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# Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals

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# SHARPENING THE CUTTING EDGE OF INTERNATIONAL HUMAN RIGHTS LAW: UNRESOLVED ISSUES OF WAR CRIMES TRIBUNALS

DANIEL KANSTROOM\*

**Abstract:** International criminal tribunals have emerged as the most tangible and well-known mechanism for seeking justice in the wake of atrocious human rights violations. As the enterprise has developed, the need to ask fundamental questions is obvious, compelling, and essential. In March, 2006, the Boston College International and Comparative Law Review, together with The Center for Human Rights and International Justice at Boston College and the Owen M. Kupferschmid Holocaust/Human Rights Project convened a diverse and impressive group of speakers from academia, the judiciary, and legal practice to evaluate: the development of “common law” of the tribunals, the function and limits of tribunals, and the state of legal concepts not clearly governed by international law. Much of the extended conversation of that day is contained in this published version, comprising seven articles. From the participants’ insights one can discern not only important new ideas and syntheses, but an outline for future research that is grounded in a deep respect for the broad human rights enterprise of which the tribunals are the “cutting edge.”

For better or worse, international criminal tribunals have emerged as the most tangible and well-known mechanism for seeking justice in the wake of atrocious human rights violations. If they accomplish their ostensible goals, international tribunals may render justice to the accused, sustain the rule of law, give voice to victims, promote reconciliation, create a record, empower communities, resolve factual disputes, and ensure that grave war crimes do not go unpunished. They offer tantalizing promises of legitimacy, regularity, and predictability as they work to achieve goals common to all systems of criminal law—just pun-

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\* Clinical Professor of Law and Director, International Human Rights Program, Boston College Law School. This article is an overview of the articles published in this issue that were based on speeches and panel discussions presented at “Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals,” a symposium on war crimes tribunals at the Boston College Law School on March 24, 2006.

ishment, deterrence, incapacitation of the dangerous, and rehabilitation.<sup>1</sup>

But criminal law is a blunt instrument at best, even in domestic legal systems. Its purposes are difficult to synthesize and therefore its achievements are elusive to evaluate.<sup>2</sup> No single normative theory works to justify all criminal doctrines, nor should it.<sup>3</sup> In operation, criminal law often masks complicated interpretive constructs.<sup>4</sup> Those who practice criminal law, as I did for many years, repeatedly see the wisdom of the maxim that when one's only tool is a hammer, all problems tend to look like nails.<sup>5</sup>

Following the death of Slobodan Milosevic in custody and mid-trial at the Hague and the grotesque spectacles of Saddam Hussein first mocking the criminal justice system he faced and then being taunted by his executioners as he faced the gallows, the need to ask hard, fundamental questions about the current state of war crimes tribunals is obvious. Moreover, as the enterprise has developed through the prodigious efforts of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC), and many other tribunals, a welter of more specific legal questions have arisen.

In March, 2006, the Boston College International and Comparative Law Review, together with The Center for Human Rights and International Justice at Boston College and the Owen M. Kupferschmid Holocaust/Human Rights Project, convened a diverse and impressive group of speakers from academia, the judiciary, and legal practice to evaluate the following related issues:

1. **The development of “common law” of the tribunals:** How might various legal standards at different tribunals be reconciled and evaluated? How much uniformity should be sought? What are

<sup>1</sup> Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 19 (1988).

<sup>2</sup> See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401 (1958) (“Examination of the purposes commonly suggested for the criminal law will show that each of them is complex and that none may be thought of as wholly excluding the others . . . . The problem, accordingly, is one of the priority and relationship of purposes as well as of their legitimacy . . . .”).

<sup>3</sup> Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350 (1996).

<sup>4</sup> See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>5</sup> So far as I am aware, the exact origins of this formulation are unclear. It is frequently attributed—without precise citation—to Mark Twain and, more recently, to Abraham Maslow.

the implications of such “common law” development for international human rights law more generally?

**2. The function and limits of the tribunals:** What are the optimal purposes of trials when massive human rights abuses have destroyed a community or indeed an entire country? How have the tribunals measured up in that regard? How does one reconcile forensic legal practice with the needs of victims? What multi-disciplinary models can be developed to move international criminal practice towards a more holistic approach?

**3. The state of legal concepts not clearly governed by international law:** What are the professional ethical standards that govern the tribunals? What is the law of competency, the scope of attorney-client privilege, self-representation, the breadth of the protection against self-incrimination, et cetera?

The results of this Symposium were a series of well-reasoned, deeply-engaged, and lively discussions. Fortunately, much of the extended conversation of that day is contained in this published version. From the participants’ insights one can discern not only important new ideas and syntheses, but an outline for future research that is grounded in a deep respect for the broad human rights enterprise of which the tribunals are the “cutting edge” (an intentional double entendre implying both a surgical and a destructive capacity).

Justice Robert Jackson’s opening statement to the Nuremberg Tribunal offers a good starting point for consideration of these topics. Jackson said, “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”<sup>6</sup> He then focused attention on the fact that, “four great nations, flushed with victory and stung with injury stay[ed] the hand of vengeance and voluntarily submit[ted] their captive enemies to the judgment of the law.”<sup>7</sup> This triumph of law over cruder mechanisms was, he said, “one of the most significant tributes that Power has ever paid to Reason.”<sup>8</sup>

These are surely among the most famous, aspirational, and ringing words ever spoken in a court room or indeed anywhere. They retain

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<sup>6</sup> Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–99 (1947) [hereinafter Jackson, Prosecutor’s Address].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the power to move and inspire me every time I read them. But one might also note an odd similarity between Jackson's phrasing of "Power" paying tribute to "Reason" and that of La Rochefoucauld,<sup>9</sup> who wrote, four centuries earlier, words with which Robert Jackson was surely familiar: "hypocrisy is a tribute that vice pays to virtue."<sup>10</sup>

Jackson was in fact called a hypocrite in his day—not only by Nazis but by believers in the rule of law such as Chief Justice Harlan Fiske Stone, who called Nuremberg "a high-grade lynching party" and, more to our point, said, "I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law . . ."<sup>11</sup> Many others also opposed the Nuremberg idea—Churchill, as is well-known, suggested shooting the captured Nazi leaders. A memo written in support of this proposition was entitled—with classic British understatement—"The Argument for Summary Process Against Hitler & Co."<sup>12</sup>

Is this debate now definitively over? War was famously called the extension of politics by other means by Carl von Clausewitz.<sup>13</sup> War crimes are the illegal extension of war by illegitimate means or to legally-protected people. How do—and how should—international tribunals draw such lines? To what extent do the tribunals embody, reflect, and recreate legitimate law and to what extent do they create new law? Are they a tribute paid by power to reason or a hypocritical homage paid by vice to virtue?

The first panel of the Symposium addressed the question of "*The Development of the Common Law of the Tribunals.*" This undoubtedly seemed an odd title to some. After all, the common law is fundamentally an Anglo-American idea, and even there it is largely anachronistic in the era of the administrative state. Anyone with even a passing knowledge of tribunals as varied as those for the Former Yugoslavia, Sierra Leone, and the ICC would certainly wonder about how much

<sup>9</sup> François VI, duc de La Rochefoucauld, le Prince de Marcillac (1613–80).

<sup>10</sup> "L'hypocrisie est un hommage que le vice rend à la vertu." La Rochefoucauld, François, duc de. *Maxims*, maxim 219, at 43 (Stuart D. Warner and Stéphane Douard eds., 2001) (translation by author).

<sup>11</sup> ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 716 (1956).

<sup>12</sup> Great Britain Pub. Records Office (PRO), Kew, London: CAB 66/65, W.P. (45) 281, Simon memorandum, War Criminals: Annex B: The Argument for Summary Process against Hitler & Co., May 3, 1945; cited in Gary J. Bass, *International Law: War Crimes and the Limits of Legalism*, 97 MICH. L. REV. 2103, 2103 n.1 (1999).

<sup>13</sup> CARL VON CLAUSEWITZ, *ON WAR* 605 (Michael Howard & Peter Paret trans., 1976) ("We maintain . . . that war is simply a continuation of political intercourse, with the addition of other means.").

common law there is. Indeed, the most famous explication of the common law highlighted the importance of a common history, perhaps even a common sense of nationhood:

The life of the law has not been logic: it has been experience . . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.<sup>14</sup>

What has the law of the tribunals been? What does it tend to become? Which nation's or nations' story does it embody? It was in this broad, legal realist sense that we asked our panelists to explore the "cutting edge" of international human rights law. The hope was that we might be at a point where one could improve upon the candid assessment of one panelist, Pierre Prosper, who had served with great distinction as a prosecutor at the United Nations International Criminal Tribunal for Rwanda. Describing his experiences in Rwanda, Prosper conceded: "We made it up as we went along. We really did."

In her article for this Symposium, Judge Patricia M. Wald,<sup>15</sup> who served for two decades on the United States Court of Appeals for the District of Columbia and then as a judge at the ICTY, notes that the legitimacy of international courts depends in large measure upon their adherence to a complex body of international law. For criminal tribunals, this means an array of treaties, such as the Hague and Geneva Conventions and Protocols, but it also means "customary law." Thus, the development of a common law for the tribunals is both a matter of textual interpretation and a still more amorphous process. Major differences among the tribunals themselves render the process of developing a consistent common law particularly complicated. The Rwanda Tribunal, for example, deals with terrible crimes committed during and after a civil war. The ICC has a much broader mandate and a comprehensive treaty.<sup>16</sup> Judge Wald notes with approval recent

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<sup>14</sup> OLIVER WENDELL HOLMES, JR. *THE COMMON LAW* 1 (1881).

<sup>15</sup> Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT'L & COMP. L. REV. qqq (2007).

<sup>16</sup> Indeed, as Judge Wald notes, Article 21 of the Rome Statute mandates a hierarchy of interpretive sources: the Statute, Elements, and Rules come first; followed by treaties and principles or rules of international law; general principles of law derived from national systems, if not inconsistent with the statute or international principles; and, finally, its own prior decisions. *Id.* at qqq.

attempts to better understand and to systematize customary humanitarian law.<sup>17</sup> At the ICTY, the identification of customary law (or its absence) was significant in matters ranging from the nexus between crimes against humanity and armed conflict to the need for discriminatory intent as an element of all crimes against humanity (not only persecution); and whether duress is a defense to killing innocent civilians or limited to a mitigating factor in punishment. But she also notes that the enterprise has a long way to go. The crux of the dispute involves an issue about which American legal scholars and politicians continually argue: when does a court simply interpret or apply existing law and when does it “legislate” or create new law?

In the second section of her article, Judge Wald analyzes a more subtle, but equally important question: the myriad of less formal rules and practices, beyond formal judgments. Here, the legal realism at the heart of her approach clearly emerges. She notes how sources of “soft” law and practice “have been indispensable to the survival of the ICTY and ICTR, and have been intensively mined by more recently established courts for ‘best practices’ replication.”<sup>18</sup> Indeed, she suggests that prosecutorial norms and guidelines may turn out to be *even more* influential in the overall record of these courts than the jurisprudence.<sup>19</sup> In the end, the problem of how all of this common law may be understood and controlled is a vexing one. As Judge Wald highlights, there can be no doubt that “tribunal law has exploded quantitatively and qualitatively.” But, unlike national courts, international courts are not embedded within a hierarchical judicial system.

At present, for the most part, though one sees many informal routes of convergence, “one court’s jurisprudence must rely on the persuasiveness of its reasoning, supplemented by the critiques of academics and international law scholars, if it is to be picked up by other courts.”<sup>20</sup> As she observes, this pathway is analogous to the transformation of common law into statutory law in the United States. But as the tribunal enterprise devolves in favor of the ICC, one wonders “where the grist for its mill will come from—the percolation process may have

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<sup>17</sup> See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817 (2005).

<sup>18</sup> Wald, *supra* note 15, at qqq.

<sup>19</sup> *Id.* at qqq.

<sup>20</sup> Judge Wald also notes how the ICC drafters “have cherry-picked what seemed to them the best rulings and practices from the earlier courts and discarded those that did not meet their standard.” *See id.*, at qqq.

largely dried up.”<sup>21</sup> Judge Wald offers what I believe is a prescient and important cautionary note about the dangers of a “monopoly jurisprudence.” As she concludes, “academics and court watchers will have to be especially vigilant and productive” to help the ICC fulfill its mission.

As Holmes noted, in order to know what the common law is, we must know what it has been. To this end, the articles by Devin O. Pendas, a historian, and Allan A. Ryan, a lawyer, are especially instructive.<sup>22</sup> Pendas highlights the modern development of the “legalist paradigm,” a term he borrows from Michael Walzer and upon which he elaborates in subtle and important ways. Pendas argues that the emergence of a “full legalist paradigm” following World War II fundamentally transformed the relationship between law and war. But why, he asks, did it suddenly make sense to think about the conduct of war as a potentially criminal enterprise *that could actually be prosecuted*? His answer is that the development was not, as some have assumed, an apotheosis of human rights reasoning in the wake of the Holocaust, but was also largely a response to the “breakdown of a long-standing civilizational consensus among European Elites.”<sup>23</sup> As Pendas writes, this civilizational consensus, “rested on the assumption that there was an intrinsic connection between the nation-state form—defined legally by the doctrine of sovereignty . . . and the practice and protection of ‘civilized’ norms of both internal and international conduct.”<sup>24</sup> Outside of this consensus was “barbarism,” a frequently racialized concept, seen to be an attribute primarily of pre-state peoples.<sup>25</sup> International law primarily governed the relationships between, but not within, “civilized” nation-states.<sup>26</sup> This ideal of civilization “delimited what it was that the international law of war needed to regulate. . . . Far from there being any provision for dealing with the reciprocal entanglement of state and individual criminality, there was a radical disjuncture between the two.”<sup>27</sup>

The post-World War II “legalist paradigm” was clearly different. Pendas is skeptical that it was solely the revelation of the Holocaust that

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<sup>21</sup> *Id.* at qqq.

<sup>22</sup> Devin Pendas, “*The Magical Scent of the Savage*”: *Colonial Violence, The Crisis of Civilization, and the Origins of the Legalist Paradigm of War*, 30 B.C. INT’L & COMP. L. REV. qqq (2007); Allan A. Ryan, *Nuremberg’s Contributions to International Law*, 30 B.C. INT’L & COMP. L. REV. qqq (2007).

<sup>23</sup> Pendas, *supra* note 22, at qqq.

<sup>24</sup> *Id.* at qqq.

<sup>25</sup> See generally ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998).

<sup>26</sup> Pendas, *supra* note 22, at qqq.

<sup>27</sup> *Id.* at qqq.

led to Nuremberg.<sup>28</sup> For one thing, “while the Holocaust was hardly ignored completely at Nuremberg or in the successor trials, it was hardly central either.”<sup>29</sup> Second, the new legalist paradigm also supported a series of trials conducted in East Asia.<sup>30</sup> Thus, he concludes, the 1945 legalist paradigm was not a uniquely European phenomenon, and did not originate solely in the experience of Nazi genocide.

Nor can it simply be described as a product of the rise of a universalist human rights culture in opposition to strong notions of state sovereignty. As Pendas notes, “a doctrine as venerable and self-interested as state sovereignty does not succumb easily.”<sup>31</sup> The Holocaust, he argues, culminated thirty years of European crisis. German “barbarism” seemed to vindicate the worst assessments of pessimists ranging from Conrad to Spengler. Civilization seemed to provide an inadequate moral check on sovereign states, even “civilized” ones. This insight provides a unique gloss on Jackson’s invocation of “wrongs which we seek to condemn” because “civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”<sup>32</sup> Thus, Pendas, notes, “Even when the Holocaust was used to justify the emerging legalist paradigm after World War II, what was relevant was not the killing but the ‘civilized’ status of the killers.”<sup>33</sup> The horrors experienced from 1914 to 1945 taught Europeans “lessons they had hitherto been unwilling to learn from their own conduct of colonial wars around the world” about the brutal capacity of the modern nation-state to violate human rights on a massive scale.<sup>34</sup> As Pendas (rather challengingly) concludes, “the legalist paradigm of war . . . emerged as a mode of redemption . . . little less than [a] last-chance gamble on the durability of civilization in the face of its own undeniable barbaric tendencies.”

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<sup>28</sup> He notes that “the unprecedented character of Nazi atrocities made anything less than an unprecedented response seem trivial and inadequate.” *Id.* at qqq.

<sup>29</sup> *Id.* at qqq (citing Michael R. Marrus, *The Holocaust at Nuremberg*, in 26 YAD VASHEM STUDIES 4–45 (David Silberklang ed., 1998)).

<sup>30</sup> *Id.* at qqq (citing generally Timothy P. Maga, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS (2001); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951 (1979); RICHARD H. MINEAR, VICTOR’S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971)).

<sup>31</sup> Pendas, *supra* note 22, at qqq.

<sup>32</sup> Jackson, Prosecutor’s Address, *supra* note 8, at 98–99.

<sup>33</sup> Pendas, *supra* note 22, at qqq.

<sup>34</sup> See, e.g., Helmut Walser Smith, *The Talk of Genocide, the Rhetoric of Miscegenation: Notes on Debates in the German Reichstag Concerning Southwest Africa, 1904–1914*, in THE IMPERIALIST IMAGINATION: GERMAN COLONIALISM AND ITS LEGACY 107–23 (Sara Friedrichsmeyer et al. eds., 1998).

Allan Ryan highlights the legal importance of the Nuremberg precedent that under-girds the current tribunals. The importance of Nuremberg, he writes, “lies chiefly in what the process ordained.”<sup>35</sup> As “the first true trial for violations of human rights,” Nuremberg served “as the bridge from the traditional law of war to the law of human rights that marked the latter half of the twentieth century.”<sup>36</sup> Thus, suggests Ryan, Nuremberg “changed forever the presumptions of national sovereignty, individual responsibility, and personal accountability that had underlain international law since the rise of nation-states three centuries before.”<sup>37</sup>

Ryan highlights the major features of the Nuremberg model: the Charter of the Tribunal explicitly held individuals, including the leaders of an enemy nation, accountable under international law for their actions; it defined a new category of crime—“crimes against humanity”—to overcome traditional limitations of international law; and it governed crimes that Germany had taken against its own citizens—an arena that hitherto was widely considered beyond the reach of international law.<sup>38</sup> It took half a century for the Nuremberg precedent to be much more than an isolated episode. With the end of the Cold War, however, the United Nations focused on the horrors of Yugoslavia and Rwanda, and attention turned to Nuremberg for its model. Ryan’s article highlights the fact that Nuremberg was far from inevitable. Indeed, it arose from an intensely political domestic and international process. As Ryan writes, “There was no precedent, no list of crimes to be charged, no guide as to how four different nations should proceed, and often no consensus on the purpose of the trial or what was to be achieved.”<sup>39</sup> His article thus offers Nuremberg as an *evolutionary* precedent, an exemplar of how tribunal law may develop. Consider the controversy over the proposal to base the trials on conspiracy charges—a uniquely Anglo-American approach that had previously not been thought of as an international crime.<sup>40</sup> Questions about the propriety of conspiracy charges at the tribunals remain quite vital to this day. Similarly, debates over legitimacy and the common law from that period retain relevance. As Ryan notes, many in the U.S. legal community, troubled by the scope and nature of the crimes addressed by Nurem-

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<sup>35</sup> Ryan, *supra* note 22, at qqq.

<sup>36</sup> *Id.* at qqq.

<sup>37</sup> *Id.* at qqq.

<sup>38</sup> *Id.* at qqq.

<sup>39</sup> *Id.* at qqq.

<sup>40</sup> Ryan, *supra* note 22, at qqq.

berg, struggled to adapt existing law to the task of redressing them. As Assistant Secretary of War John J. McCloy, a “driving force for war crimes policy in Stimson’s War Department” put it:

In texture and application, this law will be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel . . . . International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones . . . .<sup>41</sup>

But the rub, of course, is the question of where adaptation ends and innovation begins. When Robert Jackson pushed for novel charges of aggressive war, he recognized this clearly. As Ryan notes, Jackson did not and could not pretend that the trial would be applying well-settled principles. Jackson’s view was much more fluid:

International [l]aw is . . . an outgrowth of treaties or agreements between nations and of accepted customs . . . we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law.<sup>42</sup>

Of course, as Telford Taylor recognized, when it came to prosecuting aggressive launching of a war, the more realistic conclusion was that, “the thing we want to accomplish is not a legal thing but a political thing.”<sup>43</sup> Nevertheless, Ryan concludes that the intensely political Nuremberg process, which was “juridical in its execution,” renovated international law, and may even be said to have, in large measure, created human rights law.<sup>44</sup>

But how well does the criminal model embody the essence of human rights law? What are the functions and limits of tribunals? Donald L. Hafner, a political scientist, and Elizabeth B. L. King, a lawyer, grap-

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<sup>41</sup> Memorandum to Judge Rosenman From Lord Simon (Lord Chancellor) (April 6, 1945), in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945*, at 161 (Bradley F. Smith ed., 1982); see Ryan, *supra* note 22, at qqq.

<sup>42</sup> Robert H. Jackson, *Atrocities and War Crimes: Report from Robert H. Jackson to the President*, 12 DEPARTMENT OF STATE BULLETIN 1071, 1076 (1945); see Ryan, *supra* note 22, at qqq.

<sup>43</sup> Telford Taylor, *An Approach to the Preparation of the Prosecution of Axis Criminality (Early June, 1945)*, in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945*, at 209, 210 (Bradley F. Smith ed., 1982); see Ryan, *supra* note 22, at qqq.

<sup>44</sup> Ryan, *supra* note 22, at qqq.

ple with these questions.<sup>45</sup> They note that “international criminal tribunals alone cannot bear the full burden of doing justice and stitching politics back together. They must be augmented by other mechanisms.”<sup>46</sup> The problem is how to do this without undercutting the efficacy of the tribunals *qua* criminal tribunals. Hafner and King survey potential conflicts that arise from the “complementary roles” of international tribunals and national human rights trials, truth and reconciliation commissions (TRCs), and community-based *gacaca* systems. They do this within the context of a broad vision of the responsibility of tribunals: tasks such as individual or political “healing” are judicial responsibilities and are appropriate for judicial institutions. Therefore, they argue, a proper international tribunal system requires well-planned, carefully calibrated mechanisms able to achieve them. Their article offers valuable insights based on the complicated experience to date of attempts to interweave the international system with various national models.

More specifically, William J. Fenrick, in his well-focused contribution, considers the law that regulates combat activities.<sup>47</sup> He notes that the basic purpose of such international humanitarian law is preventive (i.e., it is designed to be applied in military training, planning, and operations to minimize human suffering and the destruction of civilian targets.) Although prosecution for violations of such law is uncommon, a rather substantial body of law has developed at the ICTY. Fenrick carefully reviews this jurisprudence and argues that it proves that effective prosecution for combat offences can legitimately and productively be conducted before “non-specialist” tribunals.

Finally, participants grappled with the problems of legal concepts that are not clearly governed by international law. Judith McMorrow, a leading scholar of U.S. legal ethics, considered the complex problem of how systems of legal ethics develop at international tribunals.<sup>48</sup> McMorrow provocatively views the international system as an “extraordinary laboratory” in which we can examine how legal cultures interact in the international arena.<sup>49</sup> She carefully examines the ethical dilemmas that

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<sup>45</sup> Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT’L & COMP. L. REV. qqq (2007).

<sup>46</sup> Hafner & King, *supra* note 45, at qqq.

<sup>47</sup> William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT’L & COMP. L. REV. qqq (2007).

<sup>48</sup> Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals*, 30 B.C. INT’L & COMP. L. REV. qqq (2007).

<sup>49</sup> McMorrow, *supra* note 48, at qqq.

arise as tribunals bring together lawyers and judges who have been trained in a variety of legal settings. Offering significant comparative insights, McMorro examines how attorney-conduct norms are created in the United States through such disparate mechanisms as “socialization,” malpractice law, market controls, regulatory processes, and procedural rules. She then compares this fertile (some might say messy) *melange* to the nascent legal practice community emerging at the ICTY. At present, she concludes, judges are the dominant source of “norm creation.”<sup>50</sup> This, she suggests, is because socialization is a weak harmonizing force, malpractice is a non-existent factor, and market controls have little effect. Thus, much norm setting at the ICTY occurs through regulatory processes (e.g., Rules of Conduct) and procedural rules. But, in a conclusion that ought to have important ramifications, McMorro suggests that the development of coherent, meaningful ethical norms at international courts would benefit from more interaction among the judicial, prosecutorial, and defense functions.

Phillip L. Weiner and Susan Somers added important voices of prosecutorial experience to the Symposium.<sup>51</sup> Somers focuses on Rule 11 *bis* at the ICTY, which governs the increasingly important system of referral of cases from the ICTY to national legal systems. This article forms an interesting companion to that of Hafner and King in that it explores exactly how such transfers take place. As Somers notes, referral helps to ensure that “lower and intermediate level” persons indicted by the ICTY for serious violations of international humanitarian law will be brought to justice before the appropriate national court, notwithstanding the time constraints of the ICTY “Completion Strategy.”<sup>52</sup> As her article indicates, many questions remain to be pondered in that realm, including matters of legitimacy, timing, harmonization, and questions of which law should be applied.

Weiner grapples with a rich and complex subject that exemplifies the importance of this Symposium: the question of a defendant’s competency to stand trial. His article recounts the first “competency” hearing that had taken place in an international war crimes tribunal since Nuremberg, that of Major-General Pavle Strugar. Weiner carefully analyzes how the trial court’s decision will provide important precedent for

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<sup>50</sup> *Id.* at qqq.

<sup>51</sup> Susan Somers, *Rule 11 Bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 B.C. INT’L & COMP. L. REV. qqq (2007); Phillip L. Weiner, *Fitness Hearings in War Crimes Cases: From Nuremberg to the Hague*, 30 B.C. INT’L & COMP. L. REV. qqq (2007).

<sup>52</sup> Somers, *supra* note 51, at qqq.

all future war crimes cases and tribunals. He notes how the *Strugar* decision, unlike prior competency decisions at Nuremberg and Tokyo, sets workable standards for determining the fitness of an accused person to stand trial. These standards, he concludes, adequately protect both the rights of the accused and the interests of the prosecution. Thus, Weiner's work exemplifies how complex problems that were not clearly governed by international law evolve and become refined through the jurisprudence of tribunals.

Taken together, the articles in this Symposium exemplify how the developing law of the tribunals may support Robert Jackson's aspiration that power ought to pay tribute to reason. The power is more diffuse now, the reason more nuanced, and the challenges of understanding the relationship between the two are more complicated. Therefore the work published here ranges from the most abstract considerations of legitimacy and the deepest reviews of history to highly detailed, technical analyses from which real law develops. As such, it constitutes a major contribution to the scholarly literature of modern human rights law and, one hopes, will help to enhance that law's quality and to sharpen its cutting edge.