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Remarks Made at Pace University School of Law on October 23, 1993

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I should begin with the standard disclaimer. I am here totally in my personal capacity and am not here to present a defense or detailed explanation of various provisions of the statute which some of my colleagues and I had something to do with. I think if there are to be any public statements to that effect, they will not be made by me today.

I did want to say it's certainly a great honor for me to be here, among such luminaries, eminent professors, ambassadors, diplomats, legal advisors and so on. I was telling my colleagues, before, that I feel quite unworthy, not worthy to be here on the panel. But I was urged that being such a good lawyer, I should proceed to prove that hypothesis. So, if you would allow me a few minutes.

What I thought I'd touch upon is the very narrow issue of what are crimes against humanity. I took the question quite literally, as to whether or not there should be an international court for crimes against humanity. Having been involved in the Yugoslav exercise, I was fortunate enough to get into the history of the Nuremberg situation and, at least in terms of comparing it with war crimes and genocide, crimes against humanity have not been codified. You cannot simply take the Nuremberg text as a definition. The international community as a whole has yet to address the question of what is meant by "crimes against humanity."

What you do need to do to begin with is to first look at the Nuremberg text. Let me read it to you: "Crimes against humanity, namely murder, extermination, enslavement, deportation and other inhumane acts, committed against any civilian population before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal (that phrase is

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†† The following is a transcription of the comments made by Mr. Johnson at the symposium held at Pace University School of Law on October 23, 1993.

extremely important) whether or not in violation of the domestic law of the country who had perpetrated it.”¹ I hesitate to get into the findings of the Nuremberg Tribunal with such experts here but from at least a layman’s point of view, or persons not experienced in the intricacies of the Nuremberg Tribunal, the text meant, in essence, you couldn’t be indicted and judged for having committed a crime against humanity unless you had also committed one of the other crimes in the Nuremberg Charter, such as a war crime or a crime against the peace. That’s quite a narrowing of what we consider today as the concept of crimes against humanity. Generally, most of us today would agree that such crimes stand on their own and do not have to be linked with a war crime or a crime against the peace.

A few months after that, the Allies drafted another definition of crimes against humanity which significantly de-linked crimes against humanity with other war crimes, with other crimes under the Nuremberg Charter. As I said, this was only about four months later, in something called Control Council Number 10,² an order for the prosecution of those accused of these acts within Germany, other than the major war crimes. That definition reads: “[a]trocities and offenses including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape” (in Nuremberg you do not find the words imprisonment, torture or rape) “or other inhuman acts committed against any civilian population for persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.”³ This definition adds those three crimes (imprisonment, torture and rape) plus it de-links crimes against humanity with war crimes.

That was an important development, although it was not in the form of international agreement as was the case with the Nuremberg Charter.

¹ Agreement: Prosecution and Punishment of Major War Criminals of the European Axis (including the Charter of the International Military Tribunal), August 8, 1945, 82 U.N.T.S. 279.

² *Official Gazette of the Control Council for Germany, No. 3, p. 22* (hereinafter *Official Gazette*).

³ *Id.*

When the Yugoslav exercise began, governments were requested to submit comments. Comments were welcomed from states as to what the Tribunal should be about and what the statute should contain. Let me give you some idea of what governments were submitting as to what are the definitions of crimes against humanity.

The French experts said, "These acts, when they are mass and systematic, should be punishable before the Tribunal. Violence to life and person, in particular murder of all crimes and cruel treatment such as torture, mutilation, any kind of corporal punishment. Collective punishment, taking of hostages, outrages upon personal dignity, particularly humiliating and degrading treatment, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."⁴

The U.S.: "Acts of murder, torture extra-judicial and summary execution, illegal detention and rape that are part of a campaign or attack against any civilian population of the Former Yugoslavia on national, racial, ethnic or religious grounds."⁵

The Italians: "Crimes against humanity consisting of systematic or repeated violations of human rights, such as willful murder and deliberate mutilation, rape, reducing or keeping persons in the state of slavery, servitude or forced labor or persecuting or heavily discriminating" (that's an interesting use of words in any event) "heavily discriminating against them on social, political, racial, religious or cultural grounds."⁶

These examples I just mention to you to show you that it's not clear in everyone's minds what constitute crimes against humanity.

Now, for the Tribunal's statute, the choice made was basically to follow Nuremberg and Control Council Number 10 and not to branch out and to involve human rights violations in general or to use some of the language that you find in the 1949 Geneva Conventions⁷, for which individuals are not held re-

⁴ Doc. S/25266.

⁵ Doc. S/255575.

⁶ Doc. S/25300.

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S.

sponsible. So, in the Article that was prepared, you basically had the Nuremberg list plus the three from Control Council Number 10, "imprisonment, torture, rape" and you don't have it linked to the commission of any other crimes that are before the Tribunal.

Some people have seen this as being a very conservative approach and to some extent it is. But it was not the role of the Security Council to 'legislate' a new or innovative definition. This brings me to my point as to why there should be an International Criminal Tribunal for crimes against humanity. This Tribunal was imposed, as it were, under Chapter VII of the Charter. It was not drafted by states at a conference, but was rather adopted by the fifteen members of the Security Council; it did not go through the usual procedure of agreement by states in the form of a treaty and ratification by legislatures and so on.

Pursuing the International Law Commission approach, which Bob Rosenstock just outlined for you, is the best hope for universal agreement in this area. This will take time, but will give time to governments, to interested law associations, to law school students, and professors to examine the proposals and try to deal with the points that were raised so cogently by Professor Rubin. It will also not be imposed by the Security Council or anyone else. States will agree to it and it will thus start on a much better footing. There will be a chance to improve the definition of crimes against humanity to perhaps make it more innovative, perhaps more embracing, and could contribute greatly to the advancement of international criminal law.

Finally, why all of this stress on definitions? Don't forget that what we're dealing here is not the question of responsibility of states. We're not going to be arguing before the International Court of Justice. Individual criminal responsibility is engaged here. Persons are going to be detained, arrested, thrown in jail and they're going to have lawyers. These lawyers are going to want to make the best defense possible. You need

3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365.

to devise a very carefully crafted criminal statute. The crime must be defined with great clarity and precision if this endeavor is going to succeed.

That's why I believe that we do need a Criminal Court because it will start the process. It will start the process of drafting a criminal provision in a code or treaty with clarity and precision and will be part of a process in which all states will be involved and hopefully accept a definition of crimes against humanity.