HARVARD INTERNATIONAL LAW JOURNAL — ONLINE
VOLUME 52
PROFILES: NOVEMBER 2010

An Interview with Larry D. Johnson

Introduction

In this interview, Larry D. Johnson '70 (Adjunct Professor, Columbia Law School, formerly UN Assistant-Secretary-General for Legal Affairs from 2006–2008 and Chef de Cabinet, Office of the President of the International Criminal Tribunal for the former Yugoslavia from 2003–2005) discusses his experience working for various international institutions, the pressing issues facing the United Nations and as-hoc tribunals, and the course he is currently teaching, "Constitutional Law of the United Nations." Many thanks to Larry Johnson for taking the time to sit down with the Harvard International Law Journal and share his views on these issues.

Q: Did you know you wanted to practice international law and work for international organizations when you were in law school or before that?

Before that, I was always interested in international relations, but it was really only in law school, after I had a couple of courses from professors who were giants in the field at the time—Abe Chayes and Louis Sohn—that I knew. I did well in those courses, so, as it doesn't take a rocket scientist to figure out, you should try to work in the field where you did well in school. I did well in criminal law and international law so I decided to try to find a job in international law.

Q: What were the most rewarding aspects of your career in pursuing international law?

I have had 37 years of being a lawyer in United Nations (UN) organizations, including the UN itself, the International Atomic Energy Agency, and the International

Criminal Tribunal for the former Yugoslavia (ICTY), so there have been some highlights throughout. Some of them were related to work in the UN Office of Legal Affairs, where we had to deal with the attempt of the U.S. government in 1988 to close the Palestine Liberation Organization (PLO) Mission. That got us involved with the federal district court, where the UN filed an amicus brief. It was a great mix of international law and U.S. constitutional law. The judge sided with us that Congress did not clearly intend to supersede the UN/U.S. Headquarters treaty by adopting a law closing all PLO offices in the United States, including the PLO Observer Mission to the UN. Going back to settled constitutional law doctrine, the judge ruled that as treaties and acts of Congress are both the supreme law of the land. If there is a conflict, whichever is later in time applies as long as it is absolutely clear that it is the intention of the later action, in this case an act of Congress, to supersede the treaty. In this case the judge found, as we had argued, that the requisite congressional intent to violate and supersede the treaty did not exist.

The other highlights were being involved in the creation of international criminal tribunals. The UN Legal Office prepared the statute for the International Criminal Tribunal for the former Yugoslavia, which was very challenging and exciting. We were in deep water because there wasn't anything to draw on other than Nuremberg and the courts created in Germany by the Allied Powers after the Second World War. And we had 60 days to do it. A lot of it was just flipping a coin in making policy choices. We assumed that the statute would go through lots of negotiations and tinkering by the Security Council, but at the end of the day, for various reasons, the Council adopted it as it was. So after having begun what seemed to be a very theoretical, politically motivated, and time-consuming initiative, all of a sudden it was adopted "as is" and came to life.

The second tribunal, the International Criminal Tribunal for Rwanda (ICTR), was not done by the Secretariat, but rather by members of the Security Council. Following that tribunal and after I had left, the Legal Office was involved in the creation of the tribunals for Sierra Leone and Cambodia. I was back in the Office of Legal Affairs when we created the Special Tribunal for Lebanon. This is a whole different animal, because it does not have war crimes as its subject-matter jurisdiction. The Special Tribunal for Lebanon is applying the Lebanese domestic law concerning terrorism and bombings with regard to the assassination of the late Prime Minister Rafik Hariri.

Q: Did you feel that law school prepared you for these big policy questions?

Somewhat, but at the time, international law and the UN did not "do" criminal law. There is the International Court of Justice, but that is civil involving countries suing other countries, so it has nothing to do with individual criminal responsibility. That was never part of the UN's basic mandate. And then all of a sudden, in 1993, after the atrocities and the horrible events in the Balkans, the Security Council decided that there should be something like Nuremberg to try these people, and they decided that they had the legal authority to do it. So we guessed a bit on the criminal aspects of it.

The actual subject-matter jurisdiction wasn't too difficult—war crimes, the Hague Conventions, the Law of Geneva, genocide, crimes against humanity—but how to set up a court and deal with issues such as command responsibility were relatively new. For basic international law and for legal advising, the law school provided a first class base.

Q: Critics of ad hoc tribunals such as those you have mentioned have highlighted that the international criminal tribunals prosecute too few people, that they cost too much money, and that the tribunals do not necessarily address the needs of those living in these countries. What are your responses to these critics and your views on the role of these tribunals?

On the number of indictees, actually, at the beginning of both the ICTY and the ICTR, the criticism was that they were indicting too many, and all of a sudden there were a lot of people who were being arrested or were turning themselves in. There were quite a few fugitives for a while, but in the end there are only two fugitives left for the ICTY. The Security Council, on the recommendation of the ICTY itself, said that the tribunals should limit themselves, not to every person who had committed serious violations of international humanitarian law, but to only the most senior who were responsible for the most serious crimes. So that way they began to shorten the list. And in fact some of those indictees, by procedures adopted in the ICTY, if they are middle or lower level perpetrators, can be back to local courts in the region, for example in Zagreb, Belgrade or Sarajevo, once the ICTY is satisfied that due process will be had, and that the trial will not be a sham or a kangaroo court. If the ICTY thinks that one of these domestic proceedings is not going well according to international standards of due process, it has the power to pull it back. In that way, they began to cull some of these indictees who would not be indicted today, but who were indicted in the early years when they could not get their hands on the big fish.

Later, for the tribunals for Sierra Leone and Cambodia, their mandates included that they were to try only the most senior people who had committed the most serious crimes. That's why Sierra Leone had only a few indictees, around 10–12. And they are all done except for Charles Taylor, who's being tried now. It's the same with Cambodia, where there is a relatively small number of indictees because they wanted to get the top leadership.

Q: Do you think it is a better balance to take that approach?

It fits into what later became known as the complementarity principle in the International Criminal Court (ICC), where the first port of call is the domestic jurisdiction. And if the domestic courts are unwilling or unable to investigate or prosecute, then the ICC can bring the case to the international level. So the key thing is to make sure at the domestic level that there is due process, a proper court that's functioning, and that the defendant gets a fair trial. That has created some difficulties in the case of the ICTR. Several of the applications by the Prosecutor to send cases to

the Rwandan courts have been rejected by the ICTR, as the ICTR determined that the indictees could not get a fair trial in Rwanda for various reasons, mainly the protection of witnesses. So it can be a problem. But the idea is to build up the domestic system, and certainly the Rwandese have been trying very hard. They eliminated the death penalty, and they have received a lot of assistance from various countries to try to get their system up to speed so that they can take these cases from the ICTR.

Q: Do you think we get the bang for the buck with these tribunals?

I think so. It's hard for me to say whether they are too expensive. Lots of people say that they are. But for the lawyers who say that they are too expensive, I don't know how they make that judgment. There was a good piece in the American Journal of International Law a few years ago by David Wippman comparing the cost of a trial in the Hague Tribunal to the Oklahoma City bombing trial and other trials in the United States that are very complicated.[1] One reason these trials in the tribunals take a long time is that the crimes themselves are not just single murders, rapes or atrocities, but often involve multiple victims. For example, crimes against humanity require a widespread or systematic attack against a civilian population, so it doesn't involve just killing a couple of people. There must be proof of either widespread or systematic killing. And for genocide, there must be the intent to eliminate an entire group or subgroup. So there are a lot of fact patterns and a lot of evidence and witnesses that must be produced to prosecute those kinds of crimes, as opposed to what is needed for a single murder.

The other reason they take so long is prosecutorial policy. For domestic prosecutions, if, for example, there is a serial murderer who has killed thirteen people in the Boston Common, the prosecutor does not need to prove all thirteen murders. He's going to go with the one or two murders that give him the best evidence and the best chance of a successful prosecution. But in the international criminal tribunals, because these are such heinous crimes and atrocities, prosecutors have all felt that they want to tell the world the truth about how horrible these monsters were. For example, Slobodan Milosevic was accused of crimes in three different areas, and it could have been three different cases, but for certain reasons the appeals chamber said to do one. So he was accused of doing something in Srebrenica, with the killing of the 7,000–8,000 men and boys there, and he was accused of having committed crimes in parts of Croatia, and he was accused of committing crimes in Kosovo. If you looked at it like a domestic prosecutor, you probably thought your easiest case was Kosovo, because Kosovo was part of Serbia, and he was the head of state or head of the national defense or military policy committees, and so there was a clear line of command responsibility concerning the conduct of the military. But when Carla del Ponte was asked why she had 68 counts in the indictment, she said, "Well what am I going to do about the men and boys in Srebrenica? Don't they have their day in court? Shouldn't

[1] David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006).

they have a chance to come in and expose what this person did?" What she did not say, but might have thought was, "Even though Kosovo would have been sufficient for a conviction." So it's a cumulative prosecution in many of these cases because the prosecutors feel they represent humanity and the world community. Some also—and this is somewhat debatable—feel that they must put on the historical record all the facts, to avoid the denials that occurred in Germany following World War I. All these policy factors came into play and resulted in sometimes quite lengthy indictments and proceedings. But of course the standard prosecutors in domestic cases do not care so much about the historical record. They are there to prosecute someone for having committed a crime, and they are not there to make history. So there are some interesting tensions between human rights principles—in terms of the rights of the victims to have justice for all the crimes committed and to have the story told—and the rights of the defendant to a fair trial without undue delay.

Q: Hopefully such tribunals won't be necessary again, but do you think the ones so far provide a good model for the future?

I think so, yes. Once the international community narrowed the "net" of the ICTY and the ICTR to only the senior leaders, the tribunals became much more manageable. The remaining three (Sierra Leone, Cambodia, and Lebanon) have all been funded by voluntary contributions so they are not part of the UN's assessed budget into which all members have to pay. If a government does not want to finance the Cambodia tribunal, it does not have to. The concept of voluntary contributions was objected to by the Legal Counsel at the time, and by the Secretary-General, because they said that you cannot run an international criminal tribunal by begging for funds to keep it going, with the possibility that in the middle of the trial it could run out of money. That's not a very efficient and competent way to run an international criminal tribunal, nor does it satisfy due process. But member states, including your government and mine, said "absolutely not" to assessed contributions funding these three tribunals. The only way we were going to get these three tribunals established was, unfortunately, through voluntary contributions. As we speak, there may be a request coming from the Special Court for Sierra Leone to the General Assembly for a "subvention" of General Assembly funds in order to continue the Charles Taylor trial as the voluntary funds have simply dried up.

But the ICC is supposed to take over now that it's up and running. Over a hundred countries are parties to it. The idea is that there will not be a need for these "country specific" ad hoc tribunals in the future; the ICC will take care of future cases.

Q: In a speech last year at Harvard Law School, Harold Koh said that one of the big questions in international dispute resolution is what will happen upon

the conclusion of ad hoc tribunals such as the ICTY.[2] Will there be a "residual mechanism" or "successor chamber" to handle ongoing obligations and concerns? What do you see developing in the future?

That should happen. When I was in the ICTY, there was already a call to wind it up, and we saw that certain things would have to be continued. When the statute was drafted, no one thought about how to wind it up, as the whole question was whether it would ever come alive, so it was something that we would worry about that when the time came. Now the time has come. There are various judicial functions that have to be maintained, such as the conditions of prisoners. And what happens when a prisoner becomes eligible for parole or release under the procedures of his "host" prison? The ICTY statute says that the local authorities need to go to the ICTY for approval. In theory, the ICTY could say that he is a war criminal and he should serve out the full sentence determined by the tribunal. But the practice of the ICTY is that he would serve his time according to the normal rules of the local jurisdiction. So some mechanism has to take care of that once it closes down.

The most important thing is what happens when you catch fugitives, for ICTY Ratko Mladić and Goran Hadžić. There are several fugitives in the ICTR too, one in particular Félicien Kabuga. The Security Council has indicated that these are priority fugitives who should not be tried in any local jurisdiction, and is now considering how to establish a residual mechanism for the ICTY and the ICTR. They have been at it for maybe two years now and they are making progress, but the idea is to devise a mechanism where there are judges, prosecutors and staff more or less "on call." It will have to deal with other matters such as considering whether to review a case based on new evidence not there at the time the person was convicted. There has to be some mechanism to look at it and see whether the conviction should be revisited.

The interesting thing is that the Sierra Leone tribunal probably will be the first of the five tribunals to close. The ICTY and the ICTR are still working away, but Sierra Leone tribunal only has one case left, Charles Taylor, and once that trial is over, there probably will be an appeal. So they are working in Freetown and The Hague on their own residual mechanism because that residual mechanism will not be for the Security Council but rather for the tribunal and for the group of major donors to decide. Cambodia has not touched it yet because they just completed their first successful conviction. They are going into their second case soon. The officials of the five tribunals meet periodically to discuss what they should watch for in planning a close down, and what to start thinking about now, so that it's not a panic at the end. The worst thing about closing up a tribunal is keeping good people on the staff. It's like peacekeeping missions—the hardest thing is to close it down well, efficiently, and

[2] Harold Koh, Legal Adviser, Dep't of State, Keynote Address at the Harvard International Law Journal Symposium: International Dispute Resolution in Practice (Apr. 2, 2010) (transcript available from the Harvard International Law Journal).

competently; keeping good staff until the very end. So that's the challenge now for the ICTY, the ICTR, and the Sierra Leone tribunal.

Q: On a personal level, what are the biggest differences in working for these ad hoc tribunals versus more established, standing organizations such as the UN?

There is a different geographic, age, and professional mix among the staff because these tribunals are temporary as compared to standing organizations in the UN system. First, the three tribunals funded by voluntary contributions, are outside the UN's standard application of geographic distribution rules in any event. For the ICTY and the ICTR, the usual geographic mix in a UN office is not achieved because of a lack of applications worldwide. While that is unfortunate, the upside is that most of the staff are criminal lawyers and prosecutors in their home countries. Many of the judges were judges in their home countries, and that is not found in the normal UN legal office or committee. What is also positive is that the age mix is younger in the tribunals. They follow to some extent the American system of having young law clerks and young prosecutors recently out of law school, so there were junior level people serving as law clerks to judges, just as in the United States. In fact, some of the U.S. judge's law clerks came from being law clerks in the U.S. Supreme Court. So it was a very young crowd and a very bright, young, and energetic staff. That was very exciting.

Q: Speaking of the UN, what were the key legal issues you faced at the UN as Assistant Secretary General for Legal Affairs? Which issues are most important today?

I mentioned the Special Tribunal for Lebanon that came up when I was there. That was a difficult issue because there was some opposition to it. It was requested by the Lebanese government, and it had to do with investigating and prosecuting those who assassinated Rafiq Hariri, the former Lebanese prime minister. Connected with that were possibly ten other cases that could be joined with the Hariri prosecution if the Prosecutor is able to show a connectivity—a nexus to the Hariri assassination—such as using similar *modus operandi* in the commission of the crimes. All that is very different from a war crime.

There was an attempt to put in crimes against humanity to try to ground it in war crimes so that it could follow the jurisprudence and procedures of the four "war crimes" tribunals, but there was opposition to that. It was interesting from a legal point of view. The definition of "crimes against humanity" says that it must be "widespread *or* systematic," so the acts do not need to be massive, they can be just systematic. Our thinking was that if out of these 10-plus cases maybe 80 people were killed in terrorist bombings, it could be a systematic attack, because it had the same *modus operandi*. But the permanent members of the Security Council were all very leery of that. Some of them said, "Although we know what the law says, everyone thinks crimes against humanity means a huge number of people, and that's what it has been

up to now, so having a small number of victims is not going to work." And someone on the Council actually said off the record that they would have a problem if we start going down the road of war crimes, because in the 2006 Israeli conflict with Hezbollah, although the International Committee of the Red Cross said that both sides were probably committing violations of international humanitarian law, the Council did not create a tribunal for that. If the Council did not act to create a "crimes against humanity" tribunal after that conflict, which had numerous victims, but did add it to the Lebanon tribunal which had, in comparison, fewer victims, the Council would lose credibility. Probably they were right. In any event, crimes against humanity are not part of the subject-matter jurisdiction for that tribunal. But we had a lot of discussions on trying to save bits of the statutes of the other tribunals, and procedures such as command responsibility, because once we took out war crimes, things like command responsibility and military hierarchies made no sense because it was a civilian situation. It's not armed conflict or genocide, so the test for a commander and his subordinate is different. Therefore, it had to be changed and adjusted. That tribunal remains an important issue. There are statements from Hezbollah that its members should not be indicted as it would upset the reconciliation and healing efforts in Lebanon.

Another important and interesting task that I faced soon after having left the Legal Office was the damage to UN property in Gaza during the Israel/Hamas conflict. I was a member of a Board of Inquiry of four members appointed by the Secretary-General, and we spent three weeks in the area interviewing various persons and conducting site visits and talks with the Israeli Defense Force. The Board was given the job to find the facts, determine the causes, and then determine who or what was responsible, with regard to nine specific incidents. This was not the Goldstone Inquiry as we did not have a mandate to make conclusions with regard to international humanitarian law. Our report noted the allegations in that regard and recommended an independent investigation. The Board found Israel responsible for damage to UN property, as UN property is inviolable under a 1946 Convention to which Israel is party. The Board followed the established UN position that inviolability of premises is not subject to an exception for military necessity or situations of armed conflict. On the basis of our report, the UN Legal Office submitted a claim to Israel. Last January, the UN and Israel settled the claim, with Israel paying $10.5 million while neither accepting the legal basis for the UN claim nor that it had been at fault in any way. That was a very interesting, challenging, controversial assignment, but the settlement brought it to a very satisfactory closure.

Q: You were also Assistant Secretary General for Legal Affairs during the creation of the joint AU-UN peacekeeping force for Darfur. What were the major legal issues involved in its creation?

It certainly had a lot of wrinkles. And the African Union (AU) and the UN went back and forth several times in formulating an agreement on how this joint peacekeeping force would operate. I think it was pretty well understood that because of the UN's

experience, the UN would be the more equal partner, but sensitivities had to be taken care of and respected. In the end, they were all resolved, but how it has been working on the ground I don't know. We had dual key operations in the Balkans and they did not work half the time, but I have not heard that about this operation. I think our main problem in this operation has been getting troops on the ground and getting the Sudanese government to facilitate that.

Q: Are there any ongoing issues that are troublesome for the UN?

In terms of legal issues, I mentioned the future of the Lebanon Tribunal as a matter of concern, and in addition the legacy discussions with regard to the ICTY, the ICTR and the Sierra Leone tribunal. International justice and no impunity are facing challenges in the Security Council concerning the decision of Sudan and other African states to ignore the indictment and arrest warrants issued for President al-Bashir, despite binding Council decisions. Sexual crimes committed by personnel of a peacekeeping mission (troops, experts, UN staff) continue to be an ongoing issue. There remain some cases involving UN privileges and immunities in domestic courts around the world that may cause concern if UN immunities are not honored by local courts. The Security Council's regime for freezing the assets of persons and organizations it lists as financing Taliban and Al-Qaeda is under attack in European Union courts for lack of fundamental due process. The Council may have to revise its regime if it wishes to preserve the freezes on the assets of these listed persons and organizations.

Q: On which issues (if any) do you think your view has evolved or changed the most after your time at the UN?

That's a good question. I think often international lawyers, particularly if they are civil servants—whether they are in a domestic foreign service, government legal office, or the UN—are often disappointed at times because they give advice and they don't make decisions. Sometimes if a lawyer's advice is disregarded and it's a fundamental principle the lawyer will resign, but that's basically the only thing you can do if in government service. So there have often been times when we try but it's the policymakers and politics that take over.

But in terms of the creation of the tribunals, that's been very interesting. You just never know when the stars align, when something that would have been totally seen as academic and a dream actually becomes reality. The idea of no impunity, the push for the ICC, and the idea that these three crimes—war crimes, crimes against humanity, and genocide—will not go unpunished, that's a whole new thing. That was not there until 1993. You never know when there will be great positive developments in international law. You can rarely predict when it will come.

Q: What do you think are the greatest legal barriers to the UN becoming a more effective institution?

Now you're getting into UN law. In terms of being an effective organization—for what purpose? I suppose if you look at the primary objective of the UN Charter, which is to save succeeding generations from the scourge of war, you are talking about the ability of the UN to maintain international peace and security, which is primarily the function of the Security Council. Obviously there has been a lot written in the past 60 years about how the Security Council is or is not functioning, whether the veto should be revised or expanded to have new countries get the veto or at least new permanent membership—rumor has it that World War II is over—and that the Security Council is too political an institution. I'm not sure the veto is an objective legal obstacle, because if there wasn't the veto, we would not have the organization we have today. Every member of the UN understood that and accepted the veto when they signed on to the Charter. Plus, if this "legal barrier" were removed, the Council could be adopting resolutions against the fundamental interests of the major Powers who would simply ignore the Council resolution, eroding its credibility over time. There could, as an alternative to the UN, perhaps be several organizations of like-minded states, but there would not be a universal organization. And there are high points, such as the actions leading up to the first Persian Gulf War against Iraq, when the organization actually began functioning exactly as its 1945 authors intended it to, with the five permanent members working together, meeting together, and then going to the whole Security Council. A lot of the members of the organization were not used to that and said, "What is this? The P5 are now uniting and dictating to us, imposing sanctions all over the place!" But in fact that's what the organization was intended to be like. So the biggest obstacle is dealing with the feeling of many other countries that it's not their organization, the Security Council is too powerful, and the permanent members are abusing their privileged position. You have to deal with that appearance or reality without tearing down the structure. It is trite but true to say the UN will work effectively when the political will is there of all members to make it work—that is not a legal barrier.

Q: You are currently teaching a course at Columbia entitled "Constitutional Law of the United Nations." What can the study of the UN teach us about intergovernmental organizations more generally?

I was a very good friend of the late Tom Franck, who taught that course at NYU, and at one point I was hoping to co-teach it with him. With his blessing I took that title and am using his course book. At the end of the day the course is to show the students that the UN, its Charter, its resolutions, and all of these legal texts are drafted in a political context. But that's the same thing as acts of Congress as well. So you have to understand the political context because the law doesn't fall from the sky. Policymakers make it. Sometimes they are lawyers and sometimes they are not. And there are limits to that. Sometimes it works and sometimes it doesn't work. And again it doesn't take rocket science, but the basic gist is not to have too high an expectation

of international organizations when they are a universal political organization like this one, but rather try to work it so that it does achieve its objectives.

Q: Do you have any advice for students or young lawyers interested in working for international organizations such as the UN?

Different organizations have different hiring procedures. The UN has a competitive exam for entry level applicants, just as the United States has a Foreign Service exam. We tried in the Office of Legal Affairs—and so did the U.S. Mission and I think even the State Department—to get an exemption for lawyers because lawyers in the State Department are not Foreign Service (they don't take the Foreign Service exam). For lawyers we have the Bar Exam. But that did not work; the administrative types didn't buy that. But on the other hand, the exam only applies to the entry, lowest level. For jobs after about five years of experience, there are no exams.

But other organizations, such as the criminal tribunals, specialized agencies, the UN Development Programme, the United Nations Children's Fund, and the UN High Commissioner for Refugees office, do not have the exam. So you have to do some digging and be persistent and look at different organizations to see where you can apply pretty quickly after law school without taking the exam. Basically when you leave law school you will most likely be getting a normal legal job, and proving yourself as a competent lawyer, and that's the most important thing. Not everyone has to go out and be an NGO lawyer. But maintain your interest in international law by either being active in a city bar or a state bar association, or by publishing. When you do apply—if you want to—four or five years later, you can say, "Ok, I've been practicing as a private lawyer, I'm a good bread and butter lawyer, I can do that. But I've always had my interest in this field as evidenced by my law school courses and activities and also by my continued activities in the field after law school."