

FDCH Political Transcripts
February 28, 2002, Thursday

U.S. REPRESENTATIVE HENRY HYDE (R-IL) HOLDS HEARING ON THE U.N. CRIMINAL
TRIBUNALS FOR YUGOSLAVIA AND RWANDA;
INTERNATIONAL JUSTICE OR SHOW OF JUSTICE?"

WITNESSES:

- PIERRE-RICHARD PROSPER, AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES AT THE, STATE DEPARTMENT
- PROFESSOR JEREMY RABKIN, DEPARTMENT OF GOVERNMENT AT CORNELL UNIVERSITY
- LARRY HAMMOND, ATTORNEY AT OSBORN MALEDON, P.A.
- PATRICIA WALD, FORMER JUDGE AT THE INTERNATIONAL CRIMINAL TRIBUNAL, FOR FORMER YUGOSLAVIA

HYDE: The committee will come to order. If we can come to order please. We have the pleasant task of introducing a new member to the committee, and it is a great pleasure to welcome Representative Mark Green of the State of Wisconsin. Mark attended the University of Wisconsin Eau Claire, received his law degree from the University of Wisconsin Law School at Madison. He served in the Wisconsin State Assembly for six years. He and his wife, Sue, have three wonderful children, and Mark, we all welcome you to the committee and look forward to your contributions.

U.S. REPRESENTATIVE MARK GREEN (WI): Mr. Chairman, it is a great honor indeed. I look forward to working with you and all the members of the committee. It is a real honor to join this committee.

U.S. REPRESENTATIVE TOM LANTOS (D-CA), RANKING MEMBER: Mr. Chairman.

HYDE: Mr. Lantos.

LANTOS: May I just add from the Democratic side, a warm welcome to a new colleague. We're delighted to have you.

GREEN: Thank you, Mr. Lantos. Thank you.

HYDE: By direction of the Republic conference of the committee, I have a motion at the desk, which I will ask Ms. Boomer (ph) to read.

MS. BOOMER: Mr. Hyde moves that Mr. Green be assigned to the Subcommittee on East Asia and the Pacific, and the Subcommittee on Europe.

HYDE: Without objection, the motion is agreed to. Pursuant to notice I now call up H.Res. 339, relations to the upcoming election in the Ukraine. Without objection, the chair is authorized to obtain the consideration of the resolution, H.Res. 339 as amended by the subcommittee on the suspension calendar at the next available opportunity. The committee meeting stands adjourned, and the committee will now convene for its noticed hearing.

However, before proceeding to the committee hearing, I would like to take this opportunity to advise the members that tomorrow will be the end of an era for this committee. Nancy Boomer, whose warm smile, dedication to the work of the committee, and professionalism have been a major asset to the Congress, will be moving on after more than 26 years of loyal service. I think she started here when she was seven years old. Not only are we going to miss a wealth of her institutional knowledge about the committee and the House, we'll miss her kindness and her (inaudible).

I can't be sad, because I know she's moving on to a splendid opportunity in the private sector, and she will continue to do the Lord's work. So, we wish her God speed, and I know I speak for the entire committee when I give her my sincere thanks for a splendid job and very well done.

LANTOS: Mr. Chairman.

HYDE: Mr. Lantos.

LANTOS: Just a point of order. If, in fact, she has been with the committee for 26 years, I would like all of my colleagues to join me in child labor legislation, which will prevent such atrocities from occurring *in the future. Thank you, Mr. Chairman.

HYDE: We will now adjourn the meeting, and we'll commence the hearing. The International Criminal Tribunals for the former Yugoslavia and for Rwanda were established eight years ago to bring to justice perpetrators of genocide, war crimes, and crimes against humanity in the former Yugoslavia and Rwanda.

HYDE: These tribunals have enjoyed the strong support of the United States Congress and the United States Government. The Yugoslavia tribunal alone has received approximately \$20 million over the years in voluntary contributions from the United States; that is to say, contributions above and beyond what we have been required to contribute to the tribunal, and those required U.S. contributions have also been substantial, currently, almost \$25 million per year for the Yugoslavia tribunal and as much for the Rwanda tribunal.

In addition, we have detailed them some of our finest government lawyers, including our witness today from the Department of State, Ambassador Prosper, as well as criminal investigators and other experts. Eight years into this exercise, I thought it appropriate to convene this hearing to assess how well the tribunals are doing, and I have to say that in preparing for this hearing, I have learned of some very unexpected problems.

We all know that in one of those strange turns of fate, the principal victims of the Rwandan genocide, the Tutsis, wound up in charge of the new government of that country. I would have expected the Tutsi Government of Rwanda to be the strongest supporter anywhere of an international tribunal created to punish those who killed almost one million of their fellow Tutsis, but nothing could be farther from the truth.

Apparently, relations between the Rwandan Government and the Rwandan Tribunal have ranged from frosty to hostile over the years. This is a great mystery to me and suggests something is not as it should be with this tribunal.

In the case of the Yugoslav Tribunal, we are all pleased that former Serbian President Slobodan Milosevic is now on trial for the crimes he appears to have committed, but serious questions have been asked about whether we helped or hindered the democratic evolution of Serbia by bringing Milosevic before the tribunal in the way we did.

And while we and our allies signaled a willingness to let democracy collapse in Serbia if Milosevic was not extradited, we have not been willing to run any risks ourselves to capture certain other well-known indicted war criminals in Bosnia, where we have both the capability and the legal authority to arrest them.

I realize it's not fair to criticize the Yugoslav Tribunal for decisions that have been made in Washington and other western capitols, but I believe these inconsistencies are manifestations of an underlying problem. The Yugoslavian Tribunal exists for a single purpose and that is to dispense justice. Our interests in the former Yugoslavia go well beyond justice, however, to include peace, stability, national reconciliation and democratic development.

The Yugoslav and Rwandan Tribunals are the international embodiment of that slogan we often see on bumper stickers, "no peace without justice." The problem is this slogan is demonstrably untrue. To see that

this is so, we need only to look at the situation today in such post conflict societies as South Africa and El Salvador, where peace was restored, not by prosecutors seeking to punish wrongdoers, but by truth and reconciliation commissions and general amnesties.

There are many other issues that I hope we can touch on today, such as whether the Yugoslavia Tribunal has jurisdiction to prosecute Americans for our military actions in Kosovo in 1999, whether the tribunals could be better managed, and the degree to which political considerations have colored prosecutorial and judicial decision making within the tribunals.

Finally, I think it might be interesting to explore the question of why the United Nations is not seriously considering establishing similar tribunals to address war crimes in countries like Cambodia, Sierra Leone, and East Timor, and what that tells us about the perceived success of the two existing tribunals.

But I will stop here, and am pleased to recognize our ranking member, Mr. Lantos, for any opening comments he may have. Mr. Lantos.

LANTOS: Thank you very much, Mr. Chairman, and as always, I find myself in strong agreement with many of the points you have just raised.

I want to thank you for scheduling this hearing on questions on how to bring perpetrators of genocide crimes against humanity and gross human rights violators to justice. Mr. Chairman, the last century saw the most awful violations of human rights on a scale unknown in human history.

As a witness to the holocaust at close range, I saw one of the darkest moments of mankind, yet to the shame of all civilized people we did not learn from that horrendous experience and gross violations of human rights continued throughout the rest of the 20th century and into this one.

In London, ethnic violence led to mass slaughter of a half a million to a million people, and triggered a regional conflict that has yet to subside. In the former Yugoslavia, ethnic cleansing claimed hundreds of thousands of lives, and led to as many as a million displaced persons. During East Timor's occupation, the Indonesian military and their local militias may have killed hundreds of thousands of citizens, destroyed as much as 80 percent of that embryonic country's infrastructure. And in Sierra Leone, a ruthless civil war triggered horrible human rights abuses, leaving thousands dead and many more thousands of innocents maimed.

Tragically many of these abuses are committed by young people brainwashed into perpetrating these dreadful crimes. And in our own country, Mr. Chairman, suicide terrorists have snuffed out the lives of innocents from around the world whose only mistake was to be at the wrong place at the wrong time.

In this new century I believe, Mr. Chairman, we must find ways to prevent yet more repetitions of these manmade disasters. Part of the answer is diplomatic or military intervention by the international community to prevent such catastrophes from recurring. But part of the answer is to make sure that future perpetrators of similar barbaric actions know that they will be held accountable for their crimes.

Mr. Chairman, the U.N. Tribunals on Yugoslavia and Rwanda have had their share of successes. The former prime minister of Rwanda, Jean Kambanda, has been convicted of genocide, the first such conviction ever. And as we speak, the President of formerly Yugoslavia and then Serbia Slobodan Milosevic is in the dark for unspeakable acts that were committed to advance his lust for power. Crimes against women have been recognized as crimes against humanity, as they should be, and the wrongdoing of countless others have been brought to light by these institutions.

In my mind, there can be no question that this kind of international justice has an important role to play in the 21st century, particularly in cases of failed states and in post-conflict states, where national institutions and the political culture are incapable of establishing accountability.

I want to repeat this, Mr. Chairman, because I think it is so important for us living in a society under laws, where it is so difficult to envision societies where there is no legal framework. I believe that international justice has an important role to play in our century, particularly in cases of failed states and in post- conflict states, where national institutions and the political culture are incapable of establishing accountability.

However, we have learned much since the Yugoslav Tribunal was established eight years ago. We need to improve the current tribunals and make sure that any future tribunals do not make the same mistakes. We should also be prepared to experiment with so-called mixed tribunals that combine international and national justice; indeed tribunals in Sierra Leone and Cambodia may help those countries develop their scattered judicial institutions and help pave the way for the rule of law.

Finally, with great respect and great affection, Mr. Chairman, I believe I must mention the elephant in this room that many may not want to talk about, the International Criminal Court. Mr. Chairman, I know that you are strongly opposed to the establishment of that institution and I deeply respect your opinion on that matter. But it is clear to me that the International Criminal Court is going to become a reality, and it will become a reality soon. I hope that this hearing will help also for us to understand what mistakes need to be avoided as that institution comes into being. Thank you very much.

HYDE: Thank you very much, Mr. Lantos. Without objection, any member who wishes to insert an opening statement into the record may do so at this point or at a subsequent point. Before I introduce our distinguished witness, I would like to remark to the committee, one of the most difficult jobs in Congress is chairing a committee, a large committee, with a limited amount of time with members of less seniority who get no opportunity to ask questions hearing after hearing after hearing.

I'm intimately familiar with that, because I spent 20 years in the minority and I resented it, and there are members of this committee who resent not being given the opportunity. I don't know how else to do it fairly. We do it by seniority. Seniority ought to count for something. We do it by when you get here to the meeting, and if a lot come at the same time, we then look at seniority, but there has never been an effort or attempt on my part to foreclose anybody from asking questions.

Some of you may think otherwise. Some of you may even think there's a conspiracy to deprive you of the opportunity to launch your incisive questions. Not so. I don't even ask questions myself so we have more time for the members to ask questions. But the members don't adhere to the five-minute rule, and I've been less strict than I ought to be in imposing that. We should follow the rules, but members make long speeches and then ask twelve-part questions when their time is reduced down to a thirtieth of a second, and of course, the witness wants to answer the question and witnesses from witness to witness are more prolix than others. And so, some instead of taking five minutes take 35 minutes and other people are shortchanged.

So I am going to strictly enforce the five-minute rule, giving a little flexibility to my friend, Tom Lantos, because he is so cooperative. But I'm just pleading with you that ask questions, if you don't want to ask questions, make a statement. Do whatever you want to do with your five minutes, but give somebody else a chance to ask their questions too. But there's no plan or plot to deprive less senior members from an opportunity to ask questions.

LANTOS: Mr. Chairman.

HYDE: Yes, sir.

LANTOS: Mr. Chairman, may I just say on behalf of Democrats on the committee that you have handled your job as chairman with extraordinary fairness and objectivity and wonderful humor, and we on our side have no complaints whatsoever.

HYDE: Well, I thank you very much. Now I'm very pleased to introduce our distinguished witnesses today. We welcome Pierre- Richard Prosper, who was appointed by President Bush in July of 2001 to be U.S. Ambassador-at-Large for War Crimes issues, where he advised the Secretary of State on U.S. efforts to

address serious violations of international humanitarian law, including genocide, crimes against humanity, war crimes committed in areas of conflict throughout the world.

HYDE: He also coordinates U.S. support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and assists in the creation of the operation of other mechanisms to bring violators of international humanitarian law to justice.

Ambassador Prosper has served for several years with the prior ambassador-at-large covering war crimes issues in the State Department, where he was detailed from the Criminal Division of the Department of Justice. He also served as war crimes prosecutor for the United Nations International Criminal Tribunal for Rwanda, where he won significant cases for the prosecution.

Ambassador Prosper has worked in narcotics and drug enforcement on an international basis, and has been a U.S. attorney and deputy district attorney in California. He was born in Denver, Colorado and graduated from Boston College and the Pepperdine University School of Law. He has received distinguished alumnus awards and others from Pepperdine University, Harvard Law School, and Boston College.

We welcome you to the committee, Mr. Ambassador, and as you begin your testimony, I would ask that you take about five minutes to summarize your opening remarks, and your full written statement will be included in the record. Please proceed.

PROSPER: Thank you, Mr. Chairman, members of the committee. I thank you for this opportunity to discuss the work of the United Nations International Criminal Tribunal for Yugoslavia and Rwanda. This hearing comes at an important time in history of the two tribunals, which have been in existence since the early '90s. It 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 forceful brutality of that justice is nothing more than an unobtainable abstraction.

States that protect human rights and guard against war crimes 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 3 in The Hague. Slobodan Milosevic, who only a year and a half ago was the President of the Federal Republic of Yugoslavia, is now answering for his actions. 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 pled 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, the International Criminal Tribunal for the former Yugoslavia has indicted 117 persons. Sixty-seven persons have been brought into custody, 26 have been convicted, five acquitted, 11 are currently standing trial, and one is awaiting judgment.

At the International Criminal Tribunal for Rwanda, 76 have been indicted, 57 have been brought into custody, eight 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 have been called into question with allegations of mismanagement and abuse. In both tribunals, the process at times has been costly, 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 have aggressively engaged both with the United Nations in New York and directly with the tribunals. This engagement is producing results. We are now seeing the U.N. Headquarters and the tribunals taking action to remedy these wrongs. The U.N.'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 and that is 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, members of the committee, 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 conflict, 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 aggressively begin to focus on the end game and conclude their work by 2007 or 2008, a time frame we have stressed to which officials from both tribunals have referred. We are calling on the regional states to do their part, to cooperate fully with the tribunal's 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 obligations 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 Mladic go to The Hague will be at the doorstep of normalization in the Balkans. These individuals can not 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. We are pressing for the genociders (ph) wanted for the 1994 massacres in Rwanda to be apprehended and transferred to the U.N. 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 reinstated our commitment and determination to use the breadth of means at the disposal of the United States 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 mid and lower-level perpetrators.

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's 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 Rwanda (inaudible) system, that is designed to deal with the seemingly untouchable mass of offenders.

Mr. Chairman, in your letter requesting me to testify in this matters, you asked me to address the future of these efforts. In taking the 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 the events of September 11th have changed our view toward a permanent International Criminal Court. It has not.

As with the previous administration, we oppose the ITC Treaty and will not send it to the United States Senate for advise and consent to ratification. We are steadfast in our belief that the United States can not support a court that lacks the essential safeguards to avoid a (inaudible) of justice.

We believe that the ITC Treaty is just that, a treaty, and it should not have jurisdiction over a non-pardoned state. This does not mean that we intend to forego our historical position of leadership, and pursuing accountability and justice on the world stage. 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 before the United States Senate committee judiciary last fall, 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 dysfunctional judicial system, the international community may step in through the Security Council or by way of consent on an ad hoc basis.

Our goals should be, and this administration's policy is, to encourage states to pursue credible justice, rather than advocating their 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 and crimes against humanity. We will help create the necessary 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.

We will work with the Rwanda and Yugoslav Tribunals, the special court for Sierra Leone and elsewhere, and we will stress that all parties have a responsibility on this 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 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 victim and restore confidence in domestic institutions in societies throughout the world. I thank you and am available for your questions.

HYDE: Thank you, Ambassador. Mr. Lantos.

LANTOS: Thank you very much, Mr. Chairman. President Bush has repeatedly stated that he will pursue the war against international terrorism against regimes that harbor international terrorists and rogue regimes like Iraq that develop weapons of mass destruction, and I have strongly supported him in this venture and intend to do so until the last international terrorist cell is destroyed and the last regime is changed, which harbors international terrorists.

In this context may I ask you, Mr. Ambassador, what the administration's policies regarding the establishment of an international war crimes tribunal for Iraq to cover the crimes by Saddam Hussein and other Iraqi officials in both the 1980s and the 1990s and into this century. One of the most horrendous images that all of us carry with us is the "NEWSWEEK" cover of some years ago, showing a group of Kurdish women, Iraqi citizens, and their small children in colorful clothes after they were gassed by Saddam Hussein and his henchmen at the village of Halabja.

LANTOS: What specifically is the administration doing now, since they are talking about Iraq, Iran, and North Korea as regimes that will have to pay the consequences of their actions in terms of terrorism, harboring terrorism, weapons of mass destruction. What's specific measure is the administration taking now to prepare a tribunal for Saddam Hussein?

PROSPER: Thank you, Mr. Lantos. I can begin by saying that we do believe that Saddam Hussein and his top lieutenants, if you will, need to be held to answer for their actions over the past 10 years.

LANTOS: Twenty years.

PROSPER: Twenty years. Would you believe that there have been serious atrocities committed and we do believe that they need to be investigated. In fact, we have taken steps to collect information regarding the abuses that have occurred. I currently have detailed to my office two individuals who are specifically focused on this issue and are collecting information, evidence, and witness statements to be used at the appropriate time.

We are in the process, and we are having discussions with allies and friends on this matter, and we do believe that there needs to be a forum created to address this issue, in order to hold accountable the perpetrators of these abuses. We also recognize and believe that in order to achieve true justice and accountability, there must be a change in government in Iraq. When that occurs, and only when that occurs, will true justice be brought to the people.

So we are working hard. It's an effort that my office is involved in on a daily basis, and we hope to be able to use the information soon.

LANTOS: Mr. Ambassador, if I understand you correctly, you are implying the establishment of an ad hoc tribunal to deal with Saddam Hussein when the times comes. Am I correct in this?

PROSPER: What I am stating is that we will definitely be looking for some sort of mechanism to create this, and I think it is difficult at this time to say precisely what that mechanism may be. For example, is there is a regime change in Iraq and a credible government comes into place, then I think at that point we can look at the domestic institution to take the lead responsibility on this issue and assist that institution where it is needed.

So I do believe that it's dependent upon the future, if you will. What we are doing is we are taking steps to prepare, because we do believe there must be accountability.

LANTOS: Well, surely a successful regime is unlikely to be as well organized as the regime in Serbia, yet we insisted on having Milosevic go to an international tribunal, and I really am wondering what the rationale is for a preference for ad hoc tribunals to be established as the need arises, when it is so (inaudible) obvious that a permanent international criminal court is an infinitely more efficient method of dealing with this problem.

HYDE: The gentleman's time has expired. Mr. Leach.

LEACH: I want to pursue the criminal court from a little different angle. All of the discourse in the development of it, related to a series of very discreet international crimes, such as crimes against diplomats, it was understood that one of the crimes that might be considered by an international criminal court might be war crimes. But there are serious discreet crimes, drug trafficking, all covered by international treaties.

Of all the countries in the world whose diplomats are vulnerable today to international crimes, it's the United States of America, and to deny the option of an international criminal court for the crime against diplomats seems to be me to folly. Why the United States would object to the option, it's always optional, to bring drug traffickers before an international criminal court, I don't know, and I'm wondering if you have some explanation for this, and I would stress my background, because the public is not widely focused in on this issue.

The International Court at The Hague only adjudicates disputes between states. We're seeing with terrorism some disputes that link all states somewhat by not totally, and so there are other kinds of crimes. Terrorism is a kind of a crime, and why we would not want to have this as an alternative for this kind of crime is bewildering, and can you explain that?

PROSPER: Thank you, Mr. Leach.

LEACH: I might say, this is the position of the last administration as well. I mean this is not unique to this administration.

PROSPER: I think your question shows the complexities that surround international justice. The efforts underway to create the permanent international criminal court are limited to the prosecution of genocide, crimes against humanity, and war crimes. It does not address, as you refer to, crimes against diplomats, terrorism, or . . .

LEACH: What I'm getting at, and that was very much on the agenda for discussion, in which the United States leadership, I always thought, was vacant and granted this is all several years ago, as well as the procedures by which one can bring these crimes. But please, proceed.

PROSPER: Yes. Well, I believe it wasn't only the United States. I think the difficulty was incorporating all these other offenses into an international mechanism. The idea and the preferred approach is to have each state use its unilateral powers and authorities to regulate these problems.

For example, when we looked at the terrorism today and the coalition against terror, what we have done is we've asked the international community to come together to use all the unilateral tools they have at their disposal to address these problems. This is a more effective and more efficient approach. We need to, obviously, coordinate but it gives a broader reach, and when we get into crimes such as narcotics, the ideal or preferred approach is to get each state to do what it is supposed to do and exercise its responsibility.

LEACH: I appreciate that. My time is expired, Mr. Chairman, but I would only stress that this is an optional approach, an extra technique, and one that does not necessarily bring the kind of reactions which unilateral approaches often do.

HYDE: Mr. Chris Smith of New Jersey.

C. SMITH: Thank you very much, Mr. Chairman, and Mr. Ambassador welcome. There have been some reports that Kosovo Albanians might find themselves indicted by the tribunal. I wonder if you can shed some light on that?

You know, we've heard rumors and the Wall Street Journal carried a rather significant piece today about the administration's idea of shutting down the tribunals or at least trying to get a timetable. Once Karadzic and Mladic had been arrested, at least that's what one of the rumors around is, my concern is that some of the worst of the worst like those who committed atrocities in Vukovar. I was in Vukovar weeks before it fell, while it was under siege, and what they did to those poor people there is reminiscent of the Nazis and the Vukovar Three still have not been brought to justice.

And thirdly, very briefly, the ICTR is proud of the fact that it convicted former Rwandan Prime Minister Kambanda of genocide, but I understand that this conviction came only as part of a plea bargain, one of the

conditions of which was that the family of Mr. Kambanda would receive asylum in the United States. Have we, in fact, provided asylum in the United States to family members of persons who planned the Rwandan genocide, and if so, what was the justification for this practice?

PROSPER: Thank you. Regarding the question of Kosovo, the prosecutor called the Prosecutor, Carla Del Ponte, has indicated that she is investigating the activities or the conduct of the Kosovar Albanians and there may be some indictments forthcoming. I'm not in the position to comment in greater detail on that. It will be for the prosecutor to take whatever action she deems appropriate.

The Wall Street Journal did reflect one of the views that we have is that Karadzic and Mladic must go to The Hague. This tribunal can not begin to move toward closure as long as they remain at large. It does not mean that this stops with Karadzic and Mladic. The Vukovar Three are notable offenders who also need to be brought to justice in The Hague.

What we have done is, we have asked the prosecutor to work with the states to determine where the line of responsibility needs to be drawn. Where does the tribunal's work end and the state's responsibility pick up? Because we do recognize that the tribunal can not address all of these violations. We are hopeful that this will happen and we are prepared to assist in any way we can.

Regarding individuals, family members, witnesses, whatever it may be from the tribunals coming to the United States and receiving some sort of refugee status, I am not prepared to comment in an open session as to the details of who may be here for protection or witness protection type of issues. I could do so in closed session if necessary. But we do, and we have taken steps in the past, to bring people here. We have screened them and we know that they as individuals are not responsible for abuses.

LEACH: I have some extra time. With regards to the Prime Minister, that would have to be related to the related or conveyed to us in closed session?

PROSPER: Yes.

LEACH: Thank you. Thank you, Mr. Chairman.

HYDE: Thank you. Mr. Payne.

PAYNE: Thank you very much, Mr. Chairman. Mr. Ambassador, I'm sorry that I did not get an opportunity to hear your testimony. I'm trying to browse through your written report. I just have a question regarding the Rwandan Tribunal.

I've looked at the numbers as I browsed through, about the Yugoslavian Tribunal, 117 have been indicted, 67 brought into custody, 26 have been convicted, 5 acquitted, 11 are currently standing trial, one is awaiting judgment. Now for Rwanda, 76 have been indicted, 67 have been brought into custody, 8 have been convicted, one acquitted, 17 are currently on trial. Could you sort of explain what the apparent difficult or the slowness in the Rwandan Tribunals, and has any kind of, to your knowledge, corrective practices been instituted?

PROSPER: Well, thank you. I think this is an important question. I think both tribunals early on were plagued with difficulties that are associated with the startup. We have to recall that they were starting from scratch. It was easier for the ICTY and The Hague to begin because of the general infrastructure that exists in the Netherlands.

It was more difficult in the Rwanda context because firstly, in Rwanda they were setting up operations, if you will, in a post- conflict state that was still trying to get back on its feet. It was also setting up an actual court in Arusha, Tanzania that did not have the necessary infrastructure and a lot of the material had to be brought in.

In the tribunal for Rwanda when it began, it began with a strategy of pursuing trials against single individuals, which proved to be ineffective, which also led to the delay. Now the tribunal for Rwanda has taken steps to have multiple defendant trials, and as you referred to, 17 persons are currently on trial before three trial chambers. Our hope is that this will increase the efficiency and the speed of the process.

PAYNE: Thank you. I visited the Arusha courts several years ago, and at that time, they were changing prosecutors and trying to streamline the procedure. However, there was always a question as related to the Rwandan situation. I might let you know first of all that I'm an opponent of the death penalty in any situation, and I know that the international tribunal also supports the no-death penalty, which I think is very good and the way it should be.

PAYNE: However, in Rwanda where other trials are going on, I think the death penalty is in the law of the state, and it seems that the so-called big fish as they call them, the (inaudible), the (inaudible) are in Arusha supposedly, and others who are being tried in Rwanda and I believe several have gotten the death penalty in the past. I wonder what, do you have any feeling of what the leadership, the political leadership of Rwanda, the RPF and President Kigame, has there ever been any discussion about the two systems?

PROSPER: Well, I think in general the fact that the leadership is being tried in Arusha, and the smaller fish are being tried in Rwanda and they receive a more severe penalty, has always been an issue of discussion and at times, a source of tension. I think what happens in Rwanda, not only with the government but the people, the biggest complaint that I hear is that the justice is not reaching the people.

This is one of the concerns we have with both tribunals, is that the outreach needs to be greater so that the individuals who are truly affected by the conflict can actually see justice to occur and feel the justice. This is one of the reasons why our policy is to look first to a state system to see if we can enhance that and reinforce that and create the method of participation in order to give the ownership and the feeling of contributing to the justice. I do believe that what happens in Rwanda is the main sentiment is that the justice is a little removed from the society.

HYDE: Gentlemen, time has expired.

PAYNE: We're just getting an answer.

HYDE: I'm sorry. Do you have unanimous consent for another minute? Without objection, so ordered.

PAYNE: Thank you. Then let me ask you just quickly, has the U.S. agreed to turn over, there was a problem of a big fish in Texas that our extradition policies did not work, and if you could quickly tell me that. And secondly, the Chacha (ph) what do you think of that system, real quickly, in a minute. You know, I don't to violate the Chairman's relinquishment of one minute. So in a minute, please. Thank you. Thank you, Mr. Chairman.

PROSPER: Mr. Intaka Aruchimano (ph) was transferred from Texas to the tribunal and is currently in court, in trial, in the hope that the trial will finish sometime early fall. The Chacha is something that we are looking at and we're willing to work with the Rwandan government to support, because it is important. We need to find some sort of way to address the actions of the mass number of perpetrators.

HYDE: Thank you. The gentleman from California, Mr. Rohrabacher.

ROHRABACHER: I would be happy to yield to Mr. Payne one minute of my time, if he has a follow-up question that he'd like to ask the witness.

PAYNE: Thank you very much. I would take just one more minute. The current incarceration numbers in Rwanda I think exceed about 100,000. Do you think that the Chacha will really speed up the sort of getting these prisons to be lessened in numbers? I mean, do you see this being a fast process?

PROSPER: That is the goal of the Chacha process and that is to spread the responsibilities of administering justice to the communities. The more the communities can be involved, hopefully the more individuals that can be processed through. It is our hope, and I believe it is the government of Rwanda's hope that this will help reduce the numbers of, I think, our up to 120,000 persons in custody as we speak.

PAYNE: Thank you very much.

ROHRABACHER: OK, reclaiming my time, you mentioned the death penalty, and let me just note that I am not against the death penalty, especially for people who have been convicted of crimes that cause the death and torturous death of tens of thousands of people like Mr. Milosevic if he is indeed convicted, which I guess I'm not supposed to say whether or not he should be convicted.

But let me just say that if Mr. Milosevic is convicted, considering the magnitude of his crimes against the Croatian and Bosnian people, the Kosovars and yes, against his own Serbian people, I would find it appropriate that he be executed and not simply being given free room and board for the rest of his life. Your reaction?

PROSPER: Well my reaction is that if Mr. Milosevic is convicted for his actions in Bosnia, Croatia and Kosovo, he needs to feel the firm weight of the law. The U.N. Tribunal does not allow for the death penalty. The maximum punishment that Mr. Milosevic can receive is life imprisonment, and it will for the judges to determine whether or not life imprisonment is the appropriate sentence, but our view would be that, if he is found guilty he, again he must be punished for his conduct.

ROHRABACHER: Well, when you take a look at people like Mr. Milosevic, who perhaps have the characteristics of an Adolph Eichman and Osama bin Laden personified in one personality, there are tens of thousands of people who are out there who have lost family members, people who are crying out for justice.

And, you know, I visited that region many times and I happen to believe that if it wasn't for the personality of Mr. Milosevic in play in that system, that better forces, people with better hearts may have prevailed. But instead, we had this evil force at play in such a powerful position, I would hope that we send a message with your tribunal and I'm very pleased, at least we see him being dragged before the court of humanity now to answer at least publicly for these heinous crimes that he's been associated with.

But, let us hope that there is deterrent. I don't think that life in prison, that the possibility of that deters these type of monsters, and there are monsters like this around, whether it's Saddam Hussein or Mr. Milosevic. Perhaps it would be better in cases like this if they are found guilty, to turn them over to their own government in cases like - I'm sure Saddam Hussein's people wouldn't give him life in prison, or his life might be very short in prison. So it might be better to go in that direction.

Who will hold Mr. Milosevic, by the way, if he's found guilty? Who will take care of him for the rest of his life?

PROSPER: For both tribunals what they do is they reach agreements with states to accept these individuals and house them. I can not predict where Mr. Milosevic will go, given the U.N. facility right now. But he may go to another European state.

ROHRABACHER: Maybe a Bosnian jail might accept him or a Croatian jail that might accept him.

HYDE: The gentleman's time has expired. Mr. Paul, the gentleman from Texas.

PAUL: Thank you, Mr. Chairman. I want to thank the chairman for pointing out that we have seen some shortcomings in the International Criminal Tribunal in Rwanda, and the reservations that he and actually the administration has about the international criminal court, which I think is justifiable.

But I also would maintain that the international criminal court in Yugoslavia is probably a model for what we can expect from the international criminal court, and I would have a lot more reservation of determining justice at The Hague, when you realize that they can use anonymous witnesses, secret testimony. Even a pro international criminal court website reports that there is no due process, and that there's no right to trial by jury. So our Constitution is thrown out.

When Milosevic was taken hostage and sent over, it was done because we sent a lot of money to the current government, and for no other reason, when the court, the Constitutional Court of Yugoslavia looked at this, they ruled that it was not constitutional. So you can see what will happen to our Constitution when we have the international criminal court.

Now there's been 52 countries who have endorsed the international criminal court. When there is 60, the assumption is going to be made by the signature that we put on the treaty at Rome, that it will apply to us all. Now you have indicated that we don't expect to have that applied to us because we are a non-party state. I think that's really dreaming a bit, because I believe that they're going to do what they want.

I would think that the only way to make it clear to the world whether or not we're going to be part of the international criminal court, which if we follow what the proceedings were going on in The Hague, it's closer to a Kangaroo Court with no sense of justice. I just can't believe that there's so much faith and belief in these courts, and that we're going to translate that into a permanent court and then say, "well, we're going to be in limbo. We're not going to remove our signature, but we're not going to be a party state" and then pretend to be a good member of the international community.

At the time say "yes, if we want to go after Milosevic, we will, but if we want to go after NATO we won't," because the numbers are that there were many hundreds, if not many hundreds of thousands of people killed after NATO bombing, versus the 2,000 or 3,000 killed before that. So if you just go by numbers, it's chilling.

So I think we are setting ourselves up for some serious trouble, and I would like to get an opinion from you about how we can get out of this limbo state, and whether the President has ever considered removing our signature from that treaty to make it clear to the world that when those 60 signatures occur, we don't want to have any part of the international criminal court.

PROSPER: Well, the President has made clear the fact that we oppose the international criminal court, for the same reasons the prior administration opposed. We're in the process of conducting a high-level policy review on this very subject to determine how to implement the opposition and what steps need or should be taken.

I'm not prepared to comment on what we may do, but what I can say is that in making this decision, the President has all the interests, the national security interests in mind.

PAUL: It seems to me that it's really sad that the President's trying to make this decision, but under our Constitution, treaties should have no weight whatsoever unless the Senate ratifies it. And here we are worrying about it, and there's reason to worry about it, and yet we don't say, "well, will the Senate ratify it or not" and that is when the decision is made.

I would think that we should think more in terms of getting the proper ratification, rather than saying, "well will the President accept part of this or not." Hopefully, we will come around to that position.

PROSPER: Well, we recognize the concerns. The President, we're making our position known, that we are not sending it up for ratification because we do believe that the only way to be bound by the treaty is to be a party to the treaty.

PAUL: Thank you.

HYDE: The gentleman's time has expired. I will ask one question, and then we will get to the next panel. I'm sorry, Ms. Davis has, the gentelady from the First District of Virginia, the mother of presidents.

U.S. REPRESENTATIVE JO ANN DAVIS (R-VA): Thank you, Mr. Chairman. I apologize because I wasn't here to hear your remarks. I tried to read through it very quickly and hopefully this question hasn't been asked here already. Is it true that defense counsel in both the ICTR and the ICTY have been provided kickbacks to their clients from their U.N. paid legal fees, and in effect subsidizing the war criminals out of the U.N. budget?

We provide defense counsel to indigent defendants in the United States and this so-called fee splitting has never been a problem here. So, why is it a problem in the U.N. System, and are U.N. reimbursement rates too high relative to the countries where the tribunals operate, thereby inviting abuses?

PROSPER: The question of, the issue of fee splitting is a problem in both tribunals, and we recognize that. It came to light through an investigation conducted by the United Nations on this issue. They did determine that there were not significant safeguards or procedures in place to prevent this from happening. This is something that we have taken seriously, and are taking firm actions in letting the tribunal at the U.N. in New York know that we are gravely concerned by this, and that we demand or are looking for action.

Fortunately, we are starting to see some action. The Tribunal for Rwanda has taken corrective measures on at least one defense counsel, and has others under investigation. I was informed that the Tribunal in The Hague is in the process of hiring an investigator to do this exact same thing.

The reason behind it is it's difficult for me to say why it occurs and why there is the fee splitting. It would require getting into the mind of the offenders here, but what we do know is that we do need to pay attention to this and we need to engage the tribunals to insure that they take the steps necessary to, not only hold accountable those who engage in this activity, but also to prevent it from happening so that the money is not misused.

DAVIS: Thank you, Mr. Ambassador. Thank you, Mr. Chairman.

HYDE: Thank you very much. I'll quick ask one question. After Operation Allied Force in Kosovo in 1999, the International Criminal Tribunal for the former Yugoslavia carefully evaluated charges that the United States committed war crimes during the course of that operation.

Ultimately, the tribunal announced it had found no evidence of U.S. war crimes, and therefore would not indict any Americans, which showed good judgment on their part. Would the ICTY in fact have had jurisdiction to indict Americans for war crimes during that operation? If that is so, what can we do in the future to make sure such tribunals are not given jurisdiction over our armed forces personnel?

PROSPER: Mr. Chairman, when the events in 1999 began, we were aware that an argument that could be made that the tribunal would have jurisdiction over our actions and over NATO's actions. The United States Government in conducting its campaign took great care recognizing this issue, and our practice was and our targeting was so to be precise and to follow the law so that we would not find ourselves under the jurisdiction substantively of the court, and this is exactly what we did.

When the allegations were waged, we took them for what they were. We believed that they were groundless, that there was no substantive base for it. We made our position clear. We made our position known, and fortunately the prosecutor agreed with us.

As far as future instances, I believe that now that we are not, because we are not in a state of armed conflict within the former Yugoslavia, that the tribunal does not have jurisdiction over any actions of our forces that may be in the area.

HYDE: Very well. Well, we have another panel to go, and time marches on, but it's been a very instructive morning, and we wish you great good luck in your very difficult and important tasks, and be assured we want to be cooperative with you and will be in touch with you from time to time when questions arise.

PROSPER: Thank you very much, and thank you for your attention.

HYDE: Thank you, sir. I'd like to welcome my second panel. Professor Jeremy Rabkin has been a faculty member at Cornell University, in its Department of Government for more than 20 years, and has served as a visiting professor at Harvard University.

Professor Rabkin is active on the Board of Academic Advisors of the American Enterprise Institute, and on the Board of Directors of the Center for Individual Rights. He is a well-published author of numerous books and articles on law sovereignty and judicial issues. He's well-known as an international lecturer and well-known to the Congress, where he has appeared frequently as a witness. We welcome you today, Professor Rabkin.

Larry Hammond is a practicing attorney with the Phoenix firm of Osborn Maledon, where he specializes in criminal defense, healthcare, and antitrust civil rights and commercial and false claims act litigation. He's been admitted to the U.S. Supreme Court, U.S. Court of Appeals, and the U.S. District Court.

He's been active in many professional and civil associations, including the American Bar Association's taskforce on war crimes in the former Yugoslavia. He served as deputy assistant attorney general in the Office of Legal Counsel, and as an assistant special prosecutor at the U.S. Department of Justice.

Mr. Hammond is well published in the area of criminal justice issues. He received his Juris Doctor and Bachelor of Arts from the University of Texas, where he was editor-in-chief of the Texas Law Review and was a recipient of the Order of (inaudible). We welcome you today, Mr. Hammond.

And our last witness is the Honorable Patricia Wald, who's been a judge for the International Criminal Tribunal for the former Yugoslavia, chief judge of the District of Columbia Circuit Court of Appeals, and assistant attorney general at the U.S. Department of Justice.

She has practiced public interest law and served on national and local criminal policy commissions, has been vice president of the American Law Institute, and active with judicial and legal organizations connected with the ABA.

She is and has been active in many other related organizations throughout the years, as well as with numerous universities where she's earned honorary Doctorate of Law degrees, and numerous other awards. She is a well-known author of several books on criminal law, administrative law, mental health, women's law, and poverty law. She is a graduate of the Yale School of Law, and has found time in her busy career to raise a family of five children. We welcome you today, lady and gentlemen, and we will start with you Professor Rabkin.

RABKIN: Thank you. My prepared remarks are a little deprofessional, and I would like to be a little less tempered, because I think we're all being a little too complacent about this.

To start with, we've been talking about this as if it's just something rather routine, which just may have some glitches, and I do hope the committee focuses on how very weird this is. You have to go back before the 1990s about 500 years to find real precedent for what we are doing in these tribunals. I think before the 1990s, the one real precedent that I can think of is the Spanish Conquistador Pizarro (ph) of going into Peru and trying the King of the Incas on the authority of the conquistadors.

And isn't it a very, very weird thing, for hundreds of years states have acknowledged to each other that they don't have criminal jurisdiction over what another state does within its own boundaries?

Having set up these tribunals because we weren't sure what else to do, and really because we weren't willing to use force in a serious way, I think we have created dangerous precedents which are gaining momentum. I certainly agree with Mr. Lantos, one of the elephants here is the ICC.

The Europeans say to us, "well, you supported these ad hoc tribunals, why don't you support the general tribunals?" And, of course, the real answer, one of the real answers is, we are not willing to be judged by an international tribunal. Well, if we're not willing to be judged ourselves by an international tribunal, why are we imposing this on other people? And that's a very, very good question, which nobody discusses because I don't think there's a very good answer.

In the meantime, it creates momentum for things like these national prosecutions, where countries like Belgium think that they ought to be judge of the world and just go around saying, "you're bad. We're going to try you. You are too and we're going to try you."

You may think if you want to that this is a touching display of concern for humanity. I don't think so. Mr. Lantos alluded to his experience during the war. He might remember the Europeans in recent years have not been extremely sympathetic to Israel, quite the contrary. They view Prime Minister Sharon as a war criminal and somebody who ought to be put on trial. Just recently, the Belgians have talked about indicting Shimon Peres, one of the most innocent of people in the world, certainly one of the most unthreatening.

I think that it is something that we all ought to pause over before we get deeper into this. Do we want to say that the world has so much consensus that we can have a free floating criminal law that's up in the sky, which anyone who wants to can just pull down and apply to whoever he wants to apply it to.

If you say, "well no, wait a minute, we didn't mean that" and you back off a little bit, where are you? Well, if you can't apply your own criminal standards to a third country that you have no connection with, I don't understand why the Security Council can do it. And that's something we ought to be a little bit disturbed about. If the Security Council can do it to someone else, could it do it to us? Well, probably not because we have a veto, but then again, you might have a different administration, which has a different policy on this.

Or, if you say the Security Council can do it, why can't just some other group of countries do it? We heard Ambassador Prosper testifying about, "yes, we feel that this should be done in cooperation with national courts." What does it mean, cooperation with national courts? We told the Serbs, "you can not have this trial yourselves. We won't even let you begin. We won't even let you see whether you can do it. We are just going to reach in and grab Milosevic, because we want to try him."

And I think once you set up a super national tribunal like this, all of your incentives, as people said about special prosecutors in the United States, are to go for the sensational case, not to be cooperative, but to be just making a splashy prosecution somewhere.

Let me say one last thing, which I think we really should focus on. I believe this was our founding principle. Maybe what I'm saying sounds doctrinaire to you, but after all, our country was founded on a doctrine, which is that every sovereign state is responsible for itself.

But, putting aside doctrine, we are not in the situation in which we are trying to mobilize other countries to help in the War on Terror, and what we are saying to those other countries is, "you are responsible for what goes on in your territory. If you are harboring terrorists on your soil, you're our enemy."

I think it's very weird for us to be saying, on the one hand, you have to live up to your obligations as a sovereign state to control your territory, and on the other hand, we don't take sovereignty seriously, and whenever we want to, we just set up an international tribunal that sits over your head and reaches down and fixes what we think might be wrong with your system of justice. I apologize if this sounds really too abstract, but I think we're missing the big picture by focusing on fee splitting. Thank you.

HYDE: Thank you, sir. Mr. Hammond.

HAMMOND: Thank you, Mr. Chairman and members of the committee. I believe, as do others, that there is cause for serious concern about the operation of the existing tribunals at both The Hague and Rwanda, and I share Mr. Lantos' concern that what we learn with these tribunals will inform, and indeed may not inform decisions with respect to the ICC.

In the few moments I have, rather than repeating my remarks from my prepared statement, I would ask to focus on one very small but terribly important issue, and that's the role of the prosecutor in these tribunals. And, I'd like to focus particularly on the role of the prosecutor at the ICTY.

Chairman Hyde, you several years ago were the proponent of legislation that is now the law in this land that governs the conduct of federal prosecutors. It is known by your name, the Hyde Amendment. It is an important piece of legislation in this country, because what it tells federal prosecutors in our system, in our system, is that they must indict with care and that they must be prepared to provide the information necessary, so that the accused can have a fair trial.

Your remarks in support of that legislation are eloquent, and I think they apply in full force, and maybe in even greater force with respect to the activities of these tribunals. I would ask us all to consider and to look with care at what is happening in the prosecutions, particularly the prosecutions at the ICTY.

I am particularly pleased to be sitting next to Judge Wald, who I have known for many, many years. I think she has been a bright light on this tribunal at The Hague, but I would ask anyone who wants to study carefully the questions about the operation of these tribunals to read her most recent opinions, opinions that came down shortly before she left. There's no substitute for getting down to the details. It is critically important when asking the question, do these tribunals do justice, which Mr. Chairman you said is their goal, to find out what actually happens in the trials.

One reading Judge Wald's opinions in which she reversed three convictions and acquitted she and her panel of five judges, three gentleman who had been convicted and sentenced to very long terms, once can not help but have grave concerns about whether information necessary to the defense in these cases is being produced in a timely and appropriate manner.

I won't go into detail on that, but I would urge anyone who is interested in this question to read those opinions and ask yourselves, how is it possible that the evidence that results in the acquittals of gentlemen convicted of crimes that would put them in prison for up to 25 years, became known and available only after their trials? A haunting, and I would suggest to you, most difficult question.

I would also invite us to look at some of the indictments that have come down from this tribunal. I am particularly disturbed about the indictment of Croatian General Gotovina. I would ask that people read that indictment, and see for themselves what is there.

That indictment involves events that occurred right at the end of this war, at a time when that part of western Croatia was awash in American military personnel, American political personnel, journalists from around the world, and what we have is an indictment that charges a general with conduct that is flatly contrary to, entirely inconsistent with published reports from American sources.

HAMMOND: You need only do one thing, take the Gotovina indictment, read it and then read Richard Holbrooke's book, which covers the same events, occurring at the same time, and ask yourself, how is it possible that the tribunal at The Hague, through its prosecutor, has indicted a general and has accused him of forcefully deporting, forcefully displacing 150,000 to 200,000 Serbians from the Krajina region at the same time that there are witnesses galore to that conduct? How is it possible that this indictment, this indictment can say that there was a massive artillery attack on the city of Knin at a time when American and journalists from around the world were there?

One would expect that a responsible prosecutor, before handing down any indictment, and if it were an indictment in this country I guarantee you the Department of Justice would have looked very carefully at this question, what evidence do you have that these events actually occurred?

We have a biography, written by Francis Hartman (ph), the press secretary at The Hague, in which she describes events occurring at that same time in a much, much different way than this indictment does. This causes me great anxiety, and I hope it causes anxiety for others who want to answer the question, is this tribunal doing justice? Are the people who are brought before that tribunal getting the kind of fair trial that we all believe they deserve? Thank you.

HYDE: Thank you very much. Judge Wald.

WALD: Thank you, Chairman Hyde. I would just like to make my remarks informally, knowing that my written testimony will be incorporated into the record and will just dwell on a few points that have been raised by the previous witnesses if I may.

I do want to point out that among the ICTY's achievements, I can't speak with any knowledge about the Rwandan Tribunal, because I have not been a part of it, nor have I indeed even visited it. But I would point out that the figure of 91 indicted, 31 tried, 14 appeals completed, 29 either in trial or awaiting trial are not insubstantial, considering that this was a new tribunal and no trials occurred for the first three years.

I also want to point out that many of them are high-level military and civil leaders. Two are the presidents of the autonomous Serb Republic. The third, of course, was President Karadzic and we don't have Mladic yet, but the next level, the ICTY has made substantial inroads in terms of the military generals just below Mladic and the civic leaders who participated allegedly in these horrible events.

Now the tribunal, as we all know, was a response to a horrified world, which due to the conscientious efforts of some wonderful journalists put those horrors virtually in our living room in the years '92, '93. They were referred to by the President of the U.N. as the worst atrocities since World War II, millions expelled from their home to ethnic cleansing, hundreds of thousands imprisoned in a very near approximation, if not a total, equivalent of the concentration camps of World War II, an estimated 50,000 rapes in Bosnia.

But I want to point out that at that point, at that point, and certainly for a substantial time afterwards, if there was to be any response in terms of legal accountability, there was no place to go except the creation of an ad hoc tribunal. It is unfortunately true that the governments of the countries involved, that would be Bosnia, that would be Serbia, that would be Croatia, were unwilling or unable, certainly in the case of Bosnia to do anything about that.

Now even as recently as two weeks ago, I was in Bosnia, and we had a conference there about defense counsel who appeared both before the ICTY and before national courts to prosecute the war crimes. The ombudsman for Bosnia is pursuant to the Dayton Accords, made it very clear that courts of Bosnia, still they are beginning to take over many of these prosecutions, and I read an AP dispatch yesterday that said that 62 of the cases, which had come to the prosecutor. The prosecutor had sent back to the Bosnian authorities to be tried in the local Bosnian courts, so some of that is happening now.

But at the time, the Bosnian court infrastructure had been almost totally decimated by the war, and they had lost up to half of all their judges, because the Serbian judges went up into the hills with the Serbian forces, the Bosnian judges, some of them stayed. The entire entrance to Sarajevo was shelled for several years. There was simply no national courts that could take charge, and I think that may be replicated, not in all countries. That's why we have to look at these tribunals on a one-to-one basis and see what the need is for them, vis-a-vis national courts.

Everyone in this room, I think has agreed, the optimal solution is for a national jurisdiction if it is both willing and able to take over the prosecution of its war crimes should do so. But we must remember that the Croatian government, at least until the change to President Mesic from President (inaudible) as well as the change from Milosevic to the new Serbian government. This certainly was not going to be any war crimes prosecution undertaken.

Now one might say, "OK well wait. I mean, wait it out" as it were. I would just like to raise one example of why I think the world and the United States has progressed beyond that point. One of the cases that I sat on during my two years there was the massacre at Srebrenica.

The massacre at Srebrenica involved 25,000 to 30,000 Muslim inhabitants of the so-called safe enclave, the U.N. safe enclave in Srebrenica, the 25,000 to 30,000 are really the good part of the story almost. They were women and children who were just thrown onto buses willy-nilly and dispatched in quite bad condition, but fortunately dispatched out of the territory into Muslim-held territory so that they were not killed or badly injured.

But there was 7,000 to 8,000 young Muslim men of military age, but predominantly civilians who were attempting themselves to escape toward Muslim-held territory who were captured, and within one week, within one week, they were executed. Four thousand of those bodies have been exhumed, but in such bad condition that identities can only be made for, I think, several hundred. And in fact, this was done within one week, and this is about six months prior to the Dayton Accords, while preparations are being made for the Dayton Accords to go ahead.

As that progress continued, within two months the original mass burial graves, which were all up and down this 100-mile territory, were themselves gone back into. All the bodies were scooped up into trucks and then they were taken to more remote locations for mass secret burial.

Now, if we were to wait five, ten years, it is virtually sure that much of the total of that evidence would be lost, and many of these crimes, would simply not ever be punished in any kind of tribunal. The second part of that is that many of the witnesses we saw in that particular trial would not have testified in the local courts in the ensuing five or six years, because they were terrified. In some cases, there were real threats of retaliation from the villages and the people of opposite viewpoints.

So that I think if we really are serious about the legal accountability, for the most serious crimes, I admit we're not going to be able to try them all, then I think we have to look at each situation, and I'm convinced that in the case of the ICCY tribunal, it was a very justifiable and perhaps the only way. I think a notion of a truth and reconciliation commission at that point would have been out of the question. The war was still going on. There is a truth and reconciliation commission, which is being brought into Bosnia at this time.

Very briefly, I want to just take my second and final point and that's whether or not, in my opinion, the trials are fair, whether there is justice being dispensed at the tribunal in the Yugoslavian Tribunal. I have not been a cheerleader for the tribunal. Anybody who has read my decisions and some of the written work knows that, based upon my own 20 years' experience in our federal system, I have been a critic of certain of the procedures.

However, I will tell you that overall, I think that the trials are fair. Now the fact that I presided over the appeal, which exonerated, not exonerated I'm sorry, but reversed the conviction of three, I make two points on it. One, it certainly was not unique to me. There were five judges on that panel, all of whom, none of whom disagreed with that. They were from Italy, Malaysia, Columbia and China.

But the other thing is that, I can't tell you how many times during my 20 years on the D.C. Circuit I reversed convictions by the trial bench, which I think is one of the finest trial benches in the country. I'm simply pointing out errors do occur in trials, and I don't think the fact that some errors occurred in this one condemns the entire system.

Obviously, and I'm concluding, I can't go into all the details of the various cases, which have been identified. In fact, my experience as a judge would suggest I would never draw a conclusion about whether a case was justified unless I really had looked at the record. I only want to bring to your attention a few things, which I think may have been misunderstood about the processes generally at the tribunal.

Anonymous witnesses, in one case, the very first case, the cottage case brought before the tribunal, they did I think wrongly say that you could have some witnesses whose identity would not be made known to the

defendant. That has never happened since in the ensuing eight years. In fact, some of the material put out by the ABA committee here made such a fuss about it, rightly so, there was a good dissent by one of the judges on the tribunal. It has never happened again to my knowledge.

The second point I would like to point out is the secret evidence. A survey by the Victim and Witnesses Unit, which handles all of the witnesses at the ICTY, and I can make this available to the committee staff if you wish, shows that only one percent of almost 1,000 witnesses who have come to The Hague since 1997, or 1998, one percent have been heard in closed session, and closed session means that a videotape is kept of the proceedings, but the press and the public are not allowed to see that. Now it doesn't mean it's secret forever. The court, the same court or another panel of the court can subsequently lift that. In fact, I have been involved in proceedings where we did lift the veil off of prior secret proceedings.

So, I think it would be unfair to go away with an impression that there's a wide, wide scale of secret hearings held. As far as the prosecution withholding evidence on the defense, again I wouldn't venture to conclude on any one basis. I would say that my experience with two-year long trials, which were run by American prosecutors seconded from our own Justice Department, with long records in the Justice Department, one as a 10-year public defender in California.

I saw no evidence of such, and I will just point out that yes, there is a lot of new evidence that comes in after trial is completed, because the Croatian Government is just now opening up its archives, which were closed to both sides for years and years and years. And so, you are getting lots of new evidence, which comes in later in which the Appeals Court has a rule allowing it to come into the record. That happened in the Kupreskic case, and was one of the examples. We were satisfied, we the panel in the Kupreskic case, were satisfied that that evidence, which did help us to change our mind was unavailable at the time of trial. I think I will conclude there.

HYDE: Thank you very much. Mr. Lantos.

LANTOS: Thank you, Mr. Chairman. Let me thank all three witnesses. I am unlike the three of you. I'm not a lawyer, which allows me to ask some very naive questions. I find your argument, Mr. Hammond, specifying a flawed indictment singularly unimpressive. If in fact I would have a dime for every flawed indictment in our own judicial system, I would be a very wealthy man, and the fact that you can point to a flawed indictment is just a fact of life.

LANTOS: I mean, it's regrettable. Every time there is a flawed indictment, it's regrettable. It does not address the issue of what do you do when horrendous crimes are committed and the national judicial authorities are either non-existent or the political situation is such that they are incapable of bringing these criminals to justice. That is the issue we are dealing with. I couldn't care less how many flawed indictment you can point to in this country, abroad, or by the international tribunal. That's a non-relevant item.

I also must say, Professor Rabkin, that while I enjoyed your presentation very much, and I'd like to take a course with you, and when I grow up I might be able to do that. Let me just say, I am sure that the criticism of international criminal tribunals, much of it, is justified.

You went back 500 years to find the precedent. One of the - I don't believe in progress in all fields, but one of the great steps forward that I have noticed in recent years is that human rights has trumped sovereignty. Hitler's gas chambers were functioning within the national jurisdiction of the Third Reich, but Nuremberg demonstrated that there is a higher authority than the sovereignty of Nazi Germany, and I suspect the Nuremberg Trials did a very useful job.

So the notion that at long last, mankind has evolved to the point where human rights trumps sovereignty, where you can not just gas Kurdish women because you don't like Kurds. You can not just torture and eliminate Romas because you don't like Romas, that there is an international voice, which comes in and expresses itself in a judicial context, I find extremely heartening and a sign of major progress.

Now, I was very much interested, Judge Wald, as I have been over the many years that I've followed your work, with your testimony, and I think you sort of hinted at several places in your observations what to me is the fundamental item here.

National jurisdictions in many situations of this kind are either unwilling or unable to render justice. Under the circumstances, the culprits either go free or there is some international mechanism that brings them to justice. I would be the first one to admit that clearly there are flaws. This is a new science. This is a new mechanism. Any international mechanism, by its very nature, is profoundly flawed. But what is the alternative? What is the alternative if you know the Balkans as well as I do?

There is no local judge. There is no local prosecutor who will have the guts to prosecute mass murderers, because his family will be killed. So what do you do with a mass murderer? You just say, "too bad, you go free?" Or, do you find a Judge Wald in The Hague and see to it that some justice is done. I think you need to address the fundamental question, which I do not believe the two of you gentlemen have done. What do you do when horrendous crimes are committed and the national justice system is non-existent, incapable, intimidated, terrified, incompetent, you name it? What do you do then?

And don't talk to me about flawed indictments. I stipulate there are flawed indictments. I am dealing with a generic issue. What do you do with mass murderers? What do you do with mass rapists? What do you do with the things that we discover in Yugoslavia everyday, the mass graves? Do you tell the local prosecutor to go after them? His wife and his daughter will be killed within 24 hours. That's the issue you need to address, not one single flawed indictment. I'd be delighted to have any of your reactions.

HYDE: If I could, because we're at the end of our hearings, and my friend has asked such a provocative question, ultimate provocative question, I would say, I would add to your interrogatory, at the same time guarantee due process of law to the defendants, and help immunize them from the hysteria that might well surround their being put on trial.

It is one thing to say, "you are a war criminal and you need a forum to be tried." There's another aspect of that same problem that says, due process of law. "You have a right. You're innocent until you're proven guilty. You have a right to confront your witnesses. You have the right to subpoena people." Or, do we just sweep that aside because we lack the institutions to do it and we say, "you're going to go on trial before this establishment" which may or may not know a thing about constitutional rights as we understand them in America.

It's a very complicated question. But in any event, I would love to hear your answers to Mr. Lantos' questions. Should we start with you, Mr. Rabkin.

RABKIN: You want to go that way. Let me just say a couple of quick things. You are right.

LANTOS: I rest my case.

RABKIN: You were right on this one point, which is there are circumstances in which national governments will not do justice on their own. I don't quite understand why we're focusing all of this on the Balkans. The national government, which has killed more people than any other in history probably, is the government of China. President Bush just went there. He's exchanging pleasantries with them. He's shaking their hands. We're saying that it's not actually the people there right this minute who have done this, but it's the people who arrange for the people who are there now to be in power.

What are we going to do about that? I think the honest answer is, nothing. OK. Now, let's look next door at Russia. Let's look at all the former Soviet Union. We didn't insist that there had to be justice, even though there were horrendous, horrendous atrocities there, and I'm not saying we were right in China and we were right in the U.S.S.R. to ignore this.

I'm just saying, we should first admit that your challenge is not quite so devastating as it sounds, because the truth is we have learned to live with terrorism, injustice, in other places because we don't run the world,

OK. That's the first thing. The second thing is, if you ask what can we do about it? Well, I think sending in lawyers is not really one of the great contributions.

One of the things we haven't really got into focus about Rwanda is we allowed nearly a million people there to be slaughtered. Judge Wald mentioned Srebrenica. What happened there? There were thousands of people slaughtered. Why? Because the U.N. said this is a safe harbor. Come on here and we'll protect you, and then when these people were attacked, the Dutch troops said, "oh sorry, we're busy. We don't want to take any risks, right?"

What you ought to be putting in focus is, yes or no, are we willing to use force? Because when you reach into a country and say, "we're going to try your leaders" for 500 years people understood that to be an act of war, and we're now saying, "no, it's not an act of war and we don't actually want to have war, because we don't actually want to use force. We just want to kind of make a gesture."

What we actually have done in Rwanda is to protect the perpetrators of the genocide. We did nothing to stop the genocide, and afterwards, what we've effectively done is rush in there to protect the people who did it, OK. We have nothing to be proud of there. It may be true that there are a number of cases in Yugoslavia where we can feel satisfaction to somebody who really deserved to be punished and has got to be punished. And it may well be true, I do want to admit this, it may well be true that some of those people wouldn't have been punished otherwise.

But the fact is, and it's a very important fact, we're not even waiting to sift through this and find out. We're saying, we're in it. We're having fun. We're satisfying ourselves, and so let's keep going. And the most sensational trial of all is the one that is just starting now against Milosevic, and there it just is not true that we know he wouldn't have been tried.

As a matter of fact, we had a lot of reasons to think he would have been tried, because the people who came to power, came to power by overthrowing him, and they represented a lot of people in Serbia who are very angry at him. So we hear over and over again from Judge Wald and Ambassador Prosper and everybody else in this, of course we want to have cooperation, of course this is a joint thing, but it turns out to be a cooperative and a joint thing in which the outsiders are in the driver's seat. The outsiders follow their own agenda, and their own agenda mostly is making themselves look good.

There's no way around that if you bring outsiders into it. All I'm saying and it's I think a serious point, we should take a deep breath and say, "how much do we want to let this loose in the world, the idea that outsiders can come in, not with a war, not taking full responsibility for the territory, which is what we did in Germany and in Nuremberg." I mean that is different. We were running the country. We were the sovereigns of the country. We said so on the first day of the trial. "We're in charge. That's why we're doing this trial, if you don't like it, too bad. You surrendered unconditionally. We're not in charge."

What we're doing in Yugoslavia is totally different. It's saying, "we're going to sit on the sidelines. We're not actually going to protect the people who go to Srebrenica. We're not actually going to take responsibility for what happens in Kosovo, even when we have troops on the ground. We're going to be like a little in and a little out, and anyway sovereignty is not serious because it's compatible with being a little in and a little out."

Do we want a world, which is organized in that way? And I think if we say yes, we're happy with the world organized in that way, two things follow. One is this can't go on much longer without people saying, "why isn't America accountable just like everyone else?" So there's going to be more momentum to try Americans, and that's trouble, and it's particularly trouble when we're trying to fight a war, by our own standards, and not by the standards of people in Europe. That's one.

And the second thing is, it's going to hurt a lot of small countries. Some of them maybe deserve to be hurt. Some of them do not deserve to be hurt. And, I'm not saying this to appeal to you. I'm saying it because it's one of my concerns. Israel is going to be one of those countries. If you look at humanity, if you look at the U.N. when they get together to do justice, they go to South Africa and they organize a Nuremberg rally, and

everybody stands up and says, "let's talk about international races and there's one practitioner of it in the entire world that we need to focus on and it's Israel, Israel, Israel."

It's not a good thing to let loose into the world this doctrine that everybody is responsible for everybody else, and whoever is strong enough just sets up a tribunal and goes and tries whoever he want to. That's a very dangerous thing for the world, and I think the United States ought to be using its influence to say, "wait a minute. Hold on a minute. The norm ought to be every country is responsible for itself, and if there are exceptions, we want to articulate very carefully what they are, which we have not done, I don't think in Rwanda or in Yugoslavia.

HYDE: Mr. Hammond.

HAMMOND: Thank you. Mr. Lantos I will be brief and direct. My point was not that there is one flawed indictment. My point is that in order for a tribunal like this one to gain and deserve the respect of the world community, it must be one that gets down to the details of doing justice, of providing due process of law, of taking extraordinary care.

My concern is that there are examples after examples after examples of situations in which that is not happening. I said in my remarks, and I will stand by them, I am not an opponent of the ICTY. I was not an opponent of it when I served on the ABA taskforce. I'm not an opponent of it now. I'm not an opponent of an international criminal court in concept.

What I am an opponent of, is an organization that is designed to convict, that doesn't care when someone is wrongfully charged. Let me give you one example from this country, a very quick one. You undoubtedly know about the Department of Justice's Office of Special Investigations, OSI, an office that for many years deserved tremendous respect in this country for the prosecutors and what they did. And, as you may well remember, they made the decision to advocate the deportation of a man known as Ivan the Terrible, so that he could be tried for tremendous war crimes at (inaudible). He was supposed to be the killer of (inaudible). Remember him?

We deported him to Israel. We did not turn over, OSI did not turn over information in its possession, showing that in fact he might not be Ivan the Terrible, but an entirely different Ivan. He went to trial in Israel and was eventually acquitted.

My point is this, what has happened to the respect of OSI? A court of appeals in this country at the same level as Judge Wald's court, the Sixth Circuit, has handed down a blistering opinion, saying the work of those prosecutors does not deserve the respect of our country, and I believe that's true. And what has happened is that some very good prosecutors, very good men, working on important projects, have had their respect, the respect that we need if we're going to do these jobs, tarnished. And I believe the same thing will happen to this tribunal.

When evidence is withheld, as it has been in some of these cases, when prosecutors hand down indictments that if they did any kind of reasonable investigation, they would know are without merit, we have a problem. We can not just pretend that there is due process of law. We must look at it carefully, and we must ask ourselves, are we really doing all we can? And my thesis is we are far from that.

HYDE: Judge Wald.

WALD: A few remarks. Professor Rabkin, certainly the ad hoc tribunals have been criticized for the so-called selectivity. I mean you pick out this particular conflict and do it, and then why didn't you do one there? There is no easy answer to that. Even his preferred solution of military intervention is always going to be a selective decision made upon big basic global policy grounds that are not equipped to second guess do we send the military expedition into this country, and not that country.

I will say on the concept of a criminal court, an international criminal court, I am not expert in the details, even of the details of why we're not backing one. But the concept of one would in some ways diminish that

particular criticism, because it would be drawing upon whatever charges came from all around the world, rather than making a decision to go and set up a tribunal in one place, rather than another.

I do want to refer to your particular concern, Chairman Hyde, on due process and tell you that when I first got over to the tribunal after my experience in the federal courts here, a lot of things did surprise me. There are differences in the rules at both the tribunals from the Federal Rules of Criminal Procedure under which we operate here.

But I think that if we are ever to be involved in any of these international courts, tribunals of any sort, we must recognize first, we're never going to be able to replicate exactly our system. I mean the jury system, while I think extremely highly of it, is not a system, which is practiced in most parts of the world, and I think most of us would not say, you can't get justice in this country, in France, or Italy and Germany because they don't have a jury.

I think what I came to grips was drawing deep down on what I thought were the most basic fundamentals to a fair trial, and I do believe that those are in place in the rules. All the rules basically of the European Convention on Human Rights, as far as the rights of the accused, not a jury trial but all kinds of rights to prevent the defense to be informed of the charges against you, rights to counsel, guilt beyond a reasonable doubt, rights to appeal, et cetera, are there.

Now, I do think, in answer to Mr. Hammond, I would give way to nobody in the fact that I griped continually about the fact none of these institutions will work without good people. Our own courts don't work unless we get good people into them as you legislators are fully aware of your responsibility in part, at least the Senate's responsibility in part about that.

The same is true over there. There has to be a high level of concern about who the prosecutors are, who the judges are, and who are all of the aides. There's no getting away from that. That to me is the only answer that I know of as to whether a particular indictment isn't as good as it should be, the same way as it is in our own country. And hopefully with experience, and I think even in the two years I was over there, with the griping of people like me, things did get better. People did concentrate maybe a little bit more on certain aspects of it.

But I think that due process is a term, which we must realize we have to define the most basic parts of. We can't have every one of our 150 Rules of Federal Criminal Procedure exported in toto.

HYDE: Well, I agree with you Judge Wald, but I also wonder what you do with those annoying words, "no person shall be deprived of life, liberty or property without due process of law?" Now those are wonderful words. They make a promise to every person in the United States of the United States, and to leave that to a Syrian court or a Bangladesh interpretation of due process with different culture, different history, different traditions, different everything, I don't know how you reconcile a guarantee of due process under our Constitution.

WALD: I - I'm sorry.

HYDE: No, go ahead. No, that's all right.

WALD: Well, one answer for one thing to a certain degree you can never get an absolute guarantee from any risk. Two things, one if an American citizen or even an American serviceman goes to some foreign country and allegedly commits a crime there, OK. He's going to be tried by that foreign government and is going to be tried according to the rights that are given by that foreign government. And I do have to tell you that for 10 years I traveled extensively in that part of the world myself on behalf of the American Bar Association, before I went on to the International Court.

So, I have been in many of those national courts, and I would tell you that frankly, were some member of my family to be caught in such a predicament, I would much prefer that he or she be tried at The Hague than in several of the courts that I went to there.

The second thing is due process, we all know is a term that has evolved and been interpreted many, many ways. We extradite people to foreign on occasion. We certainly have the structure in place in our own government to extradite people, American citizens, to be tried in foreign countries, which have different systems.

So, I'm just saying that I think that there are traditionally some exceptions to the notion that our down home version of due process, which I still think is the best in the world, make no mistake, but that it simply can't be replicated in every single circumstance, though we do have the right, we do have the right to demand that the basic elements of fair trial be in any international tribunal, which we support.

HYDE: Very well. I think we can go on and on and on. This is an utterly fascinating and consequential issue, and may be an imminent issue. But Mr. Smith has asked if he might ask one more question, and so with modest reluctance, I recognize Mr. Smith.

SMITH: Thank you, Mr. Chairman. Judge Wald, let me just ask you.

WALD: Sure.

SMITH: A few days ago, I met with President Kostunica, and pressed him to be more cooperative. Obviously, conditionality of U.S. foreign aid is based on whether he cooperates or does not cooperate with aid, and if he does, the money will flow, but also as a matter of establishing his government and moving it forward in the direction of democracy. And you pointed out the reluctance of some to homeland heroes, as I think you called them in your testimony.

WALD: Yes.

SMITH: To cooperate and I think that may still indeed exist in Serbia or Yugoslavia. But he did raise the criticism, as did others, the speaker met with him and I hear this in Belgrade, that some of the defendants in The Hague spend an inordinate amount of time awaiting trial. We know that speedy trial is sometimes a euphemism, but hopefully there is an effort to do so. Could you shed some light on that problem?

WALD: Sure.

SMITH: How long are these people waiting? Go ahead, please.

WALD: Right. A lot of the criticisms, which have been voiced today, vis-a-vis, "rights of defendants," I honestly think is the most serious one and I'll tell you what I know about it. I don't have the exact figures, but my impression and I think is fairly accurate, is that when I left the tribunal in November, most defendants who were on trial had been in detention for between two and two and a half years.

Now, a special case like Milosevic kind of got put up at the head of the line, but the rest of them had been there for approximately that period. In Rwanda, I think it's even longer. Now this was a concern of the tribunal, and let me tell you very rapidly what's being done to try to bring that period down; and two, why I think inherently, trials are going to take longer over there no matter what we do.

First of all, the U.N. did provide for a core of 29 ad Litem judges in the last two years. Ad Litem judges means they just go over there for a couple of trials. They don't get a regular long-term, but they are able to sit on the trials, and as you know the trials are done by panels of three judges, so they make up the three judges.

So right now, the tribunal couldn't operate any more trials than it is, because there are only three courtrooms, and these courtrooms have to be high tech courtrooms, because you have simultaneously everything going in three languages, Bosnian, Croat, French and English, including the witnesses, the prosecutors, the judges, et cetera, so that you now have, my understanding is, six trials going, one in the afternoon and one in the morning.

The president of the tribunal, if I remember correctly, believes that anybody who was in, or has scheduled it so that anybody who was in detention about the time I left, would begin trial or the immediate pre-trial period getting ready for the trial within 2002. I hope I have that right but that is my memory, because everybody is very worried about this.

I think, I've always said I thought there were some things more, so publicly I thought that care ought to be taken, perhaps more care, to assign experienced managerial trial judges to run complex trials, not to say they may not be fair, but they're going to more, if it's somebody else, that they're going to be more efficient if you have somebody with that kind of background and experience. I'm hoping somebody will pay attention to that.

There are other things, put a lot more emphasis on pre-trial management to bring things down. And the last thing they've done is they have begun to release some defendants provisionally, those that surrendered initially and where the government, and in fact the government has in Serbian Government in the case of Mrs. Plotzic (ph) in the Croatian Government in some other cases where they will absolutely send their representative to the tribunal and guarantee that these people will be supervised in their home territory, and that they will return for trial. So that that practice is beginning to pick up.

Interestingly enough, Madeleine Albright submitted an affidavit in favor of the provisional release of Mrs. Plotsic, who is now provisionally released in Serbia. There is a certain amount of inherently longer time it takes for trial of these cases. The translation itself, just what I've emphasized, every word, every direct question, cross-examination, can raise the time up to 50 percent. The trials are very complex, and witnesses have to come from a long way.

HYDE: Your idea of plea bargaining . . .

(CROSSTALK)

WALD: A very interesting question. Everybody thinks probably there's a little plea bargaining going behind the scenes, but there's no regularized system of plea bargaining akin to ours, which as we all know, accounts for 95 plus percent of all of the convictions that take place in the country.

I have said publicly that I thought that in order to reduce the backlog, especially for the mid or lower level defendants, a rational, transparent system of plea bargaining might make a great deal of sense to finish things up quickly for some of the less notorious. And I know that we have had some guilty pleas and you know, evidence would suggest, though I'm not in the prosecutor's office, that some bargaining must have taken place in order to bring them about. I think it's a sensible suggestion. I hope they'll give thought to it.

HYDE: Thank you. Mr. Payne, do you have any questions, or have we exhausted your curiosity?

PAYNE: No, I've probably exhausted yours, but I do have a question, and I will keep it within the five-minute limit.

LANTOS: Will my friend yield for a unanimous consent?

PAYNE: I certainly will.

LANTOS: Mr. Chairman, I ask unanimous consent that the written testimonies of Louis Mushikiwabo (ph) an expert on international criminal tribunal for Rwanda, and David Folting (ph), chair of the international criminal law committee of the American Bar Association be made part of the record.

HYDE: Without objection, so ordered.

LANTOS: Thank you.

HYDE: Mr. Payne.

PAYNE: Yes thank you, Mr. Chairman, and I certainly listened to your testimony and serving to the response of the professor, I have a question though, professor. I looked at your testimony, and you mentioned that we didn't press Saudi Arabia to extradite Idi Amin, the Butcher of Uganda, and we didn't press the French to extradite, former Haitian dictator Jean-Claude Duvalier, and therefore I guess we were sort of - and that was wrong.

I mean, in your opinion, what do you think? Do you think that we should have done that? And secondly - maybe my question more gets into, you seem to sort of - I'm trying to maybe paraphrase. What I got is that it's almost like a (inaudible) attitude. We, you know, problems all around. We should not really impose on other countries. The world is big and so, whatever happens somewhere happens. I mean, what - could you kind of clarify your stand?

RABKIN: Yes. What you said at the end was very appealing to me. The world is big and we're not in charge of it. I do think there's some really exceptional circumstances where something is going on that's so horrifying that, of course, we're concerned, and then we have to think what can we do? What will be the consequences and the costs of our doing this? And, we have to make a political calculation, and one of the things which really bothers me about these tribunals, is it is a way of pretending that there is no real serious, political responsibility to figure out what to do, what will be the cost and what will be the consequences. And I think in that way, this is really symptomatic of the 1990s, in which not just the Clinton Administration, but I think much of the world said, "the Cold War is over, the Iron Curtain has come down, now relax."

And then we look up and we see actually there is horrible bloodletting in the Balkans. There's genocide in Rwanda. And instead of thinking in a real focused, serious way, what are we prepared to do about it? What actually can we do about it? What will be the cost? What will be the consequences? We say, "oh, this is a problem for international justice. Let's send in some lawyers," and that's not a serious response.

And I'm not saying this is criticism of Judge Wald, but to ask a judge to come in and review how many prosecutions were there, how many convictions were there, how many appeals? That's not a serious response to policy. I'm sure that if not this committee, some other committee has had a lot of hearings about the war on drugs, or the war on terror, or some other thing that we call a war, and we would not be satisfied with a judge saying, "well, there's been a bunch of prosecutions or there's been a bunch of convictions."

We'd want to know what's actually happening. What's actually happening? Have we stopped the flow of drugs? Have we diminished the number of terrorist attacks? And, of course, you'd want to know what's actually happening in these countries. Are we strengthening democracy in the Balkans? And I don't know. I'm not pretending I'm an expert. What's actually happening in Rwanda? Are we helping to push forward national reconciliation? I know that sounds absurd when there's been genocide, but the fact is these people have to live with each other.

So, what's happening there? And the answer is, I don't know but it doesn't seem to be the responsibility of this tribunal even to think about it, and what that reflects is our government doesn't want to think about it, so we hand it off to a bunch of lawyers and we say, "hey, treat it legalistically" and that is a little bit crazy. It's a very, very exceptional circumstance in which we would be intervening in another country, and before we do it, we ought to think about what do we want to achieve and, as I said, what are the costs, what are the consequences?

We shouldn't be legalistic about it, and we sure shouldn't be delegating it to international lawyers. Nothing against people studying international law, but what I mean is people who aren't under our control. We have a lot of resources. We have a lot of leverage, a lot of influence. Let's think about what are we doing with it. Instead of that, we say, "well, there's a bunch of guys in The Hague and they're on top of it." Really? Who are they? How could they be on top of it? What are we talking about? So, I think it's fundamentally unserious and that's what bothers me.

PAYNE: But you do - I'm trying also to find out, do you feel that it's the responsibility of the world, and when we talk about the world, it's kind of a big place. What I'm trying to - you see if there's no justice, if there's no law, if there's no one to try to keep some sort of peace or tranquility in the world, and then the world gets off and we have horrible situations.

I'm a firm believer that we should step in when we, the U.S., the U.N., it really is just one super economy. I mean we are the world, make no mistake about that. But it seems to me that it would be like, maybe Washington, D.C. without a police force, what would happen? I don't know, or, Appalachia, West Virginia. There's got to be some law, someone to say, "you just can't go and kill 4,000 women because you don't like their religion," a million people in Rwanda, and someone - and I think that we have, we are the world's power.

We have 30 percent of its - we got 30 percent of its resources, so at least we're a third of the power of everybody else put together through a vehicle like the U.N. or international courts of justice. Maybe they're too weak. Maybe they should be strengthened. But there's got to be someone to say enough is enough.

RABKIN: Could I just . . .

PAYNE: Yes.

RABKIN: . . . say this one thing. Just in the last few seconds you were saying, well it would be as if there were no police, and policing is the part to focus on, because the court is just - it's nice afterwards you have a trial. But the crucial thing is the policing. We aren't serious about the policing for very, very good reasons, because you know, boy that's a bit commitment to make. And also, when we think about countries in the future, do we want to police Afghanistan right now? And the answer is, well no not really.

OK, if you're not serious enough to be policing, then you should ask yourself what business do you have judging? And just one last quick thing.

PAYNE: Go ahead.

RABKIN: I mean this is what everyone misses about Nuremberg. We didn't say in Nuremberg, "well, we'll set up a court and then go home." We were policing it. We were controlling it. We were actually in charge because we were real, real serious about saying "we are going to control this situation now." If we are not willing to control, we ought to be very, very cautious about letting some lawyers have the decisive say.

PAYNE: I knew we would agree on something if you talked enough. I think we then see eye-to-eye that perhaps the after-the-fact situation about sending in some judges and few prosecutors is sort of just a little bit too little too late.

RABKIN: Absolutely.

PAYNE: And Rwanda, a million people could have been saved . . .

RABKIN: Right.

PAYNE: . . . the small contingent of U.N. forces were not suggested to leave, but to have been reinforced. But there was reluctance on the part of the U.N. to have more forces there because the U.S. was a billion dollars behind in paying the dues for peacekeeping of our assessment, and they said, "We don't like the formula. We don't like to pay a third of peacekeeping. The cost is too much. We're behind in the dues."

So the U.N. that has to respond to dues paying countries and our responsibility for peacekeeping was about a third, 30 percent, went down to 25 percent. Now I think we're down to 20. They had no money and so the dollars were the overriding factor of not having peacekeepers in Rwanda or the few there that they went through.

In other words, so I agree that I think that there has to be a world police force that should be trained, that should go in, that should not only try to keep peace, but to make peace if it's necessary, if you've got a million people being slaughtered as on television, as we saw rivers, you know, banked up because of not of beavers diving trees and they're clogging up the waterways, but the bodies couldn't float anymore and so you had the dam's water backing up because 700, 800,000 bodies were thrown around.

I mean there's got to be some way that the world has to know that enough is enough. We will go in there. We'll straighten it up, whoever the we are. We've got the U.N. in New York. Someone has to be the policeman, and I think that we're derelict in our responsibility when we don't support a strong operation of doing justice.

We - President Bush said, no longer will the weak countries be overrun by the (inaudible). The little countries, and so - but that never happened.

RABKIN: I'll go you one better. We didn't need the U.N. We could have done this ourselves, and I think the fundamental thing was not the money. I think the fundamental thing was, we just had this bad experience in Somalia, where some Americans got dragged through the streets and everyone was upset, and the Clinton Administration was saying, "oh no, not that. We don't want to be involved in Africa, and we don't want anyone else involved either because then we might get dragged in." And I think that that in retrospect was horrible misjudgment.

PAYNE: Absolutely.

RABKIN: A shame and a disgrace to the United States. But, let's again be clear. The world is a big place. There are a lot of other people with guns. We may be the last remaining super power. That doesn't mean we have the capacity, let alone the commitment, to take responsibility for the whole world, so we've got to think somewhat cautiously and carefully about what are we prepared to do and when?

And I keep saying over and over, I mean you're not going to get out of that by handing it off to somebody in The Hague, and I don't think you're going to get out of it by handing it to someone in New York at the U.N. I mean very quickly, this is going to come down to what is the United States prepared to do, and then we got to think about it. It's not automatic and it's not simple.

WALD: Could I add one partial answer?

HYDE: Please.

WALD: I don't want to go away from the hearing leaving the impression that, at least I agree with Professor Rabkin that these courts are just an excuse for not doing something more serious. It may be that occasionally that is true, but I do think that the United States has gone around the world preaching, rightfully so because I've also done it myself, the Rule of Law. The rule of law is something that's not just our province to have, but it's something we want to see in the infrastructure of all other countries.

So I think that regardless of whether or not we conquered the country as we did before the Nuremberg trials, or whether we have not yet done that, the notion that terrible, terrible injustices and violation of international law and war crimes can happen with no vindication anyplace. I think that that is a separately justifiable reason for having these courts.

I'm not suggested there aren't cases we should have gone militarily when we didn't or anything else. But I don't agree with Professor Rabkin that every time you look at a court you say, "are they just sending some lawyers and a few judges, you know to fool around until we decide whether we're going to take it seriously enough to send in the soldiers?"

You had only to see those thousands of witnesses, who had been the victims of many of these crimes, and they longed not to - the war was over, but they longed desperately for some sense of vindication someplace.

PAYNE: And Mr. Smith, I'll conclude. But I agree that if Mobutu (ph) knew that he would have to go to trial somewhere for stealing \$10 billion of an impoverished country, maybe he would have thought twice about it. There has to be some way to step in and to eliminate these people. Sierra Leone, it should not go by the way that people who allowed hands to be chopped off to show that they're difficult and tough people in the army, and that the citizens are under control. If there was some trial that people had to pay the penalty, then maybe they would think more about that, and I do know there was a high cost to things, as the professor mentioned.

But you know we in the last budget next to next year's budget, we're spending every 24 hours, every time your heart beats 24 hours, \$1,100,000,000 a day for military and defense and homeland security, \$1,100,000,000. That's just this year. Wait until we put the \$40 billion more in there next year. It's going to be about \$1,300,000,000 every single day. I mean not prescription drug plans, not housing, not education, schools to be built, and we got to be protected and we got to have a secure homeland. But we're going to spend \$1,100,000,000 every 24 hours every day, 365 every year, and that's the low ball this year. Wait until next year.

So you know, and I just think that with that, we ought to be able to train someone else if we don't want to go in. But I agree and I do, and I've been to the courts and I think they do serve a very useful purpose and I think that they in very difficult situations, have done an outstanding job, even in Rwanda where it has been very slow. And so, I guess I better yield back. Mr. Smith treats me better; he's from New Jersey, than Mr. Hyde does. But I will not take advantage of the Jersey time. I'll yield back the balance of my time. Thank you.

SMITH: Just for the record, Mr. Payne and I, I chaired the International Ops Committee for six years, and we had many, many human rights hearings, including on Rwanda. We had the (inaudible) hearings, when we talked about that infamous fact that had been sent, and in fact it was not acted upon by then head of peacekeeping for the United Nations, Kofi Annan, or his staff, and a preventable tragedy unfortunately became one of the most horrific events in history. And one of the things we very often ended up doing was finishing up hearings, he and I, an hour after everyone else had left.

So, I just have a couple of final questions, and your remarks and your insights are very useful to the committee and we thank you deeply. As a matter of fact, Judge Wald, one of the hearings that we did have was on Srebrenica, and we had a series of hearings and brought in survivors, brought in the actual person who did the translation services who lost his entire family. And I do think that, you know, we can't make right what was done, no doubt about it. The safe enclaves were anything but safe. They became an area where people were mustered and brought together for further exploitation and killing.

So, but my one question is ad hoc versus permanent and I know, Mr. Chairman, you mentioned that you're not necessarily against the Rome statute. But it seems to me that there are inherent weaknesses in having a systematized, ever present with prosecutors who are constantly hailing from countries, as we've seen at the U.N. human rights meetings that go on in Geneva.

I've been there, been there a number of times, where you have people sitting in judgment, looking for ways to put monkey wrenches into the process so that their collective human rights abuses will not be exposed or held accountable. It seems to me the same countries coughing up and offering, proffering prosecutors as well as judges, we run into the same problem. Ad hoc might have a better track record I would think, because we've seen the longer that we get something institutionalized, the more likely it is to be compromised in the long run.

SMITH: At least that's my belief, and you might want to respond to that. But I would like to ask a very specific question with regards to allocation of resources. As we know, the ICTR will spend almost \$90 million per year. It will dispose of about 150 to 200 alleged cases of genocide.

The government of Rwanda, by contrast, has a budget last year of less than \$6 million to try something on the order of 110,000 to 115,000 genocide suspects that are held in its jails. As a matter of fact, we spend

more on defense counsel, and I'm for that. I believe like Mr. Hyde, Chairman Hyde pointed out, people are entitled to due process rights.

But when you talk about the allocation of resources, we're not doing enough, I don't think as a country, as are others, to help Rwanda. What's your sense on that? It seems to me that those 115,000 folks are not going to get, nor are those who lost loved ones, the kind of justice they're looking for in Rwanda.

HAMMOND: Mr. Smith, let me respond to the first part of your question and I'll leave the budget questions to Judge Wald. The question is whether we have an ad hoc or a permanent tribunal raises in my mind a very important question. Do you have, and by you I mean the United States Government as an example, do you have the commitment to follow through?

To me, that's a major issue with every one of these tribunals and an advantage of having an ad hoc tribunal is that you can ask that question in a focused way. You can say to the American Government, "if we're going to have an ad hoc tribunal at The Hague, for instance, are we committed, sincerely committed to doing the things that you have to do when it's your tribunal, most pointedly providing information?"

When someone is indicted, for all the reasons we talked about today, there's a high premium on getting it right, not only so that we don't convict the innocent, but so that we don't wind up having a tribunal that loses respect. So in order to do that, one thing that has to happen is that people have to cooperate, and our government has to cooperate, if we're going to assure fair trials when there is American information available as there is in the case I talked about earlier, tremendous amounts of information available from the American Government.

We ought to be willing to say, "we will make that information available" so somebody can get a fair trial. It's harder and I understand it's harder to ask the American Government to do that across the board. It's hard to say, "we're going to provide information that may deal with sources and methods, or maybe in some other way privileged in any case that comes along" and I can appreciate that. So there's a good reason to have a more focused tribunal.

But whatever you do, when we decide in the name of international justice to prosecute someone, we ought to have the backbone to stand behind that, and if that means producing information and producing witnesses, I've heard all of this talk about what a terrible thing it would be if American political figures had to go testify. Why is that?

There's no reason why we should be ashamed or afraid to have our witnesses go and testify. It's not an indignity. People testify all the time, and if they have relevant information, it ought to be heard, and if we're not prepared to do that, then we shouldn't be convicting these people.

SMITH: Thank you.

RABKIN: Can I just add one thing?

HYDE: Yes.

RABKIN: I think it's fine if they testify. I think it's fine if President Clinton testifies. He's got a lot to testify about, I think. It's not OK to have him indicted by an international tribunal. And I just say this descriptively, I believe most of the American population would be outraged and there would be immense pressure on the United States government to resist and international trial of a top American official. Look that in the face and then say, "how are we imposing this on other people?" And that is very awkward and a serious problem.

HYDE: Judge Wald.

WALD: Two very brief remarks. One, in terms of the ad hoc versus the full time, as you pointed out one, at least theoretical advantage of a regular one is you will not have all of the startup costs, all of the startup, not necessarily mistakes, but all of the trial and error kind of business.

Another one will be the prioritization because the prosecutor and the tribunal, and I will point out something here that for what little I know, and I'm not an expert on the proposed ICC, but what little I know, the tribunal itself, the judges have more control over whether an indictment goes forward than they do in either of these two ad hoc tribunals.

In both of these ad hoc tribunals, which we presently have, it is the prosecutor's call, pure and simple, unless the judge says, "you don't have enough evidence to make out a prima facie case."

In the ICC, the tribunal will more power about saying whether to go ahead with the prosecution or not, and the prosecutor in the tribunal will have to prioritize from all around the world insofar as charges on aid. They're going to have to say, well this is more important to go than this. We can't do everything, kind of thing. Whereas your example, Professor Rabkin, comparing this process to the special prosecutor in the United States, one of the criticisms, and I won't say whether I agree it or not, one of the criticisms of the special prosecutor was, "gee, if you say you're a special prosecutor for John Doe, boy you're going to work hard to find out something against John Doe."

A little bit of that has, on occasion, been used as a basis of criticism for the tribunals, especially in the middle and lower level, when they didn't have enough big fish that they'd actually apprehended. That would, I think, be less so in an international criminal tribunal.

The only other point I want to make is that the ICC, as I understand it, will have something that neither of these tribunals have and which I think is a good idea and that is the principle of complementarity (ph). I'm not sure I pronounced it correctly. In both of the tribunals now, the tribunal once it has jurisdiction of something, has the primary jurisdiction on it. It can even take something away, although in our case, it's only done it once from a local or national tribunal. But it has priority.

Now in the proposed, not proposed but the ICC, which will come in operation as I understand it in a few months, that is not so in that the tribunal will get jurisdiction only if it can show or it can be demonstrated that the national country, which would normally have the jurisdiction to prosecute this crime, is either unwilling or its infrastructure is so palpably bad that people couldn't trust it to do it. I doubt that second would ever be found to apply to the United States.

SMITH: Again, on the allocation of resources, does anybody want to touch on that, I mean.

WALD: I just don't know Rwanda. I mean, if I spoke from -

SMITH: You said that earlier.

WALD: Yes, if I spoke from the ICTY, I'd say yes if you sent me in there to be an inspector general or something, sure I would find some places where I think you could cut personnel or whether you could speed this up.

SMITH: Or ratchet up on the other end.

WALD: Yes. Yes. You're right.

RABKIN: Could I just make one response to that?

HYDE: Yes.

RABKIN: It's very awkward if you have an international tribunal to say, "well Rwanda's a different place, so we're going to have a different standard." It would have been extremely appropriate for Rwanda to say,

"we are a different place, so we're going to have a different standard" and that's one of my big concerns about this. I mean the international community, which did nothing to protect people while the genocide was going on then turns around and say, "oh, we're going to do the trials for you" and they do it in a very expensive way, and a very formalistic way, and a way that actually impedes justice there.

I mean the question we ought to be asking is not, is it costing too much money? I think the money is not ever - this is all just such small potatoes compared to our defense budget. Mr. Payne, I totally agree with you on that. I mean when I say costs, I mean the political costs, the costs in terms of our policy, and in those terms, we're not making people better off in Rwanda.

Just what the cost of having international tribunals there, it seems to me from the outside, I don't claim to be an expert, but the cost there is not dollars wasted. Forget that. The cost is that here is a country with literally gaping wounds, and we just perpetuate that year after year after year to satisfy our outsider standard of how justice should be done and that's not helpful to them. If it is not helpful to them, who are we trying to help?

HYDE: Would any of you like to add anything before we conclude? Thank you for your very extensive insights that you provided to the committee, and without any further ado, Mr. Payne, the hearing is adjourned.

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