

**THE INFLUENCE OF INTERNATIONAL LAW  
AND INTERNATIONAL TRIBUNALS ON  
HARMONIZED OR HYBRID SYSTEMS OF  
CRIMINAL PROCEDURE**

Moderator: Leila Nadya Sadat

Participants: William Schabas, Stefan Trechsel,  
Christine Van Den Wyngaert

Discussant: David Sloss

LEILA NADYA SADAT (Moderator): It's my great privilege and pleasure to introduce today's session, entitled *The Influence of International Law and International Tribunals on Harmonized or Hybrid Systems of Criminal Procedure*. It's also my great honor to welcome as old friends and new the panelists and many distinguished guests who have traveled long distances to be with us today in celebration of the centennial of the Universal Congress of Lawyers and Jurists. Over the last day we've heard some remarkable historic information about St. Louis and the St. Louis World's Fair of 1904 and the Congresses held at the same time. But one Congress that was not mentioned was the Meeting of the Interparliamentary Union in St. Louis in 1904, which adopted a resolution calling for the settlement of differences between nations in the same manner as controversies between individuals, that is, through courts of justice and in conformity with well recognized principles of law. This resolution was transmitted to President Roosevelt, who then prevailed upon the Czar to call the Second Hague Peace conference of 1907. This, of course, was an enormous step forward in the construction of a world based on the international rule of law. But I don't think the Congressmen—there weren't any Congresswomen at the time—gathered there could have contemplated the current state of international law and adjudication.

Through two long and bloody wars and conflicts ongoing still today, humanity at the same time achieved some incremental progress during the twentieth century toward the establishment of international institutions. The Permanent Court of International Justice, its successor the International Court of Justice, and the many other tribunals and dispute settlement bodies that currently exist, were all developed in the last century.

The subject of today's panel is the establishment of international criminal jurisdictions able to investigate and prosecute individuals accused of international and national crimes, as well as the harmonization and

incorporation of international norms and their influence upon each other. This morning, you will hear from three distinguished academics who have also, during their illustrious careers, worn the hat or are currently wearing the hat, of practitioners. Judge Messitte spoke too quickly, I think, when he bemoaned the lack of practitioners present at our celebration, because we have two commissioners and a judge on this panel alone.

We will start off today with Professor William Schabas, who is the director of the Irish Centre of Human Rights at the National University of Ireland at Galway. He also served as a member of the Sierra Leone Truth Commission. He is a prolific scholar and author. In particular, he is the author of a leading monograph on the crime of genocide in international law, which was just recently translated into German. Professor Schabas will lead off with some reflections on practice before the ICTY, with particular emphasis, I believe, on the Milošević trial and the recent ruling regarding the right to self representation issued by the Appeals Chamber in that case.

Judge and Professor Christine Van den Wyngaert will then offer her views on practice before the tribunal from her perspective as an *ad litem* judge on the ICTY. She will then discuss some of the issues regarding harmonization of criminal procedure in Europe, particularly the Corpus Juris Project to establish a European prosecutor's office for certain offenses. Judge Van den Wyngaert is at the University of Antwerp and is also a prolific scholar and practitioner of international criminal law. Among other things, she is the author of the "Blue Book," as her students call it, an extraordinary compilation of international criminal law instruments, now in its third edition. She also served as an *ad hoc* judge at the International Court of Justice in the arrest warrant case, *Congo vs. Belgium*, decided in 2002.

Our final speaker, Stefan Trechsel, modestly refers to himself as a Swiss lawyer, but he is also an extraordinarily distinguished scholar and teacher. He served as a member of the European Commission on Human Rights for twenty years, and he presided over the Commission from 1995 until its abolition in 1999. He is currently teaching at St. Louis University and is in the process of writing a monograph on human rights and criminal procedure in a comparative perspective, to be published next spring by Oxford University Press. He will close today's session with some remarks on the influence of human rights conventions, and particularly the European Convention on Criminal Procedure reform in Europe. In terms of the modalities, each of the speakers will have a very generous twenty to twenty-five minutes. We will then allow them to have some short responses to each other, if they arise, and then David Sloss, my colleague

and friend from St. Louis University, will give a brief commentary on the three papers and will open it up to the floor. And we will try not to keep you too long from your lunch. Please join me in welcoming today's panelists. Thank you.

PROFESSOR WILLIAM SCHABAS: Thank you, Leila. Leila Sadat has been a regular visitor to Galway, where I direct the Irish Centre for Human Rights. It's so nice to be here in St. Louis with her for the first time. And it's nice also to see her students out, joining us on a Saturday morning. I hope you didn't indulge in the old trick of telling them it's on the exam.

SADAT: I would never stoop to that.

SCHABAS: The subject I'm going to talk about this morning is international criminal procedure before the *ad hoc* tribunals and in the International Criminal Court, and this is a much younger subject than what we've been talking about over the last day or so. We're not talking about something that begins in 1904, but rather something that begins around 1994 with the creation, the previous year, of the International Criminal Tribunal for the former Yugoslavia.

I have watched and studied over the past ten years this evolving process of building a new procedural system that draws from many different sources. It is a laboratory in comparative criminal procedure law. It began with a really phenomenal ignorance by the people involved, about what might be called "the other system." The judges and lawyers in the Prosecutor's Office started meeting early in 1994. They were of course experts in the system they had been educated in, but as a general rule the common lawyers had virtually no background, training, or familiarity with so-called civil law systems of criminal procedure, and the same was true for the civilian lawyers with respect to the common law. It didn't take very long for them to start to understand things about the other system, and to develop almost an admiration for some of its accomplishments and features, rather than the hostility which marked the attitudes at the beginning. Today there's really a very positive and constructive engagement between lawyers in both systems vis-à-vis the other. They demonstrate a willingness to learn, and a conviction that the best result will be in some way a hybrid of the two systems.

The feeling that people came from either civil law or common law has diminished. I think this has, by and large, been a very positive development. It's been rather remarkable, as well, to watch it evolve and take place over the last decade. You can see this now in such documents as the Statute of the International Criminal Court, which is very much a product of this cross-fertilization between the two bodies of procedural law and practice.

I first became acquainted with this problem early in 1994. At the time I was a professor in Montreal, Canada, and we attempted to organize at my law faculty a conference on the new rules of procedure and evidence of the International Criminal Tribunal for the former Yugoslavia. The rules had been issued, I think, in February of 1994. The statute of the Yugoslavia Tribunal, which is a resolution of the Security Council, provided that the details on the procedure would be worked out by the judges. The judges were elected in late '93. They had several meetings in late '93 and early '94, and adopted this first draft of their rules of procedure and evidence. This draft has since been modified on many occasions as part of this process. We organized a conference in April of '94—I think it was the first conference on the subject anywhere to my knowledge—to reflect on these rules of procedure and evidence. Our guest of honor was the Canadian judge on the Court, Jules Deschênes. He was on the Appeals Chambers and he was a friend of many of ours. We had known him as a very distinguished judge in Quebec, and so Jules Deschênes presided over the meeting. He also gave a very interesting talk about how the rules had been drafted, and he explained that lawyers came from different systems. He himself was not particularly knowledgeable about European continental procedure. He described—I remember this vividly—he said, “The American judge”—referring to Gaby McDonald. Some of you will know her, I think she was a federal judge in Texas. He said, “The American judge showed up with the Federal Rules under her arms, and she never went anywhere in the Tribunal premises without the Federal Rules of the U.S. Court system under her arm.” She essentially tried to bulldoze through a model which was like what she was—Texas justice—is that the right term? There was some resistance from other judges, and there were debates about this. They ultimately developed a product. This first draft of the rules, which did actually represent an initial hybrid, although it was largely common law, and largely American. The American influence was not just because of Judge McDonald, but also because the American Bar Association had a project to prepare a draft of the rules, and these were very influential, as well.

One of our other guests was a very distinguished Belgian international lawyer, Éric David, one of the best Belgian lawyers. Professor David was quite agitated about the rules, and he was explaining to us that the Americans had dominated and they had bulldozed through the rules, and they hadn't shown proper respect for the continental legal traditions. A few months later I was at a meeting in Paris where I heard the same sort of thing: *Les Anglo-saxons ont gagné*—the English have won—in the procedural battle.

In fact, there was already a certain amount of deference for continental procedures. One of the areas where the first debates took place was on the question of *in absentia* trials. The continental lawyers all said “You have to have *in absentia* trials because you’ll never get any accused, you’ll never be able to arrest Milošević or Karadžić or Mladić or Tudjman—you’ll never get any of them.” And so you’ll have to hold *in absentia* trials, otherwise the tribunal won’t work. In 1994, they compromised. In order to accommodate this criticism, they created the Rule 61 procedure that provided for a kind of *in absentia* trial. In 1995 and 1996, the tribunals actually held several hearings—about half a dozen hearings—under this *in absentia* proceeding. Some would last several days, they would hear a lot of evidence from the prosecution and then the judges would reach a conclusion that there was enough evidence to find the accused guilty. They would profess in each one of these rulings that “this is not an *in absentia* trial.” Really, it was a case of “methinks the lady doth protest too much.” They really were *in absentia* trials, the only meaningful distinction being that they didn’t impose a sentence when it was over.

The debate continued about *in absentia* trials even into the preparations for the Rome Statute in 1998. They are excluded from the Rome Statute altogether, and the Rule 61 procedure isn’t even really repeated in the Rome Statute. I heard often during that debate that this was a question of trying to find an accommodation, but it was difficult because common law trained lawyers were in principle opposed. Common law lawyers believed that it was a question of fundamental rights, and were opposed to *in absentia* trials. I never fully bought into that, nor did I understand it. Even in common law jurisdictions we do accept trials continuing, sometimes, in the absence of a defendant. It’s not a question of absolute principle. It’s really more a view of the common law that if you’re going to have a lengthy trial you might as well make sure the guy’s there so you can throw him in jail when the trial’s over. Why spend days and days or weeks holding a trial of someone that you can’t actually punish? I think that was perhaps the reasonable view that prevailed.

In the first trials of the ICTY, the Yugoslavia tribunal, we started to see issues debated that brought to a head some of the other tensions between common law and civil law. One of them is guilty pleas. I won’t go into detail, but the first conviction before the Yugoslavia tribunal was a guilty plea. Someone showed up and said, “I plead guilty. I was at Srebrenica. I killed a lot of people. I feel terrible. I’m guilty.” A big debate: Can you plead guilty? What happens with a guilty plea? The continental lawyers were intensely suspicious of the whole idea of guilty pleas, and said “this is the slippery slope toward plea bargaining, and we can’t allow it.” In the

end they developed a procedure for a guilty plea that was then echoed largely in article 65 of the Rome Statute. This is the *Erdemović* Decision. It was ruled upon on appeal in 1997, only months before the Rome Statute was finalized. I can remember the debate about that provision, article 65, and the buildup to the Rome Conference. It was at New York City in August of 1997 and there was a big confrontation between the French delegation and some common law delegations, mainly the Canadians. The Canadians had a draft proposal on plea bargaining, or on guilty pleas, called The Guilty Plea Procedure. But what's underneath it all is the concept of plea bargaining. The French were very hostile to the whole thing. So they quarreled and squabbled, and they negotiated terms. Finally the Canadians—I'm not just saying this because I am a Canadian, but—very skillfully finessed the whole thing. The French lawyer came back and said, "You will have to put in that provision a rule saying that the Court is not bound by discussions between the prosecution and the defense"—which, of course, certainly in the Canadian understanding of plea bargaining, is entirely in accordance with the truth. We always understand that the negotiations between the prosecution and the defense don't bind the judge. The Canadian lawyer turned to the French lawyer and said, "Okay." The French lawyer said, "We won." So, there's this provision, article 65 of the Rome Statute, that deals with the possibility of plea bargaining and guilty pleas. There's actually a long and interesting history now, at the Yugoslavia tribunal, of guilty pleas, and there were attempts a few years ago to promote guilty pleas. For a period of several months, the prosecution was very effective in eliminating a number of cases in the enormous caseload they have through guilty pleas, only to have the judges then dig in their heels at one point and double a sentence that had been negotiated between prosecutor and defense. The defense lawyers kind of lost their taste for guilty pleas after that, because they felt that the judges weren't cooperating. At least they didn't cooperate in this case, and so it did complicate things. This has no doubt contributed to lengthening, perhaps by several years, certainly by several judge years, how long the proceedings are going to last in the Yugoslavia tribunal.

*Erdemović* had another issue demonstrating the conflict or the tension between the two systems, which is interesting. It dealt with the defense of duress, but since we're focusing on procedure today I won't go into detail about that. What the judges have often tried to do in addressing questions where the statute and the rules are silent is they have said, and the judgments differ on this, "We're looking at comparative criminal law as a basis for general principles of law."

General principles of law is one of the sources of public international law in article 38 of the Statute of the International Court of Justice. Other times judges say, "We're looking at customary international law." There's actually not much customary international law in the area of criminal procedure. It's more a question of trying to find some sort of common denominator. Sometimes that works. It does work in a lot of criminal law, particularly in substantive criminal law. Sometimes it doesn't work. Sometimes it's complicated by the fact that on issues like the defense of duress, it's hard to find even a consistent pattern among common law jurisdictions. In the Erdemović case, Judge McDonald, the American judge, led the way in saying, "There cannot be a defense of duress for crimes of the gravity of crimes against humanity." There were two dissenting judges. Antonio Cassese drew on the model from the *Code Pénal*, the French Napoleonic Code, which just talks about justifications and excuses and doesn't attempt to govern specifically the issue of duress. Sir Nianan Steven, an Australian judge from the common law tradition, was the other dissenter. I think they show the difficulty of even trying to simplify these issues into a question of compatibility or a divergence between two systems.

The other case, this time from the Rwanda tribunal, that, I think, illustrates some of the development and the evolution in this area is the *Akayesu* case. *Akayesu* was the first major trial of the Rwanda tribunal and, in that case, there was a strange incident in the court. The trial was being held before three judges. The presiding judge, the late Laïty Kama, was a Senegalese magistrate from the continental French legal tradition. He would question the witnesses a great deal, something that was part of his training and his tradition. He found this very normal. He started questioning a witness, and it became clear over the course of his questions that he knew things about the evidence that he had no business knowing, that he shouldn't have known. It soon became clear that what had happened is the following: they had a procedure for disclosure, by the prosecution to the defense. There's some reciprocal disclosure as well now, the defense to the prosecution. At this point in the evolution of the procedural regime, it was essentially disclosure by the prosecution to the defense, but it had been formalized. In the jurisdiction I come from, in Québec, disclosure is a very informal procedure that takes place between counsel—I don't know what the rule is here in this jurisdiction. We would meet the prosecutor in his or her office, and it would all be done rather informally. They have formalized it in the Rwanda tribunal, and so the prosecution prepared all of the evidence and gave it to the registrar, who then gave it to the defense. It became apparent that the registrar had made

a photocopy of all the material and slipped it under the door of Judge Kama, at his request. Judge Kama had, therefore, studied all the evidence. There was a very embarrassing day in court when this all came out. Judge Kama resolved it with his colleagues by ordering that the prosecution file was to be produced in the record of the court. It became essentially like an inquisitorial trial where you have the evidence prepared by the prosecutor. The difference being—and I think that this raises questions about fairness—that the prosecutor had never prepared a file in the way an instructing magistrate would do. The file was not intended to reflect evidence both *à charge* and *à décharge*, as they say in the French system, that is, the evidence both for and against conviction. It was really a file of evidence in favor of conviction. This, in a sense, distorted the trial and this attempt to merge one system with the other may have led to some unfairness.

Let me turn to the Milošević trial, which is now the hot issue, and a few of the difficulties that have arisen. I will also bring out some of the tensions in these procedural issues. In February 2004, the trial was two years old and had been going since February of 2002. Richard May, an English judge who was the presiding judge, announced that he was ill and would be resigning. Judge May, as it turned out, had terminal cancer and he passed away some months later. Judge May's resignation provoked an issue about his possible replacement.

The tribunal invoked Rule 15 *bis*, an amended rule, in order to justify replacing him with a judge, despite the absence of agreement by Milošević himself. Rule 15 *bis* is an interesting rule because it's a new rule. It had been adopted only a year earlier by the International Criminal Tribunal for the former Yugoslavia in the midst of the Milošević trial. The rule change was actually signed by Judge May who was the President of the Rules Committee at the time. I presume that's just an irony, I don't think Judge May knew a year earlier he was going to be so ill. The original rule adopted by the judges, back in the time of Judge Deschênes in 1994, authorized the replacement of a judge, but only with the consent of the accused. If we go back to Nuremberg, where they had the four judges, four alternates were designated. They were there in case one of the judges got sick or died, or resigned or was recused. They'd thought of it. I think they thought of it in 1994, but they didn't want to pay for it. I think that's really the issue, that it was going to be too expensive for them to provide for alternate judges.

But obviously, in 1994, the judges made a conscious decision that they could replace a judge only with the consent of the accused. I think that's significant because it means they all turned their minds to the issue, which



is a fundamental issue of fairness, and said, “Yes, we could do it. Yes, we could go on, but only if the accused agreed.” Then three years later, they changed the rule to say they could go on, even if the accused didn’t agree. They say if the two remaining judges unanimously—it’s kind of an odd wording, two judges unanimously—agree to continue, then they could continue, over the objection of the accused—or, rather, despite the lack of consent by the accused—if it was in the interest of justice.

There was actually a ruling on this at the Rwanda tribunal in late 2003 in a case where the judges said—and here’s how they interpreted the interest of justice—“this is going to delay the trial, there are a lot of accused waiting to go on, so it wouldn’t be in the interest of justice to start a new trial.” This interpretation basically means the defendant’s interests have nothing to do with the interests of justice. Yet, in 1994, the defendant’s agreement, consent, was central to the whole thing. I can’t give you any particular insights into all this with respect to the Milošević trial, because it wasn’t litigated. Milošević didn’t consent, but he didn’t challenge it either. We don’t know about the deliberations on the amendments to the rules either because they are secret. So, how much of all this was a question of the different cultures of judges from different systems? I’m not able to tell you.

I can tell you that it has become a very important issue with respect to the recent decision to impose counsel on Milošević, and that’s my final point, and I want to tell you a little about this one. Milošević, from the very beginning of the trial in 2002, invoked his right set out in article 21 of the statute, which is basically copied word for word from article 14 of the International Covenant on Civil and Political Rights, which is the gold standard on procedural due process in international law. Article 21 says everyone has the right to defend themselves, in person or by counsel of their own choosing. It couldn’t be clearer, and it’s not accompanied by any qualifier along the lines of “subject to limits in a free and democratic society,” which we see often in international human rights instruments. It just says everyone has a right to defend themselves, in person, or by counsel of their own choosing. Milošević invoked the right, and Judge May, who was presiding said, “That’s your right. That’s fine, you can do this.” He said, “You have a right to defend yourself, *and* to not be defended by counsel. That’s your right.” The prosecutor contested it from the very beginning.

When the trial was about a year old, the prosecutor in a motion said “impose a lawyer on Milošević.” There was a ruling with Judge May presiding. It was a bench ruling in December of 2002. Written reasons were issued in 2003, saying essentially what I’ve just told you. It was his

absolute right to defend himself, and that they did not have good grounds for imposing counsel. He said he relied on the—I've written it down here because I can't remember *Faretta v. California*.<sup>1</sup> The Supreme Court of the United States decision on the same point. He insisted on the fact that you couldn't impose counsel in an adversarial trial. The prosecutor said, "We have evidence, but drawn from civil law jurisdictions, from European jurisdictions, of them imposing counsel." Apparently it's rather common and widespread to impose counsel. The European Court of Human Rights, in a decision from 1992, even ruled that it was an appropriate interpretation of article six of the European Convention, which says the same thing as the statute of the Yugoslavia tribunal. Judge May and his two colleagues said that it was different when it was an adversarial trial. He said, "An adversarial trial is not built on the search for truth, for absolute truth, in the same way as an inquisitorial trial. An adversarial trial is built on decisions by the accused. That includes the right to refuse counsel, to defend themselves, and to control how the trial takes place."

There was a ruling by the Human Rights Committee, which was the treaty body that rules on the Covenant on Civil and Political Rights, dealing with Spain. The Human Rights Committee said you can't deny someone the right to defend himself without violating the Covenant on Civil and Political Rights. They were interpreting the identical provision as the judges were applying. So Judge May dismissed the prosecution's motion and said the trial will continue. He left a little phrase in there saying, "Keep it under review," and I'm sure that Judge May, wherever he is, I'm sure he's in Heaven, is looking down on this trial saying, "Never put 'and keep it under review' in your judgment." They've used that little phrase, which is totally out of context by my reading of May's judgment, to say, "Well, it's a year later, let's review." He had hardly left the court when the judges decided they were going to reopen the question. The prosecutor seized on it and they've essentially, in a ruling from September 2004, reversed Judge May's decision. They say it's because time has moved on and they said they would keep it under review.

In the judgment, they dismiss the significance of the ruling by the Human Rights Committee. They emphasize the fact that it's common in civil law jurisdictions to impose counsel, and just say, "Enough, already. We're going to move on, and we're going to impose counsel." They made this ruling in September 2004 and it was then appealed to the Appeals Chamber. The Appeals Chamber issued a ruling in November 2004 that

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1. 422 U.S. 806 (1975).

largely upholds, certainly on the legal issues, the later decision of the trial chamber. It overturns Richard May's ruling. My choice amongst them all is the May decision; I think that May's decision is the best one.

I note, by the way, that in all of this mess we've had about counsel over the last year since May left that it's actually had the effect of slowing down the trial, rather than speeding it up. If they'd said last March, "Well, let's just get on with it. Milošević, it's your turn, go ahead," we'd probably be much further advanced in the trial than we are today. The reason they used for changing—reversing, really—the judgment of Judge May, they said, "Actually there are limits to the right to defend oneself." They said there's always the limit to defend oneself when someone is excluded, such as when an obstructer or a misbehaved defendant is excluded from the courtroom. Defendants may forfeit their right to defend themselves, and then you can impose counsel. That's in the U.S. Supreme Court decision, and that's not challenged. But no one has alleged Milošević is doing this. There's a lot of innuendo, and you pick this up, but it's not in the rulings, and until it's in the rulings I think we have to say that it's not a proper legal consideration. The judges also cite the fact that in many common law jurisdictions now it's recognized that when there are sexual crimes, particularly those involving minors, that an accused can't cross examine the victim. In Scotland, the accused can't even act as his or her own counsel in a sexual crime involving children. Well, okay, that's an interesting case, and I understand why it exists. It's an exception that takes account of the protection of the victims. That's a legitimate concern. But that's not the issue in the Milošević trial. What they hinge it all on in the Milošević trial is the fact that he has high blood pressure and that this is delaying the trial, as it no doubt is because he's missed many trial days because of his illness. They're moving along, but more slowly than they would like to. I don't think that's a very good reason to impose counsel. I mean, if an older defendant can be denied the right to defend himself because of high blood pressure, well could they for other medical reasons, like diabetes? I assume there are probably people in this room who, under the Yugoslavia tribunal, can't defend yourself. If you're taking blood pressure medication, you know, forget it. Even if your blood pressure is under control, there's probably nothing like a genocide indictment to, you know, raise the blood pressure. I think it's normal that the guy would be under some strain. But in any event, he's going to have to instruct counsel. He's going to need to be there to instruct counsel. I just see this as a problem. There's a strong argument to be made that it's a discrimination based on disability, ultimately. What would we do with a stutterer who said, "Judge, this t-t-trial is going to take a lot l-l-longer than you think"?

Would that be a reason to say, "Ok, you've forfeited your right to counsel"? Could we do it with a blind person? I don't think so, I think there it would be clear that it's discrimination. But I think here it's also a case of discrimination.

A final point, Leila said two minutes. I won't take that much, but the last element is that after the appeals ruling of the first of November, the defense lawyers who were imposed upon him have raised up their backs and said, "But wait a minute. We don't have his confidence. We're not being instructed by him, it's an ethical issue. We can't act as counsel." They were in court [in November]. I was also in the Hague and I saw them and chatted with them about the case. They were arguing that they want to be off the case. They said, "We can't act for him, it's an ethical issue." So this is the latest in the saga. It's one thing to try to impose counsel on an unwilling defendant, but if you have counsel who are behaving ethically, they may have a problem themselves. The counsel, who are British barristers, Stephen Kaye and his assistant Jill Higgins, are arguing that it really is an ethical issue for a lawyer in the common law system. Clearly, all of these kinks between the two systems have still not been worked out. Thank you.

SADAT: Stefan

STEFAN TRECHSEL: I face the same problem my colleagues had, namely that of fitting the subject into the time frame. There are two extremes. One would be to say, is there an influence of the European Convention on criminal procedure in Europe? The answer is yes. The other extreme would be to go into details, and that could become something like the 800 page book by Robert Esser, a young German scholar. You realize that the time allotted here is closer to the yes or no answer than to 800 pages. And, actually, the answer is not a clear "yes," but a "yes and no."

I will start with a "yes," and the "no" explanation will come only towards the end. I also adapted the title slightly, in that I speak of the *influence* on criminal procedure in Europe, not necessarily on the reform of criminal procedure. I'm not quite sure where the difference actually lies. In a certain way, I think the fact that the protection of fundamental rights has improved is itself a reformatory influence, but it is not normally and generally looked at in this way.

I would like to begin by addressing a technical aspect. How does the Convention influence national procedure law? What are the avenues of reception? Then I will give a number of examples which have changed criminal procedures in European states. Due to the Convention and its practical application, I will choose a few examples that concern groups of

states rather than a single one in order to get an overview of the European picture. Finally, I will come to a brief conclusion.

What are the avenues of reception? How does the Convention law influence the national law of criminal procedure? I would distinguish three roads: a preventive road, so to speak, a reactive road, and then the academic digestion of what happens.

Preventive reform of codes of criminal procedure with a view towards ratification of the Convention happens relatively frequently. I followed this in Switzerland, which ratified the Convention in late 1974. Matthias Krafft, a scholar who later became chief advisor on international public law for the Swiss government, made a very comprehensive study of Swiss law, including problems with the criminal procedural law. His study was published prior to the ratification and led to preventive reforms of codes of criminal procedure. There was a general awareness that we were in danger of colliding with Convention law, and a number of amendments were adopted. Similar reactions occurred in other countries, but not all. France, for instance: I am not aware that they prepared for the ratification. In the newly accepted member states, the former Communist countries—and it's almost half of all the countries that are now members of the Council of Europe, twenty-two out of forty-six—strong preparatory work was fostered. They had to adapt their codes of criminal procedure in order to avoid conflict with the Convention.

The second road is the reactive one. After a violation of a specific guarantee of the Convention is caused by the application of the domestic law of criminal procedure, that domestic law will be amended. It is useful to recall that the European system has both fully judicial proceedings to examine whether there has been a violation of fundamental rights and a rather effective mechanism of implementation. The Committee of Ministers, the “executive of the Council of Europe, as it were—is charged with the implementation of the Court’s judgments. Whenever a violation is found, the Committee of Ministers will ask the state concerned what it has done to conform with the judgment. A sum of money will usually be paid to the successful applicant as “just satisfaction.” This can be a difficult matter if the sum is important and the problem is burning, such as in the *Loizidu* case. This case was brought by a Greek Cypriot woman who owned real estate in the North and did not have access to it. She was granted more than a million dollars in damages and costs. This would not have created an enormous problem had it just been an isolated, single case. But there are over a thousand other similar applications waiting in the background and the potential cost to Turkey has been estimated to amount to some 30 billion USD.

Sometimes a law must be adapted, and then the proceedings before the Committee of Ministers cannot be expected to lead to a result within a short period of time.

Belgium, for example, had been found in violation of the right to respect for family life because, according to its legislation the status of children born out of wedlock was such that a mother had to adopt her own child in order to give her or him an adequate position. It took ten years and further applications to the European Commission of Human Rights for the law finally to be changed.

In some areas, unfortunately, the effects of the Strasbourg proceedings have hardly been noticeable so far. Criminal proceedings in Italy have a tendency to last too long. Civil proceedings are even worse. There is now a mechanism that is supposed to deal with this on a domestic level, but it seems not to be effectively implemented. It is difficult to react to a finding of a violation of Article 6, the right to fair trial, due to excessive length of the proceedings, because what is needed is an improvement in efficiency. This is something that the Committee of Ministers cannot put forward in specific proposals.

The third point is the academic adoption of Convention law. I have to admit that in Europe, we have a tendency of excessive specialization of law professors. We become professors via *habilitation*, *agrégation*, which includes rather formal proceedings. Once this level is achieved, the professor bears a specific label and will limit her or his activities to the field covered by that label. She or he will normally be a person competent in the area of civil law, public law, or criminal law once and forever. The combination of human rights and criminal procedure is placed between two chairs. Human rights is normally regarded as the domain of international public law specialists who are not always very conversant with criminal law and criminal procedure. They have normally no practical experience in that area at all. Those who have knowledge in criminal proceedings, on the other hand, generally concentrate on the problems concerning domestic law, which is generally limited to only one jurisdiction. This is where they make their reputation. Scholars in domestic law issues are whom the national court will quote in their judgments and what their colleagues will read and comment. It is awkward to go and look across the border to Strasbourg case law—for many, there is even a language barrier. That is why the reception by academia of the Strasbourg case law under the heading of criminal procedure has been slow. There have been a few very early pioneers, Mario Chiavario, and Antonio Cassese for instance, in Italy; Evert Alkema and Egbert Meyer, in the Netherlands; Jacques Verlu, and Christine here in Belgium; the late

Theo Vogler in Germany, Dominique Poncet in Switzerland, and I apologize to quite a number of others which I have not mentioned although they would have merited it. In Germany, one explanation for the reluctance to accept the case-law of the European Court of Human Rights as a serious source of the law of criminal procedure may be the fact that, on the one hand, the Constitutional Court enjoyed a very high reputation as protector of fundamental rights, and, on the other hand, that that same Court refused to regard the Convention as a source of constitutional law which it was competent to apply. The marriage between the two fields took a quite a long time to come about. Now, however, I seem to observe a real boom. Today, most textbooks of criminal procedure cannot be taken seriously if they do not refer to the Convention. I think all European criminal law and criminal procedure specialists, beginning with my neighbors, will agree that the Strasbourg case law has become an important integral part of the domestic case law of criminal procedure.

Now, in which areas do we find an influence of the Convention on domestic law? As I've said, I can only give a slightly arbitrary selection. The first point I want to make is perhaps surprising. The Strasbourg case law has widened the scope of criminal law. How can that be? If you look at the case-law, particularly at the judgments handed down in the 90's, you will find that many of the cases where the Court found a violation of Convention rights in criminal proceedings were cases on the "borders" of criminal law. In particular, they were on the limit between criminal law and disciplinary law, or criminal law and the law of petty offenses which, in domestic law, were regarded as having a merely administrative character. Some states, Germany for instance, have taken petty offenses out of the criminal law and re-labeled them *Ordnungswidrigkeiten* ("regulatory offences") which was considered as decriminalizing them. The Court has quite correctly said, "We have to create an autonomous notion. We must define ourselves in Strasbourg, what is a crime, and what is not a crime, otherwise the Convention will not apply equally in all the States which have ratified it".

The leading case on this creation of "autonomous notions" is *Engel* and others (Dutch soldiers) versus the Netherlands. The soldiers complained of disciplinary proceedings. In its judgment of 26 June 1976, the Court began to draw a dividing line between what was to be considered "criminal" and other forms of reaction which did not lead to the application of the specific guarantees of Article 6. This basic jurisprudence has been developed constantly over the following years. It led to labeling tax offenses as criminal law, although in some countries, such as France, Sweden, and Switzerland, they had been regarded as something other than

offenses. This meant that in those countries there was no normal court procedure for cases of tax withholding. This led to very important changes of the respective domestic law.

I already referred to the example from Germany, where as a measure of decriminalization petty offenses were relabeled “*Ordnungswidrigkeiten*” instead of *Straftaten*; and elaborate set of ideological arguments was construed around this issue. However, from the beginning the procedural guarantees were to be exactly the same as in normal criminal proceedings. I’ve often had discussions with my German colleagues who thought that in Strasbourg we were destroying this fabulous, modern movement of decriminalization. I do not think that anything of that kind happened.

To sum up: Many violations of the Convention were found in cases where criminal procedure guarantees of the domestic law did not apply at all. The state concerned felt quite “innocent” because, according to the local belief, one was not dealing with a “criminal charge” in the first place.

The Strasbourg case law also influenced the organization of the judiciary. The court defined in an autonomous way what is a “tribunal,” and in a few cases it came to the result that, what was regarded as an impartial tribunal on the domestic level could not so be regarded under the Convention law. One of the most important examples is the state security courts in Turkey, where the court was composed, *inter alia*, of military personnel. On the other hand, certain bodies were accepted as “courts” although they were not called courts in the domestic legal order or were set up to adjudicate only certain specific issues.

The role of the top echelon prosecutors led to problems in a number of countries, starting with Austria, but then also in Belgium, Portugal, and the Netherlands. In these countries, the supreme prosecutor, *Avocat Général*, *Procureur Général*, *Procureur Général*, had a very special relationship with the highest court which expressed itself in one of two ways. First, the *Procureur Général* had the right to file observations with the Supreme Court which were then not served on the accused, and on which the defense could not comment. Another example for a lack of information was that the reporting judge would prepare a draft judgment for the court to deliberate upon and would send a copy of that draft, called *Croquis* in Austria, to the public prosecutor’s office, but not to the defense. Strangest of all, in Belgium, the public prosecutor assisted in the deliberations of the court. The Belgian lawyers believed that the public prosecutor held the role of guardian of the law and had to make sure that the laws were interpreted in a uniform way and that the law was correctly applied. I cannot understand how Supreme Court justices could live with such a system. For an outsider it cannot be understood. In a first round, *Delcourt*,



the Strasbourg Court said there was no violation of the convention. In the later case of *Borgers*, the Court changed its view and recognized that such a system was not compatible with the right to a fair trial including the respect for equality of arms. The French are very angry about this judgment. I recently met Mr. Francie Casserla, *Procureur Général*, who at present works with the Ministry of Justice and who complained bitterly of the lack of understanding of the Strasbourg Court for these particularities of the legal tradition and swore that the *Avocats Généraux* were absolutely neutral and only acted in the interest of the law. The Commission's argument before the court was that the only opposing entity at the trial is the *Procureur Générale*, so he must be regarded as the opponent from the point of view of the accused. In fact, the Court also referred to the importance of appearances in its conclusion.

The position of the public prosecutor at the lowest level has changed due to the case law on the rights of an arrestee. Everyone arrested has the right under the American Convention, the ICCPR, and the European Convention, to be brought promptly before a "judge or other officer authorized by law to exercise judicial power." Now, in many countries, including France, a number of Swiss Cantons, Italy, and Spain, the arrestee was brought before the *Procureur*, the public prosecutor, who was regarded as a "*magistrat*," to determine whether s/he should be detained or not.

The role of the *prokurator* was particularly deeply rooted, as Stephen Thaman said yesterday, in the former Communist countries. The *Procuratura* was a very powerful institution, entrusted, if I can use the word, with seeing to the correct application of the law. That is to say, in an application of the law in conformity with party goals. Their power extended to practically all areas of public activities, it had more or less unlimited competencies. Control over measures of coercion was in the hands of this authority, and the offer considerable resistance to being deprived of that power. There are still fights on the issue going on, e.g., in Tajikistan. Twice I attended a meeting—the second meeting with the same people—where we heard exactly the same arguments. I did not understand why I had to travel to attend that. I was told, "Well, you know, with us it's difficult." This is hard to grasp. In other countries, including Russia, it has worked. In Bulgaria I was grossly insulted by the public prosecutors for presenting and justifying the Convention Law on this issue. However, one can say that the general tendency, that the Convention puts the judge as guardian of the defendant's position, and the prosecutor in the background, comes to be accepted. There are still residues of the old ideology that the prosecutor who is charged with prosecuting, and perhaps,

also with investigating, is at the same time regarded as part of the judiciary in the sense that it is his or her task also to investigate in favor of the defense. With the result that one hears the argument: “Maybe this magistrate is a prosecutor, but he also has the duty to investigate in favor of the defendant, and therefore, one can entrust him with such tasks as controlling the application of coercive measures. Having been a public prosecutor myself, I can tell from my own experience that one is not immune against *déformation professionnelle*. If you prosecute all the time, you develop an attitude that goes under your skin and influences your outlook on cases and, perhaps, on the world in general.

I have a little to say about the law of evidence. Here the influence is relatively small, because the Court shies back from saying that someone was wrongfully convicted. To say that a trial was unfair because the evidence was not assessed correctly is regarded, in the Court’s terminology, as acting as a “fourth instance.” It is like holy water for the Devil. This is something the judges shy away from with sometimes unsatisfactory or even shocking results.

An example is *Schenk v. Switzerland*, where a tape that was clearly obtained unlawfully was used in evidence. The court nevertheless held that there was plenty of other evidence to convict and, not very convincingly, found no violation. On the basis of an expert opinion prepared by the Max-Planck-Institute for Foreign and International Criminal Law and Criminology, the directors of which are amongst us today, the Court assumed that such evidence was generally admissible in the Convention countries. I believe, however, that the opinion of the Institute was somewhat misunderstood, but that’s question which does not fall to be discussed here today.

A rather shocking case is *Khan v. United Kingdom*, where a defendant was really tricked into making self-incriminatory statements in a prison, by an agent who was wired. The agent more or less questioned him in front of concealed cameras. It was the classical example of a set-up. To me, this belongs in the category of “state gangsterism.” The court found no violation, which I can only regret.

Why did I say that perhaps the answer to the question of whether the European Convention has had an influence on criminal procedural law in Europe should be “no”? Because it is not the aim of the system to reform legislation. The Strasbourg court does not tire in stressing that it only decides a specific case. It does not want to comment on whether the legislation at issue is in conformity with the Convention. Exceptionally, such a finding could be the result in an inter-state case. Statistically, these cases are without importance. As a rule, the Court deals with individual

applications and limits itself to the examination of the single specific case, as through a microscope and with those *Scheuklappen* (blinders), that you put on horses when drawing carriages, so that they don't look left or right.

The Convention does not want to reform criminal procedure, and it is certainly aloof of disputes on the different systems. The court, I think, even went too far in this direction when in *Huvig* and *Kruslin*, both against *France*, it said that case-law even in civil-law countries falls to be regarded as a "law" sufficient to interfere with "lawful" personal rights.

In the fifty years of its operation, the Convention has made an enormous leap forward. It was for a long time regarded as a resort for vexatious litigants. Now it is part of everyday court practice in Europe. It may not have the same weight in all forty-six states, but its importance increasingly everywhere. I believe that this is a great achievement. Thank you.

LEILA SADAT: Thank *you*. Alright, Christine, now it's your turn.

CHRISTINE VAN DEN WYNGAERT: Thank you, Leila. I'm addressing this meeting on hybrid or harmonized systems of criminal procedure as a hybrid person myself, because I'm somewhere in between an academic and a practitioner. I used to be a law professor, now I'm serving as a judge on the Yugoslavia tribunal. So I must step down from my normal identity as an academic, my usual openness in speaking and making critical comments. I can't go into the discussion on the Milošević trial, for example, because now, with my new hat on my head, I'm obliged to be discreet about ongoing cases.

This being said, I'm going to convey a number of thoughts and feelings to you about what it is like being a judge in a tribunal that is, as has been repeatedly said, a laboratory where we try to find a common ground between the two great legal systems. I am sitting on a bench with a Swedish judge and a presiding judge from Australia, who has a longstanding practice in a common law criminal justice system. I myself, as a Belgian, am someone who has been trained in the continental system, so it's really interesting to see tension—the differences in the way in which the trial is conducted. Many questions would probably be handled in a different manner in a civil law setting. So it's really a continuous attempt to try and find a common ground in a legal environment that, I think, is more of an adversarial nature. The ICTY procedural setup is often said to be somewhere halfway between the two systems, but I think if one looks at the most important features of the tribunal then the more important orientation is a common law orientation. But this may be my own bias as a continental lawyer.

Let me start with the ICTY's conception of human rights standards. I think the examples Professor Schabas gave are very pertinent. The *in absentia* judgments are a prominent civil law feature. They are allowed by Rule 61, which was introduced in the early years of the Tribunal, but abandoned now in practice, mainly because of the controversy over their human rights compatibility. The reading of the relevant article in the human rights instruments is different in the two systems. Article 6 of the European Convention on Human Rights entitles you to be tried in your presence. That doesn't mean that, if you decide *not* to be present, the trial cannot be conducted in your absence. That's the way in which many civil law countries look at things. The common law interpretation of the same article is different: common lawyers tend to think that *in absentia* trials are per se incompatible with Article 6 of the European Convention, and the corresponding clause in Article 14 of the Covenant.

The same analysis applies to the question of imposing counsel. Bill has described the way we could look at it differently in a continental legal system. In Article 6 of the European Convention, there is a right to defend oneself in person *or* through counsel. There is case law from the European Court of Human Rights to the effect that this "or" term is interpreted as being the right of the *State* to decide whether the defendant is defending himself in person or by counsel, not the right of the individual. So there are different readings that can be given to the basic standards of human rights incorporated in the statutes of the *ad hoc* tribunals.

The first draft of ICTY's *Rules of Procedure and Evidence* were, so I'm told, written at the United States Department of Justice. So, obviously, the rules are more common law oriented. Bill Shabas' picture of judge McDonald carrying the U.S. Federal Rules under her arm is very striking on this point. Another feature that has encouraged the preponderance of the adversarial system is that in the early years of the functioning of the court, many of the assistant legal officers were offered with the generous help of United States and the United Kingdom. So you can see what that means in terms of how the case law is developed, with a great contribution by people who were trained in a common law legal system.

Last but not least, it's very important to remember that the first prosecutor, Richard Goldstone, and his staff, were mainly common law oriented and, quite logically, the system has been set up in the common law mode. The statute itself doesn't lean in one or another direction when it comes to filling in the role of the prosecutor. Hence, the prosecutorial function could have also been developed operated in a continental mode, which would have meant a prosecutor looking at both sides of the case, not only at the case against the accused. This would have been the one

case approach that is typical for the continental legal system, the one which focuses on the search for “the truth” has not happened. What we have now instead is a two-case approach, with a parties-driven system. This also means that the defense has to play a much more active role than in a civil law system, with the necessary financial implications.

As a result, the overall structure is very adversarial common law. Nevertheless, a number of features that were introduced in the *Rules of Procedure and Evidence* are straightforward continental. For example, the limited allowance of written evidence; unsworn statements by the accused; the *proprio motu* possibility of judges to call in evidence, which is highly theoretical, I must say, because it’s on the book, in the rules of proceeding, but it’s hardly used in practice. Other examples are: the practice of combining verdict and sentence in one single judgment and the practice of some trial chambers to give the accused “the last word.”

A prominent common law feature that hasn’t really made it in the ICTY is the guilty plea. As a civil lawyer I am totally unfamiliar with it myself. I remember, a long time ago, my own astonishment as an academic when I learned that in the UK, guilty pleas are entered in more than ninety percent of the cases. Without them, the system would collapse under an impossible caseload. This is one of the problems today in Italy, as we learned from professor Illuminati in his talk at this conference. Guilty pleas are also part of the procedural architecture of the ICTY. I can see the advantages of the system. Yet, as a judge, I remain disturbed by the idea of not getting the full picture of a case, of feeling that part of the truth is not being put before you. The guilty plea has been introduced and the judges, as you rightly observed Bill, feel divided about it. The division is shown in the sentencing because you have judges that reflect the guilty plea in the sentence, and you have others that don’t. So there, too, it shows the tension between the two systems and it may explain why it is not often used in practice.

Another important point is the role of victims. Victims, like in the common law system, are degraded, from my perspective as a civil lawyer, from victims to witnesses in their own case. They are subjected to cross examination, and thus lack the protection they would get in the continental procedure against questions of that kind. So here, too, there is a strong preponderance of the common law system.

The Tribunal has a number of particular problems that need to be resolved in the short term. As you know, we have to finish the workload within four or five years. It’s going to be a very difficult task for us to handle all these cases that are before us already. The completion strategy is an important challenge for the tribunal. The question obviously is how

do you manage a strict completion date in view of the fact that the proceedings are very lengthy and that you need to maintain the fairness of the proceedings? You can't speed them up in a way that would be detrimental to fairness. One of the strategies that we use is that of transferring cases to the region under the new Rule 11*bis* of the *Rules of Procedure and Evidence*. Cases have already been transferred to Bosnia and Croatia. Another mechanism is the joinder of cases, for example in the *Srebrenica* case, in which the trials of several accused have been joined into one big mega-case. Guilty pleas could speed up the proceedings, but for the reasons explained above, they have been less frequent than in most domestic common law jurisdictions.

I was going to deal with two subjects, so maybe it's time to turn to the other one, on which I will be very brief. I thought it would be interesting to give you an idea of another line of thought which has developed in Europe in the area of harmonization, hybridization of criminal justice systems. This is the Corpus Juris Project. What is the Corpus Juris Project? It was a project launched by the European Commission. The Director of the budget of the Commission got irritated by the fact that they could see many subsidies were paid to people who weren't entitled to them and there were no actions by states to try to recover these subsidies. Why? Because it was not the money of the states that was at stake, it was European money. So the European Commission convened a number of academics from different member states of the European Union and invited them to come up with a solution to the problem of punishing financial crimes in the European Union. What were the problems? The problems are that in a trans-European fraud case, if you want to prosecute and punish offenders, you need cooperation between states. We have twenty-five different criminal justice systems. The traditional mechanisms of cooperation include extradition, judicial assistance, etc. But there are obstacles to cooperation, for example in the field of fiscal and economic crimes. One of these obstacles is the *ordre public* clause that allows states to refuse cooperation if it's against their *ordre public*, or in a larger sense, economic order. Empirical studies have shown that for financial crimes there were enormous problems and there was really a need to change the legal thinking. That was how this group of legal experts came into existence. The mandate of this group was to think up something that may not be politically feasible immediately, but that could be juridically sound and that might, at some stage in time, be put into practice. The group was chaired by Mireille Delmas-Marty, one of the great French criminal lawyers and included prominent scholars such as Professor Spencer from

Cambridge, Professor Tiedemann from Germany, Professor Grasso from Italy and professor Bacigalupo from Spain.

The idea that we came up with is something special. We proposed to harmonize the prosecutorial system, but not the court system. For specific crimes, not all crimes, but only these fraud crimes affecting the European Union, we would institute a European Public Prosecutor. This Prosecutor would be based in Brussels and each member state would have a Deputy Public Prosecutor. These “Eurocrimes,” as we would call them, would be prosecuted by this prosecutor, but before the national courts of the member states. This would leave the criminal justice systems of the states as they are, but “Europeanize” the prosecution.

I’m just going to be very brief, because it would take me too long to explain the whole concept, but that’s not the purpose of this talk anyway. The purpose is to give you an idea of a different formula. Here, we were harmonizing the crimes. In *Corpus Juris*, we defined a number of financial crimes that would be the subject matter of the jurisdiction, this European Public Prosecutor. National courts would still apply their own procedural rules, but for these particular crimes they would apply the *Corpus Juris* notion and the notions of general criminal law that are attached to it as worked out in the *Corpus Juris*. While we were doing this reflection, which was a great brainstorming exercise in comparative criminal law and procedure with these scholars from different nations, we didn’t really think that our proposals would be readily accepted. We thought this was an academic exercise, offering a solution that might have perhaps materialized in the very long run. However, the European Parliament took it up, and in various academic circles we were met with more approval than we initially anticipated. The result is that this idea was written into the European Constitution as a potential development. Meanwhile, the Constitution has been tabled. Yet, this formula for financial crimes could be the first step in dealing with other crimes, such as terrorism. This is a debate in its own right and I won’t take any more of your time. I thank you for the opportunity to explain this to you. Thank you very much.

SADAT: Thank you, Christine. Thank you, and thank you to all the panelists for respecting the time limits so beautifully. Does anybody want to comment on any of the papers already? Bill or Christine? Or should we just pass over to David? Do you want to give a brief wrap-up and then we’ll turn to the audience for questions?

DAVID SLOSS: When Leila asked me to be a discussant on this, I said, “That’s fine, what do you see as my role?” She said, “Well, you can say whatever you want, but you just have to keep it very brief.” So, I was pleased to do that, because, frankly, I was more interested in hearing what

the other panelists had to say than in speaking to you myself. I haven't been disappointed and I think we've heard some very interesting commentary here. I want to join in thanking the panelists for that. I can't really, in the brief time allotted, do justice to summarizing anything they have said so I thought about what could I do briefly. I could talk about the impact of international law on criminal procedure in the United States. That's easy to do briefly, there basically isn't any impact of international law on criminal procedure in the United States. At least, that's what I was going to say a week ago. I just want to comment very briefly on one case, decided on Monday, which shows that things may be changing here.

As you all know, the current administration has set up these military tribunals to try folks in Guantanamo Bay. They've been challenged on various grounds. The main argument presented by the petitioner challenging the military tribunals was really based on constitutional law. But interestingly enough, a federal judge in D.C. just ruled on Monday that these tribunals are invalid and relied primarily on international law rather than constitutional law in reaching this decision. The judge essentially said that the criminal procedure protections recognized by international law—and here we're focusing primarily on the Geneva Conventions—were not respected by the process set up by the U.S. government in establishing these tribunals. It remains to be seen what will happen with this case, but it is at least a brief glimmer that there may in the future be some impact of international law on criminal procedure here in the United States.

SADAT: Thank you.

<http://law.wustl.edu/igls/Conferences/CentennialUniversal/videoindex.html>