, of 5.7 million Jews killed has been shown by subsequent censuses and statistical analyses to have been remarkably accurate. The data of the 1959 census in the Soviet Union confirms the staggering Jewish losses during World War II.

The Jewish population figures for each country in the following table are estimates of the population within the country's borders at the time the Final Solution began to be carried out.

ESTIMATED NUMBER OF JEWS KILLED IN THE FINAL SOLUTION

Estimated Pre-Final Estimated Jewish

Country	Solution Population	Population Annihilated Number	Percent %
Poland	3,300,000	3,000,000	90
Baltic countries	555,000	228,000	90
Germany/Austria	240,000	210,000	90
Protectorate	90,000	80,000	89
Slovakia	90,000	75,000	83
Greece	70,000	54,000	77
The Netherlands	140,000	105,000	75
Hungary	650,000	450,000	70
SSR White Russia	375,000	245,000	65
SSR Ukraine*	1,500,000	900,000	60
Belgium	65,000	40,000	60
Yugoslavia	43,000	26,000	60
Rumania	600,000	300,000	50
Norway	1,800	900	50
France	350,000	90,000	26
Bulgaria	64,000	14,000	22
Italy	40,000	8,000	20
Luxembourg	5,000	1,000	20
Russia (RSFSR)*	975,000	107,000	11
Denmark	8,000	-	-
Finland	2,000	-	-
Total	8,861,800	5,933,900	67

* The Germans did not occupy all the territory of this republic.

4. The Destruction of The European Jews - Raul Hilberg

THE DESTRUCTION OF THE EUROPEAN JEWS, STUDENT EDITION, RAUL HILBERG, Holmes & Meier Publishers, Inc., New York, 3985, p. 338

APPENDIX B

STATISTICAL

RECAPITULATION

TABLE B-l

DEATHS BY CAUSE

Ghettoization and general privation	Over 800,000
Ghettos in German-occupied Eastern Europe	Over 600,000
Theresienstadt and privation outside of ghettos	100,000
Transnistria colonies (Romanian and Soviet Jews)	100,000
Open-air shootings	Over 1,300,000

Einsatzgruppen, Higher SS and Police Leaders, Romanian and German armies in mobile operations: shootings in Galicia during deportations; killings of prisoners of war and shootings in Serbia and elsewhere

Camps	Up to 3,000,000
German	
Death camps	Up to 2,700,000
Auschwitz	1,000,000
Treblinka	Up to 750,000
Beizec	550,000
Sobibór	Up to 200,000
Kulmhof	150,000
Lublin	50,000

Camps with tolls in the low tens of thousands or below 150,000

Concentration camps (Bergen-Belsen, Buchenwald, Mauthausen, Dachau. Stutthof, and others)

Camps with killing operations (Poniatowa, Trawniki, Semlin) Labor camps and transit camps

Romanian

Golta complex and Bessarabian transit camps 100,000

Croatian and other under 50,000

Total 5,100,000

NOTE: Ghettos in German-occupied Eastern Europe, open-air shootings, and

Auschwitz figures are rounded to the nearest hundred thousand, other categories to the nearest fifty thousand.

TABLE B-3

DEATHS BY YEAR

1933-1940 under 100,000

1941 1,100,000

1942 2,700,000

1943 500,000

1944 600,000

1945 100,000

Total 5,100,000

NOTE: Rounded to the nearest 100,000.

5. Definition Of 'Genocide'

Webster's Third New International Dictionary, Page 947

gen-o-cide \'jenə sīd\ n-s [gen- + -cide] **1:** the use of deliberate systematic measures (as killing, bodily or mental injury, unlivable conditions, prevention of births) calculated to bring about the extermination of a racial, political, or cultural group or to destroy the language, religion, or culture of a group **2:** one who advocates or practices genocide

6. Institute For The Study Of Genocide

Institute for the Study of Genocide, http://www.isga.org/

Social Scientists' Definitions of Genocide

Social scientists have different definitions of genocide from each other and from the definition in international law (the UN Genocide Convention) following. These differences are both because of the differences between generic concepts and legal definition (legal definitions are more specific), differences in purpose of the definer, and because of the political and group processes involved in drawing up an international convention.

For an analysis of the commonalities (and differences) among social scientific definitions, see Figures 1-5 in the essay by David Sallach, "Modelling Genocide".

Definitions of social scientists and historians Frank Chalk and Kurt Jonassohn:
"Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator" (*The History and Sociology of Genocide* , 1990).

Israel W. Charny:
"Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims". (in *Genocide: Conceptual and Historical Dimensions* ed. George Andreopoulos, 1994).

Helen Fein:
"Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim". (*Genocide: A Sociological Perspective*, 1993/1990).

Barbara Harff and Ted R. Gurr:
"By our definition, genocides and politicides are the promotion and execution of policies by a state or its agents which result in the deaths of a substantial portion of a group. The difference between genocides and politicides is in the characteristics by which members of the group are identified by the state. In genocides the victimized groups are defined primarily in terms of their communal characteristics, i.e., ethnicity, religion or nationality. In politicides the victim groups are defined primarily in terms of their hierarchical position or political opposition to the regime and dominant groups" ("Toward empirical theory of genocides and politicides," *International Studies Quarterly* 37, 3 [1988]).

Steven T. Katz:
"the concept of genocide applies *only* when there is an actualized intent, however successfully carried out, to physically destroy an *entire* group (as such a group is defined by the perpetrators)" (*The Holocaust in Historical Perspective*, Vol. 1, 1994).

United Nations Genocide Convention *(in force 12 January 1951)*

Article 2:
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.

7. Modern Use and Misuse of Holocaust Terminology and Imagery

a. PETA's "Holocaust On Your Plate" Campaign

JTA News, Meat may be murder, but it's not a holocaust, Jewish groups fume, Joe Berkofsky , *March 3, 2003*

PETA´s new ad campaign is raising protests among Jewish groups.

NEW YORK, March 3 (JTA) — An emaciated death camp survivor stares blankly alongside a gaunt steer.

"During the seven years between 1938 and 1945, 12 million people perished in the Holocaust," the image declares. "The same number of animals is killed every 4 hours for food in the U.S. alone."

The poster forms the heart of a new national campaign launched last week by People for the Ethical Treatment of Animals that compares the Holocaust and the meat industry — and that is ruffling Jewish feathers.

Dubbed "Holocaust on Your Plate," PETA's campaign and its companion Web site, masskilling.com, insists the Nazi murder of Jews, gays and gypsies mirrors "the modern-day Holocaust" that is the industrialized slaughter of animals for food.

Just as the Nazis forced Jews to live in cramped, filthy conditions, tore children from parents and murdered people in "assembly-line fashion," factory farms cram animals into tiny, waste-filled spaces, treating cows, chicken and lambs as meat-, egg- and milk-producing machines, PETA says.

"It's a direct parallel," said Matt Prescott, PETA's youth outreach coordinator.

One of the campaign's creators, Prescott, 21, said that as a Jew whose relatives died in the Holocaust he finds the analogy neither "off the wall" nor "radical," but entirely apt.

Many of his mother's cousins, aunts and uncles are believed to have been killed in Buchenwald and Dachau, Prescott said, adding that his mother's sense of social justice led him to become a vegetarian, and then vegan.

PETA cites several Jewish figures as spiritual forefathers for its campaign, including Nobel Prize-winning author Isaac Bashevis Singer and the vegetarian Torah scholar, Rabbi Shraga Feivel Mendelovitz.

Singer was a staunch vegetarian whose fictional characters drew analogies between Nazism and man's treatment of animals in books such as "Enemies, A Love Story."

In "The Letter Writer" from "The Seance and Other Stories," Singer's character Herman delivers a eulogy for a mouse, in which he says that "in relation to" animals, "all people are Nazis: For the animals it is an eternal Treblinka."

That phrase, "Eternal Treblinka," became the title of a book on the subject by Holocaust educator Charles Patterson, whose Web site links to the PETA campaign.

PETA's tactics are raising the hackles of several Jewish groups and splitting the Jewish animal-rights community.

Rabbi Marvin Hier, founder and dean of the Simon Wiesenthal Center in Los Angeles, called the Holocaust comparison "ridiculous."

"No responsible Jewish leader will have anything against a campaign that seeks to limit the abuse and torture of animals," Hier said. "But putting on a Web site the images of the death camps, and comparing it to chickens cooped up in a pen, it denigrates the memory of the Holocaust."

The Anti-Defamation League's national director, Abraham Foxman, called the campaign likening animal abuse to Nazism "outrageous" and "abhorrent."

"Rather than deepen our revulsion against what the Nazis did to the Jews, the project will undermine the struggle to understand the Holocaust and to find ways to make sure such catastrophes never happen again," he said.

Ironically, the PETA project first came to the ADL's attention when the animal-rights activists sought ADL approval for their effort.

"It's chutzpah enough to compare" the Holocaust and the meat industry, Foxman said, "but to go to the Jewish community is double chutzpah!"

Prescott admitted that the ADL's response "wasn't what we were expecting," though he added that PETA still would seek support from other Jewish groups.

Such efforts may prove even more difficult, after the top lawyer for the U.S. Holocaust Memorial Museum fired off a cease and desist order to PETA last week alleging the group obtained the Holocaust images used in the campaign from the museum under false pretenses.

A spokesman for the museum, Arthur Berger, said Prescott requested the photos and signed an agreement to use museum images while using a personal email account and failing to disclose he represented PETA or mentioning animal rights.

The museum demanded that PETA stop "this reprehensible misuse of Holocaust materials" in the campaign as of Monday, Berger said.

But Prescott denied that he misled the museum, insisting the show is consistent with the museum´s mission and will continue.

Prescott said he told a museum official whose name he could not recall that his project concerned animal rights, though "I don't recall exactly every e-mail I sent."

Other Jewish groups took issue with PETA's use of Jewish sources. Rabbi Avi Shafran, a spokesman for the fervently Orthodox Agudath Israel of America, said Mendelovitz swore off meat as an act of self-deprivation following the horrors of the Holocaust and not because he opposed eating meat.

PETA's campaign, meanwhile, has grown into a meaty issue in the Jewish vegetarian community.

Roberta Kalechofsky, who founded Jews for Animal Rights and has written several books on Jewish vegetarianism, criticized PETA's use of the Holocaust.

The Holocaust "is the end result of a very complicated, theological, historical, evolutionary process that went on for 1,700 years," she said, but PETA's use of the period "is really sucking away all that history."

By drawing the parallel, PETA "reduces the meaning of the Holocaust to physical pain," she added.

Kalechofsky wrote a paper on animal rights and the Holocaust in which she drew a distinction between the motivations of hunters and Nazis.

The Nazis "didn't just want to extinguish Jewish flesh; they wanted to extinguish Jewish civilization," she said.

Prescott replied: "So if people had eaten the flesh of Jews killed in the Holocaust, would that have made it acceptable?"

Richard Schwartz, author of "Judaism and Vegetarianism," long has opposed the use of Holocaust imagery in animal-rights causes, but hoped that PETA's dramatic tactics would focus attention on animal rights.

If PETA's comparison of death camps to factory farms rouses people from their "indifference" to the environmental impact of the meat industry, he said, "why not look at the questions it raises?"

Schwartz said a routine supermarket trip evoked for him "the banality of evil" in which people buy meat "without considering what's behind it."

If Americans reduced their beef consumption by just 10 percent, he claimed, it would free up enough grain now used to feed livestock to feed the 20 million people every year who die of starvation.

Despite his initial hopes for the campaign, Schwartz changed his mind after sensing the "rage" from some Jewish groups and even colleagues. One Web site, MyJewishLearning.com, gave the debate prominent play.

Schwartz went so far as to urge PETA to issue a "clear and unambiguous" apology for the "deep pain" its Holocaust campaign has caused.

He also wants PETA to meet with Jewish groups, who he hopes will add animal rights and vegetarianism to their own agendas.

But PETA remains adamant that the “similarities” between the Holocaust and factory farming are worth exploring, Prescott said.

“We’re trying to widen the circle of compassion, and sometimes a person has to be shocked before they can begin to accept their own role in an act of injustice,” he said.

b. Holocaust comparisons resume

JTA. Dec. 15, 2004

A far-right Israeli group likened the government's planned evacuation of Jewish settlers to Nazi deportations.

Posters showing Holocaust victims being loaded on to trains and bearng the slogan “Never Again!” were distributed in Israel on Wednesday bn the National Jewish Front, a group run by far-right activist Baruch Marzel It was the second time this month that Israelis opposed to Prime Minister Ariel Sharon's plan to withdraw from the Gaza Strip and parts of the West Bank have invoked the Holocaust.

Recently, a group of Gaza settlers threatened to wear Star of David badges akin to those forced on European Jews by the Nazis. TheLeft-wing lawmaker Ran Cohen demanded that the attorney general investigate Marzel's group on suspicion of incitement and desecrating the memory of Holocaust victims.

The Justice Ministry did not immediately comment.

c. After Peace: The First Palestinian-Israeli War

New Republic, April 12, 2002, Leon Wieseltier, "After Peace: The First Palestinian-Israeli War", p. 20, 21:
"The revered Palestinian poet Mahmoud Darwish was visited at the end of March [2002] by a delegation from the International Parliament of Writers, who came to express their solidarity with the Palestinians..The writers also visited Yassir Arafat in Ramallah, where Jose Sarango declared that ‘though there are differences of time and place, what is happening here is a crime that may be compared to Auschwitz. They are turning this place into a concentration camp.’ If this is Auschwitz, an Israeli reporter asked, where are the gas chambers? Santiago replied: “There aren’t any yet.”.

d. Anit-Zionism and Anti-Semitism

Robert Wistrich, " Anti-Zionism and Anti-Semitism," Jewish Political Studies Review, v. 16, no. 3, p. 27 (Fall 2004):

Durban conference Against Racism in September 2001, where Zionism was denounced as a “genocidal” movement, practicing “ethnic cleansing” against Palestinians. (.p28).

"Anti-Zionists" who insist on comparing Zionism and the Jews with Hitler and the Third Reich appear unmistakably to be de facto anti-Semites, even if they vehemently due the fact! This is largely because they knowingly exploit the reality that Nazism in the postwar world has become the defining metaphor of absolute evil. For if Zionists are ‘Nazis’ and if Sharon really is Hitler, then it becomes a moral obligation to wage war against Israel. That is the bottom line of much contemporary anti-Zionism. In practice, this has become the most potent form of contemporary anti-Semitism."

"[Israel's] military action offer Europeans the tantalizing prospect of saying 'the victims of yesterday have become the [Nazi] perpetrators of today'…" (p.31)

And what is Zionism? Legitimate Jewish nationalism. (p.31)

8. Convention On The Prevention And Punishment Of The Crime Of Genocide

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951.

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
Killing members of the group;
Causing serious bodily or mental harm to members of the group;
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
Imposing measures intended to prevent births within the group;
Forcibly transferring children of the group to another group.

Article 3

The following acts shall be punishable:
Genocide;
Conspiracy to commit genocide;
Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
Complicity in genocide.

Article 4

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article 6

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.
The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to which an invitation to sign has been addressed by the General Assembly.
The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.
Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.
It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.
Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.
The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:
Signatures, ratifications and accessions received in accordance with article 11;
Notifications received in accordance with article 12;
The date upon which the present Convention comes into force in accordance with article 13;
Denunciations received in accordance with article 14;
The abrogation of the Convention in accordance with article 15;
Notifications received in accordance with article 16.

Article 18

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article 19

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

9. Roots of the term "Holocaust"

Forward, *Roots of the Holocaust*, September 16, 2005

Dr. Arnold Richards of New York has a question concerning a passage in the European-born, American Jewish psychiatrist A. A. Brill's "The Basic Writings of Sigmund Freud" - an anthology of Freud's major essays, published by Brill in 1938. There, in his introduction, Brill wrote:

"Alas! As these pages are going to the printer we have been startled by the terrible news that the Nazi holocaust has suddenly encircled Vienna and that Professor Freud and his family are virtual prisoners in the hands of civilization's greatest scourge."

Here's the question: Is this use of "holocaust" by Brill, who was writing at the time of the Austrian Anschluss in March 1938, the earliest known case of the word having been applied to the actions of the Nazi regime?

The answer is no. At most, it's the second earliest. The first occurred after the mass burning of banned books by the new Nazi government of Germany in May 1933, described by Newsweek magazine as "a holocaust of books." Time magazine, for its part, punning on its competitor, called it a "bibliocaust."

Neither Brill's nor Newsweek's use of "holocaust," however, referred specifically to the Nazis' treatment of the Jews. According to California researcher Jonathan Petrie, who has looked into the history of the word more thoroughly than anyone has, the first such reference is to be found in a telegram sent in November 1938, immediately after *Kristallnacht,* by Yitzhak Herzog and Ya'akov Meir, chief Ashkenazic and Sephardic rabbis of Palestine. The telegram was sent to J.H. Hertz, who at the time was Great Britain's chief rabbi. It said, in part:

"Propose you with leading French American rabbis and ourselves proclaim Jewish day of mourning throughout world for holocaust synagogues Germany...."

Did this telegram have anything to do with the subsequent use of "holocaust" as the English equivalent of the Hebrew *sho'ah*? It's hard to say. Petrie's next recorded appearance of "holocaust" is in the October 3, 1941, issue of "The American Hebrew," a few months after the German invasion of Russia and the beginning of the Nazis' mass

liquidation of Europe's Jews. The magazine's front page featured a photograph of two French Jews carrying Torah scrolls, one wearing a French army uniform (thus dating the photo to before the Nazi invasion of France in 1940), with the caption: "Before the Holocaust."

But it was in another American Jewish weekly, the Jewish Frontier, that the word "holocaust" was first used in the sense that it has today - that is, to describe a systematic program of extermination. In a November 1942 editorial, the editors wrote:

"This issue of the Jewish Frontier attempts to give some picture of what is happening to the Jews of Europe.... [We speak] of the victims not of war, but of massacre.... The annals of mankind hold no similar record of organized murder."

Although the Frontier, edited by Zionist intellectual Chaim Greenberg, was hardly a mass-circulation publication, it was well known in the Jewish world, making it probable that the increasingly frequent use of "holocaust" as a term for the Nazi genocide from 1942 on can be traced back to it. But although "holocaust" turns up in the U.S. Congressional Record in July 1943 and in a New York Times story from October 1945, it seems for a long time to have been limited largely to English-speaking Jews, since in 1949 the non-Jewish Franklin Littel, later the author of several works about the Holocaust, wrote about the word while on a trip to Germany:

"I must have picked it up - as a precise reference to the Nazi genocide of the Jews - from American Jewish chaplains or from workers in the DP camps."

Petrie demonstrates conclusively that "holocaust" (originally from Greek *holokaustos,* "burned whole" - i.e., a sacrificial offering on the altar) had, long before the rise of the Nazis, an extensive history of being used to describe both natural and manmade catastrophes, and that its application to the Shoah was neither unique nor a product - as sometimes has been claimed - of theologized notions of the murder of millions of Jews. The word was used for the San Francisco earthquake, for volcanic eruptions, for forest fires, for human sacrifice in pagan antiquity, for the American Civil War, for the slaughter of World War I, for the Turkish massacres of the Armenians, for anti-Jewish pogroms in Ukraine, for the Japanese bombing of China in World War II and so on. We even find it in an antisemitic Latin document from medieval England, "The Chronicle of Richard of Devizes," which called the purported Jewish ritual sacrifice of Christian victims in London a *holocaustum.*

In recent years, the Hebrew word Shoah has begun more and more to replace "Holocaust" as the accepted term for the Nazi genocide of the Jews, and this is just as well. It is possible to understand both those Jews who protest when the term "Holocaust," which has come to be synonymous with this genocide, is applied to lesser historical atrocities, and those non-Jews who object to Jews having a monopoly on a word they did not invent. Using "Shoah" for the Nazis' murder of Europe's Jews and "holocaust" for whatever other calamities one pleases is perhaps the optimal solution.

10. Should We Call It A Massacre Or Genocide? - The Ombudsman (Boston Globe)

Should We Call It A Massacre Or A Genocide?, Christine Chinlund, The Ombudsman

MOST GLOBE READERS PROBABLY DON'T HAVE A PARTICULARLY STRONG VIEW ON WHETHER THE WORD "GENOCIDE" OR "MASSACRE" SHOULD BE USED TO DESCRIBE WHAT HAPPENED TO ARMENIANS LIVING IN THE OTTOMAN EMPIRE NEARLY 90 YEARS AGO. BUT FOR THOSE WHO DO CARE, THE PASSIONS RUN EXTRAORDINARLY DEEP.

That is especially true for Armenian- Americans this time of year; April 24 is the anniversary of what they say was, by any reasonable measure, a campaign of genocide started against them in 1915 by the Ottoman Turks. In all, 1.5 million Armenian men, women, and children were slaughtered or died in forced marches, Armenians say. To call it anything other than genocide, they say, is a dangerous denial of history and is an insult to humanity.

To the contrary, say the Turks. They argue that while 600,000 Armenians may have died, it was simply the consequence of war, not an attempt to wipe out an entire people. (The United Nations defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.")

Newspaper editors around the country - not to mention would-be presidents and Washington politicians - have, like it or not, been drawn into the debate. The Boston Globe, like other papers, had to pick sides.

For 15 years the Globe has, to the dismay of its large Armenian- American readership, shunned the use of "genocide" unless it's used in quotes. The paper prefers "massacre," and routinely includes Turkey's version of events.

Several other papers with large Armenian-American readership use "genocide" more freely. For example, the Los Angeles Times's main headline on its story about the April 24 anniversary read, "Thousands march to denounce genocide."

The Providence Journal routinely refers to Armenian genocide in both text and headlines. (California and Rhode Island are the states with the largest share of the population reporting Armenian ancestry. Massachusetts is third.) The list goes on.

To reader Marc A. Mamigonian of Belmont, the Globe's "disgraceful, Orwellian policy has been made more obvious than ever to the Armenian community in recent months." First, he said, was the removal of the word "genocide" from the Globe's capsule review of the movie "Ararat," which, after all, was about the Armenian genocide. Then came the Globe's April 3 obituary of Pastor Vartan Hartunian, a local Armenian leader.

Pastor Hartunian was "a genocide survivor . . . [and] a righteous man who devoted a large part of his life to raising public awareness ... of the genocide," wrote Mamigonian, director of publications for the National Association for Armenian Studies and Research in Belmont. "Incredibly, I found that the word genocide was not used (except in quotes) and there was the usual caveat that 'The Turkish government maintains that figure of 1.5 million killed is exaggerated.' Well, heck - why not come out and say that Vartan Hartunian might have been a liar? It amounts to the same thing."

Add to that some Armenian-American readers' displeasure over the Globe's lack of a story on the April 24 commemoration - "I didn't read one word on Armenian genocide; what are we, dirt?" demanded reader John Garabedian - and it amounts to sour relations with the 28,500 Armenian-Americans in the state.

But there is potential for a changed landscape. The Globe is reviewing its 15-year practice of avoiding the word "genocide" next to Armenian. It is possible, although not a given, that sometime soon it will be used more freely.

The review is wise and timely.

A book describing the genocide - Samantha Power's "A Problem from Hell: America and the Age of Genocide" - just won the Pulitzer Prize. In Washington, members of Congress grow more willing to acknowledge the genocide, although they are still wary of a resolution saying so for fear of angering Turkey, a NATO ally. (That concern may fade since Turkey's parliament refused to let the United States use bases there in the war against Iraq.)

Going back a few years, there are other signs of change: France officially acknowledged the genocide. George W. Bush as a candidate, although not as president, used the g-word.

"A combination of new and better scholarship, along with a wider recognition of a fuller definition of genocide that grew out of the debate over the Balkans, have combined to lead most knowledgeable historians of the period to conclude what happened to the Armenians was genocide," says Paul Glastris, senior fellow at the Western Policy Center in Washington and editor of The Washington Monthly, who has studied the Armenian genocide.

Not being a historian, I can not claim personal knowledge of what happened to Armenians, or why. But I find it telling that 126 Holocaust scholars have signed a petition calling the Armenian genocide "an incontestable historical fact."

The Globe's rethinking comes at a good time.

The ombudsman represents the readers. Her opinions and conclusions are her own. Phone 617-929-3020 or, to leave a message, 929-3022.

11. Genocide in Sudan

Physicians for Human Rights, Press Release, JUNE 23, 2004

A Physicians for Human Rights (PHR) field team, recently back from the Chad/Sudan border where they took eyewitness accounts of systematic killings, rapes and destroyed villages, calls for an international intervention necessary to save lives and reverse injustices labeled by PHR as indicators of genocide. In his endorsement of PHR's report, Justice Richard Goldstone, former Chief Prosecutor of the Criminal Tribunals for Rwanda and Yugoslavia said,

"After all we know and have learned from the last decade's genocides and mass atrocities. We owe it to the victims of Darfur and potential victims to do everything we can to prevent and account for what PHR's report establishes is genocide and reverse the intolerable acts of forcing entire populations from their land, destroying their livelihood and making it virtually impossible to return."

Through testimonies by victims and eyewitnesses in Chad and Darfur, PHR has developed a list of indicators of genocide outlined and supported with testimonies in the document that show an organized intent to affect group annihilation in Darfur, Sudan that include: 1) consistent pattern of attacks on villages, 2) consistent pattern of destruction of villages, 3) consistent pattern of destruction of livelihoods and means of survival, 4) consistent pattern of hot pursuit with intent to eradicate villagers, 5) consistent pattern of targeting non-Arabs and 6) consistent pattern of systematic rape of women.

In addition to calling for a UN-backed resolution that supports a robust intervention to prevent and punish the crime of genocide, the PHR report, which is attached, includes specific recommendations directed to the Government of Sudan, the United Nations, the European Union, the African Union, the Arab League, the Organization of Islamic Conference and the United States.

12. UN to unveil anti-genocide plan

UN to unveil anti-genocide plan, Reuters, Tue 6 April, 2004

GENEVA (Reuters) - U.N. Secretary-General Kofi Annan will unveil a plan of action to prevent acts of genocide like the one in Rwanda in which 800,000 people were killed, the United Nations says.

"The risk of genocide remains frighteningly real," Annan said on the eve of an event in Geneva marking the 10th anniversary of the Rwandan genocide at which he will announce the plan.

"The world must be better equipped to prevent genocide, and act decisively to stop it when prevention fails," he said in a statement on Tuesday.

Critics charge that international bodies like the United Nations remain ill-equipped to detect, let alone deal with, wholesale ethnic violence and calculated massacres such as the one in Rwanda that stunned the world.

"We cannot afford to wait until the worst has happened, or is already happening, or end up with little more than futile hand-wringing or callous indifference," Annan said.

Two weeks ago, Annan accepted institutional and personal blame for the Rwandan slaughter that was initially ignored by world leaders. Annan was head of the U.N. peacekeeping department at the time.

Earlier on Tuesday, the Canadian commander of the small U.N. peacekeeping force in Rwanda at the time said Western powers bore "criminal responsibility" for the genocide because they did not care enough to stop it.

"The international community didn't give one damn for Rwandans because Rwanda was a country of no strategic importance," Romeo Dallaire told a conference in the Rwandan capital Kigali.

13. Secretary-General Observes International Day Of Reflection On 1994 Rwanda Genocide

Secretary-General Observes International Day Of Reflection On 1994 Rwanda Genocide, Launches Action Plan to Prevent Genocide Involving UN System in Speech to Commission on Human Rights, 07.04.04

Following is the speech delivered today by United Nations Secretary-General Kofi Annan to the Commission on Human Rights at a special meeting to observe the International Day of Reflection on the 1994 Genocide in Rwanda. The meeting was held at the Assembly Hall of the Palais des Nations. The speech was delivered after the participants observed two minutes of silence in memory of the victims of the genocide.

"It is good that we have observed those minutes of silence together. We must never forget our collective failure to protect at least eight hundred thousand defenceless men, women and children who perished in Rwanda ten years ago. Such crimes cannot be reversed. Such failures cannot be repaired. The dead cannot be brought back to life. So what can we do? First, we must all acknowledge our responsibility for not having done more to prevent or stop the genocide. Neither the United Nations Secretariat, nor the Security Council, nor Member States in general, nor the international media, paid enough attention to the gathering signs of disaster. Still less did we take timely action. When we recall such events and ask "why did no one intervene?", we should address the question not only to the United Nations, or even to its Member States. No one can claim ignorance. All who were playing any part in world affairs at that time should ask, "what more could I have done? How would I react next time - and what am I doing now to make it less likely there will be a next time?"

Perhaps more than any others, those questions have dominated my thoughts, since I became Secretary-General. If there is one legacy I would most wish to leave to my successors, it is an Organization both better equipped to prevent genocide, and able to act decisively to stop it when prevention fails. Many of my actions as Secretary-General have been undertaken with this in mind. But I know that my efforts are insufficient. The risk of genocide remains frighteningly real.

Therefore, as the only fitting memorial the United Nations can offer to those whom its inaction in 1994 condemned to die, and as recommended in 1999 by the Independent Inquiry into the actions of the United Nations during the genocide in Rwanda, I wish today to launch an Action Plan to Prevent Genocide, involving the whole United Nations system.

Let me summarise the plan under five headings:

First, preventing armed conflict.

Genocide almost always occurs during war. Even apparently tolerant individuals, once they engage in war, have categorized some of their fellow human beings as enemies, suspending the taboo which forbids the deliberate taking of human life. And in almost all cases they accept that civilians may also be killed or hurt, whatever efforts are made to limit so-called "collateral damage". Unless we are very careful, this can be the beginning of a swift descent into a different moral universe, where whole communities are designated as the enemy, and their lives held to be of no account. And from there, it is only one more step to the actual and deliberate elimination of these communities: one more step, in other words, to genocide.

So one of the best ways to reduce the chances of genocide is to address the causes of conflict.

The plan will therefore embrace, and expand, the recommendations already made in my report on Prevention of Armed Conflict, which have been endorsed by both the Security Council and the General Assembly. We must help countries strengthen their capacity to prevent conflict, at local and national levels. We must do more at the regional level, to prevent conflict spilling over from one country to another. We must give greater attention to environmental problems and tensions related to competition over natural resources.

We must work together with the international financial institutions, with civil society, and with the private sector, to ensure that young people get the chance to better themselves through education and peaceful employment, so that they are less easily recruited into predatory gangs and militias.

We must protect the rights of minorities, since they are genocide's most frequent targets.

By all these means, and more, we must attack the roots of violence and genocide: hatred, intolerance, racism, tyranny, and the dehumanising public discourse that denies whole groups of people their dignity and their rights.

I shall make a comprehensive report to the General Assembly later this year.

Second, protection of civilians in armed conflict.

Wherever we fail to prevent conflict, one of our highest priorities must be to protect civilians. The parties to conflict - not only states but also non-state actors - need to be constantly reminded of their responsibility, under international humanitarian law, to protect civilians from violence.

This has now been accepted by the Security Council, and the UN system is working on a platform of action for the protection of civilians. But translating it into concrete results will not be easy. In more and more conflicts we see that civilians, including women and children, are no longer just "caught in the crossfire". They become the direct targets of violence and rape, as war is waged against a whole society.

Wherever civilians are deliberately targeted because they belong to a particular community, we are in the presence of potential, if not actual, genocide.

We can no longer afford to be blind to this grim dynamic. Nor should we imagine that appeals to morality, or compassion, will have much effect on people who have adopted a deliberate strategy of killing and forcible expulsion.

That is why many of our United Nations peacekeepers, today, are no longer restricted to using force only in self-defence. They are also empowered to do so in defence of their mandate, and that mandate often explicitly includes the protection of local civilians threatened with imminent violence.

A current example is the Congolese province of Ituri, where ethnic conflicts clearly have the potential to escalate into genocide. Last year the situation was stabilised by the timely intervention of the European Union, authorised by the Security Council, and today UN peacekeeping forces are holding the local militias in check. But the situation remains precarious, and it is by no means unique. The plan calls for both the Secretariat and the Security Council to keep the mandates and resources of all our peacekeeping forces under constant review, particularly with the threat of genocide in mind, and to be ready to reinforce them promptly when the need arises.

Third, ending impunity.

We have little hope of preventing genocide, or reassuring those who live in fear of its recurrence, if people who have committed this most heinous of crimes are left at large, and not held to account. It is therefore vital that we build and maintain robust judicial

systems, both national and international - so that, over time, people will see there is no impunity for such crimes.

Working in parallel with a Rwandan justice system that has prosecuted many people who committed acts of genocide, the International Criminal Tribunal for Rwanda has handed down landmark verdicts, which send a message to those who may be contemplating genocide in other countries. It was the first international court to convict anyone for this crime; the first court of any kind to hold a former head of government responsible for genocide; the first to determine that rape was used as an act of genocide; and the first to find that journalists who incite the population to genocide are themselves guilty of that crime. The plan calls for a review of the work of this tribunal and others, both national and international, in punishing and suppressing genocide, so that we can learn lessons for the future. It calls for special attention to countries that have experienced conflict or are at risk from it. And it calls for greater efforts to achieve wide ratification of the Rome Statute, so that the new International Criminal Court can deal effectively with crimes against humanity, whenever national courts are unable or unwilling to do so.

Fourth, early and clear warning.

One of the reasons for our failure in Rwanda was that beforehand we did not face the fact that genocide was a real possibility. And once it started, for too long we could not bring ourselves to recognise it, or call it by its name.

If we are serious about preventing or stopping genocide in future, we must not be held back by legalistic arguments about whether a particular atrocity meets the definition of genocide or not. By the time we are certain, it may often be too late to act. We must recognise the signs of approaching or possible genocide, so that we can act in time to avert it.

Here, civil society groups can play a vital role. Often it is their reports that first draw attention to an impending catastrophe - and far too often, they are ignored.

The United Nations human rights system, too, has a special responsibility. This Commission, through the work of its Special Rapporteurs, independent experts and working groups, as well as the treaty bodies and the Office of the High Commissioner, should be well placed to sound the alarm. Indeed, your Special Rapporteur on Extrajudicial Killings described many warning signs in Rwanda the year before the genocide happened. Alas, no one paid attention. The challenge is to bring all this information together in a focused way, so as to better understand complex situations, and thus be in a position to suggest appropriate action. At present there are still conspicuous gaps in our capacity to analyse and manage the information we have. The plan seeks to correct this.

One decision I have already taken is to create a new post of Special Adviser on the Prevention of Genocide, who will report through me to the Security Council and the General Assembly, as well as to this Commission.

This adviser's mandate will refer not only to genocide but also to mass murder and other large-scale human rights violations, such as ethnic cleansing. His or her functions will be:

First, to work closely with the High Commissioner to collect information on potential or existing situations or threats of genocide, and their links to international peace and security;

Second, to act as an early-warning mechanism to the Security Council and other parts of the UN system; and third, to make recommendations to the Security Council on actions to be taken to prevent or halt genocide.

That brings me to the fifth and final heading of the action plan, which is the need for swift and decisive action when, despite all our efforts, we learn that genocide is happening, or about to happen.

Too often, even when there is abundant warning, we lack the political will to act. Anyone who embarks on genocide commits a crime against humanity. Humanity must respond by taking action in its own defence. Humanity's instrument for that purpose must be the United Nations, and specifically the Security Council.

In this connection, let me say here and now that I share the grave concern expressed last week by eight independent experts appointed by this Commission at the scale of reported human rights abuses and at the humanitarian crisis unfolding in Darfur, Sudan.

Last Friday, the United Nations Emergency Relief Co-ordinator reported to the Security Council that "a sequence of deliberate actions has been observed that seem aimed at achieving a specific objective: the forcible and long-term displacement of the targeted communities, which may also be termed 'ethnic cleansing'". His assessment was based on reports from our international staff on the ground in Darfur, who have witnessed first hand what is happening there, and from my own Special Envoy for Humanitarian Affairs in Sudan, Ambassador Vraalsen who has visited Darfur.

Mr. Chairman, such reports leave me with a deep sense of foreboding. Whatever terms it uses to describe the situation, the international community cannot stand idle.

At the invitation of the Sudanese government, I propose to send a high-level team to Darfur to gain a fuller understanding of the extent and nature of this crisis, and to seek improved access to those in need of assistance and protection. It is vital that international humanitarian workers and human rights experts be given full access to the region, and to the victims, without further delay. If that is denied, the international community must be prepared to take swift and appropriate action.

By "action" in such situations I mean a continuum of steps, which may include military action. But the latter should always be seen as an extreme measure, to be used only in extreme cases.

We badly need clear guidelines on how to identify such extreme cases and how to react to them. Such guidelines would ensure that we have no excuse to ignore a real danger of genocide when it does arise. They would also provide greater clarity, and thus help to reduce the suspicion that allegations of genocide might be used as a pretext for aggression.

A serious attempt to provide such guidelines was made by the International Commission on Intervention and State Sovereignty, in its report on the Responsibility to Protect. That Commission did very useful groundwork for the High-Level Panel on Threats, Challenges and Change, which surely cannot avoid this issue as it considers how to improve our collective security system. I earnestly hope that the Panel's recommendations will bring consensus within reach, and I urge all Member States to make a real effort to achieve it. But let us not wait until the worst has happened, or is already happening. Let us not wait until the only alternatives to military action are futile hand-wringing or callous indifference.

Let us, Mr. Chairman, be serious about preventing genocide.

Only so can we honour the victims whom we remember today. Only so can we save those who might be victims tomorrow".

14. Rummel on Kofi Annan's Genocide Speech

Professor R.J. Rummel On Kofi Annan's Genocide Speech, April 7, 2004

Sorry to say, I must pour rain on the celebration that appears to be taking place over United Nations Secretary-General Kofi Annan's speech to the Commission on Human Rights at a special meeting to observe the International Day of Reflection on the 1994 Genocide in Rwanda. I won't review the speech, since others have already done so for the recipients of this, and the full speech is at http://www.unog.ch/news2/documents/newsen/sg04003e.htm

I submit that the appointment of Special Adviser on the Prevention of Genocide, and the different ways in which Annan recommends that the UN prevent genocide, will not work. It is not a step forward, no more than was the highly acclaimed 1948 Genocide Convention, the Universal Declaration of Human Rights, the creation of a field of genocide studies and its vigorous anti-genocide publications, the special attention of many foreign ministries of democracies to genocide, the creation of numerous human rights and genocide nongovernmental organizations, and the International Court of Justice.

What Annan and others miss is the fundamental cause, a cause that unless recognized and acted upon will defeat attempts to prevent genocide as well as attempts on the part of some UN members to deal with incipient or occurring genocide. And that is the lack of democratic freedom. It is dictatorships that murder their own people. All cases of modern domestic genocide have been by dictatorships. While dictatorships of one species or

another, the worst being totalitarian ones, continue to exist, there will be genocide. No modern, or what may be called liberal democracies have committed domestic democide. There is an undeniable correlation here. The more democratic freedom a people enjoy, the less likely their own government will murder them.

But there is more to missing this fundamental fact. That is that the UN itself in important ways is controlled by the very dictatorships that have blood on their hands. China has a veto in the Security Council, as does Russia (not a liberal democracy by any means). The Human Rights Commission cannot recommend action against genociders or mass murderers (democide), as for example Cuba, because of the bloody dictatorships that are on it.

The UN cannot even at this moment call genocide what is genocide. For example, while Israeli civilians are murdered by genocide bombers, the politics within the UN on this issue, guided and led by many of those aiding and supporting the genocide bombers and terrorist organizations, tries to sanction Israel, the victim trying to protect itself, and not the perpetrators.

The UN has failed in its major role of preventing international violence and keeping the peace. It admits this in its own report. It will fail in doing anything about genocide. I predict another Rwanda like genocide as a result.

What is the solution to genocide? Create a parallel international organization of the democracies whose task it will be to prevent genocide and to promote democracy. Otherwise. I'm sorry to say, the Anna's speech will only be hot air, busy work, and a feeling of doing good.

15. U.S. Congress on The Cambodian Genocide

US Congress on Genocide, 108th CONGRESS, 2d Session, H. CON. RES. 399, March 25, 2004

Urging the President to provide encouragement and support for the ratification, establishment, and financing of a tribunal for the prosecution of surviving leaders of the Khmer Rouge regime.

IN THE HOUSE OF REPRESENTATIVES

March 25, 2004

Ms. MILLENDER-MCDONALD (for herself, Mr. ROHRABACHER, and Mr. LANTOS) submitted the following concurrent resolution; which was referred to the Committee on International Relations

CONCURRENT RESOLUTION

Urging the President to provide encouragement and support for the ratification, establishment, and financing of a tribunal for the prosecution of surviving leaders of the Khmer Rouge regime.

Whereas the Khmer Rouge regime of Democratic Kampuchea, led by Pol Pot, Secretary General of the Communist Party of Kampuchea, and other members of the Standing Committee of the Central Committee of the Communist Party of Kampuchea, subjected the people of Cambodia, including various religious groups and ethnic minorities, to genocide and other crimes against humanity between April 17, 1975, and January 7, 1979;

Whereas genocide and other crimes against humanity committed during the Khmer Rouge regime led to the deaths of over 1,700,000 Cambodians;

Whereas former United States Secretary of State James A. Baker, III, stated in 1991: `Cambodia and the U.S. are both signatories to the Genocide Convention and we will support efforts to bring to justice those responsible for the mass murders of the 1970s if the new Cambodian government chooses to pursue this path';

Whereas the Cambodian Genocide Justice Act (22 U.S.C. 2656 note) states that `it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity' and `urges the President to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia; . . . to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia; and . . . to provide such national or international tribunal with information collected pursuant to' the Cambodian Genocide Justice Act;

Whereas the Group of Experts for Cambodia, established pursuant to United Nations General Assembly Resolution 52/135, recommended in a report dated February 18, 1999, that `the United Nations establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide' and that `as a matter of prosecutorial policy, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons most responsible for the most serious violations of international human rights law and exercise his or her discretion regarding investigations, indictments and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia';

Whereas, after 5 years of negotiations, the United Nations and the Royal Government of Cambodia have agreed to establish a tribunal, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, that recognizes Cambodian sovereignty and has jurisdiction under Cambodian law to try those accused of crimes against humanity during the Khmer Rouge regime;

Whereas, although a majority of the judges on the tribunal will be from Cambodia, all decisions will require the affirmative vote of at least one judge nominated by the Secretary General of the United Nations;

Whereas the Extraordinary Chambers will combine the advantages of national justice with international procedural and legal standards in a manner similar to the tribunals established for Sierra Leone, East Timor, and Kosovo;

Whereas, on May 13, 2003, the United Nations General Assembly approved the agreement between the United Nations and the Royal Government of Cambodia and appealed to the international community to provide assistance, including financial and personnel support, to the Extraordinary Chambers;

Whereas, on June 6, 2003, the United Nations and the Royal Government of Cambodia signed an agreement `to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea';

Whereas the agreement now awaits ratification by the National Assembly of Cambodia and financial support from the international community;

Whereas Chhit Choeun (also known as Ta Mok), former Chief of the General Staff of the Armed Forces of the Khmer Rouge, and Kang Khek Iev (also known as Deuch), commandant of the Tuol Sleng prison during the Khmer Rouge regime, are now in detention in Cambodia awaiting trial; and

Whereas other surviving leaders of the Khmer Rouge regime continue to live freely in Cambodia with complete impunity: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That the Congress--

(1) urges the President to encourage the National Assembly of Cambodia to ratify the agreement between the United Nations and the Royal Government of Cambodia to establish a tribunal, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, for the prosecution of surviving leaders of the Khmer Rouge regime of Democratic Kampuchea who committed genocide and other crimes against humanity between April 17, 1975, and January 7, 1979; and

(2) urges the President, after such agreement is ratified, to provide support for the establishment and financing of the Extraordinary Chambers, consistent with the Cambodian Genocide Justice Act (22 U.S.C. 2656 note)

16. For the Worst of Us, the Diagnosis May Be 'Evil'

New York Times, 2/8/05, F1, 2005 WLNR 1738783, For the Worst of Us, the Diagnosis May Be 'Evil', BENEDICT CAREY

Predatory killers often do far more than commit murder. Some have lured their victims into homemade chambers for prolonged torture. Others have exotic tastes -- for vivisection, sexual humiliation, burning. Many perform their grisly rituals as much for pleasure as for any other reason.

Among themselves, a few forensic scientists have taken to thinking of these people as not merely disturbed but evil. Evil in that their deliberate, habitual savagery defies any psychological explanation or attempt at treatment.

Most psychiatrists assiduously avoid the word evil, contending that its use would precipitate a dangerous slide from clinical to moral judgment that could put people on death row unnecessarily and obscure the understanding of violent criminals.

Still, many career forensic examiners say their work forces them to reflect on the concept of evil, and some acknowledge they can find no other term for certain individuals they have evaluated.

In an effort to standardize what makes a crime particularly heinous, a group at New York University has been developing what it calls a depravity scale, which rates the horror of an act by the sum of its grim details.

And a prominent personality expert at Columbia University has published a 22-level hierarchy of evil behavior, derived from detailed biographies of more than 500 violent criminals.

He is now working on a book urging the profession not to shrink from thinking in terms of evil when appraising certain offenders, even if the E-word cannot be used as part of an official examination or diagnosis.

"We are talking about people who commit breathtaking acts, who do so repeatedly, who know what they're doing, and are doing it in peacetime" under no threat to themselves, said Dr. Michael Stone, the Columbia psychiatrist, who has examined several hundred killers at Mid-Hudson Psychiatric Center in New Hampton, N.Y., and others at Creedmoor Psychiatric Center in Queens, where he consults and teaches. "We know from experience who these people are, and how they behave," and it is time, he said, to give their behavior "the proper appellation."

Western religious leaders, evolutionary theorists and psychological researchers agree that almost all human beings have the capacity to commit brutal acts, even when they are not directly threatened. In Dr. Stanley Milgram's famous electroshock experiments in the 1960's, participants delivered what they thought were punishing electric jolts to a fellow citizen, merely because they were encouraged to do so by an authority figure as part of a learning experiment.

In the real world, the grim images coming out of Iraq --the beheadings by Iraqi insurgents and the Abu Ghraib tortures, complete with preening guards -- suggest how much further people can go when they feel justified.

In Nazi prisoner camps, as during purges in Kosovo and Cambodia, historians found that clerks, teachers, bureaucrats and other normally peaceable citizens committed some of the gruesome violence, apparently swept along in the kind of collective thoughtlessness that the philosopher Hannah Arendt described as the banality of evil.

"Evil is endemic, it's constant, it is a potential in all of us. Just about everyone has committed evil acts," said Dr. Robert I. Simon, a clinical professor of psychiatry at Georgetown Medical School and the author of "Bad Men Do What Good Men Dream."

Dr. Simon considers the notion of evil to be of no use to forensic psychiatry, in part because evil is ultimately in the eye of the beholder, shaped by political and cultural as well as religious values. The terrorists on Sept. 11 thought that they were serving God, he argues; those who kill people at abortion clinics also claim to be doing so. If the issue is history's most transcendent savages, on the other hand, most people agree that Hitler and Pol Pot would qualify.

"When you start talking about evil, psychiatrists don't know anything more about it than anyone else," Dr. Simon said. "Our opinions might carry more weight, under the patina or authority of the profession, but the point is, you can call someone evil and so can I. So what? What does it add?"

Dr. Stone argues that one possible benefit of including a consideration of evil may be a more clear-eyed appreciation of who should be removed from society and not allowed back. He is not an advocate of the death penalty, he said. And his interest in evil began long before President Bush began using the word to describe terrorists or hostile regimes.

Dr. Stone's hierarchy of evil is topped by the names of many infamous criminals who were executed or locked up for good: Theodore R. Bundy, the former law school student convicted of killing two young women in Florida and linked to dozens of other killings in the 1970's; John Wayne Gacy of Illinois, the convicted killer who strangled more than 30 boys and buried them under his house; and Ian Brady who, with his girlfriend, Myra Hindley, tortured and killed children in England in a rampage in the 1960's known as the moors murders.

But another killer on the hierarchy is Albert Fentress, a former schoolteacher in Poughkeepsie, N.Y., examined by Dr. Stone, who killed and cannibalized a teenager, in 1979. Mr. Fentress petitioned to be released from a state mental hospital, and in 1999 a jury agreed that he was ready; he later withdrew the petition, when prosecutors announced that a new witness would testify against him.

At a hearing in 2001, Dr. Stone argued against Mr. Fentress's release, and the idea that the killer might be considered ready to make his way back into society still makes the psychiatrist's eyes widen.

Researchers have found that some people who commit violent crimes are much more likely than others to kill or maim again, and one way they measure this potential is with a structured examination called the psychopathy checklist.

As part of an extensive, in-depth interview, a trained examiner rates the offender on a 20-item personality test. The items include glibness and superficial charm, grandiose self-worth, pathological lying, proneness to boredom and emotional vacuity. The subjects earn zero points if the description is not applicable, two points if it is highly applicable, and one if it is somewhat or sometimes true.

The psychologist who devised the checklist, Dr. Robert Hare, a professor emeritus at the University of British Columbia in Vancouver, said that average total scores varied from below five in the general population to the low 20's in prison populations, to a range of 30 to 40 -- highly psychopathic -- in predatory killers. In a series of studies, criminologists have found that people who score in the high range are two to four times as likely as other prisoners to commit another crime when released. More than 90 percent of the men and a few women at the top of Dr. Stone's hierarchy qualify as psychopaths.

In recent years, neuroscientists have found evidence that psychopathy scores reflect physical differences in brain function. Last April, Canadian and American researchers reported in a brain-imaging study that psychopaths processed certain abstract words -- grace, future, power, for example -- differently from nonpsychopaths.

In addition, preliminary findings from new imaging research have revealed apparent oddities in the way psychopaths mentally process certain photographs, like graphic depictions of accident scenes, said Dr. Kent Kiehl, an assistant clinical professor of psychiatry at Yale, a lead author on both studies.

No one knows how significant these differences are, or whether they are a result of genetic or social factors. Broken homes and childhood trauma are common among brutal killers; so is malignant narcissism, a personality type characterized not only by grandiosity but by fantasies of unlimited power and success, a deep sense of entitlement, and a need for excessive admiration.

"There is a group we call lethal predators, who are psychopathic, sadistic, and sane, and people have said this is approaching a measure of evil, and with good reason," Dr. Hare said. "What I would say is that there are some people for whom evil acts -- what we would consider evil acts -- are no big deal. And I agree with Michael Stone that the circumstances and context are less important than who they are."

Checklists, scales, and other psychological exams are not blood tests, however, and their use in support of a concept as loaded as evil could backfire, many psychiatrists say. Not

all violent predators are psychopaths, for one thing, nor are most psychopaths violent criminals. And to suggest that psychopathy or some other profile is a reliable measure of evil, they say, would be irresponsible and ultimately jeopardize the credibility of the profession.

In the 1980's and 1990's, a psychiatrist in Dallas earned the name Dr. Death by testifying in court, in a wide variety of cases, that he was certain that defendants would commit more crimes in the future -- though often, he had not examined them. Many were sentenced to death.

"I agree that some people cannot be rehabilitated, but the risk in using the word evil is that it may mean one thing to one psychiatrist, and something else to another, and then we're in trouble, " said Dr. Saul Faerstein, a forensic psychiatrist in Beverly Hills. "I don't know that we want psychiatrists as gatekeepers, making life-and-death judgments in some cases, based on a concept that is not medical."

Even if it is used judiciously, other experts say, the concept of evil is powerful enough that it could obscure the mental troubles and intellectual quirks that motivate brutal killers, and sometimes allow them to avoid detection. Mr. Bundy, the serial killer, was reportedly very romantic, attentive and affectionate with his own girlfriends, while he referred to his victims as "cargo" and "damaged goods," Dr. Simon noted.

Mr. Gacy, a gracious and successful businessman, reportedly created a clown figure to lift the spirits of ailing children. "He was a very normal, very functional guy in many respects," said Dr. Richard Rappaport, a forensic psychiatrist based in La Costa, Calif., who examined Mr. Gacy before his trial. Dr. Rappaport said he received holiday cards from Mr. Gacy every year before he was executed.

"I think the main reason it's better to avoid the term evil, at least in the courtroom, is that for many it evokes a personalized Satan, the idea that there is supernatural causation for misconduct," said Dr. Park Dietz, a forensic psychiatrist in Newport Beach, Calif., who examined the convicted serial murderer Jeffrey Dahmer, as well as Lyle and Erik Menendez, who were convicted of murdering their parents in Beverly Hills.

"This could only conceal a subtle important truth about many of these people, such as the high rate of personality disorders," Dr. Dietz said. He added: "The fact is that there aren't many in whom I couldn't find some redeeming attributes and some humanity. As far as we can tell, the causes of their behavior are biological, psychological and social, and do not so far demonstrably include the work of Lucifer."

The doctors who argue that evil has a place in forensics are well aware of these risks, but say that in some cases they are worth taking. They say it is possible -- necessary, in fact, to understand many predatory killers -- to hold inside one's head many disparate dimensions: that the person in question may be narcissistic, perhaps abused by a parent, or even charming, affectionate and intelligent, but also in some sense evil. While the term

may not be appropriate for use in a courtroom or a clinical diagnosis, they say, it is an element of human nature that should not be ignored.

Dr. Angela Hegarty, director of psychiatry at Creedmoor who works with Dr. Stone, said she was skeptical of using the concept of evil but realized that in her work she found herself thinking and talking about it all the time. In 11 years as a forensic examiner, in this country and in Europe, she said, she counts four violent criminals who were so vicious, sadistic and selfish that no other word could describe them.

One was a man who gruesomely murdered his own wife and young children and who showed more annoyance than remorse, more self-pity than concern for anyone else affected by the murders. On one occasion when Dr. Hegarty saw him, he was extremely upset -- beside himself -- because a staff attendant at the facility where he lived was late in arriving with a video, delaying the start of the movie. The man became abusive, she said: he insisted on punctuality.

17. Native Americans and Genocide

Speech of Prof. Robert Miller,
Lewis and Clark Law School
Conference on "Ethical Issues in Reparations to Aggrieved Groups"
April 15, 2005; Portland, OR

Genocide of the American Indian?

The policy was "A good Indian is a dead Indian."

And the more enlightened policy was "Kill the Indian and save the man."

Both of these policies are genocidal.

Also, it is the first example of using chemical weapons to commit genocide: "giving Indians blankets infected with small pox, for which Indians had no immunity.

18. Definition of "genocide" - Ukraine demands Genocide Recognition

BBC NEWS, Ukraine demands 'genocide' marked, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4471256.stm, Published: 2005/11/25 20:58:43 GMT

Ukrainian President Viktor Yushchenko has called on the international community to recognise the 1930s Great Famine as Soviet-enforced genocide.

"The world must know about this tragedy," he said, at the opening of an exhibition dedicated to famine victims.

Millions of Ukrainians starved to death in 1932-33 as USSR leader Joseph Stalin stripped them of their produce in a forced farm collectivisation campaign.

A small number of nations have already recognised the famine as genocide.

Ukraine has designated 26 November as an official day of remembrance for victims of "Holodomor" - meaning murder by hunger - and other political crackdowns.

GREAT FAMINE

Called Holodomor in Ukrainian - meaning murder by hunger

About a quarter of Ukraine's population wiped out

Seven to 10 million people thought to have died

Children disappeared; cannibalism became widespread

There are plans to mark the anniversary this Saturday by lighting 33,000 candles - representing the number of people thought to have been dying every day at the height of the famine.

The true scale of the disaster was concealed by the Soviet Union, and only came to light after Ukrainian independence in 1991.

Cannibalism is reported to have become rife as a whole nation starved.

The tragedy should "become a lesson for our nation as well as for the whole world", Mr Yushchenko said on Friday.

In 2003, marking the 70th anniversary of the famine, the UN said the famine "ranks with the worst atrocities of our time" and a national tragedy - but left out any reference to genocide.

Russia opposed

Roman Serbyn, professor of history and a Ukrainian expert at the University of Quebec in Montreal, says: "Ukraine did not make a technically clear case."

He believes the "genocide" designation has proved elusive because the famine is often considered to have been aimed at a social group (peasants) rather than a national or ethnic group.

However, a strong case can be put showing that by closing the borders so Ukrainians could not escape to Russia, Stalin was targeting Ukrainian nationals, he says.

Russia opposes designation as genocide, he says, and "the biggest reason is national pride. But also the political and economic consequences... if you recognise a crime you might have to pay compensation".

In 2003 Russia's ambassador to Ukraine, Viktor Chernomyrdin, was quoted by Interfax news agency dismissing talk of an apology or compensation, saying: "We're not going to apologise... there is nobody to apologise to."

Chapter 2: Legal System in Nazi Germany: Legal Barbarism

1. Genocide and the Law - Omer Bartov

Genocide and the Law: Legalizing Murder, Criminalizing the State, Omer Bartov

The main issue to be discussed in this presentation is the relationship between the idea of a Rechtsstaat, i.e., a state based on law, and the establishment and functioning of a criminal dictatorial and genocidal regime.

The tension between the necessary legal basis of any modern political entity and the sanction given by such a state for criminal actions is best demonstrated through the example of Nazi Germany. This is both because Germany made itself into a model of the Rechtsstaat already during the Second empire, and because the Third Reich became the epitome of genocidal state which claimed to maintain the legal framework and institutional continuity of its predecessor - and to a large extent became a mere and somewhat ambiguous link in a legal continuity that stretches all the way to the present.

The relationship between legality and criminality lies at the core of the Nazi state. This can be immediately perceived from several key examples:

1. Hitler did not come to power through a "seizure of power (*Machtergreifung*) but was legally appointed Chancellor by the President of the Republic

2. The Reichstag was at least overtly never dispersed by Hitler but rather voted itself out of existence and gave Hitler dictatorial powers by legal means.

3. The Nazi persecution of Jews, Communists, Gypsies, handicapped etc., was largely carried out by means of orders given by legally recognized authorities and recognized by the courts.

4. The case of the "race defilement" trials, which were carried out by regular courts, and of the Nuremberg Laws, which became the law of the land and were recognized by the legal establishment, indicate the deep involvement of the legal establishment in the enforcement of racial policies.

5. The sanction given to Nazi policies by the legal establishment made them acceptable to larger sectors of the public than would have been the case had they been seen as arbitrary and illegal actions by the executive.

6. The radicalization of legal measures, both in civilian and in military courts, during the war, further deepened the complicity of the legal authorities in the violent actions of the regime. Some 20,000 Wehrmacht soldiers were sentenced to death by courts martial and executed by firing squad. Thousands of civilians were also legally killed.

7. The concentration camp system was given legal sanction by the judicial authorities, which were informed of the dispatch of criminals to be worked to death in the camps.

8. Judges were also intimately involved in the sterilization arid euthanasia campaign by sanctioning the decisions of physicians.

The implications of this relationship between legality and criminality for the prosecution of genocide are considerable:

1. It is necessary to differentiate between the responsibility of the individual, who was acting legally within the context of the laws of the state, and the state, which was acting criminally.

2. Conversely, one must prosecute the individual for criminal actions even if such actions were not considered criminal by the stare that ordered them at the time in which they were carried out.

3. One must also claim to he able to prosecute individuals who acted criminally in one country by the legal authorities of another country (or several countries), thereby threatening the idea of national sovereignty.

4. Conversely, one must find a way of bypassing the quandary of sovereignty by declaring crimes committed by national of another country during wartime as war crimes rather than as crimes against humanity.

5. Hence the coining of the terms "crimes against humanity," "genocide" and "war crimes," and the variety of ways in which manner in which one was subsumed under another (at Nuremberg, the Eichmann trial, the Auschwitz trial, the Klaus Barbie trial, etc.), indicates the complexity of acting legally against genocide precisely because this is a crimes committed by individuals within the framework of a state that Commissions these actions and sanctions them through the legal establishment.

6. Finally the establishment of a permanent international tribunal or genocide and crimes against humanity can he seen as both the only way to put an international legal limit to genocide and as a tool that can he exploited politically precisely by those who wish to revitalize the term and exploit its legal fluidity.

Other post-genocidal implications of legal implications of genocide on the national level:

1. A modern country that has just carried out genocide is faced with two stark choices. It can either:
    a. Dismantle its entire legal (as well as educational, administrative, military, political, etc.) system and rebuild itself from scratch, which would probably mean the destruction of the society as a whole on a scale similar to the Chinese Cultural Revolution.

b. Or, it can accept the fact that it will not be able to purge itself of the complicit of its legal apparatus and manpower, as well as that of many other establishments, and that it must reform itself acknowledging the presence of criminals in its midst who had never been criminalized, that is, men and women who were never called to task after the end of the regime.

2. Moreover, such a country has to accept that much of the purging, reforming, and rebuilding will be carried out by the same individuals who, under different circumstances, should have been purged themselves, as was clearly indicated by the manner in which the German legal system needed a whole generation to rid itself of those who worked for the Nazis, not through purge hut through natural causes.

3. The question that remains to be answered is what is the fate of the concept of the Rechtsstaat after the experience of Nazi legalized genocide, and what are the implications of the criminalization of the legal state for our understanding of the role of the law not only in maintaining order in our society but also in presenting the sate from committing mass crimes.

2. Lawful Barbarism - Professor Bazyler

Lawful Barbarism: German Law During The Holocaust, Michael J. Bazyler

One of the most important, and least considered, aspects of the Holocaust is law. The Nazis were fastidious about following Legal requirements, and for this reason the law played an important role in the measures taken which led to the death of six-million Jews.

It is important to recognize that Germany had for a long time prior to the rise of the Nazis an extremely developed and sophisticated legal system. The two major documents creating modem civil law, which exist today in all of Continental Europe and which spread to Latin America, were the 1804 Napoleonic Civil Code and the 1898 BgB Civil Code enacted in Germany in 1898. German law, like German philosophy therefore, was well known, respected and emulated worldwide for many years prior to the Nazis coming to power in January 1933.

Some of the legal innovations created by Germany at the beginning of the late 19 and early 20 Century even spread to the United States, including the current workers compensation and Social Security systems we have in this country. Many American legal theorists looked to German jurisprudence as a source of inspiration for their writings up to WW II. In pre-Nazi Germany, lawyers played an important role, judges were independent, and a law-based state existed not too dissimilar to the United States.

The jurisprudential doctrine in favor in the West during the first part of the 20th

Century was legal positivism, the theory that legal rules are valid only because they are enacted by an existing political authority and then accepted as binding by the citizenry. Morality or natural law are not proper sources of law making in a positivist-based state.

The German society's allegiance to the necessity of written laws was recognized by the Nazis when they came to power. For that reason, the Nazis made sure that all of their horrific acts could be based upon some legal decree.

Attached to this paper as an appendix is a list prepared by the United States Holocaust Memorial Museum summarizing 128 anti-Jewish laws passed by the Nazis between 1933 and 1945.

Let me cite two examples of the Nazis' recognition that their acts must appear to have been law-based. The first comes from the early days of Nazi rule and the last in the post-World War II as Nazi Germany lay in ruins.

In 1938, when the number-two Nazi, Hermann Goering, suggested in the course of a discussion, that German travelers could always kick Jewish passengers out of a crowded compartment on a train, the Propaganda Minister, Josef Goebbels, replied: "I would not say that. I do not believe in this. There has to be a law."[1]

In 1946, when the Nazi criminals were tried in Nuremberg and accused of crimes against humanity, they "coolly produced decrees and permits in triplicate, and were genuinely shocked when prosecutors dismissed all those documents"[2]

Richard Lawrence Miller, author of Nazi Justiz, described the hijacking of the laws by the Nazis as follows:

"During a Roman Catholic mass, the faithful witnessed and participated in a miracle. A group of atheists could gather and mimic the proceedings, but the activity would no longer have meaning, even the words and ceremony were duplicated in finest detail. Nazis were legal atheists; they did not believe in law. They duplicated the natural outward form, emptied the legal ritual of meaning. The decrees, courts, and documents were no more valid than a mass celebrated by an atheist. Retaining the outward forms of law, however, made [German] citizens feel comfortable; the old priests were gone and the new ones spoke with a strange accent, but nonetheless they were adept with traditional words and ceremonies, and the congregation felt assured. Even troubled members would not consider leaving the Church. What they did not realize was that the Church was gone. The community of believers remained, but had been hijacked by unbelieving persons garbed in priestly robes, who cynically exploited the congregation's beliefs in order to enslave the faithful."[3]

Let me now discuss some of the major anti-Jewish legislation enacted by the Nazis. In discussing the legislation, it is important to note that the Nazis defined Jews by genealogy, rather than religion, using the bogus concept of a Jewish "race."

In Nazi Germany, a person did not have to practice Judaism in order to be a Jew; lifelong Christians could be Jews, be forced to wear the yellow star, and be transported to the "East." Of course, practitioners of Judaism were the primary victims, but the Nazis classified as Jews many persons who were not considered such before or after the Third Reich. The number of those victims is unclear. It is estimated, that in 1933 the non-Aryan population of Germany was about six-hundred-thousand, or one-percent. This included both those who practiced Judaism and those whose parents were half-Jewish. The racial classifications enacted by the Nazis expanded that number into six-million. The number of non-Aryans in government service was approximately five-thousand, or 0.5% of the total government personnel --a very small number.

The Nazis' first targets were those five-thousand individuals. The first major anti-Jewish law, predating the infamous Nuremberg Laws, that came two years later, was the "Law for the Reestablishment of the Professional Civil Service," enacted on April 7, 1933. "[The] decree was drafted by the appropriate experts in the Interior Ministry and ... the competent experts in the Finance Ministry were consulted before publication."[4] Like much anti-Semitic legislation, this law carried an innocuous title; however, the law expelled from government service all non-Jewish civil servants. In a gesture to the aged President of Germany, World War One hero Field Marshal von Hindenburg, the law exempted Jewish veterans from World War One from expulsion. This exemption did not last long, as the Jewish veterans were also soon banished from their government jobs.

Between the civil service law of April 1933 and the September 1935, Nuremberg Laws, the Nazis passed various anti-Jewish legislation, some major and some minor, but all meant to make life extremely difficult for Jews living in Nazi Germany. These included: an April 19, 1933 decree entered by the State of Baden, prohibiting the use of the Jewish language - Yiddish - in cattle markets; a May 13, 1933 decree issued by the State of Prussia decreeing that Jews may only change their names to other Jewish names; a November 27, 1933 issued by the Reich Interior Ministry forbidding the listing of Jewish holidays on office calendars; and a May 5, 1934 decree issued by the Reich Propaganda Ministry forbidding the appearance on stage of Jewish actors.

From September 11- 15, 1935, the Nazis held a Party congress at Nuremberg. It is believed that the Nuremberg Laws were drafted on the last two days of the Congress, even though much preliminary work had been accomplished before that.[5]

The September 15, 1935 "Reich Citizenship Law" deprived German Jews of citizenship, limiting German citizenship to persons of German or "kindred" blood. As a result, those who the Nazis considered to be non-German were now deprived of the civil rights possessed by citizens of the State. The "Law for the Protection of German Blood and German Honor" forbid marriage and extra-marital sexual intercourse between Jews and citizens of German or "kindred" blood. Jews were also forbidden to employ in their households German women younger than forty-five years of age, and were forbidden to fly the national flag.

Since the Nazis classified Jews on the basis of race, and not religion, they were forced to develop an entire set of legal rules to determine who would be classified as Jew and who would be an Aryan. The practical problem was the over-five-million Germans who had some Jewish heritage, but did not consider themselves to be Jews These individuals were labeled *Mischlinge*, a German word for half-breeds or mixed-cast.

Mischlinge, when considered Jews, fell under the category of the anti-Jewish legislation; *Mischlinge* who could under the laws' definitions keep themselves out of the Jewish category, retained all the rights and privileges of citizenship.

Since specific definitions were now required, supplementary decrees were published. The first supplementary decree to the Reich Citizenship Law, published on November 14, 1935 defined as Jewish (1) all persons who had at least three full Jewish grandparents, or (2) who had two Jewish grandparents and were married to a Jewish spouse or (3) who belonged to the Jewish religion at the time of the Law's publication, or who entered into such commitments at a later date. From November 14 on, therefore, the civil rights of these legally defined Jews were cancelled, their voting rights abolished, Jewish civil servants who had kept their positions owing to their veteran status, were now forced into retirement.

On December 21st 1935, a second supplemental decree ordered the dismissal of Jewish professors, teachers, physicians, lawyers, and notaries who were state employees and had been granted exemption.[6]

What this meant was that your religion did not matter, nor the religion of your parents. The critical fact for determination of who was to be considered a Jew was the religion of one's grandparents.

A November 26, 1935, supplementary decree to the "Law for the Protection of German Blood," specified the various categories of forbidden marriages. Marriage was now forbidden between a Jew and *Mischling* with one Jewish grandparent (*Mischling* of the first degree); between a *Mischling* and another, each with one Jewish grandparent; and between a *Mischling* with two Jewish grandparents and a German, the last one subject to waiver by special exception from the Interior Minister.

Mischlinge of the first degree (two Jewish grandparents), therefore, could marry Jews - and thereby become Jews- or marry one another. Mischlinge of the second degree (one Jewish grandparent) had even more severe legal restrictions: they could not marry a Jew, and could not marry each other.

The November 14, 1935, supplementary decree also forbid sexual relations between Jews and persons of "alien blood" The original April, 1935 decree already made it illegal to have sexual relations between Jews and Germans. This supplementary decree required clarification as to who was of "alien blood" Twelve days after the issuance of the supplementary decree, a circular from the Reich Ministry of the Interior clarified the ambiguity: alien blood referred to "Gypsies, Negroes, and their bastards."[7]

As Professor Saul Friedlander of UCLA in the volume one of his landmark study, Nazi Germany and the Jews, explains:

"Proof that one was not of Jewish origin or did not belong to any 'less valuable' group became essential for normal existence in The Third Reich. And the requirements were especially stringent for anyone aspiring to join or to remain in a State or Party agency. Even the higher strata of the civil service, the party, and the army could not escape racial investigation. The personal file of General Alfred Jodl [who would later become one of the defendants at the Nuremberg trial of major war criminals], contains a detailed family tree in Jodi's handwriting, which, in 1936, proved his impeccable Aryan descent as flit back as the mid-18th century."[8]

Friedlander describes instances when the Nazis, either for personal gain or convenience, would make exceptions to these legal categories. According to Friedlander, the most notorious case was that of Gerhard Milch, the State Secretary of the Aviation Ministry. A Mischling of the second degree, he was turned into an Aryan by the Nazis. When a priest in the religion class, a Father Wolpert, in Bavaria, stated to his children that General Milch was of Jewish origin, charges were brought against him. The cancer researcher Otto Warburg, a "Mischling of the first degree," was transformed into a "Mischling of the second degree" on Herman Goering's orders. Friedlander speculates that Hitler's hypochondriacal worries played a role. These exemptions were issued in the form of a "protection letter."

Friedlander also shows how legal opinions had to issued - based on potential or actual situations - to educate the German populace how these laws worked in actual practice. These were set out in the form of questions and answers, eerily similar to the ethics opinions issued by, for example, the California State Bar today.

The second appendix to this paper reproduces two of such hypothetical factual scenarios, followed with the coned legal answer.

A major legal hurdle encountered by experts attempting to interpret the Nuremberg Laws was the definition of "intercourse." Litigation on this question even came before the Supreme Court of Germany. In a December 1935 decision, the Supreme Court stated: "The term 'sexual intercourse' as meant by the Law for the Protection of German Blood does not include every obscene act, but it is also not limited to "coition." It includes all forms of natural and unnatural sexual intercourse - that is, coition as well as those sexual activities of those persons of the opposite sex which are designed, in the matter in which they are performed, to serve in place of coition to satisfy the sex drive of at least one of the partners."

On March 13, 1942, the Special Court for the District of the Court of Appeal in Nuremberg, issued a decision in the criminal case brought against the defendants Katzenberger and Seiler. Leo Katzenberger was an elderly Jewish widower, who had befriended Irene Seiler, a German thirty-seven years his junior, when in 1932 she came to live in Katnzenberger's apartment building. The three-judge court handed down the death

sentence for Katzenberger and a sentence of two years of hard Labor and an additional two years of loss of civil liberties for Seiler. Seiler's offense was of committing perjury while being questioned by the police in the course of their investigation of whether Katzenberger had committed racial pollution.

This is how the Court justifies the classification of their contacts as "sexual intercourse," even though the two defendants maintained that their acts amounted to no more than a case of fatherly friendliness towards a younger neighbor:

"In view of the behavior of the defendants towards each other, as repeatedly described, the court has become convinced that the relations between Seiler and Katzenberger which extended over a period often years, were of purely sexual nature. This is the only possible explanation of the intimacy of their acquaintance. As there were a large number of circumstances favoring seduction, no doubt is possible that the defendant Katzenberger maintained continuous sexual intercourse with Seiler, The Court considers as untrue Katzenberger's statement to the contrary that Seiler did not interest him sexually, and that the statements made by the defendant Seiler in support of Katzenberger's defense the Court considers incompatible with all practical experience. They were obviously made with the purpose of saving Katzenberger from his punishment."

The Court explained its rationale for imposing the death sentence upon Katzenberger, seventy years old at the time, as follows:

"The political form of life of the German people under National Socialism is based upon the community. One fundamental factor of the life of the National Community is the racial problem. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong."

Katzenberger practiced pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial problems, and he knew that by his conduct the patriotic feelings of the German people were slapped in the face. Neither the National Socialist Revolution of 1933, nor the passing of the Law for the Protection of German Blood in 1935, neither the action against the Jews in 1938 [referring to *Kristalnnacht*, the Jewish pogrom in November of that year], nor the outbreak of war in 1939 made him abandon this activity of his."[9]

Reading this opinion and many others, one is stunned by the similarity to opinions regularly issued by American courts in criminal trials. The structure is exactly the same: a detailed recitation of facts, the statement of applicable law, and then a dutiful application of the law to the facts, with statutory analysis to fill in any gaps.

The judges appear to be doing what judges presiding over criminal cases in the United States and other democracies do every day. Yet the laws that the judges were applying and interpreting were obscene. This did not stop them, however, from doing their job.

Only the last portion of the *Katzenberger* opinion reveals that the three judges were ardent believers in such laws.

As German historian Ingo Müller, in his landmark study *Hitler's Justice: The Courts of the Third Reich*[10] explains, the German jurists were more than happy, using his phrase, to "coordinate" themselves into the new reality created by the Nazis and even to profit from it.

A most sad example for this author is that of young, up-and-coming non-tenured law professors at German law schools who eagerly took up the spots of their senior mentors who had been expelled from their posts because of their Jewish origins. These younger professors were quickly granted tenure to replace the shortage created by the expulsion. Ironically, these professors reached their scholarly heights after the war, and so became the most influential post war German law teachers and scholars, teaching the new generations of German youth into the 1970s.

Resistance from the bench and bar did occur to some degree. Hubert Schorn, a retired judge, wrote a book after the war listing accounts of resistance by judges. Schorn asserted that "the overwhelming majority" of judges had opposed the Nazi system, and that a judge had "no alternative but to apply the unjust laws, and risked his own life if he objected."[11]

Fritz Hartunger, a justice of the Supreme Court in West Germany, who had worked for the courts during the Nazi era, also claimed in a study that if the judges had made any other decisions, they would have risked their lives.

Müller, in his study doubts the accuracy of these statements. Müller does point out, however, that two prominent judges were executed by the Nazis. Both were murdered by the Nazis in early 1945 for their participation in a plot against Hitler.

Müller correctly notes that neither individual was persecuted for their conduct on the bench, but rather for their political activities. In the waning years of the war, as the tide turned against Nazi Germany, these two judges joined the underground German resistance movement, even secretly assisting the few remaining Jews in Germany.

Müller also finds that the "numerous other 'martyrs of the judiciary' cited by Schorn, were either attorneys or Jewish judges who the Nazis removed from office and then murdered."[12]

Müller notes that there is only one documented case of resistance by a judge in the course of carrying out his professional duties. Dr. Lothar Kreyssig, a family law judge in Brandenburg, appointed in 1928, began complaining about the Nazis in 1934, often in his role as an officer of the Lutheran Confessional Church. Kreyssig began receiving complaints from his superiors beginning in 1936, yet continued to express his displeasure against the acts being committed by the Nazis. An inquiry with the aim of removing him from the bench began in 1937 when he referred to Nazi church policies as "injustice -

masquerading in the form of law." A criminal investigation was also opened against him in 1938 for some of the statements he made during church services.

Kreyssig was not fired or imprisoned, however, only reassigned to another court, where he continued to issue rulings to ameliorate the harshness of Nazi legal decrees. In one such move, Judge Kreyssig issued injunctions to several hospitals in his capacity as a judge of the Court of Guardianship, prohibiting the hospitals from transferring mental patients for execution. When Judge Kreyssig learned that Phillipp Bouhler, a Nazi party leader, was responsible for the euthanasia program, known as "T 4," Kreyssig filed criminal charges before the public prosecutor in Potsdam against Bouhler.

The tenacious judge was then summoned before the Minister of Justice, Franz Gürtner, who tried to persuade him that the T 4 program was lawful because it had come from an "order of the Führer." Gürtner also indicated that if Judge Kreyssig "did not recognize the will of the Führer as the [force] of law," then he could no longer serve as a judge.[13]

Soon thereafter, Judge Kreyssig wrote to Gürtner requesting early retirement, since his conscience would not allow him to withdraw the objections against the hospital. He was allowed to retire at the end of 1940, and was given lull pension rights. In April 1942, a month after his early retirement was finally confirmed, the criminal investigation against him was dropped. "[F]rom then on[,] the Third Reich left the courageous judge in peace."[14]

Muller finds Kreyssig's case to be "extremely revealing. It shows that if a judge refused to accept the injustices of the system, the worst he had to fear was early retirement."[15]

Müller sadly concludes that the cases of resistance were few and far between and that the judiciary "became a smoothly functioning part of the National Socialist's System of intimidation - today they prefer to say they became 'enmeshed' or 'entangled'..."[16] Müller cites the findings of Martin Hirsch, a retired judge of the post-war West German Federal Constitutional Court, who estimates that the courts during the Nazi era handed down at least forty-thousand to fifty-thousand death sentences, not counting the verdicts in the summary proceedings of the military and the police tribunals.

Müller looks for comparison to the wartime courts in Italy and Japan. He finds that in both of these countries, "mass arrests of political opponents did occur, and there were also irregular courts, harsher laws to protect the government and internment camps."[17] However, a military style Special Tribunal established in Fascist Italy in 1926, handed down only twenty-nine death sentences and seven sentences of life imprisonment in over five-thousand trials. In Japan, six-thousand persons were arrested; and charges were brought against less than ten-percent of them. During wartime, only two people were sentenced to death by Japanese civilian courts, and that was the German spy Richard Sorge and his Japanese informer Hozmi Ozaka.

Müller concludes: "The jurists of the Third Reich had no peers anywhere in the world."[18]

[1] Raul Hilberg, Perpetrators, Victims, Bystanders: The Jewish Catastrophe 1933-1945, 71 (1993).

[2] Lawrence Miller, Nazi Justiz: Law of the Holocaust, 2 (1995).

[3] *Id.*

[4] Hilber, supra, at 86.

[5] Saul Friedlander, Nazi Germany and the Jews: Volume One, The Years of Persecution, 1933-1939 (1997).

[6] supra, at 29.

[7] *Id* at 153.

[8] *Id* at 153.

[9] The Katzenberger case opinion is translated and reproduced in Volume III of the "Trials of War Criminals Before Nuremberg Military Tribunals Under Control Consol Law No. 10," conducted by the United States and other Allies after the trials of the International Military Tribunal at Nuremburg for the Major War Criminals.

[10] Hitler's Justice: The Courts of the Third Reich (1991).

[11] Müller, supra, at 21.

[12] Müller, supra, at 193.

[13] *Id.* at 195.

[14] *Id.* at 195.

[15] *Id.*

[16] *Id.* at 196.

[17] *Id.* at 197.

[18] *Id.*

3. Lawful Barbarism – United States Holocaust Memorial Museum

Lawful Barbarism (Appendix 1), **The Anti-Jewish Legislation of Nazi Germany from 1933-1945** (Prepared by the United States Holocaust Memorial Museum, Washington, DC)

March 2, 1933 When awarding public contracts, the state government of Thuringia will only consider Christian

March 22, 1933 Jewish lawyers and notaries are no longer allowed to work on legal matters in the city of Berlin.

March 22. 1933 The state of Saxony prohibits the slaughter of animals according to Jewish custom.

March 31, 1933 Reich Commissar of the Prussian Judiciary fires all Jewish judges and states attorneys. They are not allowed to enter the courtrooms.

*March 31. 1933 In the state of Baden, school principals and teachers are asked to protect Jewish students from attacks by their German fellow students.

May 1, 1933 The Mayor of Cologne decrees that Jews may not be employed in municipal offices. The ban also applies to baptized Jews and non-Jews who are married to Jews.

May 4, 1933 The Mayor of Munich prohibits Jewish doctors from treating non-Jewish patients in city hospitals.

May 6, 1933 The Reich Ministry of Finance revokes the licenses of all Jewish tax consultants.

May 7, 1933 The "Civil Service Law" retires all Jewish and other "non-Aryan" civil servants; Jewish veterans of World War One are exempt.

April 7, 1933 "Non-Aryan" lawyers may be de-barred until September 30, 1933.

April 7, 1933 The Bavarian Interior Ministry no longer admits Jewish students to medical school.

April 12, 1933 The Nazi Party leader in the Palatinate region decrees that Jews can only be released from "protective custody" if two petitioners or two doctors who gave Jews medical certificates are held in custody in their stead.

April 19. 1933 The state of Baden prohibits the use of the Jewish language--Yiddish--in cattle markets.

April 22, 1933 The Reich Transportation Ministry forbids the spelling of Jewish names when transmitting telegrams by phone.

April 25, 1933The Reich Transportation Ministry imposes a quota of 1.5% on the admission of "non-Aryan" students to German schools and universities.

May 7, 1933 All Jewish workers and civilian employees are dismissed from the Army (Wehrmacht).

May13, 1933 The state of Prussia-decrees that Jews may only change their name to other Jewish names.

June 30, 1933The Nazi leadership in the Allenstein district forbids all party members from entering bars frequented by Jews. This also pertains to cafés and restaurants, but *not* to hotels.

July 18, 1933The Nazi "Farmers' Chief" in Būtow forbids the farmers of his county from selling their products to Jewish traders.

August 16, 1933 The import and sale of foreign Jewish newspapers is forbidden

September 5, 1933 General Synod of the old-Prussian Union decrees that "non-Aryans" cannot be appointed as clergymen and officials in the church administration. This also pertains to the husbands of non-Arian women.

November 27, 1933 The Reich Interior Ministry forbids the listing of Jewish holidays on office calendars.

December 1, 1933 The Association of Retail Traders in Frankfurt forbids Jewish shops from using Christian symbols during Christmas season sales.

March 5, 1934 The Reich Propaganda Ministry forbids the appearance of Jewish actors.

April 17, 1934 In Prussia, "non-Aryans" and the spouses of "non-Aryans" no longer may receive concessions from pharmacies.

June 21, 1934 The Hessian Education Ministry excludes the Old Testament from the Protestant religious educational curriculum, and replaces with additional passages from the New Testament.

December 26, 1934 The Reich Interior Ministry declares that hostile activities against Jews by unauthorized persons.

February 10, 1935 The Secret State Police (Gestapo) forbids all Jewish meetings which propagandize for the continuing stay of Jews in Germany.

April 11, 1935 Hitler's Deputy, Rudolph Hess, decrees members of the Nazi party must not have any personal contact with Jews.

June 11, 1935 The Prussian Interior Ministry Signs decrees that, because of impending Olympic games in Berlin, signs saying "Jews not welcome" should be removed from major avenues.

August 17, 1935 The *Gestapo* confiscates the membership lists of all Jewish organizations in order to compile a comprehensive register of Jews living in Germany (*Judenkarten*).

September 15, 1935 The "Reich Citizenship Law" restricts German citizenship to persons of German or "kindred" blood. Non-Germans are deprived of civil rights.

September 15, 1935 The "Law for the Protection of German blood and German honor" forbids marriages and extramarital sexual intercourse between Jews and citizens of German or "kindred" blood. Jews are forbidden to employ in their household German women younger than 45 years of age. Finally, Jews are forbidden to fly the national flag or display the Reich colors.

September 18, 1935 The Gestapo rules that people guilty of "race defilement" (intermarriage or sexual relations between Jews and Germans) shall be confined to a concentration camp.

September 28, 1935 The Mayor of Königsdorf, a village in Bavaria, decrees that cows purchased directly or indirectly from Jews may not be inseminated by the common village bull.

October 17, 1935 Reich Chamber of Film decrees that Jewish owners of movie theaters must sell their theaters to Aryans by December 10, 1935.

December 24, 1935 The Reich Propaganda Ministry decrees that the names of Jewish soldiers should no longer be included on memorials for the dead of World War One.

November 4, 1935 Reich Education Ministry imposes a hiring freeze on new Jewish teachers for Jewish schools.

November 14, 1935 In a supplemental decree to the "Reich Citizenship Law," the Reich Interior Ministry defines a Jewish *Mischling* (person of mixed blood) as anyone who is descended from one or two Jewish grandparents. A grandparent is considered Jewish if he or she belonged to the Jewish religious community. A full-blooded Jew is anyone descended from at least three Jewish grandparents.

November 26, 1935 In a supplemental decree to the "Law for the Protection of German Blood," the Reich Interior Ministry defines replaces term non-Aryan with the word "Jew". The decree further defines the terms 'Jew,' "first degree *Mischling*," "second degree *Mischling*, and person of German blood.

December 17, 1935 The Reich Interior Ministry declares that racial affiliation must be emphasized in all reports to the press about crimes committed by Jews.

December 16, 1935 The *Gestapo* forbids Jews from receiving licenses to carry firearms.

December 1935 The President of the Reich Supreme Court decrees that German judges may not cite legal commentaries or treatises of Jewish authors.

February 8, 1936 The Gestapo bans the "Association of Jews Faithful to the Torah," as it cannot promote the emigration of Jews and is likely to impede the supervision of Jews.

April 2, 1936 The Reich Justice Ministry declares its intention to enforce more severely the 'Law for the Protection of German Blood."

June 18, 1935 The Reich Education Ministry imposes restrictions on the ability of Jewish medical students to perform certain gynecological examinations on German women.

June 29, 1936 The Mayor of Düsseldorf decrees that Jews will not be admitted to municipal hospitals, and will only be treated as out-patients.

August 31, 1936 The Reich Finance Ministry announces that religious affiliation must be indicated on tax forms.

October 4, 1936 RMI The conversion of Jews to Christianity has no relevance with respect to the question of race. The possibility to hide one's origin by changing one's religious affiliation will entirely vanish as soon as the offices for racial research begin their work.

March 18, 1937 The Gestapo orders ongoing, strict surveillance of the activities of assimilated Jews must, especially the activities of the *Centralverein* (Central Association) and the Alliance of Jewish Front-line Soldiers.

April 15,1937 The Reich Education Ministry decrees that Jewish university students will not be admitted to doctoral exams.

June 8, 1937 Reich Postal Ministry forcibly retires all postal officials whose spouses are not of purely Aryan origin.

June 23, 1937 To obtain a low-interest home loan newly married couples must prove that their grandparents do not belong to the Jewish religion and that their parents belong to the Christian faith.

September 27, 1937 Infertile women have the right to be examined at public expense, in order to determine whether their infertility can be remedied. The Reich Interior Ministry declares that Jewish women have no right for such an examination.

November 22, 1937 Due to foreign reports of atrocities against Jews, SS-Chief Heinrich Himmler decrees that Jews will not be released from the concentration camp of Dachau.

January 1, 1938 Jews cannot become members of the German Red Cross.

March 24, 1938 The Reich Interior Ministry forbids Jews to use governmental archives, except for the purpose of tracing their lineage or researching Jewish folklore (*Jüdisches Volksturns*).

April 26, 1938 As Chairman of the Four-Year-Plan, Hermann Göring orders all Jews must declare the value of on their entire domestic and foreign property and assets.

June 1, 1938 All Jews who have been sentenced to a prison term of more than one month or to a fine must be arrested and, without interrogation sent to a concentration camp.

June 14, 1933 Reich Economic Ministry endorses the quick elimination of Jews from industry and Commerce.

August 17, 1938 Starting January 1,1939, Jews lacking an identifiably Jewish first name must adopt the middle name must adopt the names "Israel" and "Sara."

October 5, 1938 The Reich Interior Ministry invalidates all German passports held by Jews. Jews musts surrender their old passports, which will become valid only after the letter "J" has been stamped in them.

November 9, 1938 The *Gestapo* informs all local state police offices of anti-Jewish actions which will take place all over Germany (the "Night of Broken Glass'). Local police must not be prevent these actions. The arrest of 20-30,000 Jews in the Reich must be prepared; especially rich Jews are to be targeted.

November 9, 1938 The chief of the SA commands that all Jewish shops must be immediately destroyed by SA-men in uniform (the "Night of Broken Glass"). The press should be informed. Synagogues must be put on fire immediately, Jewish symbols must be secured. Firebrigades must only protect Aryan residencies, but also adjacent Jewish residencies, though Jews must be expelled, because Aryans will move into them shortly.

November 10,1938 SS-Chief Heinrich Himmler orders that the "Night of Broken Glass" must not endanger German life and property and forbids the destruction or looting of Jew apartments. Arrested Jews will be housed in concentration camps.

November 10, 1938 The Berlin Gestapo reports the availability of room for 30,000 Jews in the concentration camps of Dachau, Buchenwald and Saschsenhausen.

November 12, 1938 Hermann Göring decrees that all damage resulting from the "Night of Broken Glass" must be removed by Jewish shopkeepers and tradesmen. The costs of repair must be borne by the Jewish proprietors.

November 12, 1938 Hermann Göring forbids Jews from operating retail trades, mail order, firms, or workshops for skilled labor, effective January 1, 1939.

November 12, 1932 Security Police Chief Reinhard Heydrich forbids the restoration of synagogues damaged or destroyed during the "night of Broken Glass."

November 12, 1938 President of Reich Chamber of Culture forbids Jews from attending theaters, movies, concerts, art exhibitions, etc.

November 12, 1238 Hermann Göring imposes a fine of 100,000,000 Reichsmark on the entire Jewish population of Germany.

November 15, 1938 The Reich Education Ministry expels all Jews from German schools.

November 29, 1938 Jews are forbidden to keep carrier pigeons.

December 3,1938 SS-Chief Heinrich Himmler revokes the driver's licenses and truck registration cards held by Jews.

December 5, 1938 In order to prevent the flight of capital owned by Jews, the Reich Economics Ministry freezes all Jewish property and assets.

December 14, 1938 Hermann Göring forbids all unauthorized activity against Jews. All local and state governments must first submit new laws against Jews for Göring's approval.

December 21, 1938 Jewish women may not be certified as midwives.

January 21, 1939 The Gestapo releases all Jews under the age of 18 to were arrested during the "Night of Broken Glass" from imprisonment in concentration camps.

March 15, 1939 SS-Chief Heinrich Himmler bans the unauthorized emigration of Jews. Illegal refugees and their helpers are to be arrested and send to concentration camps.

March 25, 1939 Jews may not become members of the Hitler Youth. Persons of mixed German-Jewish blood may be admitted.

July 12, 1939 When reporting on trials against Jews, newspapers should mention the names "Israel" and "Sara", so that the reader recognizes the defendants as Jews.

August 1, 1939 President of the German Lottery forbids the sale of tickets to Jews.

September 1, 1939 Local police stations impose a 8:00 p.m. curfew on Jews.

September 7, 1939 Security Police Chief Reinhard Heydrich orders the arrest of all Jews of Polish nationality living in Germany.

September 20,1939 Jews are forbidden to own radios. The regulation also applies to Germans living in Jewish households, and to persons of mixed German-Jewish blood.

September 21, 1939 Security Police Chief Reinhard Heydrich instructs SS and police units open ring in occupied Poland to assemble the Jewish population into urban ghettos and to create a governing Jewish Council for each ghetto.

September 26, 1939 The German governor of occupied Poland, Hans Frank, decrees that every Jew living in occupied Poland is subject to forced labor. For this purpose, the Jews will be organized into forced labor teams.

February 15,1940 The press is instructed to treat as confidential reports that 1,000 German Jews have been deported to Poland.

February 16, 1940 The Reich Interior and Justice Ministries declare that only Jewish men can be accused of the crime of "race defilement" (sexual relations between Jews and Germans). The punishment of women for "race defilement" is prohibited.

March 11, 1940 The Reich Agriculture Ministry decrees that food ration cards for Jews must be marked with the letter "J."

April 10, 1940 SS-Chief Heinrich Himmler decrees that for the duration of the war, Jewish prisoners may not be released from concentration camps.

April 20, 1940 The German Army discharges from military service all "first degree *Mischlinge*" (people of mixed German-Jewish ancestry) and the husbands of Jewish women.

July 4, 1940 The Chief of Police in Berlin announces that the purchase of food for and by Jews in Berlin has to take place between 4:00 and 5:00 p.m.

July 19, 1940 The Reich Postal Ministry refuses telephone service to Jews.

February 21, 1941 Plans to establish a special location for Jewish cultural assets are given over to the Reich Chamber of the Arts.

May 20, 1941 In light of the impending "Final Solution of the Jewish Question" the Reich Security Police acts to prevent the emigration of German Jews from Belgium and France to other countries.

June 26, 1941 The Head of the Nazi Party Chancellery decrees that Jews may no longer receive additional ration cards for soap and shaving cream.

July 31, 1941 In accordance with the Hitler's edict of 1.24.39, Hermann Göring asks Security Police Chief Reinhard Heydrich to make all necessary preparations "for the complete solution of the Jewish question in the European territory under German control.

August 2,1941 President of the Reich Chamber of Literature bars Jews from all public libraries.

September 1941 The Head of the Nazi Party Chancellery orders that a repetition of the "Night of Broken Glass" should be avoided. It is below the dignity of the Nan movement, he announces, for its members to molest individual Jews.

September 1, 1941 Starting on September 25 1943, Jews older than 6 years of age are forbidden to appear in public without displaying the "Jewish Star" on their clothing.

September 18, 1941 The Reich Transportation Ministry decrees that Jews must receive police permission to leave their home towns or to use public transportation.

October 10, 1941 Field Marshal von Reichenau of the Army High Command announces that the goal of the German invasion of the Soviet Union "is the complete crushing of its means of power and the extermination of Asiatic influence in the European cultural region...Therefore the soldier must have full understanding for the necessity of a severe but just atonement on Jewish sub-humanity.

October 23, 1941 The Security Police forbid the emigration of Jews for the duration of the war.

October 24, 1941 Germans blood who publicly display friendly relationships to Jews will be taken into Security Police custody or, in more serious cases, sent for three months to a concentration camp.

October 24, 1941 The Chief of Police orders the deportation of 50,000 Jews from Germany, Austria and Bohemia to ghettos in the occupied East (Riga, Lodz, Kovno, and Minsk).

November, 13, 1941 The Security Police orders the confiscation of all typewriters, adding machines, duplicating machines, bicycles, cameras, and binoculars owned by Jews.

November 22, 1941 Jews may no longer receive compensation for personal injuries. This regulation does not pertain to Jews living in a mixed marriage.

December 12, 1941 Jews wearing the "Jewish Star" are forbidden to use public pay telephones.

February 14, 1942 The Head of the Nazi Party Chancellery orders that all bakeries and pasty shops must post signs saying that pastries may not be given away to Jews and Poles.

March 13, 1942 Jews must mark the entrance doors to their apartments with a black "Jewish Star."

March 14, 1942 According to the Nazi Party Jews are needed for work in the armaments industry.

March 16, 1942 The Dresdin *Gestapo* forbids Jews from buying flowers.

April 5, 1942 Local police chiefs, county heads, and mayors in the lower Rhine valley region are asked not to register the deportation of Jews, but simply to record them as "moved- address unknown" or "emigrated."

May 10, 1942 The *Gestapo* in Koblenz forbids romantic and sexual relations between male Jewish *Mischlinge* and German women.

May 13, 1942 The Mayor of Berlin orders that, for the purposes of allocating food ration cards, Gypsies are to be treated exactly as Jews.

May 17, 1942 The Reich Work Ministry decrees that regulations for the protection of pregnant and nursing mothers do not apply to Jews.

May 19, 1942 The Head of the Nazi Party Chancellery announces that Gypsies are to be treated as Jews in matters pertaining to labor and taxes.

June 9, 1942 Jews must surrender all dispensable clothing.

June 22, 1942 Jews may no longer receive food ration stamps for eggs.

August 24, 1942 Reich Association of Jews in the Rhineland forbids Jews to perform religious services during the Jewish High Holidays.

September 1, 1942 The estate of deceased concentration camp inmates is to be collected by the German government.

September 24, 1942 The Military High Command denies consent to marriages between soldiers and German women who had previously been married to Jews.

November 1942 SS-Chief Heinrich Himmler orders that all Jews in concentration camps within Germany property must be transferred to the concentration camps at Auschwitz and Majdanek in occupied Poland.

December 1942 On behalf of the German government, the Economic Ministry for the state of Württemberg orders the confiscation of all metal from Jewish cemeteries (including graves, fences, and gates).

February 26, 1943 Female German savants and ladies may no longer be employed in Jewish households or the households of persons of mixed German-Jewish blood.

April 29, 1943 The Head of Reich News Agency asks that the news media discuss the Jewish question continuously and without interruption.

July 11, 1943 The Head of the Nazi Party Chancellery forbids all public discussions of the "Final Solution."

January 27, 2944 The Security Police orders that all Jews who are subjects of Argentina must be deported under guard to Bergen-Belsen.

November 25, 1944 Copies of certificates of death for Jews are to be forwarded to the tax authorities.

February 16, 1945 The Reich Education Ministry orders the destruction of files which record anti-Jewish activities of the Nazi state, to prevent them from falling into enemy hands.

4. Lawful Barbarism (Appendix 2) - Bazyler

Lawful Barbarism (Appendix 2) – Bazyler, Legal Rights - Gone Wrong, Role of Lawyers and Judges in the Holocaust, Lawful Barbarism, Professor Michael J. Bazyler

Question: What can be said about the marriage of a half-Aryan with a girl who has one Aryan parent, but whose Aryan mother converted to Judaism so that the girl was raised as a Jew? What can be said, further, about the children of this marriage?

Answer: The girl, actually half-Aryan, is not a Mischling, but is without any doubt regarded as Jewish in the sense of the law because she belonged to the Jewish religious community on the deadline date, i.e., 15th September 1935; subsequent conversion does not alter this status in any way. The husband - a first degree Mischling is likewise regarded as a Jew since he married a statutory Jew. The children of this marriage are in any case regarded as Jews since they have three Jewish grandparents (two by race, one by religion). This would not have been different if the mother had left the Jewish community before the deadline. She herself would have been a Mischling, but the children would still have had three Jewish grandparents. In other words, it is quite possible that children who are regarded as Jews may result from a marriage in which both partners are half-Aryan.

Question: A man has two Jewish grandparents, one Aryan grandmother and a half-Aryan grandfather; the latter was born Jewish and became Christian only later. Is this 62 percent Jewish person a Mischling or a Jew?

Answer: The man is Jew according to the Nuremberg Laws because of the one grandparent who was of the Jewish religion, this grandparent is assumed to have been a full Jew and this assumption cannot be contested. So this 62 percent Jew has three full Jewish grandparents. On the other hand, if the half-Aryan grandfather had been Christian by birth, he would not have been a full Jew and would not have counted at all for this calculation; his grandson would have been a Mischling of the First Degree.

5. Harry Reicher - Forward 9-21-05

The Day Evil Became the Rule of Law, Forward, September 23, 2005, Harry Reicher, a member of the United States Holocaust Memorial Council, teaches law and the Holocaust at the University of Pennsylvania Law School.

Seventy years ago this month, Hermann Göring stood up in front of a special Reichstag session in Nuremburg and read out the Law for the Protection of German Blood and Honor. The decree was one of what came to be known as the Nuremberg laws, which peremptorily and ruthlessly wrought fundamental changes to the place of Jews in German society and formed an important step on the way to the Holocaust.

Under the Nazis, law was debased beyond recognition. It became a tool of hatred and viciousness - the very antithesis of everything normally connoted by the notion of law: justice, goodness, fairness, due process, protection of the individual against the excesses of government, even morality.

Seven decades after the enactment of the Nuremburg laws, it is sobering to recall that legislation was exploited, side by side with force, to propel the German genocide machine.

The Law for the Protection of German Blood and Honor sought to effect a strict separation between Jews and Aryans by outlawing marriages between them, prohibiting extramarital relations and the employment by Jews of female Germans who are of childbearing age. At the same time, the Reich Citizenship Law stripped Jews of the right to citizenship and, with it, all the protections and political rights that accompany citizenship in a society -including the right to vote.

The legal schema formed by the Nuremberg laws was completed by the first ordinance to them, of November 14, 1935. The ordinance defined a Jew. The fulcrum around which the legal system revolved was constituted. A Jew was, first and foremost, someone who was descended from at least three grandparents who belonged to the Jewish religious community. Being dealt with in a definitional ordinance of this magnitude delivered a massive psychological blow to the Jewish community, by defining them legally to be separate and inferior. All subsequent legislation dealing with Jews harked back to this definition.

The Nuremberg laws arose directly out of the two limbs to the Nazi racial ideology, so far as Jews were concerned. The primary obsession was with racial purity, and Jews were seen as the worst polluters of Aryan blood. Thus any contact that could lead to such pollution was outlawed. In addition, Jews were regarded as diabolically clever outsiders who insinuate themselves into a society, identify and take over the key levers of control and then steer the society toward Bolshevism. For that reason, their influence in society had to be extirpated, beginning with the fruits of citizenship.

The Nazis went to extraordinary lengths to "legalize" their massive assault on Jews. By legislative means - among others, of course - Nazi Germany discriminated against, ostracized and dehumanized the Jews. In the 12-year period of Nazi rule, something of the order of 2,000 laws was directed solely, specifically and directly at the Jews. The subjects covered by those laws were breathtaking: They ranged from depriving Jews of the right to work and earn a living, expropriating their property and throwing them out of the educational system, to absurd minutiae such as the ban on buying milk from a cow owned by a Jew.

In all this, the Nuremberg laws stood at the apex, as the implementation of the core of the regime's ideology. The lessons to be learned from the Nazis' ability to legislate evil resonate into the 21st century.

First, law is inherently neutral. Used with wisdom and compassion, it can accomplish the greatest good. But if a legal system falls into the wrong hands, it can become the instrument of the greatest barbarities.

Second, constitutional separation of powers is important. The Nazis were able to legislate with impunity because there was no institution in the governmental framework to scrutinize what they were doing. The führer principle by which all legislative, executive and judicial power was aggregated in a small number of hands - and ultimately in one set of hands, Adolf Hitler's - was the very antithesis of American-style separation of powers, with its built-in system of checks and balances. The strongest guarantee of individual freedoms is ultimately a diffusion of power.

Third, within the separation of powers, the there is a need for an independent judiciary. It is imperative that courts are capable of measuring legislative action against an objective constitutional standard and, if warranted, being prepared to tell the government that it has gone too far.

Fourth, there is the fragility of democracy itself. Hitler was elected lawfully and then proceeded to destroy the very system that brought him to power, using legislation as part of that process. Can the need for vigilance be more urgently underscored?

And lastly, the plans and the threats of despots and would-be despots must be believed, for only then is there a chance that preventative action will be taken. The Nazis made no secret of their plans. From the intention to work within the system in order to come to power so that they could overturn the system itself, to the use of poison gas to kill Jews, it was all there in explicit terms.

If one had been the legal counsel to the Nazi Party when it came to power in 1933, and had been given the task of preparing a legislative program to implement the party's underlying ideology, a review of "Mein Kampf" would have yielded the very sort of legislation that was promulgated in the following years. That is why the Nuremberg laws were, in a sick, perverse way, so logical.

6. The Big Book of Jewish Humor

The Big Book of Jewish Humor, page 193:

The German authorities knew that some Jews, desperate for survival, were attempting to escape deportation and death by posing as Christians. To put a stop to this practice, squads of SS troopers converged on churches throughout that sick nation. One such group entered a Berlin Evangelical Church while the services were in progress.

"I want to make an announcement to your congregation," said the squad leader.

The minister could only shrug helplessly.

"Fellow Germans," began the Nazi, "I am here in the interests of racial purity. We have tolerated the inferior race for far too long, and now the time has come when we must spew them out from our midst."

The Nazi glared at the congregation. "All those whose mothers and fathers were both Jews are ordered to line up outside this church-at once!"

A pitiful few rose from their seats and were hustled outside.

"And now, all those whose fathers were Jews are to get outside!"

A few more white-faced people rose and left.

"Finally, all those whose mothers were Jewish, get out!"

The minister took a figurine of Jesus Christ from its niche near the pulpit. "Allow me the honor, dear Lord, of escorting you to the door!"

7. Segregation laws in the United States as a model for Nazi race laws

The Nazis received much of their inspiration for their anti-Jewish race laws from the segregation laws in the United States promulgated after the Civil War in the post-Reconstruction era. For discussion of these laws see:

http://www.jimcrowhistory.org/history/creating2.htm (essay discussing history of "Jim Crow" laws in the United States)

http://www.ags.uci.edu/~skaufman/teaching/win2001ch4.htm (Brief Timeline of the American Civil Rights Movement (1954 – 1965))

http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=347&invol=483 (Brown v. Board of Education opinion)

http://www.vcdh.virginia.edu/solguide/VUS08/essay08c.html (essay entitled “Post Reconstruction through 1920)

8. Historically, Laws Bend in Times of War, Rehnquist Says

Los Angeles Times, June 15, 2002, Historically, Laws Bend in Time of War, *Rehnquist Says Courts: Chief justice contends judges are inclined to back the government in crises. Lincoln's suspension of habeas corpus is cited,* DAVID G. SAVAGE/ TIMES STAFF WRITER

WASHINGTON -- Chief Justice William H. Rehnquist, reviewing the history of civil liberties during wartime, said Friday that the courts are inclined to bend the law in the government's favor during a time of hostilities.

"One is reminded of the Latin maxim, inter arma silent leges. In time of war, the laws are silent," Rehnquist said in a speech to federal judges meeting in Williamsburg, Va.

He cited as examples President Lincoln's suspension of the right to habeas corpus during the Civil War and the Supreme Court's willingness to uphold the internment of Japanese Americans and the secret military trial of eight Nazi saboteurs during World War II.

After the Civil War, the Supreme Court unanimously overruled the Union's use of a military trial to condemn several Confederate sympathizers in Indiana. And Congress later apologized for the Japanese internment, but long after the war was over.

"These cases suggest that, while the laws are surely not silent in time of war, courts may interpret them differently then than in time of peace," Rehnquist said.

He stressed he was offering "only a historical perspective," not a prediction on how the high court will handle civil liberties complaints that arise from the Bush administration's war on terrorism, which has not formally been declared.

Nonetheless, the chief justice has made it clear he believes it is unrealistic to expect judges to boldly challenge the government's action at a time when a threat to the nation's security is real.

This is not a new topic for Rehnquist. A history buff, he wrote a 1998 book on civil liberties in wartime, titled "All the Laws but One."

He recounted the infringements on civil liberties during the Civil War and the two world wars, and concluded that the nation's respect for civil liberties has grown steadily. Still, it is true that the demands of war have outweighed the commitment to civil liberties, at least while the conflict is underway, he wrote.

On Friday, Rehnquist cited Hawaii's imposition of martial law after the attack on Pearl Harbor. Even though the bars and restaurants reopened shortly afterward, the civilian courts remained closed by military order through most of the war, he said.

Lloyd Duncan, a civilian shipyard worker, was arrested and tried before a military court after getting into a fight with two guards at the Pearl Harbor base. Harry White, a stockbroker, was also convicted in a military court for embezzling funds from a client.

Both men filed writs of habeas corpus challenging their convictions. The Supreme Court took up their appeals, and in the case of Duncan vs. Kahanamoku, ruled that Hawaii's military trials for civilians were unconstitutional.

"The good news for the defendants, and perhaps for the people of Hawaii, was that martial law was illegal there at the time these defendants were tried in 1943," Rehnquist said. "The bad news was that they did not find out about it until February 1946, a half year after the end of the war with Japan."

A lawyer for Jose Padilla, the accused "dirty" bomb plotter, is expected to file a writ of habeas corpus challenging his detention in a military brig in Charleston, S.C.

The writ claims that Padilla, a U.S. citizen, is being held unconstitutionally, and it asks a federal judge to grant the writ and release the detainee.

Such a writ can be acted upon immediately by a judge. If the writ is rejected, lawyers for Padilla could send an appeal up through the court system. Similarly, if the writ is granted, Bush administration lawyers would appeal immediately.

9. Legal Test Was Seen as Hurdle to Spying: Civil Rights vs. National Security

http://www.latimes.com/news/printedition/la-na-spy20dec20,1,2209993.story

NEWS ANALYSIS

Legal Test Was Seen as Hurdle to Spying

Some say the court's tougher standard of 'probable cause' led to the surveillance order.

By Richard B. Schmitt and David G. Savage
Times Staff Writers

December 20, 2005

WASHINGTON — Since Sept. 11, 2001, an obscure but powerful tribunal — the Foreign Intelligence Surveillance Court — has been a solid ally of the Bush administration, approving hundreds of requests allowing government agents to monitor

the conversations and communications of suspected terrorists.

So why did the administration go around the court in devising its most secret surveillance program?

Top Bush administration officials said Monday that a controversial domestic eavesdropping program they ordered up after Sept. 11 without the court's permission reflected the "inefficiencies" of going to a judge and the need for a more "agile" approach to detecting and preventing terrorist attacks.

But they also indicated that they had a more fundamental concern: the tougher legal standard that must be met to satisfy the court. The 1978 law creating the secret tribunal, the Foreign Intelligence Surveillance Act, authorizes intelligence gathering in cases in which the government can establish "probable cause" that the target is working for a "foreign power" or is involved in terrorism.

In briefing reporters Monday, Atty. Gen. Alberto R. Gonzales said that President Bush's 2002 order allowed for surveillance in cases in which officials had "a reasonable basis" to conclude that one of the parties to the communication had terrorist links. Those judgments were made not by a court, as the law provides, but by shift supervisors at the National Security Agency.

Some experts said that easier-to-satisfy "reasonable basis" standard probably was a key reason for the administration's decision. "It is certainly different than probable cause," said Michael J. Woods, a Washington lawyer and former head of the national security law unit at the FBI. "That, in my mind, is a much more likely reason why they maintained this" surveillance program.

The revelation came on a day when the administration stepped up its defense of the secret spying program amid growing congressional and public concern. The plan, which surfaced in media reports last week, has allowed the government to monitor, without warrants, hundreds of people in the U.S. communicating with people overseas.

Although the program is relatively new, the justification put forth by the administration is a familiar one: that the powers of the president are broad and sweeping when it comes to waging war. The 1978 law established the Foreign Intelligence Surveillance Court as the sole judge of intelligence gathering in the U.S. But the administration said it was free to ignore the law: Officials cited the inherent power of the president under the Constitution. They also said that Congress had at least tacitly overridden the law when it authorized Bush to militarily engage the enemy after Sept. 11.

At the time, the country was still shaken by the terrorist attacks in New York and the Pentagon, and there was widespread agreement that the nation had to act to protect itself. It was in this context that Bush first ordered the surveillance.

But such assertions of presidential power are raising questions about whether there are

limits. "Where is the stopping point?" asked Carl Tobias, a law professor at the University of Richmond in Virginia.

Although officials have said the program has been effective in detecting and preventing attacks in the United States, they also acknowledged Monday that they had made some mistakes and listened in on people who turned out not to pose a threat. They declined to offer details.

"If this particular line of logic, this reasoning, that took us to this place proves to be inaccurate, we move off of it right away," said Lt. Gen. Michael V. Hayden, the former head of the NSA and now deputy director of national intelligence.

Hayden said that although "this is a more … aggressive program than would be traditionally available," he also believed it was "less intrusive" of privacy rights.

"It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose, is to detect and prevent," he said.

In a news conference Monday, Bush asserted that as commander in chief, he could bypass the 1978 law, citing a broad claim of executive power that has not been upheld by the Supreme Court.

"Do I have the legal authority to do this? …. The answer is absolutely," Bush said. "The legal authority is derived from the Constitution…. As president and commander in chief, I have the constitutional responsibility and constitutional authority to protect our country."

Gonzales said he had advised Bush that he had "an inherent authority as commander in chief" to order the spy agency to eavesdrop on suspicious phone calls, despite the legal requirement of a judicial warrant.

In the past, the Supreme Court has said the president's power as commander in chief gives him authority over the military and its battlefield operations, but not matters on the home front. In 1952, the court rejected President Truman's claim that he had the power to operate the nation's steel mills during the Korean War.

Last year, the high court rejected, 8 to 1, Bush's claim that he had the power as commander in chief to hold and detain Americans without a hearing, even if they were captured on foreign battlefields fighting for the enemy.

"We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens," Justice Sandra Day O'Connor said in the case of Hamdi vs. Rumsfeld. The Constitution "most assuredly envisions a role for all three branches [of government] when individual liberties are at stake," she said.

It is not known who the targets of the secret surveillance conducted by the National Security Agency were. The president described them as people in the United States "with known links to Al Qaeda and related terrorist organizations." Some of those targeted might have been U.S. citizens.

Bush and Gonzales also said Congress had authorized such extraordinary measures in the wake of the Sept. 11 attacks. The "Authorization for Use of Military Force" adopted by Congress said the president could "use all necessary and appropriate force" to capture those who planned the attacks and "to prevent any future acts of international terrorism against the United States." Several legal experts said this was a stronger justification for Bush's action.

"I think the authorization of use of military force is probably adequate as an authorization for surveillance," said Cass Sunstein, a University of Chicago law professor.

The Supreme Court also said last year this authorization was a legal basis for detaining Yaser Esam Hamdi, a U.S. citizen who was captured in Afghanistan. But the justices disagreed with the administration over its refusal to give him a hearing.

Democrats in Congress were not inclined to accept Bush's claim that the 4-year-old military authorization, combined with the president's commander-in-chief power, gave him the authority to secretly go around the law.

"I believe this interpretation of the Constitution is both incorrect and dangerous," Sen. Dianne Feinstein (D-Calif.) said.

In the fall of 2001, Democrats and Republicans on the Senate Judiciary Committee worked on the Patriot Act and debated giving the Bush administration more leeway to conduct surveillance on terrorism suspects. But the latest disclosures suggest that the administration didn't believe it needed permission and thought the president could go around the limits set by the law.

Sen. Russell D. Feingold (D-Wis.) rejected Bush's legal argument Monday as far-fetched. "The president had, I think, made up a law that we never passed."

10. The Torture Memos: Civil Rights vs. National Security

http://www.latimes.com/news/printedition/la-me-yoo16may16,1,2991859.story
Scholar Calmly Takes Heat for His Memos on Torture
By Maria L. La Ganga
Times Staff Writer

May 16, 2005

BERKELEY — John Yoo doesn't come across like a war criminal, though that's one of the more flamboyant charges leveled against the smooth young law professor from UC Berkeley's storied Boalt Hall.

With his even tones and calm demeanor, his natty suits and warm charm, the 37-year-old constitutional scholar is the embodiment of "reasonable," not the first person you'd expect to find at the heart of an international fight over terrorism, torture and the American way.

But while working for the Department of Justice after the Sept. 11 terrorist attacks, Yoo helped write a series of legal memos redefining torture and advising President Bush that the Geneva Convention does not apply to members of Al Qaeda and the Taliban.

Sen. Edward M. Kennedy (D-Mass.) demanded from the Senate floor last month that Yoo and other civilian officials be held accountable for their part in what he called the "torture scandal" over treatment of Iraqi detainees by American soldiers at Abu Ghraib prison in Iraq.

Legal scholar Scott Horton, president of the New York-based International League for Human Rights, called last month for Yoo and others to be investigated as war criminals for their part in drafting the memos.

And in a lengthy analysis to be published in the Columbia Law Review this fall, Jeremy Waldron, an author, scholar and Yoo's former colleague at the UC Berkeley School of Law, said that the "defense of torture" by Yoo and other prominent lawyers had caused "dishonor for our profession."

A year after the abuses at Abu Ghraib came to light, nearly a year after the torture memos were leaked, debate over how the U.S. government should treat its prisoners shows no sign of abating.

"If you read the history of philosophy from the Greeks to the present day, the question of when should we be willing to do something terrible in pursuit of some social good is always posed," said Martha Nussbaum, professor of philosophy and law at the University of Chicago. "It would surprise me very much that it *would* go away."

But as Yoo defends the memos in debates across the country, a measured messenger for some of the Bush administration's most controversial policies, he said he is surprised that "the issue has staying power."

Maybe, he said, it's because the fight against terrorism shows no sign of an end. Maybe it's because the government still does not know how best to battle the nation's new enemies.

"If [Democrat John F.] Kerry had won the presidency," Yoo said in a recent interview, "we'd still be trying to figure out what policies work against Al Qaeda and which ones to adopt."

The memos about the Geneva Convention and torture are probably the two most controversial documents Yoo worked on with a team of other lawyers when he was a deputy assistant attorney general with the Office of Legal Counsel from 2001 to 2003. The former bears Yoo's name; the latter, that of then-Assistant Atty. Gen. Jay S. Bybee, who now sits on the U.S. 9th Circuit Court of Appeals.

Some human rights advocates argue that the administration commissioned the memos to provide legal cover for increasingly coercive interrogation techniques used against suspected terrorists. Yoo vehemently denies such accusations. The administration has downplayed the memos' import and said that Bush never embraced the views of the lawyers who wrote them.

At the Council on Foreign Relations and West Point, at Columbia Law School and at his own leafy, liberal campus, Yoo argues that the world as America knew it ended on Sept. 11, 2001, and that the rules of war have changed because the enemy has changed.

"Al Qaeda as a non-state terror organization is not covered" by laws, such as the Geneva Convention, that are honored when the United States fights a bona fide state, Yoo argued earlier this month during a debate at Berkeley. Thus, "our leaders have the option to decide what system ought to apply."

The debate was a two-on-one bruising in front of an audience that politely applauded Yoo while cheering his detractors, an event in which a law student dressed as an Iraqi torture victim greeted spectators with a sign that read, "War criminal John Yoo facilitated torture: He belongs in a prison not a law school."

But a funny thing happened near the end of the forum. Tom Farer, dean of the Graduate School of International Studies at the University of Denver, was deep into a verbal salvo when he exhausted his allotted time but not his argument. Yoo gave up one of his own precious minutes so that Farer could continue pummeling him.

"John cedes a minute," Farer said with a smile before launching back into his attack. "John is a mensch."

Farer would find little argument, at least on that point. Yoo inspires deep loyalty in friends, mute collegiality in many fellow scholars ("You know, I'd really rather not talk about him") and an awkward mixture of kindness and dread in some of his most vocal critics.

And although Boalt students circulated a petition last year demanding that Yoo recant his positions or resign, he also has charmed many of his liberal pupils with a ready classroom wit. Others have been disappointed after signing up for one of his courses so they could hear what a fire-breathing conservative actually sounds like only to find a mild-mannered professor at the lectern, accessible and friendly.

"A lot of the concern is that people think he's dead wrong," said Ralph Steinhardt, professor of law and international affairs at George Washington University. "But you have to understand, from a personal standpoint, he's a nice guy, has a good sense of humor, dresses nicely and is as smart as the day is long."

Naomi Roht-Arriaza, a professor of law and international human rights at UC Hastings College of the Law, said she "substantively disagrees" with Yoo's analysis of the Geneva Convention.

She also disagrees with a memo that he co-wrote redefining torture and reinterpreting laws against it. The memo argued that interrogation methods qualify as physical torture only if they inflict pain "of an intensity akin to that which accompanies serious physical injury such as death or organ failure."

"The reason why it was so upsetting to many of us was that what was presented as mainstream opinion [in the memos] was very far from mainstream opinion," Roht-Arriaza said. On the other hand, Yoo "comes off as very soft-spoken and very reasonable…. No horn. No tail."

A Korean immigrant who came to this country with his parents when he was 3 months old, Yoo has been a prolific writer of journalism and scholarship since his undergraduate days on the Harvard Crimson. He is a regular contributor to the opinion pages of major newspapers, including the Los Angeles Times, New York Times and Wall Street Journal.

Yoo began teaching constitutional and international law at UC Berkeley in 1993. But he has spent many of the subsequent years bouncing back and forth between academia and government. Shortly after Yoo took the Berkeley job, Supreme Court Justice Clarence Thomas tapped him for a clerkship.

When his clerkship with Thomas ended, he headed to the U.S. Senate Committee on the Judiciary, where he served as general counsel and helped Sen. Orrin G. Hatch (R-Utah) with his speeches. Hatch describes Yoo as "a terrific human being." Yoo calls Hatch "a genuine softie."

Yoo completed a public service trifecta — working in all three branches of government — with a stint in the Office of Legal Counsel, part of the Department of Justice overseen by then-Atty. Gen. John Ashcroft, before returning to Boalt Hall last year.

It was there in the uncertain months after Sept. 11 that Yoo worked on the memos that transformed him from a rising star in conservative legal circles to a lightning rod for international controversy.

Studying law at Yale University, Yoo had specialized in "two areas that interested me and not others": war powers and the original understanding of the role of judges. "Part of the reason you pick ones like that when you're starting out is [that] they're not crowded with other scholars," Yoo said.

But those choices put him at the center of some of the major issues of the new millennium. Franklin Zimring, a fellow law professor at Boalt Hall, said, "At the moment, John's Washington career probably merits two footnotes in American history…. For those of my colleagues who voted for [Democrat George] McGovern, which of the two they'd consider most problematic would be hard to identify."

The first, Zimring said, was the 2000 presidential election stalemate. Shortly after the legal impasse began, Yoo wrote op-ed articles in favor of Supreme Court intervention. Yoo said that it would be a one-time action that would appropriately end a "bizarre" dilemma without "federalizing a whole area of life."

The second? The torture memos, which were reported for the first time in Newsweek last May, causing a fast and furious debate throughout the country, in the legal profession and on Yoo's campus.

In addition to the Boalt Hall petition, many law students and their family members wore armbands at graduation protesting Yoo's writings as deputy assistant attorney general. A month later, anti-Yoo demonstrators marched in downtown Berkeley.

Another campus petition came to his defense, charging that the furor over the memos was an assault on Yoo's academic freedom.

Yoo was asked to speak in February at UC Irvine as part of the Chancellor's Distinguished Fellow Series. Nearly 500 people signed a yet another petition demanding that Chancellor Ralph Cicerone withdraw his invitation and "stand up for justice and the rule of law in the United States and around the world."

A police escort whisked Yoo out of the Irvine engagement. Later that week, he was a no-show at a Berkeley debate on the memos because campus police had warned him of concerns about security.

"I'd never received a call from a police officer at Berkeley before," Yoo said. "I didn't want my speaking at an event to lead to anything unfortunate happening to someone."

Many legal scholars and human rights activists — along with Berkeley students — draw a straight line linking the memos and alleged prisoner abuses in Iraq and Afghanistan and at Guantanamo. Yoo argues that they do not understand how government really works.

"It's a stretch to say that a very limited, tightly held memo somehow translated into orders that soldiers on the ground violated human rights," Yoo said. "That's the difference between law and policy."

To his critics, such an argument is disingenuous, but Yoo continues to defend the memos because he feels "some sense of obligation to explain to the public why government reached some of the conclusions it did."

"No one goes into government wanting to address these kinds of questions," he said. "But we were attacked on Sept. 11 with devastating results. Our government has to think about these things in order to protect the country."

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Redefining torture after Sept. 11, 2001

John Yoo helped Justice Department attorneys write a series of legal opinions that came to be known as the torture memos. The opinions helped guide the Bush administration in its treatment of detainees. Some memos bear Yoo's name. Others were signed by his superiors. Some excerpts:

Sept. 25, 2001: "The president may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of Sept. 11."

Jan. 9, 2002: "We conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of Al Qaeda or Taliban prisoners."

Aug. 1, 2002: "Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure."

Aug. 1, 2002: "Finally, even if an interrogation method might violate Section 2340A [of Title 18 of the United States Code], necessity or self-defense could provide justifications that would eliminate any criminal liability."

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Source: "The Torture Papers: The Road to Abu Ghraib." edited by Karen J. Greenberg and Joshua L. Dratel

Los Angeles Times

Chapter 3: Prosecution of Nazi War Criminals After WWII

A. Pre-Nuremberg Precedent

1. Kellogg-Briand Pact 1928

http://www.yale.edu/lawweb/avalon/imt/kbpact.htm

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA. A PROCLAMATION. (Kellogg-Briand Pact)

WHEREAS a Treaty between the President of the United States Of America, the President of the German Reich, His Majesty the King of the Belgians, the President of the French Republic, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Poland, and the President of the Czechoslovak Republic, providing for the renunciation of war as an instrument of national policy, was concluded and signed by their respective Plenipotontiaries at Paris on the twenty-seventh day of August, one thousand nine hundred and twenty-eight, the original of which Treaty, being in the English and the French languages, is word for word as follows:

THE PRESIDENT OF THE GERMAN REICH, THE PRESIDENT OF THE UNITED STATES OF AMERICA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF POLAND THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC,

Deeply sensible of their solemn duty to promote the welfare of mankind;

Persuaded that the time has, come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its ts national interests by resort to war a should be denied the benefits furnished by this Treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a Treaty and . . . have agreed upon the following articles:

ARTICLE I

The High Contracting Parties solemly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

. . . . .

2. Laws and Customs of War on Land (Hague IV); October 18, 1907

Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

. . . . .

SECTION III

MILITARY AUTHORITY OVER THE TERRITORY

OF THE HOSTILE STATE

Art. 42.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44.

A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Art. 45.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Art. 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Art. 47.

Pillage is formally forbidden.

• • •

Art. 50.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

. . .

Art. 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

. . .

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State . . . all kinds of munitions of war may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

. . .

Art. 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

3. Judgment in Case of Dithmar and Boldt; Hospital Ship: Llandovery Castle Case

JUDGMENT IN CASE OF LIEUTENANTS DITHMAR AND

BOLDT HOSPITAL SHIP "LLANDOVERY CASTLE"

Germany, Supreme Court of Leipzig, 1921.

16 American Journal of International Law 708 (1922).

Up to 1916 the steamer Llandovery Castle, had, according to the statements of the witnesses Chapman and Heather, been used for the transport of troops. In 'that year she was commissioned by the British Government to carry wounded and sick Canadian soldiers home to Canada from the European theatre of war. The vessel was suitably fitted out for the purpose and was provided with the distinguishing marks, which the Tenth Hague Convention of the 18th October, 1907 (relating to the application to naval warfare of the principles of the Geneva Convention) requires in the case of naval hospital ships. The name of the vessel was communicated to the enemy powers. From that time on she was exclusively employed-in the transport of sick and wounded. She never again carried troops, and never had taken munitions. * * *

[In] 1918, the Llandovery Castle was on her way back to England from Halifax, after having carried sick and wounded there. She had on board the crew consisting of 164 men, 80 officers and men of the Canadian Medical Corps, and 14 nurses, a total of 258 persons. There were no combatants on board, and, in particular, no American airmen. The vessel had not taken on board any munitions or other war material. * **

In the evening of 27th June, 1918, at about 9:30 the Llandovery Castle was sunk in the Atlantic Ocean, about 116 miles south-west of Fastnet (Ireland), by a torpedo from the German U-boat 86. Of those on board only 24 persons were saved, 234 having been drowned. The commander * * * was First-Lieutenant Patzig, who was subsequently promoted captain. His present whereabouts are unknown. The accused Dithmar was the first officer and the accused Boldt the second. Patzig recognized the character of the ship, which he had been pursuing for a long time, at the latest when she exhibited at dusk the lights prescribed for hospital ships by the Tenth Hague Convention, in accordance with international law, the German U-boats were forbidden to torpedo hospital ships. According both to the German and the British Governments' interpretation of the said Hague Convention, ships, which were used for the transport of military persons wounded and fallen ill in war on land, belonged to this category. * * * Patzig knew this and was aware that by torpedoing the Llandovery Castle he was acting against orders. But he was of the opinion, founded on various information (including some from official sources, the accuracy of which cannot be verified, and does not require to be verified in these proceedings), that on the enemy side, hospital ships were being used for transporting troops and combatants, as well as munitions. He, therefore, presumed that, contrary to international law, a similar use was being made of the Llandovery Castle. In particular, he seems to have expected (what grounds he had for this has not been made clear) that she had American airmen on board. Acting on this suspicion, he decided to torpedo the ship, in spite of his having been advised not to do so by the accused Dithmar and the witness Popitz. Both were with him in the conning tower, the accused Boldt being at the depth rudder.

The torpedo struck the Llandovery Castle amidship on the port side and damaged the ship to such an extent that she sank in about 10 minutes. There were 19 lifeboats on board. Each could take a maximum of 52 persons. Only two of them were smaller, and these could not take more than 23 persona. Some of the boats on the port side were destroyed by the explosion of the torpedo. A good number of undamaged boats were, however, successfully lowered. The favorable weather assisted life-saving operations.

* * *

After the sinking of the Llandovery Castle, there were still left three of her boats with people on board. Some time after the torpedoing, the U-boat came to the surface and approached the lifeboats, in order to ascertain by examination whether the Llandovery Castle had airmen and

munitions on board. * * *

* * *

After passing by the second time, the U-boat once more went away. The lifeboat, which had hoisted a sail in the meantime, endeavored to get away. But after a brief period, the occupants of the boat noticed firing from the U-boat. The first two shells passed over the lifeboat. Then firing took place in another direction; about 12 to 14 shots fell all told. The flash at the mouth of the gun and the flash of the exploding shells were noticed almost at the same time, so that, as the expert also assumes, the firing was at a very near target. After the firing had ceased, the occupants of the lifeboat saw nothing more of the U-boat.

The captain's boat cruised about for some 36 hours altogether. On the 29th June, in the morning, it was found by the English destroyer Lysander. The crew were taken on board and the boat left to its fate. During the 29th June, the commander of the English Fleet caused a search to be made for the other lifeboats of the Llandovery Castle.

* * *

The prosecution assumes that the firing of the U-boat was directed against the lifeboats of the Llandovery Castle. The court has arrived at the same conclusion as the result of the evidence given at this time.

* * *

In this connection we must refer to the opinion of the actual witnesses, both English and German. * * *

If finally the question is asked - What can have induced Patzig to sink the lifeboats, the answer is to be found in the previous torpedoing of the Llandovery Castle. Patzig wished to keep this quiet and to prevent any news of it reaching England. * * * He may have argued to himself that, if the sinking of the ship became known (the legality of which he, in view of the fruitlessness of his endeavors to prove misuse of the ship, was not able to establish) great difficulties would be caused to the German Government in their relations with other powers. Irregular torpedoings had already brought the German Government several times into complications with other states and there was the possibility that this fresh case might still further prejudice the international position of Germany. This might bring powers, that were still neutral, into the field against her. Patzig may have wished to prevent this, by wiping out all traces of his action. The false entries in the log-book and the chart, which have already been mentioned, were intended, having regard to his position in the service, to achieve this object. This illusion could be, however, of but short duration, if the passengers in the lifeboats, some of whom had been on board the U-boat, and who, therefore could fully describe it, were allowed to get home. It was, therefore, necessary to get rid of them, if Patzig did not wish the sinking of the Llandovery Castle to be known. [There] the explanation of the unholy decision. * * *

* * * The court has decided that the lifeboats of the Llandovery Castle were fired on in order to sink them. This is the only conclusion possible, [given statements] by the witnesses. It is only on this basis that the behavior of Patzig and of the accused men can be explained.

The court finds that it is beyond all doubt that, even though no witness had direct observation of the effect of the fire, Patzig attained his object so far two of the lifeboats were concerned. * * *

For the firing on the lifeboats only those persons can be held responsible, who at the time were on the deck of the U-boat; namely Patzig, the two accused and the chief boatswain's mate Meissner. Patzig gave the decisive order, which was carried out without demur in virtue of his position as commander. It is possible that he asked the opinion of the two accused beforehand, though of this there is no evidence. As Meissner was the gunlayer and remained on deck by special orders, it may be assumed with certainty that he manned the after gun which was fired. In the opinion of the naval expert, he was able to act without assistance. According to this view, owing to the nearness of the objects under

fire, there was no need for the fire to be directed by an artillery officer, such as the accused Dithmar. The only technical explanation, which both the accused have given and which fits in with the facts, is that they themselves did not fire. Under the circumstances this is quite credible. They confined themselves to making observations while the firing was going on. The naval expert also assumes that they kept a look-out. Such a look-out must have brought the lifeboats, which were being fired on, within their view. By reporting their position and the varying distances of the lifeboats and such like, the accused assisted in the firing on the lifeboats, and this, quite apart from the fact that their observations saved the U-boat from danger from any other quarter, and that they thereby enabled Patzig to do what he intended as regards the lifeboats. The statement of the accused Boldt that "so far as he took part in what happened, he acted in accordance with his orders" has reference to the question whether the accused took part in the firing on the lifeboats. He does not appear to admit any participation. But the two accused must be held guilty for the destruction of the lifeboats.

With regard to the question of the guilt of the accused, no importance is to be attached to the statements put forward by the defence, that the enemies of Germany were making improper use of hospital ships for military purposes, and that they had repeatedly fired on German lifeboats and shipwrecked people. * * * [T]hroughtout the German fleet it was a matter of general belief that improper use of hospital ships was made by the enemy. It must, therefore, be assumed for the benefit of the accused, that they also held this belief. Whether this belief was founded on fact or not, is of less importance as affecting the case before the court, than the established fact that the Llandovery Castle at the time was not carrying any cargo or troops prohibited under clause 10 of the Hague Convention.

The act of Patzig is homicide, according to Penal Code ¶ 212. By sinking the lifeboats he purposely killed the people who were in them. * * *

* * *

The firing on the boats was an offence against the law of nations. In war on land the killing of unarmed enemies in not allowed (compare the Hague regulations as to war on land, para. 23(c)), similarly in war at sea, the killing of shipwrecked people, who have taken refuge in lifeboats, is forbidden. It is certainly possible to imagine exceptions to this rule, as, for example, if the inmates of the lifeboats take part in the fight. But there was no such state of affairs in the present case, as Patzig and the accused persons were well aware, when they cruised around and examined the boats.

Any violation of law of nations in warfare is, as the Senate has already pointed out, a punishable offence, so far as in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the State that makes war, (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of international law must be well-known to the doer, apart from acts of carelessness, in which careless ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material. This consideration, however, cannot be applied to the case at

present before the court. The rule of international law, which is here involved, is simple and is universally known. No possible doubt can exist with regard to the question of its applicability. The court must in this instance affirm Patzig's guilt of killing contrary to the international law.

The two accused knowingly assisted Patzig in this killing, by the very fact of their having accorded him their support in the manner, which has already been set out. It is not proved that they were in agreement with his intentions. The decision rested with Patzig as the commander. The others who took part in this deed carried out his orders. It must be accepted that the deed was carried out on his responsibility, the accused only wishing to support him. * * * They are, therefore, only liable to punishment as accessories.

Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to number 2, however, the subordinate obeying such an order is liable to punishment, if it were known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for * * * it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing else but a breach of the law. As naval officers by profession they were well aware, as the naval expert Saalwächter has strikingly stated, that one is not legally authorized to kill defenceless people. They well knew that this was the case here. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carryout a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished.

* * *

The defence finally points out that the accused must have considered that Patzig would have enforced his orders, weapon in hand, if they had not obeyed them. This possibility is rejected. If Patzig had been faced by refusal on the part of his subordinates, he would have been obliged to desist from his purpose, as then it would have been impossible for him to attain his object, namely, the concealment of the torpedoing of the Llandovery Castle. This was also quite well-known to the accused, who had witnessed the affair. From the point of view of necessity (para. 52 of the Penal Code), they can thus not claim to be acquitted.

In estimating the punishment, it has, in the first place, to be borne in mind that the principal guilt rest with Commander Patzig, under whose orders the accused acted. They should certainly have refused to obey the order. This would have required a specially high degree of resolution. A refusal to obey the commander on a submarine would have been something so unusual, that it is humanly possible to understand that the accused

could not bring themselves to disobey. That certainly does not make them innocent, as has been stated above. They had acquired the habit of obedience to military authority and could not rid themselves of it. This justifies the recognition of mitigating circumstances. In determining the punishment, a sever sentence must, however, be passed. * * *

* * *

B. Nuremberg Trial – Introduction and Documents

1. How the Nazi Trials Helped Spawn Modern Justice

How the Nazi Trials Helped Spawn Modern Justice

SPIEGEL (Germany) ONLINE - November 18, 2005

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60 Years after Nuremberg

How the Nazi Trials Helped Spawn Modern Justice

The idea of achieving peace through justice rose out of the ruins of Germany 60 years ago and made its way around the world. In Nuremberg, the Nazi elite were made to answer for their crimes. The trials also ushered in an era of modern international law.

The new center of international criminal law stands on the outskirts of The Hague, already visible as one approaches from the motorway-- a striped cube, slammed down between white office blocks. It's the central nervous system of the International Criminal Court, the world's court. The court, which is soundproofed, bombproofed and everything else imaginable, is currently preparing for its first trial -- the prosecution of the leaders responsible for the bloody mass slaughter that came to characterize nearly 20 years of civil war in Uganda.

It took 60 years for international justice to come this far. The root idea of bringing statesmen and military leaders before an international court of law when they infringe the basic rules of civilized life had its origins in the Nuremberg trials. The inaugural trial of the leading, surviving perpetrators of Nazi terror commenced on Nov. 20th, 1945.

Indeed, Nov. 20 is the anniversary of an idea which traversed the world. The name "Nuremberg" is synonymous with both. Nuremberg played host to the Reich's political conventions -- a government that brought death, ruin and barbarism to Europe. But it was also in Nuremberg that the victorious Allied Forces dealt with the defeated power. In the

history of man, their bold actions were wholly without precedent. There was no bloodbath, no peace treaty -- instead, there was a trial -- call it peace through justice.

The Allies' litigation against 23 "major war criminals" -- including Reichsmarshall Hermann Göring, Foreign Minister Joachim von Ribbentrop and Hitler's secretary Martin Bormann -- lasted for over a year and culminated in 12 death sentences. Göring avoided his scheduled execution by swallowing a cyanide pill, Bormann disappeared without trace and 10 others were hanged. The executioners scattered their ashes disposed of in the Isar River in Munich. No trace should remain of the Nazi regime.

Justice, a living memorial to peace

Peace followed. But was there justice as well? It was the "justice of the victors" the German governments argued -- and to this day they still have not recognized the judgment as legally binding. But now, with war back on the agenda -- pushed back to the center of the political debate following the genocide in the Balkans, in Africa and Latin America -- many people have gone back to read the transcripts of the Nuremberg trials all over again. Peace through justice could just be the saving grace in an age in which wars, civil wars and terrorism have become so difficult to tell apart. In addition to charging and punishing the war of aggression as "greatest of all crimes," the prosecutors at Nuremberg also branded the terror of the war of extermination "a crime against humanity," the first time the phrase was used.

Sixty years on, "Nuremberg" has taken on the significance of a memorial for many. Every year, 20,000 visitors pack into historic courtroom No. 600 in Nuremberg's Palace of Justice. United States citizens are no longer active as attorneys here -- instead they serve as tour guides.

It's a pretty colorful place. Big letters behind the magistrates' table in Room 600 boast of the "Texas Bar," which offers "Beer tonight" for half a deutsche mark. When the United States' chief prosecutor Robert H. Jackson flew into Nuremberg for the first time, a few weeks before the trial was due to start, on the way to undertaking the most important task of his life, he found that the GIs had made themselves right at home in the Palace of Justice. Jackson's team had architects and construction experts flown in swiftly from Washington to transform the shabby old building into a space with a sense of history in just a few weeks.

The chamber was enlarged and windows were cut into the walls to enable camera teams to film the proceedings. Red and yellow lamps were installed at every seat for the benefit of the interpreters: red meant "stop", yellow indicated "please speak more slowly." An alarm system was wired into the media chamber. If it buzzed once, the proceedings were beginning; three buzzes meant "especially noteworthy statement." The Americans were real professionals. The victorious Allies may have decided at the London conference that the prosecution was the joint responsibility of the USA, Russia, England and France, but only the Americans had the money to furnish the Nuremberg world theater. And they had Jackson.

The one-time attorney general in Washington was an ambitious man and an experienced expert in international law. Thanks to his work, the Nuremberg Trial would form the foundation for modern, international law. Before the Nuremberg trials, prosecuting what by then had become known as "crimes against humanity," had been left to the discretion of sovereign states and not the international community.

A "crime of aggression"

Despite considerable opposition, particularly from the Russians, the eloquent Washington lawyer succeeded in charging the Nuremberg Nazis of having committed a "Crime of Aggression."

Shortly before 10 a.m. on Nov. 20, 1945, the elevator from the cellar began spitting out the defendants, in groups of three, into Room 600. A meticulously prepared international court of law awaited them. "Crime of Aggression," Chief Prosecutor Jackson bellowed at the defendant, blinded by bright spotlights. "Not guilty," Göring shouted back. Two hundred fifty journalists scribbled in their notepads.

The four judges from the four prosecuting nations were enthroned on a podium with their four deputies. The Russian jurists wore chocolate brown uniforms, the Americans, English and French donned black robes. The heavy, gray satin curtains were drawn to keep out the November sky of the broken town and the room was furnished with dark wood panels. As the world watched, Jackson described the atmosphere to his team as "melancholy grandeur."

His speech would be one of the most important in history. Tears were shed in the courtroom. And the following morning, Jackson's words would appear in newspapers all over the world.

"The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."

Jackson read out reports of the raging of the SS in the conquered East. In one example, he described how 3,000 Jews had to be shot because "they had to be considered as the carriers of Bolshevik propaganda". He quoted from the chilling report by SS General Jürgen Stroop on the destruction of the Warsaw Ghetto -- "Countless numbers of Jews were liquidated in sewers and bunkers through blasting..." He read from a report which the defendant Alfred Rosenberg, Nazi ideologist and Reichsminister in the occupied territories, sent to Chief of Staff of the German High Command, the accused Wilhelm Keitel, stating that over 3 million Russians had perished: "A large number of them have

starved, or died, because of the hazards of the weather." Fenced in with barbed wire and left without food, they had frozen to death.

240 witnesses, 300,000 statements

Then came the "most terrible crime of all," the war of aggression. Jackson quoted Hitler's speech from May 23, 1939: "It is a question of expanding our living space in the East. There is therefore no question of sparing Poland." Hitler had made it patently clear to many of the defendants that, for propaganda purposes, he would give provocation for war. "It will make no difference," he announced, "whether this reason will sound convincing or not. After all, the victor will not be asked whether he spoke the truth or not. The stronger is always right. We have to proceed brutally."

Jackson trembled: "Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance." Putting the rule to the test will take up 218 days in the courtroom, calling on 240 witnesses, 300,000 sworn declarations and 2,630 documents.

The executions took place before a small gathering in the prison gymnasium behind the courthouse in the early hours of the morning of Oct. 16, 1946. There was no public audience, just a handful of official witnesses including the governor of Bavarian, Wilhelm Högner. With their hands tied behind their backs with black shoelaces, the delinquents' heads were covered with black hoods, the nooses pulled around their necks.

The aroma of coffee, whisky and Virginia cigarettes lingered in the air. Very little was said.

2. Charter of the International Military Tribunal at Nuremberg

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL (at Nuremberg)

Article 1.

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

. . .

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6.

The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9.

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10.

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11.

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12.

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

. . .

VI. JUDGMENT AND SENTENCE

. . .

Article 27.

The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28.

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29.

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly

to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

3. Justice Jackson's Report to the President on Atrocities and War Crimes; June 7, 1945

MY DEAR MR. PRESIDENT:

I have the honor to report accomplishments during the month since you named me as Chief of Counsel for the United States in prosecuting the principal Axis War Criminals.

The time, I think, has come when it is appropriate to outline the basic features of the plan of prosecution on which we are tentatively proceeding in preparing the case of the United States.

1. The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession. What shall we do with them? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and the horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.

3. Whom will we accuse and put to their defense? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals. We also propose to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors. It is not, of course, suggested that a person should be judged a criminal merely because he voted for certain candidates or maintained political affiliations in the sense that we in America support political parties. The organizations which we will accuse have no resemblance to our political parties. Organizations such as the Gestapo and the S.S. were direct action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes.

In examining the accused organizations in the trial, it is our proposal to demonstrate their declared and covert objectives, methods of recruitment, structure, lines of responsibility, and methods of effectuating their programs. In this trial, important representative members will be allowed to defend their organizations as well as themselves. The best practicable notice will be given, that named organizations stand accused and that any

member is privileged to appear and join in their defense. If in the main trial an organization is found to be criminal, the second stage will be to identify and try before regular military tribunals individual members not already personally convicted in the principal case. Findings in the main trial that an organization is criminal in nature will be conclusive in any subsequent proceedings against individual members. The individual member will thereafter be allowed to plead only personal defenses or extenuating circumstances, such as that he joined under duress, and as to those defenses he should have the burden of proof. There is nothing novel in the idea that one may lose a part of or all his defense if he fails to assert it in an appointed forum at an earlier time. In United States wartime legislation, this principle has been utilized and sustained as consistent with our concept of due process of law.

4. Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. We must not forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.

5. What specifically are the crimes with which these individuals and organizations should be charged, and what marks their conduct as criminal?

There is, of course, real danger that trials of this character will become enmeshed in voluminous particulars of wrongs committed by individual Germans throughout the course of the war, and in the multitude of doctrinal disputes which are part of a lawyer's paraphernalia. We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power.

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. I think also that through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization. Before stating these offenses in legal terms and concepts, let me recall what it was that affronted the sense of justice of our people.

Early in the Nazi regime, people of this country came to look upon the Nazi Government as not constituting a legitimate state pursuing the legitimate objective of a member of the international community. They came to view the Nazis as a band of brigands, set on subverting within Germany every vestige of a rule of law which would entitle an aggregation of people to be looked upon collectively as a member of the family of nations. Our people were outraged by the oppressions, the cruelest forms of torture, the

large-scale murder, and the wholesale confiscation of property which initiated the Nazi regime within Germany. They witnessed persecution of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions, and the liquidation of all religious and moral influences. This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an international course of aggression and was with the evil intention, openly expressed by the Nazis, of capturing the form of the German state as an instrumentality for spreading their rule to other countries. Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the "laws of humanity and the dictates of the public conscience."

Once these international brigands, the top leaders of the Nazi party, the S.S. and the Gestapo, had firmly established themselves within Germany by terrorism and crime, they immediately set out on a course of international pillage. They bribed, debased, and incited to treason the citizens and subjects of other nations for the purpose of establishing their fifth columns of corruption and sabotage within those nations. They ignored the commonest obligations of one state respecting the internal affairs of another. They lightly made and promptly broke international engagements as a part of their settled policy to deceive, corrupt, and overwhelm. They made, and made only to violate, pledges respecting the demilitarized Rhineland, and Czechoslovakia, and Poland, and Russia. They did not hesitate to instigate the Japanese to treacherous attack on the United States. Our people saw in this succession of events the destruction of the minimum elements of trust which can hold the community of nations together in peace and progress. Then, in consummation of their plan, the Nazis swooped down upon the nations they had deceived and ruthlessly conquered them. They flagrantly violated the obligations which states, including their own, have undertaken by convention or tradition as a part of the rules of land warfare, and of the law of the sea. They wantonly destroyed cities like Rotterdam for no military purpose. They wiped out whole populations, as at Lidice, where no military purposes were to be served. They confiscated property of the Poles and gave it to party members. They transported in labor battalions great sectors of the civilian populations of the conquered countries. They refused the ordinary protections of law to the populations which they enslaved. The feeling of outrage grew in this country, and it became more and more felt that these were crimes committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of a state.

I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.

In arranging these trials we must also bear in mind the aspirations with which our people have faced the sacrifices of war. After we entered the war, and as we expended our men and our wealth to stamp out these wrongs, it was the universal feeling of our people that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be held personally responsible and would be personally punished. Our people have been waiting for these trials in the spirit of Woodrow Wilson, who hoped to "give to international law the kind of vitality which it can only have if it is a real expression of our moral judgment."

Against this background it may be useful to restate in more technical lawyer's terms the legal charges against the top Nazi leaders and those voluntary associations such as the S.S. and Gestapo which clustered about them and were ever the prime instrumentalities, first, in capturing the German state, and then, in directing the German state to its spoliations against the rest of the world.

(a) Atrocities and offenses against persons or property constituting violations of International Law, including the laws, rules, and customs of land and naval warfare. The rules of warfare are well established and generally accepted by the nations. They make offenses of such conduct as killing of the wounded, refusal of quarter, ill treatment of prisoners of war, firing on undefended localities, poisoning of wells and streams, pillage and wanton destruction, and ill treatment of inhabitants in occupied territory.

(b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

(c) invasions of other countries and initiation of wars of aggression in violation of International Law or treaties.

The persons to be reached by these charges will be determined by the rule of liability, common to all legal systems, that all who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other. All are liable who have incited, ordered, procured, or counseled the commission of such acts, or who have taken what the Moscow Declaration describes as "a consenting part" therein.

IV

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.

Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."

This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and the unjust war, the war of defense and the war of aggression.

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to meet situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.

The re-establishment of the principle of unjustifiable war is traceable in many steps. One of the most significant is the Briand-Kellogg Pact of 1928, by which Germany, Italy and Japan, in common with ourselves and practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception. In 1932, Mr. Stimson, as Secretary of State, gave voice to the American concept of its effect. He said, "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing.... By that very act, we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treatises."

This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime. Without attempting an exhaustive catalogue, we may mention the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight governments, which declared that "a war of aggression constitutes . . . an international crime." The Eighth Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. At the Sixth Pan-American Conference of

1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."

The United States is vitally interested in recognizing the principle that treaties renouncing war have juridical as well as political meaning. We relied upon the Briand-Kellogg Pact and made it the cornerstone of our national policy. We neglected our armaments and our war machine in reliance upon it. All violations of it, wherever started, menace our peace as we now have good reason to know. An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community, which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.

Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.

4. Charter of the International Military Tribunal for the Far East

Charter of the International Military Tribunal for the Far East

CONSTITUTION OF TRIBUNAL

Article 1. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

. . .

II JURISDICTION AND GENERAL PROVISIONS

Article 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law,

treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

. . . . .

C. Court TV Nuremberg Overview

1. The Creation of the Tribunal and the Law Behind It

http://www.courttv.com/archive/casefiles/nuremberg/law.html

The Creation of the Tribunal and the Law Behind It

Creation of the International Military Tribunal

During World War II, the Allies and representatives of the exiled governments of occupied Europe met several times to discuss post-war treatment of the Nazi leaders. Initially, most of the Allies considered their crimes to have been beyond the scope of human justice -- that their fate was a political, rather than a legal, question.

Winston Churchill, for example, said in 1944 that they should be "hunted down and shot." The French and Soviets also supported summary executions. The Americans, however, pushed for a trial. (A faction within the U.S. government led by Secretary of War Henry L. Stimson had won a domestic battle over the U.S. position on punishment of the Nazis. The other faction, led by Henry Morgenthau, the Jewish secretary of the Treasury, supported a harsh plan designed to prevent Germany from ever rising again as an industrial power.)

In August 1945, the British, French, Americans and Soviets, meeting in London, signed the agreement that created the Nuremberg court, officially the International Military Tribunal, and set ground rules for the trial. The London Charter of the International Military Tribunal, was named to avoid using words such as "law" or "code" in an effort to circumvent the delicate question of whether the trial would be ex post facto.

The London Charter set down the rules of trial procedure and defined the crimes to be tried. (It did not define the term "criminal organizations," although six organizations were indicted under the charter.)

The defendants were charged not only for the systematic butchering of millions of people, but also for planning and carrying out the war in Europe.

The Law

The International Military Tribunal combined elements of Anglo-American and civil (continental) law. Defendants' rights and the rules of evidence differed in several ways from those in American courtrooms:

In contrast to the U.S. system, in which the prosecutors must show evidence suggesting there is probable cause to try a defendant, civil law requires that all proof be presented with the indictment. At the International Military Tribunal, some of the proof was presented at the time of indictment, some was not.

In contrast to U.S. practice, defendants were permitted to give unsworn statements at the end of the trial.

Hearsay evidence was allowed. This often came in the form of statements by individuals not called as witnesses. The statements were read by prosecutors; defendants, on cross examination, were asked to respond to incriminating allegations. In U.S. courts, unlike at Nuremberg, the accused have the right to confront and question his accuser. At Nuremberg, evidence merely had to be "probative" to be admitted.

The London Charter did not create a right to a jury trial.

There was no right to appeal and no court to which the defendants could appeal. The defendants could ask the Control Council of Germany -- the Allied occupation government, to reduce or change their sentences, and those who were found guilty did seek clemency from the Control Council. Their request was rejected and ten of the eleven defendants who received death sentences were hanged two weeks later. (The eleventh, Hermann Goering, committed suicide several hours before he was to be hanged.)

The defendants had a right to an attorney of their choice, although they could represent themselves if they wanted (none chose to do so). The four prosecuting nations paid the attorneys' fees.

The defendants also had a right to present evidence in their own defense and to cross-examine any witnesses against them.

The law of the London Charter was arguably ex post facto.

2. Who's Who

http://www.courttv.com/archive/casefiles/nuremberg/participants.html

Who's Who

The major participants in the Nuremberg war crimes trial.

John Harlan Amen

U.S. colonel, associate trial counsel, head of interrogations.

William Baldwin

Assistant U.S. prosecutor.

Murray Bernays

War Department lawyer who drafted the initial proposal for prosecuting international war criminals.

Francis Biddle

Former U.S. Attorney General, American justice on the court.

Sir Norman Birkett

Alternate British justice on the court.

Martin Bormann

Secretary to Hitler, tried in abstentia.

Rudolf Dix

Defense counsel for Hjalmar Schacht.

Thomas J. Dodd

Associate and later deputy U.S. prosecutor.

Karl Donitz

Supreme Commander of the German Navy.

Henri de Vabres Donnedieu

French justice on the court.

Franz Exner

Defense counsel for Alfred Jodl.

Robert Falco

Alternate French justice on the court.

Hans Flachsner

Defense counsel for Albert Speer.

Hans Frank

Governor-General of occupied Poland.

Wilhelm Frick

Nazi Minister of the Interior.

Hans Fritzche

Ministerial Director and head of the radio division in the Nazi Propaganda Ministry.

Walther Funk

President of the Reichsbank.

Hermann Goering

Reichsmarschall, Chief of the Air Force.

Whitney Harris

Assistant U.S. prosecutor.

Rudolf Hess

Deputy to Hitler.

Heinrich Himmler

Reichsfuher, head of the SS.

Rudolf Hoess

Commandant of Auschwitz.

Martin Horn

Second defense counsel for Joachim von Ribbentrop.

Robert Jackson

Chief U.S. prosecutor.

Alred Jodl

Operations chief of the German armed forces.

Ernst Kaltenbrunner

Head of the Nazi security apparatus, second to Himmler in the SS.

Kurt Kauffmann

Defense counsel for Ernst Kaltenbrunner.

Wilhelm Keitel

Field marshal, chief of staff of the German armed forces.

Daniel Kiley

Office of Strategic Services officer, architect who restored the Palace of Justice.

Otto Kranzbuehler

German Navy judge, defense counsel for Karl Donitz.

Thomas Lambert

Assistant U.S. prosecutor.

Sir Geoffrey Lawrence

British justice and president of the court.

Robert Ley

Head of the German Labor Front.

Daniel Margolies

Assistant U.S. prosecutor.

Otto Nelte

Defense counsel for Wilhelm Keitel.

Konstantin von Neurath

Germany's foreign minister before Joachim von Ribbentrop, protector of Bohemia and Moravia.

Ion Timofeevich Nikitchenko

Major general of jurisprudence, Soviet justice on the court.

Otto Ohlendorf

SS general.

Franz von Papen

German chancellor before Hitler, vice chancellor under Hitler.

John Parker

Alternate U.S. justice on the court.

V.Y. Pokrovsky

Deputy Soviet prosecutor.

Erich Raeder

Commander in chief of the German Navy.

Joachim von Ribbentrop

Nazi foreign minister.

Gunther von Rohrscheidt

First defense counsel for Rudolf Hess.

Alfred Rosenberg

Nazi minister for the Occupied Eastern Territories.

James Rowe

Legal advisor to Francis Biddle.

Roman Rudenko

Chief Soviet prosecutor.

Fritz Sauckel

German labor leader

Fritz Sauter

First defense counsel for Joachim von Ribbentrop, also counsel for Walther Funk and Baldur von Schirach.

Hjalmar Schacht

President of the Reischsbank prior to Walther Funk.

Baldur von Schirach

Head of the Hitler Youth.

Alfred Seidl

Second defense counsel for Rudolf Hess, also defense counsel for Hans Frank.

Arthur Seyss-Inquart

Nazi commissar of occupied Holland.

Sir Hartley Shawcross

British prosecutor.

Albert Speer

Minister of Armaments and War Production

Drexel Sprecher

Assistant U.S. prosecutor, later prosecutor at subsequent war crimes trials.

Otto Stahmer

Defense counsel for Hermann Goering.

Robert Stewart

U.S. major, legal advisor to alternate justice John Parker.

Robert Storey

U.S. colonel, head of the U.S. prosecution team under Robert Jackson.

Julius Streicher

Editor of the newspaper Der Sturmer.

Telford Taylor

U.S. general, prosecutor of the High Command case, later chief prosecutor at subsequent trials.

Alexander Volchkov

Alternate Soviet justice.

Herbet Wechsler

Chief legal advisor to American justice Francis Biddle.

3. The Indictments

http://www.courttv.com/archive/casefiles/nuremberg/indictments.html

The Indictments

In early October 1945, the four prosecuting nations -- the United States, Great Britain, France and Russia -- issued an indictment against 24 men and six organizations. The individual defendants were charged not only with the systematic murder of millions of people, but also with planning and carrying out the war in Europe.

Twenty-one of the indicted men eventually sat in the dock in the Nuremberg courtroom. One of those named, labor leader Robert Ley hanged himself before the trial began. Another, the industrialist Gustav Krupp, was judged too frail to stand trial. Martin Bormann, who as Adolf Hitler's private secretary was one of the most powerful Nazi leaders, was nowhere to be found. He was tried in absentia and sentenced to hang if he should ever turn up. Bormann apparently died as the Soviets entered Berlin -- his remains were identified there in 1972 and he was declared dead by a German court the following year.

Lt. Col. Murray Bernays, an attorney in the U.S. War Department who collected evidence on crimes committed against GIs, had devised a scheme to try the Nazis as conspirators in waging aggressive war and to try Nazi organizations as a means of reaching hundreds of thousands of members. His ideas were promoted by Secretary of War Henry Stimson and eventually incorporated into the indictment.

The Indictment of Nazi Organizations

The indictment of Nazi organizations was designed to deal with the problem of what to do about the hundreds of thousands of people who had been members of organizations such as the SS and the Gestapo. The idea was to find them to have been criminal organizations, then hold hearings to determine the extent to which a member was guilty.

At the conclusion of the trial against the 21 individuals, the International Military Tribunal spent a month hearing testimony about the organizations.

The indictment of the organizations, however, raised a fundamental legal question: the legitimacy of creating a system of guilt by association. Although members of the criminal organizations were later tried by German denazification courts set up by the U.S. occupation government, no one was ever punished solely on the basis of the tribunal convictions.

Three of the six indicted organizations were found guilty. They were: the SS, the Gestapo and the Corps of the Political Leaders of the Nazi Party.

Three of the organizations were not convicted. They were: the SA (Hitler's street thugs, known as brownshirts, whose power had dwindled in the 1930s); the Reichsregierung

(Reich Cabinet) and General Staff and High Command of the German Armed Forces. The latter two organizations were determined to cover relatively few members so that it was deemed better to deal with them as individuals.

The Charges

The four powers divided the prosecution work, giving the United States the complicated and most difficult job of proving Count One -- the conspiracy charge.

Count One: Conspiracy to Wage Aggressive War

The "common plan or conspiracy" charge was designed to get around the problem of how to deal with crimes committed before the war. The defendants charged under Count One were accused of agreeing to commit crimes.

The concept of conspiracy was not a part of continental law, and remained controversial throughout the trial.

Some historians have argued that this count caused prosecutors to over-emphasize the coherence of Nazi policymaking. It also gave the defense an additional reason to emphasize the confused Nazi command structure and allowed the defendants to buttress their contentions of ignorance of the regime's brutality.

Count Two: Waging Aggressive War, or "Crimes Against Peace"

This evidence was presented by the British prosecutors and was defined in the indictment as "the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances."

This charge created problems for the prosecutors. Although Hitler had clearly waged an aggressive war, beginning with the invasion of Poland in 1939, Count Two was based on allegations that the Germans had violated international agreements such as the Kellogg-Briand Pact of 1928. Signatories to that agreement had renounced war as an instrument of national policy (as opposed, say, to defensive war), but the pact did not define "aggressive war" and did not spell out the penalties for its violation.

(The Anschluss and the invasion of Czechoslovakia were not held to be aggressive wars because Hitler had manipulated the political situation in each nation in order to avoid an invasion.)

The Soviet Union also had broken the Kellogg-Briand Pact by invading Finland, Poland and the Baltics, and had schemed with Hitler to sign the Nazi-Soviet Non-Aggression Pact in 1939 (which secretly divided Poland).

Robert Jackson, the chief U.S. prosecutor, wanted the International Military Tribunal to create new international law that would outlaw aggressive war. Clearly, the premise that it is possible to outlaw war is a questionable one.

Count Three: War Crimes

The Russian and French prosecutors presented evidence on atrocities committed in the East and West, respectively.

Count Three was intended to deal with acts that violated traditional concepts of the law of war -- e.g. the use of slave labor; bombing civilian populations; the Reprisal Order

(signed by Field Marshal Wilhelm Keitel, a defendant, this order required that 50 Soviet soldiers be shot for every German killed by partisans); the Commando Order (issued by Keitel, it ordered that downed Allied airmen be shot rather than taken captive).

The violations of international law under Count Three were more clearly rooted in precedent than the other counts.

International laws of war had developed during the 18th and 19th centuries. The Hague Conventions of 1899 and 1907 dealt with the conduct of war by outlawing certain types of weapons (dum-dum bullets, poison gas) and outlining treatment of POWs and civilians. The Geneva Conventions of 1864 and 1906 dealt with treatment of the sick and wounded. (After 1929, the treatment of POWs was promulgated by the Geneva Convention.) Naval law developed separately and originally dealt with problems of piracy, rescue, false flags and the like.

War crimes were defined under the London Charter (the document drafted by the Allies before the trial began) as "murder, ill treatment or deportation to slave labor or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners-of-war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages or devastation not justified by military necessity."

Count Four: Crimes Against Humanity

The Russians and the French again divided responsibility along East-West lines.

Count Four was applied to defendants responsible for the death camps, concentration camps and killing rampages in the East.

Initially, crimes against humanity were understood to be crimes committed by a government against its own people, and there was some question as to whether the concept could be applied internationally. Their inclusion in the London Charter was a novel extension of the concept.

The London Charter defined these crimes as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crimes within the jurisdiction of the International Military Tribunal, whether or not in violation of domestic law of the country where perpetrated."

Selection of Defendants

The list of the accused was to some extent arbitrary. The defendants represented the major administrative branches of the Third Reich and included prisoners held by each of the four prosecuting nations. Apparently, little attention was paid to the availability of evidence against them. Attention was generally paid to how well known they were and how much power they had wielded. However, Hans Fritzsche, who was held by the Russians, had been a relatively minor official in Josef Goebbels' propaganda ministry but was included, along with Admiral Erich Raeder, to appease the Russians.

4. The Defendants

http://www.courttv.com/archive/casefiles/nuremberg/defendants.html

The Defendants

On November 20, 1945, twenty-one Nazi defendants filed into the dock at the Palace of Justice in Nuremberg to stand trial for war crimes. Another defendant, Martin Bormann, was believed dead.

Karl Doenitz

Supreme Commander of the Navy; in Hitler's last will and testament he was made Third Reich President and Supreme Commander of the Armed Forces

Sentenced to 10 Years in Prison

Hans Frank

Governor-General of occupied Poland

Sentenced to Hang

Wilhelm Frick

Minister of the Interior

Sentenced to Hang

Hans Fritzsche

Ministerial Director and head of the radio division in the Propaganda Ministry

Acquitted

Walther Funk

President of the Reichsbank

Sentenced to Life in Prison

Hermann Goering

Reichsmarschall, Chief of the Air Force

Sentenced to Hang

Rudolf Hess

Deputy to Hitler

Sentenced to Life in Prison

Alfred Jodl

Chief of Army Operations

Sentenced to Hang

Ernst Kaltenbrunner

Chief of Reich Main Security Office whose departments included the Gestapo and SS

Sentenced to Hang

Wilhelm Keitel

Chief of Staff of the High Command of the Armed Forces

Sentenced to Hang

Erich Raeder

Grand Admiral of the Navy

Sentenced to Life in Prison

Alfred Rosenberg

Minister of the Occupied Eastern Territories

Sentenced to Hang

Fritz Sauckel

Labor leader

Sentenced to Hang

Hjalmar Schacht

Minister of the Economics

Acquitted

Arthur Seyss-Inquart

Commisar of the Netherlands

Sentenced to Hang

Albert Speer

Minister of Armaments and War Production

Sentenced to 20 Years in Prison

Julius Streicher

Editor of the newspaper Der Sturmer, Director of the Central Committee for the Defence against Jewish Atrocity and Boycott Propaganda

Sentenced to Hang

Constantin von Neurath

Protector of Bohemia and Moravia

Sentenced to 15 Years in Prison

Franz von Papen

One-time Chancellor of Germany

Acquitted

Joachim von Ribbentrop

Minister of Foreign Affairs

Sentenced to Hang

Baldur von Schirach

Reich Youth leader

Sentenced to 20 Years in Prison

5. The Trial's Legacy

http://www.courttv.com/archive/casefiles/nuremberg/legacy.html

The Trial's Legacy

Fifty years ago this month, Associate United States Supreme Court Justice Robert Jackson made the opening statement in what would become known as the Nuremberg war crimes trial.

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a great responsibility," Jackson told the International Military Tribunal. "The four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law.

"The crimes which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated," he said.

During the next ten months, prosecutors from the four victorious powers -- the United States, Great Britain, France and Russia -- presented their case against 22 Nazi leaders. In trying to fix German guilt, the prosecutors had charged the defendants with conspiring and launching aggressive war and committing war crimes and crimes against humanity.

In the end, three of the defendants were acquitted. Eight received long prison sentences and the rest were sentenced to death. At 10:45 p.m. on October 15, 1946, Hermann Goering cheated the hangman with a cyanide capsule. Two hours later, the executions began.

The trial of Goering, Rudolf Hess, Albert Speer and the others was part show trial and part noble effort to create new international law in the face of crimes that negated civilization's progress. To some extent, it reflected the optimistic sentiments for world cooperation (which were rapidly eclipsed by the Cold War) that led to the creation of the United Nations. It was a political effort to find human-sized justice for crimes that were so hideous.

This was the trial of the century. In the words of Norman Birkett, who served as a British alternate judge: it was "the greatest trial in history."

A Special Court TV Presentation

Beginning November 13, 1995, Court TV broadcast 15 hours of Nuremberg. It was the most extensive coverage of the trial ever broadcast.

Some of the trial was filmed by the U.S. Army Signal Corps, Soviet cameramen and commercial newsreel companies such as Paramount and Universal. But there were many days when nothing was filmed.

A nearly complete record of the proceedings does exist on audio tape, recorded as it was spoken in the four languages of the trial - English, German, French and Russian. Court TV's broadcast supplemented selected portions of the existing film with audio tape. Where only audio exists, we added still photographs or film that was shot in the courtroom during that particular portion of the trial.

The cameras of the mid-1940s used 35 mm film on 10-minute reels. There were no zoom lenses, so cameramen used turret lenses that held close-up, normal and long lenses. Cameramen switched lenses while shooting and often did not focus after a lens change. The footage was shot and edited for newsreels that were shown in movie theaters, and choices about what was shot reflected the needs of the newsreel companies. The cameras often were placed at awkward angles to avoid disrupting the proceedings.

As stated earlier, the proceedings were held in four languages. All documents were to be translated and made available in each language, and a team of translators was employed. But the sheer volume of the material insured that the translators could not keep up.

The Legacy of Nuremberg

In the view of most historians, Nuremberg's legacy is mixed. They are generally favorable to the attempt made by the Allies to bring some form of international judicial accounting for the horrors of the Nazi regime. To this day, Nuremberg remains the most thorough record of Hitler's rise to power, and the planning, launching and execution of World War II. As such, it was no small achievement, and one that was forged out of the chaos and rubble immediately following World War II.

But some argue that the International Military Tribunal was a victor's justice, and the trial has been criticized for a variety of reasons. The list of those accused was somewhat arbitrary. There also were basic misgivings. The accused had been charged with violations of international law, but such law was binding on nations, not individuals. Individuals, it was argued, could be brought to justice only under the laws of their own country, not on the basis of a new order established after a war. It may have been imperfect justice, but there was no alternative.

Nuremberg has never fulfilled its brightest promise -- a permanent international tribunal for war crimes. Various efforts have been made in the ensuing half century, but all have languished. Only recently, with the establishment of the U.N.'s International Criminal Tribunal that is addressing war crimes in the Former Yugoslavia and Rwanda, have the ideals set at Nuremberg taken a tangible form.

The final business of Nuremberg remains unfinished.

D. Lord Shawcross, Chief British Prosecutor at Nuremberg

1. Lord Shawcross Obituary - The Economist


Lord Shawcross in 2001. Photo: PA.

The Economist

Saturday, July 19, 2003

Hartley Shawcross - Hartley William Shawcross, prosecutor at Nuremberg, died on

July 10th, aged 101.

Hartley William Shawcross, prosecutor at Nuremberg, died on July 10th, aged 101 PERHAPS Hartley Shawcross will be remembered by a single sentence: "There comes a point when a man must refuse to answer to his leader if he is also to answer to his own conscience." He was presenting the case at Nuremberg in 1945 against Germans accused of making aggressive war and of crimes against humanity. Their leader, Adolf Hitler, had killed himself. Twenty-two of Hitler's civilian and military chiefs were now on trial, a proceeding that was to end with 12 of them being sentenced to death.

The effectiveness of the Shawcross opening speech, spread over two days, is that he was able to challenge the notion that the trial was an act of vengeance by the victors. He showed that the laws the defendants had broken had been expressed in international treaties and agreements before the second world war. Germany, before Hitler came to power, had been a party to many of them. Under Hitler, he said, Germany had been organised for aggressive war, and its crimes against peace had been the parent of other crimes. On the question of conscience, in his closing speech he asked how any of the defendants could have remained ignorant of thousands of Germans exterminated because they were old or mentally ill, or of millions of other people of various nationalities "annihilated in the gas chambers or by shooting". Each defendant, he said, was a party to "common murder in its most ruthless forms".

American, French and Russian lawyers all made speeches during the 216-day trial. But in their book, "The Nuremberg Trial", John and Ann Tusa say the two Shawcross speeches stood out. Unlike Robert Jackson, who aimed to keep the bulk of the case in American hands and spoke first, he did not favour crusading oratory. "Shawcross's style, his manner of delivery and above all his intellectual approach were entirely different...his method was to concentrate on expounding the law which he believed already existed."

Sir Hartley Shawcross (the title went with the job of attorney-general) returned to Britain from Nuremberg much praised in the newspapers and Parliament for his needle-sharp mind and (incidentally) for outpointing the uppity Americans. Where would he go next?

Looking the part

Sir Hartley found himself named as a likely future prime minister, a prediction bestowed on many politicians that is usually the kiss of death. But he did look the part. Not only was he clever, he was a good-looker, always an asset for a leader. He said he was to the right of the ruling Labour Party, but no one much minded that. Clement Attlee, the prime minister, was a reformist but no leftie. Nor was Ernest Bevin, the foreign secretary.

His parents had been liberal middle-class, his father a professor of English and his mother a suffragette. Young Hartley honed his voice at street-corner political meetings. Geneva University gave him polish. He gained first place in English law exams and built up a law practice in the north of the country. His mastery of a brief and his fearsome talent for cross-examination made him a rising star. In 1941, at the age of 39, he was made a regional judge, the youngest ever appointed.

As the government's chief law officer, he was seldom out of the news. He prosecuted William Joyce, known as "Lord Haw-Haw", for broadcasting for the Germans during the war; and Klaus Fuchs and Alan Nunn May, who gave atomic secrets to the Russians.

Attlee's government was defeated in 1951 by the Conservatives (under an ageing Churchill). Attlee himself resigned as party chief in 1955. Many in the party wanted Sir Hartley to replace him. But he was through with politics. He had enjoyed being attorney-general and holding various other top jobs, among them Britain's delegate to the United Nations during a particularly chilly time of the cold war. But "I found it utterly tedious to have to conform to the doctrine that it is the duty of the opposition to oppose." One of his problems was that he admired some Conservative politicians, and even their policies. He was cautious about change. "The so-called new morality," he said, "is often the old immorality condoned."

In 1958 he resigned from the Commons. He was appointed to the Lords, the upper house, but did not speak there for 15 years out of a reluctance to clash with former colleagues. He had hopes of becoming Britain's senior judge, Lord Chief Justice, but the occupant of the post declined to budge. Instead, the might- have-been prime minister and head judge became simply a member of the great and the good. Lord Shawcross, as he now was, served on numerous worthy committees and on the boards of companies. Accepting a multitude of appointments, he said, kept him going. He noted that friends who had retired turned up shortly afterwards in obituary columns.

Lord Shawcross outlived two of his wives. In 1997, when he was 95, he proposed to Monique Huiskamp, whom he had known for many years. A court upheld objections by

Lord Shawcross's relations to the marriage. The couple eloped to Gibraltar, where a court allowed the marriage. Lord Shawcross found it agreeable that he could still win a case.

E. The Eichmann Trial in Israel

1. The Nazi and Nazi Collaborators (Punishment) Law of 1950

http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571

The Nazi and Nazi Collaborators (Punishment) Law 1950 provides:

(a) A person who has committed one of the following offences -

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.

(b) In this section -

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or-in part :

(1) killing Jews;

(2) causing serious bodily or mental harm to Jews;

(3) placing Jews in living conditions calculated to bring about their physical destruction;

(4) imposing measures-intended to prevent births among Jews;

(5) forcibly transferring Jewish children to another national or religious group;

(6) destroying or desecrating Jewish religious or cultural assets or values;

(7) inciting to hatred of Jews;

"crime against humanity" means any of the following acts;

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts;

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or

persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

2. If a person, during the period of the Nazi regime, committed in an enemy country an act by which, had he committed it in Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, and he committed the act against a persecuted person as a persecuted person he shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory:

(a) section 152 (rape, sexual and unnatural offences);

(b) section 153 (rape by deception);

(c) section 157 (indecent act with force, etc.);

(d) section 188 (child stealing);

(e) section 212 (manslaughter);

(f) section 214 (murder);

(g) section 222 (attempt to murder);

(h) section 235 (acts intended to cause grievous harm...);

(i) section 236 (preventing escape from wreck);

(j) section 238 (grievous harm);

(k) section 240 (maliciously administering poison with intent to harm);

(l) section 256 (abducting in order to murder);

(m) section 258 (abducting in order to subject person to grievous hurt);

(n) section 286 (robbery and attempted robbery);

(o) section 293 (demanding property with menaces with intent to steal).

Section 9 provides:

9. (a) A person who has committed an offence under this Law may be tried in Israel even if he has already been tried abroad, whether before an international tribunal or a tribunal of a foreign state, for the same offence.

(b) If a person is convicted in Israel of an offence under this Law after being convicted of the same act abroad, the Israel court shall, in determining the punishment, take into consideration the sentence which he has served abroad.

Section 14 provides:

14. A prosecution for an offence under this Law may only be instituted by the Attorney General or his representative.

Section 16 provides:

16. In this law -

"the period of the Nazi regime" means the period which began on ... (30th January, 1933) and ended on ... (8th May, 1945);

"the period of the Second World War" means the period which began on ... (1st September, 1939) and ended on ...(14th August, 1945);

. . .

"Axis state" means a state which during the whole or part of the period of the Second World War was at war with the Allied Powers; the period which began on the day of the beginning of the state of war between a particular Axis state and the first, in time, of the Allied Powers and ended on the day of cessation of hostilities between that state and the last, in time, of the Allied Powers, shall be considered as the period of war between that state and the Allied Powers;

"enemy country" means -

1.Germany during the period of the Nazi regime;

2.any other Axis state during the period of the war between it and the Allied Powers;

3.any territory which, during the whole or part of the period of the Nazi regime, was de facto under the German rule as aforesaid;

4.any territory which was de facto under the rule of any other Axis state during the whole, or part of the period of the war between it and the Allied Powers, for the time during which that territory was de facto under the rule of that Axis state as aforesaid;

2. Excerpts from Eichmann Trial

http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/

Section 2

Eichmann Trial (Israel)

The Attorney General of the Government of Israel v. Adolf, the Son of Karl Adolf Eichmann, Criminal Case No. 40/61 (1961)

[These excerpts are taken from the opinion and judgment of the 3 judge District Court of Jerusalem, presided over by Mr. Justice Landau]

Our jurisdiction to try this case is based on the Nazis and Nazi Collaborators (Punishment) law, a statutory law the provisions of which are unequivocal....

... we have reached the conclusion that the law in question conforms to the best traditions of the law of nations.

The power of the State of Israel to enact the law in question or Israel's right to punish is based, with respect to the offences in question, from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their

specific character as being designated to exterminate the Jewish people. In what follows we shall deal with each of these two aspects separately....

The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations itself ('delicta juris gentium'). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are universal....

The 'crime against the Jewish people' is defined on the pattern of the genocide crime defined in the "Convention for the prevention and punishment of genocide" which was adopted by the United Nations Assembly on 9.12.48. The 'crime against humanity' and the 'war crime' are defined on the pattern of crimes of identical designations defined in the Charter of the International Military Tribunal, (which is the Statute of the Nuremburg Court) annexed to the Four-Power Agreement of 8.8.45 on the subject of the trial of the principal war criminals (the

London Agreement), and also in Law No. 10 of the Control Council of Germany of 20.12.45. The offence of 'membership of a hostile organization' is defined by the pronouncement in the judgment of the Nuremberg Tribunal, according to its Charter, to declare the organizations in question as 'criminal organizations', and is also patterned on the Council of Control Law No. 10. For purposes of comparison we shall set forth in what follows the parallel articles and clauses side by side....

In the light of the recurrent affirmation by the United Nations in the 1946 Assembly resolution and in the 1948 convention, and in the light of the advisory opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, and at that ex tunc; that is to say: the crimes of genocide which were committed against the Jewish people and other peoples were crimes under international law. If follows therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.

Attorney General of Israel v. Eichmann, Israel, Supreme Court 1962, 36 Int'l L. Rep. 277, 277-78, 287-89, 294-97, 304 (1968)

1.The appellant, Adolf Eichmann, was found guilty by the District Court of Jerusalem of offenses of the most extreme gravity against the Nazi and Nazi Collaborators (Punishment) Law, 1950 (hereinafter referred to as "the Law") and was sentenced to death. These offences may be divided into four groups:

1.Crimes against the Jewish people, contrary to Section I(a)(1) of the Law;

2.Crimes against humanity, contrary to Section I(a)(2);

3.War crimes, contrary to Section I(a)(3);

4.Membership of hostile organizations, contrary to Section 3.

2.The acts constituting these offences, which the Court attributed to the appellant, have been specified in paragraph 244 of the judgment of the District Court.

The acts comprised in Group (a) are:

1.that during the period from August 1941 to May 1945, in Germany, in the Axis States and in the areas which were subject to the authority of Germany and the Axis States, he, together with others, caused the killing of millions of Jews for the purpose of carrying out the plan known as "the Final Solution of the Jewish Problem" with the intent to exterminate the Jewish people;

2.that during that period and in the same places he, together with others, placed millions of Jews in living conditions which were calculated to bring about their physical destruction, for the purpose of carrying out the plan above mentioned with the intent to exterminate the Jewish people;

3.that during that period and in the same places he, together with others, caused serious physical and mental harm to millions of Jews with the intent to exterminate the Jewish people;

4.that during the years 1943 and 1944 he, together with others, "devised measures the purpose of which was to prevent births among Jews by his instructions forbidding child bearing and ordering the interruption of pregnancies of Jewish women in Theresin Ghetto with the intent to exterminate the Jewish people".

The acts constituting the crimes in Group (b) are as follows:

5.that during the period from August 1941 to May 1945 he, together with others, caused in the territories and areas mentioned in clause (1) the murder, extermination, enslavement, starvation, and deportation of the civilian Jewish population;

6.that during the period from December 1939 to March 1941 he, together with others, caused the deportation of Jews to Nisco, and the deportation of Jews from the areas in the East annexed to the Reich, and from the Reich area proper, to the German Occupied Territories in the East, and to France;

7.that in carrying out the above-mentioned activities he persecuted Jews on national, racial, religious, and political grounds;

8.that during the period from March 1938 to May 1945 in the places mentioned above he, together with others, cause the spoliation of the property of millions of Jews by means of mass terror linked with the murder, extermination, starvation, and deportation of these Jews;

9.that during the years 1940-42 he, together with others, cause the expulsion of hundreds of thousands of Poles from their places of residence;

10.that during 1941 he, together with others, caused the expulsion of more than 14,000 Slovenes from their place of residence;

11.that during the Second World War he, together with others, cause the expulsion of scores of thousands of gipsies from Germany and German-occupied areas and their transportation to the German-occupied areas to the East;

12.that in 1942 he, together with others, caused the expulsion of 93 children of the Czech village of Lidice.

The acts comprised in Group (c) are:

that he committed the acts of persecution, expulsion, and murder mentioned in Counts 1 to 7, in so far as these were done during the Second World War against Jews from among the populations of the States occupied by the Germans and by the other Axis States.

The acts comprised of Group (d) are:

that as from May 1940 he was a member of three Nazi Police organizations which were declared criminal organizations by the International Military Tribunal which tried the Major War Criminals, and as a member of such organizations he took part in acts which were declared criminal in Article 6 of the London Charter of August 8, 1945 ....

... The two propositions on which we propose to rely will therefore be as follows:

1.The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility.

2.It is the peculiarly universal character of these crimes that vests in every State the authority to try and punish anyone who participated in their commission.

Before, however, we substantiate there propositions, and to lighten our task in this regard we must make a few observations on the four categories of offences in question, and especially on the relation between them.

The definitions of these offences given in the Law have been clearly explained by the District Court in paragraph 16 of its judgment. On the basis of a detailed comparison, it was there explained that the sources of these definitions are to be found in international documents that define the corresponding crimes ("Genocide" corresponding to "crime against the Jewish people" - in the Convention adopted by the United Nations General Assembly on December 9, 1948; "crime against humanity" and "war crime" - in the Charter of the Nuremberg Tribunal of August 8, 1945, and also in Law No. 10 of the Control Council for Germany of December 20, 1945; the local offence of "membership in a hostile organization" was defined by reference to the pronouncement on "hostile organizations" made in the judgment of the said Tribunal). We do not indent to repeat all the explanatory and comparative observations made there, but only to make it clear that the local category of "crime against humanity" - which includes the murder, extermination, starvation, and deportation of a civilian population on the one hand, and persecution on national, racial, religious or political grounds, on the other - may be seen as extending also to the other three categories, as demonstrated in the context of this case.

1.Thus, the category of "crime against the Jewish people" is, as the District Court held in paragraph 26 of its judgment, "nothing but the gravest type of 'crime against humanity'". Although certain differences exist between them - for example, the first offence requires a specific criminal intent - these are not differences material to this case.

2.The category of "war crime" comprises in essence acts which are prohibited by the laws and customs of war. Accordingly, only acts committed in time of war are included therein, whereas the category of "crime against humanity" embraces - according to the

plain meaning of the definition in the Law - inhuman acts as well that were committed during the Nazi period preceding the outbreak of war (September 1, 1939). We attach no practical importance to this distinction, even as we attach no like importance to the finding of the Nuremberg Tribunal that for the purpose of conviction for the offence of a "crime against humanity" as defined in Article 6(c) of the Charter, it was necessary to prove that it was committed in connection with one of the other offences therein defined ("crime against peace" or "war crimes"). The reason for our disregarding these distinctions is that, as emerges from the judgment of the District Court, the misdeeds attributed to the appellant in the Counts on which he was convicted were for the most part perpetrated during the war and in connection with the war. It will be noted - and the Court has dwelt on this fact in paragraph 29 of its judgment - that according to the judgment of the Nuremberg Tribunal Hitler's invasion of Austria also constitutes a "crime within the jurisdiction of the Court" in the sense of Article 6(c) of the Charter, in other words, a "crime against peace" (see also the article by Schwelb on "Crimes against Humanity" in British Year Book of International Law XXIII (1946), pp. 189-205). There is yet another distinction between the two types of crimes. While the acts appertaining to the "crime against humanity" are limited to acts of murder, etc. that were perpetrated among the civilian population, this limitation does not necessarily apply also to acts belonging to the "war crimes" category (ibid., p. 190). On the other hand, it is clear that many of the acts included in the one category overlap those in the other category, even though it is not imperative that they should all be identical (ibid., pp., 188, 191). Be that as it may, this distinction too loses its force in this appeal, since the Court found (paragraph 206 of its judgment) that "all acts of persecution, deportation, and murder in which the accused took part, as we have found in discussing crimes against the Jewish people and crimes against humanity, are ipso facto also war crimes within the meaning of Section 1(a)(3) of the Law, as far as they were committed during the Second World War and the Jews who fell victim to these acts belonged to the population of the countries conquered by Germany and the other Axis States" ....

All this goes to show that these categories of crimes, especially the first three, are independent, and we may therefore, for the purposes of our reasoning at this stage, group them within the broad category of "crimes against humanity". It must be emphasized that they are all crimes that demand mens rea on the part of the perpetrator.

[The Character of International Crimes]

II. The first proposition. Our view that the crimes in question must today be regarded as crimes which were also in the past banned by the law of nations and entailed individual criminal responsibility, is based upon the following reasons:

1.As is well known, the rules of the law of nations are not derived solely form international treaties and crystallized international custom. In the absence of a supreme legislative authority and international codes the process of its evolution resembles that of the common law; in other words, its rules are fashioned piecemeal by analogy with the rules embedded in treaties and custom, on the basis of the "general principles of law recognized by civilized nations,"....

(c) In view of the characteristic traits that mark the international crimes discussed above and having regard to the organic development of the law of nations - a development that

advances from case to case under the impact of the humane sentiments common to civilized nations and by virtue of the needs vital for the survival of mankind and for ensuring the stability of the world order - it definitely cannot be said that, when the Charter of the Nuremberg International Military Tribunal was signed and the categories of "War Crimes" and "Crimes against Humanity" were defined in it, this merely amounted to an act of legislation by the victorious countries. The truth, as the Tribunal itself said, is that the Charter, with all the principles embodied in it - including that of individual responsibility - must be seen as "the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law." (I.M.T. (1947), vol I, p. 218.) See also the identical view expressed by Court No. III in the American Zone of Germany concerning two of the types of crimes mentioned in Control Council Law No. 10.

"All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment ... were ... (not) violative of pre-existing principles of international law. To the extent to which this is true, C.C. law may be deemed to be a codification, rather than original substantive legislation" (U.S. v. Altstoetter, T.W.C., vol. 3, p. 966).

It should be added that many of those who voiced criticism of the Charter and of the Judgment of the International Military Tribunal at Nuremberg directed it against the incorporation into the Charter of the "Crime against Peace" but not against the other two categories (see articles by Finch in American Journal of International Law, 41 (1947), pp. 22, 23, and Doman in Columbia Law Review, 60 (1960), p. 413). In so far as other writers have criticized the incorporation of "Crimes against Humanity" as being contrary to international law de lege lata, they have done so on the ground the punishment of the Nazi criminals for the commission of such crimes within Germany and against German citizens imported excessive interferences with the domestic competence of the State (see the article by Schick in the same volume of the American Journal of International Law, pp. 778-779). The reply to this argument is first that it is possible to trace a direct line to the inclusion of the crimes mentioned from the wording of the provision of Hague Convention No. IV of 1907, above cited, which refers to "the Laws of Humanity" and "the dictates of public conscience". It stands to reason, as Quincy Wright said (see his article, ibid., p. 60), that this wording should apply "to atrocities against the nationals as well as against aliens". In the graphic language of Friedmann (Legal Theory, 4th ed., p.316), "it is hardly necessary to invoke natural law to condemn the mass slaughter of helpless human beings. Murder is generally taken to be a crime in positive international law." ...

... if any doubt existed as to this appraisal of the Nuremberg Principles as principles that have formed part of the customary law of nations "since time immemorial", two international documents justify it. We allude to the United Nations General Assembly Resolution of December 11, 1946, which "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal", and also to the General Assembly Resolution of the same date, No. 96 (I), in which the General Assembly "affirms that Genocide is a crime under international law".

As to the first document, Woetzel has observed (op cit., p. 57):

"This additional endorsement by the United Nations represents further tangible evidence for assuming that the principles of the Charter as well as those in the Judgment of the I.M.T. were valid principles of international law, and that their application was justified."

As to both the said documents, Sloan has said (in his article in the British Year Book of International Law, XXV (1948), p. I, at p. 24):

"While it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions declaring what it finds to be an existing rule of international law. Perhaps the most important of such resolutions have been the affirmation of the Nuremberg principles and the declaration that genocide is an international crime.... If fifty-eight nations unanimously agree on a statement of existing law it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law." (Emphasis added.)

What is more, in the wake of Resolution 96 (I) of December 11, 1946, the United Nations General Assembly unanimously adopted on December 9, 1948, the Convention for the Prevention and Punishment of the Crime of Genocide. Article I of this Convention provides:

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law."

As the District Court has shown, relying on the Advisory Opinion of the International Court of Justice dated May 28, 1951, the import of this provision is that the principles inherent in the Convention - as distinct from the contractual obligations embodied therein - "were already part of customary international law when the dreadful crimes were perpetrated, which led to the United Nations Resolution and the drafting of the Convention - the crimes of Genocide committed by the Nazis" (paragraph 21 of the judgment).

The outcome of the above analysis is that the crimes set out in the Law of 1950, which we have grouped under the inclusive caption "crimes against humanity", must be seen today as acts that have always been forbidden by customary international law - acts which are of a "universal" criminal character and entail individual criminal responsibility. That being so, the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle nulla poena or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives....

We sum up our views on this subject as follows. Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed. Here therefore is an additional reason - and one based on a positive approach - for rejecting the second, "jurisdictional", submission of counsel for the appellant.

3. Eichmann Whereabouts Known in 1947

[From Response, (2000)]

Eichmann Whereabouts Known in 1947

Adolf Eichmann, the man in charge of the Nazis' genocidal 'final solution', could have been caught and tried as early as 1947, documents unearthed by the Wiesenthal Center revealed. As commander of the Gestapo's Department for Jewish Affairs, Eichmann personally supervised the rounding up and deportation of Jews to Auschwitz/ Birkenau. The Hungarian government informed U.S. Occupation Forces in Germany that Eichmann was living in their zone in 1947, but their request for his arrest went unanswered for four years. It was not until May 1951 that the president of the U.S. extradition board responsible for war criminals officially denied the request purportedly because a "definite address" was not provided and, unbelievably, because more details of Eichmann's alleged crimes were needed. "The materials submitted in this case does not meet the technical requirements required," the denial asserted.

"The letter showed a callous disinterest by the United States because Hungary was by then a Communist country," said Rabbi Marvin Hier. "The inaction of the Americans during the Cold War made it easier for Eichmann to gain anonymity in South America," he added.

It was not until 13 years later that Eichmann was located, captured and kidnapped by Israeli agents in Argentina. Before he was hanged in 1962, Eichmann acknowledged the Holocaust in his prison diaries as "the most enormous crime in the history of mankind. I witnessed the gruesome workings of the machinery of death; gear meshed with gear, like clockwork," he wrote. "It was the biggest and most enormous dance of death of all time." More than 400,000 of Eichmann's victims were from Hungary. All were murdered after the Nazi leadership knew that WWII was a lost cause.

Theresienstadt Murderer Arrested

Anton Malloth, a former Nazi SS guard accused of involvement in the torture and murder of more than 700 concentration camp prisoners, is finally facing justice after decades of incompetence by authorities. Together with other Theresienstadt guards, Malloth was convicted in absentia by a Czechoslovak court in 1948 of murder, inhuman punishment, and torture, and sentenced to death. In 1949, he was arrested by Austrian authorities, but was soon freed.

By 1952, Malloth was on a United Nations most wanted list, but he managed to flee to Italy. In 1964, Austria told German prosecutors that Malloth had been executed.

The blunders continued: Italy wrongly said that Malloth had been expelled in 1972 and in 1979 German prosecutors closed the case. Nine years later, Italian prosecutors traced Malloth to his South Tyrolean home and put him on a plane to Munich. However, German prosecutors declined to proceed citing "insufficient evidence" until November of last year when Prague prosecutors supplied new evidence from a 70-year-old Czech

witness. Malloth was arrested in Munich in May of this year. Almost blind and barely able to walk, the 88-year-old will undergo medical tests to establish whether he is fit to stand trial.

Sweden: Nazis Immune from Justice

The Wiesenthal Center blasted Sweden's refusal to reconsider its policy of not moving against Nazi war criminals living in that country because of the statute of limitations dating back to the 1960's. Prime Minister Goran Persson reconfirmed the policy in a letter to the Center's Israel Director, Dr. Efraim Zuroff, who declared that the decision "effectively grants total immunity to all those who committed crimes during the Holocaust."

4. Aug 13, 1999 - New Eichmann Notes Try to Explain

The New York Times

August 13, 1999

Why? New Eichmann Notes Try to Explain

By ROGER COHEN

DATELINE: BERLIN, Aug. 12

BODY:

"Obeying an order was the most important thing to me. It could be that is in the nature of the German."

So, early on in memoirs published today by the German daily Die Welt, does Adolf Eichmann seek to explain his central role in the killing of six million European Jews by the Nazis.

The statement, part of an attempt by Eichmann to portray himself as a man driven by a visceral sense of duty rather than hatred to organize the mass murder of Jews, appears on page 6 of 127 pages of handwritten reflections that Die Welt said it found at the Center for Research on Nazi Crimes in the southern German town of Ludwigsburg.

The Israeli Justice Ministry announced this week that 1,200 pages of notes by Eichmann, who was captured in Argentina by Israeli agents in 1960 and executed in Israel two years later, would be released to German researchers for scholarly publication.

The photocopied pages in Ludwigsburg -- whose authenticity was confirmed by several German historians and has not been contested by Eichmann's family -- appear to be a synopsis of, or an introduction to, the larger body of Eichmann's writings that Israel has said it intends to release.

"The precise relationship of these pages to the rest of his writing in Israel is not entirely clear," said Johann-Michael Moller, the editor at Die Welt responsible for the publication. "What is clear is that they are genuine."

Hans Mommsen, a respected historian, said: "There is no question that these papers are authentic. They are a shorter autobiographical outline of what is still in Jerusalem."

In the outline of his life published today, Eichmann wrote: "From my childhood, obedience was something I could not get out of my system. When I entered the armed services at the age of 27, I found being obedient not a bit more difficult than it had been during my life to that point. It was unthinkable that I would not follow orders."

He continued: "Now that I look back, I realize that a life predicated on being obedient and taking orders is a very comfortable life indeed. Living in such a way reduces to a minimum one's own need to think."

The remarks appear likely to prove sensitive here because the question of the responsibility for the Holocaust on the part of Germans who, at a far lower level than Eichmann, merely "obeyed orders," remains contentious.

Moreover, the appropriate relationship between order and freedom, and between initiative and obedience, remains an open question in a highly regulated German society still marked at times by the rigid mentality of the "Beamte," or functionary, for whom duty has greater value than enterprise.

The pages appear to have been handed to Germany by Israeli officials as part of the summary of Eichmann's trial in 1961 and lodged in the judicial archives at Ludwigsburg, one of two large German legal archives dealing with Nazi war crimes. The other is in Dusseldorf.

Germany had an official observer at the Eichmann trial, Diedrich Zeug, and it appeared likely that a copy of the memoir was brought by him to Ludwigsburg, where it languished in the archives, historians said. Mr. Moller of Die Welt said he had learned of the existence of the writings through an anonymous tip.

Eichmann, a traveling salesman in his youth, began dealing with "Jewish questions" for the Nazi regime two years after Hitler's rise to power in 1933. Rising through the ranks of the SS, he was entrusted in early 1942 with carrying out the "final solution," a goal of annihilation he pursued with unrelenting bureaucratic zeal.

After the war, he escaped to Argentina in 1946, before being brought back to Israel in 1960. At his trial thenext year, he showed the same determination to portray himself as no more than an obedient servant of orders from on high as he does in the pages published by Die Welt.

"These pages are genuine, but they amount to a legal defense more than a memoir," said Irmtrud Wojak, a prominent historian of the Nazi years. "And in them he defends himself, as he always did, as an innocent because he did no more than obey orders."

Eichmann begins the memoir by noting that he is starting to write on May 9, 1960. This was seven days after Israeli agents tracked him down in Buenos Aires, and two days

before his abduction to Israel. Ms. Wojak said the writings were completed on June 16, 1960, before he embarked on the larger body of notes still in Israel.

From the outset, the overarching theme of obedience is struck. His father, Eichmann wrote, raised him "in a strict manner that none of my siblings would experience." He was not a difficult child, but an "agreeable and obedient boy."

So deep was the instinct for obedience in him, he wrote, that when the Nazis were defeated in 1945, he was in a panic at the prospect of living an existence not dictated by orders. "I found myself completely incapable of living as my own person and fell into a deep depression."

Eichmann first went to Auschwitz in 1941, the year he was promoted to an SS lieutenant colonel. He made later visits there, and to other death camps in Poland, to analyze progress in the elimination of the Jews.

"I was to report on the Fuhrer's plans to destroy the Jews," Eichmann writes on page 109. "I was sent to Treblinka, Minsk, Lemberg and Auschwitz. When I see the images before my eyes, it all comes back to me."

He continues: "Corpses, corpses, corpses. Shot, gassed, decaying corpses. They seemed to pop out of the ground when a grave was opened. It was a delirium of blood. It was an inferno, a hell, and I felt I was going insane."

In fact, Eichmann showed no signs of insanity, at least by the standards of the Nazi bureaucracy within which he worked. He complained regularly about death-camp quotas not being fulfilled, about the problems of getting all French Jews to the death camps, and about the intermittent failure of the Italians to cooperate.

As late as 1944, he played a leading, and open, role in the killing of Hungarian Jews, and in August of that year he reported that four million Jews had died in the death camps and another two million at the hands of the Nazis' mobile extermination units in Eastern Europe. At no point did he show the least compunction over the planning, organization and execution of what became known as the Holocaust.

Defiant to the last, Eichmann writes on the last page of this shorter memoir: "I am certain, however, that those responsible for the murder of millions of Germans will never be brought to justice."

http://www.nytimes.com

CORRECTION-DATE: August 17, 1999, Tuesday

CORRECTION:

Because of an editing error, a front-page headline on Friday about newly disclosed notes by Adolf Eichmann referred imprecisely to their scope. The papers discuss Eichmann's own motives in organizing the mass killings of Jews; they do not "try to explain" the killings themselves.

F. West Germany & Unified Germany

1. Last effort to hunt down Nazis

Last effort to hunt down Nazis

seeks help from local witnesses

By Toby Axelrod

BERLIN, May 25 (JTA) - When the hot line in Vienna rings, Christine Schindler steels herself.

It could be a tip leading to an old Nazi who has escaped justice. More likely, it's another crank caller making anti-Semitic comments.

"Why don't you leave our grandparents alone? The Jews are guilty of everything," Schindler has heard.

"There is one Nazi murderer: Ariel Sharon," is another line, or, "Austrians have paid enough for the Jews."

"Although I expected such calls, I did not know how stressful it would be," said Schindler, a volunteer for the Simon Wiesenthal Center's Operation Last Chance. The program constitutes the center's last-ditch effort to find and prosecute Nazi war criminals before they die.

Schindler works at the Vienna-based Documentation Center for Austrian Resistance, and she has been answering the hot line for several months. The Wiesenthal Center rewards successful tips - those that lead to a conviction - with $10,000.

Last Chance was launched in 2002 in the Baltics, was extended to Poland, Romania and Austria in 2003, and this June will expand to Germany, Hungary, Croatia.

"We are about to start the biggest push ever, the last push," said Efraim Zuroff, director of the Wiesenthal Center's Israel office and coordinator of Nazi war crimes research. Zuroff launched the project together with the Targum Shlishi Foundation of Miami, Fla., founded by Aryeh Rubin, who had the idea for the program.

The project reflects the fact that the World War II generation is dying. Those behind the project say it aims to correct the injustice that perpetrators have gotten away with murder, while Holocaust survivors suffer a lifetime of anguish over their pain and the loss of loved ones.

Despite the obvious challenge, there have been some positive results.

So far, 198 leads have come in from Lithuania, 43 from Latvia, 6 from Estonia and 13 from Ukraine, where the program hasn't even officially begun. In all, 72 cases have been submitted to prosecutors in Lithuania, Latvia and the United States, with nine murder investigations under way in Lithuania.

In Poland, an ad campaign for the program will be launched in June.

"This is a fight against impunity," said Winfried Garscha, historian and archivist at the Documentation Center for Austrian Resistance.

"You can't say it is so long ago and the murder is no longer a murder if it happened 60 years ago," he said. "This is the wrong attitude for the societies that allowed those crimes to take place."

"We have an obligation to the victims," Zuroff said. "We are working against the clock."

The program was started in the Baltics because those countries had the highest rate of victims during the Holocaust. There also was an extremely large number of local collaborators and police units sent from other Baltic countries who actively participated in the mass murder of Jews, Wiesenthal center officials said.

As each new country was added to the program, the rewards were announced in news conferences and were followed by local ad campaigns.

"We try to work with the Jewish communities but they are not always open to cooperation," Zuroff said. In Germany, he said he was told, "This is not the time."

"Like it is going to be 'the time' five years from now," Zuroff said.

In Austria, the ad slogan was "The murderers are among us."

In Lithuania, the ad campaign included a photograph taken by Nazis of an infamous 1941 pogrom in Kovno, where local gangs murdered 50 Jews. Some were killed when fire hoses were forced into their mouths and the water was turned on.

"Their stomachs exploded," Zuroff said. "Women and children were among those who applauded at every murder, and then they took out an accordion and people sang Lithuanian songs."

The ad said, "Lithuanian Jewry did not disappear. They were brutally murdered," Zuroff said. "This is about your Jewish neighbors, the ones who were murdered nearby."

Otto Adler, 75, is an Auschwitz survivor who leads the group Holocaust Survivors in Romania. A volunteer for the local Last Chance hot line, Adler said he's used to getting crank calls.

"The first rule is to be very, very quiet when they are speaking," he said. "This is very difficult: At my age, everyone becomes angry very easily. But we stop our anger and become quiet and explain that he is saying very, very bad things, and then I say that I am very sorry, with this kind of talk I cannot be his partner, and I break off the conversation."

In Austria, some callers mistakenly thought the reward was coming from the local Jewish community, which they then accused of using reparation money paid to Holocaust survivors by Austrian taxpayers to go after "our grandfathers."

Volunteers for the hot line say justice is a matter of principle, no matter the age.

Olaf Ossmann, 39, a Berlin attorney who works on reparations cases for Holocaust survivors in Germany, Israel and the United States, said it's outrageous that former

Lithuanian soldiers get German pensions because they worked for Germany in the Warsaw Ghetto.

Adler said the hot line also has brought in tips about Romanians who helped rescue Jews, which is a separate project of his survivors association. There is no reward money for that program.

"We found three people, but one is already dead," Adler said. "We sent their names to Yad Vashem," the Holocaust memorial in Israel.

Operation Last Chance also seeks to educate people about anti-Semitism, Zuroff said. The volunteers' experiences indicate that much remains to be done in coming to terms with the history of local collaboration, he said.

In certain countries there was "extensive collaboration and relatively little effort to face that collaboration, and almost no effort to bring them to justice," Zuroff said. "Even Austria has not had a successful conviction in 30 years, and it is certainly not for lack of suspects."

"There are many of these people around," he added.

2. Nov 14, 2001 - Germany cancels pensions to 72 former Nazis

THE JERUSALEM

POST

November 14, 2001

Germany cancels pensions to 72 former Nazis

By Etgar Lefkovrts

JERUSALEM (November 14) - Germany's Labor Ministry has canceled the government pensions of 72 Nazi war criminals, another 11 pensions are likely to be canceled soon, and investigations have started in 250 other cases, according to Dr. Efirahn Zuroff, Israel director of the Simon Wiesenthal Center.

"We are correcting an historic injustice," Zuroff said in an telephone interview with The Jerusalem Post yesterday from Berlin, adding mat the long overdue termination of pensions for Nazi war criminals is part of a two-pronged approach in righting past wrongs.

"First we worked to see that survivors and slave laborers received proper compensation, and now we are taking measures to ensure that those who don't deserve disability pensions do not continue receiving them," he said.

The landmark decision follows a January 1998 law passed in the Bundestag whereby those who "violated the norms of humanity" would lose their disability pensions.

Since then, the Wiesenthal Center has provided the German Authorities with a listing of the names of war criminals who were still receiving state benefits, which Zuroff said ranged from DM 300 to DM 1200 a month, or roughly $150 to $600.

Some of the people who were receiving these stipends for the last 55 years included members of the notorious police battalions whose death squads murdered Jews throughout Central and Eastern Europe during World War II.

Among the names of those previously struck off the pensions list is that of former SS Capt. Erich Priebke, who was jailed by an Italian court in 1997 for taking part in the slaughter of 335 men and boys outside Rome in 1944.

However Zuroff pointed out that no other SS men are on the list.

Due to the country's stringent protection laws, the names most recently removed from the Labor Ministry's list cannot be published.

Many of the war criminals who will no longer receive pension benefits were investigated in the past but never prosecuted, Zuroff said.

Germany pays disability payments to about 500,000 people each month, including about 60,000 who live outside of Germany.

Zuroff, who voiced his satisfaction, with the German Government's cooperation, said yesterday that he thinks that many more war criminals are actually benefiting from government pensions, and that hundreds of other names are being investigated.

Earlier this year, the German government and some of the country's top companies set up a $4.5 billion fund for the aging survivors of Nazi-era slave and forced labor camps.

11/13/01 6:04 PM

3. Apr 22, 2001 - Nazi camp guard goes on trial

http://cnnstudentnews.cnn.com/2001/WORLD/europe/04/22/germany.nazi/

CNN.com WORLD

Nazi camp guard goes on trial

April 22, 2001

MUNICH, Germany -- A former guard at a Nazi concentration camp is expected to go on trial in Munich on Monday accused of three counts of murder.

Prosecutors say ex-SS company leader Anton Malloth, 89, sadistically killed two inmates at the Theresienstadt camp, in what is now the Czech Republic, in January 1944.

It is the first trial of a former guard at the camp since it was liberated 56 years ago at the end of World War II.

He is accused of training a powerful jet of water at the naked inmates for half an hour. He is also accused of clubbing a third prisoner to death a few months later.

Witnesses say Malloth also he shot a fourth inmate who tried to steal a cabbage during harvesting work near the camp, although it is not clear whether he killed this victim.

Austrian-born Malloth, against whom a guilty verdict handed down in absentia by a Czechoslavakian court in 1948 was ruled unsafe in 1969, denies all charges.

A butcher by trade after the war, Malloth has lived near Munich in Bavaria since being extradited from Italy in 1988 and has been in detention since last May. Prosecutors say his nationality is unclear.

German authorities have been investigating charges against Malloth for more than 20 years since the original 1948 verdict against him, which carried the death penalty, was quashed on grounds that not all relevant details of the case were covered.

German media attention has been growing towards what are expected to be among the last trials of former Nazis.

Prosecutors in Hamburg are studying whether to try 92-year-old former Nazi SS officer Friedrich Engel for killing at least 246 Italians in 1944 and 1945 in the northwest region of Liguria in reprisal for attacks against Germans.

Engel has already been tried in absentia and sentenced to life imprisonment by Italy. Italy confirmed on Friday it had written to the German Justice Ministry stepping up its demand for Engel's arrest.

Earlier this month a German court sentenced ex-SS officer Julius Viel, 83, to 12 years in jail for the murder of seven Jewish prisoners in early 1945 near the Theresienstadt camp.

4. Apr 16, 2001 - Germany investigates former Nazi

http://cnnstudentnews.cnn.com/2001/WORLD/europe/04/16/germany.engel/

CNN.com WORLD

Germany investigates former Nazi

April 16, 2001

BERLIN, Germany -- An investigation has begun into a 92-year-old former Nazi wanted in Italy for mass executions during World War Two.

Friedrich Engel was tracked down by German ARD television last week in the northern German port city of Hamburg.

He was sentenced in absentia in Italy in 1999 for war crimes but remains a free man, pending results of the investigation.

"There is now a preliminary investigation under way in Hamburg. Documents from Italy must be evaluated," German Justice Ministry spokesman Thomas Weber said.

"He cannot be extradited to Italy, so Germany would have to have its own case against him (for him) to be arrested, and that's up to Hamburg," he said.

German law bars the extradition of German citizens for crimes committed abroad, but they can be prosecuted for such crimes back in Germany.

An Italian court found Engel responsible for the deaths of at least 246 Italians in 1944 and 1945 in the region of Liguria in reprisal for attacks against Germans in the closing phase of World War Two.

Victims were 'martyrs'

Italian media have referred to him as the "Butcher of Genoa."

In an interview with Italy's Corriere della Sera on Sunday, Engel was quoted as saying: "I am responsible, but only in part, for the execution of 59 Italian prisoners of war.

"They died as heroes and I hold them in the highest respect."

Engel was the head of the Nazi SS paramilitary police in the Italian port of Genoa at the time of the deaths.

He said the 1944 executions were a reaction to an attack by "Italian terrorists" against a theatre in Genoa.

"It would have been impossible to find those responsible," he said.

"Fifty-nine men arrested for other acts against us Germans were shot," he added.

"I want to stress that these 59 were martyrs, they did not cry, they did not shout, they did not ask for mercy."

5. Apr 3, 2001 - Ex-SS commander jailed for murder

http://cnnstudentnews.cnn.com/2001/WORLD/europe/04/03/germanwar.criminal/

CNN.com WORLD

Ex-SS commander jailed for murder

April 3, 2001

RAVENSBURG, Germany -- A court has sentenced a former SS commander to 12 years in prison for the murder of seven Jewish concentration camp inmates.

Julius Viel, now 82, denied murdering the inmates of the Theresienstadt camp in Nazi-occupied Czechoslovakia in the spring of 1945. Following the verdict, the prosecution had demanded a life sentence for Viel.

Viel was originally investigated in the 1960s but the case was closed because of lack of evidence.

Viel had by this time become a respected journalist in West Germany and had been awarded a government medal for his writings on hiking.

But he was arrested in October 1999 on the basis of the evidence of Adalbert Lallier, formerly a Nazi officer trainee and now a professor of economics in Canada. He says he witnessed the killings.

In pleading for Viel's acquittal, defence lawyer Ingo Pfliegner, sought to cast doubt on Lallier's reliability as a witness.

Lallier said that as one of an SS officers' school group watching the inmates digging a tank trap against advancing Soviet forces in Theresienstadt, he saw Viel seize a rifle and shoot the victims.

Lallier, who was born in Hungary and now lives in Quebec, first told his story publicly in 1998. He said he had stayed silent for so long out of loyalty to his fellow soldiers, but was persuaded to speak out by another former SS officer.

The SS, short for Schutzstaffel, was the quasi-military unit of the Nazi party which was used as a special police force and committed some of the worst crimes in territory under Nazi control during World War II.

G. France

1. Papon to have war crimes conviction reviewed

2004 WL 68219665

The Daily Telegraph

Friday, February 27, 2004

News: International:

Papon to have war crimes conviction reviewed

By Henry Samuel in Paris

MAURICE Papon, the ailing French Nazi collaborator, yesterday won the right to have his conviction reviewed by France's highest court of appeal. The Cour de Cassation will re-examine the legality of Papon's conviction for complicity in crimes against humanity

and could order a re-trial. In 1998, a Bordeaux court sentenced the former cabinet minister and Vichy collaborator to 10 years in jail for the part he played in deporting hundreds of Jews to Auschwitz. He was released in 2002 on grounds of ill-health. In October 1999, on the eve of his appeal Papon, now 93, fled to Switzerland. His refusal to spend a night in jail meant the appeal was automatically rejected by France's highest court. He was jailed when the Swiss handed him back. Arno Klarsfeld, who represented the families of deported Jews during Papon's trial, said he was not alarmed by the decision: "The Cour de Cassation will reject his arguments, I'm 100 per cent sure.

We have always trusted the justice system and were right to do so." Papon was the secretary-general of the department of the Gironde, around Bordeaux, between 1942 and 1944. He signed documents recording the arrest, assembly and deportation of more than 1,500 Jews, including 220 children, to an "unknown destination", now known to be Auschwitz. Last week, he told a French magazine that he had no regrets. "To express regret is to say that I did something regrettable, which would have been a confession," he told Le Point.

2. Mar 3, 2001 - Nazi Sentenced in Absentia for Sending Children to Die

LOS ANGELES TIMES March 3, 2001 pg. A-12

Nazi Sentenced in Absentia for Sending Children to Die

From Associated Press

Paris - Finally 57 years after their deaths, the children of convoy No. 77 have had their day in court.

The man who deported them to the Nazi extermination camp at Auschwitz - Alois Brunner - was tried in absentia Friday for crimes against humanity and sentenced by a French court to life imprisonment.

The verdict was largely symbolic since there is almost no chance the Austrian-born former Gestapo officer will go to jail. Brunner reportedly found safe haven in Syria decades ago and hasn't been seen alive since the early 1990's.

But prosecutor Philippe Bilger said the case must proceed because of the horrific nature of the crime.

"Whether Brunner is dead or alive, present or absent, there is still room for justice," Bilger told the court.

Brunner, who sent thousands of Jews to their death during the Holocaust, was sentenced to death in absentia twice in 1954.

But neither tribunal dealt with the specific crime that was the focus of Friday's case: the deportation to Auschwitz on July 31, 1944 of 250 children from Jewish orphanages and 100 other children who were arrested at the same time. The children were part of the last convoy to leave France for German death camps.

French Nazi hunter Serge Klarsfeld said he spent years compiling evidence for the Brunner case. Klarsfeld said his purpose was to find a permanent place for the names of the young victims in the French historical record.

Dozens of people gathered outside the Paris courthouse, many holding photographs of deported children.

H. Eastern Europe & USSR

1. Feb 15, 2001 – Lithuanian, 93, Convicted of War-Crimes but Spared Jail

THURSDAY. FEBRUARY 15, 2001

Lithuanian, 93, Convicted of War-Crimes but Spared Jail

By JOHN DANISZEWSK3

TIMES STAFF WRITES

VILNIUS, Lithuania-A court convicted a 93-year-old former security police commander Wednesday of taking part in the mass murder of more than 200,000 Jews in Lithuania during World War II.

It was the first time since the collapse of the Soviet Union that a local collaborator has been convicted of a Holocaust crime in one of the now-independent former Soviet republics.

Kazys Gimzauskas, who doctors say has Alzheimer's disease and is too ill to be incarcerated, will not be sent to prison for his crimes, the court ruled. Records show that Gimzauskas turned over at least three Jews for execution during the 1941-44 Nazi occupation of Vilnius, the Lithuanian capital.

Simonas Alperavicius, the head of Lithuania's Jewish community, described the outcome as "better than nothing."

"Unfortunately, he will bear no punishment as the doctors found him mentally impaired, and he will be left in the care of his family," Alperavicius said. "If this verdict had been pronounced three years ago, when Gimzauskas felt much better, then he would have at least under-stood that he hadn't managed to escape justice. ..."

Gimzauskas, who pleaded innocent, was allowed to be tried in absentia because of his poor health. He continues to live in an apartment in Vilnius with relatives. His lawyers have 20 days to decide whether to appeal the verdict.

Efraim Zuroff, head of the Jerusalem office of the Los Angeles-based Simon Wiesenthal Center, called the verdict in Vilnius District Court a landmark for Lithuania in facing up to the active participation by many Lithuanian citizens in the World War II genocide of the country's Jewish population.

But he deplored the fact that it had taken so long for the case to come to trial.

"Quite frankly," he said, "the Lithuanian government has had very little political will to move forward on these cases."

Lithuania once held a thriving Jewish community, and Vilnius was called "the Jerusalem of the North."

Zuroff suggested that the "overwhelming majority" of Lithuanian Jews murdered in the war were killed by compatriots who enlisted in special units under the Nazis. He estimated that only about 8,000 of the 225,000 Jews who were in Lithuania at the time of the 1941 Nazi invasion survived the war.

He said he doubts that the case against Gimzauskas would have been pursued except for Lithuania's eagerness to be admitted to the North Atlantic Treaty Organization and the European Union.

Zuroff said that Gimzauskas should have been arrested and brought to trial [in] 1993 after he returned to Lithuania from the United States, fleeing U.S. investigators. Instead, no formal investigation was opened for three years.

A Lithuanian government spokesman, however, said the Gimzauskas verdict indicates a growing awareness among Lithuanians of the need to bring Nazi-era war criminals to justice.

"I think that more and more people in Lithuania, as civilized people in Europe, understand today that the tragedy of the Jewish people is incomparable with the tragedies of other peoples during World War II," said Rimvydas Paleckis, spokesman for Prime Minister Rolandas Paksas. "They understand that punishment of people who in some way helped the Nazis to exterminate Jews must happen sooner or later," he said.

At least half a dozen other Nazi war crimes suspects are under investigation in Lithuania, but no trial dates have been set.

Sergei L. Lolko of The Times' Moscow Bureau contributed to this report

I. Venezuela

1. May 1, 2001 - Venezuela shocked by allegations it harbors Nazi collaborators

CNN.com WORLD

Venezuela shocked by allegations it harbors

Nazi collaborators

May 1,2001

CARACAS, Venezuela (AP) - Venezuela has always prided itself on being unsullied by South America's reputation as a haven for fugitive Nazis, so a claim that it is harboring 18 Nazi collaborators has shocked the nation.

The Los Angeles-based Simon Wiesenthal Center, a Nazi-hunting organization, has asked the Venezuelan government to help track down the 18 alleged collaborators. It says they include a prominent retired businessman from Estonia.

"Many Jews saved their lives coming here. We are profoundly grateful to this land that has offered us refuge," said Isabel Cohen, 61, a Spanish Jew who fled to Venezuela in 1942. "That's why we are very upset by this news. We are shaken by the very thought that this oasis of peace could be stained by the presence of war criminals."

South America was a popular destination for Nazis fleeing arrest after World War II. Prominent among them were Adolf Eichmann, a senior officer in the Nazi extermination system who lived in Argentina until Israel abducted him in 1960; Klaus Barbie, a Gestapo chief deported to France in 1987 from Bolivia; and Josef Mengele, the murderous Auschwitz camp doctor who died in Sao Paulo, Brazil, in 1979.

The Wiesenthal Center doesn't know exactly how many former Nazis and collaborators are living in South America today, but says it fears many have already died in freedom.

"Time is against us. Tune is working to allow these assassins to die in liberty,"

Among the alleged fugitives the Wiesenthal Center says are in Venezuela is businessman Harry Mannil. It claims that as a political police officer during the 1941-44 Nazi occupation of Estonia, Mannil participated in the massacre of at least 100 civilians. Mannil, now 81, has strongly denied it.

The others are from Lithuania and Latvia but won't be identified until it can be confirmed that they are alive and living in Venezuela, the Wiesenthal Center says.

The Venezuelan government has said it will cooperate in the search.

"I don't even want to think that these type of people sought refuge in Venezuela," Foreign Minister Luis Alfonso Davila told The Associated Press. "We are proud of being a country that welcomed with open arms those who fled the barbarity of the European wars."

Although Nazi-hunters have largely focused their search outside Venezuela, the news didn't surprise Elieser Rotkopf, of the Confederation of Israeli Associations of Venezuela. Rotkopf points out that in 1943, the United States made a list of Venezuelan government officials who allegedly had ties to Nazis and could have subsequently helped them enter the country.

The Wiesenthal Center also provided Argentina with the names of 20 alleged Nazi collaborators suspected of living there.

Mannil, a former importer and art collector who has donated works to Estonian museums, insists he only worked for Estonia's political police for four months and fled in 1943 rather than cooperate with the Nazis.

"This is absurd and completely unfounded," he was quoted as saying in an Estonian newspaper.

His son, Mihkel, repeated the denial.

"My father was forced to flee Estonia for refusing to work with the Nazis. He escaped when they were about to arrest him," Mihkel told the AP. "Those who accuse him are lying and they have no proof."

At least 5,000 Jews died in Estonia during the Nazi occupation of the Baltic country, according to the Wiesenthal Center.

Estonian investigators say they combed their files in 1995 for evidence implicating Mannil but found none. Last week, an Estonian presidential commission announced that a search of archives there and in Germany found no mention of Mannil. The country's security police said they would seek access to any documents on Mannil in U.S. archives.

Efraim Zuroff of the Wiesenthal Center said in a recent letter to Estonian Prime Minister Mart Laar that he believes the United States has documents pointing to Mannil's guilt. He said Estonia should try Mannil if new evidence is [discovered.]

Eli Rosenbaum, who heads the U.S. Justice Department's Office of Special Investigations on Nazis, said he couldn't comment about Mannil. But Justice Department officials, speaking on condition of anonymity, said Mannil is barred from entering the United States because of the allegations. They declined to elaborate.

Shlomo Ben-Ami, Israel's former foreign minister, said the Venezuelan case shows that Latin governments shouldn't give up the search, even if more than 56 years have passed since the war ended.

"I am confident that (Venezuelan and Estonian) authorities will punish those responsible," Ben-Ami told the AP.

J. Italy

1. Tiny Town Lost in Tides of History

April 18, 2004 NY Times

Tiny Town Lost in Tides of History

By CLIFFORD J. LEVY

SANT'ANNA DI STAZZEMA, Italy - This Tuscan village is nearly deserted, but a few survivors sometimes return: to visit the memorial, to gaze on hills once overrun by the Nazi SS, to clutch a handful of soil that, even now, is said to be mixed with the ashes of 560 people the Nazis rounded up, shot and then set afire in a few hours in midsummer 1944.

For years, the massacre stood as a symbol of a certain Italian ambivalence toward World War II. The victims - women, children, the elderly - were honored, but demands for justice were brushed aside. The nation was moving on.

Yet now, military prosecutors are reopening this grim chapter by charging at least seven former SS officers with taking part in the killings. Italy is not only delving into what happened in this hardscrabble community, it is also learning how officials covered up inquiries into events of that day.

"We hope finally that there will be justice," said a survivor, Mauro Pieri, 72, speaking in the square in front of the modest village church.

Mr. Pieri motioned. Over there was the house into which he and 30 others were herded by troops. Only four survived, cowering under bullet-riddled bodies. Here, in the square, troopers shot more than 100 villagers before using the church pews for a bonfire to dispose of the bodies.

"The thing that is still in my mind is the odor of the burning flesh," said another survivor, Enio Mancini, 67, caretaker of the memorial.

The massacre, on Aug. 12, 1944, occurred after Mussolini had been deposed, and Italian partisans were attacking retreating German troops. The 16th Division of the SS - for Schutzstaffel, the Nazi special police units - was evacuating towns to deny aid to the partisans. Learning that the SS was approaching Sant'Anna, which had been flooded with refugees, some men fled, thinking the women and children were not in danger.

Most of the SS members involved are dead, but Italian prosecutors located at least seven suspects in Germany. The trial of the first three - Alfred Schoneberg, 82; Gerhard Sommer, 82, and Ludwig Sonntag, 79 - is to begin on April 20. Prosecutors expect to try the three in absentia and will seek their extradition only if they are convicted.

The three deny any role in the massacre. Because of their ages, if found guilty they face house arrest for life in Italy.

The official interest in Sant'Anna was revived a decade ago. Prosecutors working on another found a cabinet full of yellowed files detailing Italian inquires into Nazi atrocities, including the one here. The cabinet was turned around, its drawers pressed against a wall.

The Italians had not been the only ones to examine Sant'Anna and then turn away. The United States Army conducted an inquiry in October 1944, including testimony from survivors and from an SS deserter. Army investigators found that "in many of the burnt-out houses, there still remain charred remains giving mute evidence of the massacre," according to their report.

The lead Italian prosecutor, Marco De Paolis, said in an interview that until the 1990's, the government seldom sought war-crimes charges against former Nazis. "You wouldn't think that something like that could be hidden," he said, "but everything had been blocked because of political considerations."

He said that after the war, Italy wanted warm relations with West Germany, and feared diplomatic repercussions from such cases. The American and British authorities had

decided to prosecute only senior Nazis, he said. France and others did not pursue some Nazis and collaborators until recent decades.

Historians point out one reason for such reluctance: by pursuing German war criminals, Italians may be forced to scrutinize their own actions under Mussolini, including their harsh treatment of Italian Jews. (Few if any of the Sant'Anna victims were Jewish.)

This ambivalence has not entirely ebbed, and it helps explain why it has taken a decade for the prosecutions to come to trial.

With the case, the inevitable questions arise for Italy, similar to those that have long burdened countries from Germany to South Africa: What should the nation seek, reconciliation or retribution? What good can come from prosecutions so many years after the crimes?

Mr. De Paolis has a ready answer. He brought the case, he said, because he had no choice, given the ample evidence. "The reason we are doing this is the law," he said. He added that Parliament was also trying to make amends by investigating why the records were covered up.

Luigi Trucco, a lawyer for Mr. Schoneberg, said Mr. Schoneberg found the accusations deeply unfair. Mr. Trucco said Mr. Schoneberg - who lives in the Dusseldorf area and has had two strokes - was not involved in the massacre.

"There are some witnesses saying that he belonged to the SS battalion, and he was in Tuscany at that time, but there is no proof that he was in that village," Mr. Trucco said. "This is a very difficult trial from the position of the defense. These cases have been in the archives for many years for political reasons."

Mr. Sommer, another defendant, acknowledged on German television in 2002 that he was an officer of the SS division, but said, "I have an absolutely pure conscience."

It is unclear whether Germany would extradite any of the seven, but Mr. De Paolis said German prosecutors were conducting their own inquiry into Sant'Anna.

The Sant'Anna survivors know there is a certain futility in the case. After all, even if the Germans are convicted, they will have gone nearly all their lives unpunished. Still, the trial matters to many.

"At least the wives and children of these people, they now know that they have a criminal in their families," Mr. Pieri said. "For me, forgiveness does not exist."

For others, it does. Enrico Pieri, 70, a distant relative who was left orphaned by the massacre, said: "I have forgiven the Germans. I hate their former ideology but not their people. I have gotten on with my life. I have overcome the hate."

2. Karl Hass, 92, Nazi convicted in massacre

2004 WL 63139226

Chicago Sun-Times

Thursday, April 22, 2004

News

Karl Hass, 92, Nazi convicted in massacre

FRANCES D'EMILIO

Associated Press

ROME -- Karl Hass, a former Nazi officer convicted for the wartime massacre of 335 Italian civilians in Rome, died Wednesday in a rest home where he had been serving a life sentence under house arrest, officials at the home said. Mr. Hass, 92, had been living at the Garden rest home in the Alban hills near Rome since December 1996. His health had been failing recently, and on Wednesday morning he had a heart attack, said the Garden's director, Riccardo La Rosa.

The former SS major was sentenced in 1998 to life in prison for killings at the Ardeatine Caves on the outskirts of Rome when the Italian capital was under German occupation during World War II.

He had been spared prison because of frail health and his age and because he had returned voluntarily from Switzerland after the sentencing.

Also convicted by a military court in the same case was former SS Capt. Erich Priebke. He also is serving a life sentence under house arrest in Rome.

German soldiers rounded up and shot the civilians -- among them 75 Jews -- in retaliation for a bomb attack in Rome by Italian resistance fighters that killed 33 Germans.

Both Mr. Hass and Priebke insisted at their trials that they had no choice but to follow orders.

Mr. Hass had come to Italy from Switzerland in 1996 at prosecutors' request to testify against Priebke. But he changed his mind and injured himself when he jumped from his hotel balcony in a bid to avoid taking the stand. He was then put under house arrest and later indicted.

Survivors include a daughter, Erica, who lived in Geneva and who came every few weeks to visit Mr. Hass, La Rosa said.

"He didn't talk about the trial; he was very closed, very reserved," said La Rosa.

In a 1997 interview, Mr. Hass told German magazine Der Spiegel that he worked for U.S. Army counterintelligence in Austria and Italy for a few years after World War II.

The Ardeatine massacre's anniversary is commemorated in Rome, and feelings over the killings run high in the capital.

Last month, citing fears for public order, the government's top official in Rome banned demonstrations planned by both supporters and opponents of a pardon for Priebke. A request seeking Priebke's pardon has been pending before the Defense Ministry since 1999. President Carlo Azeglio Ciampi indicated recently that a pardon was unlikely.

"Pardon in Italy presumes pardon by the victims' relatives," Ciampi said, adding he didn't think the families wanted a pardon.

Mr. Hass "followed the [pardon] debate about Priebke. We talked about it a little," La Rosa said. "He never nurtured any hopes of being free again. He was sure he would have died here."

K. Spain

1. Spain searches for Nazi camp doctor, 91

http://www.guardian.co.uk/international/story/0,3604,1563330,00.html

Spain searches for Nazi camp doctor, 91

Giles Tremlett in Madrid

Tuesday September 6, 2005

The Guardian

Spanish police are scouring old people's homes on the east coast of Spain as the hunt closes in on a 91-year-old concentration camp doctor, regarded as one of the most wanted Nazis still alive.

Investigators say there is a strong chance that Aribert Heim, who is alleged to have killed hundreds of prisoners at the Mauthausen camp in Austria, is still alive and living on the Spanish costas.

Dr Heim is regarded as the second most wanted former Nazi by the Simon Wiesenthal centre in Israel, after Alois Brunner, Adolf Eichmann's righthand man. The centre has offered a ?10,000 (£6,800) reward for Heim, in addition to the ?130,000 being offered by the German police.

The Spanish police's specialist fugitive section was yesterday checking old people's homes and looking for elderly Germans with private nurses in the Alicante region, an official source confirmed.

"They are going after him and think he may be in that region," the source told the Guardian.

German police reopened the Heim case several years ago after evidence came to light that the doctor, who allegedly injected Mauthausen prisoners with cocktails of lethal drugs, might still be alive.

Regular money orders wired to a town near Alicante by Dr Heim's family may have been picked up by him as he hid among the large population of northern European pensioners living in the area, investigators believe.

More than a hundred payments were made between 2000 and 2003, the Spanish magazine Interviú reported yesterday.

Dr Heim's family had claimed that he was dead, but several years ago German police discovered an account in his name at a Berlin savings bank, according to Der Spiegel magazine.

Dr Heim is reported to own an apartment building in the city. Sources close to the investigation said yesterday that in 2001 a German lawyer had applied for tax exemption on the income it provided on the basis that Dr Heim was living abroad. The lawyer reportedly said his duty of confidentiality meant he could not reveal where Dr Heim was hiding.

Efraim Zuroff, of the Simon Wiesenthal centre, said Spain had "a pathetic record" in hunting down Nazis. "Now it is time to make up for years of apathy and inaction," he said.

Dr Heim was briefly detained by US troops at the end of the war, but it was not until 1962 that he fled Germany as police began to investigate him. Both Germany and Austria have warrants outstanding for his arrest.

L. De-naturalization Proceedings in U.S.

1. Pursuing evil to the grave - Demjamjuk

http://www.latimes.com/news/printedition/opinion/la-oe-goldhagen9dec09,1,6003250.story

Pursuing evil to the grave

By Daniel Jonah Goldhagen

December 9, 2005

JOHN DEMJANJUK, the Nazi death camp guard who has lived in the United States since falsifying his entry papers in 1952, is again in the news, facing deportation to Germany or perhaps Ukraine, his country of origin.

Demjanjuk has been extradited once, to Israel, where the Supreme Court in 1993 overturned his conviction and death sentence, saying that he was not, in fact, Ivan the Terrible, an infamous guard at the Treblinka death camp. But today, the documentary evidence is clear that although he was not Ivan, he was a guard in several concentration camps, including Sobibor, in Poland, where the Germans exterminated an estimated 250,000 people in 1942 and 1943. Because of the persuasive evidence of Demjanjuk's service to Nazi mass murder, a federal judge stripped him of his U.S. citizenship in 2002, which set the stage for the current deportation proceedings.

The Holocaust ended 60 years ago. Many undoubtedly wonder why Demjanjuk, now 85, should not be left in peace. News reports described him at his most recent hearing, last week, as frail, moaning, hunched in a wheelchair and suffering from chronic back pain. His will certainly be one of the last legal proceedings against the Holocaust's perpetrators because both the perpetrators and the survivors of the Nazis' crimes are dying off. The trials (which the German public never supported anyway) have all but come to a halt in Germany.

So, should Demjanjuk at this late date be held accountable? Indeed, how should we assess the overall record of the last 60 years in bringing these mass murderers to justice? Now that the surviving victims of the Holocaust are becoming ever fewer, have we failed or succeeded in bringing their tormentors and the murderers of so many to justice?

No one should shed a tear for Demjanjuk and the other mass murderers, even if they are now elderly. They committed unsurpassable crimes, willfully torturing and slaughtering unthreatening, defenseless Jewish men, women and children by the tens of thousands. There is no statute of limitations for murder in this country, and, recognizing the historic nature of the Holocaust, the German Parliament repeatedly voted to extend the statute of limitations for murder there as well. Legally, the perpetrators' culpability for their willful crimes is beyond doubt. Is it any less clear morally?

That Demjanjuk and others escaped justice for decades, many rejoicing over their crimes, should not earn them a permanent "get out of jail" card. Eluding criminal punishment and living well after murdering so many, and while one's surviving victims bear their scars every day, is no argument for being allowed to continue to elude punishment. The notion - never baldly articulated - that if someone is arrested for his crime immediately or six months later, he should be punished, but that if he manages not to be punished for 10, 30 or 60 years, he merits permanent immunity, is illogical and strange.

If anything, the moral outrage should not be directed at those seeking justice but, in addition to the criminals themselves, at the political and legal authorities that have done so little over 60 years to punish these murderers.

Germany - not surprisingly, because most of the perpetrators were German - has done the most to prosecute these mass murderers. But from the perspective of justice, the record has been dismal, in two senses. Even though the Germans have convicted what seems like a large number of people for Nazi crimes - 6,500 - it is a tiny percentage of the hundreds of thousands who committed murder and other heinous crimes against Jews and non-Jews during the Nazi period. (In 1996, the German justice system's clearinghouse for prosecuting Nazi crimes had more than 333,000 names in its catalog listing members of killing institutions, of which there were more than 4,100).

And the sentences the killers received - typically a few years for the murder of hundreds, thousands, sometimes hundreds of thousands; sometimes no more than minutes or hours in prison for the murder of each of their victims - were travesties, not instances of justice. (Josef Oberhauser, for instance, who was convicted in 1965 in Germany for his participation in the murder of 300,000 people in the Belzec camp, received a prison sentence of only 4½ years). So, contrary to what many say or imply - that enough is enough, that we should let these harmless old men alone, that we should not hound them endlessly - there is no good argument for letting them be. They have not been hounded; most (and especially non-German Nazi collaborators) have lived well, enjoying perfect immunity.

Still, the prosecution of Holocaust perpetrators has been more successful than the prosecution of other genocide perpetrators. After most mass murders, those who committed the atrocities generally get off scot-free, with perhaps a few symbolic prosecutions of leaders or sacrificial underlings serving as a stand-in for actual justice. In Turkey, Indonesia, Cambodia, the countries of the former Soviet Union and the former Yugoslavia, murderers of thousands have enjoyed the sympathy and protection of the political authorities and populace alike.

This is all the more reason to redouble our efforts, to press forward prosecuting mass murderers from any genocide for as long as it takes, no matter how old they are. Until those tempted to slaughter others know that they will be pursued and punished, they will have little reason not to kill.

So, instead of worrying about this frail old man, shed a tear instead for Demjanjuk's victims - and the victims of future Demjanjuks. Demjanjuk, still living well near Cleveland, has not received a small portion of his deserved punishment - of the punishment he would have gotten had he murdered one non-Jewish German or one American in 1943, 1960, 1980 or 2000.

DANIEL JONAH GOLDHAGEN, author of "Hitler's Willing Executioners: Ordinary Germans and the Holocaust" (Vintage, 1997), is completing a book on genocide in our time.

2. Demjanjuk Court of Appeal Opinion

FOR EDUCATIONAL USE ONLY

367 F.3d 623, 64 Fed. R. Evid. Serv. 166, 2004 Fed.App. 0125P

United States Court of Appeals,

Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

John DEMJANJUK, Defendant-Appellant.

No. 02-3529.

Argued: Dec. 10, 2003.

Decided and Filed: April 30, 2004.

Rehearing Denied June 28, 2004.

Background: Government filed complaint seeking to denaturalize citizen on ground that he illegally procured his citizenship. Following bench trial, the United States District Court for the Northern District of Ohio, Paul R. Matia, Chief Judge, 2002 WL 544622 and 2002 WL 544623, revoked citizenship. Naturalized citizen appealed.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:

(1) admission of service pass for Nazi concentration camp guard was not plain error under double hearsay rule;

(2) treating service pass as sufficiently authenticated was not plain error;

(3) court did not clearly err in finding that defendant was person identified in service pass;

(4) admitting expert testimony to further identify defendant was not abuse of discretion;

(5) involuntary service as concentration camp guard could render applicant ineligible for immigrant visa;

(6) knowing misrepresentation of war record on immigrant visa application was material, rendering entry into United States unlawful and naturalization illegal.

Affirmed.

Before: COLE and CLAY, Circuit Judges; COLLIER, District Judge. [FN*]

FN* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

CLAY, Circuit Judge.

Defendant, John Demjanjuk, appeals from the district court's order revoking Defendant's citizenship, due to Defendant's illegal procurement of such citizenship, and allowing his naturalization to be set aside pursuant to 8 U.S.C. § 1451(a). Because we find that Plaintiff, the United States of America ("Government"), sustained its burden of proving through clear, unequivocal and convincing evidence that Defendant, in fact, served as a guard at several Nazi training and concentration camps during World War II ("WW II"), we concur with the district court that he was not legally eligible to obtain citizenship under *627 the Displaced Persons Act of 1948 ("DPA"). DPA, 62 Stat. 1013. We therefore AFFIRM the district court's order.

I.

Procedural History

There are six prior decisions (three by this Court) on matters related to Defendant's citizenship:

1.) United States v. Demjanjuk, 518 F.Supp. 1362 (N.D.Ohio 1981) (revoking Defendant's citizenship and naturalization; this result was later set aside by Demjanjuk 6) [FN1];

FN1. The six cases are referred to as "Demjanjuk [number of case, as presented in the list]."

2.) United States v. Demjanjuk, 680 F.2d 32 (6th Cir.1982) (per curiam) (affirming Demjanjuk 1);

3.) Demjanjuk v. Petrovsky, 612 F.Supp. 571 (N.D.Ohio 1985) (denying habeas, thus allowing the executive branch to extradite Defendant to Israel, id. at 574; but this ruling was later vacated by Demjanjuk 5);

4.) Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir.1985) (affirming Demjanjuk 3);

5.) Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir.1993) (reopening the case sua sponte, id. at 339, after Defendant was extradited to Israel and there acquitted of all crimes. This Court held that the Government perpetrated fraud in its discovery, and accordingly vacated Demjanjuk 3); and

6.) United States v. Demjanjuk, No. C77-923, 1998 U.S. Dist. LEXIS 4047 (N.D.Ohio 1998) (setting aside Demjanjuk 1, on the basis of the findings of prosecutorial misconduct in Demjanjuk 5).

Subsequently, on May 19, 1999, the Government filed a second complaint in the district court, seeking to denaturalize Defendant on the ground that he illegally procured his United States citizenship. The first claim alleged Defendant's unlawful admission into the United States, in violation of 8 U.S.C. § 1427(a)(1), and was based on his alleged persecution of civilians during WWII, in violation of the DPA, 62 Stat. 219, 227. The second claim alleged Defendant's unlawful admission into the United States, again in violation of 8 U.S.C. § 1427(a)(1), and was based on Defendant's alleged membership or participation in a movement hostile to the United States, in violation of the DPA, 64 Stat. 227. The third claim charged Defendant with illegally procuring a certificate of naturalization by making willful misrepresentation to immigration officials, in violation of 8 U.S.C. § 1451(a).

Defendant filed an Omnibus Motion to Dismiss the Complaint, which was denied by the district court in a Memorandum Opinion and Order on February 17, 2000. Defendant thereafter applied for a writ of mandamus directing the district court to dismiss the denaturalization proceeding; on April 28, 2000, this Court denied that request. Defendant then filed a counterclaim, alleging that Plaintiff tortured and harassed him and his family; this was dismissed by the district court on July 10, 2000, in a Memorandum Opinion and Order.

The case was tried without a jury on the Government's claims of Defendant's illegal procurement of United States citizenship, on May 29, 2001. On February 21, 2002, the district court released Findings of Fact and Conclusions of Law, United States v. Demjanjuk, 2002 WL 544622 (N.D.Ohio Feb.21, 2002) ("Demjanjuk 7.a"), and a Supplemental Opinion, United States v. Demjanjuk, 2002 WL 544623 (N.D.Ohio Feb.21, 2002) ("Demjanjuk 7. b "). The *628 district court entered judgment revoking Defendant's citizenship and naturalization, and ordering Defendant to surrender and deliver his Certificate of Naturalization and any passport or other documentary evidence of citizenship to the U.S. Attorney General, within ten days.

Defendant filed motions for judgment to amend findings, to alter or amend judgment, for a new trial, and for relief from judgment under Fed.R.Civ.P. 60(b); these motions were all denied by the district court in an order on March 27, 2002.

On May 10, 2002, Defendant filed a notice of appeal of the district court's orders and judgments from July 10, 2000, February 21, 2002, and March 27, 2002. On February 24, 2003, Plaintiff filed a Motion to Strike or for Leave to File Surreply, seeking to strike Defendant's Reply Brief. On February 26, 2003, this Court denied the motion for leave to file a surreply. In addition to the instant appeal, this Court will rule on the Motion to Strike Defendant's Reply Brief in the instant opinion.

Facts

In Demjanjuk 4, 776 F.2d 571, 575, this Court set forth the factual background for the various cases involving Defendant. We therefore recite only those facts most relevant to the appeal before us. John Demjanjuk is a native of the Ukraine, a republic of the former Soviet Union. Demjanjuk was conscripted into the Soviet Army in 1940 and then captured by the Germans, during WWII, in 1942. Later that year, after short stays in several German POW camps and a probable tour at the Trawniki SS training camp in Poland, Demjanjuk became a guard at the Treblinka concentration camp in Poland. Demjanjuk was admitted to the United States in 1952 under the Displaced Persons Act of 1948 and became a naturalized United States citizen in 1958. Defendant denied that he was a Ukrainian guard at Treblinka who was known as "Ivan or Iwan Grozny," that is, "Ivan the Terrible." He has resided in the Cleveland, Ohio area since his arrival in this country.

In the current proceeding, the Government alleges that Mr. Demjanjuk persecuted civilians at Trawniki, L.G. Oksow, Majdanek, Sobibor and Flossenburg Concentration Camps, but not Treblinka, as alleged in earlier denaturalization proceedings. Defendant was identified, in previous proceedings, as well as in the current one, by the Trawniki Camp's Identification Card which contained Defendant's picture. The Trawniki Card, the Government's exhibit # 3, is a German Dienstausweis or Service Identity Card, identifying the holder as guard number 1393.

One of the main issues before this Court is whether Demjanjuk was Guard 1393. There are seven German-created wartime documents in evidence that Plaintiff alleges identify Defendant. Three forensic experts testified that forensic testing revealed no evidence to doubt the authenticity of the seven wartime documents--found in archives in Russia, Ukraine, Lithuania and the former West Germany--containing Demjanjuk's name and other identifying information. (J.A. at 1407, 1416, 1423, 1441, 1461, 1861, 1877.)

II.

Standard of Review

[1] Link to KeyCite Notes[2] Link to KeyCite Notes This Court reviews for clear error when the district court's evidentiary rulings pertain to the determination of Demjanjuk's identity. Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 990 F.2d 865, 870 (6th Cir.1993) (stating the deference to be afforded a district court's findings of fact upon the conclusion of a bench trial is clear error, whether the facts were *629 based on oral or documentary evidence, because "factual conclusions rendered by a district court sitting without a jury

are binding on appeal unless this Court is left with a definite and firm conviction that a mistake has been made," and that "[i]t is the appellant who must shoulder the burden of proving such a mistake ....") (citation omitted). Under the clearly erroneous standard, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous," and it "is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." Anderson v. Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (citations omitted).

[3] Link to KeyCite Notes Additionally, because Defendant failed to object to the Trawniki service pass at trial on the ground now asserted on appeal--namely, that the card is inadmissible hearsay--this Court reviews for plain error Defendant's contention that the service pass was erroneously admitted into evidence. United States v. Evans, 883 F.2d 496, 499 (6th Cir.1989) ("The 'plain error' rule also applies [where] a party objects to [an evidentiary determination] on specific grounds in the trial court, but on appeal the party asserts new grounds challenging [that determination]."). At trial, Defendant objected to the admissibility of the service pass on grounds that it lacked authenticity, as required by Fed.R.Evid. 902; reliability as an ancient document, as required by Fed.R.Evid. 901(b)(8); and personal knowledge by declarant, as required by Fed.R.Evid. 602. On appeal, however, Defendant now asserts a different objection: inadmissibility of the service pass under the double hearsay prohibition of Fed.R.Evid. 805. Under the plain error standard:

before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights.... [I]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. United States, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citations and internal quotation marks omitted).

III.

Basis for Denaturalization

[4] Link to KeyCite Notes[5] Link to KeyCite Notes[6] Link to KeyCite Notes An individual seeking to enter the United States under the DPA first must qualify as a refugee or displaced person with the International Refugee Organization ("IRO"). Fedorenko v. United States, 449 U.S. 490, 496, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). The IRO's Constitution identified categories of people who were not eligible for refugee or displaced person status, including, "[a]ny ... persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries." Id. at 496, n. 4, 101 S.Ct. 737. Citizenship may be deemed illegally procured if, during naturalization, an applicant failed to strictly comply with a statutory prerequisite, such as lawful admittance as a permanent resident. Id. at 514, n. 36, 101 S.Ct. 737 (citing 8 U.S.C. § 1427(a)(1)). In a denaturalization proceeding, the government must prove its case by evidence that is clear, convincing, and unequivocal, Kungys v. United States, 485 U.S. 759, 772, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988), because United States citizenship is revocable when

found to be illegally procured. Fedorenko, 449 U.S. at 506, 101 S.Ct. 737 (citing 8 U.S.C. § 1451(a)).

*630 The district court below issued findings of fact and conclusions of law determining that the Government sustained its burden of proving that the Trawniki service pass identifying Defendant's presence at the Nazi training camp was 1) authentic within the meaning of Fed.R.Evid. 901(a), (b)(1), (3), (4), (8); 2) admissible under Fed.R.Evid. 803(16), the ancient document exception to the hearsay rule; 3) admissible under Fed.R.Evid. 803(8), the public records and reports exception to the hearsay rule; and 4) self-authenticating as a foreign public document under Fed.R.Evid. 902(3). Under such proof, Defendant's service as a guard at a Nazi training camp, and subsequent concentration camps, would make him ineligible for a visa under the DPA §§ 10 and 13, and therefore, unlawfully admitted, rendering his citizenship illegally procured and subject to revocation under 8 U.S.C. § 1451.

Defendant now asserts that the district court abused its discretion by admitting the Trawniki service pass and relying on its identifying features to determine that Defendant was present in the Trawniki Nazi training camp in Poland during WWII. Defendant asserts that the Government submitted only two documents identifying Defendant as a Nazi guard: the Trawniki pass and a 1979 KGB protocol of the interrogation of Ignat Danilchenko, a former concentration camp guard. (J.A. at 1407-15, 2965-72.) Defendant claims that if these two pieces of evidence fail to accurately identify him, then the subsequent identifying war documents add no further identifying information. The Government argues that there are in fact seven wartime documents that identify Defendant by his surname, three of which include Defendant's birth date and place. (J.A. at 1407, 1416, 1423, 1441, 1461, 1861, 1877.) One of those three, the Trawniki service pass, also includes Defendant's photograph, nationality, father's name, facial shape, eye color, hair color, and reference to an identifiable scar on Defendant's back.

A. Defendant's Allegation of Inadmissible Hearsay

As discussed above, Defendant now bases his objections to the Trawniki service pass' admissibility on hearsay, under Fed.R.Evid. 805. Because Defendant did not object on this ground at trial, this Court can only deem it inadmissible if, as a matter of plain error, the evidence's inadmissibility "should have been apparent to the trial judge without objection, or [if the evidence] strike[s] at fundamental fairness, honesty, or public reputation of the trial." Evans, 883 F.2d at 499 (quoting United States v. Causey, 834 F.2d 1277, 1281 (6th Cir.1987), cert. denied, 486 U.S. 1034, 108 S.Ct. 2019, 100 L.Ed.2d 606 (1988)). Based on the district court's findings of facts and having considered both parties' briefs, we find that the Trawniki service pass was not erroneously admitted by the district court.

Defendant's argument that the district court erroneously relied on the truth of the information asserted on the service pass, because it contained double hearsay, is without merit. Defendant argues that the four elements of identifying information on the service pass: name, date of birth, place of birth and nationality, are derived from out-of-court statements by the German clerk who issued the card and the allegedly "unknown" POW who was to be labeled "Guard 1393."

[7] Link to KeyCite Notes[8] Link to KeyCite Notes[9] Link to KeyCite Notes Federal Rule of Evidence 901(b)(8) governs the admissibility of ancient documents. The Rule states that a document is admissible if it "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and *631 (C) has been in existence 20 years or more at the time it is offered." The question of whether evidence is suspicious, and therefore inadmissible, is within the trial court's discretion. United States v. Kairys, 782 F.2d 1374, 1379 (7th Cir.1986). Although Rule 901(b)(8) requires that the document be free of suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be. Id. Therefore, whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact. Id.; see also Kalamazoo River Study Group v. Menasha Corp. 228 F.3d 648, 661 (6th Cir.2000).

[10] Link to KeyCite Notes[11] Link to KeyCite Notes The district court admitted the service pass into evidence, stating that it was authenticated under Fed.R.Evid. 901(b)(8), and satisfied six additional evidentiary rules, including two hearsay exceptions. Defendant fails to demonstrate how the district court erred in recognizing the alleged violation of double hearsay under Fed.R.Evid. 805, when the service pass was already admitted under two hearsay exceptions--namely, the ancient document rule (Fed.R.Evid.803(16)), and the public record exception, (Fed.R.Evid.803(8)). Hearsay within hearsay, or double hearsay, should not be excluded from admissibility if each separate hearsay component conforms to an exception to the hearsay rule. Shell v. Parrish, 448 F.2d 528, 533 (6th Cir.1971). This court need not analyze whether the district court would have deemed both sources of information contained in the service pass admissible under Defendant's "double hearsay" allegation, because the admission of the service pass, as identification of the Defendant, was already admitted under several other evidentiary rules, and was not so objectionable that it should have been apparent under a plain error analysis. United States v. Price, 329 F.3d 903, 906 (6th Cir.2003) (citing United States v. Rodriguez, 882 F.2d 1059,1064 (6th Cir.1989)).

B. Defendant's Allegation of Unauthenticated Inadmissible Evidence

Additionally, Defendant argues that the district court erroneously admitted the service pass as an authenticated document under Fed.R.Evid. 901(b)(8), based upon the expert testimony of Dr. Sydnor. Dr. Sydnor testified that the service card was found in the Vinnitsa Archives in the Ukraine; however, because Dr. Sydnor had never been to the Vinnitsa Archives, Defendant argues the testimony regarding the service pass' origin was not based on personal knowledge. The Government argues that Defendant's allegation of the service pass' admissibility must also be reviewed under a plain error analysis because, although Defendant objected to the admission of the service pass under Fed.R.Evid. 901(b)(8), he previously argued that the document's substantive content was unreliable and now, on appeal, argues that the Government failed to prove its origin. In the district court's findings of fact, there was uncontradicted testimony stating the origin of the service pass. Demjanjuk 7a., 2002 WL 544622, at * 5. Defendant has not objected to this element of the service pass' authentication until now; therefore, this Court should use a plain error analysis in determining its admissibility. Evans, 883 F.2d at 499.

[12] Link to KeyCite Notes[13] Link to KeyCite Notes Again, Defendant fails to establish that the district court so obviously erred in admitting the service pass in

opposition to Defendant's proof of origin objection, because the service pass was also admitted on six other evidentiary bases. Defendant is not, however, challenging the other evidentiary bases upon which the district court admitted the service pass; *632 therefore, Defendant's objection as to its origin, even if meritorious, would be moot as there is overwhelming evidence to the contrary. See United States v. Holloway, 740 F.2d 1373, 1379 (6th Cir.1984) (commenting on whether the district court erred in excluding certain evidence when there was an admission of evidence of substantially the same nature; stating "[w]e need not decide whether the district court's ruling was erroneous or whether this is a reviewable issue because if any error occurred it was harmless" because similar evidence would have been cumulative); see also United States v. McLernon, 746 F.2d 1098, 1114 (6th Cir.1984) ("We need not decide whether to adopt [a secondary issue's standard], however, because our finding that [the primary issues involved: whether the defendant] was entrapped as a matter of law into violating 21 U.S.C. § 846 and the jury's finding of not guilty on every other charge renders cummulative any error in the [inclusion of the secondary issue]."). Therefore, the district court's ruling that the service pass was sufficiently authenticated by the supporting circumstantial evidence showing that the document in question is what it was purported to be was not clearly erroneous and its admissibility should stand. See Fed.R.Evid. 901(b)(4). This is so particularly because Defendant did not appeal all of the additional grounds upon which the evidence was admitted.

C. Defendant's Allegations of the District Court's Erroneous Findings of Fact

[14] Link to KeyCite Notes Having deemed Defendant's hearsay argument to be without merit, this Court determines that the Government would still prevail based upon the district court's factual findings that the court's reliance on the service pass as identification evidence was not clearly erroneous. Defendant argues that because denaturalization proceedings require a much higher burden of proof, the government's case is insufficient in light of the quantum of reliable of evidence that has been required in previous cases. (Defendant's Brief at 20- 21) (citing denaturalization proceedings against individuals not admitting to service for the Germans, where the government used wartime documents that contained consistent, verifiable or unchallenged identifying information pertaining to the defendants, usually supported by corroborative evidence; see Kairys, 782 F.2d at 1379 (7th Cir.1986) (defendant's identification card verified defendant's thumb print and expert testimony identified the signature on the card as that of the defendant); see also United States v. Hajda, 135 F.3d 439, 442-43 (7th Cir.1998) (documents supported by testimony of sister and father in earlier trial stating that defendant had served in the SS)).

Here, the district court found that the Government has proven by clear, convincing, and unequivocal evidence that Defendant assisted in the persecution of civilian populations during World War II, based on evidence that the Trawniki service pass was an authentic German wartime document issued to Defendant sufficiently identifying him and establishing his presence at the Nazi training camp between 1942 and 1944. Demjanjuk 7.a, 2002 WL 544622.

Despite Defendant's arguments, the record before us does in fact support the district court's findings of fact, specifically regarding the Trawniki service pass. There is sufficient testimony from expert witnesses to corroborate the accuracy of the contents of

the service pass, in conjunction with the additional six wartime documents that corroborate Defendant's identity. Some of the characteristics that appear on the service pass and are not disputed by Defendant, such as his name, *633 birth date, town of birth, father's name, and nationality, also appear on other documents identifying Defendant as "Guard 1393." These additional documents also list specific characteristics of Defendant, such as his name, birth date, and place of birth. As the district court stated in its Supplemental Opinion, Demjanjuk 7.b, "Defendant has attacked the authenticity of the documents on various grounds, but the expert testimony of the document examiners is devastating to [D]efendant's contentions.... [T]he court is convinced that the Trawniki Service Identity Pass No. 1393(GX3), for a person named Iwan Demjanjuk is authentic." Demjanjuk 7.b, 2002 WL 544623. Defendant tries to raise doubt as to the identity of the person on the service pass, designated as Guard 1393, but he offers no evidence to support his assertion. See Kairys, 782 F.2d at 1380 (holding that the trial court was not clearly erroneous in determining that there was sufficient evidence to properly identify the defendant as the Nazi guard pictured on the defendant's alleged identification card, and although the district court primarily relied on the defendant's fingerprint on the card, there was other testimony and personal documentation that further supported the association). Given the credibility determination made with respect to the identification elements of the Government's case, this Court agrees with the Government that the district court's factual findings were not clearly erroneous.

IV.

The Court's Discretion in Admitting Expert Testimony to Further Identify

Defendant

[15] Link to KeyCite Notes Defendant contends that the district court erred in relying on Dr. Sydnor's testimony, which served to confirm Defendant's identity, arguing that the court failed to make "a preliminary assessment of the reliability" of Dr. Sydnor's "archival search methodology" before considering his substantive testimony. The Government argues, and this Court agrees that this argument is particularly ironic, inasmuch as Defendant repeatedly relies on Dr. Sydnor's testimony to support points beneficial to his defense which require expert testimonial corroboration. (Defendant's Brief at 17, 23-25, 27 n. 14). Nevertheless, Defendant argues that the court's failure to make a preliminary reliability determination of Dr. Sydnor's "archival search method" was erroneous, and in violation of Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 590-93, 113 S.Ct. 2786, 125 L.Ed.2d 469(1993) (explaining that part of a trial court's "gatekeeping" function under Fed.R.Evid. 702 when, for example, scientific opinion testimony is offered, is the determination of whether "the reasoning or methodology underlying the testimony is scientifically valid"). Defendant asserts that Dr. Sydnor's method of research was not reliably proven to be complete, and states that exculpatory evidence may not have been obtained, as was the case in Defendant's previous denaturalization proceeding. Demjanjuk 5, 10 F.3d 338 (6th Cir.1993).

This Court reviews the admission or exclusion of expert evidence for an abuse of discretion. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); see also United States v. Jones, 107 F.3d 1147, 1151 (6th Cir.1997). A "trial judge has broad discretion in the matter of the admission or exclusion of expert evidence,

and [the court's] action is to be sustained unless manifestly erroneous." Jones, 107 F.3d at 1151 (quoting parenthetically Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962)). This discretion is particularly broad in a bench trial. *634 Can- Am Eng'g Co. v. Henderson Glass, Inc., 814 F.2d 253, 255 (6th Cir.1987) (stating that the issue of whether a witness is qualified to testify as an expert is "left to the sound discretion of the trial judge and particularly so in a bench trial").

Federal Rule of Evidence 702 provides the requirements for admitting expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid 702.

In the instant action, following voir dire, which included a lengthy inquiry into Dr. Sydnor's methodology, the district court responded to Defendant's objection that Dr. Sydnor failed to follow an acceptable method of searching for archival documents. The court went on to commend Defendant's objection, but explained that it would permit Dr. Sydnor to testify based on his qualifications, and further explained that:

[this] does not mean ... the Court has to accept his testimony to any extent. Obviously, if a person who has been qualified as an expert ... has employed techniques in a particular case that are not as valid as other techniques might have been, those factors mitigate against the acceptance of their testimony. The Court is perfectly capable of making those determinations based upon the examination and cross-examination of the witness.

(J.A. at 954-55.)

Defendant now argues that the district court prevented him from inquiring into that which Daubert requires: the validity and reliability of the methodology underlying the proposed testimony--in this case the methodology pertaining to performing archival searches.

Daubert, 509 U.S. at 594-95, 113 S.Ct. 2786.

The Government relies on Berry v. School Dist. of Benton Harbor, 195 F.Supp.2d 971, 977 n. 3 (W.D.Mich.2002), to assert a court's discretion as to the admissibility of evidence, when weighed by a trier of fact, and subsequently disregarded as inadmissible or unpersuasive. The Government also asserts that whether an expert correctly applied an uncontroversial methodology is a question of the evidence's weight before the trier of fact. Here, neither party contends that the methodology was original or controversial. On the contrary, Defendant states that it is the same methodology used in the previous denaturalization proceeding, which was subsequently overturned, due in part to withheld and unearthed exculpatory evidence.

This Court has previously analyzed the requirements of Daubert, and its preliminary reliability analysis requirement. First Tennessee Bank National Assoc. v. Barreto, 268 F.3d 319, 331-33 (holding that the decision to admit the defendant's expert testimony was not an abuse of discretion, dismissing plaintiff's assertion that it was not based on

"technically valid reasoning or methodology"). In First Tennessee, the plaintiff alleged that the lower court was in violation of Daubert and abused its discretion by relying on expert testimony that the defendant failed to demonstrate was supported by technically valid reasoning *635 and methodology. 268 F.3d at 334. This Court did not agree, stating that "the fact that [the expert's] opinion may not have been subjected to the crucible of peer review, or that their validity has not been confirmed through empirical analysis, does not render them unreliable and inadmissible." Id. [FN2] The Supreme Court's decision in Kumho held that the trial court may utilize the four Daubert factors when assessing the reliability of all types of expert testimony, while reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. Kumho, 526 U.S. at 153, 119 S.Ct. 1167.

FN2. In First Tennessee, this Court grappled with a then unresolved issue surrounding the interpretation of Fed.R.Evid. 702 and

its Daubert analysis as applied to non-scientific expert testimony. First Tennessee, 268 F.3d at 333-35 (emphasis added). This Court, in Jones, recognized that the specific factors utilized in Daubert may be of limited utility in the context of non-scientific expert testimony, and if Daubert's framework were to be extended outside of the scientific realm, many types of relevant and reliable expert testimony that derived substantially from practical experience would be excluded. 107 F.3d at 1158. In Jones, this Court suggested that some of a forensic document examiners' duties are more practical in character, rather than scientific, but left open the question as to whether other specific duties by forensic document examiners such as the analysis of ink, ribbon, dye or the determination of water soaked documents are based on scientific knowledge. Id. at 1157-58, n. 10. However, in Berry v. City of Detroit, this Court followed Daubert's analytical framework when assessing the reliability of proposed non-scientific expert testimony. 25 F.3d 1342, 1350 (6th Cir.1994). Subsequently, the Supreme Court answered in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), reaffirming Daubert's central holding that a trial judge's "gatekeeper" function applies to all expert testimony regardless of the category. Nevertheless, this issue is only raised for clarity as neither party has asserted that a different standard should be

utilized based on a classification of the type of testimony Dr. Sydnor offers.

Given the aforementioned analysis, the district court's colloquy with Defendant's counsel demonstrates that the trial judge was very much aware of the applicable legal standards and considered the expert's methodology in determining the weight to be attributed to the testimony. Therefore, the district court did not abuse its discretion by admitting Dr. Sydnor's testimony.

Additionally, Defendant suggests that Dr. Sydnor's research should not be relied upon for identification purposes because, he claims, it is inaccurate. Again, Defendant offers no evidentiary support, but only baseless criticism, of Dr. Sydnor's research methods and results. Defendant claims that Dr. Sydnor should have found Defendant's Personalbogen, a document with Guard 1393's thumb print, and should have been aware of a titled "I.M. Dem'yanyuk" file from the Ukrainian government, which became available only three weeks before trial. Nevertheless, Defendant does not challenge any of the court's specific findings regarding Defendant's wartime service based on numerous other historical documents and corroborating evidence, nor does Defendant's objections to the pieces of evidence he believed Dr. Sydnor should have found call into question the foreign archival research performed by eight other government historians in this case.

[16] Link to KeyCite Notes[17] Link to KeyCite Notes Furthermore, Defendant has not established the prejudicial effect of Dr. Sydnor's testimony, particularly because his testimony was not necessary to corroborate all of the identifying evidence. If the district court abused its discretion in admitting the evidence, then reversal is required only if the district court's ruling relied on the evidence to reach a result for which there was insufficient evidence, absent *636 the inadmissible evidence. United States v. Joseph, 781 F.2d 549, 552 (6th Cir.1986) (stating that "in a non-jury trial the introduction of incompetent evidence does not require a reversal in the absence of an affirmative showing of prejudice. The presumption is that the improper testimonial evidence, taken under objection, was given no weight by the trial judge and the Court considered only properly admitted and relevant evidence in rendering its decision.") (citation omitted); id. at 553 (" '[t]he admission of such evidence is deemed harmless if there is relevant and competent evidence to establish defendant's guilt in absence of the objectionable proof.' ") (citation omitted). Therefore, the district court did not abuse its discretion in admitting Dr. Sydnor's testimony into evidence, as he was properly deemed an expert witness and his testimony was not proven to be prejudicial to Defendant.

V.

Willful Misrepresentation of Material Facts

Defendant argues that his service with armies in Graz, Austria and Heuberg, Germany was involuntary, and therefore, not a basis for denial of a visa, even absent his willful misrepresentation on his visa application in violation of Section 10 of the DPA. Defendant also argues that his misrepresentations regarding his involuntary service were not material because they would not have disqualified him from being eligible to receive a visa.

[18] Link to KeyCite Notes This Court reviews questions of law de novo. United States ex rel. Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 647 (6th Cir.2003). To the extent that the questions of law are predicated on factual findings, this Court reviews the factual findings for clear error. United States v. Harris, 246 F.3d 566, 570 (6th Cir.2001). Where denaturalization would be based on an alleged misrepresentation by the citizen, there is an issue of materiality. Kungys, 485 U.S. at 759, 108 S.Ct. 1537 (1988). Such materiality issues are also reviewed de novo. United States. v. LeMaster, 54 F.3d 1224, 1230 (6th Cir.1995) ("materiality is a conclusion of law.... As such, we review a finding of materiality de novo.") (citation omitted).

[19] Link to KeyCite Notes[20] Link to KeyCite Notes[21] Link to KeyCite Notes As previously stated, the Immigration and Nationality Act provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation. 8 U.S.C. § 1451(a); see also Fedorenko v. United States, 449 U.S. at 506, 101 S.Ct. 737 (citing 8 U.S.C. § 1451(a)). Citizenship is illegally procured if, during naturalization, an applicant failed to strictly comply with a statutory prerequisite, such as lawful admittance as a permanent resident. Id. at 514, n. 36, 101 S.Ct. 737 (citing 8 U.S.C. § 1427(a)(1)). Lawful admission for permanent residence requires that the applicant enter the United States pursuant to a valid immigrant visa. United States v. Dailide, 316 F.3d 611, 618 (6th Cir.2003). Therefore, entry in the United States under an invalid visa is a failure to comply with congressionally imposed statutory prerequisites to citizenship which renders any certificate of citizenship revocable as illegally procured under § 1451(a). Id.

[22] Link to KeyCite Notes Under a Section 10 violation of the DPA, the government must establish that an applicant's willful misrepresentation was material, i.e., that it had a natural tendency to influence the relevant decision-maker's decision. Kungys, 485 U.S. at 771, 108 S.Ct. 1537. Although the government must prove its case by evidence that is clear, convincing and unequivocal, it is not necessary for the government to *637 prove that the defendant would not have received a visa if he had not made the misrepresentation. Id.

[23] Link to KeyCite Notes[24] Link to KeyCite Notes The district court correctly ruled that voluntariness is not an element of an assistance-in-persecution charge under the DPA. The Supreme Court has previously ruled that "an individual's service as a concentration camp armed guard whether voluntary or not--made him ineligible for a visa." Fedorenko, 449 U.S. at 512, 101 S.Ct. 737. Additionally, a defendant need not engage in "personal acts" of persecution in order to be held ineligible for a visa, because an individual's service in a unit dedicated to exploiting and exterminating civilians on the basis of race or religion constitutes assistance in persecution within the meaning of the DPA. United States v. Dailide, 227 F.3d 385, 390-91 (6th Cir.2000).

[25] Link to KeyCite Notes Furthermore, the district court did not clearly err in concluding that Defendant misrepresented and concealed his wartime residence and activities, which included his service at Trawniki, Sobibor, Majdenek, with the Guard Forces of the SS and Police Leader in Lublin District, and with the SS Death's Head Battalion at Flossenburg Concentration Camp. This information was material because its disclosure would have precluded Defendant from being placed in the "of concern," category under the DPA, thus affecting the disposition of his visa application as a "displaced person." See Fedorenko, 449 U.S. at 514- 15, 101 S.Ct. 737. If Defendant had disclosed the information regarding his service in the Austrian and German armies during his application process, the immigration officials would have naturally been influenced in their decision, because service in such armies leaves applicants ineligible under the DPA. Therefore, upon signing his Application for Immigration Visa, Defendant knowingly misrepresented material facts, leaving his entry to the United States unlawful and naturalization illegally procured.

VI.

The Government's Motion to Strike Defendant's Reply Brief

[26] Link to KeyCite Notes The Government moves to strike portions of Defendant's Reply brief, specifically parts IA, IB and documents in Addenda 2 and 3, because the claims asserted by Defendant were raised for the first time in the reply brief and the documents were not previously before the district court. The Government asserts that Defendant is prohibited from (1) objecting to the translation of a document not previously before the district court, which identifies Defendant as a Nazi; (2) requesting to admit the notes of Dr. Sydnor not previously before the district court; and (3) asserting a claim of perjury against one of the Government's witnesses. Defendant unsuccessfully argues that the claims were asserted in his initial brief and the documents attached are necessary to illustrate the Government's inconsistencies and insufficient evidentiary support. The Court grants the Government's motion to strike, and finds that we cannot consider the newly raised claims or additional documents for purposes of this appeal.

As a general rule, this Court does not entertain issues raised for the first time in an appellant's reply brief. United States v. Crozier, 259 F.3d 503, 517 (6th Cir.2001) (citing Bendix Autolite Corp. v. Midwesco Enters., Inc., 820 F.2d 186, 189 (6th Cir.1987)). In fact " '[c]ourt decisions have made it clear that the appellant cannot raise new issues in a reply brief; he can only respond to arguments raised for the first time in appellee's brief.' " Id. (quoting United States v. Jerkins, 871 F.2d 598, 602 n. 3 (6th Cir.1989)).

*638 Defendant claims that Addendum 3 to his reply brief is necessary for the Court to adequately assess Defendant's contention that the pieces of evidence pointing to his identification are without merit, and are also in violation of the Federal Rules of Appellate Procedure. [FN3] See Fed. R.App. P. 10(a) (record on appeal consists of "original papers and exhibits filed in the district court ..."); see also Fed. R.App. P. 10(e) (dictating the procedure for correcting or modifying the record on appeal). Defendant's Addendum 3 contains the notes of Dr. Sydnor upon his examination of the Government's exhibit # 6, which is the transfer roster of guards from the Trawniki training camp to the Flossenburg Concentration camp, bearing Defendant's name, birth date, and birth place. Defendant sets forth no evidentiary support establishing that these notes were before the district court, nor is there evidence that they are even admissible documents. This Court, therefore, is under no obligation to consider the notes. United States v. Johnson, 584 F.2d 148, 156 n. 18 (6th Cir.1978) ("It is the responsibility of appellants to insure inclusion in the record of all trial materials upon which they intend to rely on appeal.").

FN3. Defendant originally alleged that Addendum 2 to Defendant's reply brief on appeal should also be considered by this Court; however, in Defendant's reply to the Government's Motion to Strike, he abandoned that claim, and only requests that Addendum 3 be fully considered.

Moreover, Defendant's substantive claims questioning the accuracy of (1) the Government's exhibit # 6; and (2) the perjury allegation made upon the Government's witness Gideon Epstein, are asserted for the first time in Defendant's reply brief and are, therefore, beyond the scope of our review. Crozier, 259 F.3d at 517. Furthermore,

Defendant cannot raise allegations in the eleventh hour, without evidentiary or legal support, as " 'issues adverted to [on appeal] in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived....' " Id. (quoting United States v. Layne, 192 F.3d 556, 566 (6th Cir.1999)). Therefore, we will grant the Government's motion to strike the Defendant's Reply Brief.

For the reasons set forth above, we will AFFIRM the district court's order.

C.A.6 (Ohio),2004.

3. Aug 1, 2003 - Man U.S. Says Was a Nazi Is Stripped of His Citizenship

New York Times, August 1, 2003

Man U.S. Says Was a Nazi Is Stripped of His Citizenship

By WILLIAM GLABERSON

For decades, Jakiw Palij lived in Queens like many exiles from the chaos of World War II, fitting in gradually to a new life in a new country.

Yesterday, a federal judge stripped him of his American citizenship and paved the way for his deportation, saying he had been an armed guard at an SS slave labor camp in Nazi-occupied Poland, and that he lied about his past when he came to this country in 1949.

The Justice Department provided "convincing and unequivocal evidence that defendant assisted in the persecution of civilians," Judge Allyne R. Ross of Brooklyn federal court said.

Mr. Palij, 79, presented what lawyers say is a confrontational but not unknown defense in deportation cases stemming from the Nazi era. He introduced no evidence and declared that the government's case was based on "an expression of opinion about history."

Since 1979, the Justice Department has won deportations of 57 people its lawyers argued assisted in Nazi persecution. Lawyers familiar with those cases say challenging the historical record of the Holocaust and certain events during it was a defense in some of those cases.

Justice Department lawyers presented Judge Ross with five volumes of historical documents to support their claims that Mr. Palij served in the SS and was a guard at the Trawniki camp in occupied Poland at a time when 6,000 Jewish prisoners were fatally shot there.

Those materials included rosters of units that committed atrocities, showing that Mr. Palij was a member. The government did not present evidence that he participated in any killings.

Part of the government's case was an analysis by Peter Black, a senior historian at the United States Holocaust Memorial Museum in Washington, who concluded that the

records showed Mr. Palij "served as an armed guard of civilian prisoners at a forced-labor camp for Jews at Trawniki."

Although Mr. Palij, before the Justice Department began its deportation proceeding last year, acknowledged to a government investigator that he was a trainee at Trawniki, during the proceeding he refused to answer questions, citing his right against self-incrimination.

Confronted with the Dr. Black's detailed analysis of Mr. Palij's background, Mr. Palij's lawyer, Ivars Berzins, told Judge Ross that Dr. Black was a former employee of the Justice Department unit that pursues former Nazis, the Office of Special Investigations. Mr. Berzins said Dr. Black "carries with him the stigma of that office."

A secretary at Mr. Berzins's office in Babylon, N.Y., said yesterday that he was not interested in speaking with reporters. There was no answer yesterday at Mr. Palij's home on a tree-lined street in Jackson Heights. Mr. Palij, a retired draftsman, and his wife of 43 years have no children.

The Justice Department's case against Mr. Palij is one of three deportation proceedings now under way involving men who have spent the last five decades in New York. According to evidence submitted by the Justice Department, the three remained friends in New York and their names appear next to each other on the roster of a unit at Trawniki.

After Mr. Berzins presented no evidence, Justice Department lawyers urged Judge Ross to order the deportation without a trial. Such a ruling is permissible in a civil case like a deportation proceeding when one side presents a legally compelling case and there are no disputes about the facts.

Although he had not presented evidence to contradict the government's claims, Mr. Berzins argued that a trial was "necessary to dispel serious doubts on critical issues." An appeal of Judge Ross's ruling could delay a deportation for years.

4. July 9, 2003 - SS guard's capture ends secret life in Metro suburb

July 9, 2003 The Detroit News

SS guard's capture ends secret life in Metro suburb

For Nazi in hiding, the tables were turned

By Tony Manolatos and Edward L. Cardenas / The Detroit News

CLINTON TOWNSHIP -- Johann Leprich endured 16 years as a fugitive -- evading capture for a period many times greater than most of the hunted Jews he watched over as a Nazi concentration camp guard.

Like those few who successfully escaped the Nazis, Leprich survived by craftiness.

When he went outside -- usually at night -- he was careful to pay attention to his surroundings. He looked closely at the people he passed and reacted nervously to unusual sounds and quick movements.

Leprich, who turned 78 Monday and entered the United States illegally in 1952, worked hard at blending in with his neighbors.

But the fear of discovery never allowed a normal life. Among other things, he built a secret hideout in the basement of his Clinton Township house. He was there last week when federal authorities finally caught him.

After serving at one of the most brutal Nazi concentration camps in World War II, lying about his past, fooling dozens of government officials, ducking investigators, sneaking between the United States and Canada and blending into middle America, it all came crashing down for Leprich on July 1.

"It is ironic that thousands of people hid in their homes (during World War II) and would be dragged out of the house by the Nazis -- and now he is one of those people 55 years later," said Robert Kowalkowski, a Farmington Hills private investigator who tracked Leprich for years with a team of investigators.

Neighbors said they last saw Leprich in 1987 after he fled from federal authorities, who discovered he had lied about his Nazi past to gain entry into the United States.

The man they remember was soft-spoken, gentle and neighborly.

Leprich would stop over unannounced, neighbors said. He chatted easily about the weather or his children, never leaving without saying goodbye in his faint German accent. At home, he spent hours in the back yard of his tidy ranch in Clinton Township tending to his vegetable garden.

"He grew everything in that garden and he shared his vegetables with everyone -- that's just the way he was," neighbor Clarence Sonntag, 73, said Monday across the street from the home where Leprich's wife and son still live.

Leprich's care-free life took an unexpected turn in 1987 when U.S. District Court Judge Barbara Hackett revoked Leprich's United States citizenship because he lied about his past.

But Leprich refused to give up the life he made for himself. The former Nazi soldier skipped a deportation hearing in Detroit. Instead, he moved to Windsor.

Authorities suspect Leprich used fake identification to sneak across the U.S.-Canadian border.

He may have had help and he may have used illegal entry points to cross. In either case, it worked for 16 years.

"If we would have had the answer to how he eluded us, we would have had him a long time ago," said Greg Palmore, spokesman for the Bureau of Immigration and Customs Enforcement in Detroit.

Ex-Nazi loathed

Holocaust survivors can't say if they crossed paths with Leprich, but they know of him and loathe the ex-Nazi guard.

"His neighbors were not there -- other prisoners and I can attest to the fact that guards like Mr. Leprich performed brutal tasks," said Sam Offen, 81, of West Bloomfield, who was at the Mauthausen Concentration Camp in the mid-1940s, when Leprich was stationed there.

Leprich, charged with illegally entering the United States, is tentatively scheduled to appear Friday in U.S. Immigration Court in Detroit.

A judge will decide whether to keep him in custody pending a deportation hearing. Federal officials won't say where he is being held.

William Dance, Leprich's attorney, said Tuesday he has yet to speak to his client.

"I know very little about it because (the Bureau of of Immigration and Customs Enforcement) has not discussed it with me," Dance said.

Admits he was a guard

The U.S. government has no evidence linking Leprich to killings in Nazi death camps, Palmore said.

Offen, a fur shop owner who was at Mauthausen from August 1944 to May 1945 when the U.S. Army liberated the camp, said all of the Mauthausen guards killed prisoners. If they didn't, Offen said, the guards were sent to front lines for combat.

Leprich acknowledged he was a guard at the Mauthausen Concentration Camp in his 1986 denaturalization hearing. In his deposition, he said he was forced to leave the Hungarian army and coerced into becoming a Nazi death camp guard, when he was 18.

American prosecutors said Leprich voluntarily joined Germany's Waffen SS unit and guarded the Mauthausen camp for about a year as a member of the elite Nazi group Death's Head Battalion.

"Nobody was forced to be an SS guard; they volunteered because they didn't have to go to the front lines," said Rabbi Charles Rosenzveig, director of the Holocaust Memorial Center in West Bloomfield.

The Mauthausen camp was in northern Austria, less than 100 miles from Germany. Records at the Holocaust Memorial Center indicate nearly 200,000 Jews and other ethnic, religious and political prisoners of the Holocaust passed through Mauthausen. Of them, 119,000 were killed, including 38,120 Jews.

"Prisoners were not intended to leave the camp alive," Leprich's court records say. "From his post, he could see into the camp and see the barracks where the prisoners lived. ... He could smell the odor of bodies being cremated."

Average U.S. lifestyle

Leprich apparently was able to leave the foreboding corner of his existance behind and ease into an average American life.

In 1976, Leprich and his wife Maria moved from Detroit to Clinton Township, Macomb County deed records show. The couple paid $10,500 for their brown brick suburban ranch, where they brought up two children.

Neatly maintained flower beds and Leprich's garden grow in the back of the house, which is now valued at $211,800, Clinton Township records show. Leprich wasn't registered to vote, but his wife was. He last renewed his Michigan driver's license 10 years ago when he was a fugitive, records show. His license expired in 1997.

Leprich, who became a U.S. citizen in 1958, was stripped of his citizenship because it's a federal crime to lie about Nazi membership.

Before he became a fugitive, Leprich told some of his neighbors about his past.

"He told me he was ... in the SS and was a ... guard in a concentration camp," said Sonntag, a retired postal worker. "Everybody based their knowledge of John on the present and not his past."

Neighbor Patricia Sebastian agrees.

"You couldn't have asked for better people," Sebastian, 68, said from the front door of her home. "This happened a long time ago. He was a kid. Let's get over it."

Canada joined search

Canadian authorities acknowledged they searched for Leprich more than once.

Canada flagged Leprich, meaning if he used his real identification and was stopped at the border he would have been arrested for illegally entering the country, said Jean Dube, head of the Royal Canadian Mounted Police War Crimes division. "That leads me to believe he was operating under an assumed name."

Palmore said Leprich might have sneaked across the U.S.-Canadian border illegally.

"If he would have used conventional means to go through (the border) he would have been apprehended," Palmore said.

In 1997, Leprich was profiled on "America's Most Wanted." Steven Rambam of New York, who leads a team of investigators who locate and build cases against Nazi war criminals, tracked down Leprich and provided the TV show with information about Leprich.

"He has been able to successfully thumb his nose at the U.S. government and America for the past 55 years," said Rambam, who discovered Leprich collected Social Security for 10 years after he was deported in 1987, and even was able to renew his driver's license in person.

Rambam said Leprich worked at a small tool-and-die shop in Fraser, retiring before fleeing the country in 1987.

The Federal Bureau of Investigation in Macomb County was approached by the Department of Justice and the Immigration and Naturalization Service in January of this year to investigate Leprich.

Rob Casey, supervisory agent of the Macomb County FBI, would not discuss specific details of the investigation but he said his agency used "every sophisticated investigative technique available to ascertain (Leprich's) location."

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For Nazi in hiding, the tables were turned

1952

Johann Leprich, a Waffen SS guard at the Mauthausen Concentration Camp from 1943-44, lied about his Nazi past on his U.S. visa application and was granted entrance in 1952. "From his post," court records say, "he could see into the camp and see the barracks where the prisoners lived."

2003

On July 1, 2003, Johann Leprich's life on the run ended with his capture in his Clinton Township home. Until 1987, he had lived a modest life in Metro Detroit, rearing two children with his wife. To avoid deportation, he went into hiding in Canada, and frequently sneaked back into the U.S.

Johann Leprich's life

Johann Leprich was born July 7, 1925, in Petelea, Romania, to German parents.

He received seven or eight years of education in public schools and then worked on a farm until 1943.

After Leprich turned 18 in 1943, he joined the Hungarian Army.

Toward the end of November 1943, he was discharged from the Hungarian Army so he could join the Waffen SS, the part of the Nazi Party that guarded concentration camps.

Leprich started as a guard at the Mauthausen Concentration Camp in November or December 1943.

At Mauthausen, Leprich was a member of the SS Totenkopf-Sturmbann (Death's Head Battalion) and wore the skull-and-crossbones symbol on his collar. Leprich was an SS member, wore an SS uniform and a helmet with the SS symbol.

Leprich continued to serve at the Mauthausen Concentration Camp in Austria until April or May 1944.

Leprich remained a member of the Waffen SS until his capture by the U.S. Army in June 1945. He was held as a prisoner of war until June 1946.

Leprich was issued a visa to immigrate to the United States on Feb. 12, 1952, under the Displaced Persons Act of 1948, which allowed visas for the thousands of people displaced by World War II. Government documents allege he lied on his application, omitting his service in the Waffen SS that would have precluded him from getting a visa.

After Leprich came to the United States on March 29, 1952, he signed and swore to an affidavit stating that he had "never advocated or assisted in the persecution of any person because of race, religion or national origin."

Leprich became an American citizen on Dec. 30, 1958.

U.S. District Judge Barbara Hackett issued a summary judgment to denaturalize Leprich on Dec. 12, 1986, which took away his citizenship.

Hackett formally revoked Leprich's citizenship on July 10, 1987, prompting Leprich to go into hiding, primarily in Canada.

Federal authorities capture Leprich on July 1, 2003. He was found hiding in the secret compartment he built under his basement steps in Clinton Township.

Sources: Detroit News research and interviews

Wednesday, July 9, 2003

Justice Dept. hunts Nazis

Special office, formed in 1979, has deported 57 from United States

By Edward L. Cardenas / The Detroit News

CLINTON TOWNSHIP -- Johann Leprich is the latest person snared in the U.S. Department of Justice's effort to locate and prosecute Nazis living in the United States.

Since the Office of Special Investigations was formed in 1979, 71 Nazis have been stripped of U.S. citizenship and 57 have been deported.

"It is the responsibility of the government to show you are never out of reach of the law," Greg Palmore, the Detroit-based spokesman for the Bureau of Immigration and Customs Enforcement, said.

The special office was formed to uncover people in hiding who took part in Nazi-sponsored acts of persecution before and during World War II, and are living or are trying to enter the United States. The office has a database that includes more than 70,000 people who are linked to the Nazis.

Between the end of the war and the creation of the office, only two people were deported.

Leprich, 78, of Clinton Township, is at least the third Macomb County man to be accused of lying about being a Nazi concentration camp guard.

Ferdinand Hammer of Sterling Heights was deported in 2000 to Austria. Hammer had worked as a guard to escort prisoners from a camp in Poland to Berlin.

Iwan Mandycz, also of Sterling Heights, was accused of working as an SS guard in 1943 at a camp near Lublin, Poland.

The Associated Press contributed to this report. You can reach Edward L. Cardenas at (586) 468-0529 or ecardenas@detnews.com.

Chapter 4: Anti-Nazi Laws in Post-War Europe

A. European Court of Human Rights

1. Harrying the Nazis

Jan 20, 2005

From The Economist

Charlemagne [EDITORIAL]

Harrying the Nazis

Why banning Nazi symbols across Europe would be a bad idea

PRINCE CHARLES, heir to the British throne, spends a lot of time on earnest attempts to influence public policy. But he has never, so far, had the dramatic impact of his younger son, Prince Harry, whose decision to wear a Nazi uniform to a fancy-dress party in Britain may be about to trigger Europe-wide legislation. Franco Frattini, the European Union's commissioner for justice and home affairs, declared to Italian newspapers this week that "EU action is urgent and has to forbid very clearly Nazi symbols in the European Union."

Indeed, Mr Frattini plans to put the idea of such a ban on the agenda of the next meeting of European justice ministers, on January 27th. Since that is also the day on which 40 world leaders will be gathered at Auschwitz to commemorate the liberation of the Nazi concentration camp in 1945, the chances of the EU seizing the opportunity to make a grand gesture must be high. But legislation passed at moments of high emotion is rarely well considered-and an EU-wide ban on Nazi symbols would be no exception to this rule.

The obvious problem with any such laws is where to draw the line. Do you just ban symbols, or do you also ban such offences as "Holocaust denial"? And although almost everybody may agree that Nazism was a unique evil, a ban on Nazi symbols would undoubtedly lead to a call for other similar bans. Why not a ban on the Soviet hammer-and-sickle? Or one on fascist insignia in Spain or Italy?

The issue is particularly perplexing in Mr Frattini's native Italy. Brussels-based journalists who visited the country during the Italian presidency of the EU in 2003 were startled to find Mussolini's photograph still affixed to the wall of the Palazzo Chigi, the official residence of the Italian prime minister, alongside photos of Italy's innumerable other prime ministers-and with no suggestion that there was anything remarkable about it. An official who was asked why a fascist dictator was still accorded this honour shrugged that "he's part of our history."

He is a part of Italy's present too. The deputy prime minister (and now foreign minister) whom the journalists were ushered in to see was none other than Gianfranco Fini, who in 1994 described Mussolini as "the greatest statesman of the 20th century". Mr Fini has now renounced this claim. Yet rows about the fascist era keep breaking out in Italy. The

latest was provoked this month during a football match in Rome. After scoring a spectacular goal, Paolo Di Canio of Lazio ran over to his team's notoriously right-wing supporters and gave them a fascist salute. In theory, this is illegal in Italy. But a degree of confusion is understandable. Just outside the Olympic stadium in which the game was being played stands a large obelisk that is emblazoned with the words "Mussolini, Duce".

Similar controversies rage elsewhere in western Europe. In Spain, the Valley of the Fallen, a fascist mausoleum built by political prisoners, remains one of the country's biggest tourist attractions. Franco loyalists still rally there on the anniversary of the caudillo's death. The Socialist government of José Luis Rodríguez Zapatero (whose grandfather was killed by fascists) says that it wants to cleanse public buildings of Francoist symbols. A campaign is under way to build a memorial to the victims of fascism at the Valley of the Fallen, or a museum modelled on those at Nazi concentration camps. But the government will move cautiously. The wounds of Spain's past are still sore.

The question of free speech and the past is also a live one in France. This month, Jean-Marie Le Pen, leader of the far-right National Front and one of the two run-off candidates for the French presidency in 2002, caused outrage when he suggested that the Nazi occupation of France had "not been particularly inhumane". Mr Le Pen's critics rushed to remind him of the deportation and murder of the French Jews, and talked of such massacres as that at Oradour-sur-Glane. French prosecutors are looking into whether Mr Le Pen might be tried for the crime (in French law) of "denial of crimes against humanity".

Back in Blighty

Now even Britain, which had long thought of itself as happily immune to such controversies, has been dragged into the debate by Prince Harry. German members of the European Parliament have led calls for the EU to adopt a law similar to Germany's own statute banning Nazi symbols. Some Germans seem to relish the unusual opportunity to take the moral high ground over Nazism. Matthias Matussek, the London correspondent for Der Spiegel (and brother of Germany's ambassador to Britain), informed his readers that, while the British were still unhealthily obsessed by the war, they had been "focusing too much on their own triumph and too little on the history of the victims. It now appears that the British have a greater problem with the past than the Germans." You can almost taste the wishful thinking.

The argument of those Germans who want an EU-wide ban on Nazi symbols is, as Silvana Koch-Merin, a vice-president of the Liberal Group in the European Parliament, expresses it, that "all of Europe suffered because of the crimes of the Nazis, therefore it would be logical for Nazi symbols to be banned all over Europe." But such "logic" risks redefining Nazism as a European tragedy, rather than a tragedy visited on Europe by Germans. Even today, that does not quite ring true. While it was grossly insensitive for Prince Harry to wear a Nazi uniform, a similar action by a prominent young German would have been a lot more sinister and disturbing.

That is why a ban on Nazi insignia may make sense in Germany, but be an excessive restriction on free speech in Britain and most other countries. Even in the "united Europe" of today, Nazi symbols and the memories of fascism and communism resonate

differently in different countries. Each country deals with them as it sees fit, which is as it should be.

2. Inadmissibility Decision In The Case Of Garaudy V. France

7.7.2003

Press release issued by the Registrar

INADMISSIBILITY DECISION IN THE CASE OF GARAUDY v. FRANCE

A Chamber of the European Court of Human Rights has declared inadmissible the application lodged in the case of Garaudy v. France (no. 65831/01). (The decision is available only in French.)

The applicant

The applicant, Roger Garaudy, is a French national who was born in 1913 and lives in Chennevières-sur-Marne (Val de Marne). He is a philosopher, writer and former politician.

Summary of the facts

Mr Garaudy is the author of a book entitled The Founding Myths of Modern Israel, which was distributed through non-commercial outlets in 1995 and subsequently republished at the applicant's own expense in 1996 under the title Samiszdat Roger Garaudy. Several criminal complaints, coupled with applications to be joined to the proceedings as civil parties, were lodged against him by associations of former resistance members, deportees and human-rights organisations alleging the following offences: disputing the existence of crimes against humanity, racial defamation in public and incitement to racial hatred. As a result of the complaints, which concerned various passages from both editions of the book, five judicial investigations were started into the applicant's conduct.

Five separate sets of criminal proceedings were brought under the Freedom of the Press Act of 29 July 1881. The applicant applied unsuccessfully for them to be joined. In five judgments of 16 December 1998, the Paris Court of Appeal found Mr Garaudy guilty of disputing the existence of crimes against humanity, public defamation of a group of people - namely the Jewish community - and incitement to discrimination and racial hatred. It found his works to be revisionist and imposed suspended sentences of imprisonment, the longest being for six months, and fines. The convictions were upheld by the Court of Cassation in five judgments of 12 September 2000. The prison sentences were to be served concurrently. The fines totalled in excess of 25,900 euros (EUR) and compensation of more than EUR 33,500 was awarded to the civil parties.

While the five cases were pending before the Court of Cassation, the applicant brought proceedings challenging the authenticity of a passage that appeared in one of the Court of Appeal's judgments. Those proceedings were dismissed by the President of the Court of Cassation on the ground that the allegedly inauthentic text had no bearing on the decision on the merits of the case.

Complaints

The applicant complained under Article 10 (freedom of expression) of the European Convention on Human Rights that his right to freedom of expression had been infringed. Among other points he made, he argued that his book was a political work written with a view to combating Zionism and criticising Israeli policy and had no racist or anti-Semitic content. He argued that, since he could not be regarded as a revisionist, he should have been afforded unlimited freedom of expression. He also complained that the proceedings in the domestic courts were unfair, in breach of Article 6 (right to a fair trial), taken alone or together with Article 4 of Protocol No 7 (right not to be tried or punished twice). Lastly, he alleged violations of Articles 9 (freedom of thought, conscience and religion) and 14 (prohibition of discrimination).

Procedure

The application was lodged with the Court on 23 October 2000.

Decision of the Court

Article 10 of the Convention

With regard to Mr Garaudy's convictions for disputing the existence of crimes against humanity, the Court referred to Article 17 (prohibition of abuse of rights), which was intended to prevent people from inferring from the Convention any right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in the Convention. Thus, no one could rely on the Convention as a basis for engaging in any act that was contrary to its provisions. Having analysed the book concerned, the Court found that, as the domestic courts had shown, the applicant had adopted revisionist theories and systematically disputed the existence of the crimes against humanity which the Nazis had committed against the Jewish community. There could be no doubt that disputing the existence of clearly established historical events, such as the Holocaust, did not constitute historical research akin to a quest for the truth. The real purpose of such a work was to rehabilitate the National-Socialist regime and, as a consequence, to accuse the victims of the Holocaust of falsifying history. Disputing the existence of crimes against humanity was, therefore, one of the most severe forms of racial defamation and of incitement to hatred of Jews. The denial or rewriting of this type of historical fact undermined the values on which the fight against racism and anti-Semitism was based and constituted a serious threat to public order. It was incompatible with democracy and human rights and its proponents indisputably had designs that fell into the category of prohibited aims under Article 17 of the Convention. The Court found that, since the applicant's book, taken as a whole, displayed a marked tendency to revisionism, it ran counter to the fundamental values of the Convention, namely justice and peace. The applicant had sought to deflect Article 10 of the Convention from its intended purpose by using his right to freedom of expression to fulfil ends that were contrary to the Convention. Consequently, the Court held that he could not rely on Article 10 and declared his complaint incompatible with the Convention.

As regards Mr Garaudy's convictions for racial defamation and incitement to racial hatred, the Court found that they could constitute an interference with his right to freedom of expression. The interference was prescribed by the Act of 29 July 1881 and

had at least two legitimate aims: "the prevention of disorder or crime" and "the protection of the reputation or rights of others". However, for the same reasons as those set out above and in view of the overall revisionist tone of the work, the Court had serious doubts as to whether the passages on which his convictions were based could qualify for protection under Article 10. While criticism of State policy, whether of Israel or any other State, indisputably came within that Article, the Court noted that the applicant had not confined himself to such criticism: his writings had a clear racist objective. However, the Court did not consider it necessary to decide that issue, as it found that the reasons given by the domestic courts for convicting the applicant were relevant and sufficient and the interference with his right to respect for his freedom of expression was "necessary in a democratic society", in accordance with Article 10 § 2 of the Convention. Accordingly, the Court declared this complaint ill-founded.

Article 6 of the Convention

As to the complaint of a violation of Article 6, taken together with Article 4 of Protocol No. 7, the Court noted that the various sets of criminal proceedings had proceeded concurrently and concerned different offences. Accordingly, it found that Article 4 of Protocol No. 7 was inapplicable. As to the allegation that the refusal to order the joinder of the proceedings amounted to a breach of Article 6 taken alone, it found that the complexity of the case and the nature of the offences could reasonably be regarded as requiring them to be dealt with at the same time. Joinder was refused for reasons pertaining to the proper administration of justice and the domestic courts' decision was compatible with the fair balance that had to be struck when weighing up the various aspects of that requirement. Furthermore, there was nothing to suggest that the applicant had not had a fair trial. Consequently, the Court found that that part of the complaint was ill-founded.

With regard to the allegation that the domestic courts had shown bias, notably by dismissing the proceedings challenging the authenticity of the Court of Appeal's judgment, the Court observed that Article 6 § 1 of the Convention was inapplicable to such proceedings because they were ancillary to the main criminal proceedings complained of by the applicant. With regard to the applicant's allegation that the courts had been generally biased, there was no evidence to cast doubt on the subjective impartiality of the judges who had tried the cases. Moreover, the Court found that the applicant's concerns as to their objective impartiality could not be regarded as legitimately founded. Consequently, the Court declared this complaint ill-founded.

With regard to Mr Garaudy's allegation that he had been the victim of a smear campaign and trial by the press, the Court noted that his book had been controversial from the outset and that the fierce debate provoked by his trial had been predictable. In its view, the applicant had failed to show that he had been the subject of a virulent media campaign that had or might have influenced the judge's opinions or the verdict. Consequently, the Court found this complaint to be ill-founded.

The Court dismissed the applicant's other complaints of a violation of Article 6 § 3 of the Convention. It considered that the applicant had been duly informed of the nature and cause of the accusation against him. It further considered that the rights of the defence had not been infringed by the decision of the domestic courts to exclude - on the ground

that it was of little relevance - additional oral evidence which Mr Garaudy had applied for leave to call.

The Court declared the complaints under Articles 9 and 14 inadmissible for failure to exhaust domestic remedies.

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The decision is available on the Court's Internet site (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.

B. Germany

1. A Presidential Delegate Criticized

2004 WL 78434515

The Fort-Worth Star-Telegram

Saturday, May 22, 2004

Presidential delegate criticized

By Geir Moulson

The Associated Press

BERLIN The nomination of a Nazi-era judge to help elect Germany's new president prompted complaints from Jewish leaders Friday, but the 90-year-old nominee's conservative party stood behind him.

A conservative majority among delegates choosing the next president pointed to a sure victory Sunday for former International Monetary Fund head Horst Koehler over the Social Democrat government candidate, academic Gesine Schwan.

But attention focused Friday on delegate Hans Filbinger, who resigned as state governor of Baden-Wuerttemberg in 1978 amid allegations that he helped pass death sentences as a World War II naval judge.

Filbinger, nominated by the state's Christian Democrats, denies that his verdicts led to death sentences and says he is the victim of a smear campaign.

The German presidency, to be selected by 1,205 delegates, is a largely ceremonial post but carries moral authority.

Germany's main Jewish leader, Paul Spiegel -- also a Christian Democratic delegate -- expressed surprise at Filbinger's being chosen.

"I cannot understand why the Christian Democrats in Baden-Wuerttemberg nominated him," Spiegel said. "There are certainly more deserving people who don't have this kind of past."

The Los Angeles-based Simon Wiesenthal Center demanded Filbinger's removal.

"His participation in the presidential election would send the wrong signal at the wrong time and would be a stain on Germany's democratic record," the center's associate dean, Rabbi Abraham Cooper, said in a statement.

Christian Democrat leader Angela Merkel called the debate "incomprehensible," and the party said it would not withdraw Filbinger, saying he participated in the last three presidential votes without drawing complaints.

2. Unbanning Hitler

6/25/01 New Statesman 38

2001 WL 11316236

New Statesman

Monday, June 25, 2001

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Unbanning Hitler.

Julia Pascal

Mein Kampf made the Fuhrer a millionaire, and it has been enriching anonymous charities. But in Germany, its sale is still illegal. Julia Pascal reports on the ongoing struggle over this "vile" text

Germany, 1945. As the Allies liberate the country, thousands of Germans rush to bury Mein Kampf in their gardens. The soil of the defeated is, literally, full of Hitler's anti-Semitic ravings. Fifty-six years later, the book cannot be bought or sold in Germany, and it remains buried. Is it time to release the book to a new generation of Germans? Or would the unbanning result in a revival of Hitler's race-bate? Most German and Jewish scholars I speak with think not, but the idea of circulating Mein Kampf freely in Germany opens up many difficult questions about freedom of speech and who stands to gain from Hitler's estate.

By the time of Hitler's death, eight million copies of Mein Kampf had been sold. The book, bought by the state and given out to newlyweds in the Third Reich, made him a millionaire. Six million copies were issued to couples by 1942. Hitler's boast was that Mein Kampf had the largest sales of any book worldwide, apart from the Bible. His royalties were $1m a year.

Mein Kampf was written in the Bavarian prison fortress of Landsberg am Lech in 1923-24, after Hitler's abortive beer-hall putsch. Stylistically turgid and filled with repetition, the first version was improved to bide that it was written by a half-educated man. According to Hitler, the evil behind Germany's woes was "the Jewish people", who wanted "to pollute Aryan womanhood and soil the Aryan bloodline", an idea that is still common currency on neo-Nazi websites today. Anybody reading Mein Kampf could not fail to be aware of Hitler's plans for Jews, the disabled, and those others considered "racially inferior". The book's original title was A Four and a Half Year Struggle Against Lies,

Stupidity and Cowardice. Hitler's publisher, Max Amann of Franz Eher Verlag, persuaded him to choose the shorter version ("mein Kampf' means "my struggle").

Officially, Mein Kampf cannot be purchased in Germany, Hungary, Israel, Latvia, Norway, Portugal, Sweden and Switzerland, but the book is readily available in Russia, Romania, the United States and the UK (where it sells a regular 3,000 copies annually).

Mein Kampf was first sold in the Czech lands in 1936, and again in 1993, both times in abridged, annotated versions. In March 2000, the full Czech edition was published by Otakar II. Publisher Michal Zitko printed 10,000 copies, whereas the average Czech print run is 400. The German embassy in Prague requested that Zitko stop distribution. Zitko refused. The new edition contained no commentary or introduction, and the cover bore an eagle-and-swastika design. There were protests by several organisations, including the Czech Romanies and the Czech Union of Freedom Fighters. Tomas Kraus, the executive director of the Czech Federation of Jewish Communities, says: "To spread such a book as Mein Kampf freely in the market is even more dangerous than its availability on the web." Fedor Gal, a Jew born in the Terezin concentration camp (known to the Germans as Theresienstadt) and today a Prague publisher, is equally damning: "Using this book to make money is the publishing business at its worst and most spoiled."

The copyright situation is complicated. In 1933, Eher Verlag purchased the world rights for Mein Kampf, selling it on to other publishers for translation. In Britain, it ended up as part of Hutchinson's list. In 1939, Hutchinson commissioned the Jewish emigre Ralph Mannheim to translate Hitler's race-hate bible. This choice was not approved by Berlin.

After the war, Mein Kampf went on to Hutchinson's back-list, but was

reprinted in 1969. Richard Cohen, now managing director of Richard Cohen Books, was Hutchinson's trade publishing director in 1985, and he recalls the tricky issue of how to deal with the book. "The questions we faced at Hutchinson were: what were a publisher's responsibilities when confronted with such a book, and should we do anything to increase sales?" The moral dilemma was solved by describing the book as "vile" on the dust jacket. Today's version, now published by Pimlico, still calls it an "evil" book. "Each new edition has prompted a letter of complaint from the German government," Cohen adds.

Meanwhile, Hutchinson was bought by Random House, which in turn was purchased by the German conglomerate Bertelsmann. The irony is not lost on Cohen: "Thus Hitler's racist tract, unavailable in German bookshops, will be published throughout Britain and the Commonwealth by a German company."

As for the German copyright, the state of Bavaria confiscated Hitler's assets after the war, and controls all rights except for the English-language editions. In the UK, royalties go through the Curtis Brown literary agency, which, from 1976, transferred the money to a charity whose name the agency refused to reveal. The "anonymous" charity has just gone public. Last weekend, the press published the news that the German Welfare Council has been absorbing the royalties since 1976. The German Welfare Council claims to have distributed the cash to German Jewish refugees and, now that there are so few alive, "the trustees have decided that the funding is no longer appropriate". Now [pound]250,000 worth of royalties is to be handed back to Random House.

Who else might benefit from Hitler's "intellectual" property? Hitler had a sister, Paula, and a half-brother, Alois, who settled in Dublin, married Brigid Elizabeth Dowling, and was later tried for bigamy. There was also Angela, Hitler's half-sister. The majority of her grandchildren -- Hitler's grandnieces and -nephews -- live in Linz, in the area where

Hitler was born. Alois's descendants live on Long Island. In theory, they could inherit royalties from Mein Kampf, should Bavaria ever sanction German publication.

Has money been made by association? Brigid Dowling attempted to capitalise on her Hitler links through her unpublished manuscript My Brother-in-Law, which she peddled in New York. According to Timothy Ryback (author of The Last Survivor), Alois Hitler "was reportedly earning pocket money by signing photographs of his half-brother and selling them to tourists in New York in 1953". The rest of the Hitler clan in the US and Austria prefer to keep a low profile. Family interests are represented by Werner Maser, the self-styled administrator of the Hitler estate. Maser, whose house is covered in ivy taken from the graves of Hitler's parents, claims that royalties from Mein Kampf are worth "almost DM9m" (about [pound]3m). Other assets include Eva Braun's photo albums, housed in the National Archives in Washington, DC.

* Maser has told Ryback that he has "absolutely no moral reservations" about pursuing the Hitler millions. "The Jews have got their compensation and now the slave labourers have got theirs. It is time for us to get ours." Curiously, he has admitted pretending to be partly Jewish to Jewish business colleagues. "Now, if it came out that I was reclaiming part of the Hitler estate, that might look a little strange to them." Maser has been trying to obtain profits from Mein Kampf for Hitler's family, but Siegfried Zangl and Nicole Lang, who control the copyright for Bavaria's finance ministry, state that "there is absolutely no legal basis on which the Hitler heirs could lay claim to royalties. We don't understand what legal basis Professor Maser has for calling himself the administrator of the Hitler estate. There is no Hitler estate to administer. It's our responsibility to see that this book stays out of print."

Clearly, it is possible to make the case for unbanning German sales of

Mein Kampf in the name of freedom of expression, but acting on this resolution is fraught with complications. The libertarian argument for lifting the ban is that its inducement to racial hatred should be countered through education, the law courts and public debate. Despite the ban, Mein Kampf is easy to locate. The German original can be found on the web, and it thrives on neoNazi sites. Where it has been offered for sale over the internet, there have been protests. Barnes & Noble was asked to halt sales of the book by Germany's minister for justice; Amazon agreed to stop selling through its German site in November 2000. The protests began when Simon Wiesenthal wrote to both companies, asking them to refrain from offering Mein Kampf to people in Germany. Last year, the German authorities considered taking legal action against Yahoo for auctioning copies, but the action was dropped in March.

The American picture is also worth examining. During the Second World War, the US government made more than $20,000 from royalties on Mein Kampf, having seized the copyright as part of the Trading with the Enemy Act (Hitler's book was one of the first assets gained under this law). By 1979, the Justice Department had collected more than $139,000 in royalties. Eventually, the monies were paid on a pro-rata basis to claimants, many of them American exPOWs. In 1979, Houghton Mifflin, the US publisher of the book, paid the government more than $35,000 for the rights. Selling more than 15,000 copies a year, Houghton Mifflin made substantial profits. When questioned about the ethics of this, the publishers reassigned the profits to charity.

What of those who endured the Holocaust and experienced Mein Kampf as a direct weapon? In The Holocaust: the Jewish tragedy, Martin Gilbert chronicles how, on Kristallnacht in Baden-Baden, a Dr Flehinger "was ordered to read out passages from Mein Kampf to fellow Jews. 'I read the passage quietly, indeed so quietly that the SS man posted behind me repeatedly hit me in the neck."'

Certainly, it would offend many survivors if Mein Kampf were to be on open sale in Germany. The question here is less about freedom of speech, more about the living nerve of survivors' sensitivity. Just as it might be considered absurd that Wagner's music is not officially performed in Israel, it is not hard to understand how broadcasting The Flight of the Valkyries on Israeli radio might disturb Hitler's victims.

Similarly, the furore over the proposed sale by the Board of Deputies of British Jews of Sir Richard Burton's anti-Semitic manuscript Human Sacrifice Among the Sephardine [sic] or Eastern Jews also provoked alarm. As a theatre practitioner, I would never advocate banning The Merchant of Venice, but the image of the Jew gleefully sharpening his knife to cut the flesh from the Christian breast has a horrible resonance after Auschwitz, which no amount of liberal interpretation can silence. The free representation of difficult texts may make the reader or spectator uncomfortable, but to hide the material is to deny the complexity of racism and to minimise the debate.

The thought of Mein Kampf becoming freely available in Germany will not make much difference to the majority of Germans. Most of them are hardly aware of the ban, and thousands still have their grandparents' copies hidden in the attic. The Jewish intellectuals I consulted did not seem too frightened by the question of lifting the ban. David Guttenplan, the author of The Holocaust on Trial: history, justice and the David Irving libel case, says: "As a non-German, I hate to make policy recommendations to the Germans, who have their own historical reasons for this suppression, but I do believe that suppression by the state is counterproductive." The lawyer and author Anthony Julius agrees, pointing out: "The ban is a bit of a nonsense. But I do feel that the basic principles of freedom of speech are context-specific, and a certain political judgement is needed."

Luke Holland, a documentary film-maker who has focused on the slave

labour issue, says: "Leave book banning and burning to the Nazis."

Michael Whine, a spokesman for the Board of Deputies, observes: "When Hutchinson wanted to publish in 1969 for the scholarly market, we raised no objections. But I can sympathise with governments who have a rise in white nationalism and racism, and with fledgling democracies wanting to suppress it." Professor Ian Kershaw, one of Hitler's biographers, declares himself "in favour of removing the ban on condition that there is an edited, scholarly version", and says that his position is shared by Eberhard Jackel, Germany's leading scholar of Mein Kampf.

Naomi Gryn, daughter of the late Rabbi Hugo Gryn (an Auschwitz survivor) and co-author with her father of Chasing Shadows, also thinks any publication should be printed with a running commentary. She believes that, as in the Irivng libel case, "the public debate in our liberal democracy will reveal racism masquerading as scholarship".

The historian Deborah Lipstadt, defendant in the David Irving libel case, says: "Germany has a historical legacy that makes this a unique situation. I would feel very uncomfortable, but I can understand that banning could be counterproductive." The German analysis reveals even more complexity around this subject. Ludwin Fischer is a non-Jewish German journalist living in Switzerland, and has been an active anti-fascist campaigner, successfully dismantling several internet neo-Nazi groups. He believes that no German politician today would dare suggest changing the law. "Nazism remains a trauma in Germany. There is still a cult of guilt. When Gerhard Schroder said recently, 'I am proud to be German', it provoked a cry of horror in the country. Any German politician suggesting the free publication of Mein Kampf would be hounded out of office as a pro-Nazi. It would be political suicide."

Certainly, in principle, I believe that Hitler's original text should be unbanned. But those cousins of my father, murdered in the forests of

Lithuania by the Einsatzgruppen, would probably not thank me for this opinion. Any publication of Mein Kampf, whether in German or in translation, should not enrich secret charities or any of Hitler's family. Rather, the profits should be given to those artists and writers working for reconciliation between the children of Germans and Jews and other Holocaust victims. Hitler left a gaping hole that spreads all over Europe. How fitting it would be if the money earned from Mein Kampf could be used to support writers and artists trying to reconstruct a fragment of the world Hitler destroyed.

Julia Pascal is a playwright. Her Holocaust Trilogy is published by Oberon Books ([pound]9.99)

Mein kitsch

The defining feature of Nazi sculpture, as with so many other of national socialism's cultural manifestations, is its banality. When you consider the forms the Nazis could have used to embody hatred and murderous desire -- Jacob Epstein's The Rock Drill, for example, is far more malevolent-looking than anything Hitler ever sanctioned -- it might appear strange that they favoured works that seem to have stepped straight from the pages of a Boys' Own annual.

The real driving force behind Nazism, however, was spectacle. The immaculately staged rallies at Nuremberg were the ultimate expression of its power and its vacuousness. Next to theatre of this scale and potency, the sculpture of the Third Reich was never really more than a series of one-dimensional props. Added to this, one could observe that any artist worth his salt had, by this stage, either fled or been deported (or worse).

But looking at Active Life by Arno Breker (an artist patronised by the Nazis, and who continued to work in Germany until his death in 1991),

one is forced to admit that the style has a certain power. Contact with such pieces is usually through the pages of history books; seen in the round, their strengths and weaknesses are clearer. One is reminded of Clement Greenberg's distinction between avant-garde art and kitsch -- that, while the avant-garde imitates the processes of art, kitsch imitates its effects.

Here is a piece that seems at first glance to have all the attributes traditionally required of sculpture. An imposing figure, it radiates strength and self-confidence in a manner reminiscent of classical Greek statuary. But is all quite as it seems? In his essay "Avant-Garde and Kitsch", Greenberg goes on to describe kitsch as the "debased and academicised simulacra of genuine culture". It uses the techniques of classical art to produce formulaic works whose "lifelike" qualities seem, to the untrained eye, to be miraculous. It flatters the viewer, because no effort whatsoever is required on his or her part. What we have here is a highly skilled parody of figurative sculpture, a statement of physical strength that is, in fact, as bodiless as a ghost.

The reason the Nazis favoured artists such as Breker was not just due to philistinism on their part, but because kitsch had by that time become the dominant culture in all Europe. Commissioning big, brash, easy-to-appreciate images of health and optimism (feel-good art, if you like) was a simple way of pandering to the masses. What unites all kitsch -- whether it be the sculpture of Arno Breker, fast food or a film such as Pearl Harbor -- is that its effects are immediate, unambiguous and ingratiating. There is no specific danger in letting this somewhat trite sculpture be seen. What might give us pause for thought, though, is how close it seems to the culturally sanctioned ephemera of our own time.

3. Police Investigate Man For Wearing Hitler Mask

Police Investigate Man for Wearing Hitler Mask

February 20, 2002 7:28 am EST

BERLIN (Reuters) - A man who wore a Hitler mask at a carnival in eastern Germany and won a prize for "most original costume" faces charges of violating strict anti-Nazi laws, police said Wednesday.

A police spokesman said prosecutors were investigating the man on charges of breaking laws against glorifying the Third Reich because he wore the Hitler disguise at a public festival.

The man donned the mask for a carnival celebration in the town of Gehren.

"It still has to be determined what the charges will be," said the police spokesman in nearby Gotha, around 250 miles south of Berlin.

Bild newspaper reported Wednesday the man won the prize for "most original mask." However, at least one person at the carnival objected and complained to police.

Germany has strict laws making it a crime to deny the Holocaust happened, use the stiff-armed "Hitler salute" or display Nazi medals or other paraphernalia.

Participants in the country's carnivals often wear satirical masks of politicians.

4. Germany Bans Foreign Web Site for Nazi Content

By Robyn Weisman

NewsFactor Network

December 14, 2000

Germany's High Court has declared an Australia-based Web site illegal. The question is whether that will make any difference in the real world.

Germany's highest court, the Bundesgerichthof, ruled Tuesday that material accessible on the Internet that displays pro-Nazi sentiments or denies that the Holocaust took place falls under its post-World War II legal statutes prohibiting hate speech.

As a result, said court spokesman Wolfgang Kruger, the court found that German authorities may take legal action against foreigners who upload content that is illegal in Germany -- even though the Web sites may be located elsewhere. The Bundesgerichthof's decision overturns a lower court ruling that only Web sites based in Germany were liable.

The German ruling echoes a recent French precedent. Over the last year, France's High Court has issued several rulings barring Yahoo (Nasdaq: YHOO), the global Internet portal, from auctioning Nazi memorabilia in France.

Basis of Ruling

The current ruling emanates from a 1999 court case involving Frederick Toben, a Holocaust Revisionist arrested for distributing leaflets in Germany propounding the belief that the Holocaust never happened. German courts sentenced Toben to ten months in prison for distributing the leaflets and for maintaining a Web site denying the Holocaust.

Toben appealed the latter element of his conviction, stating that his Web site is based in Australia and therefore is not subject to German law. Though German-born, Toben has lived in Australia for most of his life and is a citizen of that country.

After the Bundesgerichthof overturned Toben's appeal, Toben's attorney, Michael Rosenthal, accused the court of attempting to act as a global Internet policeman. Others have also denounced the ruling, saying that it makes Toben a martyr and will not prevent other hate-mongers from professing similar beliefs.

Their Laws vs. Ours

Hans-Gertz Lange, a spokesperson for the FBI's German counterpart, the Verfassungsschutz, told news sources, "The best chance to fight against right-wing material on the Internet is on an international level. But when I think of the U.S. or Canada, it's extremely unlikely that they'll change their laws in accordance with ours.

"Their concept of freedom of speech is tied up with their history; our laws against incitement to racial hatred are tied up in ours," Lange said.

In fact, Americans often fail to take the issue of history into account, said Mark Weitzman, director of the Task Force Against Hate at the Simon Wiesenthal Center, an international organization promoting human rights and Holocaust rememberance.

"What we don't realize in the U.S. is that living under Nazi occupation or in a Nazi country has left a tremendous impact, and their laws reflect that," Weitzman told the NewsFactor Network.

"At the same time," Weitzman added, "[Europeans] haven't realized that the U.S. has managed to exist for hundreds of years without these laws, and yet haven't created Nazi societies."

Not Just Legislation

"One of the things we're neglecting is that Internet technology is so new that we haven't figured out ways to handle things we can all agree upon," Weitzman said. "And legal remedies [to the problem of hate speech] are not the only remedies."

While the German High Court's decision may have been made for the best of reasons, the nature of the Internet is such that laws that work well for nations may have to be thoroughly reworked if they are to have any practical effect in cyberspace.

C. France - Yahoo Decision

1.Yahoo v. LaLique

YAHOO!, INC., a Delaware corporation, Plaintiff, v. LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, a French association, et al., Defendants.

Case Number C-00-21275 JF [Docket No. 17]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378; 30 Media L. Rep. 1001

November 7, 2001, Decided

November 7, 2001, Filed

PRIOR HISTORY: Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168, 2001 U.S. Dist. LEXIS 7565 (N.D. Cal. 2001)

DISPOSITION: [**1] Motion for summary judgment was granted. Judgment was entered.

COUNSEL: For YAHOO! INC., Plaintiff: Michael Traynor, Benjamin K. Riley, Karen Daly, Laura Pirri, Cooley Godward LLP, San Francisco, CA.

For YAHOO! INC., Plaintiff: Neil Jahss, O'Melveny & Myers, Los Angeles, CA.

For YAHOO! INC., Plaintiff: Robert C. Vanderet, Neil S. Jahss, O'Melveny & Myers LLP, Los Angeles, CA.

For LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, L'UNION DES ETUDIANTS JUIFS DE FRANCE, defendants: Ronald S. Katz, Coudert Brothers, San Francisco, CA.

For LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, L'UNION DES ETUDIANTS JUIFS DE FRANCE, defendants: Richard A. Jones, Coudert Brothers, San Jose, CA.

JUDGES: JEREMY FOGEL, United States District Judge.

OPINIONBY: JEREMY FOGEL

OPINION: [*1183]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment. Defendants oppose the motion. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on September 24, 2001. For the reasons set forth below, the motion will be granted.

I. PROCEDURAL HISTORY

Defendants La Ligue Contre Le Racisme Et l'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France, citizens [**2] of France, are non-profit organizations dedicated to eliminating anti-Semitism. Plaintiff Yahoo!, Inc. ("Yahoo!") is a corporation organized under the laws of Delaware with its principal place of business in Santa Clara, California. Yahoo! is an Internet n1 service provider that operates various Internet websites and services that any computer user can access at the Uniform Resource Locator ("URL") http://www.yahoo.com. Yahoo! services ending in the suffix, ".com," without an associated country code as a prefix or extension (collectively, "Yahoo!'s U.S. Services") use the English language and target users who are residents of, utilize servers based in and operate under the laws of the United States. Yahoo! subsidiary corporations operate regional Yahoo! sites and services in twenty other nations, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain. Each of these regional web sites contains the host nation's unique two-letter code as either a prefix or a suffix in its URL (e.g., Yahoo! France is found at http://www.yahoo.fr and Yahoo! Korea at

http://www.yahoo.kr). Yahoo!'s regional sites use the local region's primary language, target the local citizenry, [**3] and operate under local laws.

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n1 The "Internet" and "World Wide Web" are distinct entities, but for the sake of simplicity, the Court will refer to them collectively as the "Internet." Generally speaking, the Internet is a decentralized networking system that links computers and computer networks around the world. The World Wide Web is a publishing forum consisting of millions of individual websites that contain a wide variety of content.

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Yahoo! provides a variety of means by which people from all over the world can communicate and interact with one another [*1184] over the Internet. Examples include an Internet search engine, e-mail, an automated auction site, personal web page hostings, shopping services, chat rooms, and a listing of clubs that individuals can create or join. Any computer user with Internet access is able to post materials on many of these Yahoo! sites, which in turn are instantly accessible by anyone who logs on to Yahoo!'s Internet sites. As relevant here, Yahoo!'s auction site allows anyone to post [**4] an item for sale and solicit bids from any computer user from around the globe. Yahoo! records when a posting is made and after the requisite time period lapses sends an e-mail notification to the highest bidder and seller with their respective contact information. Yahoo! is never a party to a transaction, and the buyer and seller are responsible for arranging privately for payment and shipment of goods. Yahoo! monitors the transaction through limited regulation by prohibiting particular items from being sold (such as stolen goods, body parts, prescription and illegal drugs, weapons, and goods violating U.S. copyright laws or the Iranian and Cuban embargos) and by providing a rating system through which buyers and sellers have their transactional behavior evaluated for the benefit of future consumers. Yahoo! informs auction sellers that they must comply with Yahoo!'s policies and may not offer items to buyers in jurisdictions in which the sale of such item violates the jurisdiction's applicable laws. Yahoo! does not actively regulate the content of each posting, and individuals are able to post, and have in fact posted, highly offensive matter, including Nazi-related propaganda and [**5] Third Reich memorabilia, on Yahoo!'s auction sites.

On or about April 5, 2000, LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters informing Yahoo! that the sale of Nazi and Third Reich related goods through its auction services violates French law. LICRA threatened to take legal action

unless Yahoo! took steps to prevent such sales within eight days. Defendants subsequently utilized the United States Marshal's Office to serve Yahoo! with process in California and filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris (the "French Court").

The French Court found that approximately 1,000 Nazi and Third Reich related objects, including Adolf Hitler's Mein Kampf, The Protocol of the Elders of Zion (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900's), and purported "evidence" that the gas chambers of the Holocaust did not exist were being offered for sale on Yahoo.com's auction site. Because any French citizen is able to access these materials on Yahoo.com directly or through a link on Yahoo.fr, the French Court concluded that the Yahoo.com auction site violates Section R645-1 of the French [**6] Criminal Code, which prohibits exhibition of Nazi propaganda and artifacts for sale. n2 On May 20, 2000, the French Court entered an order requiring Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from Mein Kampf and Protocol of the Elders of Zion; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the [*1185] French Republic index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust." The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order. The order concludes:

We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible [**7] any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.

High Court of Paris, May 22, 2000, Interim Court Order No. 00/05308, 00/05309 (translation attested accurate by Isabelle Camus, February 16, 2001). The French Court set a return date in July 2000 for Yahoo! to demonstrate its compliance with the order.

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n2 French law also prohibits purchase or possession of such matter within France.

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Yahoo! asked the French Court to reconsider the terms of the order, claiming that although it easily could post the required warning on Yahoo.fr, compliance with the order's requirements with respect to Yahoo.com was technologically impossible. The French Court sought expert opinion on the matter and on November 20, 2000 "reaffirmed" its order of May 22. The French Court ordered Yahoo! to comply with the May 22 order within three (3) months or face a penalty of 100,000 Francs (approximately [**8] U.S. $ 13,300) for each day of non-compliance. The French Court also provided that penalties assessed against Yahoo! Inc. may not be collected from Yahoo! France. Defendants again utilized the United States Marshal's Office to serve Yahoo! in California with the French Order.

Yahoo! subsequently posted the required warning and prohibited postings in violation of Section R645-1 of the French Criminal Code from appearing on Yahoo.fr. Yahoo! also amended the auction policy of Yahoo.com to prohibit individuals from auctioning:

Any item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan. Official government-issue stamps and coins are not prohibited under this policy. Expressive media, such as books and films, may be subject to more permissive standards as determined by Yahoo! in its sole discretion.

Yahoo Auction Guidelines (visited Oct. 23,2001) . Notwithstanding these actions, the Yahoo.com auction site still offers certain items for sale (such as stamps, coins, and a copy of Mein Kampf [**9]) which appear to violate the French Order. n3 While Yahoo! has removed the Protocol of the Elders of Zion from its auction site, it has not prevented access to numerous other sites which reasonably "may be construed as constituting an apology for Nazism or a contesting of Nazi crimes." n4

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n3 The Court takes judicial notice that on October 24, 2001, the key word "nazi" on the Yahoo.com auction site search engine called up sixty-nine Nazi-related items for sale, most of which were stamps and coins from the Third Reich. One copy of Mein Kampf was for sale.

n4 The Court also takes judicial notice that on October 24, 2001, a search on Yahoo.com of "Jewish conspiracy" produced 3,070 sites, the search "Protocols/10 Zion produced 3,560 sites, and the search "Holocaust/5 'did not happen,'" produced 821 sites. The search "National Socialist Party" led to a website of an organization promoting modern day Nazism.

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Yahoo! claims that because it lacks the technology to block French citizens from accessing the Yahoo. [**10] com auction site to view materials which violate the French [*1186] Order or from accessing other Nazi-based content of websites on Yahoo.com, it cannot comply with the French order without banning Nazi-related material from Yahoo.com altogether. Yahoo! contends that such a ban would infringe impermissibly upon its rights under the First Amendment to the United States Constitution. Accordingly, Yahoo! filed a complaint in this Court seeking a declaratory judgment that the French Court's orders are neither cognizable nor enforceable under the laws of the United States.

Defendants immediately moved to dismiss on the basis that this Court lacks personal jurisdiction over them. That motion was denied. n5 Defendants' request that the Court certify its jurisdictional determination for interlocutory appeal was denied without prejudice pending the outcome of Yahoo!'s motion for summary judgment.

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n5 See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168 (N.D.Cal. 2001).

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II. [**11] OVERVIEW

As this Court and others have observed, the instant case presents novel and important issues arising from the global reach of the Internet. Indeed, the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one

nation's judiciary. Thus it is critical that the Court define at the outset what is and is not at stake in the present proceeding.

This case is not about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function [**12] of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here. n6

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n6 In particular, there is no doubt that France may and will continue to ban the purchase and possession within its borders of Nazi and Third Reich related matter and to seek criminal sanctions against those who violate the law.

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What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, [**13] the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of [*1187] various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another

party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made [**14] a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

III. LEGAL STANDARDS

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. A genuine issue for trial exists [**15] if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. Anderson, 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505; Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

IV. LEGAL ISSUES

A. Actual Controversy

The Declaratory Judgment Act protects potential defendants from multiple actions by providing a means by which a court declares in one action the rights and obligations of the litigants. 28 U.S.C. § 2201. A declaratory judgment will not expand a federal court's

jurisdiction, but if jurisdiction exists, litigants have earlier access to federal courts to spare potential defendants from the threat of impending litigation. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950); Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996). Declaratory judgment actions are justiciable only if there is an "actual controversy." 28 U.S.C. § 2201(a). The "actual controversy" [**16] requirement is analyzed in the same manner as the "case or controversy" standard under Article III of the United States Constitution. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40, 81 L. Ed. 617, 57 S. Ct. 461 (1937).

The threshold question in any declaratory action thus is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the [*1188] issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941); National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 565 (9th Cir. 1987). The "mere possibility, even probability, that a person may in the future be adversely affected by official acts not yet threatened does not create an 'actual controversy' which is a prerequisite created by the clear language of the [Declaratory Judgment Act]. . . ." Garcia v. Brownell, 236 F.2d 356, 358 (9th Cir. 1956) cert. denied, 362 U.S. 963, 4 L. Ed. 2d 878, 80 S. Ct. 880 (1960). The party invoking federal jurisdiction bears the burden of showing that [**17] it faces an immediate or actual injury. Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 5 (9th Cir. 1974), cert. denied, 419 U.S. 1008, 42 L. Ed. 2d 283, 95 S. Ct. 328 (1974).

1. Status of the French Order

Defendants contend that the "actual controversy" requirement is not met in the instant case. They point out that Yahoo! appealed the French Court's initial order of May 22, 2000, and that a successful appeal would nullify the order of November 20, 2000 that "reaffirmed" the May 22 order. They argue that even if the May 22 order is upheld on appeal, the French court may find that Yahoo! has substantially complied with the order. Alternatively, they assert that they themselves may elect not to initiate the complex process the French Court would use to fix an actual penalty, and that until that process is completed, there is no order that could be enforced against Yahoo! in the United States. Finally, Defendants offer declarations to the effect that they view Yahoo!'s revised policies with respect to its auction site and removal of Protocol of the Elders of Zion from its host sites as substantial compliance with the French [**18] order and that accordingly they have no present intention of taking legal action against Yahoo! in the United States.

While these points are facially appealing and suggest a way for the Court to avoid deciding the sensitive and controversial issues presented herein, the facts in the record do not support Defendants' position. First, there are no relevant appellate proceedings presently pending in France. In its order of November 20, 2000, the French Court determined that Yahoo! is technologically and legally capable of complying with the May

22 order and that Yahoo! is subject to a fine of approximately $ 13,000 for each day of non-compliance. That order was not appealed, and the record indicates that Yahoo! withdrew its appeal of the May 22 order on May 28, 2001 (Supp. Dec. of Mary Catherine Wirth, Exhibit A, Aug. 19, 2001).

Second, the fact that any penalty against Yahoo! is provisional and would require further legal proceedings in France prior to any enforcement action in the United States does not mean that Yahoo! does not face a present and ongoing threat from the existing French order. At oral argument, Defendants did not dispute that if the penalty enforcement process were [**19] initiated, the French Court could assess penalties retroactively for the entire period of Yahoo!'s non-compliance. Despite their declarations to the effect that they are satisfied with Yahoo!'s efforts to comply with the French order, Defendants have not taken steps available to them under French law to seek withdrawal of the order or to petition the French court to absolve Yahoo! from any penalty. n7 See Societe de Conditionnement en Aluminium [*1189] v. Hunter Engineering Co., Inc., 655 F.2d 938, 945 (9th Cir. 1981) ("It is not relevant that Hunter attempted to withdraw its 'threat' after the filing of this lawsuit. We do think it relevant, in the light of the circumstances, that Hunter has not indicated that it will not sue SCAL for infringement or in any other manner agree to a non-adversary position with respect to the patent.").

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n7 The Court inquired at oral argument whether Defendants would be willing to take such steps in order to avoid the necessity of the present adjudication but has received no indication to date that they would.

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Third, it is by no means clear that Yahoo! can rely upon the assessment in Defendants' declarations that it is in "substantial compliance" with the French order. The French Court has not made such a finding, nor have Defendants requested or stipulated that such a finding be made. As set forth earlier, Yahoo.com continues to offer at least some Third Reich memorabilia as well as Mein Kampf on its auction site and permits access to numerous web pages with Nazi-related and anti-Semitic content. The fact that the Yahoo! does not know whether its efforts to date have met the French Court's mandate is the precise harm against which the Declaratory Judgment Act is designed to protect.

The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never. The Act permits parties so situated to forestall

the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate.

Japan Gas Lighter Ass'n. v. Ronson Corp., 257 F. Supp. 219, 237 (D. N.J.1966). [**21]

2. Real and Immediate Threat

The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948). The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence. R.A.V. v. City of St. Paul, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992); Simon & Schuster, Inc. f. Members of New York State Crime Victims Board, 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991); Boos v. Barry, 485 U.S. 312, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988); Police Dept. v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); Brandenburg v. Ohio, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959). [**22] In addition, the French Court's mandate that Yahoo! "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes" is far too general and imprecise to survive the strict scrutiny required by the First Amendment. The phrase, "and any other site or service that may be construed as an apology for Nazism or a contesting of Nazi crimes" fails to provide Yahoo! with a sufficiently definite warning as to what is proscribed. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971). Phrases such as "all necessary measures" and "render impossible" instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech. See Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987); Gooding v. Wilson, 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 [*1190] (1972). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes [**23] irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) citing New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971).

Rather than argue directly that the French order somehow could be enforced in the United States in a manner consistent with the First Amendment, n8 Defendants argue instead that at present there is no real or immediate threat to Yahoo!'s First Amendment rights because the French order cannot be enforced at all until after the cumbersome process of

petitioning the French court to fix a penalty has been completed. They analogize this case to Int'l Soc. for Krishna Consciousness of California, Inc. v. City of Los Angeles, 611 F. Supp. 315, 319-20 (C.D. Cal. 1984), in which the City of Los Angeles sought a declaratory judgment that a resolution limiting speech activities adopted by its Board of Airport Examiners was constitutional. The district court concluded that the action was unripe because the resolution could not take effect without ratification by the City Council, which had not yet occurred. The cases, however, are distinguishable. While [**24] Defendants present evidence that further procedural steps in France are required before an actual penalty can be fixed, there is no dispute that the French order is valid under French law and that the French Court may fix a penalty retroactive to the date of the order. The essence of the holding in the Krishna Consciousness case is that the subject resolution had no legal effect at all.

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n8 As is discussed below, Defendants do argue unpersuasively that further discovery might affect the First Amendment analysis.

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Defendants also claim that there is no real or immediate threat to Yahoo! because they do not presently intend to seek enforcement of the French order in the United States. In Salvation Army v. Department of Community Affairs of the State of New Jersey, 919 F.2d 183 (3rd Cir. 1990), a religious group that operated a family center for disadvantaged persons claimed a state statute regulating boarding houses violated its right to the free exercise of religion. After the group brought [**25] suit, the state authorities agreed outside of the judicial proceedings to exempt the group from some of the provisions. The district court then granted summary judgment and dismissed the action. On appeal, the group claimed it still faced uncertainty with respect to future enforcement of the statute because the exemptions were not legally binding and the regulations in their entirety impermissibly intruded upon its First Amendment rights. The Court of Appeals for the Third Circuit agreed with the trial court that there was no immediate threat to the group because the state had provided an express assurance that it would not enforce any of the waived provisions, no criminal penalties could be imposed under the statute unless additional steps were taken by the state, the state could not impose fines without giving notice and opportunity to comply, and there was no evidence that the group's First Amendment rights actually would be affected by the threat of future law suits.

Salvation Army is distinguishable from this case in several significant respects. First, the New Jersey statute's penalties were "enforceable by the defendants only prospectively. . ." Salvation Army, 919 F.2d at 192. [**26] The French order permits retroactive penalties. Second, while the exemptions granted to the Salvation Army allowed it to maintain the status quo, the French order had the immediate effect of [*1191] inducing Yahoo! to implement new restrictive policies on its auction site. Third, while the perceived threat to the Salvation Army was the potential withdrawal of the exemptions in the future, the provisions of the French order that require Yahoo! to regulate the content of its websites on Yahoo.com never have been waived, suspended or stayed and apparently remain in full force and effect. Under these circumstances, Defendants' assurances that they do not intend to enforce the order at the present time do not remove the threat that they may yet seek sanctions against Yahoo!'s present and ongoing conduct n9. See Abbott Labs. v. Gardner, 387 U.S. 136, 154, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1969) ("There is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule [**27] they are quite clearly exposed to the imposition of strong sanctions."); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993) (construing Abbott Laboratories to mean that if "promulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation," the controversy is ripe).

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n9 Again, it would appear that legal means are available to Defendants both in France and in this Court to eliminate such a threat, but as yet Defendants have not availed themselves of these procedures.

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3. Abstention.

Defendants next argue that this Court should abstain from deciding the instant case because Yahoo! simply is unhappy with the outcome of the French litigation and is trying to obtain a more favorable result here. Indeed, abstention is an appropriate remedy for international forum-shopping. In Supermicro Computer, Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147 (N.D. Cal. 2001), [**28] a California manufacturer was sued by a corporate customer in France for selling a defective product. The California company

sought a declaratory judgment in the United States that its products were not defective, that the French customer's misuse of the product caused the product to fail, and that if the California company was at fault, only limited legal remedies were available. The court concluded that the purpose of the action for declaratory relief was to avoid an unfavorable result in the French courts. It noted that the action was not filed until a year after the French proceedings began, that the French proceedings were still ongoing, and that the French defendants had no intent to sue in the United States. It concluded that the declaratory relief action clearly was "litigation involving the same parties and the same disputed transaction." Id., at 1152.

In the present case, the French court has determined that Yahoo!'s auction site and website hostings on Yahoo.com violate French law. Nothing in Yahoo!'s suit for declaratory relief in this Court appears to be an attempt to relitigate or disturb the French court's application of French law or its orders with [**29] respect to Yahoo!'s conduct in France. n10 Rather, the purpose of the present action is to determine whether a United States court may [*1192] enforce the French order without running afoul of the First Amendment. The actions involve distinct legal issues, and as this Court concluded in its jurisdictional order, a United States court is best situated to determine the application of the United States Constitution to the facts presented. n11 No basis for abstention has been established.

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n10 Arguably, Yahoo! does seek to relitigate the French court's factual determination that Yahoo! does possess the technology to comply with the French order. For the reasons discussed herein, the Court concludes that Yahoo!'s ability to comply with the order is immaterial to the question of whether enforcement of the order in the United States would be constitutional.

n11 Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168, 1179 (N.D.Cal. 2001).

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4. Comity

No legal judgment has [**30] any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. 28 U.S.C. § 1738. However, the United States Constitution and implementing legislation require that full faith and credit be given to judgments of sister states, territories, and possessions of the United States. U.S. CONST. art. IV, §§ 1, cl. 1; 28 U.S.C. § 1738. The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by "the comity of nations." Hilton v. Guyot, 159 U.S. 113, 163, 40 L. Ed. 95, 16 S. Ct. 139 (1895). Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." Hilton, 159 U.S. at 163-64 (1895). United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) cert. denied, 405 U.S. 1017, 31 L. Ed. 2d 479, 92 S. Ct. 1294 (1972); Laker Airways v. Sabena Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 931 (D.C. Cir. 1984) [**31] ("[The court] is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests."); Tahan v. Hodgson, 213 U.S. App. D.C. 306, 662 F.2d 862, 864 (D.C. Cir. 1981) ("Requirements for enforcement of a foreign judgment expressed in Hilton are that . . . the original claim not violate American public policy . . . that it not be repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.").

As discussed previously, the French order's content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously [**32] within our borders. See, e.g., Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (declining to enforce British libel judgment because British libel standards "deprive the plaintiff of his constitutional rights"); Bachchan v. India Abroad Publications, Inc., 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup.Ct. 1992) (declining to enforce a British libel judgment because of its "chilling effect" on the First Amendment); see also, Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing a libel claim brought under English law because "establishment of a claim for libel under the British law of defamation would be antithetical to the First Amendment protection accorded to the defendants."). [*1193] The reason for limiting comity in this area is sound. "The protection to free speech and the press embodied in [the First] amendment would be seriously jeopardized by the entry of foreign [] judgments granted pursuant to standards deemed appropriate in [another country] but considered antithetical to the protections afforded the press by the U.S. Constitution." Bachchan, 585 N.Y.S.2d at 665. [**33] Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment. n12

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n12 The Court expresses no opinion as to whether any such treaty or legislation would or could be constitutional.

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B. Rule 56(f)

FED. R. CIV. P. 56(f) permits a court either to postpone determination of a motion for summary judgment or to deny such motion pending further discovery. A court may take such action when "it appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." FED. R. CIV. P. 56(f). To justify a continuance, the Rule 56(f) motion must demonstrate 1) why the movant needs additional discovery and 2) how the additional discovery likely will create [**34] a genuine issue of material fact. Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993).

Defendants assert that further discovery may lead to the development of triable issues of fact concerning the extent to which Yahoo!'s modifications to its auction site have affected its potential liability under the French order and as to Yahoo!'s technological ability to comply with the order. Defendants contend that these issues are material because the law is unsettled as to whether the First Amendment protects speech originating within the United States that is expressly targeted at a foreign market. In Desai v. Hersh, 719 F. Supp. 670, 676 (N.D. Ill. 1989) aff'd, 954 F.2d 1408 (7th Cir. 1992), an author published a book in the United States about former Secretary of State Henry Kissinger. A former Indian government official who was mentioned in the book brought a defamation action in the United States, seeking to apply Indian law. Although it held that the First Amendment applied extraterritorially to publication of the book and therefore refused to apply Indian defamation law, it also commented that "for purposes of suits brought [**35] in United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution." Id., 719 F. Supp. at 676.

Relying upon this dictum, Defendants suggest that discovery may produce additional evidence that would preclude summary judgment on First Amendment grounds. However, unlike the defendant in Desai, who claimed protection under the First Amendment for his extraterritorial conduct, Yahoo! seeks protection for its actions in the United States, specifically the ways in which it configures and operates its auction and Yahoo.com sites. Moreover, the French order requires Yahoo! not only to render it impossible for French citizens to access the proscribed content but also to interpret an impermissibly overbroad and vague definition of the content that is proscribed. If a hypothetical party were physically present in France engaging in expression that was [*1194] illegal in France but legal in the United States, it is unlikely that a United States court would or could question the applicability of French law to that party's conduct. However, an entirely different case would be presented if the [**36] French court ordered the party not to engage in the same expression in the United States on the basis that French citizens (along with anyone else in the world with the means to do so) later could read, hear or see it. While the advent of the Internet effectively has removed the physical and temporal elements of this hypothetical, the legal analysis is the same.

In light of the Court's conclusion that enforcement of the French order by a United States court would be inconsistent with the First Amendment, the factual question of whether Yahoo! possesses the technology to comply with the order is immaterial. Even assuming for purposes of the present motion that Yahoo! does possess such technology, n13 compliance still would involve an impermissible restriction on speech. Accordingly, Defendants' motion pursuant to Rule 56(f) motion will be denied.

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n13 As noted earlier, the French court expressly found against Yahoo! as to this point in its order of November 20, 2000.

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V. CONCLUSION

Yahoo! seeks a declaration [**37] from this Court that the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet. Yahoo! has shown that the French order is valid under the laws of France, that it may be enforced with retroactive penalties, and that the ongoing possibility of its enforcement in the United States chills Yahoo!'s First Amendment

rights. Yahoo! also has shown that an actual controversy exists and that the threat to its constitutional rights is real and immediate. Defendants have failed to show the existence of a genuine issue of material fact or to identify any such issue the existence of which could be shown through further discovery. Accordingly, the motion for summary judgment will be granted. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 11-7-01

JEREMY FOGEL

United States District Judge

2. Ruling On Nazi Memorabilia Sparks Legal Debate

November 24, 2000

Cyber Law Journal

By CARL S. KAPLAN

Ruling on Nazi Memorabilia Sparks Legal Debate

A ruling by a Paris judge ordering Yahoo Inc. to block French citizens from auctions of Nazi artifacts on the company's English-language Web site has sparked a passionate debate among legal experts.

Some lawyers say the decision earlier this week, rooted in a French anti-Nazi statute, is an alarming example of a foreign court's willingness to impose its national law on the activities of a United States-based Web site.

Even worse, they say, is the ruling's implication. Under the Paris court's logic, any Web site with global reach could be subject to the jurisdiction of every nation on earth. Forced to comply with a patchwork of local laws, global e-commerce could grind to a halt.

Rubbish -- the sky is not falling, other lawyers say with equal fervor. The Paris court's decision was perfectly reasonable under the circumstances, they claim. Indeed it is a welcome harbinger of things to come.

One thing both camps seem to agree on is that the decision, handed down by Judge Jean-Jacques Gomez of the Superior Court of Paris, was a shot heard 'round the world. The Financial Times of London ran a story about the Yahoo case prominently on its front page the day after the ruling, as well as an op-ed column and an editorial, which criticized the court.

In his decision on November 20, Judge Gomez gave Yahoo Inc., based in Santa Clara, Calif., three months to find a technological means to prevent Web surfers in France from gaining access to some web pages on its auction site that feature over 1,200 Nazi-related items - everything from Nazi flags to belt buckles. After the deadline, Yahoo would be fined $13,000 for each day it did not comply with the order, the Judge said. Yahoo's France-based subsidiary, Yahoo France, does not host auctions for Nazi memorabilia.

A representative of Yahoo Inc. declined to comment on the ruling.

Michael Traynor, a lawyer in San Francisco who is acting as special counsel to Yahoo on some aspects of the lawsuit, said the company is weighing its legal options. He said the company could appeal to a higher court in France and challenge Judge Gomez's assertion of jurisdiction. He also predicted that any effort by French authorities to enforce Judge Gomez's judgment in a United States court against Yahoo's United States assets would fail because of the First Amendment, which protects hate speech.

An open question, other lawyers said, is whether French authorities could seize assets of Yahoo France to pay for possible fines levied against Yahoo Inc.

The Yahoo case first rose to public attention on May 22, when Judge Gomez ordered Yahoo Inc. to "render impossible" the ability of Web surfers in France to gain access to Nazi-related auctions hosted on the company's auction pages. In reaching his decision Judge Gomez held that the display of Nazi souvenirs on computer screens in France is a violation of a section of the French criminal code that bans the exhibition or sale of racist material. He also concluded that France was competent to assert jurisdiction over Yahoo because the harm -- the display of Nazi-era artifacts -- occurred on French territory.

The suit was filed by two groups in France, the International League Against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students.

Following the May 22 order, Yahoo said at a court hearing that it was technically impossible for it to block French Internet users. In August, the court appointed a panel of three experts -- one French, one American and one European-- to independently review the viability of filtering technologies that Yahoo might use. Earlier this month, the panel reported that a filtering system based on the geographical origin of online users could block up to 90 percent of French citizens seeking to participate in Nazi-related auctions hosted by Yahoo.

One legal expert who hailed the court's final order this week is Jack Goldsmith, a law professor at the University of Chicago and an expert in Internet jurisdiction. Goldsmith said it was "too simplistic" for some lawyers to complain that the ruling threatens global e-commerce.

"IBM, McDonald's and other international companies sell stuff into every country in the world and they have to comply with local laws," he said. The fact that real-space companies have to obey a patchwork of laws "hasn't brought real-space commerce to a halt," Goldsmith quipped.

Goldsmith also noted that the Untied States routinely imposes its national laws on foreign enterprises, particularly offshore Internet companies. Yet American legal experts and Internet executives haven't complained about overreaching in those cases.

Last year, for example, a local trial judge in Manhattan made headlines when he ruled that operators of an Internet gambling casino based in Antigua, where gambling is legal, violated New York State and federal anti-gambling laws because the Web site's content was available to New Yorkers.

The key fact justifying the Paris court's decision, said Goldsmith, is that "a U.S. corporation is doing something that is causing harm" on French soil. A French court has the authority to take steps to try to stop it, he said.

The court's order is a very good compromise, Goldsmith asserted. The court did not require that Yahoo purge all its Nazi-related auctions, thus censoring what Americans could see. Instead, the court in a sense urged Yahoo to use geographical filters, knowing full well that the technology would still allow 10 percent of the auctions to slip onto French-based computer screens.

"This decision is significant because it shows that geographical filters, though not perfect, are feasible and that nations can take reasonable steps to keep content out," said Goldsmith. "I have no doubt that the Internet will become more geographically filtered. This ruling will enhance the trend."

On the opposite side of the debate is Traynor, the Yahoo special counsel. He said that Judge Gomez's order is a significant negative development in the governance of the Internet.

"One country is purporting to exercise and impose its standards on a worldwide conversation," Traynor said. "It's fundamentally an interference with freedom of speech and expression."

Traynor asserted that filters, even geographical filters, are expensive, ineffective and may block excessively. "There's just a huge question over the efficacy of filters," he said.

One American lawyer who admitted that the Yahoo ruling gives him a headache is David J. Loundy, who practices Internet law with D'Ancona & Pflaum, a Chicago law firm.

Loundy said that he would not have ruled much differently from Judge Gomez. "Filters are a pretty good compromise solution," he said. "They work, mostly."

But one thing he wants to know: where is it going to end?

This week Yahoo was ordered to block out a class of people in France, Loundy said. "The next thing you know a court in the Middle East will order another U.S. Internet company to block Middle Eastern consumers from seeing soft-core pornography, which is legal here but illegal there. You can pick your country and pick your problem. Will every Internet company in the future have to put on 42 geographical filters to make everybody happy? Or 420 filters?"

There are other questions, Loundy said with a sigh: Does an Internet company have an affirmative duty to figure out the laws of every nation in the world and put on the appropriate geographical filters, or do they just have to put on filters following a court order? And as the

technology gets better, does a company have a duty to slap on the newest filtering gizmo?

Taken in isolation, Judge Gomez's ruling is not objectionable, Loundy said. "But all the implications are starting to make me wonder."

http://www.nytimes.com/2000/11/24/technology/24CYBERLAW.html?ex=1064042519&ei=1&en=b9d96c14e7445f5d

3. Nazi Memorabilia Case Presents Jurisdiction Dilemma

Cyber Law Journal

August 11, 2000

French Nazi Memorabilia Case Presents Jurisdiction Dilemma

By Carl S. Kaplan

In Europe, where memories of World War II are still fresh in the minds of those who lived through it, the sale of Nazi and Fascist memorabilia often sparks indignation.

Today, that passion is being played out in a courtroom in Paris, where French authorities are seeking to force an American company, Yahoo Inc., to restrict French citizens from gaining access to Nazi artifacts that appear on its English-language auction site, which is available to online surfers around the world.

Whatever the outcome of the hearing today, the case points up an enduring legal and cultural puzzle about speech and commerce in borderless cyberspace: What happens when the laws and traditions of a country that receives an online message clash with the laws and values of the land where the message originated?

In this case, which began in May, the question is posed in even starker terms. Should Yahoo Inc. bow to a French law condemning the trivialization of the Nazi era, or should France yield to Yahoo's rights of freedom of expression as embodied in the United States Constitution?

"The Yahoo case points up a dilemma in the law of jurisdiction," said Henry H. Perritt Jr., dean of the Chicago-Kent College of Law and an expert in Internet law.

"If a Web site is accessible to all, and is subject to jurisdiction by every nation on earth, then the laws of the lowest common denominator nation" will govern the Internet, he said. "On the other hand, if we say that the only important law is the one where the content provider resides, then local values of foreign nations will not be enforced. We also run the risk of creating havens for shyster practices."

The Yahoo case first rose to public attention on May 22, when Judge Jean-Jacques Gomez of the Superior Court of Paris ordered Yahoo Inc., based in Santa Clara, Calif., to "dissuade and render impossible" the ability of Web surfers in France to gain access to sales of Nazi-related objects that appear on an auction service hosted by Yahoo.com.

Judge Gomez ruled that the display in France of Nazi souvenirs, for the purpose of sale, is a violation of French law (article R.645-2 of the Criminal Code). He also said the

online exposition of Nazi artifacts in France is "an offense against the collective memory of a country profoundly wounded by the atrocities committed by and in the name of the Nazi criminal enterprise."

Judge Gomez further declared that because Yahoo Inc. permitted the visualization in France of the Nazi objects, a harm had been suffered in France. Accordingly, the Paris trial court was "competent" to assert jurisdiction over Yahoo Inc., said Judge Gomez. The court's ruling marked the first time that a French Judge had issued a prior restraint against a foreign Internet company.

The suit was originally filed by two groups in France, the International League Against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students. Objecting to what they charged was a "banalizing of Nazism," according to court documents, both organizations sought to stop the English-language auction sales from appearing in France.

On Yahoo.com's auction site, more than 1,200 Nazi-related items -- everything from Nazi flags and uniforms to belt buckles and medals -- are offered to cyberspace consumers under the shield of U.S. notions of free expression. Yahoo's France-based subsidiary, Yahoo France, does not host auctions for Nazi memorabilia.

At a hearing on July 24, representatives for Yahoo told the court that while the company was opposed to racism and respected French law, it was technically impossible for it to block French surfers from its Yahoo.com auction site.

Lawyers for the other side disagreed, but also argued that if Yahoo couldn't filter out French surfers it should remove the Nazi items from its U.S.-based site. More arguments on the issue of the feasibility of filtering are scheduled for tomorrow. Yahoo, which has financial assets in France, faces the possibility of steep fines if it doesn't comply with the court's May order.

Legal scholars in the United States differ over how the Yahoo case should be resolved.

Yahoo defenders argue that while France can impose its own law on its citizens, it's not entitled to impose its views on the rest of the world. "What the government of France is trying to do is apply its laws outside its borders," said Michael Traynor, a lawyer in San Francisco who is acting as special counsel to Yahoo in the case. "If anybody in France feels that they don't want to view Nazi artifacts, they don't have to look at anything they object to. It's a voluntary act to look at information."

Traynor added that he believed that the French law in question might violate certain free expression standards embodied in European human rights laws, to which France is subject. He said Yahoo might eventually appeal an adverse result from Judge Gomez, either to an appellate court in France or to the European Court of Human Rights.

Dean Perritt of the Chicago-Kent Law School said he is hopeful that an appellate court in France will find that Yahoo Inc. is not subject to jurisdiction in that country because Yahoo.com has not "targeted" its auctions to French citizens.

"It seems to me that Yahoo de-targeted France in the sense that the Yahoo France Web site, which is in French, does not have the items in controversy," he said. "For French authorities to go after Yahoo.com nevertheless is an exorbitant exercise of jurisdiction that is inconsistent with emerging best practices."

But Jack Goldsmith, a law professor at the University of Chicago and an expert in Internet jurisdiction, takes a different view. He said that it is appropriate for a French court to assert jurisdiction over Yahoo because "Yahoo has something on its Web site that is being accessed by French citizens that violates French law."

It is true, Goldsmith said, that France in a sense is trying to impose its law on a United States. company. But the alternative is for a United States company to impose its home-town laws regarding permissible expression on France. "The harmful effects are running in both directions," he said.

For Goldsmith, the answer to the dilemma is for Yahoo to adopt some kind of filtering technology that reasonably screens out French citizens. Judge Gomez shouldn't insist that Yahoo make it "impossible" for French surfers to gain access to its U.S.-based Nazi auctions, just more difficult, he said.

"If the technology is 95 percent effective, it will have a significant effect on the ability of French citizens to get the content," Goldsmith said. "That's all France needs to do." Goldsmith added that many Internet-related jurisdictional conflicts could be solved by the use of fast-improving technology that screens out surfers on the basis of country of origin.

Thomas P. Vartanian, a Washington, D.C.-based lawyer who heads a committee on cyberspace law for the American Bar Association, said that he expects to see more cases like Yahoo in the coming years "unless the world can agree on what the standards for jurisdiction should be."

Vartanian and an international group of lawyers recently completed a two-year study that, among other things, called for the creation of an international body to develop uniform global principles of Internet jurisdiction. The risk of inaction, Vartanian warned in an interview, could result in a smothering of the emerging e-commerce golden goose.

D. Eastern Europe

1. Bavaria Still Urges Banning of Mein Kampf in Czech Republic

CTK National News Wire

March 31,2000

HEADLINE: BAVARIA STILL URGES BANNING OF MEIN KAMPF IN CZECH REPUBLIC

L

DATELINE: MUNICH, March 31 ; (JRL)

The sale of Mein Kampf in the Czech Republic is continuing to unsettle the German federal state of Bavaria, and its Finance Minister Kurt Faltlhauser has asked Bavarian

Land Assembly chairman Johann Boehm to prevent further spread of the book, the news agency AP reported.

Otakar II publishing house on March 21 published the first ever full and unabridged Czech translation of Adolf Hitler's Mein Kampf, the basis of Nazi ideology, without commentaries or disclaimers except for a warning on the cover.

The appearance of the book has been widely criticised, and police are now conducting an investigation to determine whether publisher Michael Zitko

E. Other Countries

1. Zundel Holocaust Denial

5/10/03 Nat'l Post A4

2003 WL 19347934

National Post

Saturday, May 10, 2003

ahumphreys@nationalpost.com

TORONTO - Wearing a bulletproof vest and wiping away tears, Holocaust denier Ernst Zundel defended his admiration for Adolf Hitler while testifying in court yesterday, saying he owes his life to the Nazi leader.

"I am entitled to admire a man who brought Germany work, bread, peace, honour and a place in the sun," Mr. Zundel said, testifying at a Federal Court review of the government's decision to deport him to his native Germany because he is a threat to Canada's security.

"There is more to Adolf Hitler and his government than Jews, Auschwitz and violence. The violent acts were committed as wartime measures," Mr. Zundel said on the stand.

"My mother told me in 1968 or '69, 'Ernst, you would not have been born if it weren't for Adolf Hitler,' " he said, wiping away tears and pausing to compose his emotions.

He said his father had no hope in Germany before Hitler took power and

then, afterward, his father got a job and his parents could afford to have another child; that child was Mr. Zundel, who was born in 1939.

"I owe that man my life," he said.

Jewish groups reacted sharply to the statements.

Len Rudner, a spokesman for the Canadian Jewish Congress, said Mr. Zundel's testimony shows the "true agenda" of his attempts to revise the historical record of the Holocaust, Hitler's campaign of extermination against Jews in Germany and occupied Europe.

"It's about the rehabilitation of Adolf Hitler, the rehabilitation of Nazi Germany. The Holocaust is bad for Hitler's reputation. If you can revise history so that these things never happened, it paves the way to speak out fondly of Adolf Hitler and Nazism. The fact is, he is one of the great mass murderers of history," Mr. Rudner said.

Anita Bromberg, in-house counsel for B'nai Brith Canada, said Hitler's legacy must not be whitewashed by people such as Mr. Zundel.

"He's responsible for the murder of six million Jews. Should we forget that? It is statements like his that cause us grave concern," Ms. Bromberg said.

The government presented five binders of documents alleging Mr. Zundel was connected to a long list of people who are prominent activists with the international racist right.

The links included: Wolfgang Droege, founder of the Toronto-based Heritage Front, who was involved in a plot to overthrow the government of Dominica; William Pierce, a U.S. white supremacist who penned The Turner Diaries, a novel said to be the blueprint for Timothy McVeigh in his deadly bombing in Oklahoma City; and David Copeland, a British Nazi sympathizer known as the Brixton Bomber, who killed three and injured 129 trying to spark a race war.

"[Mr. Zundel] is a figurehead or patriarch ... and he uses his position to guide others to the white supremacist ideology," said Toby Hoffman, lawyer for the government.

"Violence is a tool that the movement uses," he said.

Mr. Zundel denied the allegations that he is involved in violence,

dismissed his contact with these people as fleeting or in the context of his business as a publisher and broadcaster, and called the statement that he is the patriarch for racists an invention of the Canadian Security Intelligence Service.

"There is no white supremacist movement," he said, adding the far-right wing is inhabited by an "amorphic collection of individualists" who have a hard time agreeing on almost anything.

"There is nothing supreme about us. We are basically a sorry lot."

He said he believes the Oklahoma City bombing was not the work of McVeigh but rather was a "government job" conducted by "rogue elements of the U.S. intelligence services."

Mr. Zundel was declared a security threat and ordered deported after he claimed refugee status in February when he was deported to Canada from the United States for overstaying his visitor's visa. He had lived in Canada for decades before moving to the United States in 2001, but did not gain citizenship here.

He was ordered deported to Germany, where he faces charges of inciting hatred.

Earlier in the day, a woman from Mississauga, Ont., testified she would put her $225,000 home up as a surety for Mr. Zundel's bail, should he be released pending the court's decision on his deportation, and a Toronto man said Mr. Zundel could live with him and his son, for years if necessary, while his case is heard.

Mr. Zundel's case may not end quickly.

Douglas H. Christie, Mr. Zundel's lawyer, notified Mr. Justice Pierre Blais that he is filing a challenge of the constitutional validity of the proceedings.

The hearing continues next week.

F. Comparison With U.S.

1. Bids of Applause Heard From Jews

http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/16099/edition_id/314/format/html/displaystory.html

Bids of applause heard from Jews

as eBay site bans Nazi memorabilia

By Tom Tugend

LOS ANGELES, May 6 (JTA) - Jewish groups are applauding eBay's decision to ban Nazi memorabilia from its online auction site, effective May 17.

"eBay has made clear that those who wish to profit by the sale" of Nazi memorabilia "have no place in the eBay community," Abraham Foxman, national director of the Anti-Defamation League, said in a statement.

The decision, which also bans material associated with murders committed in the past 100 years, exempts wartime German stamps and coins, as well as books and movies about World War II.

eBay previously had discontinued auctions involving recent hate-filled memorabilia, with the exception of items more than 50 years old that it deemed "historical."

The Simon Wiesenthal Center, which had lobbied for the policy change for two years, welcomed the decision, noting that eBay had become the largest retailer of Nazi material online - much of which is believed to be fake.

"Because eBay charges for auction listings and gets a cut of successful sales, it is morally responsible for what is available on its massive site," said Rabbi Abraham Cooper, the Wiesenthal Center's associate dean.

The move by eBay, one of the most popular e-commerce auction sites, brings it in line with stricter European rules against Nazi material.

Not everyone lauded the new policy, however.

One person protesting was Arthur Rosenblatt, a Florida- based collector who has sold thousands of crime- related items through eBay, according to wire service reports.

"I'm Jewish, and I think if people want to sell Nazi memorabilia on eBay, that's their business," Rosenblatt was quoted as saying.

But Cooper disagreed.

"This is not a matter of free speech rights. We're talking about commerce," he said.

The Internet portal Yahoo similarly banned Nazi and Ku Klux Klan memorabilia in January after adverse court decisions in France and international protests.

Chapter 5: Holocaust Denial and Denial of Other Genocides

Poem

And maps can really point to places
Where life is evil now;
Nanking; Dachau

---W.H. Auden, Collected Shorter Poems,
1930-1944 (London: Faber and Faber 1950),
"In Time of War," XVI, pp. 279-80

Holocaust Denial

A. Holocaust Deniers In Their Own Words

1. Debating the Undebatable

Institute for Historical Review

Journal of Historical Review

Debating the Undebatable: The Weber-Shermer Clash

Exchanging Views on the Holocaust

For several years now, Jewish organizations have said that to debate those who dispute the Six Million story gives legitimacy to a view that is beyond the bounds of decent public discourse, and provides a forum for "hate." Deborah Lipstadt, author of Denying the Holocaust, insists that there is not and cannot be a debate on the Holocaust. In a few countries, including France and Germany, those who express dissident views on this issue are treated as criminals.

Actually, there have already been a few scattered Holocaust debates. For several hours in April 1979, French professor Robert Faurisson defended his revisionist views against challenge by several "exterminationist" historians on Italian-language Swiss television. That same year the Italian history journal Storia Illustrata opened its pages to both Faurisson and anti-revisionist scholars to present their conflicting arguments. (See R. Faurisson, "The Gas Chambers: Truth or Lie?," Winter 1981 Journal, pp. 319-373.)

Although nothing on this scale has so far been possible in the United States, on Saturday afternoon, July 22, 1995, a strong beam of light pierced the prevailing blackout when two scholars squared off in a debate at a hotel in Costa Mesa, California. Michael Shermer, history of science associate professor at Occidental College, and editor-publisher of Skeptic magazine, matched wits for two hours with Mark Weber, Director of the Institute for Historical Review, and editor of its Journal of Historical Review. Greg Raven, Journal associate editor, served as MC for the event, which was sponsored by the Institute for Historical Review, and introduced the two participants. Each speaker delivered a 30-minute opening presentation, followed by a 20-minute rebuttal. A question and answer period concluded the event. (A videotape of this debate is available from the IHR for $19.95, plus tax and shipping.)

Changing Holocaust Story

In his opening presentation, Weber explained precisely what revisionists say, and do not say, about the Holocaust issue. He stressed that the Holocaust story has changed drastically over the years. What we are told today is quite different than the story given at the great Nuremberg trial of 1945-46. Weber continued:

Many extermination claims that were once widely accepted have been quietly dropped in recent years. For example, the great Nuremberg Trial of 1945-1946 supposedly proved that the Germans systematically killed people in gas chambers at Dachau, Buchenwald and other concentration camps in Germany proper. That part of the extermination story proved so untenable that it was abandoned more than twenty years ago.

As Weber pointed out, no serious historian now supports the once supposedly proven stories of "extermination camps" in the territory of the old German Reich. Even Simon Wiesenthal, the well-known "Nazi hunter," acknowledged in 1975 and again in 1993 that, "there were no extermination camps on German soil."

These days, said Weber, prominent Holocaust historians maintain that large numbers of Jews were gassed at just six camps in what is now Poland: Auschwitz (including Birkenau), Majdanek, Treblinka, Sobibor, Chelmno and Belzec. However, Weber said, the so-called "evidence" presented for gassings at these six camps is not qualitatively different than the now-discredited so-called "evidence" for alleged gassings at the camps in Germany.

At the great Nuremberg trial, Weber pointed out, the Allies charged that the Germans had murdered one and a half million people in the Majdanek camp alone. In the decades that followed, this charge was widely repeated. Today no one believes it.

Cornerstone Auschwitz

Weber and Shermer each devoted considerable attention to the alleged gas chambers at Auschwitz, and especially Auschwitz-Birkenau, the cornerstone of the Holocaust story. At the Nuremberg Tribunal, and for decades afterwards, it was universally alleged that the Germans killed four million prisoners at Auschwitz alone. In recent years, Weber pointed out, this figure has been drastically revised downwards. For example, prominent French Holocaust historian Jean-Claude

Pressac has recently estimated that 775,000 persons, of whom 630,000 were Jews, perished at Auschwitz. While even such lower figures are incorrect, said Weber, they show how the Auschwitz story has changed drastically over the years.

Blame for the wildly exaggerated four million figure is today pinned in the Poles or the Soviets. "What is routinely suppressed," said Weber, is the fact that the four million Auschwitz figure was not only promoted by the Soviets, but officially endorsed by the United States and Britain, notably at the Nuremberg Tribunal, and was widely and uncritically repeated in the American media and major reference works.

One document that is constantly cited as key evidence for the Holocaust extermination story, said Weber, is the postwar "confession" of Auschwitz commandant Rudolf Höss. In his statement of April 5, 1946, which was submitted by the US prosecution at the main Nuremberg trial, Höss supposedly "confessed" to killing two and half million people at Auschwitz between 1940 and December 1943. (He claimed that another half million succumbed to starvation and disease during this period.)

But if far fewer than two million died at Auschwitz, as is now officially conceded in Israel and Poland, the Höss "confession" is implicitly fraudulent. In fact, said Weber, we now know that this "confession," as well as Höss' Nuremberg trial testimony, are not only demonstrably false on crucial points, but were obtained by torture. (See: Rupert Butler, Legions of Death [England: 1983], pp. 235ff.; R. Faurisson, "How the British Obtained the Confessions of Rudolf Höss," Winter 1986-87 Journal, pp. 389-403.)

In spite of the drastic downward revisions in the once supposedly authoritative death tolls for Auschwitz and Majdanek, said Weber, no non-Revisionist historian has yet had the courage to draw the "rather obvious conclusion that the legendary six million figure cannot possibly be correct." For the time being, anyway, it is still treated with reverence.

Weber cited detailed aerial photographs of Auschwitz taken by Allied reconnaissance aircraft on several random days in 1944, during the height of the alleged extermination period there. These photographs, which were first made public in 1979, "show no trace of piles of corpses, smoking crematory chimneys or masses of Jews awaiting death," all of which have been alleged, and which would have been visible if Auschwitz had indeed been the infamous extermination center it is said to have been.

Forensic Examinations

Weber spoke about the various expert reports and on-site forensic examinations that have been made of the alleged extermination gas chambers, especially at Auschwitz-Birkenau. He spoke first about Fred Leuchter and his February 1988 on-site investigation at Auschwitz, Birkenau and Majdanek. In sworn testimony in the 1988 Toronto trial of Ernst Zündel, and in a technical report, Leuchter described every aspect of his investigations. Presenting photos of the facilities, plans, charts and scientific data, he explained his startling conclusion that the "gas chamber" story is absurd and physically impossible. It is worth noting that at the time Leuchter was widely

acknowledged as America's foremost execution hardware specialist. (See the Winter 1992-93 Journal, pp. 421-428, 485-492.)

Leuchter's findings have been authoritatively corroborated by a major Polish research center, Weber continued. They prompted the Auschwitz State Museum, an agency of the Polish government, to commission the Institute of Forensic Research in Krakow to conduct a similar forensic investigation. In a confidential report dated September 24, 1990, the Krakow Institute confirmed that its own findings very closely match those of the American gas chamber specialist. (See the Summer 1991 Journal, pp. 207-216.)

Dr. William Lindsey, an American research chemist employed for 33 years by the Dupont Corporation, likewise personally inspected the so-called gas chambers, said Weber. In a 1985 court case Lindsey testified under oath that the Auschwitz gassing story is physically impossible. Based on his careful examination of the alleged gas chambers at Auschwitz, Birkenau and Majdanek, and on his years of experience, he declared: "I have come to the conclusion that no one was willfully or purposefully killed with Zyklon B [hydrogen cyanide] in this manner. I consider it absolutely impossible."

Similarly, said Weber, a leading Austrian engineer, Walter Lüftl, declared in March 1992 that the stories of mass extermination of Jews in gas chambers at Auschwitz and Mauthausen are "technically impossible." Lüftl, a court-recognized engineer, heads a large engineering firm in Vienna. At the time his report was made public, he was president of the Austrian Engineers Chamber, a four thousand member professional association. (See the Winter 1992-93 Journal, pp. 391-420.)

German chemist Germar Rudolf similarly published a detailed report on the supposed gas chambers of Auschwitz, including Birkenau. His 1993 report, Weber said, is based on an on-site investigation, chemical analysis of samples, and meticulous research. Rudolf, a certified chemist and doctoral candidate, worked at the renowned Max Planck Institut research center in Stuttgart. "For chemical-physical reasons," Rudolf concluded, "the claimed mass gassings with hydrocyanic acid in the alleged 'gas chambers' in Auschwitz did not take place ... The supposed facilities for mass killing in Auschwitz and Birkenau were not suitable for this purpose."

'Steam Chambers' and 'Jewish Soap'

At one time, Weber pointed out, it was seriously claimed that the Germans exterminated Jews with electricity and steam, and that they manufactured soap from Jewish corpses. At Nuremberg, he went on, the United States charged that the Germans killed Jews at Treblinka, not in gas chambers, as is now claimed, but by steaming them to death in so-called "steam chambers." These bizarre stories have also been quietly abandoned in recent years. (See "Treblinka," Summer 1992 Journal, pp. 133-158.)

In April 1990, Israeli historians conceded that the Germans did not manufacture bars of soap from the bodies of murdered Jews -- contrary to what had been alleged for years in countless periodicals and supposedly authoritative history texts. If this story is not true, one might reasonably ask, how then did it ever get started? Israeli historian Yehuda Bauer had a ready answer. He charged that the

Nazis invented it. In fact, said Weber, this particular fable was first widely circulated in 1942 by the World Jewish Congress, and especially by its president, Rabbi Stephen S. Wise.

Anne Frank

The Holocaust extermination story is superficially plausible, said Weber. Everyone has seen the horrific photos of dead and dying inmates taken at Bergen-Belsen, Nordhausen and other concentration camps when they were liberated by British and American forces in the final weeks of the war in Europe. These people were unfortunate victims, said Weber, not of an extermination program, but of disease and malnutrition brought on by the complete collapse of Germany in the final months of the war. In fact, he said, if there had been an extermination program, the Jews found by Allied forces at the end of the war would have long since been killed.

Perhaps the best known "Holocaust victim" has been Anne Frank, whose name is known around the world for her famous diary. Her fate, said Weber, is typical of many Jews who lost their lives in German camps during the war. The 15-year-old girl and her father, Otto Frank, were deported from the Netherlands to Auschwitz in September 1944. Several weeks later, in the face of the advancing Soviet army, Anne was evacuated along with many other Jews to the Bergen-Belsen camp, where she died of typhus in March 1945.

Her father came down with typhus in Auschwitz and was sent to the camp hospital to recover. He was one of thousands of sick and feeble Jews who were left behind when the Germans abandoned the camp in January 1945, shortly before it was overrun by the Soviets. He died in Switzerland in 1980. If the German policy had been to kill Anne Frank, neither she, nor her father and sister (along with many other Jews), would not have "survived" Auschwitz. "As tragic as it was," said Weber, "their fate cannot be reconciled with the extermination story."

Himmler's Order to the Camps

At the end of the Second World War, Weber said, the Allies confiscated a tremendous quantity of German documents dealing with Germany's wartime Jewish policy, which was sometimes referred to as the "final solution." "But not a single German document has ever been found that orders or even refers to an extermination program," he emphasized. "To the contrary, the documents clearly show that the German 'final solution' policy was one of emigration and deportation, not extermination."

Moreover, said Weber, there "is no documentary evidence that Adolf Hitler ever gave an order to exterminate the Jews, or that he knew of any extermination program." Instead, Weber continued, "the record shows that the German leader wanted the Jews to leave Europe, by emigration if possible and by deportation if necessary."

Contrary to the popular propaganda image, the wartime German authorities were concerned about the high death rate in the concentration camps due to disease, and took measures to prevent deaths among the inmates. In this regard, Weber quoted from a directive dated December 28, 1942, from the head of the SS camp administration office to all the German concentration camps, including Auschwitz. It sharply criticized the high death rate of inmates due to disease, and ordered that

"camp physicians must use all means at their disposal to significantly reduce the death rate in the various camps." Furthermore, it ordered: "The camp doctors must supervise more often than in the past the nutrition of the prisoners and, in cooperation with the administration, submit improvement recommendations to the camp commandants ..." Finally, the directive stressed, "The Reichsführer SS [Himmler] has ordered that the death rate absolutely must be reduced."

'Survivor Testimony'

Holocaust historians rely heavily on so-called "survivor testimony," to support the extermination story. But such "evidence," Weber said, is notoriously unreliable. He cited an article by Jewish historian Samuel Gringauz, himself a "survivor" (Jewish Social Studies, Jan. 1950). "Most of the memoirs and reports" of "survivors," Gringauz pointed out, "are full of preposterous verbosity, graphomanic exaggeration, dramatic effects, overestimated self-inflation, dilettante philosophizing, would-be lyricism, unchecked rumors, bias, partisan attacks and apologies."

In addition, Weber continued, more than ten thousand of the twenty thousand so-called "testimonies" of Jewish "survivors" on file at the Yad Vashem Holocaust center in Israel are also unreliable, according to a front page article that appeared in the Jerusalem Post newspaper of August 17th, 1986. The report quotes Shmuel Krakowski, the archives director of the Israeli government's Holocaust memorial center, who declared that "over half of the 20,000 testimonies from Holocaust survivors on record at Yad Vashem are 'unreliable'."

As a fairly typical example of "eyewitness" gas chamber evidence, Weber quoted from the sworn statement of Regina Bialek, a former Auschwitz prisoner who supposedly survived a "gassing." (See her statement on page 32). Calling this first-person account "absurd" and "ludicrous," Weber pointed out that her description of a "gassing" is one that no serious historian today would credit.

ADL Disinformation

Weber took several minutes to deal with claims presented in one of the most widely distributed pieces of Holocaust propaganda. He held up a copy of The Record: The Holocaust in History, a publication of the Zionist Anti-Defamation League of B'nai B'rith that purports to be a reliable account of how Europe's Jews were treated between 1933 and 1945.

According to The Record, said Weber, no less two million Jews were killed at Treblinka alone. But it does not claim that the victims were shot or gassed, which is the generally accepted story these days, but maintains instead that they were steamed to death -- a story no reputable historian now accepts. Another item, Weber continued, tells readers about mass killings at the Belzec camp. Citing an "eyewitness account," The Record reports that Jews were put to death there, not by gassing, but by electrocuting them in a special hydraulic electrocution device. This is yet another discredited propaganda fable.

This ADL publication also includes a photograph of a door with a sinister skull and crossbones emblem, and the words in German: "Caution! Gas! Mortal Danger! Do Not Open!" Underneath this photo a caption tells readers: "Door of a gas chamber, typical of ones through which millions of Jews passed to their deaths." In fact, said Weber, this photograph actually shows the door of a non-

homidical gas chamber at Dachau used to kill lice in clothing. It was never used to kill people. At Auschwitz, the ADL Record goes on to report, "more than four million persons were systematically slaughtered." As Weber had already mentioned, this is another once authoritatively accepted claim that has been consigned to the trash heap of history.

'Holocaustomania'

"Even after more than forty years," said Weber, "the vast Holocaust campaign shows no sign of diminishing, but instead seems to grow more intense with each passing year." He continued: "This relentless media campaign, which Jewish-American historian Alfred Lilienthal appropriately calls 'Holocaustomania,' portrays the fate of the Jews during the Second World War as the central event of history."

Non-Jewish victims just do not merit the same concern, said Weber. "For example, there are no American memorials, 'study centers,' or annual observances for the victims of Soviet dictator Joseph Stalin, even though it is well established that Stalin's victims vastly outnumber Hitler's ... The Holocaust has become both a flourishing business and even a kind of new religion for many Jews."

While we are endlessly told that the Germans murdered six million European Jews during the Second World War, said Weber, the public is kept largely ignorant of the conflict's non-Jewish victims. Weber continued:

If you ask an average, reasonably educated American: "How many European Jews were killed by the Nazis during World War II?," the almost automatic answer is, of course, six million. But if you ask that same person: How many Americans lost their lives in the Second World War, or, for that matter, how many British, or Chinese, or Germans, died, the response is usually an admission of ignorance.

According to the Encyclopaedia Britannica, Weber noted, some 20 million Chinese civilian perished in World War II, while according to the Chinese government, 35 million Chinese lost their lives as a result of Japanese aggression. "How many Americans know or care about these Asian victims of the Second World War?," Weber asked.

Shermer's 'Convergence of Evidence'

As Michael Shermer came to the podium the audience greeted him with a round of applause. The Holocaust is obviously a very emotional issue, he told the gathering, "if not the most emotional event in modern history." All the same, he went on, as a "civil libertarian" he entirely agrees that the principle of free speech should also protect dissident views about the Holocaust. As it happens, he had just returned from Europe, where he inspected the sites of the wartime German concentration camps of Auschwitz, Majdanek, Mauthausen and Dachau.

He sought to discredit Holocaust revisionists (and their arguments) by comparing them with anti-Darwinian "creationists." He rejected as specious Robert Faurisson's often-repeated demand for "one proof, just one proof" of a wartime German homicidal gas chamber. "He's not going to get

'one proof'," said Shermer, "because there isn't 'one proof' of a gas chamber." Faurisson's call is like the creationist demand for "just one fossil" proving evolution. "Evolution is not proved by one fossil," Shermer said.

"We are very confident of the sequence of historical events in evolution and in the Holocaust," he continued. "The Holocaust, as it is generally accepted, happened," said Shermer. Evidence for the extermination of six million Jews, many of them in gas chambers, is "constantly fine tuned and changed." "While there may be problems with bits and pieces of the story," said Shermer, "we have to look at the big picture." What proves "the Holocaust," he said, is a "convergence of evidence" or a "consilience of inductions."

"Did the Nazis intend to exterminate European Jews?," Shermer asked. He responded to his own query by saying that this question is too simple. "The Holocaust is not a single event that occurred at one time," he said, but rather a collection of events. Rather than an over-arching plan or program, the "Holocaust evolved over time."

Incriminating Statements?

Perhaps the most impressive evidence presented by Shermer to prove a German extermination policy were several wartime statements by high-ranking Third Reich officials. These included excerpts from the "service journal" of Hans Frank, governor of German-ruled Poland, passages from the diary of propaganda minister Joseph Goebbels, and a portion of SS chief Heinrich Himmler's well-known October 1943 Posen speech. (Shermer had already published these in the June 1994 "pseudohistory" issue of his Skeptic magazine, Vol. 2, No. 4, pp. 44-54.)

In spite of what Weber had said earlier about it, Shermer also cited the postwar testimony of former Auschwitz commandant Rudolf Höss as important evidence of a German extermination program. Shermer offered no response to the specific points made by Weber about this, except to say that Höss' testimony "has some funky things surrounding it," and that Höss' figures may be "way off." Shermer also compared Höss' postwar testimony with that of Perry Broad and camp physician Dr. Johann Paul Kremer. (On this, see: R. Faurisson "Confessions of SS Men who were at Auschwitz," Summer 1981 Journal, pp. 103-136.)

Holding up a copy of the 1994 anthology, Anatomy of the Auschwitz Death Camp, Shermer recommended this work and specifically endorsed the contribution there of Canadian architect Robert-Jan van Pelt. Quoting van Pelt, Shermer said that "Auschwitz has become a myth ... Few events can rival the mythic power of Auschwitz."

Auschwitz, said Shermer, was "never intended, he [Van Pelt] proves, to be an extermination camp." Rather, it "evolved" into a killing center. Holocaust historians such as Pressac and van Pelt now contend that the supposed "gas chambers" at Kremas II and III were originally planned and constructed as normal morgues (Leichenkeller). Only later, they assert, were these rooms transformed into killing facilities.

Weber Responds

Weber stressed that while Shermer readily acknowledges that much of what we have been told about the Holocaust over the years is not true, and that many specific Holocaust claims are now demonstrably false, he entirely ignores the implications of this drastic revision of the historical record. Piles of once supposedly solid "evidence" are now acknowledged to be fraudulent, numerous "eyewitness" testimonies and "official" reports are now conceded to be worthless. But this is of more than academic significance. Many lives have been ruined because of such once supposedly "proven" Holocaust claims. Shermer ignored numerous specific points made by Weber, and was vague about precisely when and where Jews were supposedly gassed, even at Auschwitz.

Shermer's "convergence of evidence" thesis is fundamentally flawed, Weber went on, because it can readily be used to "prove" claims, such as gassings at Dachau, that are now universally regarded as untrue. Indeed, the evidence presented at Nuremberg for (mythical) gassings at Dachau, said Weber, is in some ways stronger than the evidence presented there for gassings at Auschwitz. To "prove" gassings at Dachau, Nuremberg prosecutors were at least able to point to the "gas chamber" itself, cite an official US congressional investigative report, and quote "eyewitness" testimony by former camp physician Dr. Franz Blaha.

The story of gassings at the Auschwitz I main camp has also changed, Weber pointed out. For years a room there was shown off to tourists as a homicidal "gas chamber" in its "original state." Now it is acknowledged to be a postwar "reconstruction." Claims of gassings there are played down ever more. Weber cited a recent issue of the French magazine L'Express, which reports that "everything" about this gas chamber "is false." (See: "Major French Magazine Acknowledges Auschwitz Gas Chamber Fraud," Jan.-Feb. 1995 Journal, pp. 23-24.)

Responding to Shermer's citation of wartime statements of Hans Frank, Weber pointed out that at the end of the war the former Governor General of Poland had turned over to the Allies his own detailed "service journal" (Diensttagebuch), confident that it would exonerate him. Moreover, Weber went on, Frank testified at Nuremberg that he did not know of any wartime German program or policy to exterminate Europe's Jews. (Testimony of April 18, 1946. IMT "blue series," vol. 12, pp. 17-19. See also: M. Weber, "The Nuremberg Trials and the Holocaust," Summer 1992 Journal, p. 195.)

Frank explained to the Tribunal that he had been very concerned over persistent reports that Jews were being exterminated. He said that on one occasion, when a report reached him about killings of Jews at Belzec, he went to the site the next day. He spoke with Jews who were working there, and was unable to find evidence of killings.

On another occasion, in February 1944, he raised this matter in a conversation with Hitler. "My Führer, rumors about the extermination of the Jews will not be silenced. They are heard everywhere ... Tell me, my Führer, is there anything to it?" As Frank related, Hitler replied: "You can very well imagine that there are executions going on -- of insurgents. Apart from that I do not know anything. Why don't you speak to Heinrich Himmler about it?" Himmler denied the extermination allegations, Frank said. (Incidentally, the statements by Frank, Goebbels and Himmler cited by Shermer were all dealt with in detail during the 1988 Zündel trial, particularly by prosecution witness Christopher Browning, defense attorney Doug Christie, and defense witnesses Faurisson,

Irving and Weber. See: B. Kulaszka, ed., Did Six Million Really Die? [Toronto: 1992], esp. pp. 93, 113-116, 130, 131, 208, 302, 336, 343-344, 369, 396, 405-409, 417.)

While conceding that many specific Holocaust claims are now known to be demonstrably untrue, Shermer does not hold anyone responsible for these falsehoods. In his 1994 Skeptic essay, he manifests a double standard: while quick to point to real or imagined errors of fact or interpretation by revisionists, he passes over in silence the numerous demonstrable historical falsehoods promoted by such groups as the ADL. In his Skeptic essay Shermer casts aspersions on the allegedly sinister motives of revisionists, while treating anti-revisionists as high-minded scholars of good will. In short, he questions the motives only of critics of the Holocaust story.

Weber cited a recent letter by Michael Berenbaum, research director of the US Holocaust Memorial Museum. From Australia came this question: "Why don't you have homicidal gas chambers and/or some crematorium ovens on display in your large museum?" Berenbaum responded: "We do have crematoria ovens in the Museum. We could not bring over gas chambers because there was no original that was available for us to bring to the United States. Instead we made a model of the crematoria and labelled it a model." This is a remarkable statement, because until very recently, anyway, it was asserted that "original" homicidal gas chambers existed at Auschwitz, Mauthausen and Majdanek. (Berenbaum letter of April 21, 1995. Adelaide Institute newsletter, May 1995, pp. 5-6.)

Although claims of gassings at the Mauthausen camp have been played down in recent decades, it should not be forgotten that this was once authoritatively regarded as one of the most terrible German killing centers. As an example, Weber noted that, according to the 1957 edition of the Encyclopaedia Britannica (vol. 10, p. 288), "close to two million people, mostly Jews, were exterminated between 1941 and 1945" in Mauthausen.

Referring to the mentality behind the seemingly ceaseless Holocaust campaign, Weber cited a statement by Abraham Foxman, national director of the Zionist Anti-Defamation League. (ADL On the Frontline newsletter, Jan. 1994, p. 2.) "The Holocaust," Foxman declared,

is a singular event. It is not simply one example of genocide but a near successful attempt on the life of God's chosen children and thus, on God himself. It is an event that is the antithesis of Creation as recorded in the Bible; and like its direct opposite, which is relived weekly with the Sabbath and yearly with the Torah, it must be remembered from generation to generation.

While Shermer has described this Foxman statement merely as "an unfortunate choice of words" (Skeptic, June 1994, p. 33), it is actually "fortuitous," said Weber, because "it is refreshingly reveals the arrogant and bigoted mind-set of the ADL and, indeed, of much of the entire Holocaust campaign." He continued:

When such people say "Never Forget," they mean never: at no time, and until the end of time. Five years, twenty years, a hundred years from now, we will still be enduring a steady drumbeat of what is euphemistically called "Holocaust education" ... This mentality helps explain why the Holocaust plays the quasi-religious role it does in our society.

As evidence both of the mentality of our adversaries, and of the progress that has been made in recent years. Weber cited the public declaration issued in February 1979 by 34 French scholars. "The question of how technically such a mass murder was possible should not be raised," they stated. "It was technically possible because it occurred.... There is not nor can there be a debate over the existence of the gas chambers." Today, and largely in response to revisionist skepticism, individuals such van Pelt, Pressac and Shermer are earnestly investigating precisely this "question of how technically such a mass murder was possible."

Shermer Responds

When Shermer returned to the podium, he affirmed that it is "obviously" proper to ask such questions, adding that his own research shows that he rejects the 1979 French scholars' statement. During his recent visit to Europe, he asked numerous questions of officials at former camp sites in an effort to learn just how the "gas chambers" are supposed to have functioned.

During his visit to Mauthausen, Shermer said, officials there responded to his specific questions about the camp "gas chamber" with inadequate or contradictory explanations. He also conceded that there are problems with this facility. For one thing, the chamber's "doors don't lock." Shermer expressed the belief that homicidal gassings were conducted at Mauthausen "at most on a small scale and experimentally."

The Dachau "gas chamber" is a "non-issue," said Shermer, because no one now claims that anyone was ever gassed there. Surprisingly, though, he went on to give a few reasons why he thinks prisoners may indeed have been gassed there.

Bogus Majdanek Chamber

At the former Majdanek camp (near Lublin, Poland), Shermer said, he inspected a building that is shown off to tourists as a wartime killing facility, with a "big sign" identifying it as a homicidal gas chamber. This "reconstructed" chamber, he said, "makes no sense." Shermer said that he is "certain" that it was "not a homicidal gas chamber." He speculated that it might have been a non-homicidal delousing facility. (Such non-homicidal gas chambers, common in German camps, were installed to prevent deaths. They used Zyklon B, with poisonous hydrocyanic gas, to kill typhus-bearing lice in clothing.) Shermer ascribed the misrepresentation of this building to the "unprofessional" character of the staff there. "I suspect at Majdanek [that] if there were homicidal gassings, it was done on a small scale," he continued, albeit at other locations in the camp. He made no effort to defend the claim that one and half million people were killed at Majdanek.

Shermer also found problems with the "gas chambers" at Auschwitz. As he noted, it is frequently and authoritatively alleged that Zyklon B was dumped into Auschwitz-Birkenau "gas chambers" (at Kremas II and II) through ceiling-floor "wire mesh columns." However, Shermer said he was unable to find any on-site trace of these columns. "I am skeptical" of the wire mesh columns story, he said.

Ongoing Revisionism

"For traditional Jewish historians," Shermer said, the gas chambers are important because they are "what makes the Holocaust unique over other Holocausts." In Shermer's view, "the Holocaust is only unique in the sense of being contingently unique, as all historical events are ... There's nothing unique about states killing masses of people -- it's been done for thousands of years."

Acknowledging that many specific Holocaust claims have been abandoned over the years, Shermer affirmed: "Clearly revision has been going on." Over the years, he said, the Holocaust "story has been refined hundreds of percentage points," and has been revised "umpteen times." "How is it that some people can get away, so to speak, with revising the Holocaust?," Shermer asked, while revisionists cannot? In our society, he said, it all "depends on who is doing the asking."

"The problem you're having as revisionists," he went on, "is that you've been labeled ... the assumption is that there's an ideology behind the questions you've been asking." Revisionist statements, no matter how factual and truthful, are simply dismissed. "You've been labeled," said Shermer of Holocaust revisionists, and a pejorative "label has stuck there."

"The Holocaust will be revised," Shermer stressed," by "van Pelt and others ... but they'll get away with it because they're not associated with any ideology, and that's the problem you're encountering. I'm not going to impute ideological motives to any particular person here. I'm just saying that that's the perception out there amongst non-revisionists, and that's the problem you're running into."

Final Remarks

One member of audience -- an African-American journalist and television writer -- was bothered by the abrupt and facile way that Shermer had acknowledged that a "gas chamber" shown to tourists at Majdanek is a fraud. During the concluding question and answer session, he asked the Skeptic editor-publisher if he isn't offended by the fact that a "gas chamber" is deceitfully presented to tourists at Majdanek with a sign that is "so patently untrue." While Shermer was willing to call this sign "not appropriate" and to say that it constitutes a "danger," he did not seem particularly bothered by this fraud.

Shermer seemed similarly unconcerned over the ideological or religious agenda that obviously drives much of the Holocaust campaign -- a campaign that portrays all of non-Jewish humanity as collectively guilty for what is regarded as the most terrible crime in history. With the passage of time, said Weber, and as ever more historical evidence comes to light, the Holocaust story diminishes in magnitude. At the same time, he went on, the Holocaust campaign continues -- if anything, growing ever more intense with the passage of years.

In our society, the Holocaust story is treated with special reverence. It is simply not permissible to view the fate of Europe's Jews during the Second World War with the same critical, open-minded consideration with which we look at other chapters of history. Consequently, revisionist skeptics are not only dismissed but smeared and vilified, and, in some countries, treated as criminals.

'Politically Correct' Skepticism

Shermer's Skeptic magazine, Weber said, safely takes aim at phony UFO sightings, fraudulent health cures, Uri Geller spoon-bending tricks, witchcraft trials in centuries gone by, and so forth. In short, said Weber, it practices "PC skepticism." This kind of skepticism takes no particular courage. "The real challenge" for sincerely open-minded skeptics, said Weber, "is to challenge statements made by governments."

Weber addressed the argument by Shermer and van Pelt that the alleged "gas chambers" at Auschwitz-Birkenau crematory facilities II and III were originally designed and constructed as normal morgue cellars in 1942, and only later (in late 1942 or early 1943) modified or transformed into homicidal gassing facilities. Van Pelt believes that a decision to kill Auschwitz prisoners in gas chambers was made in the summer of 1941, while other "exterminationists" contend that this decision was made in early 1942.

In either case, this thesis makes not sense, said Weber. Why would the Germans design and construct Kremas II-V at Birkenau -- the cornerstone of the Holocaust extermination story -- as ordinary, non-homicidal crematory facilities in late 1942 and early 1943, that is, after the Germans had supposedly already inaugurated their extermination policy.

Furthermore, Weber said, the crematories at Auschwitz (and especially Auschwitz-Birkenau), with their limited cremation capacities, simply were not designed to dispose of the bodies of many hundreds of thousands of prisoners. In short, the Auschwitz crematories were not planned or built consistent with a plan or policy to exterminate prisoners in the camp. (See: A. Butz, "Some Thoughts on Pressac's Opus," May-June 1993 Journal, pp. 23-37.)

Finally, Weber responded to a question about the "bloodcurdling" remarks of high-ranking German officials quoted earlier by Shermer. While these statements do reflect a policy of brutal repression, Weber said, they do not refer to a policy to exterminate Europe's Jews. These remarks are either rhetorical exaggeration or are taken out of context.

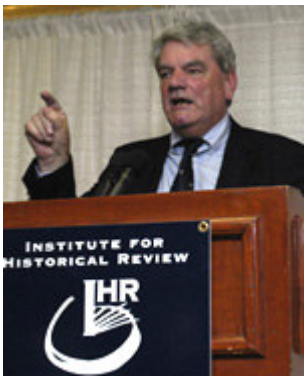
Several of those who attended the Weber-Shermer exchange commented that it was not much of a debate because Shermer made so many concessions to the revisionists. In any case, this event was a big step forward for the cause of historical revisionism because it dramatically gave the lie to the often-repeated claim that "the Holocaust" is "undebatable," and showed that the revisionist view of the Holocaust story is one that cannot be dismissed out of hand.

From *The Journal of Historical Review*, Jan.-Feb. 1996 (Vol. 16, No. 1), pages 23-34.

2. Hitler's Place in History

http://www.ihr.org/news/050427_meeting.shtml

Irving, Weber Speak on Hitler's Place In History



News from the Institute for Historical Review

British historian David Irving and IHR director Mark Weber tackled the emotion-laden topic of Hitler's place in history at an IHR meeting on Sunday evening, April 17, 2005. Some 70 men and women packed a hotel meeting room in Orange County, southern California, for the standing-room-only event.

Click here to purchase CDs or tapes of this memorable event!

Weber, who has written extensively on twentieth-century European history, and is a court-recognized expert on Germany's wartime "Final Solution" policy, spoke first. He began his 45-minute address, entitled "Is an Objective View of Hitler Possible?," by mentioning John F. Kennedy's visit to defeated and war-ravaged Germany in the summer of 1945.

After a stop at Hitler's mountain retreat in the Bavarian alps, the 28-year-old Kennedy wrote in his diary that the German leader "had in him the stuff of which legends are made," and predicted that "within a few years Hitler will emerge from the hatred that surrounds him now as one of the most significant figures who ever lived."

Kennedy was both right and wrong, said Weber. While hatred against Hitler has endured for much more than "a few years," he was indeed a personality of legendary stature. Worldwide fascination with Hitler shows no sign of diminishing, said Weber, who noted the seemingly endless stream of books, articles, television broadcasts and motion pictures devoted to this extraordinary man.

In 1977, Weber went on, Patrick Buchanan wrote a column about Hitler based on John Toland's biography, *Adolf Hitler*. Although Buchanan condemned Hitler, he did note that the German leader had been a courageous soldier during the First World War, and was a skilled political organizer and a powerful public speaker. Ever since, Buchanan has been harshly criticized by Jewish groups for "praising" Hitler. In our society, Weber stressed, even factually true statements about Hitler — such as those made by Buchanan — bring swift and harsh condemnation.

A balanced or objective portrayal of Hitler is nearly impossible. In today's America, the portrayal of Hitler and his regime is grotesquely unbalanced, not only in the mass media, but even in supposedly authoritative history books and reference works. For example, he noted, American dictionaries routinely refer to Hitler as a "Nazi dictator," while describing Stalin merely as a Soviet "political leader" or "premier." While it is certainly true that Hitler wielded dictatorial power, said Weber, especially during the war years, the "dictator" epithet suggests that he ruled without popular support.

Nearly four years after Hitler had come to power, David Lloyd George — Britain's prime minister during World War I — made an extensive tour of Germany. In an article published in a leading London newspaper in late 1936, the British statesman recounted what he had seen and experienced. His description, said Weber, is difficult to reconcile with the image to which most Americans are accustomed.

"Whatever one may think of his [Hitler's] methods," wrote Lloyd George, "and they are certainly not those of a parliamentary country, there can be no doubt that he has achieved a marvelous transformation in the spirit of the people, in their attitude towards each other, and in their social and economic outlook.

“He rightly claimed at Nuremberg that in four years his movement had made a new Germany. It is not the Germany of the first decade that followed the war — broken, dejected and bowed down with a sense of apprehension and impotence. It is now full of hope and confidence, and of a renewed sense of determination to lead its own life without interference from any influence outside its own frontiers.

“There is for the first time since the war a general sense of security. The people are more cheerful. There is a greater sense of general gaiety of spirit throughout the land. It is a happier Germany. I saw it everywhere, and Englishmen I met during my trip and who knew Germany well were very impressed with the change.

“One man has accomplished this miracle. He is a born leader of men. A magnetic and dynamic personality with a single-minded purpose, a resolute will and a dauntless heart. He is not merely in name but in fact the national Leader. He has made them safe against potential enemies by whom they were surrounded. He is also securing them against the constant dread of starvation which is one of the most poignant memories of the last years of the [First World] War and the first years of the Peace.

“As to his popularity, especially among the youth of Germany, there can be no manner of doubt. The old trust him; the young idolise him. It is not the admiration accorded to a popular leader. It is the worship of a national hero who has saved his country from utter despondence and degradation. To those who have actually seen and sensed the way Hitler reigns over the heart and mind of Germany, this description may appear extravagant. All the same it is the bare truth.”

In today’s America, said Weber, outright lies about Hitler and Third Reich Germany are widespread and unchallenged. One of the most often repeated of these is that Hitler tried to “conquer the world.” In fact, said Weber, Hitler put great effort into cultivating friendship with other countries, above all with Britain. At the same time that he was earnestly striving to avoid clashes with the United States, President Roosevelt was doing everything in his power to push the US into war against Germany, including broadcasting fantastic lies about Hitler and his supposed ambition to take over the world. Weber cited President Roosevelt’s radio address of October 27, 1941, in which he claimed that Hitler threatened the nominally neutral United States, was plotting to take over all of South America, and was determined to abolish all existing world religions, including Christianity, and replace them with “an international Nazi church.”

To support their distorted portrayals of Hitler and the Third Reich, prominent historians rely upon and cite fraudulent source materials. A good example, said Weber, is the supposed memoir of Hermann Rauschning, an official in the German city-state of Danzig who broke with the National Socialist movement in 1934-35, and then moved to France and later to the United States. In his book, published in the US under the title *The Voice of Destruction*, he presents page after page of what are purported to be Hitler's most intimate views and secret plans for the future, allegedly based on many private conversations between 1932 and 1934.

In fact, Weber said, Rauschning never had even a single private talk with Hitler. All the same, lurid but fake quotes attributed to him by Rauschning have found their way into numerous history books.

Weber held up copies of a few of the many books that rely on Rauschning’s fraudulent “revelations,” including *The Rise and Fall of the Third Reich*, by William L. Shirer, *Hitler: A Study in Tyranny*, by Alan Bullock, and *Hitler*, by Joachim Fest.

While it’s true that winners write history, that alone does not entirely explain why Hitler and the Third Reich continue to be portrayed in such a distorted and prejudiced way in our society. This widespread and enduring bias with regard to Hitler and his regime, concluded Weber, is a reflection of the Jewish-Zionist grip on American cultural and political life.

Irving on 'Faking’ History

Weber introduced David Irving by noting that even his adversaries concede that his knowledge of Hitler and wartime Germany is unrivaled. The British historian is the author of numerous books on this era, many of

them best-sellers, including his monumental work, *Hitler's War*. Before and after his 45-minute address, entitled "The Faking of Adolf Hitler for History," Irving autographed copies of his books.

Among the many fraudulent historical documents that have been cited over the years by "conformist" historians of the Third Reich era, Irving said, have been the fake wartime diaries of Gerhard Engel, Hitler's army adjutant, and of Felix Kersten, masseur and confidant of Himmler. Similarly unreliable is the diary of Mussolini's foreign minister Galeazzo Ciano, which American officials doctored after the war. Completely fake are Hitler's supposed "table talk" remarks from February and April 1945. Irving related that the Swiss lawyer Francois Genoud, now dead, admitted privately that he had fabricated them.

Irving related that many valuable documents and research materials seized during the course of his drawn-out legal battle with Jewish academic Deborah Lipstadt have been destroyed or "lost."

He spoke contemptuously of the "historian incest" of his establishment rivals, many of whom write new books about Hitler based on earlier and equally derivative works by others who share similar prejudices. Irving, by contrast, is known for his reliance on original documents dug out of major archives, as well as diaries and letters obtained through great effort from private individuals.

B. Holocaust Denial

1. United Nations Shocked by Iran President's remarks

http://www.iranfocus.com/modules/news/article.php?storyid=4800

United Nations "shocked" by Iran President's remarks

Friday, 9th December 2005

Iran Focus

London, Dec. 09 – The United Nations Secretary General Kofi Annan said on Thursday that he was "shocked" by remarks by Iran's hard-line President Mahmoud Ahmadinejad who denied that the Holocaust took place and called for the state of Israel to be moved from the Middle East to Europe.

"The Secretary-General recalls that only last month the General Assembly passed a resolution which 'rejects any denial of the Holocaust as an historical event, either in full or in part'", Annan's spokesman said in a statement.

He urged all member states to combat such denial, and to educate their populations about the well established historical facts of the Holocaust, in which one third of the Jewish people were murdered, along with countless members of other minorities.

While in Mecca for talks with leaders of fellow Muslim countries on Thursday, Ahmadinejad said, "Some European countries insist on saying that [Adolf] Hitler killed millions of innocent Jews in furnaces and they insist on it to the extent that if anyone proves something contrary to that they

condemn that person and throw them in jail", adding, "If the Europeans are honest they should give some of their provinces in Europe -- like in Germany, Austria or other countries -- to the Zionists and the Zionists can establish their state in Europe. You offer part of Europe and we will support it".

In October, Ahmadinejad told a gathering of Islamist students in Tehran that Israel must be "wiped off the map" and threatened Muslim nations that normalise their ties with the Jewish state. His comments drew outrage across the world and were condemned by the United Nations Security Council.

2. Europe Seen Cracking Down on Holocaust Revisionists

http://www.forward.com/articles/6931

News

Europe Seen Cracking Down on Holocaust Revisionists

By MARC PERELMAN

November 25, 2005

In a flurry of activity on both sides of the Atlantic, several so-called revisionists have been arrested on Holocaust denial charges in recent weeks.

Three revisionists - Germar Rudolph, Ernst Zundel and Siegfried Verbeke - have been extradited to Germany. But the most visible case involves far-right British historian David Irving, who was arrested November 11 in Vienna, Austria, on 16-year-old charges that he publicly denied aspects of the Holocaust - a crime in Austria.

Jewish communal leaders, including Shimon Samuels, international relations director of the Simon Wiesenthal Center, praised the moves. Samuels said that they were part of an overall trend in Europe toward greater attempts to atone for the Holocaust.

"There is a drive toward transparency that is very healthy in Europe," he said. "Unlike in America, there is not much difference in Europe between hate speech and hate crime. And there seems to be a new willingness to use those laws when it comes to Holocaust denial."

Holocaust revisionists, meanwhile, were slamming the crackdown efforts, saying they were part of a Jewish conspiracy to prevent open debate.

"As the new owner of Germar Rudolf's publishing company, I wish to express my outrage that the Holocaust, unlike any other historical event, is not subject to critical revisionist investigation," said Michael Santomauro, who runs a Web site dedicated to Holocaust denial and to attacks against Jewish communal leaders and organizations. "Furthermore I deplore the fact that many so-called democratic states have laws that criminalize public doubting of the Holocaust. It is my position that the veracity of Holocaust assertions should be determined in the marketplace of scholarly discourse and not in our legislature's bodies and courthouses."

The charges against Irving, filed by Austrian prosecutors, were based on two 1989 speeches in which he denied the existence of the gas chambers. If convicted, Irving could face up to 20 years in prison.

Irving is the author of nearly 30 books. One of them, "Hitler's War," challenges the fact that 6 million Jews were murdered in the Holocaust. He once famously insisted that Adolf Hitler knew nothing about the systematic slaughter of the Jews, and he has been quoted as saying there is "not one shred of evidence" that the Nazis carried out their "final solution" on such a scale.

In 2000, Irving lost a libel case he brought against historian Deborah E. Lipstadt for calling him a Holocaust denier. The British court ruled that Irving was antisemitic and racist and that he misrepresented historical information.

In addition to Irving's arrest, Rudolph, 41, was sent from Chicago this month to his native Germany, where he was wanted on a 1995 conviction of inciting racial hatred for disputing the deaths of thousands of Jews held captive at a concentration camp. Rudolph was sentenced to 14 months in prison for publishing a report disputing the deaths of thousands of Jews in the gas chambers at Auschwitz, according to a statement by the Department of Homeland Security. Rudolph, a former chemist, claimed in his report that since he had failed to find traces of Zyklon B on the bricks of gas chambers, mass gassings of Jews could not have occurred at Auschwitz.

After his conviction, he fled Germany and lived in Spain, Great Britain, Mexico and the United States, according to the DHS press release. He was arrested in Chicago October 19 after a background check by immigration officials, and deported November 14 to Germany.

Earlier this year, Canada deported Ernst Zundel, 66, to Germany, where a state court is hearing charges of incitement, libel and disparaging the dead. He faces a maximum sentence of five years in jail if convicted. Also, in October a Dutch court agreed to extradite Siegfried Verbeke - a co-founder of the Belgian extreme-right Vlaams Blok party, now called Vlaams Belang - to Germany, where he faces charges of racism and xenophobia and publicly doubting the Holocaust. He is looking at 14 months in prison.

Verbeke was convicted on charges of Holocaust denial and racism in Belgium in 2003 and sentenced to a one-year jail term. However, Belgian authorities refused to extradite him to Germany. After his arrest in Amsterdam this past August, he faced similar charges in the Netherlands for having questioned the veracity of Anne Frank's diary. But the proceedings were suspended and Verbeke was sent to Germany in early October.

MARC PERELMAN

http://forward.com/main/printer-friendly.php?id=6931

3. The fight against Holocaust denial

http://news.bbc.co.uk/1/hi/world/europe/4436275.stm

The fight against Holocaust denial

By Raffi Berg

BBC News, April 14, 2005

It is 60 years since the full horror of the Nazi Holocaust began to emerge with the liberation of Bergen Belsen concentration camp in Germany.

Belsen was the first death camp entered by the Western allies and first-hand accounts of mass graves, piles of corpses and emaciated, diseased survivors spread quickly around the world.

The BBC's Richard Dimbleby described dead and dying people over an acre of ground, while US radio correspondent Patrick Gordon Walker described the camp as a "hellhole", adding that this was not propaganda but the "plain and simple truth".

But, in the 21st Century, as these events recede into history and the number of Holocaust survivors dwindles, there are still people who deny these crimes happened - and it is a tendency that some experts say is growing.

"Holocaust revisionism is spreading, and not only among neo-Nazis," Kate Taylor, of the anti-fascist publication Searchlight, told the BBC News website.

"As survivors are increasingly dying out it is much easier to hijack history for whatever cause or purpose."

The internet has played a role in this.

While publications peddling Holocaust denial were previously confined to the race-hate paraphernalia of extremist groups, the same material is now readily available on the web.

One of the earliest and most infamous publications denying the Holocaust was a 32-page pseudo-academic booklet entitled Did Six Million Really Die?, first printed in England in 1974.

It dismisses concentration camps as "mythology", rejects the Diary of Anne Frank as a hoax and claims Jews were not exterminated but rather emigrated from Nazi Germany with the help of a benevolent government.

The booklet was widely banned but has resurfaced in electronic form on the internet.

"At 14-years-old children are not mature enough to make the distinction between a denialist site and a more legitimate site."

Kay Andrews, of the UK Holocaust Educational Trust, says Holocaust denial sites, subtly questioning the facts, can mislead the young people her group is trying to teach.

"With the internet, you've got to be fairly well-educated to see through what revisionist websites are trying to do," she says.

"I think as soon as you look at them closely you can work it out, but part of the problem that we find is teachers will send pupils off to do internet research and not guide them to specific sites.

"So as a result kids put the Holocaust into a search engine, which comes up with all of this stuff, and at 14-years-old they are not mature enough to make that distinction between a denialist site and a more legitimate site."

However, the eminent British historian Sir Martin Gilbert believes the tireless gathering of facts about the Holocaust will ultimately consign the deniers to history.

"I saw the gas chambers. I saw the crematoria. I saw the open fires."

"I don't think Holocaust denial is really a problem because of the incredible state of survivor memoirs," he told the BBC News website.

"The number of deniers and the amount of denial literature is miniscule compared with the serious literature, not only the memoirs but the history books, the specialist books, and books which cater for every age group on the Holocaust.

"There is a tremendous range of stuff and some of it is written for young people and teenagers - in that sense the Holocaust deniers have totally lost out."

Over a period of many years, Jerusalem's Yad Vashem museum has documented the lives of more than three million Holocaust victims.

More recently, Steven Spielberg's Survivors of the Shoah [Holocaust] Visual History Foundation (VHF) has recorded more than 50,000 videotaped interviews with Holocaust survivors and witnesses.

But VHF president Doug Greenberg is less confident about the future than Martin Gilbert.

On the positive side, he notes that in 2000 a British judge rejected a libel case brought by a notorious British revisionist, David Irving, against US historian Deborah Lipstadt who had called him one of the "most dangerous spokespersons for Holocaust denial".

"The most important thing that's happened in terms of Holocaust denial is the David Irving trial," Mr Greenberg told the BBC News website.

"Because a British court of law said in effect Holocaust denial is not a valid way to look at the past."

On the other hand, he says, we just cannot tell how far history will be forgotten in years to come.

"In 50 years from now, not only will there be no survivors alive, there won't be anybody alive who even knew a survivor, and that is where the real danger lies," he said.

The fear that deniers could gain the upper hand led an SS camp guard, Oskar Groening, to break a lifetime of silence earlier this year in a BBC documentary, Auschwitz: The Nazis and the Final Solution.

"I saw the gas chambers. I saw the crematoria. I saw the open fires. I was on the ramp when the selections [for the gas chambers] took place," said Mr Groening, now in his 80s.

"I would like you to believe these atrocities happened - because I was there."

Story from BBC NEWS:

http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4436275.stm

4. How Holocaust denier fought and lost

http://news.bbc.co.uk/2/hi/europe/4449212.stm

November 18, 2005

How 'Holocaust denier' fought and lost

By Jon Silverman

BBC Legal Affairs analyst

David Irving's reputation as a historian was shredded at the High Court in April 2000 in a devastating judgement.

At the conclusion of a libel action brought by Mr Irving against American academic Deborah Lipstadt and Penguin Books, Mr Justice Charles Grey described Mr Irving as a "falsifier of history" an "associate of right-wing extremists" and "an active Holocaust denier".

In a book, Ms Lipstadt had branded Mr Irving "one of the most prominent and dangerous Holocaust deniers".

The three-month case was among the most colourful in British legal history.

Mr Irving, defending himself and surrounded by a mountain of source material, opened by describing his opponents as "part of an international endeavour" to destroy his reputation and make him untouchable by publishers.

Later, a video was played to the court, showing him telling a meeting that "more women died on the back seat of Edward Kennedy's car at Chappaquiddick than died in a gas chamber in Auschwitz".

Mr Justice Grey's judgement comprehensively dismantled Mr Irving's case and his reputation. It was later published as a book.

Although a libel action, it was Holocaust denial which was, by implication, on trial.

In Britain, to deny the Holocaust is not a criminal offence but it is in Austria and that is why Mr Irving has been arrested there.

In a co-incidence of timing, one of Mr Irving's associates, convicted Canadian Holocaust denier Ernst Zundel, is standing trial in Germany, having been extradited to face charges of inciting racial hatred and spreading Nazi propaganda. Like Austria, Germany has a Holocaust denial law, as does France.

Lawyer James Libson, who represented Deborah Lipstadt in her battle with Mr Irving, believes it is right that they should have.

"Given Britain's history, it would be ridiculous to have a Holocaust denial law here. But in countries like Germany and Austria, where far-right, neo-Nazi parties are highly visible, it is different. However, the Holocaust denial message is still being disseminated, despite the law," he says.

Mr Irving is an undischarged bankrupt and the Trustee in Bankruptcy is still trying to recover assets tied up in archive documents and World War II diaries in his possession. Some are thought to be quite valuable.

Since losing his Mayfair flat, the disgraced historian has relied on an international network of supporters for financial help and from his speaking engagements abroad, which are invariably in front of extreme right-wing, anti-Semitic audiences.

Despite the mortal blow to his reputation in 2000, he remains a showman and may well relish the opportunity to grandstand before a wider audience if put on trial.

Story from BBC NEWS:

http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4449212.stm

5. Austrians refuse bail for Irving

http://news.bbc.co.uk/2/hi/europe/4471026.stm

BBC, November 25, 2005

Austrians refuse bail for Irving

Austrian authorities have refused bail for British historian David Irving, who is facing Holocaust denial charges.

Mr Irving, 67, was arrested on 11 November in connection with two speeches he gave in Austria in 1989.

Mr Irving's lawyer has said the historian now no longer denies that gas chambers existed in Nazi death camps.

Mr Irving can appeal against the charges under Austrian law. No trial date has been set yet. He could face up to 10 years in jail if found guilty.

A court in Vienna ruled on Friday that Mr Irving must stay in custody as there was a risk he could abscond.

His lawyer Elmar Kresbach had offered to post bail.

COUNTRIES WITH LAWS AGAINST HOLOCAUST DENIAL

Austria

Belgium

Czech Republic

France

Germany

Israel

Lithuania

Poland

Slovakia

Switzerland

Mr Irving is accused of having denied the existence of gas chambers at Auschwitz in two speeches he made in Vienna and Leoben in 1989.

Mr Irving sued US historian Deborah Lipstadt in London in 2000 for labelling him a Holocaust denier. He lost in a comprehensive verdict.

Despite the mortal blow to his reputation in 2000, he remains a showman and may well relish the opportunity to grandstand before a wider audience if put on trial, BBC legal affairs analyst Jon Silverman says.

In his books, Mr Irving has argued that the scale of the extermination of the Jews by the Nazis in World War II has been exaggerated.

He has also claimed that Nazi leader Adolf Hitler knew nothing of the Holocaust.

Mr Irving was previously arrested in Austria in 1984.

Story from BBC NEWS: http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4471026.stm

6. David Irving Deserves Obscurity And Free Speech

http://www.latimes.com/news/opinion/commentary/la-oe-guttenplan19nov19,0,1149020.story?coll=la-news-comment-opinions

The rights of a 'paper Eichmann'

'Holocaust denier' David Irving, still capable of making headlines, deserves obscurity -- but also free speech.

By D.D. Guttenplan

D.D. GUTTENPLAN, London correspondent for the Nation, is the author of "The Holocaust on Trial" (W.W. Norton, 2001). He is currently writing a biography of I.F. Stone.

November 19, 2005

WHAT DO YOU DO with a problem like David Irving? Until a few years ago, the British author of "Hitler's War" was usually described as a "controversial historian." But in April 2000, a British high court judge held that Irving not only had denied the reality of the Holocaust but was an anti-Semite, a racist and a neo-Nazi sympathizer who "deliberately falsified and distorted" historical evidence in the service of his right-wing views.

Justice Charles Gray's damning 333-page judgment - which ended Irving's libel suit against academic Deborah Lipstadt for calling him a "Holocaust denier" - turned Irving from controversial to disgraced. It also cost Irving his London home (in Britain, the loser in a libel case has to pay the winner's costs), leaving him a bankrupt, marginal figure reduced to lecturing credulous audiences of conspiracy enthusiasts and collectors of Nazi memorabilia. Yet for all that, he is still capable of making headlines.

Late last week, it was reported that Irving had been arrested in Austria for giving speeches denying the existence of gas chambers in Nazi death camps. Like Germany, France, Poland, Lithuania, Belgium and Israel, Austria has laws against denying or applauding the Holocaust.

There are several odd details about Irving's arrest, starting with the fact that the offending speeches were allegedly made more than 15 years ago; the warrant for Irving's arrest was issued in November 1989. But for Americans, accustomed as we are to the 1st Amendment's robust guarantee of free speech, the mere existence of laws forbidding certain kinds of expression may invite dismissal of the whole affair as of little relevance to our own concerns. In my view, that would be shortsighted.

Countries that outlaw Holocaust denial do so not because they love liberty less than we do but because their history is different from ours. Holocaust denial causes real pain to survivors and their families. To fail to acknowledge that pain, or to treat it as a particularly Jewish problem that need not trouble anyone else, is to deny our common humanity - precisely the denier's aim.

As important, in Germany and Austria Holocaust denial is not just hate speech but also a channel for Nazi resurgence, like the Hitler salute and the swastika, which are also banned. Countries where the experience of occupation and the shame of collaboration still rankle have different views than ours on the balance between dissent and disorder. And Bosnia and Rwanda should have taught all of us that these are not simple questions. Sticks and stones may still break bones but name-calling can clear a path to genocide.

Understanding, however, need not compel imitation. In 1949, the Supreme Court heard an appeal by Arthur Terminiello, a Catholic priest who'd been fined $100 by the city of Chicago for making a Jew-baiting speech. Justice Robert Jackson, former chief prosecutor at Nuremberg, warned that "if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact" - an argument echoed today by those who would safeguard our security by abridging our rights.

But Jackson was in the minority. "Almost every generation in American history," wrote the journalist I.F. Stone, "has had to face what appeared to be a menace" frightening enough to justify the sacrifice of basic liberties. Stone, who described himself as "exactly what Terminiello meant .

by an 'atheistic, communistic, Zionistic Jew," felt that free speech, though not an absolute value, was worth the risks it carried. I agree.

As for Irving, he seems to me exactly what Pierre Vidal-Naquet meant by "a paper Eichmann." A distinguished classical scholar who lost both parents to the Holocaust, Vidal-Naquet coined the term to describe Irving's French ally, Robert Faurisson. "Confronting an actual Eichmann, one had to resort to armed struggle," wrote Vidal-Naquet. "Confronting a paper Eichmann, one should respond with paper." Which need not be passive.

Indeed, Deborah Lipstadt's exposure of Irving's unsavory views in her book "Denying the Holocaust" was effective enough on its own that Irving was willing to risk financial ruin to try and force her, or her publishers, to back down.

In Austria, a country dogged by its own failure to come to terms with the Holocaust, and where Kurt Waldheim's Nazi past was no bar to electoral success, Irving's arrest is not much more than a symbolic gesture. The threat of a 20-year prison term, even if it doesn't come to pass, only burnishes Irving's counterfeit credentials as a martyr to free speech.

Whatever their motives, the Austrians have every right to deny Irving a platform, even to deport him. They do not, though, have the right to rescue him from well-deserved obscurity.

7. Leading Liberal Mag Yanks Ad Denying Holocaust

FORWARD, APRIL 30, 2004, p. 1

Leading Liberal Mag Yanks Ad Denying Holocaust

By Miriam Colton

A leading U.S. Holocaust-denial group's advertisements were pulled from a liberal weekly, The Nation, after protests from editorial staffers and Jewish organizations.

The May 3 issue of the magazine featured a promotional ad for the book "The Founding Myths of Modern Israel." The ad claimed that the book dissects historical myths used to justify Zionist aggression, including "the most sacred of Jewish-Zionist icons, the Holocaust story."

Placed by the Institute for Historical Review, an organization dedicated to refuting accepted Holocaust history, the ad was scheduled to run in six issues. But at a hastily convened meeting, several editors and business executives at The Nation decided that the claims in the ad violated the magazine's policy not to print "patently fraudulent" ads.

"We have the right to refuse ads on the one hand, and on the other hand we have a presumption in favor of taking ads where we politically disagree," said Victor Navasky, publisher and editorial

director of The Nation, one of the country's oldest liberal magazines. "Those two principles are in tension in a case like this... and here the argument that it was inappropriate prevailed."

Navasky said the magazine has not adopted a general policy regarding the printing of Holocaust-denial ads, though the issue of advertising guidelines was hastily put on the agenda of the magazine's biannual board meeting, scheduled to start at the end of this week.

The initial decision to run the Holocaust-denial ad was criticized on April 21 in separate correspondence to The Nation from the director of the Anti-Defamation League, Abraham Foxman, and Rafael Medoff, the director of the David S. Wyman Institute for Holocaust Studies, near Philadelphia. That same day, the magazine's advertising manager, Leigh Novog, sent an e-mail to Medoff, stating that his complaint had "prompted a meeting of The Nation's Advertising and Acceptability Committee," after which the magazine requested that the Institute for Historical Review "not run advertising in future issues."

Medoff quickly issued a statement claiming credit for the decision. Navasky told the Forward that the ad was brought to his attention by an editor who found it to be offensive.

Novog sent an April 21 letter explaining the magazine's decision to Mark Weber, director of the Institute for Historical Review.

"I am disappointed to write you today," Novog wrote. "I am aware of the position the Institute for Historical Review takes on the holocaust. It was my belief that The Nation would support my decision to solicit the IHR for advertising in a media outlet that would welcome discussion of this controversial viewpoint."

In his letter to Weber, Novog quoted from The Nation's ban on fraudulent ads, which was published in a 1979 issue of the magazine. Novog also detailed the refund being sent with the letter: "Mark, the IHR rendered a check to The Nation for $1,600 for 6 one-eighth page black and white ads," Novog wrote. "One insertion ran on 5/3. The Nation is returning a check for $1,333.33."

This was the first time that Weber's organization ran an ad in The Nation, according to Peter Rothberg, an associate publisher at the magazine.

The IHR did place the same ad in the Washington Post book section in 2001. An advertising manager at the Post told the Forward that it slipped through by mistake and that the procedure was immediately revamped so it wouldn't happen again.

The Nation controversy was the second one last week surrounding Weber's Southern California-based organization. Weber stepped in after the Turn Verein, a German social and sports club in Sacramento, canceled plans earlier this month to rent its facilities to a Holocaust revisionist conference only days before the two-day event was scheduled to start. Funded in part by the IHR, the event was organized by the European American Cultural Council, a smaller Holocaust-denial group with a membership of approximately 600.

After the Turn Verein decided not to host the event, saying that it had only just learned in a local newspaper that the conference involved Holocaust deniers and white supremacists, Weber quickly organized a truncated one-day gathering on April 24 that attracted 130 participants to an undisclosed location in Sacramento.

The president of the European American Cultural Council, Walter Mueller, refused to participate in the rescheduled conference, since Weber decided to accept the assistance of members of white supremacist groups, including the National Alliance.

In an interview with the Forward, Weber said that his organization challenges the notion that 6 million Jews were murdered by the Nazis, as well as the existence of gas chambers and extermination camps. Weber argued that Hitler did not have a "final solution" to annihilate European Jewry.

"The whole issue with The Nation underscores the very point that we live in a society in which trenchant criticisms of Jewish-Zionist power are just not permitted," Weber said.

Medoff countered that it was important for respected publications to deny advertising space to the IHR and other groups that deny the Holocaust. "Groups like the IHR are always seeking legitimacy, to appear as if they are saying something credible," Medoff said.

"If they place an ad in a mainstream publication, that's a major victory in their view.... That's why we felt it was important for The Nation to affirm that Holocaust denial is beyond the pale."

8. Nova Online - Holocaust on Trial

For further info on the David Irving Trial, see

http://www.pbs.org/wgbh/nova/holocaust

9. Holocaust Denial - The David Irving Trial and International Revisionism

ISBN: 0952203855

HOLOCAUST DENIAL:

The David Irving trial and international revisionism

Edited by Kate Taylor

THE VERDICT

AND so it was left to Mr Justice Gray to decide whether Professor Lipstadt had been correct in her assertions about David Irving. The closing statements finished on 13 March 2000 and the verdict was pronounced four weeks later on 11 April.

On this day the court was packed to breaking point. Around 150 journalists from around the world filled the seats and lined the walls of court 36. Members of the public had been queuing for hours. Some had arrived at the High Court as early as 6.30am. It was the moment that many had been waiting for over the preceding three months.

The atmosphere was tense and nervous. Yet it was strangely quiet as people fought for that coveted seat in court Heavy security was on hand at all times. Irving supporters were few and far between. No doubt fearing the worst, only a handful turned up looking sheepish and dejected. Gertner, representing the BNP, stood quietly in the queue, surrounded by many survivors of the Holocaust.

Irving arrived a few moments late. There was some speculation in the audience that he would not arrive at all. Sporting a navy and maroon waistcoat, it appeared initially that he had changed his customary navy pinstriped suit for the first time in 30 years. But it emerged that Anti Nazi League protesters had pelted him with eggs as he entered the High Court forcing him to remove his stained jacket. This was a day when Irving ended up with egg on his face both metaphorically and physically.

There had been little doubt about which way the verdict would go. But it was a surprise to most just how unequivocal the judge was.

Irving was impassive while Mr Justice Gray read a summary of his verdict. But as the judge tore his work to shreds piece by piece over the next two hours, he became visibly winded. Irving had received the 334-page verdict the previous night, but now it had entered the public domain. His eyes were focussed on the ground. His face grew noticeably redder, as if he would explode. Occasionally he displayed a nervous smirk of disbelief, as people sometimes do when in shock.

This was not a judgment about historical truth, Mr Justice Gray pronounced. A judge should not be called upon to be an historian. But Mr Justice Gray had had to scrutinise Irving's historiography and honesty. And so it was inevitable that he had to form a view about what was plausible and implausible in Irving's conclusions about history.

HISTORIOGRAPHY Of Irving's historiography the judge said, "Irving treated the historical evidence in a manner which fell far short of the standard to be expected of a conscientious historian".

"The criticisms advanced by the defendants are almost invariably well founded," he added. Richard Evans who examined Irving's historiography "justified each and every one of the criticisms on which the defendants have chosen to rely. The nature of these misstatements and misjudgements by Irving is a further pointer towards the conclusion that he had deliberately skewed the evidence to bring it in line with his political beliefs."

HITLER'S KNOWLEDGE "Irving pays little attention to the evidence which implicates Hitler," the judge told the court. "To write, as Irving did, that Hitler was 'totally unaware of what Goebbels had done' is in my view to pervert the evidence... Irving appears to take every opportunity to exculpate Hitler."

Of Hitler's views on the Jewish question, Mr Justice Gray said that Irving's submissions had "an air of unreality about them". The result was that Irving conveys to his readers a picture of Hitler that is at odds with the evidence. He rejected as contrary to the evidence the claim that Hitler ceased to be antisemitic from 1933 onwards.

Of Hitler's knowledge of the gassing programme the evidence disclosed substantial reasons for concluding "not only that Hitler was aware of the gassing in the Reinhard camps but also that he was consulted and approved the extermination". It was unreal to suggest that Himmler would not have obtained the authority of Hitler for the gassing programme, the judge contended.

AUSCHWTIZ The judge declared that, in common with most other people, he had supposed that the evidence of mass extermination of Jews in gas chambers at Auschwitz was compelling. Irving selectively picked up on this statement in later interviews, arguing that he was correct about his thesis that no gassings took place at Auschwitz and the judge had been prejudiced. But Mr Justice Gray made it clear that he had put aside any preconceptions. He concluded that the "totality of the

evidence that Jews were killed in large numbers in the gas chambers at Auschwitz is that it would require exceedingly powerful reasons to reject it".

Irving's attempt to denigrate eyewitnesses had failed. The account of Tauber "is so clear and detailed that, in my judgment, no objective historian would dismiss it as invention unless there were powerful reasons for doing so".

Of the Leuchter Report he said, "the results on which Leuchter relied had effectively no validity. I do not consider that an objective historian would have regarded the Leuchter Report as a sufficient reason for dismissing, or even doubting, the convergence of evidence on which the defendants rely for the presence of homicidal gas chambers at Auschwitz."

HOLOCAUST DENIAL "It appears to me to be incontrovertible that Irving qualifies as a Holocaust denier. Not only has he denied the existence of gas chambers at Auschwitz and asserted that no Jew was gassed there, he has done so on frequent occasions and sometimes in the most offensive terms."

Irving's Holocaust denial has been bolstered by his attempt to minimise the Holocaust, the judge claimed, for example his assertion that mass shootings in the East were arbitrary and individualised attempts to diminish the systematic nature of the Holocaust.

ANTISEMITISM AND RACISM Unequivocally, he said, Irving is "antisemitic". "His words are directed against Jews, either individually or collectively, in the sense that they are by turns hostile, critical, offensive and derisory in their references to Semitic people, their characteristics and appearances.

"I agree that the Jews are as open to criticism as anyone else," the judge declared. Again, Irving selectively drew upon this line, ignoring the fact that Mr Justice Gray explicitly added that, "Irving has repeatedly crossed the divide between legitimate criticism and prejudiced vilification of the Jewish race and people".

Of Irving's alleged racism he said, "I accept that Irving is not obsessed with race ... But he has on many occasions spoken in terms which are plainly racist."

RIGHT-WING EXTREMISM The judge clearly recognised that the evidence relating to Irving and right-wing extremism was directly relevant to the case. Irving's links with the far right showed that Irving had his own agenda. The neo-nazis that Mr Justice Gray linked to Irving included Gerhard Frey, Deckert, Althans, Philipp, the Worchs, Christophersen, Wilhelm Staglich, Ahmed Rami, Pedro Varela. Ziindel, Otto Ernst Remer, Ingrid Weckert and Faurisson.

They are all, Mr Justice Gray said, "right wing extremists ... who deny the Holocaust and who are racist and antisemitic... Irving shares many of their political beliefs.

Of Irving's claim, for example, that he had never knowingly spoken to the National Alliance, the judge said, "Irving cannot fail to have become aware that the National Alliance is a neo-nazi and antisemitic organisation. The regularity of Irving's contacts with the National Alliance and its officers confirms Irving's sympathetic attitude towards an organization whose tenets would be abhorrent to most people.

"He is content to mix with neo-fascists and appears to share many of their racist and antisemitic prejudices. The picture of Irving which emerges ... reveals him to be a right-wing pro-Nazi polemicist... Irving has a political agenda."

DRESDEN The judge dealt with the issue of Dresden only briefly, but accepted that Irving had deliberately inflated the numbers killed in the Allied bombing of the German city to perpetuate his continued relativism of the Holocaust.

MOSCOW The Defendants did not successfully prove that Irving broke an agreement with the Moscow Archive, or that he put plates of the Goebbels diaries at risk. Nor did the Defendants even attempt to prove Lipstadt's assertion that Irving intended to take a platform at an anti-Zionist conference m Sweden with Hamas. Hezbollah and Pamyat.

However, under section 5 of the Defamation Act, Mr Justice Gray found that these allegations did not significantly injure Irving's reputation in the light of the fact that the other, more serious, charges had been proved.

The judge found to be true the allegations that Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler m an unwarrantedly favourable light; that he is an active Holocaust denier; that he is antisemitic and racist and that he associates with right-wing extremists who promote neo-Nazism.

THE AFTERMATH Irving was visibly shaken when he rose to speak following the verdict. For once the arrogant tone was gone, the booming voice was muffled. His voice shook as he asked the judge for leave to appeal. The judge refused his request, although Irving says he intends to apply directly to the Appeal Court. Before the judgment he had claimed that he would not appeal if he lost.

"I need time to gather my thoughts and regain my strength from this," he told the judge. Already he was attempting to put down his loss to the omnipotent hand of Jewish money. Having received details of the costs the previous night, he claimed that expert witnesses had been paid too much. Richard Rampton QC replied: "Mr Irving is waving now a flag in tatters. He brought this action." Irving, weakly fighting the tide, quipped, "My flag will be fully restored through the appeal".

The immediate consequence of Mr Justice Gray's decision is the financial one. Costs are estimated at around £2 million. Penguin Books, which put up most of the costs for the case, intends to recover as much as it can. However that might not amount to much. Land Registry records show that Irving's flat in Mayfair - one of the most expensive parts of London has been mortgaged five times. He claims this is his only asset.

Irving could follow Nikolai Tolstoy's precedent in the Aldington v Tolstoy libel case. Despite Tolstoy being ordered to pay a record £L5 million in damages, Lord Aldington received only a tiny fraction of this sum after Tolstoy declared himself bankrupt.

Of course Irving's audiences will not change. He will address the same motley crew of neo-nazis that he always has. Indeed in the past 10 years these are really the only people who have listened to him.

The decision by Mr Justice Gray will not stop Holocaust deniers disseminating their lies. Indeed it will not even stop Irving propagating his wilful distortions. Hours after the humiliating judgment, Irving was spouting even more extreme views than ever before and unequivocally told Jeremy Paxman on Newsnight that he would not stop denying the Holocaust. He had asserted on his website that he would give no post-verdict interviews. He then proceeded to give a multitude of them. He was shaken but unrepentant. Unfortunately the effect was that he received

more publicity than he had ever received in his life.

What the verdict will ensure is that Irving and his followers are refused mainstream legitimacy and credibility. But the deniers will be pushed underground rather than silenced entirely. Perhaps the only medium left for Irving and the Holocaust deniers is the Internet. If he chooses to publish future books in this domain it may be difficult to seize the royalties in any bankruptcy proceedings. Some of the most notorious Holocaust deniers have already been pushed into cyberspace and Irving himself has already taken the first steps along this path. There are still few controls over racial hatred on the Internet.

Because of the difficulty of applying the Public Order and Race Relations laws to the Internet, some of the worst incitement to racial hatred occurs there. Zündel, since his conviction in Canada for disseminating Holocaust denial material, now channels most of his energies into

his "Zundelsite". Ahmed Rami, a vicious anti-Semite, also uses this medium to propagate the most hateful material from his Radio Islam programme in Sweden.

The Holocaust-denying Institute for Historical Review now also puts much of its energy into its website. The more Holocaust deniers are pushed off mainstream platforms, the stronger will become their love affair with the Internet. Inciting racial hatred on a website is no different

to publishing the same sentiments on a piece of paper, but Holocaust deniers have taken full advantage of the weak controls over the Internet.

This is the likely scenario for Irving. Before the trial he had claimed he would sink the "battleship Auschwitz" once and for all. But for the moment at least, it is Irving's ship that has sunk, although he is still fighting the tide and has an enormous talent for self-publicity.

Following the trial, Holocaust denial was still being propagated vehemently. Some Holocaust deniers have even had their beliefs bolstered by Irving's failure. Given that Holocaust denial is about manipulation, some were twisting the result to fit into their antisemitic ideology, putting Irving forward as an example of the power of the International Zionists to crush those whom they perceive to be a threat His stature as a martyr has been reinforced by the verdict in many circles. Indeed, the court case could even lead to an increase in animosity towards Jewish people because of the way, antisemites claim, they are exploiting the Holocaust.

In response to the verdict, an editorial in The Tehran Times declared, "One of the biggest frauds of the outgoing century which has dragged into the new millennium is the story of the Holocaust made up by the Zionists to blackmail the West. Western countries, under the pressure of Zionist circles, are still paying huge amounts of money in reparations to the Zionist entity and the relatives of those claimed to have perished in the Nazi gas chambers.

"But the same countries condemn, imprison and stigmatise as 'racist'and 'antisemitic' whoever tries to dig the facts and expose the fraud of the Zionists.

"Such treatment of the researchers and historians by the Western countries is a token of their subservience to the Zionist circles, particularly their submission to the pro-Zionist US Administration."

Holocaust denial did not start with David Irving and it will not end with him. It boasts a long and complex history, and Irving is not alone in his views. He is only one part of a long chain of people who have sought, for whatever reasons, to rewrite history Irving himself may now lose his credibility as an historian, but his ideas will not die, and it seems he will not sink without a fight.

He is still planning to go ahead with his legal case against The Observer and Gitta Sereny, despite the fact that many of the issues in contention have already been fully aired in his case against Professor Lipstadt.

More disturbingly, two of his own witnesses, D C Watt and Sir John Keegan, both well respected historians, still believe that Irving has a place to fill as an historian. In a field dominated by ageing white men, it seems that some still cling to the concept of the eccentric Englishman who goes against the grain. "The news that David Irving has lost his libel case will send a tremor through the community of twentieth century historians," said Sir John Keegan in The Daily Telegraph. "Mr Irving, if he will only learn from this case, still has much that is interesting to tell us."

Watt, writing in the Evening Standard, declared that we should not write Irving "off as an historian because of his political views". Still accepting that Irving was indeed a legitimate historian, he remarked, "The truth needs Irving's challenges to keep it alive".

Historical truth is not best determined in a court of law. As the well known journalist Nell Ascherson commented after the Aldington v Tolstoy case, libel trials have the potential to turn "history into toxic sludge". But the Irving trial did at least pronounce that there are certain moral and ethical guidelines that an historian must follow if this title is to be legitimately adopted. It is not so much that historians should remain entirely impartial and objective, but that they should remain honest to the facts.

Some witnesses to the Irving trial were angered that the Holocaust was portrayed as an event solely inflicted upon the Jews. The Holocaust is certainly not an exclusively Jewish tragedy. The repercussions are relevant for all humanity. But the trial did serve to remind us why the Holocaust is unique. Time and time again, the court was shown documentary evidence of the meticulously planned, rational and ruthless nature of the system the Nazis implemented. As Zygmunt Bauman writes in Modernity and the Holocaust [1989], "In the Final Solution, the industrial potential and technological know how boasted by our civilisation has scaled new heights in coping successfully with a task of unprecedented magnitude. And in the same Final Solution our society has disclosed to us it heretofore unsuspected capacity."

Recognition of the Holocaust as unique does not detract from other instances of suffering and mass extermination, such as the Armenian genocide or the Bosnian war. Each instance can be viewed within a framework of genocide. But each example is different and deserves to be treated as such. Relativism does not add to our understanding of these atrocities. Even Irving showed us that the Nazis left concrete evidence of their calculated genocide, although of course he chose to interpret that evidence as showing precisely the opposite. That is why the Holocaust

should not be debated with deniers. They will not change their minds, even in the face of facts. Irving did not want an informed argument He wanted a platform.

These disseminators of hate, it seems, are already feeding off Irving's defeat. Had Irving won, in their view, he would have proved the existence of the "international Jewish conspiracy". But contradictorily, by having lost, Irving has still proved this to the deniers. To them the verdict makes little difference. It can always be manipulated to fit in with their thesis. To Michael A. Hoffman of the IHR, "Gray's verdict... was predictable given the display of naked Jewish power during the trial". Other revisionists, it seems, were upset that Irving chose a non-jury trial and did not call up his fellow revisionists as witnesses, which would have ensured a number of them a public platform. Still clearly blinkered from the truth, Hoffman continues, "his single handed performance in court

was consistently magnificent and the gallery was frequently bowled over by his near total recall of the most minute details and recondite facts of the military history of the Second World War". Quite the contrary in fact is true. The gallery was composed mainly of concerned Jews and survivors, who were clearly sickened by Irving's anti-Semitism.

Hoffman added that, "Revisionists were hoping for a world shaking miracle in the Irving-Lipstadt face-off, instead they got another revisionist weed pushing itself up through the hairline cracks in the Jewish concrete that covers our planet".

Following the verdict Professor Lipstadt said, "My personal nightmare is over. But this nightmare is not over. There is no end to the fight against racism and antisemitism". The judge had vindicated everything she had said in her book about Irving. In fact he went further in his judgment than Lipstadt ever had. Lipstad told a press conference following the verdict, "David Irving has done a lot of evil things. The way he has denigrated survivors was truly horrible. The racism that he propagated in court was truly horrible and evil." It was clear to her that despite her victory, Holocaust deniers would not stop propagating their lies. But she had sent a clear message to them that their lies will not be voiced without a challenge. She added, "I see this not only as a personal victory, but a victory for all those who speak out against hate and prejudice".

The night before the verdict, Professor Lipstadt said, a Holocaust survivor had called her up. "You sleep well tonight Deborah", he told her, "Because we will not be sleeping." This was a judgment primarily for them.

Mr Justice Gray did not just rule in favour of Professor Lipstadt and Penguin Books. He ruled in favour of history, truth and reason.

10. Holocaust Denial Timeline

http://www.hdot.org/timelinedenial.asp

Holocaust Denial Timeline

1918 November 11. World War I ends.

1920 Sidney B. Fay writes a series of articles criticizing the prevailing view that Germany had been the main cause of World War I. Fay was respected as a legitimate and serious revisionist historian, as were his colleagues Charles A. Beard and Harry Elmer Barnes.

1939 September 1. Germany invades Poland and World War II begins.

1942 January 20. The Wannsee Conference is held in Germany to decide the fate of European Jewry. In all official documents from the Conference, the Nazis use euphemistic language to describe the extermination of the Jews, which they call the "Final Solution of the Jewish Question." Deportation to extermination camps is termed, "resettlement in the East."

In later years, Holocaust deniers would misinterpret the documents and conclude that the extermination of the Jews was never an intention of either Hitler or the Nazis because it was not explicitly stated. Deniers would also use this same tactic to obfuscate their own intentions (i.e. claiming to be "anti-Zionist" rather than antisemitic or anti-Jewish).

1945 September 2. World War II ends.

1947 Maurice Bardèche, a French fascist, defends the Nazis and suggests that much of the evidence about the concentration and extermination camps was fabricated. He maintains that any deaths in the camps should be attributed to disease and starvation and blames Jews for taking action against the German people and instigating World War II.

1947 Harry Elmer Barnes, who had been a part of the revisionist movement after World War I, produces a pamphlet, The Struggle Against Historical Blackout, which suggests that the Allies were responsible for World War II and that the Germans had once again been unfairly blamed for starting the conflict. The "historical blackout" refers to a supposed conspiracy of "court historians" who support establishment views and will not allow Germany to be exonerated.

1948 Paul Rassinier, a French Socialist who had been imprisoned in the concentration camps Buchenwald and Dora when he was a member of the Communist party, publishes La Passage de la Ligne (Crossing the Line). This book, and the others he would produce over the next two decades, declares that atrocity stories from the camps were exaggerated and unfair to the Germans. Rassinier tries to justify Jewish suffering at the hands of the Germans by describing the Jews as the enemy of the German people and laying the blame for the war on the "Zionist establishment."

1949 Rassinier publishes Le Monsonge d'Ulysse (The Lie of Ulysses).

1952 Charles C. Tansill's Back Door to War is published. Tansill was a revisionist historian who discussed the culpability of the Allies in both World Wars but did not deny that the Holocaust occurred Still, many of his more extreme arguments that try to exonerate Germany form the base for the later theses of Holocaust deniers.

1955 Willis Carto founds the Liberty Lobby, which is billed as a "lobby for patriotism." The Anti-Defamation League refers to the Liberty Lobby as the most influential right-wing extremist propaganda organization in the United States.

1961 David Leslie Hoggan's book, Der Erzwungene Krieg (The Forced War) is published in Germany because no publisher could be found for the original English version. Hoggan asserts that England and Poland had forced a reluctant Germany into war, and that German policies concerning the Jews were benign when compared to their treatment at the hands of the Poles.

1964 Rassinier's The Drama of European Jewry is published. In this book, Rassinier begins to actively deny that the Holocaust happened and charges that the "genocide myth " was created by the "Zionist establishment."

1967The Public Stake in Revisionism, written by Harry Elmer Barnes, moves closer to explicit denial of the Holocaust by hinting that Allied actions against the Germans were much worse than any German war crimes, "real or alleged." He also escalates his claims of an historical blackout to that of a "smotherout."

1969 The Myth of the Six Million is published by Noontide Press, the publishing arm of the antisemitic Liberty Lobby. The book is apparently written by David Leslie Hoggan, author of The Forced War, and accuses Jews of using the Holocaust to discredit the German nation and its attempts to maintain national identity and racial purity.

1973 Austin J. App, a professor of English literature at LaSalle College, publishes The Six Million Swindle: Blackmailing the German People for Hard Marks with Fabricated Corpses. The pamphlet states openly that the Holocaust "hoax" was created by Communists and Jews, particularly the

Zionists. It also lays out eight axioms that will become the founding principles of the Institute for Historical Review (IHR).

1974 Heinz Roth publishes Porque nos mienten? O acaso Hitler tenia Raz"n? (Why Do They Lie to Us? Perhaps Hitler Was Right?) in Argentina.

1974 The booklet Did Six Million Really Die? The Truth at Last, written by Richard Harwood, is published in Great Britain. Richard Harwood was the pseuedonym of Richard Verrall, the editor of Spearhead, the periodical associated with the British right-wing, neofascist organization the National Front. The book was based on an earlier American publication, The Myth of the Six Million.

1975 Palestine My Homeland, written by Ahmad Hussein, claims that the Holocaust never happened.

1977 David Irving's controversial book, Hitler's War, is published. While Irving does not yet deny the Holocaust in this book, he does surmise that Hitler was a weak and vacillating leader who knew nothing about the "Final Solution." Many historians condemned the book as an attempt to rehabilitate Nazism and explained that it was filled with factual errors and fabrications.

1977 Irving offers "$1000 for evidence that Hitler knew about Auschwitz."

1977 Arthur R. Butz, a tenured professor of electrical engineering at Northwestern University, publishes The Hoax of the Twentieth Century. Butz significantly changed the way Holocaust denial literature was written because of the sophisticated, "pseudoscholarly" tone he used in writing his book and his pretensions toward objectivity and legitimate research. While Butz claimed that he had no problem with Jews, his animosity toward Zionists was merely a disguise for his antisemitic views.

1978 Louis Darquier de Pellepoix, the former commissioner of Jewish affairs in Vichy France and the man responsible for deporting Vichy Jews to death camps, tells the French weekly L'Express that the Holocaust was another Jewish hoax.

1979 The Institute for Historical Review (IHR) is founded by Willis Carto. Carto insists that the IHR is an independent organization with no ties to any of his other organizations or publications. However, the umbrella organization that is responsible for the IHR, the Legion for the Survival of Freedom, links the Institute to the Noontide Press, the publishing arm of the IHR, and other Carto vehicles.

1979 The IHR convenes its first Revisionist Convention in Los Angeles. IHR Director Lewis Brandon (the pseudonym of William David McCalden) offers $50,000 to anyone who "could prove that the Nazis operated gas-chambers to exterminate Jews during World War II."

1980 spring. All members of the Organization of American Historians (OAH) receive a complimentary copy of the first issue of the Journal of Historical Review, the periodical for the IHR. The IHR had purchased the OAH's 12,000 member mailing list in order to mail out the Journal, leading some of the OAH members to protest against the sale of their names and addresses to an antisemitic hate group.

1981, February 19. Mel Mermelstein, a survivor of Auschwitz whose mother, father, sister and brothers had died during the Holocaust, files a lawsuit against the IHR, Lewis Brandon/David McCalden and Willis Carto. Mermelstein, had submitted a notarized declaration of his experiences

at Auschwitz in answer to the IHR's $50,000 offer and, when the Institute did not respond to his claim, he turned for redress to the legal system of the state of California.

1982 The German-American National Political Action Committee (GANPAC) is founded by Hans Schmidt. An organization which uses Holocaust denial to contribute to the rehabilitation of National Socialism, GANPAC is also devoted to fighting perceived anti-German sentiment in the media.

1983 February. American actor Robert Mitchum, after playing leading roles in the World War II television epics Winds of War and War and Remembrance, expresses doubts about the veracity of the Holocaust in an interview with Esquire magazine. In the interview, he qualifies statements about the Holocaust with the statement, "So the Jews say."

1983 Robert Faurisson, a former Associate Professor of Contemporary Literature at the University of Lyon, France, is fined and given a three month suspended sentence for "racial defamation" after making remarks on a radio show that are anti-Zionist and support Holocaust denial.

1984 The Canadian government charges Ernst Zündel, a German immigrant living in Canada, with "knowingly publishing false news that caused or was likely to cause damage to social or racial tolerance." by publishing and distributing antisemitic literature. He is tried and convicted, but the ruling is overturned.

1984 July 4. Fire breaks out at the IHR headquarters in Torrance, California. While IHR members suspected that Israeli-trained terrorists had started the fire, the perpetrators were never found.

1985 Henri Rocques receives a doctorate from University of Nantes in France; in his dissertation, Confessions of Kurt Gerstein: A Comparative Study of Different Versions - A Critique, he argues that Auschwitz had no functioning gas chambers.

1985 July. The Los Angeles Superior Court orders the IHR to pay Mel Mermelstein $90,000, which includes the $50,000 reward and an additional $40,000 for pain and suffering. The judge also orders the defendants in the case to draft and sign a letter of apology to Mermelstein because of the trouble they had caused him. During pre-trial hearings, Judge Thomas T. Johnson, the presiding judge, had taken judicial notice of the undisputed fact of Jewish gassings at Auschwitz, and the letter of apology contained a verbatim reprise of this notice.

1985 James Keegstra, a popular school teacher and also the mayor of Eckville (a Canadian town in the province of Alberta), is convicted of "willfully promot[ing] hatred toward a definable group, i.e. the Jewish people" by teaching social studies classes that included antisemitic conspiracy theories as well as Holocaust denial.

1986 January. Mermelstein wins $4.75 million in punitive damages and $500,000 in compensatory damages in a suit against Ditlieb Felderer, an Austrian living in Sweden whose Jewish Information Bulletin derided the Jews killed at Auschwitz and personally attacked Mermelstein.

1986 Rocques' dissertation is declared invalid by the French Minister of Higher Education, Alain Devaquet.

1987 January. The Ontario Court of Appeals overturns the Zündel conviction.

1987 David Irving's Churchill's War is published in Australia. In it, Irving hypothesizes that Winston Churchill was responsible for the deaths of millions of civilians and Allied soldiers instead of Adolf Hitler.

1987 June. A new trial for Ernst Zündel is granted by the Ontario Court of Appeals.

1987 It is found that public school teacher Dorothy Groteluschen, who teaches in Aurora, Colorado, instructed her students that the Holocaust was a "holohoax." Although she was disciplined by the school, she eventually sued and won $3850 in an out-of-court settlement.

1987 Jean Marie Le Pen says in a radio interview that the gas chambers were merely a "detail" of World War II. "Are you trying to tell me that [the existence of gas chambers] is a revealed truth that everyone has to believe?" he asked. "I say that there are historians debating these issues."

1988 May 13. Ernst Zündel is convicted after his second trial and sentenced to nine months in jail. Some of the biggest names in Holocaust denial, including Robert Faurisson, David Irving, Bradley Smith, and Ditlieb Felderer had testified during the second trial. In addition, a self-styled engineer named Fred Leuchter presented a report entitled The Leuchter Report: An Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau and Majdanek, Poland that attempted to prove that the gas chambers were a myth.

1988 David Irving claims to have been converted to the idea that there were no functioning gas chambers and, thus, no Holocaust, after reading The Leuchter Report. Irving pledges to delete all references to the Holocaust in the next edition of Hitler's War.

1988 summer. A criminal suit is filed in France against Robert Faurisson and two other Holocaust deniers, Pierre Guillaume and Carlo Mattogno because of a book, Annals of Revisionist History that was published by Guillaume and contained two articles by Faurisson.

1988 July. Keegstra's conviction is overturned by the Alberta Court of Appeals on the grounds that the "promoting hatred" law is unconstitutional.

1988 September 28. The Templeton Prize, a prestigious award for interreligious understanding worth $370,000, is given to Dr. Inamullah Khan, the Secretary-General of the World Muslim Congress (WMC). The WMC had promoted Holocaust denial material and expressed antisemitic ideas and views.

1989 Miguel Serrano, the former Chilean ambassador to India, writes the introduction for the Spanish translation of Fred Leuchter's report.

1989 October 31. The suit against Faurisson, Guillaume and Mattogno is dismissed.

1989 December 13. In an issue of El-Istiqlal, Cyprus-based Palestinian journal, Dr. Khalad El-Shamali suggests that the incineration of Jews in crematoria had been fabricated.

1989 Jean-Claude Pressac writes Auschwitz: Technique and Operation of the Gas Chambers in response to the Leuchter Report. Pressac, who had once been a colleague of Robert Faurisson, turned away from embracing Holocaust denial after his own independent research convinced him that Faurisson was deliberately falsifying information and ignoring factual evidence pertaining to the gas chambers at Auschwitz.

1990 July 13. The French government enacts the Gayssot Law, which makes it a criminal offense to dispute the findings of the Nuremberg Trials.

1990 September. Faurisson gives an interview to the far-right magazine Le Choc du Mois where he describes the gas chambers as a "myth" and is charged under the Gayssot Law.

1990 Safet and Ingeborg Sarich, a couple in Winnetka, Illinois, remove their daughter from a junior high school class on the Holocaust, claiming that the subject was the product of Jewish propagandists.

1990 Donald Hiner, a professor at Purdue University in Indiana, is found to be teaching a Western Civilization class where he claims that the Holocaust was a "myth" and that "the worst thing about Hitler is that without him, there would not be an Israel." Hiner taught for more than half the academic year before a student brought his comments to the attention of the school.

1990 December 13. The Canadian Supreme Court upholds the constitutionality of the "promoting hatred" law in the Keegstra case.

1991 March 13. The Alberta Court of Appeals rules that the original Keegstra conviction must be quashed and a new trial ordered.

1991 April 18. Robert Faurisson is convicted and sentenced to a 250,000 franc ($50,000) fine of which 100,000 francs ($20,000) is suspended.

1991 June 12. Fred Leuchter, who holds a B.A. degree in history from Boston University, signs a consent agreement that admits that he misrepresented himself as an engineer and agrees to stop representing himself as such.

1991 After telling a French magazine that the Nazis did not plan to exterminate the Jews and that there were no gas chambers, Robert Faurisson is convicted in France under the auspices of a law against "criminal revision" and is fined the equivalent of $20,000. Unfortunately, the court also denounced the 1990 law under which he was charged.

1991 Over 700,000 Lousianians vote for David Duke as their governor, despite his history as a racist, antisemite and Holocaust denier.

1992 Ernst Zündel's conviction is overturned by the Canadian Supreme Court, which rules that the law against spreading "false news" is unconstitutional.

1992 July 10. Keegstra receives a $2,640 fine from Judge Arthur Lutz.

1992 David Irving is hired by the Sunday Times in London to translate Joseph Goebbels' diaries, which were found in a Russian archive. The Times claims that Irving is only being used to transcribe Goebbel's handwriting and that translation and editing of the diaries will be done by Oxford professor and Times staff writer Norman Stone. The question remains, though, why Irving's services were contracted at all.

1992 fall. Public opinion poll in Italy indicates that close to 10% of the Italian population believe that the Holocaust never happened.

1993 October 4. Willis Carto receives a letter from the IHR saying that they want to "fire" him from his position of influence at the Institute. At issue is an estimated $10 million in stock certificates given to the Legion for the Survival of Freedom by Jean Farrel, allegedly the grandchild of Thomas Edison. The IHR staff claims that Carto is skimming funds for the benefit of himself and his wife, Elisabeth, while skimping on salaries and benefits for IHR employees. The IHR hopes to gain control of the money from Carto and the Legion.

1993,Deborah Lipstadt's Denying the Holocaust: The Growing Assault on Truth and Memory and Kenneth S. Stern's Holocaust Denial are published.

1994 While the dispute is still in litigation, the IHR is declared independent of Carto and the Legion for the Survival of Freedom, and a Superior Court Judge in California awards $6.4 million to the IHR in their civil suit against Carto.

1994 Carto creates the Barnes Review to rival the Journal of Historical Review as a denial periodical.

2000 January Irving/Lipstadt suit.

11. ADL Online Guide to Exposing and Combating Anti-Semitic Propaganda

http://www.adl.org/holocaust/response.html

Holocaust Denial:

An Online Guide to Exposing and Combating Anti-Semitic Propaganda

The Facts:

Exposing Holocaust Denial Propaganda Themes

The following are summaries of five (5) major claims frequently made by Holocaust-denial propagandists. Click on each to read a brief factual response. The footnoted sources are listed at the bottom of the page.

1) The Holocaust Did Not Occur Because There Is No Single "Master Plan" for Jewish Annihilation

2) There Were No Gas Chambers Used for Mass Murder at Auschwitz and Other Camps

3) Holocaust Scholars Rely on the Testimony of Survivors Because There Is No Objective Documentation Proving the Nazi Genocide

4) There Was No Net Loss of Jewish Lives Between 1941 and 1945

5) The Nuremberg Trials Were a "Farce of Justice" Staged for the Benefit of the Jews

1. The Holocaust Did Not Occur Because There Is No Single "Master Plan" for Jewish Annihilation

There is no single Nazi document that expressly enumerates a "master plan" for the annihilation of European Jewry. Holocaust-denial propagandists misrepresent this fact as an exposure of the Holocaust "hoax"; in doing so, they reveal a fundamentally misleading approach to the history of the era. That there was no single document does not mean there was no plan. The "Final Solution" - the Nazis' comprehensive plan to murder all European Jews - was, as the Encyclopedia of the Holocaust observes, "the culmination of a long evolution of Nazi Jewish policy." 1 The destruction process was shaped gradually: it was borne of many thousands of directives.2

The development and implementation of this process was overseen and directed by the highest tier of Nazi leadership, including Heinrich Himmler, Reinhard Heydrich, Adolf Eichmann, Hermann Goering and Adolf Hitler himself. For the previous two decades, Hitler had relentlessly pondered Jewish annihilation.3 In a September 16, 1919, letter he wrote that while "the Jewish problem" demanded an "anti-Semitism of reason" -- comprising systematic legal and political sanctions -- "the final goal, however, must steadfastly remain the removal of the Jews altogether."4

Throughout the 1920s, Hitler maintained that "the Jewish question" was the "pivotal question" for his Party and would be solved "with well-known German thoroughness to the final consequence."5 With his assumption to power in 1933, Hitler's racial notions were implemented by measures that increasingly excluded Jews from German society.

On January 30, 1939, Hitler warned that if Jewish financiers and Bolsheviks initiated war, "The result will not be the Bolshevization of the earth, and thus the victory of Jewry, but the annihilation of the Jewish race in Europe."6 On, September 21, 1939, after the Germans invaded Poland, SD chief Heydrich ordered the Einsatzgruppen (mobile killing units operating in German-occupied territory) to forcibly concentrate Polish Jews into ghettos, alluding to an unspecified "final aim." 7

In the summer of 1941, with preparations underway for invading Russia, large-scale mass murder initiatives -- already practiced domestically upon the mentally ill and deformed -- were broadly enacted against Jews. Heydrich, acting on Hitler's orders, directed the Einsatzgruppen to implement the "special tasks" of annihilation in the Soviet Union of Jews and Soviet commissars.8 On July 31, Heydrich received orders from Goering to prepare plans "for the implementation of the aspired final solution of the Jewish question" in all German-occupied areas.9 Eichmann, while awaiting trial in Israel in 1960, related that Heydrich had told him in August 1941 that "the Führer has ordered the physical extermination of the Jews."10 Rudolf Hoess, the Commandant of Auschwitz, wrote in 1946 that "In the summer of 1941... Himmler said to me, 'The Führer has ordered the Final Solution to the Jewish Question... I have chosen the Auschwitz camp for this purpose.' "11

On January 20, 1942, Heydrich convened the Wannsee Conference to discuss and coordinate implementation of the Final Solution. Eichmann later testified at his trial:

These gentlemen... were discussing the subject quite bluntly, quite differently from the language that I had to use later in the record. During the conversation they minced no words about it at all... they spoke about methods of killing, about liquidation, about extermination.12

Ten days after the conference, while delivering a speech at the Sports Palace in Berlin that was recorded by the Allied monitoring service, Hitler declared: "The result of this war will be the complete annihilation of the Jews. . . the hour will come when the most evil universal enemy of all time will be finished, at least or a thousand years."13 On February 24, 1943, he stated: "This struggle will not end with the annihilation of Aryan mankind, but with the extermination of the Jewish people in Europe.14

Approximately 6 million Jews were killed in the course of Hitler's Final Solution.

2. There Were No Gas Chambers Used for Mass Murder at Auschwitz and Other Camps

Death camp gas chambers were the primary means of execution used against the Jews during the Holocaust. The Nazis issued a directive implementing large-scale gas chambers in the fall of 1941 but, by then, procedures facilitating mass murder, including the utilization of smaller gas chambers, were already in practice. Before their use in death camps, gas chambers were central to Hitler's "eugenics" program. Between January 1940 and August 1941, 70,273 Germans -- most of them physically handicapped or mentally ill -- were gassed, 20-30 at a time, in hermetically shut chambers disguised as shower rooms.15

Meanwhile, mass shooting of Jews had been extensively practiced on the heels of Germany's Eastern campaign. But these actions by murder squads had become an increasingly unwieldy

process by October 1941. Three directors of the genocide, Erhard Wetzel, head of the Racial-Policy Office, Alfred Rosenberg, consultant on Jewish affairs for the Occupied Eastern Territories, and Victor Brack, deputy director of the Chancellery, met at the time with Adolf Eichmann to discuss the use of gas chambers in the genocide program.16 Thereafter, two technical advisors for the euthanasia gas chambers, Kriminalkommissar Christian Wirth and a Dr. Kallmeyer, were sent to the East to begin construction of mass gas chambers.17 Physicians who had implemented the euthanasia program were also transferred.

Mobile gassing vans, using the exhaust fumes of diesel engines to kill passengers, were used to kill Jews at Chelmno and Treblinka -- as well as other sites, not all of them concentration camps -- starting in November 1941.18 At least 320,000 Chelmno prisoners, most of them Jews, were killed by this method; a total of 870,000 Jews were murdered at Treblinka using gas vans and diesel-powered gas chambers.19

Gas chambers were installed and operated at Belzec, Lublin, Sobibor, Majdanek and Auschwitz-Birkenau from September 3, 1941, when the first experimental gassing of a group of Soviet prisoners-of-war took place at Auschwitz, until November 1944.20 Working with chambers measuring an average 225 square feet, the Nazis forced to their deaths 700 to 800 men, women and children at a time.21 Two-thirds of this program was completed in 1943-44, and at its height it accounted for as many as 20,000 victims per day.22 Authorities have estimated that these gas chambers accounted for the deaths of approximately 2½ to 3 million Jews.

Holocaust-denial attacks on this record of mass murder intensified following the end of the Cold War when it was reported that the memorial at Auschwitz was changed in 1991 to read that 1 million had died there, instead of 4 million as previously recorded. For Holocaust deniers, this change appeared to confirm arguments that historical estimates of Holocaust deaths had been deliberately exaggerated, and that scholars were beginning to "retreat" in the face of "revisionist" assertions. Thus, for example, Willis Carto wrote in the February 6, 1995, issue of The Spotlight, the weekly tabloid of his organization, Liberty Lobby, that "All 'experts' until 1991 claimed that 4 million Jews were killed at Auschwitz. This impossible figure was reduced in 1991. . . to 1.1 million. . . . The facts about deaths at Auschwitz, however. . , are still wrong. The Germans kept detailed records of Auschwitz deaths. . . These show that no more than 120,000 persons of all religions and ethnicity died at Auschwitz during the war. . . ."

In fact, Western scholars have never supported the figure of 4 million deaths at Auschwitz; the basis of this Soviet estimate - an analysis of the capacity of crematoria at Auschwitz and Birkenau - has long been discredited. As early as 1952, Gerald Reitlinger, a British historian, had convincingly challenged this method of calculation. Using statistics compiled in registers for Himmler, he asserted that approximately 1 million people had died at Auschwitz; Raul Hilberg in 1961, and Yehuda Bauer In 1989, confirmed Reitlinger's estimate of Auschwitz victims. Each of these scholars, nonetheless, has recognized that nearly 6 million Jews were killed overall during the Holocaust.23 Polish authorities were therefore responding to long-accepted Western scholarship, further confirmed subsequently by documents released in post-Soviet Russia; the cynical allegations of "Holocaust revisionism" played no part in their decision.

3. Holocaust Scholars Rely on the Testimony of Survivors Because There Is No Objective Documentation Proving the Nazi Genocide.

Another frequent claim of Holocaust "revisionists" concerns what they describe as the lack of objective documentation proving the facts of the Holocaust, and the reliance by scholars on biased and poorly recollected testimonies of survivors. However, the Germans themselves left no shortage of documentation and testimony to these events, and no serious scholar has relied solely on survivor testimony as the conclusive word on Holocaust history. Lucy Dawidowicz, in the preface to her authoritative work, The War Against the Jews 1933-1945, wrote,

"The German documents captured by the Allied armies at the war's end have provided an incomparable historical record, which, with regard to volume and accessibility, has been unique in the annals of scholarship.... The National Archives and the American Historical Association jointly have published 67 volumes of Guides to German Records Microfilmed at Alexandria, VA. For my work I have limited myself mainly to published German documents."24

The author then proceeds to list 303 published sources - excluding periodicals - documenting the conclusions of her research. Among these sources are the writings of recognizable Nazi policy makers such as Adolf Hitler, Heinrich Himmler, Rudolf Hoess and Alfred Rosenberg.

Similarly, Raul Hilberg in his three-volume edition of The Destruction of the European Jews, wrote, "Between 1933 and 1945 the public offices and corporate entities of Nazi Germany generated a large volume of correspondence. Some of these documents were destroyed in Allied bombings, and many more were systematically burned in the course of retreats or in anticipation of surrender. Nevertheless, the accumulated paper work of the German bureaucracy was vast enough to survive in significant quantities, and even sensitive folders remained.25

It is thus largely from these primary sources that the history of the Holocaust has been compiled. A new factor in this process is the sudden availability of countless records from the former Soviet Union, many of which had been overlooked or suppressed since their capture at war's end by the Red Army. Needless to say, the modification of specific details in this history is certain to continue for a number of years to come, considering the vastness and complexity of the events which comprise the Holocaust. However, it is equally certain that these modifications will only confirm the Holocaust's enormity, rather than -- as the "revisionists" would -- call it into question.

4. There Was No Net Loss of Jewish Lives Between 1941 and 1945

Another frequent "revisionist" assertion calls into question the generally accepted estimates of Jewish victims of the Holocaust. In attempting to portray the deaths of millions of Jews as an exaggeration or a fabrication, Holocaust deniers wildly manipulate reference works, almanac statistics, geopolitical data, bedrock historical facts and other sources of information and reportage.

For example, "revisionists" commonly cite various almanac or atlas figures -- typically compiled before comprehensive accounts on the Holocaust were available -- that appear to indicate that the worldwide Jewish population before and after World War II remained essentially stable, thereby "proving" that 6 million Jews could not have died during this period.

The widely cited "6 million" figure is derived from the initial 1945 Nuremberg trial estimate of 5.7 million deaths; subsequent censuses, statistical analyses, and other demographic studies of European Jewry have consistently demonstrated the essential accuracy of this first tally.26 After nearly 50 years of study, historians agree that approximately 6 million Jews perished during the course of the Nazi genocide.27

In The War Against the Jews, Lucy Dawidowicz offers a country-by-country accounting of Jewish deaths.

ESTIMATED NUMBER OF JEWS KILLED IN THE FINAL SOLUTION

Country

Estimated Pre-Final Solution Population

Estimated Jewish Population Annihilated

Number

Percent

Poland

3,300,000

3,000,000

90

Baltic countries

253,000

228,000

90

Germany/Austria

240,000

210,000

90

Protectorate

90,000

80,000

89

Slovakia

90,000

75,000

83

Greece

70,000

54,000

77
The Netherlands
140,000
105,000
75
Hungary
650,000
450,000
70
SSR White Russia
375,000
245,000
65
SSR Ukraine*
1,500,000
900,000
60
Belgium
65,000
40,000
60
Yugoslavia
43,000
26,000
60
Romania
600,000
300,000
50
Norway
1,800
900
50

France
350,000
90,000
26
Bulgaria
64,000
14,000
22
Italy
40,000
8,000
20
Luxembourg
5,000
1,000
20
Russia (RSFSR)*
975,000
107,000
11
Denmark
8,000
-
-
Finland
2,000
-
-
TOTAL
8,861,800
5,933,900
67
*The Germans did not occupy all the territory in this republic

28

5. The Nuremberg Trials Were a "Farce of Justice" Staged for the Benefit of the Jews

Yet another centerpiece of "revisionist" propaganda attacks the objectivity and legal validity of the postwar Nuremberg Trials, where much information about the Holocaust first became public, and where the general history of the genocide was first established.

The actual process of bringing Nazi war criminals to justice was a lengthy and complicated effort involving the differing legal traditions and political agendas of the United States, England, France and the Soviet Union. As the historical record shows, the allied victors, if anything, erred on the side of leniency toward the accused Nazis.

Discussions concerning allied treatment of war criminals had begun as early as October 1943.29 In the summer months following Germany's surrender in 1945, British, American and Soviet representatives met in London to create the charter for an international military tribunal to prosecute "major criminals" whose offenses extended over the entire Reich, and who therefore could be punished by joint decision of the Governments of the Allies.30

By early autumn, the Allies had resolved their debates over whom to prosecute and how to define the crimes committed during the Holocaust; the first trials began thereafter in Nuremberg, before an international military tribunal. The chief defendant was Hermann Goering, but the prosecution also selected 20 other leading officials from the Nazi party, German government ministries, central bureaucracy, armament and labor specialists, the military and territorial chiefs.31

These trials did not result in either "rubber stamp" guilty verdicts or identical sentences. In fact, of the 21 defendants, three were set free; one received a 10-year sentence; one a 15-year sentence; two, 20-year sentences; three, life sentences, and 11 received the death penalty.32

The defendants, moreover, had access to 206 attorneys, 136 of whom had been Nazi party members.33 Furthermore, as Raul Hilberg stated, "The judges in Nuremberg were established American lawyers. They had not come to exonerate or convict. They were impressed with their task, and they approached it with much experience in the law and little anticipation of the facts."34

A second round of trials resulted in 25 death sentences, 20 life sentences, 97 sentences of 25 years or less, and 35 not-guilty verdicts.35 By 1951, following the recommendations of an American-run clemency board, 77 the 142 convicted criminals had been released from prison.36

NOTES

1. Israel Gutman (Editor in Chief), Encyclopedia of the Holocaust, Volume 2, New York, 1990, p. 788.

2. Raul Hilberg, The Destruction of the European Jews (Student Edition), New York, 1985, p. 263.

3. Lucy Dawidowicz, The War Against the Jews, 1933-1945, New York, 1975, pp. 150-166. 4. Encyclopedia of the Holocaust, Volume 2, p. 489.

5. Encyclopedia of the Holocaust, Volume 2, p. 489.

6. Encyclopedia of the Holocaust, Volume 2, p. 490.

7. Holocaust, Jerusalem: Keter Books, 1974, p. 104

8. Encyclopedia of the Holocaust, Volume 2, p. 657.

9. Encyclopedia of the Holocaust, Volume 2, p. 492.

10. Ronnie Duggar, The Texas Observer, Austin, 1992, D. 48.

11. Encyclopedia of the Holocaust, Volume 2, pp. 641-642.

12. Encyclopedia of the Holocaust, Volume 2, p. 657.

13. Ronnie Duggar, The Texas Observer, Austin, 1992, D. 48.

14. Holocaust, pp. 105-106.

15. Encyclopedia of the Holocaust, Volume 2, p. 453.

16. Martin Gilbert, The Holocaust, New York, 1985, p. 219.

17. Raul Hilberg, The Destruction of the European Jews, Volume 3, New York, 1985, pp. 873-876.

18. Encyclopedia of the Holocaust, Volume 2, pp. 541-544

19. Encyclopedia of the Holocaust, Volume 2,, p. 542; Volume 4, pp. 1483, 1486.

20. Encyclopedia of the Holocaust, Volume 2, pp. 113, 116.

21. Holocaust, p. 86.

22. Holocaust, p. 87.

23 Reitlinger, who conducted his research before Hilberg and other scholars, arrives at a more conservative figure of approximately 4.5 murder victims; he nonetheless estimates that one-third of the internees at concentration camps died as a result of starvation, overwork, disease, and other consequences of their captivity. Although his murder count is somewhat lower than that of later scholars, his overall death count remains consistent with subsequent research.

24. Dawidowicz, The War Against the Jews, p. 437.

25. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1223.

26. Dawidowicz, The War Against the Jews, 1933-1945, p. 402.

27. Peter Hayes, Associate Professor of German History at Northwestern University, states, "After years of studying this matter, I know of no authority who puts the number of Jews killed [emphasis in original] by the Nazis at less than 5.1 or more than 5.9 million men, women and children.

28. Dawidowicz, The War Against the Jews, 1933-1945, p. 403.

29. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1060.

30. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1061.

31. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1066.

32. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1070.

33. Hilberg, The Destruction of the European Jews, Volume 3,

p. 1075.

34 Hilberg, The Destruction of the European Jews, Volume 3,
p. 1076.

35. Hilberg, The Destruction of the European Jews, Volume 3,
p. 1077-1078.

36. Hilberg, The Destruction of the European Jews, Volume 3,, p. 1079.

C. Denial of Armenian Genocide

1. Beginning to face up to a terrible past

Apr 7th 2005 | DIYARBAKIR
From The Economist print edition
At least the Turks now allow the Armenian tragedy to be talked about

ZEKAI YILMAZ, a Kurdish health worker, was 12 when he found out that his grandmother was Armenian. "She was speaking in a funny language with our Armenian neighbour," he recalled. "When they saw me they immediately switched to Kurdish." Pressed for an explanation, his grandmother revealed an enormous scar on her back. At 13 she had been stabbed and left for dead together with hundreds of fellow Armenians in a field outside Diyarbakir. Mr Yilmaz's grandfather found her, rescued her, converted her to Islam and married her. "But in her heart she remained an Armenian and I sort of feel Armenian too," said Mr Yilmaz.

Similar accounts abound in Turkey's mainly Kurdish south-eastern provinces. The region was home to a thriving community of Armenian Christians until the first world war; traces of their culture are evident in the beautifully carved stone churches that lie in ruins or have been converted into mosques.

But the first world war was when, according to the Armenians, 1.5m of their people were systematically murdered in a genocide perpetrated by Ottoman Turks, a massacre that went on even when the war was over. Millions of Armenians worldwide are set to commemorate the 90th anniversary of the start of the violence on April 24th.

The Turks deny there was genocide. Though they admit that several hundred thousand Armenians perished—the figures vary from one official to the next—they insist that it was from hunger and disease during the mass deportation to Syria (then also Ottoman) of Armenians who had collaborated with the invading Russian forces in eastern Turkey.

Some Kurds dispute this version saying that their forefathers had joined in the slaughter after being promised Armenian lands—and a place in heaven for killing infidels—by the Young Turks

who ruled Turkey at the time. "You [Kurds] are having us for breakfast, they [Turks] will have you for lunch," an Armenian proverb born in those days, was "eerily prescient" says a Kurdish journalist, referring to the violence between Turkish forces and separatist Kurds that later racked the south-east.

Until recently such talk would have landed these Kurds in jail on charges of threatening the integrity of the Turkish state. But as Turkey seeks membership of the European Union, its repressive laws are being replaced by ones that allow freer speech. Calls are mounting within Europe, and much more encouragingly among some Turks themselves, for the country to face up to its past. As a result, unprecedented debate of the Armenian issue has erupted in intellectual and political circles and the mainstream Turkish press.

Some of the reaction has been ugly. Orhan Pamuk, Turkey's best-known contemporary novelist, received death threats when he told a Swiss newspaper that "One million Armenians and 30,000 Kurds were killed in Turkey." One over-zealous official in a rural backwater went so far as to issue a circular calling for all of Mr Pamuk's books to be destroyed—only to find there were none in his town. His actions were applauded by a vocal and potentially violent group of ultra-nationalists, who claim that the Europeans are using Armenians, Kurds and other minorities to dismember Turkey.

Yet there are hopeful signs that the Turks are willing to listen to other opinions as well. Halil Berktay, a respected Ottoman historian long ostracised for his unconventional views, survived telling the pro-establishment daily *Milliyet* recently that the Armenians were victims of "ethnic cleansing". After decades of wavering, Fethiye Cetin, a Turkish lawyer, roused the courage to publish the story of her grandmother, another "secret Armenian" rescued by a Turk. Published in November, the book is already into its fifth edition.

In Istanbul members of a newly formed ethnic Armenian women's platform have vowed to shatter negative stereotypes by publicising the works of their successful sisters. "We are fed up with Turkish movies that portray us as hairy, morally promiscuous and money-grubbing creatures," explained one.

In a groundbreaking if modest gesture, Turkey's mildly Islamist prime minister, Recep Tayyip Erdogan, made a joint call last month with the main opposition leader, Deniz Baykal, for an impartial study by historians from both sides of the genocide debate. His reason, he said, was that he did not want "future generations to live under the shadow of continued hatred and resentment." He believes that the findings will show there was no genocide.

The move has been shrugged off by Armenia as a ploy to quash attempts in various EU quarters to link Turkey's membership with recognition of the genocide, as well as deterring America's Congress from a possible resolution mentioning "genocide". Turkish officials retort that the prime minister's call marks the first time any Turkish leader has invited international debate of Turkey's past, albeit a purely academic one. If the government were insincere, they ask, why did the Turkish parliament ask a pair of ethnic Armenian intellectuals to brief it on April 5th?

Hrant Dink, the publisher of *Agos*, a weekly read by Turkey's 60,000-member Armenian community, was one of the questioned intellectuals. He offered plenty of sensible advice. He says that Turkey, rather than getting bogged down in endless wrangles over statistics and terminology, needs to normalise its relations with neighbouring Armenia. As a first step, it should unconditionally open its borders with the tiny, landlocked former Soviet republic. These

were sealed in 1993 after Armenia occupied large chunks of ethnically Turkic Azerbaijan in a bloody conflict over the Nagorno-Karabakh enclave.

Make friends with Armenia, first

Not only would Turkey score valuable credit with the EU and the United States, but mutual trade would blunt the influence of the hawkish Armenian diaspora. A recent survey carried out jointly by a Turkish and Armenian think-tank showed 51% of Turkish respondents and 63% of Armenians in favour of opening the borders.

Even so, mutual hostility prevails. Among the Armenians, 93% said it would be "bad" if their son married a Turkish girl, while 64% of Turks said the same of an Armenian bride. This does not worry the irrepressibly optimistic Mr Dink. "Let's first get to know one another," he declares. "Love will follow."

2. Armenian Genocide - Turkey Trial of Orhan Pamuk - New Yorker

THE NEW YORKER

THE TALK OF THETOWN

COMMENT
ON TRIAL
by Orhan Pamuk
Issue of 2005-12-19

In Istanbul this Friday—where I have spent my whole life, in the courthouse directly opposite the three-story house where my grandmother lived alone for forty years—I will stand before a judge. My crime is to have "publicly denigrated Turkish identity." The prosecutor will ask that I be imprisoned for three years. I should perhaps find it worrying that the Turkish-Armenian journalist Hrant Dink was tried in the same court for the same offense, under Article 301 of the same statute, and was found guilty, but I remain optimistic. For, like my lawyer, I believe that the case against me is thin; I do not think I will end up in jail.

This makes it somewhat embarrassing to see my trial overdramatized. I am only too aware that most of the Istanbul friends from whom I have sought advice have at some point undergone much harsher interrogation and lost many years to court cases and prison sentences just because of a book, just because of something they had written. Living as I do in a country that honors its pashas, saints, and policemen at every opportunity but refuses to honor its writers until they have spent years in courts and in prisons, I cannot say I was surprised to be put on trial. I understand why

friends smile and say that I am at last “a real Turkish writer.” But when I uttered the words that landed me in trouble I was not seeking that kind of honor.

Last February, in an interview published in a Swiss newspaper, I said that “a million Armenians and thirty thousand Kurds had been killed in Turkey”; I went on to complain that it was taboo to discuss these matters in my country. Among the world’s serious historians, it is common knowledge that a large number of Ottoman Armenians were deported, allegedly for siding against the Ottoman Empire during the First World War, and many of them were slaughtered along the way. Turkey’s spokesmen, most of whom are diplomats, continue to maintain that the death toll was much lower, that the slaughter does not count as a genocide because it was not systematic, and that in the course of the war Armenians killed many Muslims, too. This past September, however, despite opposition from the state, three highly respected Istanbul universities joined forces to hold an academic conference of scholars open to views not tolerated by the official Turkish line. Since then, for the first time in ninety years, there has been public discussion of the subject—this despite the spectre of Article 301.

If the state is prepared to go to such lengths to keep the Turkish people from knowing what happened to the Ottoman Armenians, that qualifies as a taboo. And my words caused a furor worthy of a taboo: various newspapers launched hate campaigns against me, with some right-wing (but not necessarily Islamist) columnists going as far as to say that I should be “silenced” for good; groups of nationalist extremists organized meetings and demonstrations to protest my treachery; there were public burnings of my books. Like Ka, the hero of my novel “Snow,” I discovered how it felt to have to leave one’s beloved city for a time on account of one’s political views. Because I did not want to add to the controversy, and did not want even to hear about it, I at first kept quiet, drenched in a strange sort of shame, hiding from the public, and even from my own words. Then a provincial governor ordered a burning of my books, and, following my return to Istanbul, the ?i?li public prosecutor opened the case against me, and I found myself the object of international concern.

My detractors were not motivated just by personal animosity, nor were they expressing hostility to me alone; I already knew that my case was a matter worthy of discussion in both Turkey and the outside world. This was partly because I believed that what stained a country’s “honor” was not the discussion of the black spots in its history but the impossibility of any discussion at all. But it was also because I believed that in today’s Turkey the prohibition against discussing the Ottoman Armenians was a prohibition against freedom of expression, and that the two matters were inextricably linked. Comforted as I was by the interest in my predicament and by the generous gestures of support, there were also times when I felt uneasy about finding myself caught between my country and the rest of the world.

The hardest thing was to explain why a country officially committed to entry in the European Union would wish to imprison an author whose books were well known in Europe, and why it felt compelled to play out this drama (as Conrad might have said) “under Western eyes.” This paradox cannot be explained away as simple ignorance, jealousy, or intolerance, and it is not the only paradox. What am I to make of a country that insists that the Turks, unlike their Western neighbors, are a compassionate people, incapable of genocide, while nationalist political groups are pelting me with death threats? What is the logic behind a state that complains that its enemies spread false

reports about the Ottoman legacy all over the globe while it prosecutes and imprisons one writer after another, thus propagating the image of the Terrible Turk worldwide? When I think of the professor whom the state asked to give his ideas on Turkey's minorities, and who, having produced a report that failed to please, was prosecuted, or the news that between the time I began this essay and embarked on the sentence you are now reading five more writers and journalists were charged under Article 301, I imagine that Flaubert and Nerval, the two godfathers of Orientalism, would call these incidents *bizarreries*, and rightly so.

That said, the drama we see unfolding is not, I think, a grotesque and inscrutable drama peculiar to Turkey; rather, it is an expression of a new global phenomenon that we are only just coming to acknowledge and that we must now begin, however slowly, to address. In recent years, we have witnessed the astounding economic rise of India and China, and in both these countries we have also seen the rapid expansion of the middle class, though I do not think we shall truly understand the people who have been part of this transformation until we have seen their private lives reflected in novels. Whatever you call these new élites—the non-Western bourgeoisie or the enriched bureaucracy—they, like the Westernizing élites in my own country, feel compelled to follow two separate and seemingly incompatible lines of action in order to legitimatize their newly acquired wealth and power. First, they must justify the rapid rise in their fortunes by assuming the idiom and the attitudes of the West; having created a demand for such knowledge, they then take it upon themselves to tutor their countrymen. When the people berate them for ignoring tradition, they respond by brandishing a virulent and intolerant nationalism. The disputes that a Flaubert-like outside observer might call *bizarreries* may simply be the clashes between these political and economic programs and the cultural aspirations they engender. On the one hand, there is the rush to join the global economy; on the other, the angry nationalism that sees true democracy and freedom of thought as Western inventions.

V. S. Naipaul was one of the first writers to describe the private lives of the ruthless, murderous non-Western ruling élites of the post-colonial era. Last May, in Korea, when I met the great Japanese writer Kenzaburo Oe, I heard that he, too, had been attacked by nationalist extremists after stating that the ugly crimes committed by his country's armies during the invasions of Korea and China should be openly discussed in Tokyo. The intolerance shown by the Russian state toward the Chechens and other minorities and civil-rights groups, the attacks on freedom of expression by Hindu nationalists in India, and China's discreet ethnic cleansing of the Uighurs—all are nourished by the same contradictions.

As tomorrow's novelists prepare to narrate the private lives of the new élites, they are no doubt expecting the West to criticize the limits that their states place on freedom of expression. But these days the lies about the war in Iraq and the reports of secret C.I.A. prisons have so damaged the West's credibility in Turkey and in other nations that it is more and more difficult for people like me to make the case for true Western democracy in my part of the world.

(*Translated, from the Turkish, by Maureen Freely.*)

D. Denial of Responsibility by Japan for World War II Acts

1. Nanjing Massacre Leaves a Bitter Legacy

The Japan Times, April 14, 2000

http://www.japantimes.co.jp/news/news4-2000/news4-14.html#story5

Nanjing Massacre leaves history a bitter legacy

By ERIC JOHNSTON

Staff Writer

OSAKA - The Nanjing Massacre took place more than 60 years ago, but the battle over what exactly happened continues to rage.

For the past few years, since the publication of "The Rape of Nanking," by American author Iris Chang, international pressure on Japan to apologize and offer compensation for the Nanking atrocities has grown. In the U.S., several states, including California and Nebraska, have discussed or approved resolutions condemning Japanese actions during the war.

There have always been those in Japan who deny the massacre occurred. But since the publication of Chang's book, an unusually large number of works have appeared supporting these details.

The basic facts of events prior to the incident are not in dispute. On Dec. 12, 1937, after fierce fighting around Nanjing between the Imperial Japanese forces and Chinese soldiers and weeks after Shanghai fell, Japan defeated the last of Chang Kai-shek's Nationalist soldiers and entered the walled city.

What happened next, though, is where the disagreements begin. How many were killed and by whom? Were those who died innocent civilians or soldiers in hiding? How such questions are approached and answered divides those who deny that the massacre occurred form those who stress it is history.

The main reason such questions can be raised is that evidence and eyewitness accounts, although numerous, are scant compared with the voluminous death-camp records kept by the Nazis.

The Holocaust was ruthlessly planned at the highest levels, took place over a period of years and involved the whole of Europe. In contrast, the Nanking Massacre was conducted by troops running amok over a period of several months and in just one city.

Much of the debate focuses on proving or disproving evidence and accounts. At a symposium held here in January that denied the massacre occurred, Osamichi Higashinakano, a professor at Asia University who has written several books on the issue, presented video testimony by former Imperial Japanese military officers who were in Nanjing at the time and said they say no evidence of large-scale murder.

A polished public speaker, Higashinakano's argument rests on four premises. First, because some Japanese soldiers claimed they saw no one in the city when they entered, mass slaughter could not have occurred. Second, although killings occurred, the victims were Chinese soldiers who had stripped off their uniforms, not civilians.

Third, the records of foreigners in the Nanking International Safety Zone do not support claims of large-scale rape or murder, only isolated incidents. And fourth, much of the photographic evidence that later appeared was faked.

"All the evidence indicates that although some killings did occur, nothing like 300,000 people were killed," he said.

The problem with these presumptions is that they take isolated facts to support conclusions, or they are based on highly selective evidence.

For example, Higashinakano is correct when he says German businessman John Rabe, who headed the International Safety Zone, does not record seeing 300,000 people raped and murdered. But Rabe did see many Chinese killed. He estimated in June 1938, after returning to Germany, that between 50,000 and 60,000 had died.

The professor also interviewed former soldiers who denied participating in the mayhem. He does not attempt to address testimony, compiled by journalist Katsuichi Honda, among others, of Japanese soldiers who admitted they took part in the rape.

But Higashinakano has proved persuasive. So much so that a group of Japanese scholars and activists, alarmed at his growing popularity, published a book last year criticizing him and others denying the rape and for telling 13 specific lies.

"Higashinakano uses rhetorical tricks to argue that the Rape of Nanking was first brought up at the Tokyo Trials as a plot to punish Japan, that no one knew about it at the time and that the testimony from the Chinese was unreliable," said Hitotsubashi University professor Yutaka Yoshida, one of the book's authors, who spoke at a separate symposium countering the revisionists' claims earlier this month.

"These claims are proved false by those in Nanking at the time and records of the Foreign Ministry," he said.

Yoshida is referring to a cable sent by then-Foreign Minister Koki Hirota to the Japanese Embassy in Washington on Jan. 17, 1938, about a month after Japanese troops entered the city.

"Hirota tells the Japanese ambassador that reports out of Nanking say 300,000 Chinese have been killed," Yoshida said.

Many Western historians agree that 300,000 people were killed and 20,000 women were raped. As further evidence, they cite the November 1948 verdict of the International Military Tribunal of the Far East. The court concluded that at least 200,000 were killed in Nanjing proper. Historians say that when the number of those killed in outlying areas is added, the figure becomes 300,000.

But Yoshida and other Japanese who firmly believe mass rape and murder were committed have their doubts about this figure.

"The official Japanese view is that somewhere between 150,000 and 200,000 people were killed," Yoshida said. "It is not clear how, exactly, the 300,000 figure was reached."

The number of deaths recorded in scholarly works has ranged from 40,000 to 1 million. For many years after the war, historians, including Barbara Tuchman, whose book "Stilwell and the American Experience in China," won the Pulitzer Prize, used the figure of about 42,000 deaths. In general, source material from 1937 and 1938, including diaries and journalistic dispatches, contains estimates ranging from 40,000 and 300,000 dead.

After the war, the numbers increased to between 100,000 and 200,000 in China and the West. Japanese sources were silent until the textbook controversies of the early 1980s, where figures ranging from only a few to 200,000 were put forth by retired military officers and some academics.

The disagreements stem from the suspicious nature of some of the original testimony. For example, during the Tokyo Trials, the court accepted evidence from Lu Su, a Chinese victim. On Dec. 18, 1937, Lu claimed, the Imperial Japanese Army rounded up 57,418 Chinese and executed them. The court did not ask how Lu, hiding in a cave at the time, could arrive at such a precise figure.

Those who deny the massacre have held up such testimony as proof that Chinese claims are exaggerated. But the very debate over the numbers shows a shift in their position.

"Higashinakano has been forced to admit that killings did occur. This is different from many years ago, when those who deny the rape said there were no murders," Yoshida said.

"What happened at Nanking cannot be denied because it is known around the world. But poor scholars like Higashinakano must be exposed for their lies and half-truths," he added.

But as the past few months have demonstrated, the fight over how the history books will be written is unlikely to end anytime soon.

Also see Donald MacIntyre's article in the Time Magazine:

http://www.cnn.com/ASIANOW/time/magazine/2000/0117/japan.slavelabor.html

2. Japan Denial - Christian Science Monitor 10-21-05

from the October 21, 2005 edition - http://www.csmonitor.com/2005/1021/p01s04-woap.html

Koizumi's visits boost controversial version of history

By Robert Marquand | Staff writer of The Christian Science Monitor

TOKYO - Prime Minister Junichiro Koizumi's fifth visit to the Yasukuni shrine this week on a drizzly morning set off angry protests in Asia. China canceled a visit by the Japanese foreign minister, no small thing. Yasukuni holds the remains of 14 Class A war criminals hanged after World War II, and is regarded as symbol of Japan's perceived failure to atone for its killing sprees in and brutal occupation of Asia 60 years ago.

The Shinto shrine, a solemn wooded acre in downtown Tokyo, private, and filled with purple and yellow chrysanthemums, seems an unlikely focus for either Asian anger or rising Japanese nationalism. Mr. Koizumi says the shrine visits are an internal affair and no one else's business. Some of his advisers feel that if Koizumi keeps visiting, the world will get bored and forget.

Yet a prime reason why that wish may not come true is found on the grounds of the shrine, a few paces from where Koizumi dropped a coin and prayed. It is a boxy refurbished museum called the Yushukan, whose self-professed aim is to "shed a new light on modern Japanese history."

In fact, the museum appears to be regularizing an extremist narrative about Japan's 20th-century military behavior and role in Asia. No mention is made of Japanese soldiers subjugating Asia and

its populations. Rather, the new history portrays Japan as both the martyr and savior of Asia, the one country willing to drive "the foreign barbarians," as one panel describes them, from the Orient.

The unapologetic nationalism, emperor worship, and military glorification offer graphic clues about why Asians remain concerned about "the lessons learned" by Japan after the war, to borrow the phrase used often in post-Nazi Germany.

This week, after Koizumi visited the shrine, thousands of Japanese paid $10 to visit Yushukan, with its 20 rooms, high-tech displays, and two theaters. They saw and heard that Japan occupied China and Korea in order to liberate and protect Asia from Russian Bolshevism and European colonialism. They were told the Japanese attack on Pearl Harbor was "forced" by "a plot" by President Roosevelt. Japanese-led massacres, Korean comfort women, Chinese sex slaves, or tortured POWs are not mentioned. There are only Japanese martyr heroes dying in defense of Japan.

"Ten years ago that museum contained some expressions of regret and remorse for the loss of life, both Japanese and foreign," says Richard Bitzinger of the Asia Pacific Center for Security Studies in Honolulu. "Back then there wasn't an effort to tell a story about the war. Now, it is revisionist. A whitewash. Major battles where many thousands lost their lives on both sides are simply called Japanese 'operations' or 'incidents.' "

In one, the "Nanjing incident," thought to have been a slaughter of as many as 100,000 civilians in 1937, the museum text suggests that only those outside the city who refused to obey were harmed. Once the Japanese Army cleared up the problem, "residents were once again able to live their lives in peace."

"Nanjing is treated as something very minor, like just a few instances, sort of a spring-break party for the soldiers that got a little out of hand," Mr. Bitzinger notes.

In one set of panels about the European war, Adolf Hitler was merely "trying to reclaim the territory lost in World War 1." No mention is made of other contexts, such as the murder of 6 million Jews.

The new history is being implicitly fed to a public that in Japan never got a very honest account anyway, scholars point out. Textbooks and public schools rarely describe the causes of war or Japanese behavior. Moreover, the Japan-is-innocent school is given legitimacy by the country's wildly popular prime minister when he visits the Yasukuni shrine. "It is an extreme version of history being viewed daily by the public," says a foreign diplomat. "When Koizumi goes to the shrine, it sure looks like it could be an endorsement."

At the museum book shop, students and elders walk past merchandise with titles like "The Alleged Nanjing Massacre," and $90 embossed volumes that glorify kamikazi pilots. A glassed-in lobby sports a rebuilt Japanese Zero and a replica train engine used in Burma operations that is strikingly similar to the one that fell in the river in "The Bridge On the River Kwai." There are bulletpocked 15-mm howitzers used in "the defensive war of Okinawa."

To be sure, modern Japan is so cosmopolitan and diverse, and the general tenor of its political culture so mild that few experts see anything like a full-blown resurgent nationalist Japan on the horizon. But the rise of China has worried many Japanese. "Left alone in a domestic context, Japanese don't buy this kind of ideology," notes Professor Yoshihide Soeya of Keio University. "But it comes up due to the concern about China. Sadly, many Chinese believe the Yasukuni shrine thinking represents the majority of Japanese. It does not."

Still, Japan is at a transitional moment, when the old regime forged in the 1950s is dead but no new clear direction has emerged in a defining way.

The museum, which dates to the mid-19th century, was set up to promote what became a powerful notion in the Meiji era (1868-1912) - that the emperor and the Japanese people were one. "One hundred million [Japanese] hearts beat as one," the saying went. That concept was seen as crucial to the intensity and the blind obedience of the military. After the war, emperor worship was forbidden by US occupiers. A recognition of the collective psychosis it engendered has been regarded as a lesson of the war. Yet extremism has persisted: the remains of the 14 Class A war criminals at Yasukuni were put there only in the 1970s, and only secretly.

But on the Yasukuni property, the concept of the emperor as the spiritual leader is quite strong. One poem on display reads: "We shall die in the sea/We shall die in the mountain/In whatever way/We shall die beside the emperor/ Never turning back...."

The thesis of a martyred and misunderstood Japan dates to the end of the war. In 1964 it was articulated by Hayashi Fusao in his "In Affirmation of the Great East Asian War." By the early 1990s, when some texts began showing up with this theory, it was still considered slightly nutty. Now it is appearing in a polished format in the same venue as the prime minister's visits, described as "private."

"In this version of history, Japan has done nothing wrong," says the foreign diplomat. "That is quite a burden to bear."

How Japan was 'forced' into war

In a small theater near an exhibit marked "Spirit of the Samurai," a grainy black-and-white film purports to show how the US went to war with Japan. In it, the US "forced" Japan to attack Pearl Harbor on Dec. 7, 1941. The film shows familiar shots of Franklin Roosevelt, Winston Churchill, and newsreels of Secretary of State Cordell Hull visiting the White House in a top hat, and meeting with Japanese ambassadors.

What is not familiar is the story line. In a version that most historians would refute, Mr. Roosevelt drew Japan into a conflict hoping, in part, this would end the Great Depression: "The only option open to Roosevelt ... was to use embargoes to force resource-poor Japan into war.... The US economy made a complete recovery once the Americans entered."

When Secretary Hull asked Japan to remove its troops from China in the spring of 1941 and to stop the planned invasion of Southeast Asia, this "showed the US was hostile to Japan." As old diplomatic images scroll, a voiceover says: "We had huge interests in China and many fellow countrymen.... We could absolutely not abandon these interests."

US requests during that summer to negotiate were "a pretext for the Americans to initiate hostilities toward Japan."

The timeline speeds up: On July 25, Japanese "advances" into French Indochina give the US "the excuse it needs to adopt hard-line policies against Japan." On Aug. 1, "The US resolves to go to war against Japan." The Aug. 10-14 mid-Atlantic meeting between Roosevelt and Churchill results in a secret agreement to carry out the attack on Japan. On Nov. 7, "The US plan to force Japan in to war is set in motion." Nov. 20: Japanese ambassadors in Washington attempt a final compromise. But by Nov. 25, Roosevelt is "exploring ways of getting Japan to attack."

Chapter 6: Holocaust Restitution Litigation in the United States

A. Overview

1. Unorthodox Justice

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UNORTHODOX JUSTICE

By Michael Bazyler

The Untold Story of How a Team of Feuding Lawyers, a Billionaire Jewish Activist, a U.S. Senator Seeking Reelection, Tenacious New York City and State Comptrollers, and a Deft Brooklyn Federal Judge Negotiated the Swiss Banks Restitution Settlement--Which Is Changing the Way Aggrieved Groups Around the World Are Fighting Back

One day in September 1996, when 66-year-old Auschwitz survivor Gizella Weisshaus made her weekly visit to deliver homemade potato kugel and sponge cake to her attorney and friend Edward Fagan, she set in motion a legal battle that would result in some of the largest legal settlements in United States history--and revitalize the African American reparations movement.

On that day, Fagan showed her a New York Times article on the growing scandal surrounding the failure of Swiss banks to return funds deposited by Jews for safekeeping before and during World War II. He then asked her whether she had any experience with this problem.

To Fagan's astonishment, Weisshaus began to tell him about her fruitless attempts to recover the money that her father, who died in the Holocaust, had deposited in a savings account at the Union Bank of Switzerland (UBS). After the war, Gizella had made three trips to Switzerland, to no avail; UBS demanded documentation, including the account number, which she could not produce.

When Gizella finished her story, Fagan became excited. "Oh, my God," he thought, "I have a plaintiff."

Although he had no experience in class-action litigation, Fagan was always ready to venture into new legal territory--and he wasted no time. Less than two weeks later, working on his laptop during a ballgame at Yankee Stadium, Fagan put the final touches on a $20 billion lawsuit against UBS and the two other largest banks in Switzerland. He listed Weisshaus as lead plaintiff. Employing a tactic he would repeat in later Holocaust restitution litigation, Fagan first delivered the lawsuit to the press. The next day, October 3, 1996, after the media had picked up the story, he filed his suit in Brooklyn federal court. The modern era of Holocaust restitution litigation had begun.

Pressure on the Swiss to return confiscated assets to Holocaust survivors had been building since 1995, when Edgar Bronfman, Sr., the billionaire scion of the Seagram's liquor empire and head of the World Jewish Congress (WJC), began to champion their cause. Alerted to the issue by WJC deputy Rabbi Israel Singer, Bronfman arranged for WJC staffers to research Swiss-related documents at the U.S. National Archives offices in College Park, Maryland. They returned with

U.S. intelligence reports confirming that Swiss banks had collaborated with the Nazis in the purchase and laundering of gold and other stolen assets.

Bronfman and Singer took aim at the three dominant Swiss banks--Union Bank of Switzerland (UBS), Credit Suisse, and the Swiss Bank Corporation (SBC)--all of which had operations in the United States. Bronfman's fiercest political ally would be former New York Senator Alfonse D'Amato, then chairman of the U.S. Senate Banking Committee, who was facing a tough re-election campaign. D'Amato offered to hold public hearings on the matter. As Time magazine would later note: "Bronfman brought [D'Amato] a heaven-sent gift certain to appeal to his large bloc of Jewish voters."

By April 1996, the hearings were underway in the Senate Banking Committee. The story made international headlines. Books began to appear exposing the details of Swiss complicity in what the WJC called "the greatest theft in history"--the expropriation of an estimated $230-$320 billion of Jewish assets by the Nazis and their accomplices.

Denying any wrongdoing, Swiss officials portrayed their country as the victim of a Jewish conspiracy. In December 1996, the outgoing Swiss President Jean-Pascal Delamuraz decried Jewish efforts to create a Swiss fund to compensate Holocaust survivors and heirs as an attack on Swiss sovereignty; he also warned of an antisemitic backlash. A month later, Carlo Jagmetti, Switzerland's ambassador to the United States, was forced to resign after a 1996 memo was leaked to the press in which he advised his government to wage "war against Jewish groups that are seeking compensation for Holocaust victims.... This is a war that Switzerland must wage and win on the foreign and domestic fronts."

This strategy of denial and counterattack failed. Unable to wall off the growing tide of negative publicity that was eroding Switzerland's image both in the U.S. and Europe, the Swiss government announced on February 26, 1997 the establishment of the "Swiss Fund for Needy Victims of the Holocaust/ SHOA." The fund distributed $179 million to 309,000 people around the world, more than 80% to Jewish survivors, mainly in Eastern Europe; what remained was paid to non-Jewish victims, including gypsies, gays, political dissenters, and rescuers of Jews. The individual payouts were small, between $375 and $1,250, depending on the nationality of the recipient. This remedy, however, did not address individual claims against the banks, and it was too little, too late.

At the same time that Fagan was readying the Weisshaus litigation, Washington, D.C. attorney Michael Hausfeld, representing a different group of plaintiffs, was completing exhaustive preparations for a separate lawsuit against the Swiss banks. Hausfeld's firm, described by the Corporate Legal Times as "probably the most effective class-action firm in the country for lawsuits dealing with a strong social and political component," had recently concluded what at that time was the largest class-action settlement in U.S. history: $141 million paid by Texaco to settle a case accusing the corporation of race discrimination in its workforce.

In a highly unorthodox move--the expert testimony of historians had never before been introduced in a class-action suit in U.S. courts--Hausfeld hired Holocaust historians on a full-time basis to search for documents at the U.S. National Archives that might bolster his case by exposing Switzerland's wartime complicity. After months of meticulous research, Hausfeld's historians uncovered a number of "smoking guns" implicating the Swiss as the Nazis' bankers--among them, documents showing that Swiss banks purchased gold stolen by the Nazis from individual victims, including dental gold ripped from the mouths of Jews. One of the historians on the case, Miriam Kleiman, who earlier had conducted similar research for the WJC, would later say, "Before my

eyes I saw Switzerland's reputation change from being a neutral haven for refugees to being an ATM for the Third Reich."

Hausfeld waited until October 21, 1996 to file his class-action suit at Brooklyn federal court. In so doing, he lost the race to the courthouse; Fagan had initiated his class-action suit eighteen days earlier. And two months later, yet another suit was filed against the Swiss banks, this time by the World Council of Orthodox Jewish Communities, a U.S.-based organization that claimed to be the heir to Jewish religious institutions destroyed by the Nazis in Europe.

Three separate lawsuits, encompassing twenty-eight law firms, were now pending in Brooklyn federal court. To assist him with the litigation, Fagan brought aboard New York University Law School professor Burt Neuborne (a constitutional and human rights scholar and a former director of the ACLU) and Philadelphia attorney Robert Swift (who had previously sued Ferdinand Marcos on behalf of the victims of Marcos' dictatorship). For his part, Hausfeld recruited one of the nation's most savvy class-action lawyers, Melvyn Weiss (whose firm is presently lead plaintiffs' counsel in the Enron litigation).

Acrimony among the competing sets of plaintiffs' lawyers quickly ensued. The enmity was so acute that when Hausfeld and Fagan addressed a "Nazi gold" symposium in March 1998, they would not speak to one another. "[Fagan's suit] angered us," Hausfeld later told American Lawyer magazine. "Here we were, taking all this time, and [Fagan] writes this sloppy ten-page thing and makes this silly demand for $20 billion." An unrealistic demand, to be sure, but one that immediately got the attention of the world press. Major pieces about the litigation in The Wall Street Journal, The New York Times, and the European media all highlighted Fagan's $20 billion figure.

By April 1997, the three suits had been consolidated into one--In re Holocaust Victim Assets Litigation--and named as defendants UBS, Credit Suisse, and SBC, which together represented approximately 75% of the private banks operating in Switzerland between 1933-45. The case was assigned to Brooklyn federal judge Edward R. Korman, whose innovative approach to the case would become a model for future restitution settlements.

The strategy of the defense lawyers was to challenge the suit on procedural grounds, filing extensive motions to throw the case out of court. The banks argued that American courts had no jurisdiction over claims stemming from acts committed on foreign soil, and over a half century ago. Moreover, they asserted that they had already established an alternative mechanism for resolving dormant bank claims. Earlier, in response to public pressure, the banks had hired former U.S. Federal Reserve chief Paul Volcker to lead an independent audit of the banks' prewar and wartime records to determine any wrongdoing and resolve the issue of unpaid Holocaust-era monies.

For their part, the plaintiffs' lawyers filed extensive briefs explaining why the U.S. federal court did have jurisdiction over this litigation and why the suits were not time-barred. Because many of the claimants were now U.S. citizens and their claims were against banking entities which operated in the U.S., they argued that American courts did have jurisdiction. As to the passage of time, plaintiffs' lawyers maintained that the banks' retaining funds not legally belonging to them--"unjust enrichment"--amounted to a continuing injury, a wrong for which the clock to file a suit does not run out. Rejecting the claim that litigation was unnecessary, plaintiffs' lawyers pointed out that the Swiss banks had failed to deal with the problem for more than a half century, and that the Volcker audit was yet another device for the banks to avoid confronting their full liability. Only through litigation in U.S. courts, they insisted, would justice finally be served.

The Diplomatic Front

In May 1997, the Clinton administration issued a report on Swiss activities during the war, based upon its own research of the U.S. wartime and postwar archives. Eleven government agencies participated in the study, supervised by Stuart Eizenstat, then assistant secretary of state and later Clinton's chief representative in all matters concerning Holocaust restitution claims. Eizenstat's 212-page report concluded that the Swiss had "profit[ed] handsomely from their economic cooperation with Nazi Germany while the Allied nations were sacrificing blood and treasure to fight one of the most powerful forces in the annals of history."

In December 1997, another important figure in the Holocaust restitution drama appeared on the scene. New York City Comptroller Alan Hevesi announced the creation of a special committee to monitor "international efforts at restoring stolen, lost, and looted property to Holocaust survivors and victims' heirs." He buttressed his demand for a settlement with the very real prospect of financial sanctions against Swiss banks operating in the U.S. Objecting vehemently to the sanctions threat, the Swiss government filed a formal protest with the U.S. State Department. In an effort to prevent further erosion of U.S.-Swiss relations, Eizenstat tried to convince Hevesi that sanctions would be counterproductive, "making it more difficult for us to get a measure of justice for Holocaust survivors." Hevesi stood his ground.

Bowing to the pressure, the Swiss bank defendants announced on June 19, 1998 that they were prepared to settle all claims for $600 million--their "top offer." The amount outraged Jewish leaders. Bronfman called it "an insult." Hevesi, with New York State Comptroller H. Carl McCall at his side, announced at a Manhattan news conference on July 2, 1998 that unless the Swiss banks made a more credible offer, the city and state would introduce a three-stage program of rolling sanctions, ranging from ceasing to make deposits of public funds in Swiss banks to instructing private investment managers investing for the state and city to stop trading through Swiss firms, as well as other unspecified restrictions to be issued in the future. In protest, the Swiss business community placed full-page ads in The New York Times and major media to win public support against a "trade war" between the two nations and urged the Clinton administration to intervene. Speaking for the White House, Eizenstat called on Hevesi and McCall to desist. They refused. Speaking before the Senate Banking Committee, McCall, an African American, explained, "This is not the first time that state and local governments have determined that morality and justice require the imposition of sanctions.... I have been to Capetown; I have seen Nelson Mandela sitting in the Presidential office; and I have heard him say that without sanctions--without visible and painful economic pressure from the United States--he would not be in that seat and, in fact, his nation would not have experienced a peaceful transition to democracy."

Back on the legal front, Judge Korman still had not ruled on the Swiss banks' procedural motions to dismiss the lawsuits. On July 28, 1998, sensing that the timing was right, he called a meeting of the attorneys representing both sides. Breaking with custom, instead of meeting in his chambers, Korman moved the negotiations to a private dining room at the famed Brooklyn steakhouse Gage & Tollner. The parties failed to reach an agreement that night, but two weeks later the plaintiffs' attorneys informed Korman they would settle for $1.5 billion. For the next two days, Korman kept the negotiations moving, interceding when necessary. Finally, on August 12, 1998, just days before the rolling sanctions were to take effect, the Swiss banks agreed to pay $1.25 billion. The plaintiffs' attorneys accepted, and the next day the deal was announced in open court.

Next came the tough question: how would the $1.25 billion be divided? To help him decide, Judge Korman appointed famed New York attorney Judah Gribetz to undertake an unenviable job: reviewing and consolidating submitted suggestions from all interested parties (which eventually numbered more than a thousand) on how to allocate the funds--a plan that Judge Korman would then have to authorize. Two years later, Gribetz sent Korman his nearly 1,000-page plan, which the judge approved in full. In recognition of the fact that the strongest legal claim in the litigation was the failure of the Swiss banks to return moneys deposited for safekeeping on the eve of and during the war, Gribetz allocated the largest portion, $800 million, to these so-called "dormant account" claims. The remaining $425 million went to the other classes of claimants, including slave laborers and survivors who had sought entry into Switzerland but were stopped at the border or expelled from the country.

As of early 2003, approximately 500 individual claims have been processed. Both Jewish and non-Jewish survivors who have not been able to prove entitlement to funds left for them in Swiss banks but who worked as slaves have each received a $1,450 lump sum. One hundred forty-five million dollars has also been distributed from the settlement to the "neediest of the needy" Holocaust survivors--especially those in the former Soviet Union. In addition, some refugees who had been denied entry to Switzerland and laborers who had been forced to work as slaves for Swiss companies operating in Nazi Germany are receiving payouts of approximately $2,500. The goal now is to complete the claims process sometime in 2003. No decision has been reached on the disposition of funds that might remain after all current claims have been satisfied.

One of the most heated issues in the Swiss banks litigation and subsequent Holocaust restitution suits has been whether the plaintiffs' attorneys should be compensated, and if so, how much? Some survivors have argued that the lawyers were engaging in "holy work" and therefore should not charge fees. Others believe they should be paid, but not in the millions while the actual victims receive much less.

In late 2002 and early 2003, Judge Korman awarded approximately $6 million in legal fees, amounting to approximately one-half of one percent (0.05%) of the settlement--an amount substantially lower in percentage terms than the 15-20% usually received by plaintiffs' lawyers in successful class-action cases in American courts. Three of the principal lawyers in the case--Burt Neuborne, Michael Hausfeld, and Mel Weiss--waived their fees. Some of the lawyers who did take fees, including Fagan, donated all or a portion of their fees to those survivors who helped them win the litigation but could not prove that their family had a prewar Swiss bank account. All the principal lawyers, however, went on to earn millions of dollars in subsequent suits. In the German slave labor settlement, for example, they were awarded fees totaling almost $60 million (amounting to 1.2% of the nearly $5 billion settlement), of which Fagan received $4.4 million, Hausfeld $5.8 million, Swift $4.3 million, Neuborne $4.3 million, and Weiss $7.3 million.

The Legacy of the Swiss Banks Settlement

Following the successful litigation against the Swiss banks, lawyers, politicians, and Jewish activists in the United States became emboldened to initiate claims against other governments and corporations, including U.S. companies such as Ford, JP Morgan, and Chase Manhattan, all of which had profited from the Holocaust. JP Morgan and Chase Manhattan (today a joint company) are now making settlement payments because in 1940, after the Nazi conquest of France, their Paris-based branches had "aryanized" (confiscated) accounts of their Jewish clients. Ford agreed to pay for the slave labor used by its German plant in Cologne during World War II. Several major

European insurance companies, including Allianz of Germany, Generali of Italy, and Winterhur of Switzerland, agreed to honor some claims on prewar policies which they had previously denied to Jewish policyholders and to establish a commission to process Holocaust-era insurance claims (1998); German industry and the German government agreed to approximately $5 billion to settle all claims against private German firms for their wartime wrongs--especially for profits earned from the use of both Jewish and non-Jewish slave labor (1999); and more than a dozen French and Austrian banks agreed to pay Holocaust survivors and their heirs $50 million and $40 million respectively for the banks' theft of assets of their Jewish account holders (2001). In addition, beginning in 1998, museums in the United States, Germany, Austria, Switzerland, and other European countries agreed to pay restitution or to return artworks in their collections which had been stolen from their Jewish owners during the war.

Boost to Non-Holocaust Restitution Cases

The Swiss banks case has also revitalized other long-standing claims. Aging survivors of the Armenian genocide have filed suit against New York Life Insurance Company for failure to honor policies sold to their parents and grandparents in Ottoman Turkey before World War I. In July 1999, American POWs and foreign civilians who had been forced into slave labor by the Japanese during the war began filing suits against private Japanese corporations which acted as their masters during the war. (So far, these suits have been unable to achieve the results of the Holocaust restitution cases.) The Washington, D.C.-based Council for Palestinian Restitution and Repatriation has declared its determination "to do for Palestinians driven from their homes in 1948 and 1967 what lawyers for the Jewish survivors of the Holocaust have succeeded in doing for their clients." In response, Jews who had fled or were expelled from Arab lands are preparing lawsuits to win restitution for lost properties. In May 2002, Israel launched a major initiative to preserve, collect, and computerize claims of Jewish refugees from Arab lands.

And now gaining momentum in the U.S. is a case that may dwarf all previous restitution deals: compensation for the enslavement of African Americans. If the governments and corporations which abetted or used slave labor in Europe over a half century ago are legally accountable for their actions, insist leaders of the African American reparations movement, the same should apply to American corporations which benefited from the labor of Africans brought to these shores in chains.

The African American Reparations Movement

Before the settlement by the Swiss banks and other corporate defendants for wartime historical wrongs, Randall Robinson, the chief proponent of reparations for slavery, had received little attention outside the African American community. Suddenly the theoretical became attainable. Robinson lost no time enlisting the services of superstar attorney Johnnie Cochran. Together they recruited a legal "dream team," among them Alexander Pires, Jr., a Washington D.C. lawyer who had recently achieved a $1 billion settlement on behalf of black farmers who had been discriminated against in obtaining federal farm loans, and Professor Charles Ogletree of Harvard Law School, whom American Lawyer magazine labelled in June 2002 as "the Rajah of Reparations" given his long-time advocacy for the cause. Shortly thereafter, Cochran invited Michael Hausfeld to join the team. Hausfeld's original blueprint for the litigation against the Swiss banks, conceived in 1996 and then fine-tuned during the subsequent five years of litigation against the Germans and other European corporate wrongdoers, is now being applied to the legal struggle against American corporate interests with ties to slavery. The once formidable statute of

limitations obstacle with regard to slavery reparations no longer seems insurmountable: it could be overcome either by convincing a court that the wrong continues to the present day and, therefore, the period for filing suit remains open, or by obtaining the passage of a federal or state law extending time-bound statutes, as has been done in Holocaust restitution cases. (In January 2003, however, a federal appeals court in San Francisco did rule that a law enacted by the California legislature extending the statute of limitations was an impermissible intrusion on "the federal government's exclusive power to make and resolve war.") A far more daunting obstacle is the fact that slavery was legal and constitutional in America until its abolition in 1865. And perhaps the greatest challenge is determining the proper class of aggrieved claimants, who, unlike the plaintiffs in the Holocaust restitution slave labor lawsuits, are not the actual victims or their immediate heirs.

With few exceptions, advocates of reparations for slavery in America are not seeking payouts for individual claimants; they want funding for social and educational programs that would benefit the African American community for generations to come. This line of thinking echoes the position of the WJC's Rabbi Israel Singer, who has argued that all Jews are heirs to moneys stolen from deceased Holocaust victims and that the funds should be used "to address the future needs of the Jewish people...to rebuild the Jewish soul and spirit."

While Johnnie Cochran and his team were pondering these thorny legal issues and formulating their strategy, the enterprising Edward Fagan struck again. On March 27, 2002, in the same Brooklyn courthouse where, almost seven years earlier, he had rushed past Hausfeld, Fagan, joined by 36-year-old African American reparations activist and attorney Deadria Farmer-Paellmann, filed a class-action suit on behalf of nearly forty million African Americans. They accused Aetna of profiting from the sale of insurance policies to protect slave owners from loss; FleetBoston and its predecessor, The Providence Bank, of having financed transatlantic slave ships; and CSX, the largest railroad on the East Coast, of profiting from rail networks built by slaves for its predecessor companies. The suit sought unspecified damages, but Fagan and Farmer-Paellmann announced to the press that they would be seeking $1.4 trillion, which they calculated in their complaint to be the current value of unpaid African American slave labor plus interest.

Fagan's race to the courthouse infuriated Cochran, who condemned the suit as a threat to the African American reparations movement; "All you need," Cochran said, "is for one judge to throw a case out and this thing doesn't go anywhere." Fagan, however, is confident that, like their corporate counterparts confronted by Holocaust-era claims, the U.S. corporations named in his suit will eventually see the wisdom of reaching an out-of-court solution. Cochran is not so sure. "It's going to be hard," he says. "There'll be some settlements [and] some victories along the way, but this will be a long battle."

Justice or Extortion?

In the end, Holocaust claimants will receive more than $8 billion. But the restitution movement is not without its Jewish critics. Anti-Defamation League director Abraham Foxman, himself a child survivor, wrote in The Wall Street Journal that restitution from private defendants (the Swiss banks) is a "desecration of the victims...and too high a price to pay for justice we can never achieve." Nationally syndicated columnist Charles Krauthammer accused attorneys representing Holocaust victims of being "shysters" out to commit a "shakedown of Swiss banks, Austrian industry, [and] German auto makers," and warned that "the scramble for money by lawyers could revive anti-Semitism [in Europe]."

Holocaust survivor Roman Kent strongly disagrees that Holocaust restitution is not worth pursuing: "Although 50 years late, we survivors, before we depart, are demanding that the historical facts regarding the role of Switzerland and its banks, and the insurance companies and industrial giants involved in profiteering during the Holocaust be exposed and the truth be known," he wrote in Commentary magazine. "If, as a result of such exposure, long-overdue and token compensation is given to survivors, we deserve it. Justice demands it. History demands it." As to the issue of whether it is fair to make current shareholders pay for the actions of their predecessors, Professor Neuborne argues: "Just as the sins the father should not be visited upon the sons, the unjust profits of the fathers should not be inherited by the sons."

Stuart Eizenstat stands with those who reject Foxman's argument that restitution is "a desecration of the victims." "In every developed nation on earth," he writes in the same issue of Commentary, "the accepted method of compensating the victim when a civil wrong has been committed...is the award of money. Victims of...radiation exposure, oil spills, medical malpractice, and smoking-related illness routinely bring lawsuits.... Why should the victims [of the Holocaust] not have the same right?" As for Foxman's concern that the restitution campaign would fuel antisemitism in Europe, Jerusalem Post columnist Hirsh Goodman counters: "[We should] not allow the antisemites to dictate our agenda."

Overlooked and underplayed in this dispute is the fact that Jews are not the only beneficiaries of the Holocaust restitution movement; in fact, the majority of recipients are non-Jewish wartime survivors or heirs. For example, 80% of those receiving payments from the $5 billion German settlement are elderly Slavs from Eastern Europe dragooned to work for Nazi industries.

Perhaps one of the most significant and lasting outcomes of the Holocaust litigation movement is the creation, in almost fifty European countries, of historical commissions of inquiry, some governmental and others less formal, to examine the wrongs committed by their citizens against their Jewish neighbors during the war. A Swiss commission corroborated most of the allegations filed in the Holocaust litigation and strongly criticized both the private Swiss banks and the Swiss government for their dealings with the Nazis. France's historical commission exposed the long-suppressed looting of Jewish assets in wartime France. An Italian government commission determined that both Italian Fascists and Nazis had systematically plundered Jewish assets in Italy. President Johannes Rau of Germany wrote letters asking for forgiveness to every Holocaust survivor that benefited from the Slave Labor agreement. And in January 2000, in Stockholm, prime ministers and education ministers from forty-three countries assembled to discuss how to teach the younger generation the lessons of the Holocaust.

While tens of thousands of survivors and heirs have benefited from her quest, the elderly survivor who sparked the restitution movement, Gizella Weisshaus--Fagan's lead plaintiff--never received a cent of the settlement. The Swiss banks claimed they could not find any evidence of her father's account. And so Fagan took up her cause once again in December 2002, asking the court to grant her $100,000 of his fees. Judge Korman agreed, and the same month, President George W. Bush signed legislation that made all such payouts tax-free.

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B. Recent U.S. Supreme Court Decisions

1. American Ins. Assoc. v. Garamendi - 123 S.Ct. 2374 (2003)

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, et al., Petitioners,

v.

John GARAMENDI, Insurance Commissioner, State of California.

No. 02-722.

Argued April 23, 2003.

Decided June 23, 2003.

Rehearing Denied Aug. 25, 2003.

See --- U.S. ----, 124 S.Ct. 35.

Insurance companies and a trade association of insurance companies brought action to enjoin Insurance Commissioner of the State of California from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The United States District Court for the Eastern District of California, William B. Shubb, Chief Judge, 186 F.Supp.2d 1099, permanently enjoined enforcement of the statute, and Commissioner appealed. The United States Court of Appeals for the Ninth Circuit, 296 F.3d 832, reversed. Certiorari was granted. The Supreme Court, Justice Souter, held that California's Holocaust Victim Insurance Relief Act (HVIRA), and in particular a provision of the HVIRA requiring any insurer that did business in California and that sold insurance policies in Europe which were in effect during Holocaust-era to disclose certain information about those policies to the California Insurance Commissioner or risk losing its license, impermissibly interfered with the President's conduct of foreign affairs, and was preempted on that basis.

Reversed.

Justice Ginsburg dissented and filed opinion, in which Justice Stevens, Justice Scalia, and Justice Thomas joined.

Opinion

Justice SOUTER delivered the opinion of the Court.

California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA or Act), Cal. Ins.Code Ann. §§ 13800-13807 (West Cum.Supp.2003), requires any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one "related" to it. The issue here is whether HVIRA interferes with the National

Government's conduct of foreign relations. We hold that it does, with the consequence that the state statute is preempted.

I

A

The Nazi Government of Germany engaged not only in genocide and enslavement but theft of Jewish assets, including the value of insurance policies, and in particular policies of life insurance, a form of savings held by many Jews in Europe before the Second World War. Early on in *2380 the Nazi era, loss of livelihood forced Jews to cash in life insurance policies prematurely, only to have the government seize the proceeds of the repurchase, and many who tried to emigrate from Germany were forced to liquidate insurance policies to pay the steep "flight taxes" and other levies imposed by the Third Reich to keep Jewish assets from leaving the country. See G. Feldman, Allianz and the German Insurance Business, 1933-1945, pp. 249-262 (2001). Before long, the Reich began simply seizing the remaining policies outright. [FN1] In 1941, the 11th Decree of the Reich Citizenship Law declared the confiscation of assets (including insurance policies) of Jews deported to the concentration camps, and two years later the 13th Decree did the same with respect to property of the dead, each decree requiring banks and insurance companies to identify Jewish accounts and transmit the funds to the Reich treasury. Id., at 264-274. After the war, even a policy that had escaped confiscation was likely to be dishonored, whether because insurers denied its existence or claimed it had lapsed from unpaid premiums during the persecution, or because the government would not provide heirs with documentation of the policyholder's death. See M. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 117-122 (2003). Responsibility as between the government and insurance companies is disputed, but at the end of the day, the fact is that the value or proceeds of many insurance policies issued to Jews before and during the war were paid to the Reich or never paid at all.

FN1. A vivid precursor of the kind of direct confiscation that would become widespread by 1941 was the Reich's seizure of property and casualty insurance proceeds in the aftermath of the November 1938 Kristallnacht, in which Nazi looting and vandalism inflicted damage to Jewish businesses, homes, and synagogues worth nearly 50 million deutsch marks. Days afterward, a Reich decree mandated that all proceeds of all insurance claims arising from the damage be paid directly to the state treasury, an obligation ultimately settled by German insurance companies with the Reich at a mere pittance relative to full value. See Feldman, at 190-235.

These confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war. At the Potsdam Conference, the United States, Britain, and the Soviet Union took reparations for wartime losses by seizing industrial assets from their respective occupation zones, putting into effect the plan originally envisioned at the Yalta Conference months before. Protocol of Proceedings of the Berlin (Potsdam) Conference, 1945, in 3 Dept. of State, Treaties and Other International Agreements of the United States of America 1776-1949, pp. 1207, 1213-1214 (C. Bevans comp.1969) (hereinafter Bevans); Report of the Crimea (Yalta) Conference, 1945, in 3 Bevans 1005; Protocol of the Crimea (Yalta) Conference on the Question of the German Reparation in Kind, 1945, in 3 Bevans 1020. A year later, the United States was among the parties to an agreement to share seized assets with other western allies

as settlement, as to each signatory nation, of "all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war." Agreement on Reparation from Germany, on the Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, 61 Stat. 3163, Art. 2(A), T.I.A.S. No. 1655 (hereinafter Paris Agreement).

The effect of the Paris Agreement was curtailed, however, and attention to reparations intentionally deferred, when the western allies moved to end their occupation and reestablish a sovereign Germany as a buffer against Soviet expansion. They worried that continued reparations would cripple the new Federal Republic of Germany economically, and so decided in the London Debt Agreement to put off "[c]onsideration of claims arising out of the second World War by countries which *2381 were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich ... until the final settlement of the problem of reparation." Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 449, T.I.A.S. No. 2792. These terms were construed by German courts as postponing resolution of foreign claims against both the German Government and German industry, to await the terms of an ultimate postwar treaty. See Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 Wash. U.L.Q. 795, 813-814, and n. 62 (2002).

In the meantime, the western allies placed the obligation to provide restitution to victims of Nazi persecution on the new West German Government. See Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 4452-4484, as amended by Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, [1955] 6 U.S.T. 4117, T.I.A.S. No. 3425. This had previously been a responsibility of the western military governments, which had issued several decrees for the return of property confiscated by the Nazis. See N. Robinson, Restitution Legislation in Germany: A Survey of Enactments (1949); U.S. Military Law Nos. 52 and 59 (reprinted in U.S. Military Government Gazette, Germany, Issue A, p. 24 (June 1, 1946) and Issue G, p. 1 (Nov. 10, 1947)). West Germany enacted its own restitution laws in 1953 and 1956, see Institute of Jewish Affairs, The (West German) Federal Compensation Law (BEG) and its Implementary Regulations (1957), and signed agreements with 16 countries for the compensation of their nationals, including the Luxembourg Agreement with Israel, Sept. 10, 1952, 162 U.N.T.S. 205; see Supplemental Excerpts of Record in No. 01-17023(CA9)(SER), p. 1244. Despite a payout of more than 100 billion deutsch marks as of 2000, see ibid., these measures left out many claimants and certain types of claims, and when the agreement reunifying East and West Germany, see Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 124, was read by the German courts as lifting the London Debt Agreement's moratorium on Holocaust claims by foreign nationals, class-action lawsuits for restitution poured into United States courts against companies doing business in Germany during the Nazi era. See Neuborne, supra, at 796, n. 2, 813-814; see generally Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 Rich. L.Rev. 1 (2000) (describing the flood of lawsuits after 1996).

These suits generated much protest by the defendant companies and their governments, to the point that the Government of the United States took action to try to resolve "the last great compensation related negotiation arising out of World War II." SER 940 (press briefing by Deputy Secretary of Treasury Eizenstat); see S. Eizenstat, Imperfect Justice 208-212 (2003). From the beginning, the Government's position, represented principally by Under Secretary of State (later Deputy Treasury Secretary) Stuart Eizenstat, stressed mediated settlement "as an alternative to endless litigation"

promising little relief to aging Holocaust survivors. SER 953 (press conference by Secretary of State Albright). Ensuing negotiations at the national level produced the German Foundation Agreement, signed by President Clinton and German Chancellor Schröder in July 2000, in which Germany agreed to enact legislation establishing a foundation funded with 10 billion deutsch marks contributed equally by the German Government and German companies, to be used to compensate all those "who suffered at the hands of German companies during the National Socialist era." Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 Int'l Legal Materials 1298 (2000).

*2382 The willingness of the Germans to create a voluntary compensation fund was conditioned on some expectation of security from lawsuits in United States courts, and after extended dickering President Clinton put his weight behind two specific measures toward that end. SER 937 (letter from President Clinton to Chancellor Schröder committing to a "mechanism to provide the legal peace desired by the German government and German companies"); see also Eizenstat, supra, at 253-258. First, the Government agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." 39 Int'l Legal Materials, at 1303. Though unwilling to guarantee that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," that being an issue for the courts, the Government agreed to tell courts "that U.S. policy interests favor dismissal on any valid legal ground." Id., at 1304. On top of that undertaking, the Government promised to use its "best efforts, in a manner it considers appropriate," to get state and local governments to respect the foundation as the exclusive mechanism. Id., at 1300. [FN2]

FN2. The executive agreement was accompanied by a joint statement signed by the American and German Governments, the Governments of Israel and five Eastern European countries, and the Conference on Jewish Material Claims Against Germany, Inc., "[r]ecognizing that it would be in the participants' interests for the Foundation to be the exclusive remedy and forum" for all Holocaust-era claims against German companies. Excerpt of Record in No. 01-17023(CA9)(ER), pp. 812-816.

As for insurance claims specifically, both countries agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners, the organization of American state insurance commissioners. The job of the ICHEIC, chaired by former Secretary of State Eagleburger, includes negotiation with European insurers to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them. It has thus set up procedures for handling demands against participating insurers, including "a reasonable review ... of the participating companies' files" for production of unpaid policies, "an investigatory process to determine the current status" of insurance policies for which claims are filed, and a "claims and valuation process to settle and pay individual claims," employing "relaxed standards of proof." SER 1236-1237.

In the pact with the United States, Germany stipulated that "insurance claims that come within the scope of the current claims handling procedures adopted by the [ICHEIC] and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." 39 Int'l Legal Materials, at 1299. And in a supplemental agreement formalized in October 2002, the German Foundation agreed to set aside 200 million deutsch marks, to be used for insurance claims approved by the ICHEIC and a portion of the ICHEIC's operating expenses, with another 100 million in reserve if the initial fund should run out. Agreement Concerning Holocaust Era Insurance Claims, in Lodging of Petitioners in Gerling Global Reinsurance Corp. v. Garamendi, No. 02-733, pp. L-70 *2383 to L-71, L-78 to L-79, cert. pending. The foundation also bound itself to contribute 350 million deutsch marks to a "humanitarian fund" administered by the ICHEIC, id., at L-80, and it agreed to work with the German Insurance Association and the German insurers who had joined the ICHEIC, "with a view to publishing as comprehensive a list as possible of holders of insurance policies issued by German companies who may have been Holocaust victims," id., at L-147. Those efforts, which control release of information in ways that respect German privacy laws limiting publication of business records, have resulted in the recent release of the names of over 360,000 Holocaust victims owning life insurance policies issued by German insurers. See Treaster, Holocaust List Is Unsealed by Insurers, N.Y. Times, Apr. 29, 2003, section A, p. 26, col. 6.

The German Foundation pact has served as a model for similar agreements with Austria and France, [FN3] and the United States Government continues to pursue comparable agreements with other countries. Reply Brief for Petitioners 6, n. 2.

FN3. Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, Jan. 18, 2001, 2001 WL 416465; Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," 40 Int'l Legal Materials 523 (2001); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, 2001 WL 935261, Annex A, § 2(n). Though the French agreement does not address insurance, the agreement with Austria does. Austria agreed to devote a $25 million fund for payment of claims processed according to the ICHEIC's procedures. See ibid. Austria also agreed to "make the lists of Holocaust era policy holders publicly accessible, to the extent available." Ibid. The United States Government agreed, in turn, that the settlement fund should be viewed as "the exclusive ... forum" for the resolution of Holocaust-era claims asserted against the Austrian Government or Austrian companies. 40 Int'l Legal Materials, at 524.

B

While these international efforts were underway, California's Department of Insurance began its own enquiry into the issue of unpaid claims under Nazi-era insurance policies, prompting state legislation designed to force payment by defaulting insurers. In 1998, the state legislature made it an unfair business practice for any insurer operating in the State to "fai[l] to pay any valid claim from Holocaust survivors." Cal. Ins.Code Ann. § 790.15(a) (West Cum.Supp.2003). The legislature placed "an affirmative duty" on the Department of Insurance "to play an independent role in representing the interests of Holocaust survivors," including an obligation to "gather, review, and

analyze the archives of insurers ... to provide for research and investigation" into unpaid insurance claims. §§ 12967(a)(1), (2).

State legislative efforts culminated the next year with passage of Assembly Bill No. 600, 1999 Cal. Stats. ch. 827, the first section of which amended the State's Code of Civil Procedure to allow state residents to sue in state court on insurance claims based on acts perpetrated in the Holocaust and extended the governing statute of limitations to December 31, 2010. Cal.Civ.Proc.Code Ann. § 354.5 (West Cum.Supp.2003). The section of the bill codified as HVIRA, at issue here, [FN4] requires "[a]ny insurer currently doing business in the state" to disclose the details of "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" issued "to persons in Europe, which were in effect between 1920 and 1945." Cal. *2384 Ins.Code Ann. § 13804(a) (West Cum.Supp.2003). The duty is to make disclosure not only about policies the particular insurer sold, but also about those sold by any "related company," ibid., including "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer," § 13802(b), [FN5] whether or not the companies were related during the time when the policies subject to disclosure were sold, § 13804(a). Nor is the obligation restricted to policies sold to "Holocaust victims" as defined in the Act, § 13802(a); it covers policies sold to anyone during that time, § 13804(a). The insurer must report the current status of each policy, the city of origin, domicile, or address of each policyholder, and the names of the beneficiaries, § 13804(a), all of which is to be put in a central registry open to the public, § 13803. The mandatory penalty for default is suspension of the company's license to do business in the State, § 13806, and there are misdemeanor criminal sanctions for falsehood in certain required representations about whether and to whom the proceeds of each policy have been distributed, § 13804(b).

FN4. Challenges to Cal.Civ.Proc.Code Ann. § 354.5 (West Cum.Supp.2003) and Cal. Ins.Code Ann. § 790.15 (West Cum.Supp.2003) were dismissed by the District Court for lack of standing, a ruling that was not appealed. See Gerling Global Reinsurance Corp. of America v. Low, 240

F.3d 739, 742-743 (C.A.9 2001).

FN5. These terms are further defined in the commissioner's regulations. Cal.Code Regs., Tit. 10, § 2278.1 (1996). An "affiliate" company is one that "directly, or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the [insurer]." Cal. Ins.Code Ann. § 1215(a) (West 1993) (cross-referenced in § 2278.1(e)). A "[m]anaging [g]eneral [a]gent" is a company that "negotiates and binds ceding reinsurance contracts on behalf of an insurer or manages all or part of the insurance business of an insurer." § 769.819(c) (cross-referenced in § 2278.1(c)). A "reinsurer" is "a parent, subsidiary or affiliate of the insurer that provides reinsurance." Cal.Code Regs., Tit. 10, § 2278.1(i) (1996).

HVIRA was meant to enhance enforcement of both the unfair business practice provision (§ 790.15) and the provision for suit on the policies in question (§ 354.5) by "ensur[ing] that any involvement [that licensed California insurers] or their related companies may have had with insurance policies of Holocaust victims are [sic] disclosed to the state." § 13801(e); see ibid. (HVIRA is designed to "ensure the rapid resolution" of unpaid insurance claims, "eliminating the further victimization of these policyholders and their families"); Excerpt of Record in No. 01-17023(CA9)(ER), p. 994 (California Senate Committee on Insurance report) (HVIRA was

proposed to "ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims"). While the legislature acknowledged that "[t]he international Jewish community is in active negotiations with responsible insurance companies through the [ICHEIC] to resolve all outstanding insurance claims issues," it still thought the Act "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." § 13801(f).

After HVIRA was enacted, administrative subpoenas were issued against several subsidiaries of European insurance companies participating in the ICHEIC. See, e.g., SER 785, 791. Immediately, in November 1999, Deputy Secretary Eizenstat wrote to the insurance commissioner of California that although HVIRA "reflects a genuine commitment to justice for Holocaust victims and their families, it has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the [ICHEIC]." SER 975. The Deputy Secretary said that "actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors," and he also noted that ICHEIC Chairman Eagleburger had expressed his opposition to "sanctions and other pressures brought by California on companies *2385 with whom he is obtaining real cooperation." Id., at 976. The same day, Deputy Secretary Eizenstat also wrote to California's Governor making the same points, and stressing that HVIRA would possibly derail the German Foundation Agreement: "Clearly, for this deal to work ... German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." Id., at 970. These expressions of the National Government's concern proved to be of no consequence, for the state commissioner announced at an investigatory hearing in December 1999 that he would enforce HVIRA to its fullest, requiring the affected insurers to make the disclosures, leave the State voluntarily, or lose their licenses. ER 1097.

II

After this ultimatum, the petitioners here, several American and European insurance companies and the American Insurance Association (a national trade association), filed suit for injunctive relief against respondent insurance commissioner of California, challenging the constitutionality of HVIRA. The District Court issued a preliminary injunction against enforcing the Act, reflecting its probability judgment that "HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause." App. to Pet. for Cert. 110a. On appeal, the Ninth Circuit rejected these grounds for questioning the Act but left the preliminary injunction in place until the District Court could consider whether plaintiffs were likely to succeed on their due process claim. Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739, 754 (C.A.9 2001).

On remand, the District Court addressed two points. Although it held the Act to be within the State's "legislative jurisdiction," as it applied only to insurers licensed to do business in the State, the District Court granted summary judgment to the petitioners on the ground of a procedural due process violation in "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." Gerling Global Reinsurance Corp. of America v. Low, 186 F.Supp.2d 1099, 1108, 1113 (E.D.Cal.2001). In a second appeal, the same panel of the Ninth Circuit reversed again. While it agreed that the Act was not beyond the State's legislative authority, the Court of Appeals rejected the conclusion that procedural due process required an

opportunity for insurers to raise an impossibility excuse for noncompliance with the law, 296 F.3d 832, 845-848 (C.A.9 2002), and it reaffirmed its prior ruling that the Act violated neither the foreign affairs nor the foreign commerce powers, id., at 849. Given the importance of the issue, [FN6] we granted certiorari, 537 U.S. 1100, 123 S.Ct. 817, 154 L.Ed.2d 768 (2003), and now reverse. [FN7]

FN6. Several other States have passed laws similar to HVIRA. See Holocaust Victims Insurance Act, Fla. Stat. § 626.9543 (Cum.Supp.2003); Holocaust Victims Insurance Act, Md. Ins.Code Ann. §§ 28-101 to 28- 110 (2002); Holocaust Victims Insurance Relief Act of 2000, Minn.Stat. § 60A.053 (Cum.Supp.2003); Holocaust Victims Insurance Act of 1998, N.Y. Ins. Law §§ 2701-2711 (Consol.2000); Holocaust Victims Insurance Relief Act of 1999, Wash. Rev.Code §§ 48.104.010-48.104.903 (2003); see also Ariz.Rev.Stat. Ann. § 20-490 (West Cum.Supp.2003); Texas Ins.Code Ann. Art. 21.74 (2003). And similar bills have been proposed in other States. See, e.g., Mass. Senate Bill No. 843 (Jan. 1, 2003).

FN7. Two petitions for certiorari were filed, one by the petitioners in this case (No. 02-722), and one, raising additional issues, by the Gerling Companies (No. 02-733), which were also appellees below. Our grant of certiorari in No. 02-722 encompassed three of the questions addressed by the Ninth Circuit: whether HVIRA intrudes on the federal foreign affairs power, violates the self-executing element of the Foreign Commerce Clause, or exceeds the State's "legislative jurisdiction." Pet. for Cert. I. Because we hold that HVIRA is preempted under the foreign affairs doctrine,

we have no reason to address the other questions.

*2386 III

[1] The principal argument for preemption made by petitioners and the United States as amicus curiae is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France. The major premises of the argument, at least, are beyond dispute. There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); see Crosby v. National Foreign Trade Council, 530 U.S. 363, 381-382, n. 16, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (" '[T]he peace of the WHOLE ought not to be left at the disposal of a PART' " (quoting The Federalist No. 80, pp. 535-536 (J. Cooke ed.1961) (A. Hamilton))); The Federalist No. 44, p. 299 (J. Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"); The Federalist No. 42, p. 279 (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"); see also First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (plurality opinion) (act of state doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations"); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) (negative Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries (internal quotation marks omitted)).

[2] Nor is there any question generally that there is executive authority to decide what that policy should be. Although the source of the President's power to act in foreign affairs does not enjoy any

textual detail, the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring). While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act. See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109, 68 S.Ct. 431, 92 L.Ed. 568 (1948) ("The President ... possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); Youngstown, supra, at 635-636, n. 2, 72 S.Ct. 863 (Jackson, J., concurring in judgment and opinion of Court) (the President can "act in external affairs without congressional authority" (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936))); First Nat. City Bank v. Banco Nacional de Cuba, supra, at 767, 92 S.Ct. 1808 (the President has "the lead role ... in foreign policy" (citing Sabbatino, supra)); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs").

[3] [4] At a more specific level, our cases have recognized that the President has authority to make "executive agreements" with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic. See *2387 Dames & Moore v. Regan, 453 U.S. 654, 679, 682-683, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); United States v. Pink, 315 U.S. 203, 223, 230, 62 S.Ct. 552, 86 L.Ed. 796 (1942); United States v. Belmont, 301 U.S. 324, 330-331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); see also L. Henkin, Foreign Affairs and the United States Constitution 219, 496, n. 163 (2d ed.1996) ("Presidents from Washington to Clinton have made many thousands of agreements ... on matters running the gamut of U.S. foreign relations"). Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799, when the Washington administration settled demands against the Dutch Government by American citizens who lost their cargo when Dutch privateers overtook the schooner Wilmington Packet. See Dames & Moore, supra, at 679-680, and n. 8, 101 S.Ct. 2972; 5 Dept. of State, Treaties and Other International Acts of the United States 1075, 1078-1079 (H. Miller ed.1937). Given the fact that the practice goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable." Pink, supra, at 240, 62 S.Ct. 552 (Frankfurter, J., concurring); see 315 U.S., at 223-225, 62 S.Ct. 552 (opinion of the Court); Belmont, supra, at 330-331, 57 S.Ct. 758; Dames & Moore, supra, at 682, 101 S.Ct. 2972.

The executive agreements at issue here do differ in one respect from those just mentioned insofar as they address claims associated with formerly belligerent states, but against corporations, not the foreign governments. But the distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy, and three of the postwar settlements dealing with reparations implicating private parties were made by the Executive alone. [FN8] Acceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience. As shown by the history of insurance confiscation mentioned earlier, untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments. While a sharp line between public and

private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies. Cf. Pink, supra, at 234-242, 62 S.Ct. 552 (Frankfurter, J., concurring) (noting the unsoundness of transplanting "judicial subtleties" of domestic law into "the solution of analogous problems between friendly nations").

FN8. The Yalta and Potsdam Agreements envisioning dismantling of Germany's industrial assets, public and private, and the follow-up Paris Agreement aspiring to settle the claims of western nationals against the German Government and private agencies were made as executive agreements. See supra, at 2380 (citing agreements); see also L. Margolis, Executive Agreements and Presidential Power in Foreign Policy 15-16 (1986).

[5] Generally, then, valid executive agreements are fit to preempt state law, just as treaties are, [FN9] and if the agreements *2388 here had expressly preempted laws like HVIRA, the issue would be straightforward. See Belmont, supra, at 327, 331, 57 S.Ct. 758; Pink, supra, at 223, 230-231, 62 S.Ct. 552. But petitioners and the United States as amicus curiae both have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody. Reliance is placed on our decision in Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).

FN9. Subject, that is, to the Constitution's guarantees of individual rights. See Reid v. Covert, 354 U.S. 1, 15-19, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); Boos v. Barry, 485 U.S. 312, 324, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). Even Justice Sutherland's reading of the National Government's "inherent" foreign affairs power in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), contained the caveat that the power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Id., at 320, 57 S.Ct. 216.

Zschernig dealt with an Oregon probate statute prohibiting inheritance by a nonresident alien, absent showings that the foreign heir would take the property "without confiscation" by his home country and that American citizens would enjoy reciprocal rights of inheritance there. Id., at 430-431, 88 S.Ct. 664. Two decades earlier, Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947), had held that a similar California reciprocity law "did not on its face intrude on the federal domain," Zschernig, supra, at 432, 88 S.Ct. 664, but by the time Zschernig (an East German resident) brought his challenge, it was clear that the Oregon law in practice had invited "minute inquiries concerning the actual administration of foreign law," 389 U.S., at 435, 88 S.Ct. 664, and so was providing occasions for state judges to disparage certain foreign regimes, employing the language of the anti-Communism prevalent here at the height of the Cold War, see id., at 440, 88 S.Ct. 664 (the Oregon law had made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own"). Although the Solicitor General, speaking for the State Department, denied that the state statute "unduly interfere[d] with the United States' conduct of foreign relations," id., at 434, 88 S.Ct. 664 (internal quotation marks omitted), the Court was not deterred from exercising its own judgment to invalidate the law as an "intrusion by the State into

the field of foreign affairs which the Constitution entrusts to the President and the Congress," id., at 432, 88 S.Ct. 664.

The Zschernig majority relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict. The Court cited the pronouncement in Hines v. Davidowitz, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941), that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." See 389 U.S., at 432, 88 S.Ct. 664; id., at 442-443, 88 S.Ct. 664 (Stewart, J., concurring) (setting out the foregoing quotation). Likewise, Justice Stewart's concurring opinion viewed the Oregon statute as intruding "into a domain of exclusively federal competence." Id., at 442, 88 S.Ct. 664; see also Belmont, 301 U.S., at 331, 57 S.Ct. 758 ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states" (citing Curtiss-Wright Export Corp., 299 U.S., at 316, 57 S.Ct. 216 et seq.)).

Justice Harlan, joined substantially by Justice White, disagreed with the Zschernig majority on this point, arguing that its implication of preemption of the entire field of foreign affairs was at odds with some other cases suggesting that in the absence of positive federal action "the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." 389 U.S., at 459, 88 S.Ct. 664 (opinion concurring in result) (citing cases); see *2389 id., at 462, 88 S.Ct. 664 (White, J., dissenting). [FN10] Thus, for Justice Harlan it was crucial that the challenge to the Oregon statute presented no evidence of a "specific interest of the Federal Government which might be interfered with" by the law. Id., at 459, 88 S.Ct. 664 (opinion concurring in result); see id., at 461, 88 S.Ct. 664 (finding "no evidence of adverse effect in the record"). He would, however, have found preemption in a case of "conflicting federal policy," see id., at 458-459, 88 S.Ct. 664, and on this point the majority and Justices Harlan and White basically agreed: state laws "must give way if they impair the effective exercise of the Nation's foreign policy," id., at 440, 88 S.Ct. 664 (opinion of the Court). See also Pink, 315 U.S., at 230-231, 62 S.Ct. 552 ("[S]tate law must yield when it is inconsistent with, or impairs ... the superior Federal policy evidenced by a treaty or international compact or agreement"); id., at 240, 62 S.Ct. 552 (Frankfurter, J., concurring) (state law may not be allowed to "interfer[e] with the conduct of our foreign relations by the Executive").

FN10. Justice Harlan concurred in the majority's result because he

would have found the Oregon statute preempted by a 1923 treaty with Germany. 389 U.S., at 457, 88 S.Ct. 664. This required overruling the Court's construction of that treaty in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947), which Justice White, in dissent, declined to do, 389 U.S., at 462, 88 S.Ct. 664.

[6] It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the Zschernig opinions, [FN11] but the question requires no answer here. For even on Justice Harlan's

view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law. And since on his view it is legislation within "areas of ... traditional competence" that gives a State any claim to prevail, 389 U.S., at 459, 88 S.Ct. 664, it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted. Cf. Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 768-769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (under negative Commerce Clause, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved"); Henkin, Foreign Affairs and the United States Constitution, at 164 (suggesting a test that "balance[s] the state's interest in a regulation against the impact on U.S. foreign relations"); Maier, Preemption of State Law: A Recommended Analysis, 83 Am. J. Int'l L. 832, 834 (1989) (similar). *2390 Judged by these standards, we think petitioners and the Government have demonstrated a sufficiently clear conflict to require finding preemption here.

FN11. The two positions can be seen as complementary. If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., Hines v. Davidowitz, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Where, however, a State has acted within what Justice Harlan called its "traditional competence," 389 U.S., at 459, 88 S.Ct. 664, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the

strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question. Cf. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) (congressional occupation of the field is not to be presumed "in a field which the States have traditionally occupied"); Boyle v. United Technologies Corp., 487 U.S. 500, 507-508, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) ("In an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption").

IV

A

To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, Pink, supra, at 225, 62 S.Ct. 552, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries, Dames & Moore, 453 U.S., at 679, 101 S.Ct. 2972. The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in

wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.

The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two. The foregoing account of negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions. See also, e.g., Hearings on H.R. 2693 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (statement of Ambassador Randolph M. Bell that it is the "policy of the U.S. Government" "to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation"); Hearings on the Status of Insurance Restitution for Holocaust Victims and the Heirs before the House Committee on Government Reform 107th Cong., 1st Sess., 77 (2001) (statement of Ambassador J.D. Bindenagel to the same effect). As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information. See German Foundation Agreement, 39 Int'l Legal Materials, at 1299, 1303 (declaring the German Foundation to be the "exclusive forum" for demands against German companies and agreeing to have insurance claims resolved under procedures developed through negotiation with the ICHEIC); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, 2001 WL 935261, Annex A, § 2(n) (same for Austria). This position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch, as mentioned already, ante, at 2384-2385. See also, e.g., Hearing before the Committee on House Banking and Financial Services 106th Cong., 2d Sess., 173 (2000) (Deputy Secretary Eizenstat statement that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World *2391 War II era"); Hearings on H.R. 2693, at 24 (statement by Ambassador Bell to the same effect); Hearing on the Legacies of the Holocaust before the Senate Committee on Foreign Relations, 106th Cong., 2d Sess., 23 (2000) (Eizenstat testimony that a company's participation in the ICHEIC should give it " 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period"). [FN12] The approach taken serves to resolve the several competing matters of national concern apparent in the German Foundation Agreement: the national interest in maintaining amicable relationships with current European allies; survivors' interests in a "fair and prompt" but nonadversarial resolution of their claims so as to "bring some measure of justice ... in their lifetimes"; and the companies' interest in securing "legal peace" when they settle claims in this fashion. 39 Int'l Legal Materials, at 1304. As a way for dealing with insurance claims, moreover, the voluntary scheme protects the companies' ability to abide by their own countries' domestic privacy laws limiting disclosure of policy information. See Brief for Federal Republic of Germany as Amicus Curiae 12-13. [FN13]

FN12. In Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 328-330, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994), we declined to give policy statements by Executive Branch officials conclusive weight as against an opposing congressional policy in determining whether California's "worldwide combined reporting" tax method violated the Foreign

Commerce Clause. The reason, we said, is that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.' " Id., at 329, 114 S.Ct. 2268 (quoting Art. I, § 8, cl. 3). As we have discussed, however, in the field of foreign policy the President has the "lead role." First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972).

FN13. The dissent would discount the executive agreements as evidence of the Government's foreign policy governing disclosure, saying they "do not refer to state disclosure laws specifically, or even to information disclosure generally." Post, at 2400-2401 (opinion of GINSBURG, J.). But this assertion gives short shrift to the agreements' express endorsement of the ICHEIC's voluntary mechanism, which encompasses production of policy information, not just actual payment of unpaid claims. See supra, at 2382-2383. The dissent would also dismiss the other Executive Branch expressions of the Government's policy, see supra, at 2384-2385, 2390- 2391, insisting on nothing short of a formal statement by the President himself. See post, at 2401. But there is no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is no apparent reason for adopting the dissent's

"nondelegation" rule to apply within the Executive Branch.

California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail. The situation created by the California legislation calls to mind the impact of the Massachusetts Burma law on the effective exercise of the President's power, as recounted in the statutory preemption case, Crosby v. National Foreign Trade Council, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, employs "a different, state system of economic pressure," and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it. Id., at 376, 120 S.Ct. 2288. Whereas the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding "the coercive power of the national economy" as a tool of diplomacy, id., at 377, 120 S.Ct. 2288, HVIRA denies this, by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure. "Quite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." Ibid. (citing Dames & Moore, 453 U.S., at 673, 101 S.Ct. 2972). The law thus "compromise[s] the very capacity*2392 of the President to speak for the Nation with one voice in dealing with other governments" to resolve claims against European companies arising out of World War II. 530 U.S., at 381, 120 S.Ct. 2288. [FN14]

FN14. It is true that the President in this case is acting without express congressional authority, and thus does not have the "plenitude of Executive authority" that "controll[ed] the issue of preemption" in Crosby v. National Foreign Trade Council, 530 U.S. 363, 376, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). But in Crosby we were careful to note that the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, id., at 381, 120 S.Ct. 2288, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.

Crosby's facts are replicated again in the way HVIRA threatens to frustrate the operation of the particular mechanism the President has chosen. The letters from Deputy Secretary Eizenstat to California officials show well enough how the portent of further litigation and sanctions has in fact placed the Government at a disadvantage in obtaining practical results from persuading "foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC." Brief for United States as Amicus Curiae 15; see also SER 1267, 1272 (Joint Statement with Switzerland noting the "potentially disruptive and counterproductive effects" of laws like HVIRA and promising effort by the United States to call on state legislatures "to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers"). In addition to thwarting the Government's policy of repose for companies that pay through the ICHEIC, California's indiscriminate disclosure provisions place a handicap on the ICHEIC's effectiveness (and raise a further irritant to the European allies) by undercutting European privacy protections. See ER 1182, 3131 (opinions of the German Government that public disclosure of all European insurance policies "is not permissible" under German privacy law); Brief for United States as Amicus Curiae 18 (noting protests from the German and Swiss Governments). It is true, of course, as it is probably true of all elements of HVIRA, that the disclosure requirement's object of obtaining compensation for Holocaust victims is a goal espoused by the National Government as well. But "[t]he fact of a common end hardly neutralizes conflicting means," Crosby, supra, at 379, 120 S.Ct. 2288, and here HVIRA is an obstacle to the success of the National Government's chosen "calibration of force" in dealing with the Europeans using a voluntary approach, 530 U.S., at 380, 120 S.Ct. 2288.

B

The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.

The commissioner would justify HVIRA's ambitious disclosure requirement as protecting "legitimate consumer protection interests" in knowing which insurers have failed to pay insurance claims. Brief for Respondent 1, 42-44. But, quite unlike a generally applicable "blue sky" law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago. Cal. Ins.Code Ann. § 13804(a) (West Cum.Supp.2003); see also § 790.15(a) (mandating license suspension only for "fail[ure] to pay any valid claim from Holocaust survivors"). Limiting the public disclosure requirement to these policies raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State.

*2393 Indeed, there is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State. § 13801(d) (legislative finding that roughly 5,600 documented Holocaust survivors reside in California). But this fact does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one. "Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a

move little or no significance." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 820, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see Allstate Ins. Co. v. Hague, 449 U.S. 302, 311, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) ("[A] postoccurrence change of residence to the forum State--standing alone--[i]s insufficient to justify application of forum law").

But should the general standard not be displaced, and the State's interest recognized as a powerful one, by virtue of the fact that California seeks to vindicate the claims of Holocaust survivors? The answer lies in recalling that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements, there being about 100,000 survivors in the country, only a small fraction of them in California. ER 870 (press release of insurance commissioner of California); Bazyler, 34 Rich. L.Rev., at 8, n. 11. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.

C

The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives." Crosby, supra, at 386, 120 S.Ct. 2288.

V

The State's remaining submission is that even if HVIRA does interfere with Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act, 59 Stat. 33, ch. 20, 15 U.S.C. §§ 1011-1015, and the more recent U.S. Holocaust Assets Commission Act of 1998 (Holocaust Commission Act), 112 Stat. 611, note following 22 U.S.C. § 1621. There is, however, no need to consider the possible significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy, cf. generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S., at 637-638, 72 S.Ct. 863 (Jackson, J., concurring in judgment and opinion of Court), for neither statute does the job the commissioner ascribes to it.

[7] The provisions of the McCarran-Ferguson Act said to be relevant here specify that "[t]he business of insurance" shall be recognized as a subject of state regulation, 15 U.S.C. § 1012(a), which will be good against preemption by federal legislation unless that legislation "specifically relates to the business of insurance," § 1012(b); see also § 1011 (policy behind § 1012 is that "continued regulation and taxation by the several States of the business of insurance is in the public interest" and "silence on the part of the Congress *2394 shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"). As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised. Compare Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-430, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), with United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); see Department of Treasury v. Fabe, 508 U.S. 491, 499-500, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). Quite apart, then, from any doubt whether HVIRA would qualify as

regulating "the business of insurance" given its tangential relation to present-day insuring in the State, see FTC v. Travelers Health Assn., 362 U.S. 293, 300-301, 80 S.Ct. 717, 4 L.Ed.2d 724 (1960) (McCarran-Ferguson was not intended to allow a State to "regulate activities carried on beyond its own borders"), a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.

[8] Nor does the Holocaust Commission Act authorize HVIRA. That Act set up a Presidential Commission to "study and develop a historical record of the collection and disposition" of Holocaust era assets that "came into the possession or control of the Federal Government." Pub.L. 105-186, § 3(a)(1), 112 Stat. 612. For this purpose, Congress directed the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 613. These provisions are no help to HVIRA. The Commission's focus was limited to assets in the possession of the Government, and if anything, the federal Act assumed it was the National Government's responsibility to deal with returning those assets. See § 3(d), 112 Stat. 614 (President to collect recommendations from the commission and submit a suggested plan for "legislative, administrative, or other action" to Congress). In any event, the federal Act's reference to the state insurance commissioners as compiling information was expressly limited "to the degree the information is available," § 3(a)(4)(B), 112 Stat. 613, a proviso that can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims.

Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law. See H.R. 1210, 108th Cong., 1st Sess. (2003); S. 972, 108th Cong., 1st Sess. (2003); H.R. 2693, 107th Cong., 1st Sess. (2001); H.R. 126, 106th Cong., 1st Sess. (1999).

In sum, Congress has not acted on the matter addressed here. Given the President's independent authority "in the areas of foreign policy and national security, ... congressional silence is not to be equated with congressional disapproval." Haig v. Agee, 453 U.S. 280, 291, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

VI

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

So ordered.

2. Republic of Austria v. Altmann

Supreme Court of the United States

REPUBLIC OF AUSTRIA et al., Petitioners,

v.

Maria V. ALTMANN.

No. 03-13.

Argued Feb. 25, 2004.

Decided June 7, 2004.

Background: Heir of original owner of paintings sued Republic of Austria and state-owned Austrian gallery, seeking return of paintings taken by Nazis in violation of international law. Austria moved to dismiss. The United States District Court for the Central District of California, Florence-Marie Cooper, J., 142 F.Supp.2d 1187, denied motion. Defendants appealed. The Court of Appeals for the Ninth Circuit, 317 F.3d 954, affirmed and remanded. Petition for rehearing was filed. The Court of Appeals, 327 F.3d 1246, denied rehearing and amended opinion. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that Foreign Sovereign Immunities Act (FSIA) applies to conduct that occurred prior to its enactment, and before the United States' adoption of the restrictive theory of sovereign immunity.

Affirmed.

Justice Scalia filed a concurring opinion.

Justice Breyer filed a concurring opinion, in which Justice Souter joined.

Justice Kennedy filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.

Opinion

Justice STEVENS delivered the opinion of the Court.

In 1998 an Austrian journalist, granted access to the Austrian Gallery's archives, discovered evidence that certain valuable works in the Gallery's collection had not been donated by their rightful owners but had been seized by the Nazis or expropriated by the Austrian Republic after World War II. The journalist provided some of that evidence to respondent, who in turn filed this action to recover possession of six Gustav Klimt paintings. Prior to the Nazi invasion of Austria, the paintings had hung in the palatial Vienna home of respondent's uncle, Ferdinand Bloch-Bauer, a Czechoslovakian Jew and patron of the arts. Respondent claims ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She alleges that the Gallery obtained possession of the paintings through wrongful conduct in the years during and after World War II.

The defendants (petitioners here)--the Republic of Austria and the Austrian Gallery (Gallery), an instrumentality of the Republic--filed a motion to dismiss the complaint asserting, among other

defenses, a claim of sovereign immunity. The District Court denied the motion, 142 F.Supp.2d 1187 (C.D.Cal.2001), and the Court of Appeals affirmed, 317 F.3d 954 (C.A.9 2002), as amended, 327 F.3d 1246 (2003). We granted certiorari limited to the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1602 et seq., which grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including "cases ... in which rights in property taken in violation of international law are in issue," § 1605(a)(3), applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the so-called "restrictive theory" of sovereign immunity in 1952. 539 U.S. 987, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003).

I

Because this case comes to us from the denial of a motion to dismiss on the pleadings, we assume the truth of the following facts alleged in respondent's complaint.

Born in Austria in 1916, respondent Maria V. Altmann escaped the country after it was annexed by Nazi Germany in 1938. She settled in California in 1942 and became an American citizen in 1945. She is a niece, and the sole surviving named heir, of Ferdinand Bloch-Bauer, who died in Zurich, Switzerland, on November 13, 1945.

Prior to 1938 Ferdinand, then a wealthy sugar magnate, maintained his principal residence in Vienna, Austria, where the six Klimt paintings and other valuable works of art were housed. His wife, Adele, was the subject of two of the paintings. She died in 1925, leaving a will in which she "ask[ed]" her husband "after his death" to *2244 bequeath the paintings to the Gallery. [FN1] App. 187a, ¶ 81. The attorney for her estate advised the Gallery that Ferdinand intended to comply with his wife's request, but that he was not legally obligated to do so because he, not Adele, owned the paintings. Ferdinand never executed any document transferring ownership of any of the paintings at issue to the Gallery. He remained their sole legitimate owner until his death. His will bequeathed his entire estate to respondent, another niece, and a nephew.

FN1. Adele's will mentions six Klimt paintings, Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apple Tree I, Beechwood, Houses in Unterach am Attersee, and Schloss Kammer am Attersee III. The last of these, Schloss Kammer am Attersee III, is not at issue in this case because Ferdinand donated it to the Gallery in 1936. The sixth painting in this case, Amalie Zuckerkandl, is not mentioned in Adele's will. For further details, see 142 F.Supp.2d 1187, 1192-1193 (C.D.Cal.2001).

On March 12, 1938, in what became known as the "Anschluss," the Nazis invaded and claimed to annex Austria. Ferdinand, who was Jewish and had supported efforts to resist annexation, fled the country ahead of the Nazis, ultimately settling in Zurich. In his absence, according to the complaint, the Nazis "Aryanized" the sugar company he had directed, took over his Vienna home, and divided up his artworks, which included the Klimts at issue here, many other valuable paintings, and a 400-piece porcelain collection. A Nazi lawyer, Dr. Erich Führer, took possession of the six Klimts. He sold two to the Gallery in 1941 [FN2] and a third in 1943, kept one for himself, and sold another to the Museum of the City of Vienna. The immediate fate of the sixth is not known. 142 F.Supp.2d, at 1193.

FN2. More precisely, he traded Adele Bloch-Bauer I and Apple Tree I to the Gallery for Schloss Kammer am Attersee III, which he then sold to a third party.

In 1946 Austria enacted a law declaring all transactions motivated by Nazi ideology null and void. This did not result in the immediate return of looted artwork to exiled Austrians, however, because a different provision of Austrian law proscribed export of "artworks ... deemed to be important to [the country's] cultural heritage" and required anyone wishing to export art to obtain the permission of the Austrian Federal Monument Agency. App. 168a, ¶ 32. Seeking to profit from this requirement, the Gallery and the Federal Monument Agency allegedly adopted a practice of "forc[ing] Jews to donate or trade valuable artworks to the [Gallery] in exchange for export permits for other works." Id., at 168a, ¶ 33.

The next year Robert Bentley, respondent's brother and fellow heir, retained a Viennese lawyer, Dr. Gustav Rinesch, to locate and recover property stolen from Ferdinand during the war. In January 1948 Dr. Rinesch wrote to the Gallery requesting return of the three Klimts purchased from Dr. Führer. A Gallery representative responded, asserting--falsely, according to the complaint--that Adele had bequeathed the paintings to the Gallery, and the Gallery had merely permitted Ferdinand to retain them during his lifetime. Id., at 170a, ¶ 40.

Later the same year Dr. Rinesch enlisted the support of Gallery officials to obtain export permits for many of Ferdinand's remaining works of art. In exchange, Dr. Rinesch, purporting to represent respondent and her fellow heirs, signed a document "acknowledg[ing] and accept[ing] Ferdinand's declaration that in the event of his death he wished to follow the wishes of his deceased wife to donate" the Klimt paintings to the Gallery. Id., at 177a, ¶ 56. In addition, Dr. Rinesch assisted the Gallery *2245 in obtaining both the painting Dr. Führer had kept for himself and the one he had sold to the Museum of the City of Vienna. [FN3] At no time during these transactions, however, did Dr. Rinesch have respondent's permission either "to negotiate on her behalf or to allow the [Gallery] to obtain the Klimt paintings." Id., at 178a, ¶ 61.

FN3. The sixth painting, which disappeared from Ferdinand's

collection in 1938, apparently remained in private hands until 1988, when a private art dealer donated it to the Gallery. Id., at 1193.

In 1998 a journalist examining the Gallery's files discovered documents revealing that at all relevant times Gallery officials knew that neither Adele nor Ferdinand had, in fact, donated the six Klimts to the Gallery. The journalist published a series of articles reporting his findings, and specifically noting that Klimt's first portrait of Adele, "which all the [Gallery] publications represented as having been donated to the museum in 1936," had actually been received in 1941, accompanied by a letter from Dr. Führer signed " 'Heil Hitler.' " Id., at 181a, ¶ 67.

In response to these revelations, Austria enacted a new restitution law under which individuals who had been coerced into donating artworks to state museums in exchange for export permits could reclaim their property. Respondent--who had believed, prior to the journalist's investigation, that Adele and Ferdinand had "freely donated" the Klimt paintings to the Gallery before the war--immediately sought recovery of the paintings and other artworks under the new law. Id., at 178a-179a, ¶ 61, 182a. A committee of Austrian government officials and art historians agreed to return

certain Klimt drawings and porcelain settings that the family had donated in 1948. After what the complaint terms a "sham" proceeding, however, the committee declined to return the six paintings, concluding, based on an allegedly purposeful misreading of Adele's will, that her precatory request had created a binding legal obligation that required her husband to donate the paintings to the Gallery on his death. Id., at 185a.

Respondent then announced that she would file a lawsuit in Austria to recover the paintings. Because Austrian court costs are proportional to the value of the recovery sought (and in this case would total several million dollars, an amount far beyond respondent's means), she requested a waiver. Id., at 189a. The court granted this request in part but still would have required respondent to pay approximately $350,000 to proceed. Ibid. When the Austrian Government appealed even this partial waiver, respondent voluntarily dismissed her suit and filed this action in the United States District Court for the Central District of California.

II

Respondent's complaint advances eight causes of action and alleges violations of Austrian, international, and California law. [FN4] It asserts jurisdiction under § 2 of *2246 the FSIA, which grants federal district courts jurisdiction over civil actions against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under either another provision of the FSIA or "any applicable international agreement." 28 U.S.C. § 1330(a). The complaint further asserts that petitioners are not entitled to immunity under the FSIA because the Act's "expropriation exception," § 1605(a)(3), expressly exempts from immunity all cases involving "rights in property taken in violation of international law," provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activity here. [FN5]

FN4. As the District Court described these claims:

"[Respondent's] first cause of action is for declaratory relief pursuant to 28 U.S.C. § 2201; [she] seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. [Her] second cause of action is for replevin, presumably under California law; [she] seeks return of the paintings. [Her] third cause of action seeks rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. [Her] fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. [Her] sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, [her] eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices

law." Id., at 1197.

FN5. The provision reads:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

.....

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any

property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

Petitioners filed a motion to dismiss raising several defenses including a claim of sovereign immunity. [FN6] Their immunity argument proceeded in two steps. First, they claimed that as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute immunity from suit in United States courts. [FN7] Proceeding from this premise, petitioners next contended that nothing in the FSIA should be understood to divest them of that immunity retroactively.

FN6. Petitioners claimed (1) "they are immune from suit under the doctrine of sovereign immunity," and the FSIA, 28 U.S.C. §§ 1602-1611, "does not strip them of this immunity"; (2) the District Court "should decline to exercise jurisdiction ... under the doctrine of forum non conveniens"; (3) respondent "fail[ed] to join indispensable parties under Fed.R.Civ.P. 19"; and (4) venue in the Central District of California is improper. 142 F.Supp.2d, at 1197.

FN7. As the District Court noted, id., at 1201, n. 16, and the above summary of the complaint makes clear, supra, at 2245, respondent alleges that petitioners' wrongdoing continued well past 1948 in the form of concealment of the paintings' true provenance and deliberate misinterpretation of Adele's will. Because we conclude that the FSIA may be applied to petitioners' 1948 actions, we need not address the District Court's alternative suggestion that petitioners' subsequent alleged wrongdoing would be sufficient, in and of itself, to establish jurisdiction.

The District Court rejected this argument, concluding both that the FSIA applies retroactively to pre-1976 actions and that the Act's expropriation exception extends to respondent's specific claims. Only the former conclusion concerns us here. Presuming that our decision in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994), governed its retroactivity analysis, the court "first consider[ed] whether Congress expressly stated the [FSIA's] reach." 142 F.Supp.2d, at 1199. Finding no such statement, the court then asked whether application of the Act to petitioners' 1948 actions "would impair rights [petitioners] possessed when [they] acted, impose new duties on [them], or increase [their] liability for past conduct." Ibid. Because it deemed the FSIA "a jurisdictional statute that does not alter *2247 substantive legal rights," the court answered this second question in the negative and accordingly found the Act controlling. Id., at 1201. As further support for this finding, the court noted that the FSIA itself provides that " '[c]laims of foreign states to immunity should henceforth be decided by courts of the United States ... in conformity with the principles set forth in this chapter.' " Ibid. (quoting 28 U.S.C. § 1602) (emphasis in District Court opinion). In the court's view, this language suggests the Act "is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued." 142 F.Supp.2d, at 1201.

The Court of Appeals agreed that the FSIA applies to this case. [FN8] Rather than endorsing the District Court's reliance on the Act's jurisdictional nature, however, the panel reasoned that applying the FSIA to Austria's alleged wrongdoing was not impermissibly retroactive because

Austria could not legitimately have expected to receive immunity for that wrongdoing even in 1948 when it occurred. The court rested that conclusion on an analysis of American courts' then-prevalent practice of deferring to case-by-case immunity determinations by the State Department, and on that Department's expressed policy, as of 1949, of " 'reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' " 317 F.3d, at 965 (quoting Press Release No. 296, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (emphasis deleted)).

FN8. The Court of Appeals also affirmed the District Court's conclusion that FSIA § 1605(a)(3) covers respondent's claims. 317 F.3d 954, 967-969, 974 (C.A.9 2002). We declined to review that aspect of the panel's ruling. 539 U.S. 987, 124 S.Ct. 46 (2003).

We granted certiorari, 539 U.S. 987, 124 S.Ct. 46 (2003), and now affirm the judgment of the Court of Appeals, though on different reasoning.

III

Chief Justice Marshall's opinion in Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287 (1812), is generally viewed as the source of our foreign sovereign immunity jurisprudence. In that case, the libellants claimed to be the rightful owners of a French ship that had taken refuge in the port of Philadelphia. The Court first emphasized that the jurisdiction of the United States over persons and property within its territory "is susceptible of no limitation not imposed by itself," and thus foreign sovereigns have no right to immunity in our courts. Id., at 136. Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign. [FN9] Accepting a suggestion advanced by the Executive Branch, see id., at 134, the Chief Justice concluded that the implied waiver theory also served to exempt the Schooner Exchange--"a national armed vessel ... of the emperor of *2248 France"--from United States courts' jurisdiction. Id., at 145-146. [FN10]

FN9. "Th[e] perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." Schooner Exchange, 7

Cranch, at 137, 3 L.Ed. 287.

FN10. Chief Justice Marshall noted, however, that the outcome might well be different if the case involved a sovereign's private property:

"Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do

with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern." Id., at 145.

In accordance with Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement, this Court has "consistently ... deferred to the decisions of the political branches--in particular, those of the Executive Branch--on whether to take jurisdiction" over particular actions against foreign sovereigns and their instrumentalities. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (citing Ex parte Peru, 318 U.S. 578, 586-590, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30, 33-36, 65 S.Ct. 530, 89 L.Ed. 729 (1945)). Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns. 461 U.S., at 486, 103 S.Ct. 1962. In that year, however, the State Department concluded that "immunity should no longer be granted in certain types of cases." [FN11] App. A to Brief for Petitioners 1a. In a letter to the Attorney General, the Acting Legal Adviser for the Secretary of State, Jack B. Tate, explained that the Department would thereafter apply the "restrictive theory" of sovereign immunity:

FN11. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952), and in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-715, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (App. 2 to opinion of White, J.).

"A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). ...[I]t will hereafter be the Department's policy to follow the restrictive theory ... in the consideration of requests of foreign governments for a grant of sovereign immunity." Id., at 1a, 4a-5a.

As we explained in our unanimous opinion in Verlinden, the change in State Department policy wrought by the "Tate Letter" had little, if any, impact on federal courts' approach to immunity analyses: "As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department," and courts continued to "abid[e] by" that Department's " 'suggestions of immunity.' " 461 U.S., at 487, 103 S.Ct. 1962. The change did, however, throw immunity determinations into some disarray, as "foreign nations often placed diplomatic *2249 pressure on the State Department," and political considerations sometimes led the Department to file "suggestions of immunity in cases where immunity would not have been available under the restrictive theory." Id., at 487-488, 103 S.Ct. 1962. Complicating matters further, when foreign nations failed to request immunity from the State Department:

"[T]he responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions.... Thus, sovereign immunity determinations were

made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." Ibid.

In 1976 Congress sought to remedy these problems by enacting the FSIA, a comprehensive statute containing a "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Id., at 488, 103 S.Ct. 1962. The Act "codifies, as a matter of federal law, the restrictive theory of sovereign immunity," ibid., and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch. The preamble states that "henceforth" both federal and state courts should decide claims of sovereign immunity in conformity with the Act's principles. 28 U.S.C. § 1602.

[1] The Act itself grants federal courts jurisdiction over civil actions against foreign states, § 1330(a), [FN12] and over diversity actions in which a foreign state is the plaintiff, § 1332(a)(4); it contains venue and removal provisions, §§ 1391(f), 1441(d); it prescribes the procedures for obtaining personal jurisdiction over a foreign state, § 1330(b); and it governs the extent to which a state's property may be subject to attachment or execution, §§ 1609-1611. Finally, the Act carves out certain exceptions to its general grant of immunity, including the expropriation exception on which respondent's complaint relies. See supra, at 2245-2246, and n. 5. These exceptions are central to the Act's functioning: "At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the exceptions applies," as "subject-matter jurisdiction in any such action depends" on that application. Verlinden, 461 U.S., at 493- 494, 103 S.Ct. 1962.

FN12. The Act defines the term "foreign state" to include a state's political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(a).

IV

The District Court agreed with respondent that the FSIA's expropriation exception covers petitioners' alleged wrongdoing, 142 F.Supp.2d, at 1202, and the Court of Appeals affirmed that holding, 317 F.3d, at 967-969, 974. As noted above, however, we declined to review this aspect of the courts' opinions, confining our grant of certiorari to the issue of the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment, and more specifically, prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. See supra, at 2243, 2246-2247, and n. 8. We begin our analysis of that issue by explaining why, contrary to the assumption of the District Court, 142 F.Supp.2d, at 1199-1201, and Court of Appeals, 317 F.3d, at 963-967, the default rule announced in our opinion in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), does not control the outcome in this case.

*2250 In Landgraf we considered whether § 102 of the Civil Rights Act of 1991, which permits a party to seek compensatory and punitive damages for certain types of intentional employment discrimination, Rev. Stat. § 1977A, as added, 105 Stat. 1072, 42 U.S.C. § 1981a(a), and to demand a jury trial if such damages are sought, § 1981a(c), applied to an employment discrimination case that was pending on appeal when the statute was enacted. The issue forced us to confront the " 'apparent tension' " between our rule that " 'a court is to apply the law in effect at the time it renders its decision,' " 511 U.S., at 264, 114 S.Ct. 1483 (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)), and the seemingly contrary "axiom that '[r]etroactivity is not favored in the law' " and thus that " 'congressional enactments ... will not be construed to have retroactive effect unless their language requires this result,' " 511 U.S., at 264,

114 S.Ct. 1483 (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)).

Acknowledging that, in most cases, the antiretroactivity presumption is just that--a presumption, rather than a constitutional command [FN13]--we examined the rationales that support it. We noted, for example, that "[t]he Legislature's ... responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," Landgraf, 511 U.S., at 266, 114 S.Ct. 1483, and that retroactive statutes may upset settled expectations by " 'tak [ing] away or impair[ing] vested rights acquired under existing laws, or creat [ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past,' " id., at 269, 114 S.Ct. 1483 (quoting Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (Story, J.)). We further observed that these antiretroactivity concerns are most pressing in cases involving "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." 511 U.S., at 271, 114 S.Ct. 1483.

FN13. But see Landgraf, 511 U.S., at 266-268, 114 S.Ct. 1483 (identifying several constitutional provisions that express the antiretroactivity principle, including the Ex Post Facto Clause, Art. I, § 10, cl. 1, and the prohibition on "Bills of Attainder," Art. I, §§ 9-10).

In contrast, we sanctioned the application to all pending and future cases of "intervening" statutes that merely "confe[r] or ous[t] jurisdiction." Id., at 274, 114 S.Ct. 1483. Such application, we stated, "usually takes away no substantive right but simply changes the tribunal that is to hear the case." Ibid. (internal quotation marks omitted). Similarly, the "diminished reliance interests in matters of procedure" permit courts to apply changes in procedural rules "in suits arising before [the rules'] enactment without raising concerns about retroactivity." Id., at 275, 114 S.Ct. 1483.

Balancing these competing concerns, we described the presumption against retroactive application in the following terms:

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's *2251 liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Id., at 280, 114 S.Ct. 1483. [FN14]

FN14. Applying this rule to the question in the case, we concluded that § 102 of the Civil Rights Act of 1991 should not apply to cases arising before its enactment. 511 U.S., at 293, 114 S.Ct. 1483.

Though seemingly comprehensive, this inquiry does not provide a clear answer in this case. Although the FSIA's preamble suggests that it applies to preenactment conduct, see infra, at 18, that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." Under Landgraf, therefore, it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred). But the FSIA defies such categorization. To begin with, none of the three examples of retroactivity mentioned in the above quotation fits the FSIA's clarification of the law of sovereign immunity. Prior to 1976 foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts (provided the State Department did not recommend otherwise), but they had no "right" to such immunity. Moreover, the FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither "increase[s those states'] liability for past conduct" nor "impose[s] new duties with respect to transactions already completed." 511 U.S., at 280, 114 S.Ct. 1483. Thus, the Act does not at first appear to "operate retroactively" within the meaning of the Landgraf default rule.

That preliminary conclusion, however, creates some tension with our observation in Verlinden that the FSIA is not simply a jurisdictional statute "concern[ing] access to the federal courts" but a codification of "the standards governing foreign sovereign immunity as an aspect of substantive federal law." 461 U.S., at 496-497, 103 S.Ct. 1962 (emphasis added). Moreover, we noted in Verlinden that in any suit against a foreign sovereign, "the plaintiff will be barred from raising his claim in any court in the United States" unless one of the FSIA's exceptions applies, id., at 497, 103 S.Ct. 1962 (emphasis added), and we have stated elsewhere that statutes that "creat[e] jurisdiction" where none otherwise exists "spea[k] not just to the power of a particular court but to the substantive rights of the parties as well," Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original). Such statutes, we continued, "even though phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other[s]." Ibid. [FN15]

FN15. Of course, the FSIA differs from the statutory amendment at issue in Hughes Aircraft. That amendment was attached to the statute that created the cause of action, see former 31 U.S.C. § 3730(b)(1) (1982 ed.), 96 Stat. 978; 31 U.S.C. § 3730(b)(1), 100 Stat. 3154, and it prescribed a limitation that any court entertaining the cause of action was bound to apply, see § 3730(e)(4)(A), 100 Stat., at 3157. When a "jurisdictional" limitation adheres to the cause of action in this fashion--when it applies by its terms regardless of where the claim is brought--the limitation is essentially substantive. In contrast, the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. The Act does not create or modify any causes of action, nor does it purport to limit foreign countries' decisions about what claims against which defendants their courts will entertain.

Even if the dissent is right that, like the provision at issue in Hughes Aircraft, the FSIA "create[s] jurisdiction where there was none before," post, at 2268 (opinion of KENNEDY, J.) (punctuation omitted), however, that characteristic is in some tension with other, less substantive aspects of the Act. This tension, in turn, renders the Landgraf approach inconclusive and requires us to examine the entire statute in light of the

underlying principles governing our retroactivity jurisprudence.

*2252 Thus, Landgraf's default rule does not definitively resolve this case. In our view, however, Landgraf's antiretroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context. Cf. 511 U.S., at 271, n. 25, 114 S.Ct. 1483 ("[T]he great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties"). The aim of the presumption is to avoid unnecessary post hoc changes to legal rules on which parties relied in shaping their primary conduct. But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present "protection from the inconvenience of suit as a gesture of comity." Dole Food Co. v. Patrickson, 538 U.S. 468, 479, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the "decisions of the political branches ... on whether to take jurisdiction." Verlinden, 461 U.S., at 486, 103 S.Ct. 1962. In this sui generis context, we think it more appropriate, absent contraindications, to defer to the most recent such decision--namely, the FSIA--than to presume that decision inapplicable merely because it postdates the conduct in question. [FN16]

FN16. Between 1952 and 1976 courts and the State Department similarly presumed that the Tate Letter was applicable even in disputes concerning conduct that predated the letter. See, e.g., National City Bank of N.Y. v. Republic of China, 348 U.S. 356, 75 S.Ct. 423, 429, 99 L.Ed. 389 (1955) (assuming, in dicta, that the Tate Letter would govern the sovereign immunity analysis in a dispute concerning treasury notes purchased in 1920 and 1947-1948).

V

[2] This leaves only the question whether anything in the FSIA or the circumstances surrounding its enactment suggests that we should not apply it to petitioners' 1948 actions. Not only do we answer this question in the negative, but we find clear evidence that Congress intended the Act to apply to preenactment conduct.

To begin with, the preamble of the FSIA expresses Congress' understanding that the Act would apply to all postenactment claims of sovereign immunity. That section provides:

"Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (emphasis added).

Though perhaps not sufficient to satisfy Landgraf's "express command" requirement, 511 U.S., at 280, 114 S.Ct. 1483, this language is unambiguous: Immunity "claims"--not actions protected by immunity, but assertions of immunity to suits arising from those actions--are the relevant *2253 conduct regulated by the Act; [FN17] those claims are "henceforth" to be decided by the courts. As the District Court observed, see supra, at 8 (citing 142 F.Supp.2d, at 1201), this language suggests Congress intended courts to resolve all such claims "in conformity with the principles set forth" in the Act, regardless of when the underlying conduct occurred. [FN18]

FN17. Our approach to retroactivity in this case thus parallels that advocated by Justice SCALIA in his concurrence in Landgraf:

"The critical issue, I think, is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their

effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event." 511 U.S., at 291, 114 S.Ct. 1483 (opinion concurring in judgment).

FN18. The dissent is quite right that " '[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.' " Post, at 2265. The provision of the FSIA to which this observation applies, however, is not the preamble but section 8, which states that the "Act shall take effect ninety days after the date of its enactment.' " 90 Stat. 2898, note following 28 U.S.C. § 1602. The office of the word "henceforth" is to make the statute effective with respect to claims to immunity thereafter asserted. Notably, any such claim asserted immediately after the statute became effective would necessarily have related to conduct that took place at an earlier date.

The FSIA's overall structure strongly supports this conclusion. Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. In Dole Food Co. v. Patrickson, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), for example, we held that whether an entity qualifies as an "instrumentality" of a "foreign state" for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred. In addition, Verlinden, which upheld against constitutional challenge 28 U.S.C. § 1330's grant of subject-matter jurisdiction, involved a dispute over a contract that predated the Act. 461 U.S., at 482-483, 497, 103 S.Ct. 1962. And there has never been any doubt that the Act's procedural provisions relating to venue, removal, execution, and attachment apply to all pending cases. Thus, the FSIA's preamble indicates that it applies "henceforth," and its body includes numerous provisions that unquestionably apply to claims based on pre-1976 conduct. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect.

Finally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. We have recognized that, to accomplish these purposes, Congress established a comprehensive framework for resolving any claim of sovereign immunity:

"We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled *2254 to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity. As we said in Verlinden, the FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the

existence of one of the specified exceptions to foreign sovereign immunity.' " Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-435, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (quoting Verlinden, 461 U.S., at 493, 103 S.Ct. 1962).

The Amerada Hess respondents' claims concerned conduct that postdated the FSIA, so we had no occasion to consider the Act's retroactivity. Nevertheless, our observations about the FSIA's inclusiveness are relevant in this case: Quite obviously, Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged " 'standards' " that the FSIA replaced. See supra, at 2249 (quoting Verlinden, 461 U.S., at 487, 103 S.Ct. 1962).

We do not endorse the reasoning of the Court of Appeals. Indeed, we think it engaged in precisely the kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate. Nevertheless, we affirm the panel's judgment because the Act, freed from Landgraf's antiretroactivity presumption, clearly applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity. [FN19]

FN19. Petitioners suggest that the latter date is important because it marked the first shift in foreign states' expectations concerning the scope of their immunity. Whether or not the date would be significant to a Landgraf-type analysis of foreign states' settled expectations at various times prior to the FSIA's enactment, it is of no relevance in this case given our rationale for finding the Act applicable to preenactment conduct.

VI

We conclude by emphasizing the narrowness of this holding. To begin with, although the District Court and Court of Appeals determined that § 1605(a)(3) covers this case, we declined to review that determination. See supra, at 2243, 2246-2247, and n. 8. Nor do we have occasion to comment on the application of the so-called "act of state" doctrine to petitioners' alleged wrongdoing. Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts jure imperii) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts. [FN20] See Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory"). Petitioners principally rely on the act of state doctrine to support their assertion that foreign expropriations *2255 are public acts for which, prior to the enactment of the FSIA, sovereigns expected immunity. Brief for Petitioners 18- 20. Applying the FSIA in this case would upset that settled expectation, petitioners argue, and thus the Act "would operate retroactively" under Landgraf. 511 U.S., at 280, 114 S.Ct. 1483. But because the FSIA in no way affects application of the act of state doctrine, our determination that the Act applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing.

FN20. Under the doctrine, redress of grievances arising from such acts must be obtained through diplomatic channels.

Finally, while we reject the United States' recommendation to bar application of the FSIA to claims based on pre-enactment conduct, Brief for United States as Amicus Curiae, nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity. [FN21] The issue now before us, to which the Brief for United States as Amicus Curiae is addressed, concerns interpretation of the FSIA's reach--a "pure question of statutory construction ... well within the province of the Judiciary." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference. See, e.g., ibid. In contrast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, [FN22] that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy. [FN23] See, e.g., Verlinden, 461 U.S., at 486, 103 S.Ct. 1962; American Ins. Assn. v. Garamendi, 539 U.S. 396, 414, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (discussing the President's " 'vast share of responsibility for the conduct of our foreign relations' "). We express no opinion on the question whether such deference *2256 should be granted in cases covered by the FSIA.

FN21. See, e.g., Flatow v. Islamic Republic of Iran, 305 F.3d 1249, 1251-1252, and n. 4 (C.A.D.C.2002) (statement of interest concerning attachment of property that is owned by a foreign state but located in the United States); Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 642 (C.A.4 2000) (statement of interest concerning sovereign immunity of a foreign state's vessels); 767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia, 218 F.3d 152, 157 (C.A.2 2000) (statement of interest concerning successor states to the Socialist Federal Republic of Yugoslavia).

FN22. We note that the United States Government has apparently indicated to the Austrian Federal Government that it will not file a statement of interest in this case. App. 243a (Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Deputy Secretary of the Treasury Stuart E. Eizenstat (Jan. 17, 2001)). The enforceability of that indication, of course, is not before us.

FN23. Mislabeling this observation a "constitutional conclusion," the dissent suggests that permitting the Executive to comment on a party's assertion of sovereign immunity will result in "[u]ncertain prospective application of our foreign sovereign immunity law." Post, at 2274, 2275. We do not hold, however, that executive intervention could or would trump considered application of the FSIA's more neutral principles; we merely note that the Executive's views on questions within its area of expertise merit greater deference than its opinions regarding the scope of a congressional enactment. Furthermore, we fail to understand how our holding, which requires that courts apply the FSIA's sovereign immunity rules in all cases, somehow injects greater uncertainty into sovereign immunity law than the dissent's approach, which would require, for cases concerning pre-1976 conduct, case-by-case analysis of the status of that law at the time of the offending conduct--including analysis of the existence or nonexistence of any State Department statements on the subject.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Chapter 7: Legal Legacy of the Holocaust

A. Introduction

1. The Promise of Hybrid Courts

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THE PROMISE OF HYBRID COURTS

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Over the past decade, issues of accountability and reconciliation in the aftermath of mass atrocities have increasingly dominated the field of international human rights. Indeed, the proliferation of international and domestic courts, truth commissions, civil compensation schemes, and other mechanisms for confronting the past has spawned its own scholarly field: transitional justice. [FN1] And the sheer number and variety of institutional mechanisms suggests that questions of how peoples address gross human rights abuses and move forward into the future will continue to be a source of international interest as well as a site for innovation and creative adaptation.

Much of the transitional justice discussion has centered on four types of accountability mechanisms that have proven to be both significant and controversial. First, the promise and pitfalls of international criminal justice bodies--such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)-- have taken on increased importance with the establishment of the International Criminal Court (ICC). Second, the growing use of truth commissions, pioneered in Latin America, developed famously in South Africa, and now being used around the globe from East Timor to Nigeria to Peru, has elicited enormous interest within policy, advocacy, and scholarly communities. Third, transnational accountability efforts--such as Spain's attempt to extradite Augusto Pinochet to stand trial for torture and other human rights abuses committed in Chile, or Belgium's application of its relatively recent universal jurisdiction law--have sparked vigorous debate. Finally, the use of the Alien Tort Claims Act in the United States to allow civil tort claims brought by victims of human rights abuses continues to be controversial.

Comparatively little attention has been paid, however, to a fifth, newly emerging, form of accountability and reconciliation: hybrid domestic- international courts. Such courts are "hybrid" because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards. This hybrid model has developed in a range of settings, generally postconflict situations where no politically viable full- fledged international tribunal exists, as in East Timor or Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo.

Most recently, an agreement to create a hybrid court in Cambodia has been reached, [FN2] and there is discussion about establishing such a court in postwar Iraq. [FN3]

*296 Frequently, such courts have been conceived in an ad hoc way, the product of on the ground innovation rather than grand institutional design. As a result, hybrid courts have not yet been the subject of sustained analysis, even among scholars and policymakers who focus on transitional justice issues. This Comment seeks to fill that gap by identifying hybrid courts as an important area of future study and making a preliminary assessment of their potential strengths and weaknesses.

Interestingly, one reason the hybrid courts have received comparatively little attention so far may be that their very hybridity has left them open to challenge both from those advocating increased use of formal international justice mechanisms and those who resist all reliance on international institutions. For example, many supporters of international justice seem to fear that hybrid tribunals may be used as an alternative to, and possibly as a means to undermine, the use of full-fledged international criminal courts. Indeed, it is striking that two government officials who played key roles in establishing hybrid tribunals in Kosovo and East Timor have resisted the notion that such courts could serve as a model for the future. [FN4] Many within the human rights advocacy community have been critical of the hybrid courts as well. [FN5] From the opposite end of the political spectrum, those who generally eschew international justice mechanisms--such as Bush Administration officials who have opposed the ICC--may see hybrid tribunals as carrying too many of the trappings of international courts. For example, administration officials have been wary of international involvement in efforts to establish courts to try those suspected of committing mass atrocities in Iraq, instead advocating an Iraqiled domestic process. [FN6] In a sense, then, hybrid courts are being squeezed from both sides.

This dual resistance to hybrid courts is unfortunate. As I argue in this Comment, such courts hold a good deal of promise and may even offer an approach to questions of accountability that addresses some of the concerns raised in both camps. At the very least, such courts warrant further study and careful examination. In this Comment, I look at three recent examples of hybrid courts, those established in Kosovo, East Timor, and Sierra Leone to hear cases involving war crimes, crimes against humanity, genocide, and other mass atrocities in those countries. I then address some of the advantages and disadvantages of these courts, particularly with regard to their perceived legitimacy (among both international and domestic constituencies), their ability to catalyze local efforts to establish rule of law institutions, and their potential to foster the development of human rights norms within emerging legal systems. Finally, I discuss ways in which hybrid courts might fit into the ICC's complementarity regime. I argue that such courts are best seen not as an alternative to international or local justice, but rather as an important complement to both.

I. THREE EXAMPLES OF HYBRID COURTS

Kosovo

In June 1999, the United Nations Mission in Kosovo (UNMIK) faced the daunting task of apprehending, trying, and punishing those who had committed past atrocities as well as those *297 who committed crimes after the establishment of UN authority. [FN7] This task was not easily fulfilled. Much of the physical infrastructure of the judicial system--court buildings, law libraries, and equipment--had been destroyed or severely damaged during years of civil conflict. [FN8] Local lawyers and judges were scarce, and those available lacked experience because most ethnic Albanians had been barred from the judiciary for many years and Serbian judges and lawyers had

mostly fled or refused to serve. [FN9] Detainees suspected of committing atrocities, once apprehended by UN security forces, were crowding prison facilities, with little prospect of trial. [FN10] Devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trials. Yet the prosecutor for the International Criminal Tribunal for the former Yugoslavia made it clear that the international tribunal had the resources to try only those who had committed the worst atrocities on the widest scale. [FN11] As the detainees continued to languish in prison, many argued that the continued detention itself violated international human rights standards, and local frustration with the failure of the judicial process contributed to increasing ethnic violence. [FN12]

To address what was rapidly becoming an accountability and justice crisis, UN authorities issued a series of regulations allowing foreign judges to sit alongside domestic judges on existing local Kosovar courts, and allowing foreign lawyers to team up with domestic lawyers to prosecute and defend the cases. [FN13] The substantive law applied in these cases has also been a blend of the international and domestic. Initially, after little consultation with the local population, UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia (FRY)/Serbian law, modified to conform to international human rights standards. [FN14] This decision outraged many ethnic Albanian Kosovars, who considered FRY/Serbian law to be the law of the oppressive Serbian regime. [FN15] Kosovar Albanian judges refused to apply the law, resulting in widespread confusion. [FN16] In response, UNMIK issued new resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989. [FN17] But, like the initial decision, the applicable law was to be a hybrid of preexisting local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.

As of June 2002, these courts had held trials in 17 war crimes cases. [FN18] Initially, international judges had minimal impact, as they did not comprise a majority on the trial panels. [FN19] An UNMIK *298 regulation enacted in December 2000 sought to rectify this problem, however, [FN20] and after that date all cases of war crimes have been held in front of courts composed of a majority of international judges, while prosecution has mostly been undertaken by international prosecutors. [FN21] And even a report that is critical of the tribunals in many respects suggests that the presence of international actors has improved the quality of justice delivered in these cases. [FN22]

East Timor

East Timor's path to hybrid courts resembles Kosovo's, though the decision to use them was perhaps more self-conscious. As in Kosovo, the United Nations Transitional Administration in East Timor (UNTAET) was charged with establishing a process to provide meaningful accountability for serious violations of international humanitarian law. [FN23] Yet, the capacity of the local judiciary was perhaps even weaker than in Kosovo. Very few East Timorese had been trained as lawyers at all, and most civil service posts had been reserved for Indonesians. [FN24] The physical infrastructure of the country had been almost completely destroyed during the period of looting prior to the arrival of the multinational force. [FN25] Militia members suspected of committing mass atrocities were being held in makeshift prison facilities. [FN26] And, while no domestic court system existed to allow for meaningful trials, unlike Kosovo no international court existed either. [FN27]

Under these circumstances, hybrid courts were particularly attractive. UNTAET issued regulations providing that "serious crimes" would be tried before three- judge panels, comprised of two international judges and one East Timorese judge, sitting within the jurisdiction of the District Court of Dili. [FN28] "Serious crimes" were defined as war crimes, crimes against humanity, and genocide, as well as murder, sexual offenses, and torture, insofar as the latter three crimes were committed between January 1, 1999, and October 25, 1999. [FN29] Prosecutors and investigators were again drawn from other countries, as well as the local population. [FN30] By June 2002 the serious crimes unit had issued forty-two indictments for 112 individuals and *299 obtained twenty-four convictions. [FN31] The serious crimes unit continues to be hampered by lack of funding, inexperienced personnel, and vacancies in key positions. For example, the appellate panel currently cannot function because too few judges have been hired, and the trial courts have also been forced to suspend proceedings periodically because of lack of personnel. [FN32] Nevertheless, despite these problems, trials are proceeding, and it appears that the hybrid court will continue to play a significant role in the process of accountability for human rights abuses, even now that East Timor has gained independence.

Sierra Leone

In Sierra Leone, as in Kosovo and East Timor, establishing a hybrid court became a priority in the summer of 2000 after a severe accountability crisis developed at the end of a long civil conflict. [FN33] The domestic justice system, strained to the breaking point by the civil war and rife with corruption, was ill-equipped to handle any serious case involving atrocities committed during the war, particularly the impending trial of Revolutionary United Front (RUF) leader Foday Sankoh, who had been taken into government custody. [FN34] Yet, there was little prospect that a new international criminal tribunal would be created, and incoming Sierra Leonean President Ahmed Tejan Kabbah opposed a full-fledged international tribunal because he thought some Sierra Leonean participation in and ownership of the trial process was important. At the same time Kabbah did not want the responsibility for the prosecution of Foday Sankoh to fall entirely on his government's shoulders, [FN35] in part because he feared the potential for retaliation against judges and other government officials involved in the case. And while the trial of Foday Sankoh posed serious problems for the government of Sierra Leone, so did his detention without prospect of trial or release. Accordingly, in June of 2000 the Sierra Leonean government asked the United Nations to help set up a Special Court to try those who "bear the greatest responsibility for the commission of crimes against humanity, war crimes, and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996." [FN36]

Unlike the East Timor and Kosovo courts, the Sierra Leonean tribunal established in response to this request operates outside the national court system. [FN37] Nevertheless, the hybrid institutional features are similar. Again, the personnel is both international and domestic. [FN38] *300 All components are staffed by a combination of international and domestic actors, [FN39] and the applicable law is a blend of the international and the domestic, because the court has jurisdiction to consider cases both under international humanitarian law and under domestic Sierra Leonean law. [FN40] Adding to its hybrid character, the court's statute specifically contemplates that the court will be "guided by" both the decisions of the ICTY and ICTR (with respect to the interpretation of international humanitarian law) and the decisions of the Supreme Court of Sierra Leone (with respect to the interpretation of Sierra Leonean law). [FN41]

As of this writing, the work of the court has only just begun. The eight judges of the court--two Sierra Leoneans, and one judge each from Australia, Canada, Austria, Nigeria, Cameroon, and Gambia--began serving in December 2002. [FN42] Ultimately, the court is expected to try approximately 20 people.

Thus we can see that, in three very different postconflict settings over the past several years, officials have turned to the hybrid court mechanism. Faced with the reality that international courts would be unable to try more than a handful of the most serious perpetrators at best and the specter of a domestic court system in disrepair, these officials have improvised a compromise strategy. Incorporating some aspects of the formal international criminal justice models while seeking to include local actors and develop local norms, the hybrid approach has been thought beneficial in addressing practical, on the ground dilemmas about criminal accountability for human rights abuses. Now that we have seen the experiment at work in at least two of the three settings, it is time to take a step back and evaluate both the promise of hybrid courts (in comparison to purely international and purely domestic alternatives) and the degree to which the hybrid model appears to be fulfilling that promise.

II. THREE PROBLEMS OF PURELY INTERNATIONAL AND PURELY DOMESTIC TRIBUNALS

Until recently, the primary mechanisms for imposing individual criminal responsibility for grave human rights abuses fell into two categories. Either new regimes attempted domestic trials or the international community established international tribunals to hold wrongdoers accountable. Both of these approaches, however, have significant limitations, which can be conceptualized along three axes: first, problems of legitimacy, second, problems of capacity-building, and third, problems of norm penetration. Focusing on the lessons learned from Kosovo and East Timor (and to a lesser degree Sierra Leone), this part outlines the problems of both purely domestic and purely international tribunals before turning to a discussion of ways in which hybrid domestic-international courts might address some of these problems.

*301 Legitimacy Problems

In the adjudication of serious violations of international humanitarian and human rights law, both purely domestic trials on the one hand and purely international processes on the other may face problems of perceived legitimacy. It is important to make clear when discussing such problems, however, that what I mean by perceived legitimacy is not the formal question of political legitimacy or democratic legitimacy that is often debated in political philosophy or international law theory. Although such debates are certainly important, I am focusing here on legitimacy in a more on-the-ground sense: what factors tend to make the decisions of a juridical body acceptable to various populations observing its procedures? Thus, in this Comment I am less interested in whether or not a particular criminal justice approach can be justified as legitimate on a theoretical level than in whether or not various local and international communities are likely, as a practical matter, to "buy in" to the approach and treat the activities of the institutions involved as legitimate. [FN43]

Of course, different constituencies viewing the work of any court system may have different ideas about what constitutes its legitimacy. For example, various national communities may focus on very different factors in assessing a court's legitimacy, and these factors might, in turn, be different from those that underpin legitimacy in the eyes of various international communities standing

outside a country and judging its legal process. It is beyond the scope of this brief essay to provide a comprehensive overview of the legitimacy problems facing juridical institutions in postconflict societies. Nevertheless, while it is impossible to measure with absolute accuracy the sort of perceived legitimacy I have in mind, I believe that we can at least make some tentative observations based on experience over the past decade that may be useful in assessing the likely efficacy of various juridical mechanisms in the future.

Not surprisingly, the perceived legitimacy of domestic judicial institutions in postconflict situations is often in question. To the extent that such institutions exist at all, they typically will have suffered severely during the conflict. The physical infrastructure often will have sustained extensive, crippling damage, and the personnel is likely to be severely compromised or lacking in essential skills. Judges and prosecutors may remain in place from the prior regime, which may have backed the commission of widespread atrocities. Thus, the state may continue to employ the very people who failed to prosecute or convict murderers or torturers or ethnic cleansers. Alternatively, the new regime may replace the old personnel almost completely, resulting in an enormous skill and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes:

For example, in both Kosovo and East Timor the utter lack of functional domestic institutions created the need for a UN transitional administration in the first place. The physical infrastructure of the legal systems had been severely damaged by the conflicts, and the systems were still tainted by the former oppressive regimes, undermining public confidence in, and the broad societal legitimacy of, legal processes. Indeed, the justice systems had been run virtually exclusively by perceived oppressors--Serbs in Kosovo and Indonesians in East Timor--and ethnic Albanians and East Timorese had been systematically excluded from participation. [FN44] Although Sierra Leone did not see the same sort of ethnic division as in Kosovo and East Timor, the RUF retained control over various areas of the country, [FN45] raising the possibility that local judges would be unable to deliver verdicts holding RUF members accountable for human rights violations.

*302 Even if a new local justice system can be established quickly, overcorrection for these imbalances can create new problems. In Kosovo, for example, it was easier after the conflict to appoint ethnic Albanian judges than ethnic Serbian judges. Only a few Serbian judges were willing to serve, and even those Serbs who were initially appointed stepped down after feeling pressure from Belgrade. [FN46] Yet, without Serbian representation in the judiciary, the independence of the decision making--a key factor in establishing the court system's perceived legitimacy among the entire local population--was severely imperiled. [FN47] In fact, several judgments imposed against Serbian defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges, due to concerns about lack of due process and insufficient evidence. [FN48] In East Timor, this was less of a problem because most Indonesians had fled the territory, and the remaining population was largely pro-independence Timorese. [FN49] Nonetheless, a small segment of the population supported only limited autonomy for East Timor under the authority of Indonesia, [FN50] and many of those individuals were the ones most likely to face trial for committing atrocities, [FN51] raising concern about whether they could receive a fair trial under the newly created Timorese system. In Sierra Leone, the possibility of domestic prosecutions was made even more difficult because the Lomé peace accord had included a broad amnesty provision, which would have posed a significant obstacle to domestic prosecutions. As former UN Ambassador Richard Holbrooke said at the time, "[t]he Lomé agreement created this amnesty provision in domestic law, but the United Nations did not accept it in international law, and

therefore an international character to the court was required." [FN52] Thus, in Kosovo, East Timor and Sierra Leone, the local justice system on its own was unlikely to be able to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities.

At the same time, broad acceptance of purely international processes may be difficult to establish as well. In Kosovo an international tribunal--the ICTY--did exist as a forum to try those responsible for the most egregious atrocities. Yet, this institution was ill-equipped to address more than a handful of cases--as international courts undoubtedly always will be. Moreover, international institutions like the ICTY are likely to encounter resistance on the ground. For example, in light of the continuing ethnic tensions within the region, the ICTY was established at The Hague, far removed from the scene of the atrocities, and the court was staffed by international judges and staff. However, the lack of connection to local populations has been problematic. A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina indicates that a wide cross-section of lawyers and judges from all ethnic groups, while playing different roles within Bosnian society, were similarly ill-informed about the ICTY's work, and were often suspicious of its motives and its results. [FN53] The study *303 attributes this lack of perceived legitimacy not only to the physical distance between the tribunal and the local population, but also the failure of the ICTY to publicize its work within Bosnia, the lack of participation of local actors, even as observers, and the use of predominantly common law approaches to criminal justice unfamiliar to local legal professionals, trained in a civil law tradition. [FN54] While no such study exists for Kosovo, similar problems might be expected there. Of course, over time, the perceived legitimacy of the ICTY may change as new generations of opinion makers in the former Yugoslavia come to view the conflict and its aftermath in new ways. Indeed, the norms articulated by the ICTY may play a role in shaping such popular perceptions. Nevertheless, at least in the short term, the ICTY must grapple with ongoing local resistance.

It is too simple to say that international tribunals have legitimacy with respect to the international community, but not with respect to local populations. In fact, the story is always much more complicated. Many segments of the local population, as in the case of Kosovo and East Timor, often strongly support international justice in the wake of mass atrocities. Moreover, the international community does not always support the establishment of such institutions, and of course there is never one, monolithic international community. Rather, there are multiple international constituencies: communities of nation-states (such as UN members, Security Council members, NATO countries, the Council of Europe, and the Organization of American States), communities of non-governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), or communities of other actors such as corporations, academics, and on and on. Indeed, even the division between the international and the local may make little sense in the globalized era, given that international NGOs often partner with local NGOs, foreign governments give aid to local civil society organizations, and public policy networks routinely bridge gaps between local and international actors. Nonetheless, despite these complexities, it does appear that international courts such as the ICTY do face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than they do in establishing legitimacy within broader international communities.

Finally, an international tribunal may not always be an option. In East Timor, for example, no international tribunal existed to handle even the most egregious cases. While many voices, both domestic and international, called for such a tribunal in the immediate aftermath of the atrocities of 1999, there is little chance that one will be established. [FN55] Similarly, calls for an international

court in Sierra Leone were resisted because such a tribunal would be too expensive and time-consuming to create. [FN56] Even the creation of the International Criminal Court will not alleviate this problem, because the ICC will never be able to try more than a handful of the most egregious cases stemming from any particular conflict.

Capacity-Building Problems

Purely domestic and purely international institutions may also fail to promote local capacity-building, which is often an urgent priority in postconflict situations. As discussed previously, the conflicts in Kosovo and East Timor virtually eliminated the physical infrastructure of the judiciary, including court buildings, equipment, and legal texts. [FN57] But even more devastating than the physical loss was the loss in human resources. In Kosovo, only Serbs had the experience and training to work as judges and prosecutors; yet these Serbs often refused to work *304 in the new system because doing so would constitute a betrayal of their ethnic heritage. [FN58] There were some Albanians with legal training, but they had been almost completely excluded from the system for many years and therefore had little experience. [FN59] In East Timor, the capacity deficit was even more severe because the Indonesians, who had staffed the judiciary, had evacuated, and few Timorese possessed any legal training or experience. [FN60] Indeed, there were no East Timorese judges or prosecutors until UNTAET made its first appointments in 2000. [FN61] Likewise, in Sierra Leone, the lack of judges, magistrates, prosecutors, and courtrooms led to huge backlogs of cases. [FN62] The High Court was only functional in Freetown and two other provincial towns, and many magistrates courts had been shut down during the civil war. [FN63] Under such circumstances, a domestic legal system stands little chance of being established for a significant period of time.

Moreover, a purely international process that largely bypasses the local population does little to help build local capacity. An international court staffed by foreigners, or even a local justice system operated exclusively by the UN transitional administration, cannot hope to train local actors in necessary skills. In short, local actors lack the resources to run the system themselves, but a system run completely by the international community--whether physically located inside or outside the territory in question--will do little to help improve the capacity of the local population to establish its own justice system.

Norm-Penetration Problems

Finally, purely international or purely local accountability mechanisms may have little impact on the application and development of substantive norms criminalizing mass atrocities in transitional countries. The reach of such norms depends not only on the existence of formal institutions-- such as legislatures and courts--but also on both networks among the professionals who run them and links from those networks to broader groups within the population at large. [FN64] Networks of judges and other legal professionals from different countries, forged through informal face-to-face meetings as well as more formal and official encounters and exchanges, can lead to the cross-fertilization of norms across national boundaries and between international and domestic institutions. [FN65] It is through these networks that international law can be implemented and developed domestically, and that domestic law in one country can take into account the domestic law of other countries. [FN66]

With respect to accountability for mass atrocities, for example, the mere existence of a domestic law incorporating international norms does not, in itself, result in the application of those norms in domestic cases. When international and transnational networks exist, however, judges and legal

professionals in a given country are more likely to apply, interpret, critique, and refine such norms. They are also more likely to develop domestic norms addressing these issues. Accordingly, these networks are essential to foster a transnational legal process that might result in the internalization and interpenetration of norms. [FN67] Because purely international and purely local processes of accountability and reconciliation do not open the pathways for the creation of such networks as readily as hybrid courts, they are much less able to contribute to this transnational process.

*305 Thus, although international tribunals have developed a rich jurisprudence concerning the application of international humanitarian law to the question of individual responsibility for mass atrocities, [FN68] it is unclear how far this body of norms has actually penetrated both the local jurisprudence of the countries affected, and, just as importantly, the popular consciousness of local populations. Because the work of the international courts is physically remote from the countries in question, and the judges and personnel have not been drawn from the local population, there is little opportunity for domestic legal professionals to absorb, apply, interpret, critique, and develop the international norms in question, let alone for the broader public to do so. Even when local courts are authorized under domestic law to apply international humanitarian law, there is often such a limited base of familiarity with the norms in question that such authority is meaningless. In short, the mere existence of an international court does not create a channel for its jurisprudence to be used and developed, or even merely respected and understood, on a local level.

Where justice is purely local, on the other hand, the problem takes a slightly different form. Local courts and local lawyers, unfamiliar with international standards, may seek to apply ordinary criminal law to the mass atrocities in question, even if the local law technically incorporates international humanitarian law. For example, prosecutors may choose to charge perpetrators with murder rather than genocide or crimes against humanity. [FN69] The difficulty with such "ordinary law" charges is that while they may be more familiar to local actors, they do not capture the complexity or magnitude of the atrocities committed, thereby minimizing the wrongs suffered. And even when perpetrators are charged with the more serious international law offenses, lawyers unfamiliar with the elements of such crimes may fail to understand how best to prove them, and judges are often not sure how to evaluate such charges--despite the potentially useful case law of the ICTY and ICTR.

For example, in Kosovo, before provisions were made for international judges to sit in the local courts, many defendants were charged with and convicted of genocide and other serious international law offenses. [FN70] Yet it was apparent that these convictions failed to properly apply the actual elements of these crimes, such as the more stringent intent requirement to prove genocide. [FN71] As a result, many of the convictions were highly suspect. Later, when international judges were appointed to serve on the panels, these convictions often were reversed and remanded for new trials. [FN72] Similarly, in Indonesia, prosecutions of international humanitarian law crimes led to difficulties because prosecutors failed to establish the elements of these crimes--such as the requirement that atrocities be systematic or widespread in order to qualify as crimes against humanity--despite the fact that such evidence was readily available. [FN73] Thus, although international humanitarian law norms are now sufficiently well-established, they often fail to penetrate even the local judicial institutions, let alone the popular consciousness more broadly.

III. POTENTIAL ADVANTAGES OF HYBRID COURTS

The success of any effort to confront past atrocities, whether through criminal trials, truth commissions, civil compensation schemes, vetting of public officials, or some combination *306

thereof, will depend on the particular social, political, and cultural context. The need for such an effort to confront the past, and the role it might play in establishing peace and democratic institutions of governance, likewise varies considerably depending on the unique circumstances of each case: there are no cookie-cutter solutions to these highly complex problems. The Kosovo, East Timor, and Sierra Leone cases share enough similarities, however, that one can use them to draw a few tentative conclusions about the promise that hybrid courts hold in other settings. In particular, hybrid courts may offer at least partial responses to the problems of legitimacy, capacity, and norm-penetration discussed previously.

In Kosovo and East Timor, the addition of international judges and prosecutors to cases involving serious human rights abuses may have enhanced the perceived legitimacy of the process, at least to some degree. In both contexts, the initial failure of UN authorities to consult with the local population in making governance decisions generally, and decisions about the judiciary specifically, sparked public outcry. Without normal political processes in place, of course, such consultation is inherently difficult. When no elected officials exist to give advice, and civil society is badly damaged by years of oppression and conflict, it is not at all clear precisely which people should be consulted without creating impressions of bias. Thus, in both Kosovo and East Timor the appointment of foreign judges to domestic courts to sit alongside local judges and the appointment of foreign prosecutors to team up with local prosecutors helped to create a framework for consultation that may have enhanced the general perception of the institution's legitimacy. By working together and sharing responsibilities, international and local officials necessarily consulted with each other. [FN74]

The appointment of international judges to the local courts in these highly sensitive cases may also have helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population. In Kosovo this was most apparent, as the previous attempts at domestic justice had failed to win any support among Serbs. [FN75] Indeed, Serbian judges refused to cooperate in the administration of justice and the verdicts in the cases tried by ethnic Albanians were regarded by the ethnic Serbian population as tainted. [FN76] In contrast, the verdicts of the hybrid tribunals garnered considerable support, even among Serbs. [FN77]

The sharing of responsibilities among local and international officials is not a complete cure for legitimacy problems, of course. Indeed, such hybrid relationships can raise new questions about who is really controlling the process. When international actors wield more power than local officials--when the majority of judges on a given panel is international, for example, or when the local prosecutors merely serve as deputies to international prosecutors-- some may charge that the international actors control the process and that such control smacks of imperialism. In East Timor, some local actors involved in the criminal justice process criticized the hybrid court on these grounds. [FN78] On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally controlled processes. [FN79] And the devil is, of course, often in these details. Nonetheless, the shared arrangement does offer more promise of working out these difficulties than a purely international or a purely domestic process.

*307 The hybrid process offers advantages in the arena of capacity- building as well. The side-by-side working arrangements allow for on-the-job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles. [FN80] And the teamwork can allow for sharing of experiences and knowledge in both directions. International actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice

at the same time that local actors can learn from international actors. In addition, hybrid courts can serve as a locus for international funding efforts, thereby pumping needed funds into the rebuilding of local infrastructure.

To be sure, hybrid courts also face difficulties in capacity-building. A lack of resources has proven to be the most serious problem so far. For example, in both Kosovo and East Timor, the hybrid courts have been given an enormous mandate without receiving sufficient funding. Court personnel lack even the most basic equipment necessary for them to do their jobs; translators and other administrative personnel are in short supply; and, perhaps most significantly, the courts have had trouble attracting and retaining qualified international personnel to fill posts as judges, prosecutors, and defense counsel. [FN81] To the extent that hybrid courts are touted as a means of doing justice on the cheap and are then deprived of even the most basic resources, they cannot fulfill their potential. Nonetheless, such concerns about funding are issues more of implementation than conception. And, of course, lack of resources can be a problem regardless of the legal framework adopted.

With respect to the penetration and development of the norms of international humanitarian law, hybrid courts potentially offer still further benefits. Because the personnel of such institutions include both international and domestic judges, the opportunities are much greater for the cross-fertilization of international and domestic norms regarding accountability for mass atrocity. In a sense, the hybrid courts themselves create a network of international and domestic legal professionals, providing a setting in which they can interact, share experiences, and discuss the relevant norms, both in and out of the courtroom. [FN82] Of course, the argument that this network will result in the better use and richer development of international norms (and of domestic ones) assumes that the foreign judges will be experts in the jurisprudence of the international tribunals, an assumption that has not been borne out in the Kosovo case, where the hybrid courts often have failed even to cite relevant cases from the ICTY. [FN83] In East Timor, the difficulty in attracting qualified international personnel has led to similar problems. [FN84]

Yet again, these problems stem more from resource constraints than from structural problems with the hybrid model. Because international and local legal professionals can work together in the hybrid court setting, there is at the very least an opportunity for the kinds of interactions that can result in the local application of existing international humanitarian law as well as the local development of mass atrocity norms. [FN85] In Sierra Leone, for example, the Secretary-General has emphasized that the hybrid court should be guided by the jurisprudence of the ICTR and ICTY. To the extent that some of the judges appointed to the court are aware of this jurisprudence, they are more likely to apply it and share their knowledge with the others. In turn, the Sierra Leonean legal professionals involved in the work of the court will be more likely to use and develop these principles, not only within the hybrid court but perhaps in future cases in domestic Sierra Leonean courts as well. The international humanitarian law norms are thus more likely to penetrate into Sierra Leonean legal culture than norms applied in a remote tribunal by foreigners.

*308 Indeed, the establishment of hybrid courts may not only aid in the penetration of norms within the transitional countries affected, but in the growth of regional human rights norms as well. For example, it is significant that many of the judges on both the ICTR and the Sierra Leonean hybrid court are African. Because the hybrid court will be applying norms from the ICTR, the interaction among the various judges will create a cadre of African jurists who have become familiar with international humanitarian and human rights law as well as international legal procedures. Ultimately, these judges will return to their various countries, bringing their experience

and knowledge with them. Moreover, the hybrid court in Sierra Leone may well develop and apply these norms in an African context and perhaps contribute to a regional mass atrocity jurisprudence.

IV. THE RELATIONSHIP BETWEEN HYBRID COURTS AND INTERNATIONAL COURTS

Some critics have suggested that hybrid courts are a mere second best alternative to international courts. [FN86] So, for example, it could be argued that the hybrid courts established in East Timor and Sierra Leone arose only because of "tribunal fatigue" and that the existence of an international tribunal with applicable jurisdiction would have made these courts unnecessary. On the other hand, the experience in Kosovo demonstrates that hybrid courts need not be a replacement for international justice (or for local justice either). Rather, the hybrid courts in Kosovo were a necessary complement to international tribunals. Indeed, the use of hybrid courts in Kosovo, in the shadow of the ICTY, may have implications for the relationship of such courts to the newly established ICC.

The ICC's complementarity regime ensures that, in general, the ICC can only assume jurisdiction if national courts are unwilling or unable to investigate. [FN87] Yet, it is precisely in these circumstances that large numbers of cases cannot adequately be resolved by local courts, and the volume of these cases is likely to far outstrip the ability of the ICC to adjudicate them. In these circumstances, hybrid courts can play a useful role by addressing the less high profile cases, thereby providing a forum to try those accused of committing mass atrocities, who might otherwise languish in prison for many years awaiting trial or escape accountability altogether. Indeed, as noted previously, the United Nations established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region.

In addition to serving simply as a supplemental adjudicatory body, the potential advantages of hybrid courts that have already been discussed-- fostering broader public acceptance, building local capacity, and helping to disseminate norms--may also help the ICC to function. Hybrid courts may help the international court gain legitimacy among local populations because, operating in tandem with the ICC, hybrid courts can ground the pursuit of individual accountability for atrocities more squarely within local legal and popular culture. Of course, reciprocity can work in both ways: if a hybrid court were plagued with problems--such as perceived bias toward specific political or ethnic groups or excessive delay due to lack of resources--those problems might taint the entire international justice effort. And turf battles between the two types of institutions, including disputes about evidence- sharing and the appropriate division of cases among the two institutions, might lead to difficulties. Nonetheless, it is easy to envision ways in which both institutions might help to reinforce the legitimacy of the other. *309 Likewise, the interaction between the ICC and a hybrid court could help in the development of the local justice sector. Finally, with respect to norm penetration, the existence of a hybrid court is more likely to foster the regional and domestic implementation of the norms articulated and interpreted in the jurisprudence of the international court.

One difficult question is whether the successful operation of hybrid courts might strip the ICC of jurisdiction because of the complementarity regime. As mentioned previously, the ICC's complementarity principle generally deprives the court of jurisdiction unless domestic courts are "unwilling" or "unable" to prosecute a given case. [FN88] This presents a dilemma with regard to hybrid courts. After all, if a domestic court system otherwise without the ability to prosecute a case is able to do so only because of the creation of a hybrid court within that system, as in Kosovo or East Timor, does the establishment of the hybrid court strip the international court of jurisdiction?

If so, then we might worry that the creation of hybrid courts could endanger the effective deployment of the ICC.

Nevertheless, while the answer to this question is not obvious, I believe the existence of hybrid courts need not divest the ICC of jurisdiction under the complementarity regime for several reasons. First, the existence of hybrid panels might render the domestic court system capable of handling some cases but not others. For example, the existence of a hybrid court might make it possible for the local justice system to handle the trials of lower level subordinates, but even a hybrid court might have difficulty trying the leaders most responsible for mass atrocities. Admittedly, this is not the model of the Sierra Leonean Special Court, which was created specifically to try those bearing the "greatest responsibility." [FN89] However, in the Sierra Leonean case, no international forum existed with which to share cases. [FN90] In contrast, once the ICC is in operation, an international forum would be available, and a hybrid court would not need to try the high level leaders. Thus, a more likely model of coexistence with international tribunals is the Kosovo example, where the hybrid court and the ICTY have divided cases in this way.

Second, even apart from the argument about ability, a state that does not wish to prosecute a given case and would prefer ICC involvement might well be deemed "unwilling" to prosecute. Thus, a state could choose to leave some cases for the international forum to resolve, even if a hybrid court existed.

Third, it could be argued that the ICC jurisdictional test must be applied based on the capacity of the domestic court system prior to international involvement. Thus, even if a hybrid court had been established, with international judges and prosecutors playing key roles, such activity would not necessarily alter the inquiry regarding whether the domestic court system was willing and able to prosecute. This is because, regardless of the formal label, the hybrid court is not truly part of the domestic court system; by definition, it is a hybrid domestic/international court.

Finally, as a practical matter, the decision to establish a hybrid court will most likely be made at the same time that the ICC is considering its jurisdiction, rather than at some prior point. Thus, one would expect that, after order is established in the wake of a series of human rights violations, various actors both domestically and internationally would consider how best to ensure accountability. At that point, the ICC would evaluate its jurisdiction, while the possibility of a hybrid court would also be considered. Accordingly, it seems unlikely that a hybrid court option would supplant ICC jurisdiction. Rather, from the very start, they could be viewed as complementary processes.

*310 V. CONCLUSION

A hybrid court is not a panacea, of course. Indeed, one of the important lessons of the scholarship on transitional justice is that no mechanism is perfect, and none is appropriate in all contexts. Moreover, many accountability and reconciliation processes can operate in tandem and complement one another. Thus, the use of one approach almost never excludes other possibilities. This ecumenical perspective may be one of the primary reasons that the field of transitional justice continues to be a font of on- the-ground creativity and innovation.

Hybrid courts are merely the most recent step in this endless process of creative adaptation. Responding to significant shortcomings in both purely international and purely domestic approaches, hybrid courts have been devised in at least four settings and are under consideration

elsewhere. These courts, though often hampered by underfunding and other logistical difficulties, at least have the potential to address three serious drawbacks of both international and domestic tribunals. First, they may be more likely to be perceived as legitimate by local and international populations because both have representation on the court. Second, the existence of the hybrid court may help to train local judges and funnel money into local infrastructure, thereby increasing the capacity of domestic legal institutions. Third, the functioning of hybrid courts in the local community, along with the necessary interaction-- both formal and informal--among local and international legal actors may contribute to the broader dissemination (and adaptation) of the norms and processes of international human rights law.

Moreover, any fears (or hopes) that these hybrid courts will serve as a complete substitute for purely international or purely domestic courts are misplaced because the hybrid courts are best viewed as a complement to both. Indeed, there is no reason to believe that hybrid courts will divest the ICC of jurisdiction. Rather, because the ICC will never be able to try more than a few cases in any given setting, the hybrid courts may continue to be a necessary part of any transitional justice process.

In any event, simply by highlighting hybrid courts as a new transitional justice mechanism to be recognized and considered, I hope to encourage further study of their strengths and weaknesses both in theory and in practice. While the heartbreaking reality of this field is that atrocities continue to occur, the saving grace is that people continue to innovate and create new models to address the brutality of the past and help to build a more peaceful future. Hybrid domestic/international courts are merely the most recent creative adaptation, and those who work in this area should soberly assess the promise and pitfalls of hybrid courts, while celebrating the innovative spirit that has led to their creation.

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[FN1]. See generally STEVEN R. RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001); AVENUES TO ACCOUNTABILITY: NATIONAL AND INTERNATIONAL RESPONSES TO ATROCITIES (Jane Stromseth ed. forthcoming 2003) [hereinafter AVENUES TO ACCOUNTABILITY]; ALEX BORAINE, A COUNTRY UNMASKED (2000); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS (2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz, ed. 1995).

[FN2]. See Seth Mydans, U.N. and Cambodia Reach an Accord for Khmer Rouge Trial, N.Y. TIMES, Mar. 18, 2003, at A5.

[FN3]. See Neil A. Lewis, Tribunals Nearly Ready for Afghanistan Prisoners, N.Y. TIMES, Apr. 8, 2003, at B1 (reporting plans to create "civilian tribunals conducted by Iraqi lawyers and judges with the help of the United States to prosecute crimes against humanity committed over the past 20 years, including charges of genocide against the Kurds").

[FN4]. At a panel on hybrid courts that was part of the 2002 International Law Association Annual Conference, David Scheffer, former U.S. Ambassador-at- Large for War Crimes Issues, and Hansjörg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, both rejected the notion that such courts might be touted as a model for the future despite the fact that Scheffer had helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia, and Strohmeyer had worked to establish hybrid courts in Kosovo and East Timor as an assistant legal advisor to the UN transitional administrators there.

[FN5]. See, e.g., U.N. Action on Sierra Leone Court Welcomed But "Mixed" Tribunal Has Shortcomings, Press Release, Human Rights Watch (Aug. 14, 2000) (warning that Sierra Leone authorities could manipulate the hybrid court, "leading to biased prosecutions and inadequate protections for persons standing trial before the tribunal").

[FN6]. See, e.g., Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, Opening Statement Before the Senate Commission on Governmental Affairs, April 10, 2003, available at . Although the administration has not explicitly ruled out a hybrid court, officials to date appear to be publicly supporting a domestic, rather than a hybrid, process. See Elizabeth Neuffer, Plan Concerning Abuse Cases Gets Mixed Response, BOSTON GLOBE, Apr. 9, 2003.

[FN7]. For an overview of efforts to establish the rule of law in postconflict Kosovo, see Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law, 22 MICH. J. INT'L L. 371 (2001); Hansjörg Strohmeyer, Making Multilateral Interventions Work: the U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor, FLETCHER FOR. WORLD AFF. (2001) [hereinafter Strohmeyer, Multilateral Interventions]; Hansjörg Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, 95 AJIL 46 (2001) [hereinafter Strohmeyer, Collapse].

[FN8]. Betts, supra note 7, at 376-77.

[FN9]. Strohmeyer, Collapse, supra note 7, at 49-50, 53.

[FN10]. Id.

[FN11]. See Carla Del Ponte, Prosecutor of the ICTY, "Statement on the Investigation and Prosecution of Crimes Committed in Kosovo," The Hague (Sept. 29, 1999).

[FN12]. See Strohmeyer, Collapse, supra note 7, at 49. When UNMIK issued a regulation allowing for longer pretrial detention of suspects, the Legal System Monitoring Section (LMS) of the Organisation for Security and Co- operation in Europe (OSCE) concluded that the new regulation was a "clear breach" of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). OSCE LMS, Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26 (April 29, 2000).

[FN13]. Betts, supra note 7, at 381.

[FN14]. UNMIK Resolution 1999/1.

[FN15]. Strohmeyer, Multilateral Transitions, supra note 7, at 112-13.

[FN16]. Id.

[FN17]. UNMIK Resolution 1999/24 and UNMIK Resolution 1999/25.

[FN18]. OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Kosovo's War Crimes Trials: A Review, September 2002, available at [hereinafter Kosovo's War Crimes Trials].

[FN19]. Id.

[FN20]. UNMIK Regulation 2000/64 (Dec. 15, 2000).

[FN21]. Kosovo's War Crimes Trials, supra note 18.

[FN22]. Id.

[FN23]. See SC Res. 1272 (Oct. 25, 1999).

[FN24]. See Strohmeyer, Collapse, supra note 7, at 50.

[FN25]. See id. at 57.

[FN26]. See id.

[FN27]. For a discussion of the interactions among various accountability mechanisms in East Timor and Indonesia, see Laura A. Dickinson, The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia, in AVENUES TO ACCOUNTABILITY, supra note 1.

[FN28]. See Section 10 of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor, available at (last visited Oct. 21, 2002) [hereinafter Regulation No. 2000/11], which gives to the Dili District Court exclusive jurisdiction over the most serious crimes, including genocide, war crimes, and crimes against humanity. Regulation No. 2000/11 is further supported by UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction for Serious Crimes, promulgated on June 6, 2000, available at (last visited Aug. 27, 2002). For an analysis of these provisions and the hybrid courts they establish, see Suzannah Linton, Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor, 25 MELB. U. L. REV. 122, 145-73 (2001); Strohmeyer, Multilateral Interventions and Collapse, supra note 7; Joel C. Beauvais, Note, Benevolent Despotism: A Critique of U.N. State-Building in East Timor, 33 N.Y.U.J. Int'l L. & Pol. 1101 (2001); see also UNTAET Press Office, Fact Sheet 7, Justice and Serious Crimes (Dec. 2001), available at < http://www.un.org/peace/etimor/fact/fs7.pdf> (last visited Oct. 21, 2002).

[FN29]. Regulation No. 2000/11, supra note 28.

[FN30]. See, e.g., Strohmeyer, Multilateral Interventions, supra note 7, at 118; Sharifah al-Attas, Picking Up the Pieces, THE NEW STRAITS TIMES, Jan. 21, 2002, at 8 (interview with Malaysian prosecutor who works for the Serious Crimes Unit Prosecution office; notes that other prosecutors come from Brazil, Burundi, Canada, England, Sri Lanka, and the United States); see also UNTAET Daily Press Briefing (Jan. 9, 2002), available at (last visited Oct. 21, 2002) (announcing arrival of Siri Frigaard, from Norway, to take the position as the new chief prosecutor for the serious crimes unit).

[FN31]. Judicial System Monitoring Program, Summary of Serious Crimes Cases, available at .

[FN32]. For an overview of the shortfalls of the special panels, caused in part by scarce resources, see Richard Dicker, Mike Jendrzejczyk & Joanna Weschler, East Timor: Special Panels for Serious Crimes, Human Rights Watch, Aug, 6, 2002, available at ltr0806.htm> (last visited Dec. 26, 2002);

see also David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future? ASIA PACIFIC ISSUES, available at (last visited Dec. 26, 2002).

[FN33]. For an account of the conflict and efforts to establish postconflict mechanisms of accountability and reconciliation, see Avril D. Haines, Accountability in Sierra Leone: The Role of the Special Court, in AVENUES TO ACCOUNTABILITY, supra note 1; see also U.S. Department of State, Sierra Leone, 2001 Country Reports on Human Rights Practices, March 4, 2002, available at < http://www.state.gov/g/drl/rls/hrrpt/2001/af/8402.htm> [hereinafter Sierra Leone 2001 Country Report].

[FN34]. See Barbara Crossette, U.N. to Establish a War Crimes Panel to Hear Sierra Leone Atrocity Cases, N.Y. TIMES, Aug. 15, 2000, at A6 (describing fears that Foday Sankoh would be able "to bargain for amnesty if the country's weakened judicial system has control of the tribunal").

[FN35]. See Robert Holloway, Security Council Approves International Court for Sierra Leone, AGENCE FRANCE-PRESSE, Aug. 14, 2000 (describing Kabbah's concerns about domestic prosecutions).

[FN36]. Sierra Leone 2001 Country Report, supra note 33, at § 4.

[FN37]. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN SCOR, UN Doc. S/2000/915 (2000) [hereinafter Report of the Secretary-General].

[FN38]. The court consists of two trial chambers and an appeals chamber, as well as a prosecutor's office and a registry. Each trial chamber is composed of three judges, two international (to be appointed by the Secretary-General) and one domestic (to be appointed by the government of Sierra Leone). The appellate chamber is composed of five judges, three international and two domestic, and while the Secretary-General is to appoint the prosecutor, the government of Sierra Leone is to appoint a deputy. Other court staff is also to include both international and domestic personnel. See generally Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, Appendix II, UN Doc. S/2002/246, [hereinafter Special Court Agreement]; Statute of the Special Court for Sierra Leone, Appendix II, Attachment, UN Doc. S/2002/246 [hereinafter Statute of the Special Court]; Report of the Secretary-General, supra note 37. For an overview of the court's central features, see Michael Scharf, The Special Court for Sierra Leone, ASIL INSIGHTS, October 2000, available at < http://www.asil.org/insights/insigh53.htm.at3>.

[FN39]. Special Court Agreement, supra note 38, at Art. 2; Statute of the Special Court, supra note 38, at Art. 12.

[FN40]. Statute of the Special Court, supra note 38, at Art. 1. Specifically, the court may hear cases concerning crimes against humanity, violations of common Article 3 of the Geneva Conventions, and other serious violations of international humanitarian law, including intentional attacks on civilians or humanitarian personnel, and the abduction and forced recruitment of children under the age of 15. Id. at Arts. 2-4. At the same time, the court has jurisdiction over certain domestic crimes, including offenses related to the abuse of girls, and arson. Id. at Art. 5. Because there was no evidence that the mass killing in Sierra Leone was at any time perpetrated against an identifiable national, ethnic, racial, or religious group with the intent to annihilate the group as such, the Special Court does not have jurisdiction over the crime of genocide. See Report of the Secretary-General, supra note 37, at 3.

[FN41]. Statute of the Special Court, supra note 38, at Art. 20.

[FN42]. War Court Judges for Sierra Leone Take Their Oaths, N.Y. TIMES, Dec. 3, 2002, at A8.

[FN43]. Obviously, these two inquiries may be similar. For example, the perceived legitimacy of a juridical body might be related to the transparency or democratic accountability of the body, two factors that might also be relevant for evaluating the legitimacy of that body as a matter of political theory.

[FN44]. See Strohmeyer, Collapse, supra note 7, at 48-53.

[FN45]. Sierra Leone 2001 Country Report, supra note 33.

[FN46]. See Organisation for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, Report 9--On the Administration of Justice, March 2002, at 5 [hereinafter March 2002 OSCE Report].

[FN47]. See Andrew McKay, Judicial Affairs: Delivering Effective Law and Order, FOCUS KOSOVO, Oct. 2001, at (last visited Oct. 21, 2002); Multi-Ethnic Justice, FOCUS KOSOVO, Dec. 2001, at (last visited Oct. 21, 2001).

[FN48]. Detentions: A Tale of Two Prison Groups, FOCUS KOSOVO, Feb. 2002, at (last visited Oct. 21, 2002).

[FN49]. See Strohmeyer, Collapse, supra note 7, at 50-53.

[FN50]. See Beauvais, supra note 28, at 1119-20.

[FN51]. Most of the atrocities were committed by pro-autonomy (anti- independence) militias, backed by Indonesian authorities. See Strohmeyer, Collapse, supra note 7, at 46.

[FN52]. As quoted in Minh T. Vo, War-Torn Sierra Leone Gets Help from the West, CHRISTIAN SCI. MON., Aug. 10, 2000, available at .

[FN53]. See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors, 18 BERKELEY J. INT'L L. 102, 136-40 (2000).

[FN54]. See id. at 144-47.

[FN55]. See Michael J. Jordan, Hopes Dim for International Tribunal in Thoenes Case, CHRISTIAN SCI. MONITOR, June 25, 2002, at 7.

[FN56]. See, e.g., Vo, supra note 52.

[FN57]. See Strohmeyer, Collapse, supra note 7, at 49-51.

[FN58]. See id.

[FN59]. See id.

[FN60]. See id. at 50.

[FN61]. See Linton, supra note 28, at 133-34.

[FN62]. See Human Rights Watch, World Report 2003, Sierra Leone, available at .

[FN63]. See id.

[FN64]. See, e.g., Anne-Marie Slaughter, Judicial Globalization, 40 VA.J. INT'L L. 1103 (2000).

[FN65]. See id.

[FN66]. See id.

[FN67]. See Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599, 2645-46 (1997).

[FN68]. Sean D. Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 AJIL 57, 95 (1999).

[FN69]. In East Timor, for example, the Serious Crimes Unit tried its first cases as murder cases, rather than the more complex crimes against humanity that might have been charged. See, e.g., Suzannah Linton, Prosecuting Atrocities at the District Court of Dili, 2 MELBOURNE J. INT'L L. 415, 425 (2001); see also Human Rights Watch, Trial Welcome but Justice Still Elusive in East Timor, Jan. 26, 2001, available at .

[FN70]. Kosovo's War Crimes Trials, supra note 18, at 34-36.

[FN71]. Id.

[FN72]. Id. at 12-27.

[FN73]. See, e.g., International Crisis Group, Indonesia: Implications of the Timor Trials, May 8, 2002, available at www.crisisweb.org/projects/showreport.cfm?reportid=643>.

[FN74]. See Beauvais, supra note 28 (describing the benefits of this consultation process in East Timor).

[FN75]. March 2002 OSCE Report, supra note 46, at 6.

[FN76]. See id. at 5-6.

[FN77]. See id.

[FN78]. See Linton, Rising From the Ashes, supra note 28, at 150.

[FN79]. See March 2002 OSCE Report, supra note 46, at 6. Indeed, efforts to establish a hybrid court in Cambodia stalled due to an inability to agree about the balance of international and local control. See Seth Mydans, U.N. Ends Cambodia Talks on Trials for Khmer Rouge, N.Y. TIMES, Feb. 9, 2002, at A4. An agreement to establish a hybrid court has now been reached. See Mydans, supra note 2.

[FN80]. See Beauvais, supra note 28, at 1157-59.

[FN81]. See, e.g., id. at 1160; Linton, Rising From the Ashes, supra note 28, at 149; Kosovo's War Crimes Trials, supra note 18.

[FN82]. See Slaughter, supra note 64.

[FN83]. Kosovo's War Crimes Trials, supra note 18, at 46-47.

[FN84]. See Dicker et al., supra note 32.

[FN85]. In this respect, hybrid courts can be seen as a potentially effective form of transnational legal process. See Koh, supra note 66, at 2602 (defining "transnational legal process" as "the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems").

[FN86]. See supra notes 4-5 and accompanying text.

[FN87]. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, UN Doc. A/CONF. 183/9 (1998), 37 ILM 999 (1998) [hereinafter 1998 Rome Statute], Art. 17. One exception to this requirement is if the Security Council directly authorizes ICC jurisdiction in a particular situation. Id. For further background on the ICC, see generally, e.g., LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2002).

[FN88]. Rome Statute, supra note 87, Art. 17.

[FN89]. See supra note 36 and accompanying text.

[FN90]. Moreover, the hybrid court was not established within the domestic court system.

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2. Statement from the Honorable Pierre-Richard Prosper

STATEMENT OF

THE HONORABLE PIERRE-RICHARD PROSPER

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UNITED STATES DEPARTMENT OF STATE

The U.N. Criminal Tribunals for Yugoslavia and Rwanda:

International Justice or Show of Justice?

BEFORE THE COMMITTEE ON INTERNATIONAL RELATIONS

UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 28, 2002

Mr. Chairman, members of the committee, I thank you for this opportunity to discuss the work of the United Nations International opportunity to discuss the work of the United Nations International Criminal Tribunals for Rwanda and the Former Yugoslavia. This hearing comes at an important time in the history of the two Tribunals which lave been in existence since the early nineties. This hearing also comes at a time when the world is making dramatic advances in achieving accountability for grave atrocities and war crimes.

Leaders throughout the world can no longer expect to employ their might ruthlessly and remain above the reach of the law. And citizens worldwide are starting to feel that they are no longer at the mercy of forces of brutality, or that justice is nothing more than an unattainable abstraction. States that protect human rights and guard against war criminals are now becoming the norm. The rule of law is beginning to prevail over evil.

Nowhere is this more evident than today in Trial Chamber III in The Hague. Slobodan Milosevic, who only a year and a half ago was president of the Federal Republic of Yugoslavia, is now

answering for his actions. The examination of his individual responsibility will hopefully remove any misperception of collective guilt of law-abiding

Serbs. The rule of law is also strengthened by the trials in Arusha, Tanzania where the first-ever judgment for genocide was handed down and where a former head of state plead guilty for his part in the massacres.

The United States remains proud of its leadership in supporting the two ad hoc Tribunals and will continue to do so in the future. Their work is important and has greatly contributed to justice for the victims of war crimes and to ending impunity for those who would orchestrate and commit genocide. To date, at the International Criminal Tribunal for the former Yugoslavia 117 have been indicted, 67 persons have been brought into custody, 26 have been convicted, 5 acquitted, 11 are currently standing trial, and one is awaiting the judgment of the court. At the International Criminal Tribunal for Rwanda, 76 have been indicted, 57 have been brought into custody, 8 have been convicted, one acquitted, and 17 are currently on trial.

These efforts show that the Tribunals are on the path to success. However, despite these achievements, we recognize that there have been problems that challenge the integrity of the process. In both Tribunals, at times, the professionalism of some of the personnel has

been called into question with allegations of mismanagement and abuse. And in both Tribunals, the process, at times, has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims.

To address these abuses, we aggressively engage both with the United Nations in New York and directly with the Tribunals. This engagement is producing results. We are now seeing the UN headquarters and the Tribunals taking action to remedy these wrongs. The UN's Office of Internal Oversight Services has launched an investigation and will issue a report this spring. We successfully obtained approval for on-site auditors at both Tribunals last fall and expect them to be in place shortly. Additionally, the Tribunal for Rwanda is ahead of her sister Tribunal and has taken steps to cure a problem that has plagued both Tribunals: fee-splitting.

With new rules in place, the Tribunal for Rwanda has ongoing efforts to investigate abuses. Just recently, on February 6, the Tribunal dismissed a Scottish defense attorney after evidence of abuses were found and reported him to his home bar association for disciplinary action. Mr. Chairman, the goal of this Administration is to see the Tribunals reach a successful conclusion. That means the Tribunals need to remain within the spirit of the founding resolutions and pursue those who bear the greatest responsibility. We recognize that the Tribunals were not established to judge each and every violation of law that occurred during the conflicts. And they were not designed to completely usurp the authority and, more importantly, the responsibility of sovereign states. In establishing these organs, the Security Council clearly envisioned the shared responsibility of local governments to adjudicate some of these serious violations. And it is this shared responsibility that will lead us to the successful conclusion we seek.

As a result, this Administration is calling for action. We have and are urging both Tribunals to begin to aggressively focus on the endgame and conclude their work by 2007-2008, a timeframe that we have stressed and to which officials from both Tribunals have referred.

We are calling on the regional states to do their part: to cooperate fully with the Tribunals' investigations and prosecutions. We are aggressively engaging the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Croatia at the highest levels to remind them of their

international obligation to transfer all at-large indictees to The Hague. This is an obligation that must be honored. It is an obligation that must be fulfilled.

Not until accused architects of genocide such as Radovan Karadzic and Ratko Miadic go to The Hague will we be at the doorstep of normalization in the Balkans. These individuals cannot out-wait the pursuit of justice and will not remain beyond the reach of the law. We have the requisite patience and are committed to holding them to answer before the Tribunal.

We are engaging the Government of the Democratic Republic of the Congo and other states, pressing for the genocidaires, wanted for the 1994 massacres in Rwanda, to be apprehended and transferred to the UN Tribunal. Not until these organizers are brought to justice will peace in the Great Lakes Region of Africa begin to take hold and a true healing process begin.

We are soliciting our allies to enlist them in this cause. We have restated our commitment and determination to use the breadth of means at the disposal of the U.S. government to see the indictees of both of these Tribunals brought to justice in a timely fashion.

We are also pressing the governments in the former Yugoslavia to accept their responsibility, and are working with the government in Rwanda, to hold accountable the mid and lower level perpetrators. The lower level perpetrators in both of these regions do not get a free pass. We do not want to see an abandonment of the state responsibility and are encouraging appropriate domestic judicial and administrative action.

The United States stands prepared to assist the states in rebuilding their shattered judicial systems to make them capable of dispensing truth-based justice and establishing systematic respect for the rule of law. As part of this commitment, we are jointly exploring creative approaches such as the Rwandan gacaca system that is designed to deal with the seemingly untouchable mass of offenders.

Mr. Chairman, in your letter requesting me to testify on these matters you asked me to address the future of these efforts. Since taking post as ambassador-at-large for war crimes issues I have often been asked what kind of future we see. I have been asked whether September llth has changed our views toward a permanent International Criminal Court ? it has not.

As with the previous U.S. Administration, we oppose the Rome treaty and will not send it to the United States Senate for advice and consent to ratification. We are steadfast in our belief that the United States cannot support a court that lacks the essential safeguards to avoid a politicization of justice.

We also believe that the ICC treaty is just that, a treaty. It does not and should not have jurisdiction over a non-party state. This does not mean that we intend to forgo our historical position of leadership in the pursuit of accountability and justice on the world stage. We remain committed.

We will continue to seek a world where every state fulfills its responsibility to safeguard the law. When war crimes do occur, we look first to a state's domestic system for action. We believe, as I testified last fall before the United States Senate Committee on the Judiciary, that:

The international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and Cambodia. International tribunals are not and should not be the courts of first

redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis...

Our goal should be and this Administration's policy is to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times.

In the years ahead, the United States will continue to lead the fight to end impunity for genocide, crimes against humanity, and war crimes. We will help create the political will. We will continue to seek to bring justice as close as feasibly and credibly possible to the victims in order to create a sense of ownership and involvement. In our work with the Rwanda and Yugoslav Tribunals, the Special Court for Sierra Leone, and elsewhere, we will stress that all parties have a responsibility on the road to justice.

For this noble cause to be successful, for justice to endure, the international community, the Tribunals, and the regional states must coordinate, accept their role and individual responsibility, and go down this arduous road together. With our strong support of these efforts, we will continue to overcome obstacles, achieve accountability for the perpetrators, and secure the rule of law. In passing milestones and creating an environment where there is not a dependency on international mechanisms we will bring justice to the victims and restore confidence in domestic institutions in societies throughout the world.

3. Book excerpt - Genocide in International Law: The Crime of Crimes

Genocide in International Law: The Crime of Crimes

The Crimes of Crimes

William A. Schabas, National University of Ireland, Galway

Cambridge University Press, 2002

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Conclusions

Many of the conclusions suggested in this study may soon find themselves challenged by judicial decisions. Important cases are pending before the trial and appeals chambers of the two ad hoc international tribunals, and before the International Court of Justice, and these may well clarify the lingering interpretative issues that have wallowed in obscurity over the half-century since the adoption of the Genocide Convention in 1948. The academic's dilemma is whether to await judicial pronouncements or to anticipate them. The second course has been more compelling because of the existence of published commentaries on the Convention that set out different hypotheses than those presented here. The judges who will have the final say on these matters in the years to come should be exposed to a range of views. What today remain nebulous and arcane disputes will, probably in short order, be taught and studied as conventional wisdom, established by this or that decision of the International Court of Justice, the ad hoc tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court.

The horrors of Auschwitz, Dachau and Treblinka set the context for the development of human rights law in the years following the Second World War. Prosecution of war crimes perpetrated against civilians had hitherto been confined to cases where the victims resided in occupied territories. What a country did to its own citizens had been deemed a matter that did not concern international law and the international community. Nuremberg appeared to take this bold step forward, but strings were attached. Although the Nazi persecution of Jews, even those within the borders of Germany, was deemed an international crime, the drafters of the Nuremberg Charter insisted upon a nexus between the crime against humanity and the international conflict. In effect, they were holding the Germans accountable for atrocities committed against Germans but resisting a more general principle that might hold them responsible for atrocities perpetrated within their own borders or in their colonies. This imperfect criminalization of crimes against humanity mirrored the ambiguities of the Charter of the United Nations, adopted in June 1945, that pledged to promote and encourage respect for human rights yet at the same time promised that the United Nations would not intervene in matters which were 'essentially within the domestic jurisdiction of any state'

Two streams converged in December 1948, at the General Assembly of the United Nations: the standard-setting of international human rights manifested in the Universal Declaration of Human Rights, and the individual accountability for violations of human rights, of which the Convention for the Prevention and Punishment of the Crime of Genocide was the modest beginning. Both instruments were adopted, within hours of each other, by the General Assembly on 9-10 December 1948, meeting in the Palais de Chaillot in Paris. The Genocide Convention established that in the case of a particular form of strictly defined atrocity there was no longer any nexus, and that the crime could be committed in time of peace as well as in wartime. The Universal Declaration laid the groundwork for steady progress in both standard-setting and a growing recognition of the right of the international community in general and United Nations bodies such as the Commission on Human Rights in particular to breach the wall of the domaine reserve by which States historically sheltered atrocities from international scrutiny.

Then the accountability component of the movement stalled, and was only revived as me Cold War came to an end. During this period, the only instrument with any real potential, at least theoretically, to compel accountability for human rights violations remained the Genocide Convention. When gross violations were committed - in Vietnam, Bangladesh, Cambodia, Indonesia, Lebanon, to give a few examples - the international community turned inexorably towards the Genocide Convention in the hope that it might govern. In fact, its application was almost never clear because of the very strict definition of the crime of genocide. As Georg Schwarzenberger noted cynically, 'the convention is unnecessary when applicable and inapplicable when necessary'.37 The obligations assumed by States in the Genocide Convention were a radical departure from the past. But in so doing, they had made it clear that the scope would be confined to a very narrow range of violations, indeed, the most extreme and rare of the catalogue of human rights breaches.

Two factors emerged to change this situation and, in a sense, to take the pressure off the Genocide Convention as the vital weapon in the battle to protect human rights. First, new law developed to enhance accountability for human rights violations. No longer was the Genocide convention indispensable. The case law of international human rights bodies directed States to enforce the prosecution of human rights violations, even when committed by non-State actors.38 The clouds surrounding the concept of crimes against humanity, which arguably fills the gaps left by the

Genocide Convention, began to dissipate, in particular with the recognition that they could be committed in the absence of armed conflict.39 New instruments were developed dealing with international crimes such as apartheid40 and torture,41 imposing obligations largely similar to those set out in the Genocide Convention. Thus, the first of Schwarzenberger's objections, namely, that the Convention never seemed to apply when it was needed, became less significant, because there were other norms, both customary and conventional, to take its place. Secondly, the growth of ethnic conflict brought with it circumstances that seemed to correspond exactly to what the Convention's drafters had in mind, of which the clearest and most horrific manifestation was the massacres in Rwanda in mid-1994. Schwarzenberger's other objection, that when the Convention applied it was not needed, had been overtaken by events. In the last decade of the twentieth century, after more than four decades of marginalization, the Convention became an imperative legal tool for prosecution of individual offenders in situations where its applicability was unchallengeable.

The recent revival of the Convention has shown that forty years of atrophy did the instrument little good. During this time, many of the more or less intentional ambiguities left by the drafters had never been described or even seriously addressed. Aside from the Eichmann trial, there was essentially no case law. Academic writing had focused far more on the perceived inadequacies of the Convention than on clarifying the content of the actual provisions.

Perhaps the greatest unresolved question in the Convention is the meaning of the enigmatic word 'prevent'. The title of the Convention indicates that its scope involves prevention of the crime, and, in article I, States parties undertake to prevent genocide. Aside from article VIII, which entitles States parties to apply to the relevant organs of the United Nations for the prevention of genocide, the Convention has little specific to say on the question. The obligation to prevent genocide is a blank sheet awaiting the inscriptions of State practice and case law. A conservative interpretation of the provision requires states only to enact appropriate legislation and to take other measures to ensure that genocide does not occur. A more progressive view requires States to take action not just within their own borders but outside them, activity that may go as far as the use of force in order to prevent the crime being committed. The debate on this is unresolved, and is likely to remain so, at least until the next episode of genocide, if there is no insistence that the subject be clarified. The sad reality is that, five years after the Rwandan genocide, and despite professions of guilt about their inertia while the crimes were taking place. States are hardly more prepared today to intervene to prevent genocide in central Africa. Military action in Kosovo in early 1999 was sometimes defended as being founded in a desire to correct the tragic errors committed while genocide raged in Rwanda in 1994. But the Kosovo intervention fit within a context of strategic interests of the North Atlantic Treaty Organization. Moreover, the tragic ethnic cleansing in Kosovo in March, April and May 1999 fell short of the requirement in article II of the Convention that the intent be to destroy physically a protected group. In any case, NATO never claimed that it was required to intervene in Kosovo, only that it was entitled to. The missing piece here, the one that is relevant if genocide recurs, particularly in Africa, is the view that humanitarian intervention to prevent genocide is not so much a 'right' as a duty.

Short of an amendment to the Convention that could develop the content of the duty to prevent genocide - an unlikely prospect - a number of other less dramatic mechanisms might be considered. A commitment by States to the use of force in order to prevent genocide might take the form of a General Assembly resolution. Statements to the same effect could be adopted by regional bodies, such as the Organization for Security and Cooperation in Europe, the Organization of American States and the Organization of African Unity. These would amount to authentic interpretation of the

obligation to prevent genocide set out in the Convention, and might also be deemed to create binding law as a manifestation of subsequent State practice.

Article I of the Convention also declares genocide to be a crime under international law, specifying that it can be committed in time of peace or war. This was an important factor in 1948, when the prevailing view of crimes against humanity was that they could only take place in relationship with an armed conflict. The law has now removed the distinction, and genocide can be readily admitted as a subset or category of crimes against humanity. Affirming genocide to be a crime under international law was an answer to those who pleaded that it was a retroactive offence. The point had already been made by the General Assembly two years previously, in Resolution 96(1).

The definition of the crime of genocide, set out in articles II and HI of the Convention, has stood the test of time. A source of great controversy when it was adopted, debate continued to rage as to whether or not the enumeration of groups should be expanded, principally to include political groups, as well as about extension of the punishable acts of genocide. But, when given the opportunity, at the Rome conference in 1998, the international community showed no inclination to amend or revise the definition of genocide. With due respect for views to the contrary, of which there are many, this study concludes that the definition of genocide is not an unfortunate drafting compromise but rather a logical and coherent attempt to address a particular phenomenon of human rights violation, the threat to the existence of what we would now call 'ethnic' groups and what the drafters conceived of essentially as 'national minorities'.

As for extending the scope of punishable acts, this would be desirable if the Convention's full preventive mission is to be enhanced. Experience has shown that the inability to address preparatory acts such as the dissemination of hate propaganda, by radio and print media in particular, contributes mightily to the extent of the crime and the difficulty in its suppression. Some of the Convention's shortcomings in this respect have been corrected by provisions of widely ratified human rights instruments. Similarly, the political compromise that resulted in the Convention's exclusion of cultural genocide is to be regretted. However, the normative protection of ethnic and national minorities against cultural persecution remains an underdeveloped zone within the overall scheme of international human rights.

Several of the provisions of the Convention contemplate the obligations assumed by States in matters of criminal law legislation, jurisdiction and extradition. Scrutiny of the domestic law provisions by which States introduce the crime of genocide in their own penal codes shows that many States have enacted the crime of genocide, although there are some notable exceptions, including the tragic example of Rwanda, which acceded to the Convention and then neglected to amend its Penal Code. There are also significant and relatively widespread shortcomings in terms of the legal rules that accompany the crime itself. This indicates that the introduction of the crime of genocide in domestic penal legislation is often rather perfunctory. The inadequacies of the English laws concerning the exclusion of head of State immunity, a principle recognized since the Treaty of Versailles and codified in article IV of the Genocide Convention, came to international attention during the efforts to extradite Chilean dictator Augusto Pinochet.42

The Convention's failure to recognize universal jurisdiction is one of its great defects. Article VI, which declares that offenders are to be tried by the courts of the State where the crime took place (or by an international court), was a pragmatic compromise reflecting the state of international law at the time the Convention was adopted. Although

universal jurisdiction, and the related concept of aut dedere aut judicare, had been long recognized for certain crimes, committed by individual outlaws, few in 1948 wanted to extend it to crimes which would, as a general rule, involve State complicity. The Israeli courts, in the Eichmann case, attempted to manoeuvre around the obstacle of article VI, but their reasoning was unconvincing.

Extradition is another area where the provisions of the Convention seem insufficient. States undertake to 'grant extradition in accordance with their laws and treaties in force', but article VII might be deemed inapplicable if there is no treaty between the two States concerned. Extradition ought to be mandatory, even if there is no treaty. Arguably, when article VII is combined with the obligation to punish set out in article I, this is implicit in the Convention. Practice is so limited that it is hazardous to attempt any conclusions as to how States view the scope of article VII.

Parallel to the Genocide Convention there exists a body of customary international law, and some have argued that it is in some respects more complete than the instrument itself. This was the position of the Israeli courts in Eichmann, where the judgment found that customary law had enlarged the scope of jurisdiction under the Convention. The definition of the crime of genocide is undoubtedly part of international custom, as are the basic obligations to punish and prevent genocide. The very consistent State practice in introducing the crime of genocide, in conformity with the Convention definition, and the reaffirmation of that definition in contemporary instruments, attests to the customary status of articles II and III of the Convention. Demonstrating that some of the more specific rules set out in the Convention, such as a duty to extradite and a prohibition of head of State immunity, are also customary norms in a more difficult undertaking. The Convention, while relatively widely ratified, lacks the universal scope of treaties like the Geneva Conventions or the Convention on the Rights of the Child, which have laid claim to status as a codification of customary norms by virtue of their general acceptance within the international community. The norms found in articles IV, V, VI and VII cannot claim the same consistent introduction in domestic law or in bilateral practice between States.

Thus, the Convention's balance sheet is inadequate, incomplete and uncertain. In some cases, such as jurisdiction, the Convention plainly needs to be brought up to date. In others, great doubts remain about its interpretation. A very useful mechanism to help resolve some of these problems would be to create a reporting system, similar to those developed by the International Labour Organization and the major human rights treaties. States parties to the Convention would be expected to submit periodic reports on their compliance with the Convention in which they would address the unresolved interpretative issues. In this way, a form of 'practice' could be established. The reports would be presented to an expert committee that would ensure some control over the sincerity and accuracy of the reports, challenging the State to explain omissions or to provide justifications.43 Such a committee could also monitor the early signs of genocide, alerting the State itself as well as the international community to potential dangers. In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the creation of a treaty committee along these lines, including a system of periodic reports, and a role for the High Commissioner for Human Rights:

requests the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide ... to encourage - or even undertake - the drafting and adoption of a control mechanism in the form of a treaty committee charged in particular with monitoring compliance of States Parties with the commitments which they undertook . . . through the assessment of the reports submitted by the States Parties and, on a preventive basis, to draw the attention of the High Commissioner for Human Rights to situations which my lead to genocide.44

A similar proposal has been made by the Special Rapporteur on extrajudicial, summary and arbitrary executions of the Commission on Human Rights.45 While ideally a mechanism along these lines would be established by an additional protocol to the Convention, that option may be rather too ambitious, at least in the short term. But it could also be created by resolution of the General Assembly; a similar body was created by the Economic and Social Council, charged with monitoring respect of the International Covenant on Economic, Social and Cultural Rights, although no provision to this effect was made in the treaty itself. It is true that some States might fail to co-operate, but this is also the case with many who have ratified the treaties. In other words, the existence of a binding legal obligation to submit reports is probably not that essential, at least for those States that are in good faith. If the resolution creating such a mechanism reflects genuine consensus, and if the members of the committee are credible and prestigious, its success will be likely even in the absence of a treaty obligation.

Early warning of genocide has been suggested on several occasions as a necessary element in its prevention. It is hard to quarrel with any efforts to anticipate crimes before they are committed. The proposals have sometimes involved sophisticated models employing computer databases and modern technology. In his report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Benjamin Whitaker said that, once warning was provided, subsequent steps could be taken to prevent genocide:

the investigation of allegations; activating different organs of the United Nations and related organizations, both directly and through national delegations, and making representations to national Governments and to interregional organizations for active involvement, seeking support of the international press in providing information; enlisting the aid of other media to call public attention to the threat, or actuality, of genocidal massacre, asking relevant racial, communal and religious leaders, in appropriate cases, to intercede, and arranging the immediate involvement of suitable mediators and conciliators at the outset.46

Early warning of genocide requires an ability to identify and recognize the initial symptoms. The real challenge is distinguishing between garden-variety ethnic conflict, of which there is no shortage in the modern world, and genuine signs of possible genocide. In early 1994, the United Nations peacekeeping mission learned of the planning of the Rwandan genocide from a well-placed informer. Yet even direct information of preparations was not enough to sound alarm bells at United Nations headquarters in New York. Other signs, however, confirmed the report, and ought to have been taken more seriously. The principal external indicator in Rwanda, as in Nazi Germany, was the tone of hate propaganda directed against the targeted group. Speeches by prominent political personalities, print media and radio all pointed to a campaign intended, at a minimum, to lay the groundwork for public acceptance of genocide and, possibly, provoke public participation in the crimes. While early warning of genocide involves assessment of a range of factors, the presence of such propaganda is the real common denominator.

The law of genocide, if it is to develop, is confronted with a choice between two very different options. The first is to enlarge the scope of me definition of genocide, mainly by including groups not presently covered by article II, such as political groups, gender groups and other groups that are the victim of mass killing. Many have argued in favour of this, and their arguments are compelling. The second is to extend the scope of the obligations assumed by States parties, notably in the direction of a duty to intervene in order to prevent genocide. Ultimately, this may require military intervention. The more the definition of the crime is either generous or equivocal, the less States will be prepared to make such commitments. We cannot improve the Genocide Convention in both

directions at the same time. Assuring States that genocide has a precise, restrictive and unchanging definition is the price to pay for their undertaking to take effective preventive action.

Yugoslavia's proceedings taken against NATO in April 1999 demonstrated the value of a restrictive definition of the crime of genocide. While Yugoslavia had an arguable case against the respondents for breaching the obligation not to use force contained in the Charter of the United Nations, it faced enormous obstacles on the jurisdictional front. It tried, but in vain, to engage its adversaries in a debate about the merits of the case. The respondents refused the invitation, sticking to their position that the Court had no jurisdiction to hear the case. But Yugoslavia also charged NATO with genocide. Its argument on the merits was weak, possibly even frivolous, but there was little trouble in establishing the jurisdiction of the Court. Here, most of the NATO countries took on the debate on the merits of the claim, because they had no quarrel on the jurisdictional issue. In other words, genocide is different. States will accept obligations, such as the jurisdiction of the Court, that they refuse in another context. And, to the extent that the International Court of Justice continues to insist upon a precise and restrictive definition of genocide, it will be relatively easy to convince States to accede to or ratify the Convention without reservation. But, if the opposite path is taken, the prospect of enlarging the body of States parties will be a dim one.

Given that other instruments exist or are emerging to cover the crimes that lie on the margins of genocide, including mass killing taking the form of crimes against humanity, enlargement of the definition does not rate at the top of the list of priorities. Admittedly, the author remains marked and indeed haunted by the failure of the international community to intervene in order to prevent the Rwandan genocide. These views prompt a preference for strengthening the obligations that flow from prevention rather than extension of the scope of those protected by the Convention. In other words, if a choice must be made, it would be better to engage States in a commitment to intervene, with force if necessary, in order to prevent the crime of genocide, rather than to expand the definition or suggest its borders are uncertain.

4. The Danger of a World Without Enemies

Michael Ignatieff:

The Danger of A World Without Enemies.

Lemkin's Word

in The New Republic, 21 February 2001 © The New Republic 2001

MICHAEL IGNATIEFF is Carr Visiting Professor of Human Rights at the Kennedy School of Government at Harvard University. A different version of this essay was delivered as a lecture for the Committee on Conscience at the U.S. Holocaust Memorial Museum in December.

When Claude Lanzmann was filming Shoah, he asked a Polish peasant whose fields abutted a death camp what he felt when he saw human ash from the crematoria chimneys raining down on his

fields. The peasant replied: "When I cut my finger, I feel it. When you cut your finger, you feel it." The man's reply takes us to the heart of the problem of genocide. Why exactly is genocide a "crime against humanity"? Why is a crime committed against Jews or any other human group a crime against those who do not belong to that group?

The obvious answer seems obvious only if you assume what in fact requires demonstration, namely that we belong to the same species and owe each other the same duties of care. This concept came late to mankind, and to judge from the horrible century just past it is still struggling to make headway against the more evident idea that race, color, or creed mark impassible frontiers of moral concern. The Polish peasant was not implying that he had no feelings towards Jews. He was admitting only that he did not feel very much about them, and that his stronger feelings were reserved for people more like himself. To the extent that ethics follow feeling, his codes instructed him to care only for his own. In this, he reasoned as most human beings do.

Most moral principles take root within tribal boundaries and remain confined by the tribe's allegiances and interests. According to this conception of the ethical life, morality articulates identity and identity depends on difference. For millennia, human beings saw nothing odd about slavery, about selling and disposing of persons as if they were things. The Romans distinguished explicitly between war against civilized peoples, which had to obey certain rules of honor and mercy, and war against barbarians, which could be conducted without restraint of any kind. Moral universalism is a late and vulnerable addition to the vocabulary of mankind.

If all this is true, we need to force ourselves to think beyond the platitude that genocide is an abomination, and to understand the more difficult thought that it represents an unending moral temptation for mankind. The danger of genocide lies in its promise to create a world without enemies. Think of genocide as a crime in service of a utopia, a world without discord, enmity, suspicion, free of the enemy without or the enemy within. Once we understand that this utopia is the core of the genocidal intention, we have to realize that this utopia menaces us forever. Once we understand genocide as utopian, we understand also the vulnerability of universalism. The idea that there can be a "crime against humanity" is a counterintuitive one that has to make its way against the more alarming thought that what humans actually desire is not a world of brotherhood, but a world without enemies.

It will be said that moral universalism has an ancient pedigree, and that we can take comfort in how deeply the idea of the brotherhood of mankind runs in our religious and secular faiths. I am not so sure that we can derive such comfort from history. The moral world of the Old Testament is not only a universe of monotheistic universalism and prophetic justice; it is also a world of tribal moralities, of righteous slaughter rationalized by those who believed themselves chosen of God. The New Testament extends its new ideal of human equality only to the class of all believers. The precondition for Christian brotherhood is conversion.

Secular people, disgusted by the ingenious ways in which human beings have used religion to justify slaughter, may turn in relief to the secular universalism that we date to the Enlightenment. But as we now know, the Founding Fathers of the American civil religion did not see any contradiction between the universal claim that all men are created equal and the particularistic claim that slavery was merely a legitimate exercise of a constitutional right to property. It took the Civil War, the Fourteenth Amendment, and the repeal of Jim Crow for the most egalitarian society on earth even to begin to narrow the gulf between principle and practice. We cannot date effective

legal universalism in the United States any earlier than 1964, and the passage of the Civil Rights Act.

All of this is prologue to the thought that moral universalism is a modern conviction, established in our souls only after the most tenacious struggle to convince the powerful that they must practice what they preach. If we turn from the struggle to give equality a universalistic application to the struggle to establish the idea that the extermination of any group is a crime against all human groups, we discover again the modernity of moral universalism. To be sure, there are anticipations of the idea in the Roman conception of offenses against jus gentium, the law of all nations; but this is still a large conceptual step away from the idea of a common human race with equal rights and equal duties. The phrase "crime against humanity" enters the language of international law very late, only after World War I. The word "genocide" was not coined until 1943.

The man who coined it was Raphael Lemkin, a lawyer born in Bialystok in Poland a hundred years ago. Cast ashore in America by the Holocaust, and acting as a private citizen, without state support or salary, he single-handedly drafted and lobbied for the passage of the Genocide Convention, approved by the U.N. General Assembly in December 1948. This would be achievement enough, but Lemkin died alone and remains almost forgotten. The word that he coined--"genocide"--is now so banalized and misused that there is a serious risk that commemoration of his work will become an act of forgetting, obliterating what was so singular about his achievement.

To appreciate Lemkin's achievement, we must see it not as the ratification of easily available common sense, but as a counterintuitive leap of the imagination beyond the realm of what common sense deemed possible. For the extraordinary fact is that Lemkin coined the word "genocide" before the reality it applied to had revealed itself in its demonically modern industrial form. Already in August 1941, Churchill had said, in the face of Nazi atrocities in Eastern Europe, that the world was faced with "a crime without a name." Yet when Lemkin coined the word, in 1943, while writing Axis Rule in Occupied Europe at Duke University, it was fully two years before the world knew the words Auschwitz, Buchenwald, Belsen, and Dachau.

By the middle of 1942, to be sure, prophetic figures such as Jan Karski and Szmul Zygielbojm had begged official Washington and London to grasp the reality of extermination in Poland. But those to whom they brought the news--Justice Felix Frankfurter, for example--could not bring themselves to believe what they were told. Isaiah Berlin was in the British Embassy in Washington from 1942 onwards, and was constantly in touch both with Frankfurter and with Nahum Goldman, Chaim Weizmann, and other key figures in the Zionist movement. None of them could believe that what was happening in Europe was more than a massive pogrom, a continuation of an immemorial pattern of persecution. What escaped them was the terrible novelty of industrialized mass slaughter sustained by an ideological desire to wipe a people from the face of the earth, to grind salt into the earth, as the Bible would say, so that nothing would ever grow again.

How are we to explain that Lemkin had the moral imagination these great figures lacked? It cannot be because he was privy to what they knew. He came to Washington in 1943, but he remained an isolated outsider and was not aware of the secret that insiders refused to believe. Instead he had to extrapolate, by a leap of the mind, from his own particular experience to the terrible general reality, the continental catastrophe that all but a handful refused to see. In 1939, he was in Warsaw, a lawyer in private practice, when the Germans invaded. He joined in the defense of the city and then fled eastwards. On the way, he hid with a Jewish baker and his family in a small town. He begged

the family to flee and the family refused. Lemkin never forgot what the baker said to him: "We Jews are an eternal people, we cannot be destroyed. We can only suffer."

This noble adherence to an ancient truth almost certainly cost the baker and his family their lives. This very Jewish endurance was an essential element of that inability to see against which Lemkin was to struggle throughout the war. He fled to Sweden, leaving behind more than forty members of his own family. He set himself up in a Stockholm law library and began a study of the legal decrees of the New Order in Europe, using evidence that reached him through the neutralist Swedish embassies, the Red Cross delegations in Germany, and German occupation radio.

Nobody before Lemkin had studied the German occupation from the standpoint of jurisprudence. His central insight was that the occupation, not just in Poland but all across Europe, had inverted the equality provisions of all the European legal traditions. Food in Poland was distributed on racial grounds, with Jews getting the least. Marriage in occupied Holland was organized entirely on racial lines: Germans responsible for getting Dutch women pregnant were not punished, as would be the case under normal military law; they were rewarded, because the resulting child would be a net addition to the Nordic race.

Lemkin was the first scholar to work out the logic of this jurisprudence. From its unremitting racial bias, he was able to understand, earlier than most, that the wholesale extermination of groups was not an accidental or incidental cruelty, nor an act of revenge. It was the very essence of the occupation. Lemkin published his findings, with the help of the Carnegie Endowment for International Peace, in 1944, in Axis Rule in Occupied Europe. This book is a rare example of scholarship as heroism: a patient, detailed, unprecedented, and unflagging demonstration, decree by decree, of modern despotism's infernal logic.

As Lemkin slowly worked out where this logic was headed, he was just as concerned about the fate of the Polish people as he was about the fate of his fellow Jews. In the decrees penalizing the use of the Polish language and promoting the destruction of Polish cultural monuments and treasures, the use of Poles for slave labor, the merciless repression of all resistance, and the settlement of Germans on Polish land--in all those awful edicts Lemkin could make out a concerted desire to subjugate, and if necessary to exterminate, the Polish people. The concept of genocide was invented, in other words, not only to describe the fate of his own people, but also to capture what was happening to the people to whom he would have belonged, had he been permitted. He was one of those Polish patriots never allowed membership in the nation that he claimed as his own. Lemkin's theoretical innovation taught a universalist lesson not least by example.

In understanding why he had such unique premonitory capacity, such a special gift for anticipating horror, we should remember that Lemkin was born and raised in a place where it was a matter of life and death for a Jew to anticipate the worst. Born on a farm near Bialystok, when Poland still belonged to the Russian czar, he remembered how his father had to bribe the local constable to turn a blind eye to the fact that the family owned a farm, a violation of Pale legislation against the Jews. He was twelve years old when Mendel Beilis was put on trial for ritual murder, and the family lived in fear until Beilis was released. In World War I, the Germans and Russians fought over the family's farm, and it was destroyed. After the war, when Trotsky and Lenin fought Pilsudski, Lemkin did service in Pilsudski's army. Later he trained as a lawyer and helped to draft the criminal code of a newly independent Poland. He served as a state prosecutor in Warsaw until anti-Semitic slurs forced him to withdraw into private practice in the 1930s.

Never secure in the Poland of his birth, he sought belonging in the law. He was not the only Jew from Bialystok to do so. Hersh Lauterpacht, later the Whewell Professor of Jurisprudence at Cambridge, was also from Bialystok, and made his escape to England in the 1920s. Like Lemkin, he became an international lawyer; and like Lemkin, he devoted his war work as a scholar to devising legal responses to barbarism. In Lauterpacht's case, it was by drafting an international bill of rights that influenced both the Universal Declaration of Human Rights of 1948 and, more directly, the European Convention on Human Rights of 1950. Both men responded to barbarism in the same way: by seeking to draft international legal instruments that would ban it. In a deeper sense, both these men found a home in the law, and their passionate attachment to international law was a consequence of their homelessness anywhere else.

This ideal of a world made civilized by international convention drove Lemkin first to define genocide as a crime in international law, then to secure its inclusion in the Nuremberg indictments in 1945, and finally to secure a convention making the crime a matter of universal criminal jurisdiction in 1948. When it was finally passed by the General Assembly in 1948, he was discovered weeping in a corridor of the United Nations. He wanted to be left alone, and in every sense he was alone. All of his family, except one brother, had perished in the Holocaust.

Lemkin's faith in international law was not universally shared. The surviving Jews of Poland put no trust in a world made safe by international covenants against genocide. For them, safety and home lay where Herzl, Weizmann, and Ben-Gurion said it lay: in a defensible nation-state of their own. But Lemkin never identified with the promise of Zion. In an article written in April 1945, he rather poignantly identified himself as "Polish but his viewpoint is international." There is pathos in this internationalism, since internationalism had always betrayed him. He had believed in the League of Nations, and he had presented his first legal ideas to outlaw barbarism and vandalism to League of Nations experts in 1933, only to find himself laughed at by the German delegations.

Yet he was one of those rare people who take scorn as proof that they are right. Lemkin never deviated from the conviction that only a just international legal order could protect his own people. Zionism, a Jewish homeland, was a distraction. He never stopped to consider that a defensible homeland is a more reliable remedy for genocide than any U.N. convention. In his way, he too was a utopian. The young journalist A.M. Rosenthal of The New York Times once challenged Lemkin to explain how a legal document, a "scrap of paper" could stop a Hitler or a Stalin. Lemkin replied: "Only man has law. Law must be built, do you understand me? You must build the law." Alas, his faith in law was not only powerful, it was also poignant: the Genocide Convention Lemkin labored so hard to draft and to have ratified has secured only one conviction in its fifty-year existence.

He was also a prisoner of his past in his strange scorn for human rights. As Samantha Power shows in a forthcoming study of the history of the Genocide Convention, Lemkin was contemptuous of the work of Eleanor Roosevelt and the drafters of the Universal Declaration of Human Rights, which secured General Assembly approval within days of the vote on his Genocide Convention. Mere declarations, he believed, were meaningless. What was needed was a binding convention, with universally enforceable powers.

But here, too, history has been ironic. Human rights have gone on to become the faith of a faithless age, while the Genocide Convention has been honored only in the breach. Against all of Lemkin's expectations, conventions have proved less influential than declarations. Indeed, his own convention has had perverse effects. During the genocide in Rwanda, State Department spokesmen

refused to use the word "genocide" to describe it, lest it entrain the very responsibilities that Lemkin had written into the convention.

Those who should use the word "genocide" never let it slip their mouths, and those who do use the word "genocide" banalize it into a validation of every kind of victimhood. Thus slavery is called genocide, when--whatever else it was--it was a system to exploit the living rather than to exterminate them. Aboriginal peoples in North America speak of a microbial genocide, when it should be evident that microbes do not have intentions. Genocide has no meaning unless the crime can be connected to a clear intention to exterminate a human group in whole or in part. Something more than rhetorical exaggeration for effect is at stake here. Calling every abuse or crime a genocide makes it steadily more difficult to rouse people to action when a genuine genocide is taking place.

Towards the end of his life, with his convention a dead letter and its ratification by the United States stalled in the Senate, Lemkin wrote mournfully that there had been three things he had wanted to avoid in his life: wearing eyeglasses, losing his hair, and ending up as a refugee. All three, he said ruefully, had taken place. He died alone and forgotten in a Manhattan hotel in 1959.

Was he a failure? I do not believe so. The achievement that cannot be taken away from Lemkin is the intelligence and the courage to have identified an abominable new intention when others saw only immemorial cruelty, and to have given this new intention--to live in a world without enemies--the name that it deserves. It must be said, too, that it was Lemkin who gave meaning to what has to be the central concept in the postwar moral imagination: the idea of a crime against humanity.

Yet we cannot share the meaning that Lemkin gave to his concept. For if you were to ask Lemkin the question that I posed at the outset--why is a crime against Jews also a crime against Gentiles?--he would have replied that what human beings share is a common civilization, in which the achievements of one group are shared by all. Thus in a passage written in April 1945, at the very moment that the world was discovering what lay behind the barbed wire at Auschwitz and Belsen, he continued to write:

Our whole heritage is a product of the contributions of all peoples. We can best understand this when we realize how impoverished our culture would be if the so-called inferior peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.

There is something affecting--and also something wrong--about this idea that what humanity holds in common is civilization. Kultur did not prevent Germans from massacring even their fellow citizens. Indeed, Kultur was Germanized in such a way as to deny Jews any right to belong to the civilization that they had made in common with Gentiles. Lemkin remained trapped by the hopeful optimism of a civilization in twilight, just as he was trapped by the illusion that what was Western was universal. But when Tutsis start massacring Hutus, when Khmers start killing fellow Cambodians, what shared civilization is supposed to mobilize Europeans to intervene?

This perplexity returns us to the Polish peasant and the mysterious question of why the fate of one group should concern the fate of another. What can we say that is truthful enough to acknowledge the ineluctable difference between human beings that saved Polish peasants from extermination and

condemned their fellow beings to infamous death? What we can say--what Lemkin did not say--is that it is not civilization we share, but those very differences.

What it means to be a human being, what defines the very identity we share as a species, is the fact that we are differentiated by race, religion, ethnicity, and individual difference. These differentiations define our identity both as individuals and as a species. No other species differentiates itself in this individualized abundance. A sense of otherness, of distinctness, is the very basis of the consciousness of our individuality, and this consciousness, based in difference, is a constitutive element of what it is to be a human being. To attack any one of these differences--to round up women because they are women, Jews because they are Jews, whites because they are whites, blacks because they are blacks, gays because they are gay--is to attack the shared element that makes us what we are as a species. In this way of thinking, we understand humanity, our common flesh and blood, as valuable to the degree that it allows us to elaborate the dignity and the honor that we give to our differences--and that this reality of difference, both fated and created, is our common inheritance, the shared integument that we must fight to defend whenever any of us is attacked for manifesting it.

B. ICTY – Primary Sources

1. Amended Statute Of The International Tribunal

AMENDED STATUTE OF THE INTERNATIONAL TRIBUNAL

(ADOPTED 25 MAY 1993 by Resolution 827)

(AS AMENDED 13 MAY 1998 by Resolution 1166)

(AS AMENDED 30 NOVEMBER 2000 by Resolution 1329)

(AS AMENDED 17 MAY 2002 by Resolution 1411)

AMENDED STATUTE OF THE INTERNATIONAL TRIBUNAL

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Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9

Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;

(b) the Prosecutor; and

(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine ad litem independent judges appointed in accordance with article 13 ter, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six ad litem judges shall be members of each Trial Chamber. Each Trial Chamber to which ad litem judges are assigned may be divided into sections of three judges each, composed of both permanent and ad litem judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 13

Qualifications of judges

The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 bis

Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two

of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 of the Statute of that Tribunal.

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world.

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 ter

Election and appointment of ad litem judges

1. The ad litem judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for ad litem judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven ad litem

judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.

(e) The ad litem judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, ad litem judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular ad litem judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the ad litem judge received in the General Assembly.

Article 13 quater

Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, ad litem judges shall:

(a) benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal;

(b) enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;

(c) enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal.

2. During the period in which they are appointed to serve in the International Tribunal, ad litem judges shall not:

(a) be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;

(b) have power:

(i) to adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;

(ii) to review an indictment pursuant to article 19 of the Statute;

(iii) to consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute;

(iv) to adjudicate in pre-trial proceedings.

Article 14

Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 bis of the Statute to the Appeals Chamber and nine to the Trial Chambers.

4. Two of the judges elected or appointed in accordance with article 12 of the Statute of the International Tribunal for Rwanda shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.

5. After consultation with the permanent judges of the International Tribunal, the President shall assign such ad litem judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Article 22

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International

Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29

Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

Article 30

The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31

Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33

Working languages

The working languages of the International Tribunal shall be English and French.

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

2. ICTY Tribunal: How It Works

The New York Times, February 12, 2002

Tribunal: How It Works

ORIGIN -- The International Criminal Tribunal for the former Yugoslavia was established by the United Nations Security Council in 1993 and opened in The Hague in 1994. It is the first international criminal court since the military tribunals that judged Nazi and Japanese leaders after World War II.

OBJECTIVES -- The tribunal's mandate allows it to prosecute individuals for serious violations of international humanitarian law committed on the territory of any of the countries that were part of Yugoslavia before it began to disintegrate in 1991. The mandate encompasses four broad categories: grave breaches of the 1949 Geneva Conventions; violations of the laws or customs of war; genocide and crimes against humanity.

JURISDICTION -- The tribunal and national courts have concurrent jurisdiction. The tribunal can claim primacy over national courts and may take over national investigations and proceedings at any stage if this is deemed to be in the interest of international justice. Most defendants have been ethnic Serbs, but Muslims and Croats also have been indicted.

JUDGES -- The court has 16 permanent judges, elected to four-year terms by the United Nations General Assembly. The judges represent the main legal systems in the world. They serve in panels of three judges each; there are seven appeals judges, who serve in a panel of five .

PROSECUTION -- The Office of the Prosecutor operates independently of the Security Council, of any state or international organization and of the other organs of the tribunal. Its members are experienced police officers, crime experts, analysts and lawyers. It conducts investigations by collecting evidence, identifying witnesses, exhuming mass graves, prepares indictments and presents prosecutions before the judges of the Tribunal.

CUSTODY AND SENTENCES -- Presently 45 accused are held at the tribunal's detention unit for The Hague, in the high security compound of the Dutch prison at Scheveningen. Six have been released, pending trial. Another 30 have been indicted but remain fugitives. The maximum sentence that can be imposed on an accused is life imprisonment. The longest sentence handed down so far was 46 years for genocide.

3. Judgment Of Trial Chamber II in the Case of *Prosecutor v. Milomir Stakić*, July 29, 2003

SUMMARY

TRIAL CHAMBER II JUDGEMENT

in

PROSECUTOR v DR. MILOMIR STAKIC

A. Preliminary Observations

1. The Chamber will briefly summarise its findings. The summary that follows forms no part of the final Judgement which is delivered. The only authoritative account of the Trial Chamber's findings, and of its reasons for those findings, is to be found in the written Judgement.
2. The Trial Chamber wishes to emphasise that this is not a case against "the Serbs" collectively or an individual because of his Serb ethnicity, but rather a case in which the Trial Chamber, based on the charges set out by the Prosecution in the Fourth Amended Indictment, had to decide whether Dr. Stakic is to be held individually criminally responsible for the alleged crimes. This Judgement, especially since it is pronounced under Chapter VII of the Charter of the United Nations, should never be misunderstood as directed against one of the warring parties or ethnicities at the relevant time. The Trial Chamber is aware that crimes of a similar gravity were committed in the Municipality of Prijedor and beyond by and against members of all three main ethnicities. Following the principle of equality before the law, this Tribunal and domestic courts will therefore continue to prosecute and try these other perpetrators as well. A judgement should not serve as a pretext for a re-opening of old wounds. Its purpose is to present reliable factual findings and thereby contribute to reconciliation and bringing people back to a state of peaceful co-existence.
3. The trial of the Accused on the allegations set out in the Indictment began on 16 April 2002 and concluded on 15 April 2003 after 150 days of hearings. Dr. Stakic

faced charges of **genocide** or alternatively **complicity in genocide**, **murder** as a violation of the laws or customs of war, and the following crimes against humanity: **murder**, **extermination**, **persecutions**, **deportation**, and other **inhumane acts** (forcible transfer), in relation to events that took place in the Municipality of Prijedor between 30 April and 30 September 1992.

4. Despite the comprehensive pattern of atrocities against Muslims in Prijedor in 1992 which has been proved beyond reasonable doubt, and without detracting from its gravity, the Trial Chamber has not found this to be a case of genocide. Rather, it is a serious case of persecutions, extermination and deportation.

B. Procedural Background

5. The Trial Chamber heard 37 live Prosecution witnesses and admitted 19 witness statements pursuant to Rule 92 *bis*. The Prosecution called three expert witnesses. Pursuant to Rule 98, the Chamber called six witnesses and ordered the Prosecution to appoint a forensic handwriting examiner and a forensic document expert. The Trial Chamber heard 38 live Defence witnesses and admitted seven Rule 92 *bis* statements and one Rule 94 *bis* report. The Defence called two live expert witnesses and introduced the report of an expert on constitutional issues through Rule 94 *bis*. A total of 1448 exhibits were admitted into evidence, 796 for the Prosecution ("S"), 594 for the Defence ("D") and 58 Chamber exhibits ("J"). 150 days of hearings are reflected in 15,337 pages of transcript ("T.").

C. Factual Findings

6. The factual findings can be summarised relatively briefly, particularly in the light of the fact that previous judgements of this Tribunal have already described the overall situation in Prijedor and more specifically the Omarska, Keraterm and Trnopolje camps. What follows is an overview of the scope of all the crimes committed at the relevant time, i.e. from 30 April 1992 to 30 September 1992.
7. On 7 January 1992, the Serbian members of the Prijedor Municipal Assembly and the presidents of the local Municipal Boards of the SDS proclaimed a parallel Assembly of the Serbian People of the Municipality of Prijedor. Dr. Milomir Stakic, a physician, was elected President of this Assembly. Ten days later, in a decision signed by Dr. Stakic, the Assembly endorsed "joining the Serbian territories of the Municipality of Prijedor to the Autonomous Region of Bosnian Krajina" (ARK). By the end of April 1992, a number of clandestine Serbian police stations had been created in the municipality and more than 1,500 armed men were ready to take power.
8. During the night of 29-30 April 1992, the SDS led forcible takeover of power took place. Legitimate central authorities were replaced by SDS or SDS-loyal personnel. First and foremost, Dr. Stakic replaced the freely elected President of the Municipal Assembly, Professor Cehajic.
9. The takeover in the municipality of Prijedor was an illegal *coup d'état* which had been planned and coordinated for months and which had as its final goal the creation of a pure Serbian municipality. The plans were never hidden and were implemented

through coordinated action by the police, army and politicians. One of the main figures was Dr. Stakic who was by then playing the leading role in the political life of the Municipality.

10. Shortly after the takeover, the municipal People's (National) Defence Council started meeting in a new composition presided over by Dr. Stakic in his capacity as President of the post-takeover Municipal Assembly.
11. On 20 May 1992, the Municipal Assembly was replaced by the Crisis Staff of Prijedor municipality, later known as the War Presidency, whose membership was almost identical to that of the People's Defence Council, including Dr. Stakic as its president. The Crisis Staff met very frequently in the period immediately after the takeover and adopted numerous decisions, orders, and other enactments.
12. Civilian life in Prijedor was transformed in a myriad ways after the takeover. There was a marked increase in the military presence in the town and a propaganda war against non-Serbs was launched. According to a decision of the Crisis Staff, armed attacks were launched against the non-Serb civilian population throughout the municipality. The creation of an atmosphere of fear in Prijedor culminated in the agreement amongst members of the Prijedor Crisis Staff to establish the Omarska, Keraterm and Trnopolje camps.
13. The Trial Chamber has found that killings occurred frequently in the camps. There can be no reasonable doubt that a number of massacres were committed, *inter alia*, in Room 3 of the Keraterm camp on or about 24 July 1992. In late July 1992 over a hundred people were killed in the Omarska camp and approximately 120 people were taken on buses from Omarska on 5 August 1992 and killed. On 21 August 1992, approximately 200 people on a deportation convoy escorted by members of the Prijedor Intervention Squad were killed on Mount Vlasic by members of this platoon. Many more were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Municipality of Prijedor - Kozarac, Hambarine, Biscani, Ljubija, to name a few - and several massacres of Muslims took place. The Trial Chamber has found that more than 1,500 killings occurred and has been able to identify by name 486 victims.
14. Rapes and sexual assaults were committed in the camps and the thousands of persons detained were subjected to inhuman and degrading treatment, including routine beatings and torture. Detainees lived in unhygienic conditions and were given little more than a subsistence diet.
15. Bosnian Muslims who had lived their whole lives in the Municipality of Prijedor were expelled from their homes and deported in huge numbers, often on convoys organised and supervised by the Serb authorities from Prijedor. The Trial Chamber heard evidence from many witnesses who were forced to flee the territory of the Municipality of Prijedor in 1992, mostly to Travnik or Croatia to escape Serb-controlled territory. The exodus of the mainly non-Serb population from Prijedor started as early as 1991 but accelerated considerably in the run-up to the takeover and reached its peak in the months after the takeover. More than 20,000 persons became victims of this campaign of deportation. Most people travelled on one of the daily convoys of buses and trucks leaving the territory.
16. The houses of non-Serbs were marked for destruction, and in many cases were actually destroyed along with mosques and Catholic churches.

17. The Trial Chamber does not wish to reduce the victims to mere numbers in statistics. The victims were people - men and women with different backgrounds, histories and personalities. As it is impossible to reconstruct all their fates, the Chamber has selected three of these individuals to highlight the core issues in this case: Professor Muhamed Cehajic, Witness X and Nermin Karagic.

D. Individual Criminal Responsibility of Dr. Stakic

18. As regards the central question of this case, whether Dr. Stakic is to be held responsible for the crimes described in the factual findings, the Trial Chamber has answered this question in the affirmative.
19. The Trial Chamber finds that the mode of liability described as "co-perpetratorship", a form of "committing" under Article 7(1) of the Statute, best characterises Dr. Stakic's participation in offences committed in Prijedor Municipality in 1992. It has not been found necessary to resort to the judicial formula of "joint criminal enterprise". For co-perpetration, it is essential to prove the existence of an agreement or silent consent to reach a common goal by coordinated co-operation with joint control over the criminal conduct. The co-perpetrator must have acted in the awareness of the substantial likelihood that crimes would occur and must have been aware that his role was essential for the achievement of the common goal.
20. The Trial Chamber is satisfied that between January 1991 and September 1992, Dr. Stakic held the following superior positions and was the leading political figure in the Municipality of Prijedor in 1992.

- From 4 January 1991, he served as the elected Vice-President of the Municipal Assembly of Prijedor, under Muhamed Cehajic, the legally elected President.
- On 11 September 1991, the SDS in Prijedor established a Municipal Board and Dr. Stakic served as Vice-President of the Board.
- As of 7 January 1992, he was elected President of the self-proclaimed Assembly of the Serbian people of the Municipality of Prijedor.
- After the takeover on 30 April 1992, Dr. Stakic rose to prominence within the municipality, acting as President of the Municipal Assembly after the forced removal of Muhamed Cehajic from that post. He simultaneously assumed the position of President of the Prijedor Municipal People's Defence Council.
- As of May 1992, he served as President of the Prijedor Municipal Crisis Staff, later renamed "War Presidency".
- As of 24 July 1992 until the end of the period covered by the Indictment (30 September 1992), he again exercised the functions of President of the Municipal Assembly of Prijedor.

21. Dr. Stakic's associates included the authorities of the self-proclaimed Assembly of the Serbian people of the Municipality of Prijedor, the SDS, the Prijedor Crisis Staff, the Territorial Defence and the police and military. In particular, Dr. Stakic acted together with the Chief of Police, Simo Drljaca, prominent members of the military such as Colonel Vladimir Arsic and Major Zeljaja, the President of the Executive Committee of Prijedor Municipality, Dr. Milan Kovacevic, and the Commander

both of the Municipal Territorial Defence Staff and Trnopolje camp, Slobodan Kuruzovic.

22. With the establishment of the self-proclaimed Assembly of the Serbian People on 7 January 1992, the common goal of creating a Serbian municipality took tangible form.
23. The common goal on the Prijedor level found its vibrant expression in Radovan Karadzic's six strategic goals of the Bosnian Serb leadership in Bosnia and Herzegovina which included as the first goal the separation of Serbs from "the other two national communities". By the time Karadzic had set out these objectives, preparations were already underway for the fulfillment of the first goal in Prijedor Municipality.
24. On 29 April 1992, at a meeting convened by Dr. Stakic, the final agreement was made amongst those willing to participate, in particular the police and armed Serbs, that power would be taken over in Prijedor municipality that night. This was the trigger and the first in a series of agreements necessary to achieve the common goal. No formal agreement was necessary and all participants were aware of where the decision to take over power would lead.
25. The takeover on 30 April 1992 was the culmination of months of planning by the SDS which, at that time, was already co-operating with the police to boost security forces in the municipality in anticipation of the *coup d'etat*. After the takeover, Dr. Stakic and other SDS leaders assumed the central positions in the municipal government, and Muslim and Croat politicians, who had been legally elected, were forcibly removed. Other leading SDS members were installed in strategic positions throughout the municipality. Simo Drljaca became Chief of Police.
26. After the takeover, the Serb leadership sought to achieve a state of readiness for war in the municipality of Prijedor. The Prijedor Crisis Staff started to impose restrictions on the non-Serb residents of Prijedor. The creation of a coercive environment for the non-Serb residents of Prijedor municipality is consistent with the co-perpetrators' objective of consolidating Serb power in the municipality by forcing non-Serbs to flee or be deported, thereby forcibly changing fundamentally the ethnic balance in the municipality.
27. A propaganda campaign helped to polarise the Prijedor population along ethnic lines and created an atmosphere of fear. Dr. Stakic made a number of media appearances during the summer of 1992 instilling inter-ethnic suspicion. The media became a propaganda tool of the Serb authorities. In a speech reported in "Kozarski Vjesnik", a newspaper serving as a voice of the Serb authorities at the time, Dr. Stakic proclaimed: "Now we have reached a state in which the Serbs alone are drawing the borders of their new state." This is also demonstrated by the fact that the Official Gazette of Prijedor Municipality of 20 May 1992 started explicitly with a "Year 1" edition. Apparently, from the point of view of the new self-proclaimed authorities, a new Serbian age had dawned in the Municipality of Prijedor.
28. The order to set up the Omarska camp on 31 May 1992, signed by Simo Drljaca, was issued "in accordance with the Decision of the Crisis Staff" presided over by Dr. Stakic. As Dr. Stakic stated in a television interview, the camps of Omarska, Keraterm, and Trnopolje were "a necessity in the given moment". He confirmed that

these camps "were formed according to a decision of [his] civilian authorities in Prijedor".

29. Throughout the period immediately after the takeover, Dr. Stakic, in co-operation with the Chief of Police, Simo Drljaca, and the most senior military figure in Prijedor, Colonel Vladimir Arsic, worked to strengthen and unify the military forces under Serb control. The disproportionate armed response to the minor incidents at Hambarine and Kozarac in late May 1992 was directed against the civilian non-Serb population. It heralded the first in a series of measures taken by the Crisis Staff, in co-operation with the military and the police, to rid the municipality of non-Serbs.
30. Simo Drljaca represented the police forces in the Crisis Staff. Dr. Stakic suggested that the Crisis Staff should also have a military representative but this proposal was rejected. Nevertheless, either Arsic or Zeljaja attended meetings of the Prijedor Crisis Staff and National Defence Council on behalf of the military. Just after the takeover, military uniforms were ordered by the civilian authorities for the use of civilian leaders, including Dr. Stakic, who wore a military uniform and carried a weapon.
31. Dr. Stakic's influence over the military and the police was strongly contested by the Defence. The Trial Chamber, however, has found that there was strong co-operation between Dr. Stakic and both police and military. Through his positions as President of both the Crisis Staff and the National Defence Council, Dr. Stakic facilitated coordination by the police and military with each other and with the civilian authorities. The various bodies headed by Dr. Stakic also provided logistical and financial assistance to the military. The National Defence Council required competent municipal organs to secure priority communications and essential supplies such as food and oil and to report to the Prijedor Executive Committee about these matters. Documentary evidence proves that the Crisis Staff set up the Logistics Base at Cirken Polje which provided meals for police at checkpoints and guards at the camps, fuel for transporting detainees to and between camps, and equipment for the police and army.
32. Furthermore, the Crisis Staff ordered the Prijedor Public Security Station and the Prijedor Regional Command (i.e. the police and the army) "to form a joint intervention platoon" or "squad".
33. A document dated 4 August 1992 from Simo Drljaca, Chief of the Prijedor SJB, credits the "synchronised activities of the Serbian army and police" with having, in large part, destroyed any paramilitary formations. Simo Drljaca, as Chief of the Public Security Station, is reported to have said in a closed session of the Municipal Assembly, that due to efficient army and police action, Muslim paramilitary formations had been smashed and the situation was stable in this respect.
34. There was coordinated co-operation between the Crisis Staff, later the War Presidency, and members of the police and army in operating the camps. The Crisis Staff participated through its oversight of security in the camps, taking decisions on the continuing detention of Prijedor citizens, providing transport and the necessary fuel for the transfer of prisoners between the various camps and from the camps to territory not controlled by Serbs, as well as co-ordinating the provision of the limited food for detainees.

35. With the arrival of the first detainees at Omarska, permanent guard posts were established and anti-personnel landmines were set up around the camp. The military encircled the camp compound while, according to witnesses, the police were located "inside, where the detainees were". An Order from the Prijedor SJB confirms that the Omarska camp compound was enclosed and that a mine field lay around the perimeter of the camp.
36. The common goal could not be achieved without joint control over the final outcome and this element of interdependency characterises the criminal conduct. No participant could have achieved the common goal on his own. However, each participant could individually have frustrated the plan by refusing to play his part or by reporting crimes. If, for example, the political authorities led by Dr. Stakic had not participated, it would have frustrated the common plan. Dr. Stakic was aware of this. Otherwise it would not have been necessary to oust Professor Cehajic.
37. The atmosphere of impunity for all those involved in the *coup d'état* led by Dr. Stakic and the general lawlessness which prevailed in Prijedor ensured that the common goal could be pursued.
38. To quote one witness, in Prijedor "there was neither *de facto* nor *de jure* authority or individual who would be above Dr. Stakic". In "Kozarski Vjesnik" on 13 January 1993, Dr. Stakic was described as "the top official in the municipality". Dr. Stakic was identified as the "mayor" of Prijedor, a title that usually denotes a position of great political authority, in contemporaneous articles and reports and he even introduced himself this way. However, the titles themselves are immaterial as it is clear that Dr. Stakic had a special responsibility for all events which took place in Prijedor municipality and also the power to change their course.
39. In relation to all offences, the Trial Chamber is convinced that Dr. Stakic and his co-perpetrators acted in the awareness that crimes would occur as a direct consequence of their pursuit of the common goal. The co-perpetrators consented to the removal of Muslims from Prijedor by whatever means necessary and either accepted the foreseeable consequence that crimes would occur or actively participated in their commission. The fact that Dr. Stakic felt it necessary to replace Professor Cehajic and others who clearly would not have participated in the implementation of the common goal demonstrates Dr. Stakic's awareness that without his acts and the acts of the other co-perpetrators the ultimate goal of the creation of a Serbian municipality and eventually a Serbian state could not be realised.
40. In an interview in his position as President of the Crisis Staff on 24 May 1992, Dr. Stakic stated that the whole territory of the Municipality of Prijedor had been under Serb control since the "liberation of Kozarac" and that "cleansing" (in his own language "čišćenje") or "mopping up" was still ongoing in Kozarac "because those remaining are the most extreme and the professionals". It is the Trial Chamber's firm opinion that Dr. Stakic was fully aware that these so-called extreme citizens were none other than innocent Muslim and Croat civilians, some of whom were armed but who could not be considered a professional armed force. In fact, the evidence shows that even though Dr. Stakic spoke of fighting only the Muslim extremists who were carrying out armed operations against the Serb forces, he acted as if the Muslim population was composed entirely of extremists. The Trial Chamber is satisfied that Dr. Stakic did not differentiate between the civilian

Muslim and Croat population, which he claimed he wanted to protect against evil and harm, and the extremists whom he wanted more than anything else to defeat.

41. The Trial Chamber is convinced that Dr. Stakic knew that his role and authority as the leading politician in Prijedor was essential for the accomplishment of the common goal. He was aware that he could frustrate the objective of achieving a Serbian municipality by using his powers to hold to account those responsible for crimes, by protecting or assisting non-Serbs or by stepping down from his superior positions.

E. Legal Findings

42. Before turning to the concrete legal findings, the Trial Chamber wishes to make some general observations on the applicable law to facilitate an understanding of this Judgement by the parties and also by the peoples of the states of the former Yugoslavia.
43. The Trial Chamber is restricted by the Indictment and cannot make a legal assessment of the facts that does not conform to the Indictment as it would be possible in other legal systems where judges themselves assess the entire legal characterisation of acts and are not bound by the charges in an indictment.
44. The Trial Chamber does not wish to go into all the details of its legal assessment except to point out the following:
45. Following a careful analysis of the facts and the state of mind of the actors, the Trial Chamber was unable to infer the necessary *dolus specialis* for genocide, this *dolus specialis* - or specific intent to destroy, in whole or in part, a group as such - being the core element of the crime. Thus, the Trial Chamber could not come to the conclusion that Dr. Stakic or other actors had the necessary specific intent to characterise his conduct as genocide or complicity in genocide. The primary aim was to displace the non-Serb population in order to achieve the vision of a pure Serbian state. This intent to displace a population cannot be equated with an intent to destroy it as such.
46. However, the Chamber wishes to stress that it has reached the conclusion that a genocidal intent on a higher level has not been proved beyond reasonable doubt only on the basis of the evidence in this concrete case. This does not mean that another Trial Chamber in another case, basing its findings on different evidence, could not come to a different conclusion. It must be emphasised, especially in this context and in order to allow a better understanding of this result in the former Yugoslavia, that, in principle, it is the parties who tender the evidence. The judges do not play an active investigatory role under this Tribunal's Rules of Procedure and Evidence.
47. It is, in general, not necessary in the interests of justice and of providing an exhaustive description of individual responsibility to make findings under Article 7(3) of the Statute if the Chamber is already satisfied beyond reasonable doubt that both responsibility under 7(1) and the superior positions of the accused have been established. The Accused's superior positions constitute only an aggravating factor in sentencing, the seriousness of which depends on the concrete superior status of the accused over his subordinates.

48. The Trial Chamber has used a definition of deportation that covers different forms of forcible transfer. It has concluded that the vast majority of the forms of forcible transfer that the Prosecution argues should be covered by Article 5(i) of the Statute under the heading "other inhumane acts" fall under the definition of deportation in Article 5(d). These include forcible transfers not only across internationally recognised borders but also across *de facto* borders dividing areas controlled by different belligerent parties. The Trial Chamber is not convinced that other examples provided by the Prosecution, such as the removal of individuals to detention facilities, fulfil the requirement of reaching the same level of gravity as other crimes listed under Article 5. Moreover, these examples do not necessitate a conviction based cumulatively on Article 5(i) and such a conviction might amount to an infringement of the principle *nullum crimen sine lege certa* (no crime without a precise law).
49. The Trial Chamber has found that the crimes of persecutions and extermination constitute the core element of the criminal conduct of Dr. Stakic as alleged in the Indictment. The Trial Chamber has set out in the Judgement the legal preconditions for the crime of persecution and elaborated on the discriminatory intent required for this crime. The Trial Chamber is convinced that there was a persecutorial campaign based on the intent to discriminate against all non-Serbs or those who did not share the plan to consolidate Serbian control and domination of the Municipality of Prijedor. Dr. Stakic was one of the main actors in this persecutorial campaign and the Trial Chamber is satisfied that he had the requisite intent to discriminate against non-Serbs and those affiliated or sympathising with them, because of their political and religious affiliations.

F. Sentencing

50. In determining the appropriate sentence the Trial Chamber has taken into account the International Tribunal's Statute and Rules, the general sentencing practice in the former Yugoslavia, the individual circumstances of the case, aggravating and mitigating factors, and the personality of the Accused. The sentence must reflect the gravity of the criminal conduct of the accused and this has required a consideration of the underlying crimes as well as the form and degree of the participation of the Accused.
51. The Trial Chamber wishes to emphasise that the individual guilt of an accused limits the range of the sentence. Other goals and functions of a sentence can influence only the range within the limits defined by the individual guilt.
52. The Trial Chamber recalls that the International Tribunal was set up to counteract impunity and to ensure a fair trial for the alleged perpetrators of crimes falling within its jurisdiction. The Tribunal was established under Chapter VII of the United Nations Charter on the basis of the understanding that the search for the truth is an inalienable pre-requisite for peace. The Tribunal is mandated to determine the appropriate penalty, often in respect of persons who never expected to stand trial. While one goal of sentencing is the implementation of the principle of equality before the law, another is to prevent persons in similar situations in the future from committing crimes.

53. When Dr. Stakic acted, he almost certainly never believed he would one day stand trial, be convicted and sentenced. In cases such as this one dealing with the head of a municipality, general deterrence becomes substantially relevant. In the context of combating serious international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they must respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at integrating potential perpetrators into a peaceful global society, compelling them to obey the rule of law.
54. Apart from the gravity of the crimes, the superior positions held by the Accused constitute a serious aggravating factor, as does his proven responsibility for also planning and ordering the crime of deportation. As mitigating factors, the Trial Chamber has considered Dr. Stakic's consent on 1 October 2002 that a new judge be appointed which allowed proceedings to continue, his proper behaviour towards witnesses, and his personal situation.
55. Article 24 of the Statute reflects the reasonable and humane policy of the United Nations aiming at the global abolition of the death penalty and fixes life imprisonment as the maximum sanction to be imposed. The Trial Chamber wishes to stress in this context that on both the international and national levels the imposition of the maximum sanction is not restricted to the most serious imaginable criminal conduct.
56. Finally, the Trial Chamber wishes to emphasise that Rules 123-125 of the Rules, and the Practice Direction on Pardon, Commutation of Sentence and Early Release (IT/146, 7 April 1999) remain unaffected by, and have priority over, the Disposition that follows.

G. Disposition

We, Judges of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by United Nations Security Council Resolution 827 of 25 May 1993, elected by the General Assembly and mandated to hear this case against Dr. Milomir Stakic and find the appropriate sentence,

HEREBY DECIDE:

The Accused, Dr. Milomir Stakic, is **NOT GUILTY** of:

Count 1: Genocide

Count 2: Complicity in Genocide

Count 8: Other Inhumane Acts (forcible transfer), a Crime against Humanity

The Accused, Dr. Milomir Stakic, is **GUILTY** of:

Count 4: **Extermination**, a Crime against Humanity

Count 5: **Murder**, a Violation of the Laws and Customs of War

Count 6: **Persecutions**, Crimes against Humanity, incorporating **Count 3**: Murder, a Crime against Humanity, and **Count 7**: Deportation, a Crime against Humanity

Dr. Milomir Stakić is hereby sentenced to life imprisonment.

The then competent court (Rule 104 of the Rules) shall review this sentence and if appropriate suspend the execution of the remainder of the punishment of imprisonment for life and grant early release, if necessary on probation, if:

(1) **20 years** have been served calculated in accordance with Rule 101(C) from the date of Dr. Stakic's deprivation of liberty for the purposes of these proceedings, this being the "date of review".

(2) In reaching a decision to suspend the sentence, the following considerations, *inter alia*, shall be taken into account:

- the importance of the legal interest threatened in case of recidivism;
- the conduct of the convicted person while serving his sentence;
- the personality of the convicted person, his previous history and the circumstances of his acts;
- the living conditions of the convicted person and the effects which can be expected as a result of the suspension;

(3) Dr. Stakic's consent to the suspension of his sentence is required.

(4) The competent court may determine the term of probation, if any.

In case of early release, pursuant to Rule 101(C) of the Rules, Dr. Milomir Stakic is entitled to credit for 2 years, 4 months and 8 days, as of the date of this Judgement, calculated from the date of his deprivation of liberty for the purposes of these proceedings.

Pursuant to Rule 103(C) of the Rules, Dr. Milomir Stakic shall remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

C. ICTY – News Articles

1. Top Croat War Crimes Suspect Is Arrested

http://www.latimes.com/news/nationworld/world/la-fg-croat9dec09,1,951202.story

Los Angeles Times, December 9, 2005

Top Croat War Crimes Suspect Is Arrested

MADRID - Croatia's top war crimes suspect, a retired general indicted in the killings of at least 150 Serbs, has been arrested at a resort on Spain's Canary Islands after four years on the run, officials said Thursday.

Elite Spanish police seized Ante Gotovina as he dined Wednesday at the Hotel Bitacora on the island of Tenerife, the Interior Ministry said. He had traveled to the island, off Africa's Atlantic coast, on a fake Croatian passport, the ministry said.

Gotovina, 50, was flown to Madrid on Thursday and ordered held overnight in a high-security prison north of the capital, the Efe news agency reported. He was expected to be turned over to the U.N. war crimes tribunal in The Hague today, reports said.

The retired Croatian army general, who speaks Spanish, appeared calm and unruffled as he entered the courtroom, a court official said.

Gotovina was indicted by the tribunal in the killings of at least 150 Serb rebels by troops under his command and in the expulsion of about 150,000 others during the 1991-95 war.

In Zagreb, several hundred Gotovina supporters briefly scuffled with riot police, a witness said.

They shouted abuse at the government and hurled stones and bottles at the police, who arrested several men.

Gotovina was the last fugitive war crimes suspect from Croatia, and his capture put pressure on Serbia to come up with two other top fugitives from the Balkan wars: the wartime Bosnian Serb army commander Gen. Ratko Mladic and the former Bosnian Serb leader Radovan Karadzic.

The two are believed to be hiding in Serbia or in the Serb-controlled half of Bosnia-Herzegovina. They were charged by the tribunal with orchestrating the 1995 massacre of 8,000 Muslim boys and men from Srebrenica.

Gotovina's arrest should help Croatia's bid to join the European Union, which has been skeptical about how hard Zagreb was trying to track down a man many Croats deem a hero.

2. Justice on Trial: Milosevic

Former Yugoslavia

Justice on trial

Feb 26th 2004 | THE HAGUE

From The Economist print edition

The long, slow trial of Slobodan Milosevic, former Yugoslav president, is raising questions about international courts

IT HAS been neither as short nor as salutary as believers in international justice had hoped. Moreover, the trial of Slobodan Milosevic, ex-president of Yugoslavia, has run into many practical snags. This week, just as the prosecution at the International Criminal Tribunal for the former Yugoslavia (ICTY) was preparing, at long last, to wind up its case, the 62-year-old defendant, whose illness had already interrupted proceedings a dozen times, fell ill yet again. And the presiding judge, Britain's Richard May, announced that he was to step down, also for health reasons.

The tribunal's American head, Theodor Meron, says that Mr May's departure should "not have an unduly disruptive effect on any proceedings". But Mr Milosevic may now be able to demand a retrial. And that could conceivably mean abandoning two years' worth of hearings, involving nearly 300 witnesses and 30,000 pages of evidence.

Under the ICTY's rules, a replacement judge can be appointed if one of the three-judge panel dies or resigns in mid-trial. So Mr Meron could order the continuation of proceedings-but only if the defendant agrees. If Mr Milosevic, who has always refused to recognise the authority of the court anyway, will not agree, the two remaining judges could still decide to continue the trial if it would "serve the interests of justice". They probably will. But Mr Milosevic would have a right of appeal, causing yet more cost and delay.

Charged with 66 counts of war crimes, crimes against humanity and genocide during the Balkan wars in the 1990s, Mr Milosevic is the first head of state since the second world war to have to answer for such atrocities. At the trial's opening, Carla del Ponte, the chief prosecutor, declared that it was "the most powerful demonstration that no one is above the law." Human-rights groups

predicted that it would set a "new benchmark". Nobody wants to throw all that away, especially at a time when the very concept of international justice is under fire.

The ICTY, set up in The Hague in 1993, was the first international court of its kind since the Nuremberg and Tokyo tribunals after the second world war. In the years since, ad hoc war-crimes tribunals have been set up for Rwanda, East Timor, Kosovo, Sierra Leone and Cambodia. Hopes were high that they, together with a new permanent International Criminal Court (ICC) in The Hague, would end any notion of impunity for the chief perpetrators of atrocities-and so help to deter future ones.

But as the proceedings have lengthened and the costs have risen, disillusion has set in. The long American campaign against the ICC (not to be confused with the International Court of Justice, also in The Hague) has not helped. Last August, the UN imposed a "completion strategy" on both the Yugoslav and the Rwandan tribunals, requiring them to end all trials by 2008 and appeals by 2010. Financing (some $120m for the ICTY this year alone) will then cease.

Some criticisms of the ICTY are justified. All pioneers make mistakes, and the Yugoslav tribunal is no exception. But other shortcomings are inherent to international courts. The ICTY has had to harmonise different legal traditions, cope with multiple languages (of judges, lawyers, perpetrators and victims), and translate mountains of documents. Most of the cases before it are hugely complex, involving dozens of charges and hundreds of witnesses. Those convicted have a right of appeal against both conviction and sentence, which they always seem to exercise.

Evidence for war crimes is generally hard to come by, and suspects can be more elusive still. International tribunals do not have police powers: they cannot send in sheriffs to make arrests. They rely on the co-operation of foreign governments, which is not always forthcoming. The ICTY was lucky to have NATO and UN forces in Bosnia to help. But 20 of its chief suspects are still on the run, including Radovan Karadzic, the former Bosnian Serb leader, and Ratko Mladic, the general who allegedly organised the massacre of 7,500 Bosnian Muslims at Srebrenica in 1995. Mrs del Ponte has accused Serbia of giving these suspects a "safe haven", and of failing to hand over vital evidence.

Based in The Hague, operating only under international law, and with no judges from former Yugoslavia, the ICTY has been criticised for its distance from the scene of the crimes, for making victims feel irrelevant and for leading the Serbs, who make up the great majority of defendants, to talk of "victors' justice". Some even blame the court for the nationalists' revival in Serbia-both Mr Milosevic and Vojislav Seselj, a radical nationalist awaiting trial in The Hague, played a part in the elections in December and the political manoeuvring since (see article).

But the ICTY deserves praise as well as criticism. After an admittedly slow and shaky start, it has streamlined its operations and scored some notable successes. Between four and six trials are now being held in shifts every day, in the tribunal's three chambers. Of the 94 accused who have so far appeared before the court, half have been convicted, including Milan Babic, the former Croatian Serb leader. Eight are still on trial, including Momcilo Krajisnik, the Bosnian Serb leader accused of masterminding the Serbs' ethnic-cleansing campaign-the darkest chapter in a war that left some 100,000 Bosnians dead and forced a further 2m from their homes. Another 25 await trial; five have died after being charged; and five have had their charges withdrawn. Only five have so far been acquitted.

The prosecution has now agreed to rest its case forthwith, forgoing two days that had been allocated to it. The court has suspended its hearings until June 8th, so as to allow Mr Milosevic the extra time that he had requested to prepare his defence. This will also give time for a substitute judge for Mr May to get abreast of the proceedings. The court has given Mr Milosevic 150 days to complete his defence. Given a rhythm, on doctor's orders, of around three court days a week, proceedings could last well into 2006.

Will Mr Milosevic agree to a simple continuation of the trial? Officials suggest he has nothing to gain by prolonging things. But if he faces a life sentence anyway, he has nothing to lose either. More grandstanding on a public podium may be far more appealing than rotting quietly in a prison cell for the rest of his days.

3. Life in Prison for Dr. Milomir Stakic

From Associated Press

August 1, 2003

THE HAGUE - The U.N. war crimes tribunal for the former Yugoslavia imposed its harshest punishment to date Thursday, sentencing a Bosnian Serb politician to life in prison for exterminating or deporting thousands of Muslims and Croats in 1992.

Though acquitted of genocide, Milomir Stakic was convicted of being a leading figure in a campaign of persecution "to achieve the vision of a pure Serbian state," according to a summary of the verdict read in court.

Stakic, a 41-year-old doctor, was convicted of directly planning and coordinating war crimes and was held responsible for subordinates who killed 1,500 people and forced at least 20,000 non-Serb civilians from their homes in the northwestern Bosnian municipality of Prijedor, where he was mayor.

It was the third acquittal on genocide charges by the tribunal and was another signal that the court is demanding rock-hard proof of an intent to destroy a group of people because of race, religion or ethnicity.

The Hague court has convicted only one defendant - Bosnian Serb Gen. Radislav Krstic - of genocide. Until Thursday, Krstic's 46-year sentence was the harshest on record for the tribunal. His case is under appeal.

Stakic was convicted on five counts of crimes against humanity and war crimes, specifically extermination, murder and persecution.

4. Srebrenica: Officers Say Bosnian Massacre Was Deliberate

http://www.nytimes.com/2003/10/12/international/europe/12HAGU.html?tntemail1

October 12, 2003

Officers Say Bosnian Massacre Was Deliberate

By MARLISE SIMONS

THE HAGUE, Oct. 8 - Eight years after the massacre of more than 7,000 Bosnians, doubts have lingered about the degree to which the killings were coldly planned, or were improvised in chaos.

Most of those killed were unarmed prisoners, boys and men, shot in groups, or sometimes one by one.

Among the executioners, only a few foot soldiers have talked about the events that turned Srebrenica - its name means the "place of silver" - into a symbol of a modern European nightmare. No architect of the crime has ever explained in public what was in the killers' minds, or what made them believe that the murderous frenzy was acceptable to their own society and to their leaders.

But now, two senior Bosnian Serb officers, both crucial figures involved in organizing the bloodshed at Srebrenica, have spoken out at the war crimes tribunal here, describing the countdown to the massacre and depicting a well-planned and deliberate killing operation. They say it was largely coordinated by the military security and intelligence branch of the Bosnian Serb Army and militarized police, forces that were on Serbia's payroll.

The two, an intelligence chief and a brigade commander, recently pleaded guilty to crimes against humanity and have now given evidence against two fellow officers.

They provided so many names, firsthand accounts, documents and even a military log of the crucial days, that one court official blurted, "They've practically written the judgment."

One of the insiders referred to a directive he received, which said that "the life of the enemy has to be made unbearable." He also said it was his role to coordinate "the separation, detention and killings of the men."

This officer, Momir Nikolic, a former intelligence chief, described with cool precision the steps he took in coordinating the logistics, moving between army and police units, avoiding phones and radios, as preparations for the mass executions were under way.

The second officer, a brigade commander, Dragan Obrenovic, recounted how in the final hours, prisoners were moved to different detention and killing sites, in a deliberate move to avoid detection by the Red Cross and the United Nations mission, which were active in the area.

The officers' behind-the-scenes accounts from the Bosnian war represent sharp departures from persistent denials on the part of the Bosnian Serbs, including a recent government report maintaining that most of the men found in mass graves - many with their hands tied behind their backs - were killed in combat.

The first officer to speak out, Mr. Nikolic, 48, the former chief of intelligence and security of the Bratunac Brigade, said the countdown to Srebrenica's capture began a year earlier, in June 1994. During eight days of testimony, he said his brigade commander sent out a directive detailing Bosnian Serb policy toward the Muslims in the enclave protected by United Nations peacekeepers.

"The life of the enemy has to be made unbearable and his temporary stay in the enclave made impossible so that they leave en masse as soon as possible, realizing they cannot survive there," said the directive, as it was quoted and read in court.

That policy was carried out, said Mr. Nikolic, speaking with the precision of a math teacher, which he once was. Civilians were fired at, aid was blocked and fuel, food and other supplies for the United Nations peacekeepers were halted so "they could not be ready for combat," he said.

The harassment went on for a year, until late May 1995, Mr. Nikolic said, and then the military began to prepare its final assault. Bosnian Serb troops, aided by militarized police officers and paramilitary fighters from Serbia, overran the enclave on July 11.

"They had been expecting Muslim forces to put up fierce resistance," said Mr. Nikolic. "No one thought the resistance would be so short-lived."

Instead, he said, there was chaos, with thousands of civilians fleeing, many hoping for safety near a United Nations base at Potocari.

The next day, at an early morning meeting at the Bratunac Brigade headquarters, Gen. Ratko Mladic announced his plan to kill the prisoners, according to the testimony.

Mr. Nikolic said he learned about it from two of his superiors coming out of the meeting. One of them, Col. Vujadin Popovic, "told me that women and children had to be deported to Kladanj and the men had to separated and temporarily detained," Mr. Nikolic said.

"When I asked him what would happen then, he said that all balija had to be killed," he said. Balija is a derogatory name for Muslims. "I was told my task would be to coordinate the different forces."

Orders were to concentrate prisoners in Bratunac, a nearby town under Bosnian Serb control, Mr. Nikolic continued, and he and his two superiors talked about suitable places, including several schools, a sports complex and a hangar. Then the discussion turned to sites for executions, including a brick factory and a mine, he said.

Mr. Nikolic also described an encounter on July 13 at which General Mladic addressed several hundred Muslims who had surrendered in Konjevic Polje. The general told the Muslims not to worry, that transport would be organized for them, according to the testimony.

Later as General Mladic greeted him, Mr. Nikolic said, he asked what was to be done with the men. General Mladic, who has been indicted by the war crimes tribunal and is a fugitive, responded with a gesture, Mr. Nikolic said, and he repeated it in court, moving his hand from left to right, palm down, in a cutting motion.

The prosecutor, Peter McCloskey, asked, "What did you think would happen to the prisoners?"

Mr. Nikolic said: "I did not think. I knew."

That same day, orders came that the executions would take place, not in Bratunac, but near Zvornik, some 25 miles farther north.

Mr. Nikolic said he moved from place to place, informing regional commanders personally, avoiding telephones and radios.

His version was corroborated in court by the second insider witness, Mr. Obrenovic, at the time the acting commander of the Zvornik Brigade. Mr. Obrenovic said his brigade's intelligence chief told him to prepare for some 3,000 prisoners in his area. Mr. Obrenovic said he asked why the prisoners were coming to Zvornik, instead of going to the prisoner-of-war camp at Batkovici.

The response, he told the court, was that orders were to evade the Red Cross and the United Nations peacekeepers.

"The order was to take the prisoners and execute them in Zvornik," Mr. Obrenovic said. When he questioned the order again, he was informed that it came from General Mladic, the head of the army.

The prosecutor asked why he cooperated. Mr. Obrenovic replied that once he understood the order was coming from the top. "I became afraid," he said. "I thought there was no point in standing up to it."

That same night of July 13, the small town of Bratunac was extremely tense, Mr. Nikolic said. About 3,500 to 4,500 prisoners were held in overcrowded schools, a warehouse and a gym, and piled in buses and trucks parked around town, as more were arriving.

Soldiers, police officers and armed local volunteers were mobilized to guard them. During the night, Mr. Nikolic said, 80 to 100 prisoners were taken off buses and from a hangar and shot.

In the early hours of July 14, Mr. Nikolic said, he watched a long column of buses and trucks pull out of Bratunac, heading for Zvornik. At the head of the column, as a decoy, was a white United Nations armored personnel carrier, one of the vehicles stolen from peacekeepers. On board were Bosnian Serb soldiers and police officers, Mr. Nikolic said.

In their testimony, the two officers said they were not present at the mass executions around Zvornik that began on July 14 and lasted four days, but that like most members of the forces in the area, they knew of them. Mr. Obrenovic said he understood when he was asked to send engineers to dig mass graves. Mr. Nikolic said he became part of the cover-up that followed the killings. He said that later on, in September, he helped to oversee the operations to dig up uncounted bodies and rebury them at secret sites.

During lengthy cross-examination a defense lawyer for Col. Vidoje Blagojevic challenged Mr. Nikolic's credibility, reminding him of a lie.

He said that earlier this year, when negotiating a plea agreement with prosecutors, Mr. Nikolic confessed to his role in Srebrenica but also claimed a role in another massacre at which he was not present. Before the agreement was completed, he retracted that statement.

Mr. Nikolic provided an answer, in a show of emotion that is rather exceptional at a tribunal where perpetrators' toughness and denial are far more common.

At the time, he said, he accepted more guilt, fearing that the plea agreement might fall through. During his confessions, he said, he had lived through "a terrible" period he did not want to remember, let alone talk about. "Everything that happened in and around Srebrenica was always present in my mind," he said. "I did not want to go through that process again and face a trial."

Michael Karnavas, the defense lawyer, also asked why he ignored the army's rule to grant protection to prisoners of war under the Geneva Conventions.

Mr. Nikolic responded sharply: "Do you really think that in an operation where 7,000 people were killed that somebody was adhering to the Geneva Conventions? First of all, they were captured, then killed and then buried, exhumed once again, and buried again. Nobody, Mr. Karnavas, adhered to Geneva Conventions."

5. Milosevic Denies Role in Srebrenica Killings

New York Times, August 26, 2003,

Milosevic Denies Role in Srebrenica Killings

A former Bosnian Serb soldier who confessed to executing at least 100 Muslims from Srebrenica in 1995 testified at Slobodan Milosevic's war crimes trial today that the killings must have been ordered by higher-ranking military officials.

Mr. Milosevic, the former Yugoslav president, denied involvement in the massacre at Srebrenica, which claimed up to 8,000 Bosnian Muslim men and boys. He blamed mercenaries who he said had been paid in gold and commissioned by French intelligence.

"Neither Serbia nor I have anything to do with these events in Srebrenica," he said.

The former soldier, Drazen Erdemovic, 31, took the stand as prosecutors entered a final, critical stage of their case, in which they will try to prove the allegations that Mr. Milosevic orchestrated the massacre, which was the most heinous crime of the Balkan wars.

Mr. Erdemovic, who pleaded guilty to murder as part of a deal with prosecutors in 1996 and has served a five-year sentence, described how on July 11, 1995, his battalion summarily shot 1,000 to 1,200 people at a farm in the northeastern enclave of Srebrenica.

He said that in spite of moral objections, he took part in the killing for four hours before being relieved.

"I was personally ordered to do it," Mr. Erdemovic said. "This could not have happened if it had not been allowed by the main staff" of the Bosnian Serb military command, he said.

6. Ambassador Prosper Backs War-Crime Tribunal

New York Times , March 7, 2002

U.S. Official Backs War-Crime Tribunal

BYLINE: By The New York Times

DATELINE: THE HAGUE, March 6

BODY:

A week after casting doubt on the integrity of the war crimes tribunals, a senior American official said today that the Balkans tribunal should stay open until its most wanted men, the former Bosnian Serb leader Radovan Karadzic and the military commander Ratko Mladic, were brought to justice before it.

"Karadzic and Mladic will come to The Hague," said the official, Pierre-Richard Prosper, ambassador at large for war crimes. "It could happen tomorrow, it could be next year. The U.S. is determined to see these two individuals brought before this court. They cannot out-wait justice."

At a news conference during a visit to the court today, he praised both the Balkans tribunal and the Rwanda tribunal in Arusha, Tanzania.

Seated next to Carla Del Ponte, the chief prosecutor for both tribunals, Mr. Prosper seemed at pains to temper the criticism he delivered last week in testimony on Capitol Hill.

He said then that the tribunals had suffered mismanagement, abuses and lapses of professionalism and should close in five years. He said today that Washington firmly backed both tribunals.

"We believe that the tribunal is addressing any deficiency that may exist," he said.

His criticism had stunned some tribunal supporters because it came just as the court in The Hague had begun trying its most important prisoner, Slobodan Milosevic. They said he was undermining the court and providing ammunition to Mr. Milosevic, who denounces the court daily.

http://www.nytimes.com

D. ICTR - Primary Sources

1. Statute Of The International Criminal Tribunal For Rwanda

UNITED NATIONS

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

(As amended)

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

Article 4: Violations of Article 3 Common to the Geneva Conventions

and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12

August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9: Non Bis in Idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterised as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

(b) The Prosecutor;

(c) A Registry.

Article 11: Composition of the Chambers

1. The Chambers shall be composed of 16 permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four ad litem independent judges appointed in accordance with article 12 ter, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of four ad litem judges shall be members of each Trial Chamber. Each Trial Chamber to which ad litem judges are assigned may be divided into sections of three judges each, composed of both permanent and ad litem judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 bis: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 bis of the Statute of that Tribunal;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 ter: Election and Appointment of Ad Litem Judges

1. The ad litem judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for ad litem judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen ad litem judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;

(e) The ad litem judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, ad litem judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular ad litem judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the ad litem judge received in the General Assembly.

Article 12 quarter: Status of Ad Litem Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, ad litem judges shall:

(a) Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal for Rwanda;

(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;

(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, ad litem judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;

(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;

(iv) To adjudicate in pre-trial proceedings.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.

2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 bis of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.

4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such ad litem judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

2. Judgment issued by Trial Chamber I, Prosecutor v. Aloys Simba, Case No. 01-76-T December 13, 2005

http://65.18.216.88/ENGLISH/cases/Simba/Judgement/131205.pdf

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding

Judge Sergei Alekseevich Egorov

Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 13 December 2005

THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-T

SUMMARY OF JUDGEMENT

Office of the Prosecutor:

Richard Karegyesa

Ignacio Tredici

Didace Nyirinkwaya

Counsel for the Defence

Sadikou Ayo Alao

Beth Lyons

International Criminal Tribunal for Rwanda

Tribunal pénal international pour le Rwanda

SUMMARY OF JUDGEMENT

1. The judgement in the case of the Prosecutor v. Aloys Simba is delivered by Trial Chamber I, composed of Judges Erik Møse, presiding, Sergei Alekseevich Egorov, and Dennis C. M. Byron. The Chamber will now read out a summary of the judgement. The full text of the judgement will be available after this session, in English. A French translation will be provided later. This summary is not binding. The written judgement is the only authoritative version.

2. The Prosecutor originally charged Aloys Simba with four counts. At the close of its case, the Prosecution withdrew the counts of complicity to commit genocide and murder as a crime against humanity. Simba is therefore facing two counts: genocide and extermination as a crime against humanity.

3. Aloys Simba was arrested in Senegal on 27 November 2001. The trial commenced on 30 August 2004 and closed on 8 July 2005. Over the course of thirty trial days, the Prosecution called sixteen witnesses. The Defence case opened on 13 December 2004. During twenty-three trial days, the Defence called twenty witnesses, including the Accused.

4. This trial is the first case in the Tribunal which specifically concerns events in Gikongoro prefecture.

5. The evidence reflects that in the days following the death of President Habyarimana, thousands of Tutsi civilians in Gikongoro prefecture in southern Rwanda fled their homes in the wake of attacks by Hutu militiamen. They sought sanctuary at places such as Kibeho Parish, Cyanika Parish, Murambi Technical School, and Kaduha Parish. Attacks against the refugees at these places began with Kibeho Parish on 14 April 1994. On 21 April 1994, Hutu militiamen assisted by local officials and gendarmes launched subsequent attacks against refugees at Murambi, Cyanika, and Kaduha in the course of a period of around twelve hours. At the end of April, attackers from Gikongoro prefecture continued the killings by crossing the Mwogo river into neighbouring Butare prefecture to kill Tutsi civilians who had fled to Ruhashya commune. These five massacre sites are the primary basis of this case.

6. The Prosecution places responsibility for these killings on Aloys Simba, a retired lieutenant colonel and former member of parliament. Simba hails from Musebeya commune, Gikongoro prefecture and became a national hero fighting the "*Inkotanyi*" in the 1960s. He is a member of the "comrades of the fifth of July", who participated in the *coup d'état* that brought former President Juvenal Habyarimana to power in 1973, and was well-known throughout Rwanda. At the time of the events in 1994, the evidence suggests Simba had no formal ties to any government, military, or political structure. He claims that he was an ordinary man who had become a marginal figure in Rwandan society. Simba assumed the role of civil defence adviser to the Prefect of Gikongoro on 18 May 1994. The five massacres are not related to his actions in this position.

7. The Prosecution contends that Simba is one of the principal architects of the five massacres and that he personally participated in their execution by furnishing arms, ordering militiamen and government forces to attack and kill Tutsi.

8. The Defence denies this involvement and claims that Simba was not in Gikongoro

prefecture when the genocide was planned or unfolded and that he played no role in the killings in Butare.

9. The Defence has also challenged the fairness of the proceedings. The Defence did not receive sufficient notice of allegations, arising for the first time at trial, related to roadblocks, certain meetings and related activity in Gikongoro town, and a massacre at Kinyamakara commune. The Chamber has therefore excluded certain portions of the testimonies of Witnesses KSM, KDD, KSU, and KEI from evidence. In addition, the Defence argued that the government of Rwanda has unduly interfered with the Defence's efforts to call witnesses. However, the Defence did not demonstrate that any interference from Rwandan authorities called into question the fairness of the proceedings. These issues are discussed in greater detail in the judgement.

10. The Chamber will now summarize its factual findings concerning the five massacre sites at Kibeho Parish, Murambi Technical School, Cyanika Parish, Kaduha Parish, and in Ruhashya commune. The Prosecution presented other evidence of Simba's activities in Gikongoro prefecture. However, it is not seeking a conviction on the basis of these events, and the Chamber will not therefore discuss them here.

11. For the Kibeho Parish massacre on 14 April, the Prosecution points to evidence of a single witness who three to five days after the death of President Habyarimana, observed Simba addressing Hutu militiamen in Gasarenda Trading Centre in Mudasomwa commune, and urging them to kill Tutsi in surrounding areas, including Kibeho. Over the course of the next few days, the witness heard the same attackers shouting that they were on their way to Kibeho and saw them returning covered in blood and heard them recounting their exploits

12. According to Simba, in the days following the death of President Habyarimana, he remained in Kigali gathering family, friends, and neighbours in an effort to protect them from the ensuing violence. As Kigali became a war-zone, he evacuated a number of refugees hiding in his home to Gitarama Town where some of them remained with him from 13 until 24 April.

13. The Chamber has some concern with the Prosecution's uncorroborated evidence. Moreover, in the Chamber's view, Simba presented a reasonable account of his time from 6 to 13 April. Consequently, the Prosecution did not establish beyond reasonable doubt that Simba was involved in this massacre.

14. The Chamber will now consider together the three massacres occurring on 21 April at Murambi Technical School, Cyanika Parish, and Kaduha Parish. The Prosecution presented evidence placing Simba and other local authorities at Murambi Technical School and Kaduha Parish during the attacks. The Defence led evidence that Simba was in Gitarama town at this time. The Prosecution and Defence evidence for these events is set out in detail in the judgement.

15. The Chamber has noted discrepancies in the alibi which undermine its reasonableness. Nonetheless, the Prosecution still bears the burden of proving beyond reasonable doubt that Simba participated in the massacres on that day. The Chamber has not accepted all of the Prosecution's evidence. However, the Prosecution presented corroborated first-hand testimony placing Simba at Murambi Technical School and Kaduha Parish. The Chamber found this evidence reliable.

16. The Chamber will summarize its findings concerning these three attacks based on the evidence presented at trial:

17. The massacres at Murambi Technical School, Cyanika Parish, and Kaduha Parish on 21 April commenced around 3.00 a.m. when *Interahamwe* and gendarmes armed with guns and grenades began the killings at Murambi. Around 6.00 a.m., Prefect Bucyibaruta, Captain Sebuhura, and Bourgmestre Semakwavu replenished ammunition and directed half of the assailants to reinforce the assault at nearby Cyanika Parish. Simba came to Murambi Technical School around 7.00 a.m. and distributed traditional weapons to the attackers who then continued the killing. Attackers at Murambi Technical School also participated in the massacre at Cyanika Parish, which commenced around 8.00 a.m.

18. Simba arrived at Kaduha Parish around 9.00 a.m. where hundreds of attackers had already assembled. Most of the assailants were armed with traditional weapons. However, there was also a well-armed contingent of gendarmes, former soldiers, and communal policemen with guns and grenades. Simba invoking the approval of the government, urged the attackers to "get rid of the filth" at the parish. He then distributed guns and grenades to the assailants who proceeded to kill the Tutsi at the parish.

19. The three massacres on 21 April can only be described, in the Chamber's view, as a highly coordinated operation involving local militiamen backed by gendarmes, armed with guns and grenades, and with the organizational and logistical support offered by local authorities and prominent personalities such as Simba who provided encouragement, direction, and ammunition. This operation was conducted over the course of a period of around twelve hours on a single day and involved the killing of thousands of Tutsi concentrated at three geographically proximate locations. Prior planning and coordination is the only reasonable explanation for the manner in which the perpetrators conducted these three massive assaults.

20. Turning now to the fifth massacre, which took place in Ruhashya commune, the Prosecution points to evidence that Simba participated in the attack along with government forces to reinforce an initial assault. While the Chamber accepts that this attack occurred, it is not satisfied that the evidence presented is sufficiently reliable to determine beyond reasonable doubt

that Simba participated in it or that this formed part of the same operation described above.

21. In its legal findings, which are based on the evidence presented at trial, the Chamber finds that Aloys Simba participated in a joint criminal enterprise to kill Tutsi at Murambi Technical School and Kaduha Parish by distributing weapons to the assailants and providing encouragement and approval for the attacks. The Chamber has some doubt, however, that Simba participated in the planning of the attacks. There is no direct evidence of this, and the Chamber cannot say that this would be the only reasonable inference on the evidence.

22. Simba is charged with genocide in Count I of the Indictment. Given the scale of the killings and their context, the only reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy in whole or in part a substantial part of the Tutsi group. This genocidal intent was shared by all participants in the joint criminal enterprise, including Simba.

23. In reaching this conclusion, the Chamber has considered the arguments of the Defence that Simba could not have committed genocide given his close association with Tutsi and his tolerant views. There is no clear evidence that Simba was among the adherents of a hard- line anti-Tutsi philosophy. However, he was physically present at two massacre sites. He provided weapons to attackers poised to kill thousands of Tutsi. Simba was aware of what was going on in his country, and as a former military commander, he knew what would follow when he urged armed assailants to “get rid of the filth”. The only reasonable conclusion, even accepting the Defence submissions as true, is, at that moment, he acted with genocidal intent.

24. The Chamber finds beyond reasonable doubt that Simba is criminally responsible for genocide for his role in a joint criminal enterprise to kill Tutsi at Murambi Technical School and Kaduha Parish.

25. Simba is also charged with extermination as a crime against humanity under Count 3of the Indictment based on the same facts underlying the count of genocide. As discussed in the judgement, this evidence equally supports a conviction against Simba for extermination.

26. For the reasons set out in this Judgement, having considered all evidence and arguments, the Trial Chamber finds unanimously in respect of Aloys Simba as follows:

Count 1: GUILTY of Genocide

Count 2: NOT GUILTY of Complicity in Genocide

Count 3: GUILTY of Crimes Against Humanity (Extermination)

Count 4: NOT GUILTY of Murder

27. Having found Aloys Simba guilty on Counts I and III of the Indictment for genocide and extermination as a crime against humanity, the Chamber must determine the appropriate

sentence.

28. The Prosecution submits that the adequate penalty is life imprisonment. The Defence did not make any sentencing submissions.

29. In this Tribunal, a sentence of life imprisonment is generally reserved those who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.

30. Simba held no formal position at the time of the events. The Chamber is not convinced beyond reasonable doubt that Simba was one of the architect of the massacres. His own actions did not evidence any particular zeal or sadism. In particular, he did not personally kill anyone and only remained at the sites for a brief period.

31. Among the aggravating factors, the Chamber notes Simba's stature in Rwandan society as a prominent former political and military figure. The influence he derived from this status made it likely that others would follow his example, which is an aggravating factor. The number of victims of the massacres is also an aggravating factor. Additionally, it is significant that Simba supplied the attackers with guns and grenades which greatly facilitated the slaughter during the attacks on 21 April.

32. The Chamber finds few mitigating circumstances. Simba spent much of his life and career before 1994 engaged in the public service of his country. There is some evidence that his political views before April 1994 appear to have been relatively moderate. Such evidence can in no way exonerate or excuse Simba for his participation in the killings. However, it provides a somewhat nuanced picture and may imply that his participation in the massacres resulted from misguided notions of patriotism and government allegiance rather than extremism or ethnic hatred. The Chamber also notes that Simba does not deny the existence of genocide in Rwanda and condemned the massive slaughter that occurred. The Chamber has also considered the selective assistance he provided several members of his family and others close to him after the death of President Habyarimana.

33. In the Chamber's view, after weighing the gravity of the crime and the circumstances of the Accused, limited mitigation is warranted.

34. The Chamber has the discretion to impose a single sentence and notes that this practice is usually appropriate where the offences may be characterized as belonging to a single criminal transaction. Considering all the relevant circumstances discussed above, the Chamber **SENTENCES** Aloys Simba to **TWENTY-FIVE YEARS IMPRISONMENT**.

35. Simba shall receive credit for his time served since his arrest in Senegal. The Chamber has calculated this time as four years and sixteen days.

36. In accordance with Rules 102 (A) and 103, Simba shall remain in the custody of the Tribunal pending transfer to the State where he will serve his sentence.

E. ICTR - News Articles

1. Remember the Blood Frenzy of Rwanda

http://www.latimes.com/news/printedition/opinion/la-op-power4apr04,1,1892869.story

AFRICA

Remember the Blood Frenzy of Rwanda

Genocide prevention must become a foreign policy priority to avoid a repetition of those hideous crimes.

By Samantha Power

Samantha Power is the author of "A Problem from Hell: America and the Age of Genocide," which won the 2003 Pulitzer Prize for general nonfiction, and a lecturer in human rights policy at Harvard Unive

April 4, 2004

BOSTON - When Hutu began murdering Tutsi in Rwanda 10 years ago this week, many Rwandans had to decide whether to desert their loved ones. At a church in the town of Kibuye, two Hutu sisters, each married to a Tutsi man, faced such a choice. One of the women decided to die with her husband. The other, hoping to save her 11 children, chose to leave. Because her husband was Tutsi, her children had been categorized as Tutsi and thus were technically forbidden to live. But the machete-wielding Hutu attackers had assured the woman that the children would be permitted to depart safely if she joined them.

When the woman stepped outside the church, however, the assailants butchered eight of her 11 children as she watched in horror. The youngest, a 3-year-old boy who saw his brothers and sisters slain, pleaded for his life. "Please don't kill me," he said. "I'll never be Tutsi again." The killers, unmoved, struck him down.

In three short, cruel months, between April and July 1994, Rwanda experienced a genocide more efficient than that carried out by the Nazis in World War II. The killers were a varied bunch: drunk extremists chanting "Hutu power, Hutu power"; uniformed soldiers and militia men intent on

wiping out the Tutsi inyenzi, or "cockroaches"; ordinary villagers who had never themselves contemplated killing before but who decided to join the frenzy.

The murderers, and their ebullient abettors, were turned into ghastly marionettes, consumed by a manic wrath. Men and women, young and old, religious and agnostic, became killers. They killed with machetes in one hand and radios broadcasting instructions in the other. They killed in churches, at traffic lights, in supermarkets and in homes. They killed after taunting, after savagely beating and, often, after raping.

The Clinton administration's response was best captured by a State Department press conference two days into the slaughter. Prudence Bushnell, the midlevel official who had been put in charge of managing the evacuation of Americans - and only Americans - from Rwanda, spoke with journalists about the Rwandan horrors. After she left the podium, State Department spokesman Michael McCurry took her place and seamlessly turned to the next item on the day's agenda: U.S. criticism of foreign governments that were preventing the screening of the Steven Spielberg film "Schindler's List."

"This film movingly portrays the 20th century's most horrible catastrophe," McCurry said. "And it shows that even in the midst of genocide, one individual can make a difference." McCurry urged that the film be shown worldwide.

"The most effective way to avoid the recurrence of genocidal tragedy," he declared, "is to ensure that past acts of genocide are never forgotten."

No one made any connection between Bushnell's remarks and McCurry's, between Rwanda and the Holocaust. Neither journalists nor officials in the United States were focused then - or in the ensuing three months - on the fate of Rwanda's Tutsis.

By July 1994, when Tutsi rebels took control of the country, the killers had accomplished much of what they set out to achieve. At least 800,000 people - half of the Tutsis who had lived in Rwanda three months earlier - had been eliminated.

The Rwandan genocide revealed, more than any other event in the 20th century, the shallowness of the pledge of "never again." Again, a dozen key plotters managed to organize a society around mass murder. Again, an inconvenient minority found itself targeted for extermination. And again, the world watched.

Indeed, the U.S. and its allies on the U.N. Security Council didn't simply watch. They voted to withdraw the U.N. peacekeepers who were in Rwanda, abandoning Rwandans who had relied upon the blue helmets for their protection.

While it was once possible to view the world's neglect of Europe's Jewry as a monstrous aberration, the Rwanda genocide shows how three patterns persist: The U.S. and other states ignore the warning signs that would enable them to act early. When the killing starts, "mere genocide" doesn't command high-level attention or resources. And domestically, U.S. leaders do not fear they will pay a political price for being bystanders to genocide.

Genocide comes with ample early warning, as would-be perpetrators are careful to test the waters before plunging in. In the months preceding their slaughter, the Rwandan killers staged a number of mini-massacres in order to gauge international reaction. By January 1994, Rwanda had become so militarized - and imported machetes had become so omnipresent - that the U.N. commander in Rwanda, Romeo Dallaire, urgently cabled Kofi Annan, the U.N. head of peacekeeping, in New York. Dallaire warned that militia members could exterminate "up to 1,000 [Tutsis] in 20 minutes."

Dallaire sent his cable three months after 18 U.S. soldiers had been killed in a Somalia firefight. Annan, believing that the United States and its allies were unwilling to confront the militants, opted not to cross what became known as "the Mogadishu line." He buried what has become known as the "genocide fax," and the militia members took their cue.

Annan was wrong not to sound an alarm, but he accurately predicted the U.S. attitude: Stopping Rwanda's massacres was not seen as in the U.S. national interest. The foreign policy of the United States is devoted to advancing a narrow national interest, which has long been defined in terms of economic and security gains for American citizens. Genocide rarely affects such interests, so no matter how many men, women and children are killed, the occurrence of genocide rarely rises within the bureaucracy to command the attention of influential U.S. policymakers. Focusing foreign policy attention on acts of genocide would require presidential leadership, which has rarely been forthcoming.

More shocking than the U.S. avoidance of military intervention in Rwanda was the fact that President Clinton never even convened his Cabinet to discuss what might be done about the murder of nearly a million human beings. The response was low-level, and neither Bushnell nor the other career bureaucrats nor Africa specialists had the clout needed to move the machinery of a risk-averse system in time to save lives. Thus, the U.S. not only failed to intervene, it also failed to even denounce the "genocide," or to use its technology to jam the "hate radio," or to rally additional U.N. troops from other countries, or to freeze the financial assets of the killers. The Rwandan killers went utterly unchallenged.

It's easy and right to hold Clinton accountable for American by- standing, but his administration's inaction was affirmed by societywide silence. While U.S. officials dithered, the rest of us failed to generate the "noise" that would have gotten their attention. Editorial writers at the major newspapers who pushed for intervention in Bosnia made no such appeals on behalf of the Rwandans.

The Congressional Black Caucus was consumed with the refugee crisis in Haiti. And we voters never picked up our telephones, so the congressional and White House switchboards didn't ring.

Then-Rep. Pat Schroeder (D-Colo.) described the relative silence in her district. "There are some groups terribly concerned about the gorillas," she said, noting that Colorado was home to a research group that studied Rwanda's imperiled gorilla population. "But - it sounds terrible - people just don't know what can be done about the people."

The Clinton administration didn't help inform Americans - indeed it distorted the facts, deliberately avoiding use of the word "genocide" - and then it invoked the public and congressional indifference as yet one more alibi for its inaction.

On this historic 10-year anniversary, we must try not to allow 800,000 to become a faceless statistic. Each Rwandan lived a precious life and died a horrible death. And if we are serious about learning the "lessons of Rwanda," we must do more than remember and regret; we must press our leaders to make genocide prevention and suppression the foreign policy priority it has never been. Otherwise, when we pledge "never again Rwanda," what we will really be saying is "never again will Rwandan Hutus kill 800,000 Tutsis between April and July, 1994."

2. Belgian Jury Convicts 4 Nuns in '94 Rwanda Massacre

New York Times, June 8, 2001

Belgian Jury Convicts 4 in '94 Rwanda Massacre

In a ground-breaking case, a court in Brussels early today found four Rwandans, including two Catholic nuns, guilty of taking part in the 1994 massacres in Rwanda.

A 12-member jury found the defendants guilty on most of the 55 counts against them, stemming from their involvement in the events between April and July 1994, when ethnic Hutu extremists killed more than half a million Tutsi and politically moderate Hutu before a Tutsi rebel front seized power in the central African country.

All four defendants, Rwandans who are now Belgian residents, were tried under a 1993 law that allows Belgium -- the former colonial power in Rwanda -- to try Belgian residents, whatever their nationality, for crimes against humanity, even if committed abroad.

The verdict marks the first time that a jury of 12 ordinary citizens of one country had been asked to judge people accused of war crimes committed elsewhere.

Also, because two of those convicted are Catholic nuns -- Sister Gertrude, 42, and Sister Maria Kisito, 36 -- the case has brought further embarrassment to the Roman Catholic Church, which had already come under heavy criticism over its equivocal role during the massacres.

The two others convicted were a college teacher, Vincent Ntezimana, 39, and a factory owner and former minister, Alphonse Higaniro, 51.

All the defendents were accused of participating directly or indirectly in the massacres. According to the indictment, Sisters Gertrude and Kisito handed over 5,000 to 7,000 people who had been sheltering in their convent complex to the extremist militia.

The presiding judges were to spend today deciding on sentences for the four, who could face life imprisonment.

3. Rwandan Nuns, Man Lose Appeals

Rwandan Nuns, Man Lose Appeals

Associated Press, January 9, 2002

By PAUL AMES

Associated Press Writer

BRUSSELS, Belgium (AP) -

Belgium's supreme court rejected appeals Wednesday from two Rwandan nuns and a businessman convicted of war crimes during the central African nation's 1994 genocide.

The three were given jail sentences of up to 20 years in June after a landmark trial under laws authorizing Belgian courts to try war crimes committed abroad.

The decision confirming the sentences was welcomed by friends and relatives of genocide victims.

"This encourages us to continue to struggle in other cases. This was just the first," said Melanie Uwamaliya, who lost family members.

Sister Gertrude, the former Consolata Mukangango, received a 15-year sentence for assisting a mob that killed thousands seeking shelter at the Sovu convent in southern Rwanda, where she was mother superior.

Fellow Roman Catholic nun Sister Maria Kisito, also known as Julienne Mukabutera, was jailed for 12 years for her role in the massacre. Alphonse Higiniro, a prominent and former Rwandan government minister, received a 20-year sentence for helping plan and carry out massacres of the Tutsi minority in the southern city of Butare.

A fourth man convicted at the same trial, university professor Vincent Ntezimana, did not appeal his 12-year sentence.

Lawyers for the three had appealed to the Court of Cassation, Belgium's highest judicial authority, claiming irregularities in the trial. The case was the first under a 1993 law granting Belgian courts jurisdiction to try war crimes wherever they take place. The three defendants had fled to Belgium after the massacres.

Human rights campaigners hailed the trial as a breakthrough in denying safe havens to suspected war criminals.

Lawyers representing Rwandan victims said the ruling would encourage further prosecutions.

Lawyers have lodged complaints under the 1993 law and supplementary 1999 legislation against several world figures, including Israeli Prime Minister Ariel Sharon, Palestinian leader Yasser Arafat, Cuban President Fidel Castro and Iraqi President Saddam Hussein.

The rush of cases has embarrassed the Belgium government, which plans to submit amendments to the law making it harder to file actions against serving politicians.

Lawyers representing the defendants said they may take the case to the European court of human rights in Strasbourg, France.

For Belgian justice, it is finished. "There is no more recourse," said Serge Wahis, who represented Sister Maria Kisito. "We will now look calmly at the possibility of taking this to the European court of human rights in Strasbourg."

4. Ex-Rwandan Officer Gets Prison for Genocide

Ex-Rwandan Officer Gets Prison for Genocide

http://www.latimes.com/news/nationworld/world/wire/sns-ap-rwanda-genocide-tribunal,1,1058177.story?coll=sns-ap-world-headlines

Ex-Rwandan Officer Gets Prison for Genocide

By SUKHDEV CHHATBAR

Associated Press Writer

December 13, 2005

ARUSHA, Tanzania - A United Nations tribunal convicted a retired Rwandan army officer of genocide Tuesday and sentenced him to 25 years in prison for participating in the slaughter of ethnic minority Tutsi.

The tribunal found retired Lt. Col. Aloys Simba guilty of genocide and extermination charges stemming from the 100-day slaughter of more than half a million Tutsi, as well as political moderates from the Hutu majority.

Prosecutors said one of the largest killings in the period occurred in a region where Simba, 63, was the top civil defense officer.

They said that Simba commanded the military, police and civilian militias that carried out most of the killing in the Gikongoro and Butare regions of southern Rwanda in May and June 1994.

"This is a very important judgment as one of the largest killings happened in Gikongoro," said Steven Rapp, chief prosecutor for the U.N. International Criminal Tribunal for Rwanda.

Judge Erik Mose said the tribunal was convinced that Simba supplied guns and grenades that killed thousands of innocent people. He also was part of a group of army officers who led a 1973 coup that brought President Juvenal Habyarimana to power, prosecutors said.

The genocide was unleashed by the extremist government that took power after Habyarimana was killed when his plane was shot down as he returned home from peace talks with Tutsi-led rebels in 1994.

Defense lawyers claimed that Simba, who was arrested in November 2001, was framed.

The tribunal found him not guilty of lesser charges of complicity in genocide and murder.

He will receive credit for the four years he spent in detention after his arrest in Senegal.

5. *Gacaca* courts in Rwanda

G*acaca* courts in Rwanda

Presentation of the *Gacaca*

In 1994, over a million Rwandan citizens were killed during the genocide perpetrated against the Tutsi and the massacres of Hutu opponents, planned and carried out by the previous government. Approximately three million people were forced into exile. The country was laid to waste. The institutions in charge of upholding the law (courts, police, prisons, etc.) ceased to function.

After the genocide, almost 130,000 people accused of having organised and taken part in it were put into prison in the worst possible conditions. Eight years on, around 125,000 are still in detention awaiting trial. A general amnesty was out of the question as the new government (Government of National Unity), the Rwandan people and the international community all agreed that those responsible for the genocide should be held accountable for their acts in order to eradicate the culture of impunity, reinforce respect for the law and uphold the principle of punishment for crimes.

The government came to the conclusion that a conventional European-style justice system could not be the only solution to the problems Rwanda was facing. This is why it began searching for alternatives in 1998. In 1999, this led to the proposal of an alternative justice system: the *Gacaca* jurisdictions, a new system of participatory justice (a reworking of the traditional community conflict resolution system) in which the whole of society would take part. In July 1999, the government published a paper on the "*Gacaca* jurisdictions", which was the follow-up document to a series of discussions with a number of groups of representatives of the Rwandan population and the international community.
After several redrafts, the "*Gacaca* law" was adopted and published in March 2001.

Objectives and organisation of the *Gacaca* courts
The main principle of the *Gacaca* courts is to bring together all of the protagonists at the actual location of the crime and/or massacre, i.e., the survivors, witnesses and presumed perpetrators. All of them should participate in a debate on what happened in order to establish the truth, draw up a list of victims and identify the guilty.
The debates will be chaired by non-professional "judges", the inyangamugayo, elected from among the men of integrity of the community, who will have to decide on the sentence for those found guilty.
According to the government, the advantages of the new *Gacaca* jurisdictions will be as follows:

- Neither the victims nor the suspects will have to wait for years for justice to be done. This means the process will be sped up.
- The cost to the taxpayer for the upkeep of prisons will be reduced, enabling the government to concentrate on other urgent needs.
- The participation of every member of the community in revealing the facts of a situation will be the best way to establish the truth.
- The Gacaca courts will enable the genocide and other crimes against humanity to be dealt with much faster than the formal justice system. This should end the culture of impunity that currently exists.
- The new courts will put into practice innovative methods in terms of criminal justice in Rwanda, in particular sentencing people to Community Service *t*o aid the reintegration of criminals into society.
- The application of the law should aid the healing process and national reconciliation in Rwanda, which is seen as the only guarantee of peace, stability and future development of the country, as well as obliging the Rwandan people to take political responsibility.

The people accused of genocide are divided into four categories:

- No. 1 Category: the planners, organisers and leaders of the genocide, those who acted in a position of authority, well known murderers and those guilty of rape and sexual torture.
- No. 2 Category: those guilty of voluntary homicide, of having participated or been complicit in voluntary homicide or acts against persons resulting in death, of those having inflicted wounds with intent to kill or who committed other serious violent acts which did not result in death.
- No. 3 Category: those who committed violent acts without intent to kill.
- No. 4 Category: those who committed crimes against property.

The accused in the first category will be judged by the ordinary courts, i.e., Courts of First Instance / Magistrates' Courts.

For all other cases the government created around 11,000 Gacaca jurisdictions, each made up of 19 elected judges known for their integrity. Over 254,000 of these civil judges were elected between the 4th and 7th October 2001 and received training in 2002 before the courts began to function.

There are four levels of jurisdiction for the different categories of crime (2, 3 and 4) tried by the *Gacaca* courts. Only the first and second categories may appeal. The judgements are then examined by the highest district and provincial levels of the administration.

The 9,201 *Gacaca* jurisdictions at "cell" level investigate the facts, classify the accused and try the fourth category cases (no appeals).
The 1,545 *Gacaca* jurisdictions at sector level are in charge of third category crimes.
The 106 *Gacaca* jurisdictions at district level hear the second category cases and the third category appeals.
The 12 *Gacaca* jurisdictions at provincial level or of Kigali are in charge of appeals of second category cases.

Three structures coexist at each jurisdictional level:

1. The General Assembly (at cell level, the entire population over the age of 18; at all other levels a group of 50 or 60 elected "people of integrity"),
2. The Chair: 19 judges in each jurisdiction,
3. The coordination committee made up of 5 people

The *Gacaca* courts do not have the right to pass the death penalty. Defendants who were aged between 14 and 18 at the time of the crimes receive sentences that are half as long as those for adults. Those who were less than 14 years old at the time are not sentenced and are set free.

With the exception of defendants in the second category who refuse to confess and plead guilty, it has been decided that all the other prisoners in categories 2 and 3 may serve half their prison sentences doing Community Service. The time already spent in prison will be deducted from this sentence.

The defendants in No. 4 Category will not be sentenced. If no agreement can be reached on the return of stolen or destroyed goods, the Chair of the cell's *Gacaca* jurisdiction will decide on the damages to be paid.

The new *Gacaca* system is based on a participatory justice system and on its reconciliatory virtues. According to the Justice Ministry, the population that was in the hills at the time of the genocide will be "witness, judge and plaintiff".

Source: Excerpt from http://www.penalreform.org/english/theme_gacaca.htm

Can the Gacaca Courts Deliver Justice?
Rachel Rinaldo

Inter Press Service
April 8, 2004

As Rwanda commemorated the 10th anniversary of the 1994 genocide this week, attention focused on the hundreds of thousands of people who lost their lives in the killing spree. But, what has become of the machete-wielding individuals who carried out the plans of the genocide masterminds? The International Criminal Tribunal for Rwanda, which began work in Tanzania in 1995, has concentrated on bringing the ringleaders of the massacres to book. To date, over 60 people accused of playing a major role in the killings have been detained, including former Prime Minister Jean Kambanda, who was later sentenced to life imprisonment. But, tens of thousands of other genocide suspects still await trial in Rwanda's crowded jails.

"In Rwanda you have a situation in which a large part of the population participated in the genocide," says Elizabeth Onyango of African Rights, a non-governmental organisation (NGO) with offices in Kigali and London. "A select few might have orchestrated it, but they did it so cleverly that they got a lot of the population implicated - and how do you try cases like this, all these people?"

Given Rwanda's shortage of judges and lawyers, it would take decades for conventional courts to try the suspects - which sources put at about 80,000 and upwards. As a result, the government has turned to a traditional system of justice known as "gacaca" to relieve the burden on prisons and courts. Gacaca hearings are traditionally held outdoors (the word loosely translates as "justice on the grass"), with household heads serving as judges in the resolution of community disputes. The system is based on voluntary confessions and apologies by wrongdoers.

Over 250,000 community members have been trained to serve in panels of 19 judges in gacaca courts all over Rwanda. The tribunals will operate in several stages, first identifying victims, then suspects - and finally holding trials. Local residents will give testimony for and against the suspects, who will be tried in the communities where they are accused of committing crimes. The initiative was launched in June 2002. But, with the exception of courts involved in a pilot phase of the operation, most are not yet operational. They are expected to begin work in May or June this year. Many of those on trial will be prisoners who have already been released from jail after making confessions. Those who confess in gacaca courts will have their sentences reduced, or may in some cases be freed if they have already served enough time in prison.

"As a country we have now decided to try to find the truth behind the genocide," said Robert Bayigamba, Minister of Culture, Youth and Sports. Gacaca, he said, is intended "to accelerate the process of knowing the truth so that justice may be done".

But some international observers have reservations about the gacaca system. Richard Haavisto, who researches Central Africa for Amnesty International, visited gacaca courts during the pilot phase, and was concerned by what he saw - particularly the low level of participation by community members. According to Haavisto, people often failed to attend the trails, or did not give testimony when they did appear. "The objective is a truthful accounting of what happened in the

genocide and (non-participation) really undermines the whole premise," he told IPS. Fear appears to be a major issue. "Many of those who might be willing to give evidence are afraid of retribution," Haavisto said. In fact, there have been reports in the last few years of killings and attacks on witnesses who were expected to testify in gacaca courts.

Haavisto adds that many communities also perceive the tribunals as being one-sided - something that contributes to a lack of confidence in the system. He recommends that the courts should deal with crimes committed by the Rwandan Patriotic Front (RPF), a rebel movement which took control of the country after the killings - as well as the so- called "genocidaires". "The government has to create a climate which convinces people that there is an equitable system of justice at work," Haavisto says.

The ranks of the RPF were dominated by members of Rwanda's minority Tutsi group, which was targeted during the genocide by militants from the Hutu majority, (Hutu moderates also found themselves in the firing line). The killings began after a plane carrying Rwandan President Juvenal Habyarimana and his Burundian counterpart was shot down over Kigali on Apr. 6 1994. Prior to the massacres, peace talks had been underway between Kigali and the RPF, which is accused of committing human rights abuses as it advanced across Rwanda. According to the New York-based Human Rights Watch, United Nations consultant Robert Gersony found that "the RPF had engaged in widespread and systematic slaughter of unarmed civilians". In addition, Haavisto warns that gacaca trials may eventually prove to be a drain on community members who participate, as most are not compensated for their involvement.

Outside the Rwandan capital views about gacaca are mixed. In the province of Ruhengeri, which has a large concentration of Hutus, many people appear favourably disposed to gacaca - at least when they speak to a foreign journalist. "It's up to the people to make it work," said Cyril Munyanya, a farmer. "If they put their minds to it there's no reason it can't work."

Dacile Nyirabazungu, a female survivor who works at the Ntarama Church genocide memorial, says the trials will help Rwanda "find out who are the killers." Nyirabazungu and other survivors at Ntarama proudly point out the new brick building across from the church that will serve as the gacaca headquarters in the community. For Musavimana, a 24-year old ex-prisoner in the western Rwandan town of Kibuye, the system has already proved beneficial. He was arrested in 1994 for a murder he says he did not commit, and spent eight years and three months in jail. Finally, he was released because the men who carried out the murder confessed in a special prison gacaca.

But, others dread the moment at which the courts will become fully operational. Mbezuanda, a woman in Kibuye, is emotionally shattered from her ordeal at the hands of Hutu militia - and has also contracted HIV. She is afraid to testify in a public court because she says it will be her word against the accused: there are no other witnesses. Without anyone to back her up, Mbezuanda feels it would be dangerous to give evidence. She is also worried that the courts are moving too slowly. "Maybe by the time it comes I will be dead," she says. But at the very least, says Elizabeth Onyango, gacaca might help Rwandans talk about what happened in 1994 rather than shutting it away, as has been done before. "Rwanda is a society where people, because of all they've been through...don't really speak up," Onyango notes. "Gacaca does give people a chance to begin to talk about genocide."

Source: http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/0408justice.htm

F. ICC - Primary Sources

1. Rome Statute Of The International Criminal Court

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of

violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor

from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving

evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court

or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of

the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled

to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44

Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this

article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice

so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation

to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial

Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2 . (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of

any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest

or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where

the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their

participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and

any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of

penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81

Appeal against decision of acquittal or conviction

or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92

Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94

Postponement of execution of a request in respect

of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in

respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of

assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97

Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98

Cooperation with respect to waiver of immunity

and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the

consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103

Role of States in enforcement of

sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and

conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that

person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their

commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October

1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

G. ICC - News Articles

1. Heed the Lesson of Nuremberg: Let No Nation Be Above the Law

Forward Forum

Heed the Lesson of Nuremberg: Let No Nation Be Above the Law

By Benjamin Ferencz

November 18, 2005

"We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow," Chief Justice Robert Jackson warned at the opening session of the Nuremberg war crimes tribunal, on November 20, 1945. "To pass these defendants a poisoned chalice is to put it to our own lips as well."

As we mark the 60th anniversary of the Nuremburg trials this week, it increasingly appears that Jackson's warning is falling on deaf ears in America.

Six decades have passed since we condemned Nazi war crimes and crimes against humanity, since "Never again!" became a universal slogan. Six decades have passed, but the more peaceful and humane world we envisioned at Nuremberg - one protected by rules of law that bind all nations large and small - remains elusive.

In response to the tragedy of the Holocaust laid bare at Nuremberg, the United Nations assigned legal committees to codify international law and establish a permanent international criminal court. The proposed court, commonly known as the ICC, would help deter such crimes in the future by holding personally accountable those leaders responsible for genocide and massive crimes against humanity. But faced with opposition by conservative American senators, it took 40 years before our government ratified the Genocide Convention in 1988.

A decade later, American obstinacy against codifying international law was again on display. In 1998, high representatives of 120 nations voted to accept carefully negotiated statutes for a permanent ICC. It was a historic achievement, hailed by U.N. Secretary General Kofi Annan as "the hope of future generations."

Only seven countries voted against the new court. The United States, under pressure from the Pentagon and congressional conservatives, was among them. So, too, was Israel, which found, despite having worked long and hard for the establishment of such a court, a minor technicality for objection and reluctantly followed the United States in voting "no."

The next year, President Clinton told the U.N.'s General Assembly that he supported the establishment of an ICC. On December 31, 2000, shortly before he left office, Clinton instructed his ambassador, David Scheffer, to proceed to the U.N. on a snowy New Year's Eve to sign the ICC treaty. By pre-arrangement, Israel again followed America's lead and signed.

However, without ratification by two-thirds of the Senate, America's signing of the treaty merely indicated support for the ICC's goals and bound it only to not sabotaging its objectives. The powerful chairman of the Senate Foreign Relations Committee, Jesse Helms of North Carolina, quickly made clear his unalterable opposition to the ICC. And so, despite hesitations by several other major powers, including China, India and Pakistan, nearly 100 nations ratified the Rome Treaty in record time and the ICC went into effect July 1, 2002 - without America's participation.

Helms no longer serves in Washington, but the Republican administration of President Bush has more than made up for the senator's absence. Two months before the Rome Treaty was ratified, John Bolton - a protégé of Helms who was then an assistant secretary of state and is now America's ambassador to the U.N. - sent a one-paragraph letter to the U.N., stating that the United States has no intention of ever becoming a party to the Rome Treaty, and hence is not legally bound by Clinton's signature. The repudiation of the official signature of an American president was unprecedented, and was seen by many as an unnecessary slap in the face of the great number of nations that had supported the ICC.

The Bush administration, backed by the Republican-led Congress, has boycotted the new court and done everything possible to destroy its power. Opponents of the ICC allege that its prosecutors may subject American servicemen to politically motivated charges that would inhibit foreign intervention for humanitarian purposes. Yet no other country in the world has raised this objection.

In fact, according to its own statute the ICC is permitted to deal only with crimes "of concern to the international community as a whole." This means that only leaders responsible for planning or perpetrating major crimes against humanity will be targets of the court.

The Bush administration's other objections to the court are equally untenable. To begin with, guilty knowledge and criminal intent must be established beyond reasonable doubt. Furthermore, the U.N. Security Council can direct the ICC to suspend any prosecution that might interfere with peace negotiations. And American objections on constitutional grounds are also unsupported by the facts.

Jingoistic slogans about protecting national sovereignty may sound appealing to an uninformed public, but try as the current administration might, it cannot eliminate the need for certain universally binding rules of humanitarian law in an increasingly interdependent world.

Simply put, current American fears are both misguided and unpersuasive. Not only does the ICC's carefully negotiated statute guarantee no retroactivity and fair trials, but it also requires nations to have priority to try their own citizens. The ICC can exercise jurisdiction only if the state of the perpetrator is unable or unwilling to provide a fair trial.

No prosecutor in human history has been subjected to as many controls as exist in the ICC. The prosecutor is under strict administrative and budgetary controls of the court's Assembly of State Parties, which includes such staunch allies of America as Great Britain, Canada, Australia and the European Union. The American Bar Association, every former president of the American Society of International Law and a host of the most renowned and respected international lawyers in the United States, Israel and around the world support the ICC.

How, then, to explain America's objections - which, to many informed observers, seem to border on the irrational?

The American public deserves to be told the truth: The stated opposition of the Bush administration to the ICC is a sham. It is disgraceful that our government expects the rest of the world to simply swallow the argument that the United States is above the law. Those who oppose the ICC - whose

most fundamental premise is that law applies equally to everyone - do not believe in the rule of law.

One need only look at the American Service-Members' Protection Act to find evidence of the administration's belief in American exceptionalism. The legislation, mockingly called "The Hague Invasion Act" by many Europeans, authorizes the president to use "all necessary means" to liberate any American who might be held in custody by the ICC in The Hague.

For further proof, one could examine the various "immunity agreements" that all nations receiving American aid are requested to sign. If they refuse to stipulate that no Americans, or their employees, will be sent to the ICC, the nations risk forfeiting all American military and economic aid - even if the recipient country needs the funds in order to pursue terrorists and drug traffickers.

Such irrational behavior, of course, can only evoke suspicion about American intentions and resentment toward Washington by intimidated signatories. Not one single American has been helped in any way by these coerced agreements - not one.

And little wonder that many are suspicious of our intentions. Earlier this year, Secretary of Defense Donald Rumsfeld proclaimed America's intention to bypass, if necessary, restraints on the use of force codified by the U.N. Charter. Washington reserves the right, he warned, to anticipate hostilities and to strike first and pre-emptively - alone, if necessary - to counter a perceived threat to our national security.

Now, I do not wish to compare any Americans to the Nazi leaders. But after hearing Rumsfeld's words, I could not avoid being reminded of the argument put forward by the lead defendant in the Einsatzgruppen trial at Nuremberg, S.S. General Otto Ohlendorf. When asked to explain why his unit murdered more than 90,000 Jews, including their children, the remorseless defendant casually explained that it was justified as anticipatory self-defense.

Germany anticipated an attack from the Soviet Union, Ohlendorf argued, and since Jews were perceived as supporters of Bolshevism, they presumably posed a potential future threat to German national interests. And if Jewish children knew that their parents had been executed, he continued, they, too, might become enemies of Germany, and therefore they had to be killed.

In a carefully reasoned judgment by the three judges presiding over the case - all of them American - Ohlendorf's defense was held to be untenable, and the S.S. general was hanged.

Sixty years later, I am afraid, this and other lessons from Nuremberg are lost on the Bush administration.

Benjamin Ferencz was chief prosecutor in the Einsatzgruppen trial at Nuremburg.

http://forward.com/main/printer-friendly.php?id=6903

2. Hunting Uganda's child-killers

Justice versus reconciliation

Hunting Uganda's child-killers

May 5th 2005 | GULU AND KITGUM

From The Economist print edition

Ghastly civil war provides a test case for the International Criminal Court

NO ONE doubts that terrible crimes have been committed in northern Uganda. The Lord's Resistance Army (LRA), a rebel group led by Joseph Kony, a man who thinks himself semi-divine, has spent the past 18 years slaughtering peasants, enslaving children and slicing off the lips and noses of conscripts it suspects of disloyalty. But does this mean that the newly established International Criminal Court (ICC) should be going after Mr Kony and his lieutenants? Several community leaders in northern Uganda think not.

As the ICC prepares to issue its first arrest warrants against the LRA's leaders, Rwot Acana II, the paramount chief of the northern Acholi people, who have borne the brunt of the rebels' atrocities, predicts that it will be "the last nail in the coffin" of a fragile peace process. The threat of prosecution, he argues, will deter the rebels from accepting a government-offered amnesty, and therefore prolong the war. He and other Acholi leaders have been furiously lobbying the ICC to back off. They argue that it would be better to apply traditional Acholi justice. If the rebels confess their guilt and undergo cleansing rituals, they will be accepted back into their communities, say the ICC's critics.

The ICC was first invited to consider the northern Ugandan conflict in January 2004, by the Ugandan government. Earlier this year, the government appeared to be having second thoughts. President Yoweri Museveni spoke of "convincing the ICC to drop their indictment if the LRA rebels surrender". But Luis Moreno-Ocampo, the court's chief prosecutor, turned a deaf ear, and the government has now relented. Mr Moreno-Ocampo is expected to apply to the court's pre-trial chamber for arrest warrants against half a dozen rebel chiefs by the end of this month.

Mr Kony's gang has reportedly abducted more than 20,000 children. Some are forced to fight, some to carry bags, others to have sex with the fighters. By way of initiation, many are obliged to club, stamp or bite to death their friends and relatives, and then to lick their brains, drink their blood and even eat their boiled flesh.

Nearly 2m people, representing some 90% of the population of the three main Acholi provinces of Gulu, Kitgum and Pader, have fled their homes and now live in crowded and unhealthy camps. Even here, they are at risk. Every night, streams of bare-footed children trudge miles to sleep in the relative safety of the main towns, before returning home at dawn.

The force that terrorises them remains shadowy. Mr Kony, who was raised, like most Acholis, as a Catholic, claims to have been sent by God to save his people from evil, a heading under which he includes President Museveni and all forms of witchcraft. He says he wants to rule Uganda in accordance with the Ten Commandments, though he has at times made more prosaic demands, including education for all, an independent judiciary and policies to encourage foreign investment.

No one knows how many troops Mr Kony commands. Some say he once had as many as 10,000; others that he now has only a few hundred. Betty Bigombe, the chief mediator between the government and the LRA, reckons there are about 3,000 "rebels" left, of whom 800 are fighters. Since Mr Museveni's forces number 100,000 or so, including militias, many northerners wonder how hard the government is really trying to crush the rebellion.

Fewer places to hide

That said, peace looks more likely now than for a decade. Pressure on the rebels has increased since the government of neighbouring Sudan agreed in 2002 to stop backing them. It has also allowed Ugandan forces to attack Mr Kony's bases in southern Sudan, and last month, the two countries mounted their first joint military operation against the LRA.

This, combined with the amnesty, has flushed thousands of rebels out of the bush. Despite the vaunted Acholi tradition of reconciliation, many have found it hard to rejoin their own communities. Hundreds have joined the army instead, and are now hunting their former comrades. Others have hidden to escape the wrath of their families. But Mr Kony and his top commanders have not been lured out-and many suspect they never will be.

The ICC's supporters argue that it can help end impunity, which was why it was first set up in 1998. If Mr Kony is brought to justice, it may deter others currently contemplating mass murder. And despite the fears of Acholi leaders-which not all Acholis share-it does not seem to have impeded the peace process in northern Uganda. Some argue that, on the contrary, it has increased the pressure on rank-and-file rebels to turn themselves in.

But the ICC has no police force. How, ask the sceptics, will it catch Mr Kony when he has evaded the Ugandan army for 18 years? The court's supporters retort that similar misgivings were voiced when the international tribunal for the former Yugoslavia was set up, yet Slobodan Milosevic, the former Serbian president, and most of his generals are now in the dock.

Since this is its first test case, the ICC is determined to succeed in northern Uganda. Its credibility is at stake. Catching Mr Kony may take years or even decades. But unlike other international tribunals, the ICC is permanent. There is no time limit for its work. Its indictments, once issued, remain in force until the indictee is either tried or dead. It can wait for Mr Kony, who may incidentally be running out of hiding places.

His fellow Acholis hate him. His friends in Sudan are turning their backs on him. Donors are pressuring Mr Museveni to pacify the north (and to abide by constitutional term limits, but that is another story). Mr Kony might hope to hide in a state that is not a party to the ICC. But who would want him

3. Nuremberg Trials and the ICC

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International Criminal Court

Nuremberg Trials a Tough Act to Follow

By David Crossland in Berlin

Sixty years after the Nuremberg trials blazed the trail for a global system of justice, the head of the International Criminal Court dismisses U.S. concerns it may engage in politically motivated prosecutions and appeals for world recognition to help the court bring mass murderers to trial.

The proceedings of the Nuremberg Trials are projected on a screen during the 60th anniversary ceremony commemorating the first major effort at international justice.

For Philippe Kirsch, the Canadian president of the new International Criminal Court, traveling to Nuremberg for the 60th anniversary of the trials of Nazi leaders must have been a tad frustrating. Veteran lawyers and interpreters convened in the southern German city last Saturday to commemorate the launch in 1945 of the first multinational court to try Hitler's henchmen for the worst crimes ever committed.

But the ceremony also served as a reminder that the ICC, inspired by Nuremberg and created by a conference of states, hasn't yet attained the global legitimacy it needs to do its job -- bringing to justice the perpetrators of genocide, crimes against humanity and war crimes.

The United States, the driving force behind the Nuremberg trial, has refused to join the ICC because it is worried that U.S. soldiers on missions abroad might be subject to politically motivated prosecutions by such a court.

That stance is totally unwarranted, says Kirsch with more than a hint of irritation. "The spectre of politically motivated prosecution which is a running theme against the ICC is so unfounded that it is to me intellectually difficult to understand," he told journalists in Berlin earlier this week ahead of a speech he held at the American Academy.

According to media reports, William Timken, the new U.S. ambassador to Berlin, declined to participate in a discussion with Kirsch and German Justice Minister Brigitte Zypries in Nuremberg.

China, India, Pakistan, Indonesia and Turkey have not signed the treaty under which the court was set up in 2002. Among countries that signed up but have not yet ratified it are Egypt, Iran, Israel and Russia. So far 100 countries have ratified the court, including Germany, France and Britain. Jordan is the only Arab state which has thus far joined.

In Kirsch's view, it's only a matter of time before acceptance of the ICC grows worldwide. "Over a period of time the court will demonstrate that it is acting in a fair, non-political way as it is supposed to do, and support should in my view follow," he said. A number of states which have not

joined the ICC were showing more interest and less apprehension about the court than a couple of years ago, he said.

He noted that the ratification of the ICC treaty by 100 states -- most recently Mexico -- would not have been thought possible by most people just a few years ago.

Unlike the two temporary international tribunals set up to try individuals for crimes against humanity in the former Yugoslavia and Rwanda, the Hague-based ICC is a permanent institution. It can only deal with crimes committed after July 1, 2002, when it was formally set up. This means, of course, that it can't take the case of a leader like Saddam Hussein, whose alleged crimes against humanity took place before the court's creation.

Its remit is also limited in other respects. It only has jurisdiction if it has the consent of the nation where the crime was committed or of the nation the accused person belongs to, or when the United Nations Security Council refers a case to it.

So far, its activities have been limited to Africa where it is investigating allegations in the Democratic Republic of Congo of thousands of deaths by mass murder and summary execution since 2002.

International Criminal Court President Philippe Kirsch: "The spectre of politically motivated prosecution which is a running theme against the ICC is so unfounded that it is to me intellectually difficult to understand."

The ICC's biggest investigation so far is into mass killing and rape in the Sudanese region of Darfur. It has also unsealed warrants of arrest for five leaders of the Lord's Resistance Army for crimes committed in Uganda -- the first warrants issued by the ICC.

ICC prosecutors have received more than 2,000 communications about alleged crimes, but they have already dismissed 80 percent of the possible cases because they didn't fit the court's mandate, Kirsch said. The court is also monitoring seven or eight further "situations" in addition to the cases it is already dealing with in Africa, he said.

Kirsch said the ICC was intended as a court of last resort, able to take over when a nation's courts were unwilling or unable to prosecute people for committing atrocities. Ultimately, it should act as a deterrent, he said.

Understanding of the court was still limited because it was so young, said Kirsch. He then appealed to states to help make the court effective by co-operating in arresting suspects and gathering information. "That cooperation has to come not only to demonstrate the fairness of the court but also the effectiveness of the system as a whole," said Kirsch. Enforcing international law was "a shared responsibility between the ICC, states and international organizations," he said.

http://www.spiegel.de/international/spiegel/0,1518,371348,00.html

4. An Argentine Prosecutor Turns Focus to New War Crimes Court

An Argentine Prosecutor Turns Focus to New War Crimes Court

By MARLISE SIMONS (New York Times)

Published: September 29, 2003

THE HAGUE - Back in 1985, Luis Moreno Ocampo joined the team to prosecute Argentina's generals and admirals who stood accused of secretly torturing and killing thousands of civilians.

The nation's fragile new democracy was barely two years old, and the hard-line military was restive. Other lawyers had refused the post of deputy prosecutor out of fear. When Mr. Moreno Ocampo accepted it, his own family was furious, he said. His grandfather had been a general in the military, and one uncle, a colonel, never spoke to him again.

But the young lawyer from Buenos Aires told friends he had to play his part to consolidate democracy. The trial of the nine junta members shook Argentina for months and reverberated through the pro-military powerhouses of Latin America.

"I thought that trial would be the height of my professional life," Mr. Moreno Ocampo said in a recent conversation. "But when I see where I am today, it turns out that this period was only training."

Three months into his new job as the first chief prosecutor of the first permanent International Criminal Court in The Hague, Mr. Moreno Ocampo, now 51, is just setting out to navigate through a global minefield of justice and politics.

His task is to set the court's prosecution policy and seek out, on a worldwide scale, the people responsible for the sort of large-scale crimes that brought such pain to Argentina.

The court's purpose is to deal with genocide, crimes against humanity and war crimes if they are going unpunished elsewhere. The United States is not only opposed to the global court, but actively campaigning against it, pressing countries into bilateral deals to exempt Americans.

Mr. Moreno Ocampo declines to give interviews about his personal life, but has held monthly press briefings. "I will not answer any personal questions," he told reporters recently. "You can say, this is a crazy guy, whatever you want. But there is a huge distance between my personal information and the real issues of this office."

This new court, unlike the tribunals for the former Yugoslavia and Rwanda, does not answer to the United Nations Security Council but to the 92 countries that have agreed to take part in it since it

was created by the Rome treaty in 1998. It can deal only with crimes that occurred after July 1, 2002.

Mr. Moreno Ocampo, who has an easy, affable style, has so far moved with caution, aware that his decisions will be minutely scrutinized.

"Inevitably the prosecutor will be the public face of the institution," said Edmond Wallenstein, a Dutch diplomat involved in setting up the court.

Mr. Moreno Ocampo recently told a group of reporters, "This is only an emergency court," picking another of his favored phrases to deflate any image of an unconstrained, arbitrary political weapon. "We are not here to replace national judicial systems. We will act only when they need us."

In the glass-and-steel office tower where he has his office, a temporary home while the court awaits a permanent headquarters, he is putting together a staff of lawyers, researchers and investigators. They are writing regulations and sorting through the first avalanche of complaints arriving from all over the world.

But given the high expectations from member countries, the myriad human rights groups and the court's 18 judges, who are eager to take on cases, he is under pressure to prepare his first prosecution.

"There's a range of opinions," he said, when asked about his plans. "Some people want us to act fast and aggressively - others prefer us to be slow and conservative. But I'll say that we will start with a very clear situation."

Plans are for his office to be able to handle up to three investigations in a year's time. He has said he is already closely looking at the recent killing, torture, rape and mutilations of thousands of civilians in the Ituri region of the eastern Congo.

But the business behind mass killings must also be examined, he said recently, citing the illegal trade in diamonds and arms, and the banks that enable it. He said he was calling on national prosecutors for help.

In one early but important policy decision, he said that even in the case of "massive crimes," investigations would focus only on the top leaders responsible. That means he is not likely to deal with some of the lower-ranking war criminals of the kind tried at the Yugoslavia tribunal, which initially was not handed high-ranking prisoners.

"The number of cases taken up by the court should not be a measure of its efficiency," he cautioned. On the contrary, he added, the absence of trials would be a success because it means national institutions are functioning properly and are handling these cases themselves.

One of Mr. Moreno Ocampo's first acts in office was to organize two days of public discussions with lawyers, judges and human rights workers about the role and structure of his office. He has put draft regulations and other documents relating to the working of his office on the Internet, soliciting public comments, a far cry from the secrecy that surrounded the Yugoslavia and Rwanda tribunals in their early days.

In August, while screening candidates to be his deputy, he asked other international prosecutors, including Carla Del Ponte, Richard Goldstone and Louise Arbour, for advice.

His own appointment as prosecutor may not be a surprise, given his past record. Although he was not a household name outside his own country, he became well known at home not just because of

his role in the trials of the members of three military juntas - including two former presidents - but also in trials of the chief of the Buenos Aires police, the military leaders responsible for the Falkland war and many public corruption cases.

Because of his activities, he gained numerous admirers and critics. He was often the target of threats, he has told friends, but he pressed on. Aside from a number of legal texts, he has also written a more personal book, with his four children in mind, friends say. The book, in Spanish, is titled: "How to Explain the Dictatorship to Our Children."

5. War Crimes Tribunal Becomes Reality, Without U.S. Role

New York Times, April 12, 2002

War Crimes Tribunal Becomes Reality, Without U.S. Role

By BARBARA CROSSETTE

More than half a century after it was proposed in the ruins of World War II, the world's first permanent court for the prosecution of war criminals and dictators became a reality today as the United States stood on the sidelines in strong opposition.

The treaty that established the court, which is expected to take shape in The Hague over the next year, went into effect after the 60th nation had ratified it. The court closes a gap in international law as the first permanent tribunal dedicated to trying individuals, not nations or armies, responsible for the most horrific crimes, including genocide and crimes against humanity.

Until now, just ad hoc courts like the Nuremberg trials after World War II and the Balkans tribunal that is now sitting in judgment on Slobodan Milosevic, the former Yugoslav president, have done that work.

"The long-held dream of the International Criminal Court will now be realized," Secretary General Kofi Annan said at a news conference in Rome, where 120 countries first agreed in 1998 to set up the tribunal. "Impunity has been dealt a decisive blow."

But the Bush administration again demonstrated its readiness to go it alone when it deems necessary, boycotting the ceremony here that celebrated the birth of the court. That attitude has prompted concern in Europe and elsewhere over a new American unilateralism.

The establishment of the court has been broadly welcomed by most democratic nations, American lawyers' associations and human rights groups. But it has an implacable foe in the Bush administration, which argues that the court will open American officials and military personnel in operations abroad to unjustified, frivolous or politically motivated suits.

The court will assume jurisdiction over charges of genocide, crimes against humanity and war crimes committed after July 1 of this year. Washington fears that a country as powerful as the United States, with its unchallenged military might and troops around the world, would be uniquely vulnerable to prosecutions. In theory, any American, from high-ranking officials like the Secretaries of Defense or State to soldiers in the field, could be accused of a crime.

President Bush appears to be on the verge of not only renouncing the tribunal, but also removing the signature of the United States from the treaty.

Even so, no country is deemed to be outside the court's jurisdiction. American participation would strengthen the court considerably, and by not taking part the United States will lose influence over court proceedings.

The United States signed the treaty for the court in December 2000 in the last days of the Clinton administration. Bush administration officials say it will never be sent to the Senate for ratification.

Congress has passed a law to forbid Americans at all levels of government to cooperate with the new court, and the United States is trying -- so far without success -- to insist on exemptions for Americans from its jurisdiction.

Today, five members of Congress, led by Henry J. Hyde, chairman of the House International Relations Committee, sent a letter to Secretary of State Colin L. Powell requesting that he ask the Security Council to write into every future peacekeeping resolution a grant of absolute immunity from the court for Americans who take part in operations. That would start with a renewal of the international force for Bosnia in June.

The New York City Bar Association was one of many organizations that wrote to Mr. Bush this week urging a reconsideration of what is apparently a decision to renounce the court treaty. The action, the president of the lawyers' group, Evan A. Davis, said would "weaken U.S. international standing at the very time we need international cooperation for the war against terrorism."

The United States ambassador for war crimes, Pierre-Richard Prosper, said in a conference call from Washington with reporters that Mr. Bush had not decided to "unsign" the treaty. But all his

comments on the relations, or lack of them, between the United States and the court point to that end. Symbolically, the American seat at the ceremony today was empty.

It was a ceremony, Mr. Prosper said, "that we felt there was no need for us to attend, and there was no role for us to play."

Mr. Prosper seemed to rule out allowing the treaty to remain in limbo, perhaps to be reconsidered by a future administration.

"Our position is that we continue to oppose the treaty and do not intend to become a party," he said. "It is important that our position is made clear and that we operate here in good faith and not create expectations in the international community that we will be a party to this process in the near term."

Asked whether the United States would cooperate in handing over war criminals or information for prosecutions, Mr. Prosper said, "We have no obligation to the court."

David J. Scheffer, who signed the treaty for the United States as the ambassador for war crimes in the Clinton administration, said in an interview today that backing out now was "a very ill-advised strategy."

"The only reason you would unsign the treaty is if your intention was to wage war against the court," Mr. Scheffer said. "If your intention is not to wage war against the court but rather to try to preserve American interests, defend American interests, protect American interests, then the best strategy would be to remain as a signatory."

Michael Posner, executive director of the Lawyers Committee for Human Rights, said in an interview that unsigning the treaty would set a terrible precedent. "No American president in 200 years has unsigned a treaty, as far as we can find," he said. "It would also send a signal to other governments around the world that treaties they signed are unsignable."

Most democratic nations and all European Union countries have ratified the treaty -- except Greece, which is in the process of doing so -- along with Canada, New Zealand and a number of African, Eastern European and Central Asian countries. Israel has signed it but not ratified. Egypt, Iran and Syria have signed. India and Pakistan have neither signed nor ratified.

Besides the United States, other powerful nations have held themselves aloof, as well. Russia has signed but not ratified. China has done neither.

European allies have been among those trying to convince the United States that many safeguards are built into the court that can prevent frivolous or politically inspired prosecutions. Most cases will be brought by a chief prosecutor or the Security Council. A pretrial review panel will be able to throw out charges. Moreover, the court will be required to allow national courts to handle cases in the first instance.

Mr. Prosper said today that those steps were not enough. "The point is that we do view the safeguards as being insufficient," he said.

Mr. Annan tried to calm American fears today. "The court will prosecute in situations where the country concerned is either unable or unwilling to prosecute," he said. "Countries with good judicial systems who apply the rule of law and prosecute criminals and do it promptly and fairly need not fear.

"I don't think this a court that is going to run amok."

http://www.nytimes.com

LOAD-DATE: April 12, 2002

H. Iraq

1. Trial of Saddam Hussein and his Cohorts--A Dissenting View

Forward Forum

An Injustice to Saddam's Victims

By RICHARD GOLDSTONE

November 18, 2005

Last week Adil al-Zubeidi, a leading defense lawyer in the trial of Saddam Hussein and his erstwhile political colleagues, was assassinated on the streets of Baghdad. It was the second such killing in less than a month, and it has caused many to question whether the trial can be a fair one. How, more than a few commentators have asked, can the judges, lawyers, defendants and witnesses be expected to participate in this high-profile trial when their lives and their families' lives are under threat?

Meanwhile others are advocating a more forceful position. One American lawyer has suggested that when the tribunal reconvenes at the end of the month, the judges should take disciplinary action against those defense lawyers who carry out a threat to boycott the trial, and that court-appointed lawyers should take over the defense - even over the objections of the defendants.

Another American lawyer has gone so far as to suggest that the assassinated lawyers have only themselves to blame because they made their identities public.

On both sides of the debate, however, insufficient consideration has been given to the real purpose of taking Saddam and his co-defendants to court. The primary reason for putting these alleged serial war criminals on trial is to bring some measure of justice to those of his victims who are still alive - and this can be done only by a trial that has wide credibility and is generally perceived to be fair and just.

In order for the inevitable denials of Saddam's wrongdoing to be rebutted, evidence must be gathered meticulously and presented efficiently in a public court to which the victims have access, either in person or through the media. Given the current climate of fear in Iraq, however, it is difficult to see how the case can be tried openly without compromising the safety of those involved.

But it is not only in regard to the parlous security situation that the trial now under way will have great difficulty in achieving justice for the victims.

The indictment against Saddam covers the murder of a relatively small number of victims in 1982, and does not relate at all to the myriad war crimes he allegedly committed during his oppressive rule. These include, among others, genocide against the Kurds and egregious war crimes alleged to have been committed during Iraq's war against Iran.

It is said that this is the first of other indictments to come. If that is true, I question the wisdom of approaching the trial in this episodic fashion. The death sentence is apparently being sought in this trial, and if it is imposed it will cast an unpleasant shadow across any other proceedings that might follow.

Not only will a trial of Saddam that does not have credibility deny his millions of victims any meaningful justice, but it also will make him a martyr and help convince his remaining supporters that he must be innocent of the more egregious crimes alleged against him. They will suggest that if he were truly guilty of those crimes, he would have been indicted for them rather than for a relatively insignificant incident that took place some 23 years ago.

The sensible approach would have been to hold the trial only after the imminent national elections. Even accepting the legal competence of the provisional government to commence this trial, a democratically elected government would have been the appropriate authority to set up the tribunal to try Saddam and his senior lieutenants. Such a tribunal would not have carried the taint, as the current one does, of having been established by a foreign force in occupation of Iraq. It would not have carried the taint, as this one does, of serving the interests of that foreign force rather than those of the victims.

Furthermore, such a tribunal would have been much freer than the current one from charges of politicization. Supporters portray the ongoing trial as a confidence-building step for the interim government of Iraq, one that demonstrates that it is truly in charge of events and will be ready next month to hold the first democratic elections under the country's new constitution. This political motive, it has been suggested, is supported by the United States out of the belief that the sooner a permanent Iraqi government is installed, the sooner Washington can bring home its troops .

Such short-term political considerations, however, should be tempered by a recognition of the importance of providing a reliable historical record - something that can derive only from a credible trial of Saddam and colleagues.

A clear understanding of the past, based on fact and not on self-serving fabrication, was the gift given to the Balkans and Rwanda by their respective United Nations ad hoc tribunals. It was also the gift given to the people of South Africa by the country's Truth and Reconciliation Commission. In all three cases, the details of the heinous crimes committed have been established - and that has provided a sound foundation on which future peace and reconciliation can be built.

I would suggest that when elected next month, the new government of Iraq should take stock of the present proceedings against Saddam and his co-defendants and reconsider, as it will have the authority to do, how to appropriately prosecute these alleged serial war criminals. The country's new leaders should recognize that until the security situation in Iraq allows for a fair and just public trial, one should not be held - and that if time is of the essence, consideration should be given to holding it in a more secure environment outside of Iraq.

Richard Goldstone, former chief prosecutor of the United Nations International War Crimes Tribunals for the former Yugoslavia and Rwanda, is a former justice of the Constitutional Court of South Africa.

http://forward.com/main/printer-friendly.php?id=6904

2. Rice Scolds Holdouts on Iraq Trial

http://www.latimes.com/news/nationworld/world/la-fg-rice14dec14,1,7986481.story

THE WORLD
Rice Scolds Holdouts on Iraq Trial

Nations not aiding the Hussein proceedings are ducking duty to law and human rights, she says.

By Paul Richter
Times Staff Writer

December 14, 2005

WASHINGTON — Secretary of State Condoleezza Rice sharply criticized other nations Tuesday for failing to provide support for the trial of Saddam Hussein, saying that the world community's "effective boycott of Saddam's trial is only harming the Iraqi people."

Speaking at a time when the trial has suffered setbacks, Rice complained that other countries had "barely done anything" to aid the prosecution of the former Iraqi dictator.

"All who express their devotion to human rights and the rule of law have a special obligation to help the Iraqis bring to justice one of the world's most murderous tyrants," Rice said in a speech at a conservative think tank here.

U.S. officials have expressed disappointment that other countries and international organizations

such as the United Nations have not offered more technical help and moral support for the trial. But Rice's words carried a new, more forceful tone aimed, aides said, at persuading more outsiders to join the effort.

U.S. officials have differed with many other governments almost from the outset of the war on how to conduct trials of Hussein and top aides. The U.S. and its Iraqi allies wanted the trials to be overseen by national authorities in Iraq, whereas officials with the U.N. and from many other countries favored hybrid proceedings with a larger international component.

Officials of other governments, including many in Europe, have said they would avoid a proceeding they feared could be seen as an American-run show trial. They also have been put off by the possible death penalty, which is legal in Iraq and the United States but banned in much of the world.

As a result, other countries have declined to send legal advisors, investigators or forensic specialists, despite pleas from Iraqi officials. Such decisions not only have deprived attorneys and investigators of resources but cost the trial the international legitimacy sought by the U.S., which has spent more than $100 million on the undertaking.

A U.S. official who spoke on condition of anonymity said Rice has been hoping to find a way "to energize others to get involved." The televised trial is the most important exercise in human rights going on anywhere in the world at the moment, the official said, as well as "the most popular show in Iraq…. The world is watching."

The official argued that the proceeding could no longer be called a show trial, since it had had the support of a succession of Iraqi governments, including the administration put in office by January's election.

In recent weeks, the Hussein trial has been jolted by the slayings of two defense lawyers, and questions have arisen about whether Hussein is manipulating the event to play on Iraqis' sympathies.

But the U.S. official insisted that testimony is unfolding well from the prosecution's standpoint and that Rice's words were not spurred by anxiety in Washington about the outcome.

An official with the advocacy group Human Rights Watch, which had argued for a hybrid Iraqi-international trial, contended that the White House had only itself to blame for other countries' unwillingness to take part.

"The Bush administration rebuffed efforts to engage," said Joe Stork, director of the organization's Middle East and North Africa program. "They had a very strong aversion to anything that smacked of international justice."

Rice's comments were tucked into a speech aimed at praising other countries for taking what she said was a growing role in the rebuilding of Iraq. In an appearance at the Heritage Foundation, Rice said members of the American-led coalition were still providing important military forces as well

as security training and financial support.

Iraq's Arab neighbors provide backing for the democratic government, she added, and hailed a recent Arab League meeting in Cairo that urged Iraq's Sunni Muslim Arab minority to renounce violence and take part in Thursday's parliamentary vote.

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Times staff writer Richard Boudreaux in Baghdad contributed to this report.

3. Accounts of Brutality Roil Hussein Trial

http://www.latimes.com/news/nationworld/world/la-fg-saddam6dec06,1,3655422.story

Accounts of Brutality Roil Hussein Trial

The deposed leader is confronted by witnesses who tell of torture and attacks on their village. He threatens and spars with them and the judge.

By Richard Boudreaux

Times Staff Writer

December 6, 2005

BAGHDAD - The first witnesses to take the stand against Saddam Hussein confronted him Monday with chilling testimony about an aerial assault on their village, mass arrests, torture by electric shock, and executions after the Iraqi leader survived an assassination attempt there.

Two witnesses, men now in their 30s, stood glaring at the deposed leader a few feet away as each outlined his memory of the horrors suffered in their youth. Hussein and some of his seven co-defendants being tried in the slayings of 146 villagers repeatedly disrupted the proceedings and furiously disparaged the charges.

In the tumultuous, daylong hearing, leadoff witness Ahmad Hassan Mohammed recalled that after his arrest he peeked through his blindfold in a torture chamber and saw a machine that "looked like a grinder" with hair and blood on it.

Jawad Abdul-Aziz Jawad, who followed him to the stand, said Iraqi troops used helicopters to fire at homes in Dujayl within hours of the 1982 assassination attempt and later sent bulldozers to destroy the palm groves and orchards that were the village's livelihood.

"There were mass arrests, women and men," Mohammed said in a rambling, tearful account often disrupted by outbursts from the defendants. He said he was taken to a field of half-buried bodies. "I recognized them," he said. "They were my neighbors."

Mohammed sparred angrily with Hussein, betraying no fear of the man who once held the power of life and death over millions of Iraqis. He pressed on when the former president tried to butt in, at one point drawing a sharp rebuke. "Do not interrupt me, son!" Hussein exclaimed.

Both witnesses identified themselves on camera on the third day of the televised trial, despite the violence surrounding the case.

Two defense lawyers have been killed since the Oct. 19 opening of the trial, which has been recessed twice. Three of the five trial judges remain nameless and off-camera.

The next nine scheduled complainant witnesses have asked to testify off-camera, two of them from behind a curtain so that even those in the courtroom can't see their faces.

Neither of Monday's witnesses offered evidence directly linking Hussein to the slayings in Dujayl, a predominantly Shiite Muslim village 35 miles north of Baghdad that was largely populated by foes of his Sunni Arab-led Baath Party.

Instead, Mohammed painted a harrowing picture of the former regime's dungeons as experienced by a 15-year-old boy.

He said intelligence police knocked at the door of his family's home the day after the assassination attempt. They took him, his parents, seven brothers, four sisters and a niece to Room 63 of the Hakmiya intelligence center in Baghdad, a large hall filled with Dujayl residents.

Relatives were tortured in front of one another, he said. Interrogators used rubber hoses and acid. His brother Moshen was questioned with the aid of an electrically charged whip in front of his father, Mohammed said. It was there he recalled seeing the bloody grinder.

"If I had to describe all the torture, I would need 10 days," he said, his voice breaking.

Seven relatives died in captivity, he said. Beaten but spared because of his youth, he was banished with others to a desert prison camp for four years.

Hussein and his co-defendants are accused of ordering or carrying out the roundup, interrogation and torture of about 1,500 villagers in Dujayl after a small group of gunmen opened fire on the presidential motorcade July 8, 1982. They are also charged with criminal destruction of tens of thousands of acres of village land.

Some of the villagers were shot dead in the immediate aftermath; most of those slain were executed without trial. The Dujayl case is the first of about a dozen being prepared against the 68-year-old ex-president and former aides by the new Iraqi High Tribunal.

Under Iraqi law, judges question each witness first and then allow the prosecution, defense lawyers and defendants, in that order, to cross-examine. The first witnesses in this trial are complainant witnesses, victims of the repression in Dujayl who were called by the prosecutor.

But in practice Monday, Judge Rizgar Mohammed Amin struggled to maintain control as defendants, witnesses and lawyers shouted at one another.

The strongest testimony in Monday's hearing was directed against former Vice President Taha Yassin Ramadan and Barzan Ibrahim Hasan, Hussein's half brother and former head of the intelligence service.

Both witnesses placed Hasan in the village right after the motorcade attack. "He had red cowboy boots and bluejeans and a sniper rifle," Mohammed said.

Jawad, 10 at the time, recalled seeing Ramadan in the village. He said his father pleaded with the vice president and his orchard was spared destruction.

As the testimony wore on, the former president, his aides and their lawyers began to reveal more of their defense strategy. After losing a 35-minute battle to delay the trial on procedural grounds, they attacked the credibility of both witnesses.

For the first two days of the trial, Hussein had essentially ignored the charges and used the courtroom as a political stage, clashing with the chief judge and playing to his supporters in Iraq's insurgency.

Hussein was full of bluster again Monday. He threw down a notebook and pounded a table. He ridiculed the court as "made in America." He told the chief prosecutor: "Hey, you in the glasses, don't you recognize your leader of 30 years?"

He said he was not afraid to be hanged, the maximum sentence he faces. And he appeared to threaten the judge. "When the revolution of the heroic Iraq arrives," he said, "you will be held accountable."

But for the first time, Hussein addressed the accusations against him, defending his decision to send aides to Dujayl to investigate the attempt to kill him. "Isn't it Saddam Hussein's right as a president, or the right of the president of . any other country to follow these aggressors who shot at him?" he asked the court.

Khalil Dulaimi, Hussein's lawyer, repeatedly asked both witnesses how they could recall so many details from their childhoods. Hasan called the emotional leadoff witness a liar and yelled, "He should act in the movies!"

"I remember all this," Mohammed responded. "I wrote it down so that people would never say it was made up."

Monday's hearing began with a prolonged battle over a defense motion to declare the court illegal and halt the trial until the judge issued a formal ruling on the question. The defense argues that the court has no legal standing because it was created under U.S. military occupation following Hussein's ouster in 2003.

During the heated discussion, Amin twice declared, "This is a legitimate court!" - a de facto ruling that the trial would continue while he considered the motion. When the defense team began a walkout, the judge agreed to permit one of the attorneys to argue the motion in court after a two-hour recess.

In turn, the defendants agreed to stay and take part in the trial, for now. It is to resume today. Former U.S. Atty. Gen. Ramsey Clark, one of three non-Iraqi advisors to Hussein's legal team, led the walkout. After the recess he was allowed to make a statement demanding better security for the defense lawyers and their families. The judge cut him off after five minutes and ordered him to sit down.

Toward the end of the day, Iraqi and American officials controlling the courtroom's sound system shut down the English translation briefly as Hussein invoked a Koranic verse to justify resistance to the U.S. presence: "Fight them! The lord will torture them with your hand."

Later, officials shut down TV transmission from the courthouse, ending the session for viewers in Iraq and around the world about 10 minutes early.

Raid Juhi, the court's spokesman, said the judge may cut off the sound at his discretion and sometimes does so for security reasons. He did not explain the shutdown of TV coverage.

Times staff writer Borzou Daragahi contributed to this report.

4. Saddam Hussein Trial Blog

Case Western Reserve University School of Law

Frederick K. Cox International Law Center Launches Saddam Trial Blog

Newly revised ISt Statute and Rules Available for First Time

The trial of Saddam Hussein, scheduled to begin on October 19, 2005, will be one of the most important trials in our lifetime. To help journalists, academics, and the general public keep abreast of and understand developments related to the trial, the Frederick K. Cox International Law Center at Case Western Reserve University School of Law has just launched "Grotian Moment: The Saddam Hussein Trial Blog," which you can access at: http://www.law.case.edu/saddamtrial .

The new website, which has been in preparation for months, features the key documents related to the Iraqi Special Tribunal (IST), answers to frequently asked questions, and expert debate and public commentary on the major issues and developments related to the trials of Saddam Hussein and other former Iraqi leaders.

The website is the first to publicly post an English translation of the newly revised Iraqi Special Tribunal Statute and Rules of Procedure, which were promulgated on August 11, 2005, by the Iraqi Provisional Legislature. It also includes English translations of such hard to find documents as the Iraqi Penal Code and the Iraqi Code of Criminal Procedure, which will be relevant to the Saddam Trial.

We have assembled a panel of a dozen of the foremost experts on the Saddam Hussein Trial to provide commentary on the critical issues and on breaking news. Issues debated on the Blog include: Does Saddam Hussein have a right to represent himself; should his trial be televised gavel to gavel; will the trial be fair; is the IST legitimate; should the IST impose the death penalty; and can Saddam Hussein be convicted of genocide for the crimes alleged.

Our Blog experts include:

Case Law Professor/Director of the Cox Center Michael Scharf, who has led training sessions for the IST judges and provides ongoing research assistance to the IST as head of the IST's Academic Consortium. Michael.Scharf@case.edu.

DePaul University Law Professor Cherif Bassiouni, who helped draft the IST Statute.

University of Connecticut Law Professor Laura Dickinson, who served as Deputy to the Assistant Secretary of State for Human Rights in the Clinton Administration.

William and Mary College of Law Professor Linda Malone, who serves as a member of the IST's Academic Consortium.

Col. (ret) Michael Newton of Vanderbilt School of Law, who helped draft the IST Rules of Procedure.

Deputy Director of the Cox Center War Crimes Research Office, Christopher Rassi, who has served as a Legal Assistant to the Judges of the International Criminal Tribunal for Rwanda.

Washington University School of Law Professor Leila Sadat, author of the award-winning book "The International Criminal Court and the Transformation of International Law."

Director of the Irish Centre for Human Rights, Bill Schabas, one of the world's leading authorities on human rights and war crimes trials.

Former U.S. Ambassador at Large for War Crimes Issues, David Scheffer, who has worked for the past ten years to bring Saddam Hussein to justice.

Johns Hopkins Professor Ruth Wedgwood, who has served as the U.S. Expert Member on the UN Human Rights Committee.

American University Law Professor Paul Williams, who helped draft Iraq's new Constitution.

We hope you will find the Saddam Hussein Trial Blog to be a useful research tool in the coming months.

I. Sudan

1. The Hague Takes On the Sudanese Blood Bath

August 22, 2005

Der Spiegel

The Hague Takes On the Sudanese Blood Bath

PART I: THE WORLD COURT

By Thomas Darnstaedt and Helene Zuber

The dream of using international law to impose world peace is not a new one. But the International Criminal Court is now trying to make it happen. With its eye firmly on Sudan -- and with Security Council backing -- the court is tackling a bloodbath of massive proportions. But with only a handful of investigators, can it really succeed?

The white monstrosity with its facade tilting forward looks a little like the superstructure of some fantasy ship on a pleasure cruise. But what's going on inside the building is being taken very seriously indeed.

One can already imagine the scenario: Armed guards in black uniforms are deployed to secure the side entrance to the white fortress on the outskirts of The Hague. A gate fortified with barbed wire is raised to allow passage through a steel-lined, electrified enclosure. Several vehicles carrying prisoners roll down the ramp into the basement.

The vehicles' occupants, top officials of the government of Sudan and leaders of their gangs of hired assassins are taken to room K 127, where they empty their pockets and pass their belongings through a scanner. The walls are painted blue and purple and the floor light green. Thick concrete separates the prisoners from the rest of the world. They sit down, these presumed criminal violators of human rights, on chairs bolted to the floors of their basement cells. There are eight cells here, just enough for a small selection of the very worst of the bunch.

Upstairs, on the second floor of the ICC, the spectators to the first regular international law case in world history sit in red Cassina chairs, waiting for the proceedings to begin. The rest of the world is waiting with them, waiting for the trial of those considered principally responsible for crimes against humanity in the Darfur region of Sudan. The proceedings will center on the deaths of at least 300,000 people, and on a barbaric civil war in Sudan that experts believe is the most gruesome ongoing war in the world. Five judges in dark blue robes will be called upon to issue a ruling on the slaughter in Darfur.

This vision though of using the courts to impose peace -- close as it may be to becoming reality -- is still a dream. But most of the details are already reality. The cells are ready, though still empty, the electrified wire has been charged, and the Cassina chairs are in place. Only one thing is missing: the miracle. "Have some patience," says the Canadian president of the ICC, Philippe Kirsch, "the court is prepared for everything."

The dream of a world court

Most of the roughly 300 men and women who work in this 15-story stronghold of international criminal law are no dreamers. In fact, most are lawyers. And the court where they work, which has been in existence for the past two years, bears the unadorned and direct name "International

Criminal Court." Without much fanfare, Judge Rene Blattmann, a Bolivian with a thorough understanding of German legal history, a jovial man who likes to serve strong coffee to his guests in cups decorated with a floral motif, discusses his and his colleagues' views on their court. "This," he says, "is a step in the direction of realizing mankind's age-old dream of a world court."

This court could very well prove right a principle that has repeatedly been tested, with moderate success, ever since the Nuremberg trials of Nazi war criminals at the end of World War II: that justice can not only establish internal security, but can also create the framework for peace. And everyone at the world court knows that this principle -- with all its implications for global human rights law -- could be decided by this one case which has been sitting on the desk of Chief Prosecutor Luis Moreno Ocampo for all of two months: the Sudan case.

So far, the case includes a list of 51 possible defendants -- leading politicians and military officials charged with committing horrific crimes in the war-torn country of Sudan -- handed over to UN Secretary General Kofi Annan in January.

Antonio Cassese, a short, combative professor of international law from Florence, Italy compiled the list. The Italian, responsible for assembling the Yugoslavia tribunal -- likewise located in The Hague -- to try former Yugoslav President Slobodan Milosovic, is an important personality in the milieu of international criminal law. And given his experience, he was for the UN the obvious choice to dispatch to the Darfur region in western Sudan last autumn when the conflict there suddenly escalated.

It is a conflict that fits well into the International Criminal Court's vision of bringing war criminals and major human rights violators to justice. Raging since 2003, then US Secretary of State Colin Powell referred to the situation in Darfur as genocide, partly in response to the gruesome tactics the mounted Janjaweed militias and government troops had been using to fight rebel groups -- tactics that have been used with abhorrent results against civilians as well.

Routine massacres

Since then, massacres in Darfur have become routine. In a region the size of France, the Sudanese military and militias alike appear to be conducting a war of extermination. They have attacked and destroyed entire cities, like Khor Abeche in April where very few of the town's 20,000 inhabitants escaped with their lives. Women, men and children -- even helpless patients in the local hospital -- were massacred.

British experts estimate that the slaughter has claimed between 180,000 and 400,000 lives so far, and that about two million Sudanese in Darfur are now refugees -- and virtually unprotected. Although the African Union has sent about 2,200 soldiers and police officers to Darfur, they often arrive at the scenes of these crimes when it's already too late. Furthermore, they are met with distrust in the region because they are viewed as collaborators with the government.

Cassese headed for Darfur with a 30-member team, and returned to New York with nine crates packed with evidence: witness testimony about rapes, torture, looting and bloodbaths of unspeakable proportions. Cassese concludes that more than 2,000 villages and towns have already been burned to the ground -- and the slaughter continues. Officials at the UN are calling Darfur "currently the world's worst humanitarian catastrophe."

But the experienced international law expert Cassese didn't just hand over the evidence and leave it at that. He also had a proposal, which sounded harmless enough, but which quickly proved to be

explosive. As he handed the list of possible defendants to Annan, Cassese suggested that the matter be referred to the International Criminal Court in The Hague.

The Hague versus Washington

Cassese's suggestion was about the last thing the Bush administration, which had actually triggered the case with its warnings of genocide, could have wanted. The USA has long been fighting against the creation of the ICC, and Washington has turned some of its most powerful diplomatic guns on the small court in faraway The Hague.

Why the worry? The US fears a scenario in which a GI fighting in a war or serving as part of a peacekeeping mission could be arrested and locked up in one of the court's basement cells in The Hague. US President George W. Bush even withdrew America's ratification of the Rome Statute, the document that establishes the framework for the ICC under international law -- a pact which former President Bill Clinton had already signed. It was a far-sighted move for Bush, as the Abu Ghraib prison abuse case soon demonstrated. If Iraq or the United States had ratified the statute, the American torturers in Iraq and their Washington bosses would certainly have qualified to be put on trial for war crimes in The Hague.

Genocide, crimes against humanity, war crimes: Because the Rome Statute stipulates that the ICC can also prosecute presumed criminals from non-signatory states if they have committed their crimes in the territory of a state that has ratified the statute, it is still possible that US citizens could be hauled before the court for participating in an ill-advised military campaign. To avert such an outcome, the United States has enacted a law that prohibits any cooperation with the court, and even authorizes the president to use military force to free any US citizens imprisoned in The Hague.

Jurists in The Hague derisively refer to the law as the "Hague Invasion Act," and say they are waiting -- half-amused, half-irritated -- for the day when US Marines land on the beaches of the Dutch seaside resort of Scheveningen.

But the superpower lacks a sense of humor when it comes to these matters. The White House has promised to put up "active resistance" against anything coming out The Hague. In the Sudan case, this means: "We will not support efforts by the international community to use the Security Council as a way of legitimizing the ICC" -- said Pierre Prosper, US Ambassador at Large for War Crimes, in January. But the Security Council was precisely the target of Cassese's proposal. Because Sudan has signed but not ratified the Rome court statute, the ICC can only act if the case is referred to it by the UN Security Council.

But then came the miracle. The United States decided not to veto the resolution. In return, the Security Council assured that if any US soldier were truly challenged during a peacekeeping mission in Sudan, he could not be summoned before the ICC in The Hague.

In this manner, UN Security Council resolution 1593, dated March 31, 2005, became a sort of birth certificate for the world court. Claus Kress, a professor of international criminal law in Cologne, optimistically sees the incident as "proof" that even superpower America "cannot survive a confrontation with the ICC -- the moral convictions of most Americans would make that impossible." Kress represented the German government when the Rome Statute was being fleshed out, and today he is a key advisor to the court.

Time for miracles

Following the Council resolution, UN envoy Cassese and ICC Chief Prosecutor Moreno Ocampo met in Ocampo's office on an afternoon in April. In the presence of his two deputies, the prosecutor opened Cassese's sealed brown envelope and the three prosecutors carefully read through the document. No copies were made, no notes were taken and the list was promptly locked up again in Ocampo's safe. The prosecutor's conclusion? It is now the court's turn to work a few miracles.

But then, Moreno Ocampo is the right man for miracles. In truth, the world ought to be shaking in its books -- at least that part of it with something to hide -- when it encounters this man, this grand inquisitor for global justice. And it's not as if Sudan were his only concern. Since last year, Ocampo has been investigating the civil wars in Uganda and the Democratic Republic of Congo. Indeed, the governments of both countries even approached Moreno Ocampo in the hopes that his justice could end up being their peace. "Such enormous trust," he says, appearing completely exhausted.

It's not easy to set up an appointment with Ocampo, busy as he is with an almost uninterrupted schedule of conferences, and interviews with the press mean skipping out on one of these important meetings. He is tired, but talkative. The sleeves of his striped red shirt are rolled up, his glasses dangle from a chain, and his small-patterned tie hangs loosely around his neck. First he tries to conceal a yawn, then gives up and yawns heartily. "What can I do for you?" he says.

Question number one: How exactly is it possible to achieve peace through justice?

The Hague Takes On the Sudanese Blood Bath

Part II: The Court's Plan

Moreno Ocampo sinks into one of the tall, black armchairs in his office and rests his legs on another. He sighs and tells the story of his involvement -- 20 years ago, when he was the assistant to Public Prosecutor Julio Cesar Strassera -- in the investigation of former Argentine dictator Jorge Rafael Videla, a man who had shown a complete disregard for human rights. "Mama was furious with me," he says.

In those days, Mama lived in the same neighborhood and went to the same church as the accused dictator. But two weeks of public hearings against the former despot, says Ocampo, were enough even for his mother. One day, he says, Mama called him to say: "I still like Videla, but you're right. He belongs behind bars."

The idea of peace through justice is something the Argentine's great predecessor, Robert H. Jackson, the US chief prosecutor in the Nuremberg trials, had promised the world 60 years ago: "A world order based on the principles of law." Ocampo, the world court's current criminal prosecutor, says that this order is something formed in people's heads, as a consequence of the idea of justice, even justice in the form of deterrence. Security and peace, he adds, are "of course mainly the business of the military and the police." But that's just the hardware, the lifeless technology of it all. "We are responsible for the software," says Moreno Ocampo. Justice, he adds, is "the soft side of security."

No one is willing to share responsibility with Ocampo, the responsibility for imparting a sense of justice to a destroyed people, surrounded by mountains of corpses, in a destroyed Darfur. It would be tempting to draw comparisons between the situation in Sudan and the genocide of Auschwitz, but it's a dangerous comparison -- nevertheless, the Security Council did exactly that in a debate a few weeks ago. However, there is one crucial difference between the two: When the Allies

liberated Auschwitz in 1945, they had used all the hardware of war to achieve peace. It wasn't until Nuremberg that the lawyers showed up with the software.

Complicated conflicts

But in Sudan the war gets worse every day. The prosecutor suddenly flashes his half-shut eyes, as if to say that this is exactly his point: "The real challenge is that justice and peace are mutually dependent." Anyone waiting for peace can wait a long time, he says. "The peace negotiations in Uganda have been going on for almost 20 years now."

Ever since his fellow prosecutor, Jackson, announced in Nuremberg, for the first time, that wars are waged by people and not states (and, therefore, that people are the ones who must be punished for waging war), the world's wars have changed fundamentally. The new wars are rarely wars between states. What the ICC's international law experts see in Africa, Latin America or the Balkans are explosions of violence that are so difficult to control precisely because they are not ordinary disputes between ordinary states -- disputes that, in the worst case, come to an end when one state emerges victorious over the other.

The new wars are conflicts with no end, because they are controlled by corrupt governments, their accomplices and half-starved rebels, like in Sudan, power-hungry drug barons and organized criminal gangs, like in Latin America, or insane preachers, like in Uganda. There is no victory in these wars, because these wars have no objectives. The desperados of the new wars have only one goal: to make sure their wars continue indefinitely, so that they, or their bosses, cannot some day be taken to account for the massacres they have caused.

Herfried Münkler, Professor of Political Science at Humboldt University in Berlin and an expert on the history of war, calls these aimless conflicts "wars without the shadow of the future." In a war without a shadow, there is nothing to fear but death.

The purpose of Moreno Ocampo's work, in part, is to cast a shadow on Africa's wars -- albeit an artificial shadow, the black shadow of the prosecutor in The Hague. Indeed, Ocampo's fellow jurists in their offices in that white fortress in The Hague have registered, with great enthusiasm, that they are beginning to throw their first shadows far away in Africa. The phrase "You'll be sent to The Hague," says an employee in the office of ICC President Kirsch, is already being perceived as a threat in parts of an Africa ravaged by violence. Kirsch, clearly pleased, calls the fact that African nations are coming to The Hague to ask for help an "unforeseen but interesting development." It is "one of the biggest challenges" for the court, he says, that "we are in the middle of conflict everywhere -- our job is to determine how we can master these situations."

A court with no police officers

Things become even tougher for the investigators from the faraway court when a government -- like Sudan's -- refuses to cooperate. Sudanese President Omar el-Bashir has already sworn "before Allah three times" that he will never extradite a Sudanese citizen to a foreign court.

Ironically, the Sudan case, tried before the eyes of the Security Council and the entire world, could end up demonstrating the Hague court's powerlessness. The big question remains how Moreno Ocampo's bailiffs will go about arresting people? The chief prosecutor leans back in his chair, looks completely relaxed and, clearly enjoying himself, reveals what sounds like a secret: "I don't have a single police officer."

So what does he propose to do? "I have my method," he replies. It's the Argentine method, put to the test two decades ago in that country's investigation of more than 10,000 cases of human rights violations by the military junta. Nine officers were eventually charged, and five were sentenced. It was the successful outcome of a rational approach -- aside from one minor detail: The five were later pardoned.

In The Hague they call this concept "focused investigations." Only the "relevant case groups" are selected from a series of massacres like those occurring in Sudan. Investigators then focus on the worst cases, pick one that is easiest to prove and then devote their full efforts to searching for the principal perpetrator in that case. The idea behind this approach is that once a prosecutor manages to identify someone who essentially embodies every injustice, it is no longer difficult to gain the cooperation of authorities worldwide in capturing the suspect and bringing him to The Hague. Ninety-nine states have already ratified the treaty Moreno Ocampo uses as the basis for his work. The 100th, Mexico, is expected to ratify in the coming days. "They'll have to help us then," says Moreno.

This pragmatic approach to justice must be deeply offensive to most prosecutors who are obliged by law to devote the same amount of effort to prosecuting any offence, no matter how minor. The software of national systems of justice is simply programmed to pursue a principle that says "We'll get every one of you." But that doesn't help the jurists working in The Hague. Moreno Ocampo has all of 16 investigators at his disposal to address the most important case in its history, the Sudan issue.

Serge Brammertz, head of Moreno Ocampo's investigation department, was previously a public prosecutor in Belgium, and it's because of this experience that he knows exactly what happens in the justice system when a high-profile crime -- a child abduction, for example -- has been committed: "That's when they suddenly start assembling special commissions of 50 people." Brammertz says he'll have to "get used to the fact" that the ICC operates completely differently. In Uganda, Brammertz is investigating a case in which up to 30,000 children have been victimized -- kidnapped, abused and sometimes killed -- by the Lord's Resistance Army of insane rebel leader Joseph Kony. Brammertz was able to muster barely over ten investigators for the case.

Keeping a low profile

In the beginning, Brammertz's people had to drive from village to village in old, rented cars, sleeping in tents. No one wants to risk arming the investigators from The Hague or even giving them official ID cards and extra authority. To conduct their work in Africa, they ask discreet questions about genocide, crimes against humanity and war crimes, then secretly type the information into their laptops.

"If we take a more aggressive approach, all we do is increase the risk to us and our witnesses," says Brammertz. Indeed, Kony's people have given hundreds of bloody demonstrations of how they feel about traitors, using machetes to hack off their lips, limbs and sometimes heads. Occasionally, in meetings at the stronghold of justice in The Hague, someone mentions an unspeakable fear at the back of everyone's mind: What do you do when you open a package from Africa, and it's filled with the blood-encrusted evidence of this crude justice?

The ICC finally has its Sudan team assembled. They'll be trained in investigation methods, briefed on the specifics of the Rome Statute and given a crash course in the local culture. Finally, they'll be given sleeping bags and field equipment and sent on their way.

These kinds of positions are advertised on the court's website -- at a starting salary of about ?3,000 per month -- and usually attract people like district attorneys, lawyers, human rights activists and social workers. In teams of three or four people each, they spend two to three weeks on site and then return to The Hague to deliver their reports.

Morten Bergsmo is responsible for programming the laptops the investigators carry with them. From his sixth-floor office, Bergsmo, a gaunt Norwegian, manages the investigators' secret weapon, specially developed for the Sudan case. "Case Matrix" is software -- customized to reflect Moreno Ocampo's investigation methods -- that's intended to generate fear among the world's cruel despots.

At the other end of the city, former dictator Milosevic has been putting on a show for the global public in his trial before the International Criminal Tribunal for the former Yugoslavia. While Milosevic faces an understaffed court, drowning in a sea of documents, legions of witness testimony and a confusingly vast array of charges of war crimes in the Balkans, Bergsmo has invented a system for streamlining the process and pinpointing precisely the right information.

"Case Matrix" organizes the world's offences into a user-friendly system of green, red and blue boxes. Blue represents the facts of the case at issue. And then -- "You click," says Bergsmo, clearly pleased with himself, and a list of criminals who have been found guilty of this offence in the past appears on the screen. And then, "You click" again. What kind of evidence does one need to prove this offence? The answer appears in purple. For murder, it's fairly straightforward: "corpse not needed as evidence."

You click. Each item in the program is accompanied by empty boxes, into which the Sudan team members type the information the system requires as evidence. Once a box is full, the investigator can move on to the next item. You click. What could the defense bring up as a counter-argument, and is it something the court would take seriously?

A trap laid by Washington?

In some cases the investigator may be required to fill out additional boxes, perhaps for additional witness statements. You click, and that's that. The catastrophe in Sudan, the 300,000 lives it has claimed, the two million refugees, burning villages, starving victims -- there's a box for everything in "Case Matrix."

It may sound cynical, but it works. A team of interns constantly enters new information, updated daily, about genocide, crimes against humanity, war crimes, wars of aggression, and the legal volunteers' assessments of what they observe. Bergsmo was recently in Cambodia. The Cambodians want the system to help them process Pol Pot and their Khmer Rouge past. Peace through justice? Perhaps it could work after all.

Perhaps. Some of the judges at the ICC can't shake the feeling that Washington may have led them into a trap. Is it possible that the only reason the Americans were so willing to give up their veto against the referral of the Sudan issue to the ICC is that they were already convinced that the hated court would fail in this effort? Wouldn't this serve as ample evidence that the peacemakers housed in that white building in The Hague have the wrong idea?

"The Security Council referred this case to us, which already constitutes a great deal of recognition for the court," says Kirsch. No one at the ICC would put it any differently. But German judge Hans-Peter Kaul, who will be ruling in the Sudan case, is constantly warning the overly optimistic:

"We mustn't forget how difficult the investigations are. The suspected crime sites are hardly accessible, and fighting is still going on."

"Our conviction and our commitment will give us the strength we need," says Kaul's colleague, Bolivian judge Blattmann. And he needs the strength. For the past two years, a convinced and committed Rene Blattmann has shown up to work on time every morning, and each time, just like any other visitor, he has first had to endure being scanned from head to toe by polite but deliberate security guards. But he remains undaunted in his enthusiasm for the task of pursuing mankind's dream of a world court. Like his colleagues, Blattmann spends his days working out the details of procedural law, coming up with rules for compensating victims, and discussing whether perpetrators' confessions should be evaluated under Anglo-Saxon or continental criminal law.

And everything is done for that moment when the heavy gate to the prison basement slowly opens and Blattmann, for the first time in his life, puts on the dark blue robe with light-blue lettering. Peace through justice? "Ideals," the Bolivians says, citing a saying from his native country, and glancing at The Hague's overcast skies, "are like unreachable stars. They point the way."

Translated from the German by Christopher Sultan

2. Genocide In the Darfur Region of the Sudan

Field Team Compiles Indicators of Genocide

FOR IMMEDIATE RELEASE

JUNE 23, 2004

A Physicians for Human Rights (PHR) field team, recently back from the Chad/Sudan border where they took eyewitness accounts of systematic killings, rapes and destroyed villages, calls for an international intervention necessary to save lives and reverse injustices labeled by PHR as indicators of genocide. In his endorsement of PHR's report, Justice Richard Goldstone, former Chief Prosecutor of the Criminal Tribunals for Rwanda and Yugoslavia said,

"After all we know and have learned from the last decade's genocides and mass atrocities. We owe it to the victims of Darfur and potential victims to do everything we can to prevent and account for what PHR's report

establishes is genocide and reverse the intolerable acts of forcing entire populations from their land, destroying their livelihood and making it virtually impossible to return."

Through testimonies by victims and eyewitnesses in Chad and Darfur, PHR has developed a list of indicators of genocide outlined and supported with testimonies in the document that show an organized intent to affect group annihilation in Darfur, Sudan that include: 1) consistent pattern of attacks on villages, 2) consistent pattern of destruction of villages, 3)consistent pattern of destruction of livelihoods and means of survival, 4)consistent pattern of hot pursuit with intent to eradicate villagers, 5)consistent pattern of targeting non-Arabs and 6) consistent pattern of systematic rape of women.

In addition to calling for a UN-backed resolution that supports a robust intervention to prevent and punish the crime of genocide, the PHR report, which is attached, includes specific recommendations directed to the Government of Sudan, the United Nations, the European Union, the African Union, the Arab League, the Organization of Islamic Conference and the United States.

The full report, photographs, audio and video footage of the PHR investigation can be found at http://www.phrusa.org/research/sudan/

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3. Genocide and Conscience/Darfur

http://www.forward.com/main/article.php?ref=20040414936

April 16, 2004
Forward
Editorial
Genocide and Conscience

The continuing agonies of the African continent - in Liberia and Sierra Leone, Congo and now Sudan - are a constant reminder to the rest of the world of the fragility of what we call societal decency. The inability of the international community to address those agonies and aid the sufferers is an ongoing stain on the world's conscience.

In the litany of African suffering, Sudan holds a special place. The continent's largest country, it has been a flashpoint for decades in the confrontation between the expansionist Islamic culture of Arab North Africa and the Christian and animist traditions of sub-Saharan Africa. It is home to what is believed to be the world's most persistent slave trade. The Islamist government in Khartoum has given important aid and comfort to Al Qaeda and other terrorist gangs. The confrontation between Sudan's two warring cultures has led to continuing bloodshed in recent decades, on a scale that has repeatedly raised charges of genocide. Its continuation is an affront to humanity.

The silence of the organized Jewish community in the face of repeated atrocities and incidents of genocide on that bleeding continent is an affront of a different order. Jewish organizations and their leaders have earned the prominence and credibility they enjoy on the world stage in large measure because they speak for a community that has known suffering and sought to learn from it. They speak often and powerfully on memory and its lessons. They remind the world of its failure to intervene when it mattered to stop the Nazi genocide during World War II. They call on the world community to learn from its failure, so it will not recur.

And yet, confronted with new atrocities in today's world, they fail again and again to take the lead and speak out. They failed in Rwanda. They failed in Liberia. They failed in Congo. And, as Nathaniel Popper reports on Page 1, they have - with a handful of brave and noteworthy exceptions - failed in Sudan.

As the Jewish community prepares for the annual observance next week of Yom haShoah, the Holocaust Remembrance Day marking the anniversary of the Warsaw Ghetto uprising, the most appropriate way of honoring the dead might be a serious accounting by the living. The leaders and spokesmen of the Jewish community should begin a process of study, reflection and debate. What, we need to know, did the Holocaust actually teach us? And when will we learn it?