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WAR CRIMES AND THE PROTECTION OF PEACEKEEPING FORCES

by

LIEUT. COL. STEVEN J. LEPPER¹

First of all let me thank Professor DeSaussure and The University of Akron for inviting me to talk to you. What I will try to do in the next fifteen minutes is to condense my experience and the experiences of my colleagues in Washington in the areas of War Crimes Tribunal and Protection of Peacekeepers, both of which are very timely subjects in international criminal law. However, before I do that, let me give the standard government caveat. In no way should my opinions or comments be construed to be the opinions of the Department of Defense and Joint Chiefs of Staff, or even me if they are wrong.

In preparing for this evening, I turned my thoughts back to an event that I think was a key one in my military career – the end of the Cold War. I remember when the Berlin Wall fell down. I was posted in Europe at the time and it was a monumental occasion. It was an occasion that brought about everybody's hope that finally we would have peace; that and the United States and the Soviet Union would no longer have the threat of nuclear weapons aimed at each other. We would be able to set the nuclear alarm clock back. Most Americans were looking forward to investing money traditionally spent in the defense establishment into domestic programs, hoping we would not need the same kind of monolithic defense establishment in the future.

Those were great hopes. Unfortunately the last few years have not been what we all hoped they would be. Since the Cold War ended we have had Desert Storm, Bosnia (still continues to this day), Somalia (remnants of which are still around today), and Haiti. Most recently, we witnessed the massacre of almost one million people in Rwanda. Given these developments, I had to take a step back and think about what the end of the Cold War really means. Although we no longer have nuclear weapons pointed at each other, we continue to have horrendous things happening to people all over the world. This really is not peace.

As I digested these contradictions, I started thinking some more about what really happened in the Cold War and came to the conclusion that it was unreasonable to think that the end of the Cold War would herald peace. During the Cold War we had Vietnam, Grenada, Panama. We had folks like Idi Amin killing his own people. Things have not changed that much, at least in terms of what people are doing to each other around the world. What has

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changed though – a change that is important to understand in context of what I will be talking about this evening – is the fact that the international community now is a bit better prepared to deal with those issues than it used to be.

The best example of this progress is that we no longer have a Security Council that is bogged down in superpower politics with the United States or Soviet Union, opposing each other when either wants to respond to some of the atrocities occurring around the world. Today we have a Security Council that establishes a war crimes tribunal for Bosnia and that last week put together a war crimes tribunal for Rwanda. Things that were not even conceivable during the Cold War are now happening.

Another positive, post-Cold War development is the international community's increased willingness to intervene in conflicts flaring up around the world, to stop genocide in places like Rwanda and Somalia, to reinstall the legitimate government of Haiti, to stop the aggression of people like Saddam Hussein. We are now more willing to respond to these crises more effectively than ever before. This new world order forms the backdrop for the two topics of my talk tonight: war crimes and protection of the people who are now being sent to intervene in the hot spots around the world.

I am sure that most of you are aware of the Nuremburg and Tokyo war crimes tribunals convened by the Allies after World War II. Since then, the world has not engaged in the international prosecution of war crimes or international crimes. Although we have established a number of crimes that are now considered international crimes, we have not really prosecuted anyone in an international forum – that is, until the prospect recently appeared in the form of the Bosnia War Crimes Tribunal.

The Bosnia Tribunal is the first international mechanism since World War II in which the international community can enforce international law. From time to time, various countries have enforced international criminal law themselves. The *Calley* case, for example, involved a U.S. prosecution of a U.S. military member for alleged war crimes. Similarly, Israel prosecuted World War II Nazi war criminal Adolph Eichmann well after the war ended. However, Bosnia and Rwanda now present opportunities for the international community to demonstrate its resolve that international crimes must be addressed by all nations.

I would like to tell you a brief story about how the Bosnia War Crimes Tribunal was established, and to try to fold into that story a discussion of the kinds of issues that arose then and that are also being raised and considered today. Ideas about establishing a tribunal began in 1991 when the world was inundated with stories from the press about the brutality in Bosnia. It was at this time that the United States started reporting to the U.N. Security Council and the Secretary General the kind of atrocities that were occurring. As an

initial step, the United States pressed for the establishment of a commission of experts to look into the atrocities that were being committed in the former Yugoslavia. After it confirmed many of the allegations of ethnic cleansing and other brutality, the United States pressed for an international tribunal. A great deal of credit for this tribunal really goes to Ambassador Madeline Albright, who forcefully encourages her colleagues in the Security Council to accept the proposition that the international community needed to step in and address these atrocities. On May 25, 1993, the U.N. Security Council adopted Resolution 827 establishing the tribunal.

Tonight, I want to briefly discuss three aspects of the tribunal: structure, jurisdiction and U.S. participation in its creation. Many of you are probably aware that the tribunal consists of three chambers. The judicial chamber is comprised of five appellate judges and two trial panels of three judges each. The United States has a judge - Judge Gabrielle Kirk McDonald - who, before she went to the Hague was a federal district court judge and a professor at the Thurgood Marshall School of Law in Houston. I had an opportunity to meet her and brief her on some tribunal issues we in the U.S. government were working on.

Judge Richard Goldstone is the second prosecutor elected to that position. His predecessor was a Venezuelan lawyer who left shortly after his appointment. Judge Goldstone is a very highly regarded South African jurist who earned his reputation for fairness in his investigation of the excesses of apartheid. The international community is fortunate to have his services. He is an independent prosecutor, assisted by a staff of about seventy people, twenty-two of whom are Americans. The U.S. government sent twenty-two government employees to serve the tribunal as investigators and prosecutors. The Department of Defense sent six people over two lawyers, two judge advocates (military lawyers), and six military investigators to assist in the investigation of war crimes. Finally, there is a registry or clerk of court.

The jurisdiction of the tribunal is really interesting. There are several aspects: First, the tribunal's subject matter jurisdiction includes war crimes, crimes against humanity, genocide, and violations of the laws and customs of war. This jurisdiction is a bit broader than Nuremberg's in some respects and a bit narrower in others. As an example of its narrow charter, the crime of aggression is not included in the Bosnia tribunal's subject matter jurisdiction. An example of its broader scope is its jurisdiction over the crime of genocide - a crime defined after World War II.

The second aspect of jurisdiction is the tribunal's personal jurisdiction. The tribunal has the jurisdiction to prosecute any person who planned, instigated, ordered, committed, or otherwise engaged in the planning preparation or execution of a crime within its subject matter jurisdiction. Although supe-

rior orders is not a defense – at least it is not a complete defense – it can be raised to mitigate punishment. There are other interesting issues here that I can go into later if there are any questions. For example, the statute establishing the tribunal also incorporates the principle of command responsibility – the principle that commanders are responsible for the crimes of their troops.

A third aspect of jurisdiction is the tribunal's concurrent jurisdiction. In this regard, the tribunal enjoys a superior/subordinate relationship with individual states. Many of you may have read last week in the national press where the prosecutor, Judge Goldstone, went to the court to the tribunal to ask it to intercede in a war crimes case that was then being prosecuted in Germany. A concentration camp commandant visiting his brother in January last year was arrested and is being held there pending trial in a German court. Under its statute, the tribunal can step in and supersede any national exercise of jurisdiction. That is what it has done here. We may soon see the first tribunal prosecution.

The U.S. Government played a significant role in the establishment of the tribunal. We sent investigation teams over to Bosnia and collected evidence against individuals who were alleged to have committed war crimes. We turned that evidence over to the Commission of Experts, which used much of it for its report. I mentioned earlier our loan of twenty-two U.S. personnel. Finally, one particular contribution that I am personally really proud of is the effort we undertook to draft proposed rules of evidence and procedure for the tribunal.

We recognized very early that regardless of how far this tribunal went, whatever it did, it would set a precedent in international law. In this regard, we were particularly concerned that the tribunal statute left it to the judges to come up with their own rules for procedure and evidence. We were concerned about what kind of rules they would come up with.

The tribunal's judges come from a number of different systems of law, primarily civil law systems. Those of us in uniform were concerned that if whatever they drafted became a precedent, it may someday govern the prosecution of our own people. We therefore undertook a nine month effort to draft some rules that served ultimately as the U.S. government's proposal to the tribunal. I and several other government lawyers went down to see Judge McDonald shortly after her appointment to present her our product. The U.S. Government thereafter submitted our rules to the tribunal in The Hague and it formed the basis for what ultimately became the tribunal's rules of procedures and evidence.

Our forecast that these rules would be of precedent and value was just realized last week. The statute for the Rwanda tribunal basically incorporated without modification the Bosnia tribunal's rules of procedures and evidence.

So we now see this snowball effect, and we suspect that if these prosecutions are successful, perhaps the international community will also look to these tribunals as examples of what permanent international tribunal should look like. The rules of procedure and evidence, which are extremely important as those of you who are learning law are beginning to understand, may therefore ultimately become the centerpiece of a permanent international judicial system.

Let me now switch gears briefly to peacekeeper protection. I recently had the honor and privilege of being a member of the U.S. Delegation to the United Nations' effort to negotiate a convention for protection of peacekeepers.

Some of you may recall Chief Warrant Officer Michael Durant whose helicopter was shot down over Mogadishu. After he was captured by Somali forces, we recognized a little too late that there was really no international law to protect him. The Geneva Conventions did not apply – at least the ones protecting prisoners of war – because this was not an international armed conflict. So, we were left with a gap in international law. What we are trying to do right now is to fill that gap. This convention, news of which you may see in coming weeks as it is considered by the U.N. General Assembly, is an effort to fill that gap by establishing as an international crime any attacks against or detention of U.N. personnel.

This post-Cold War era has introduced a new form of warfare. Back in 1949 when we negotiated the Geneva Conventions, and in 1977 when we negotiated the Geneva protocols, we had in mind a very different kind of military operation than what we are confronted with today. Now we are confronted with things called peacekeeping operations, or peace enforcement operations, conducted under Chapter 6 or Chapter 7 of the U.N. Charter. By their very nature they are very different from war because forces we provide are generally not parties to an armed conflict – they are there merely to keep the conflict's parties apart. So, one can argue that the Geneva Conventions do not protect U.N. forces because they are not engaged as combatants. It is this kind of new thinking and new philosophy that we are now starting to come to grips with. This convention is one way in which we are trying to deal with the problem of U.N. peacekeepers being attacked all around the world.

