



Proceedings of the Second International Humanitarian Law Dialogs

August 25-26, 2008, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane



**Proceedings of the Second
International Humanitarian Law
Dialogs**

*August 25-26, 2008
at the Chautauqua Institution*

Edited by

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How does it end

This time of man on earth?

Will it be by a flood of the seas over the land?

The return of the monster, Tyrannosaurus Rex?

The crash of a comet into the earth?

None of these.

The forces of nature we shall surmount.

We have naught to fear save ourselves. Only ourselves.

The tyrant must be forced to end his tyranny.

The aggressor must be punished for his aggressions.

And law, not force, must rule the world.

Man's destiny lies in the hands of man.

Whitney R. Harris

Introduction

Elizabeth Andersen*

On August 25, 2008, the chief prosecutors of most of the international criminal tribunals since Nuremberg convened at the Chautauqua Institution in upstate New York for the Second Annual International Humanitarian Law Dialogs. In a mix of public and private sessions, the group shared lessons learned, brainstormed strategies for meeting common challenges, and took stock of global efforts to end impunity. Marking the sixtieth anniversary of the Genocide Convention, the meeting focused on this “crime of crimes.” The speeches and commemorative essays collected in these *Proceedings* provide a valuable record of those discussions. The American Society of International Law, dedicated to strengthening the role of international law in international affairs, is pleased to support the Chautauqua Dialogs and in particular to publish this record—to inform contemporary accountability efforts and create an historical record for the ages.

In what amounts to a report card on humanity’s efforts to criminalize genocide, the Chautauqua Dialogs summarized here highlight the significant progress made since Raphaël Lemkin coined the term “genocide” at Nuremberg. As outlined in valuable essays by Professors Mark Drumbl and Michael Newton, within

* Executive Director & Executive Vice President, American Society of International Law. Many thanks to Preeti Kundra Deshmukh for her invaluable assistance in reviewing these *Proceedings*.

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the lifetimes of Ben Ferencz, Whitney Harris, and Henry King, the prohibition and criminalization of genocide has become law—recognized as customary international law, codified in the Convention, and operationalized in the statutes and judgments of international criminal tribunals for Yugoslavia, Rwanda, Sierra Leone, and Cambodia, and finally, the International Criminal Court (ICC). And yet, as we hail those achievements, the Chautauqua discussions remind us of the major challenges and open questions that remain.

The year between the first and second Chautauqua Dialogs saw significant developments at the international tribunals and in particular with respect to accountability for genocide. Most notable was the arrest of Bosnian Serb leader Radovan Karadžić. After thirteen years on the run, Karadžić had been brought to The Hague to face charges of genocide, crimes against humanity, and war crimes. In the same vein, thirty years after the Khmer Rouge's reign of terror in Cambodia, preparations were finally under way for the first trial before the Extraordinary Chambers in the Courts of Cambodia. These developments demonstrate that even when perpetrators of atrocities enjoy impunity in the short run, time is on the side of accountability.

Against the backdrop of this progress, however, the prosecutors at Chautauqua were preoccupied with more than a few challenges. Principal among these was the fate of Sudanese President Omar Al Bashir, for whom the Prosecutor of the International Criminal Court had sought confirmation of an arrest warrant on charges of genocide and crimes against humanity. A number of

African states were pressing for suspension of the process against Bashir, arguing that accountability would undermine the Darfur peace process and renewing “peace versus justice” debates. In her Chautauqua remarks, ICC Deputy Prosecutor Fatou Bensouda gave a clear response:

[T]he same countries and leaders who have been heard to say ‘never again,’ who have shamed the international community for letting Rwanda and other massive atrocities happen, are asking the Court to look away. Well, let me repeat again the Prosecutor’s words: we don’t have the luxury to look away We have heard it all before. Don’t do justice before a peace agreement because it makes negotiations difficult, and don’t do justice after a peace agreement because it makes implementation difficult. Don’t present a case against Bashir now, don’t arrest Kony now. When will we have enough raped women, enough abducted children? I think now, sixty years after the adoption of the Genocide Convention, is the right time to act.¹

While Prosecutor Bensouda worried about the Security Council suspending the ICC case against Al Bashir, prosecutors for the Cambodia, Yugoslavia, and

¹ Fatou Bensouda, *The Genocide Convention: A Sixtieth Anniversary Celebration*, *infra* p. 71.

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Rwanda tribunals expressed concern that completion strategies for their institutions would cut short their accountability efforts, without adequate capacity in national courts to fill the gap—a concern driven home in Professor Leila Sadat’s provocative essay about transnational judicial dialogue and complementarity between the Rwanda tribunal and courts in Rwanda and third party states.

Beyond these institutional concerns, discussion among the prosecutors revealed intriguing differences among them on questions such as which crime is the “crime of crimes” (the crime of aggression or genocide); how best to manage victims’ interest in having their suffering labeled as “genocide,” even when the law may not support it; whether defendants should be able to plead guilty to “genocide” or prosecutors should be allowed to trade away genocide charges in plea negotiations; whether their accountability efforts could be said to have a deterrent effect; and whether deterrence matters any way.

Even while much of the discussion highlighted progress on holding *genocidaires* accountable, Ambassador Williamson reminded the Chautauqua gathering that much remains to be done to effectively prevent mass killing in the first place. The importance of prevention was underscored by moving personal accounts from Omer Ismail and Grace Akallo about atrocities in Darfur and Uganda respectively. Too often discussion of international criminal law takes on an abstract legalistic cast. Their stories reminded us all of the very personal human interests at stake, and Lucy

Reed's account of claims tribunals offered insights into "rough justice" mechanisms that can swiftly provide victims some measure of relief.

In sum, the 2008 Chautauqua Dialogs and these commemorative essays marked sixty years of progress toward accountability, but more importantly, they set out a large agenda for the field of international criminal law and the Dialogs for years to come. We hope that this volume provides readers with a useful snapshot of the debates circa 2008 and serves as a springboard for future efforts to advance the field.

Reflections on
Nuremberg

Nuremberg and Genocide: Historical Perspectives

**Whitney R. Harris
Henry T. King, Jr.
Benjamin B. Ferencz**

Introduction
*John Q. Barrett**

I thank each of the sponsors who convened this extraordinary gathering. It is a privilege for me to be in conversation with these prosecutors, and particularly to be at this podium to moderate a panel of former Nuremberg prosecutors.

Professor Michael Newton said during a previous panel, “The era of accountability is underway.” That is a true and important statement. It also is, coincidentally, a fine setup line for this introduction, because before the

* Professor of Law, St. John’s University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). This panel, part of the second annual International Humanitarian Law Dialogs, occurred on August 26, 2008, at Chautauqua Institution’s Athenaeum Hotel. I am very grateful to panelists Whitney Harris, Henry King, and Ben Ferencz for their contributions here and for their generous and inspiring friendship. They join me in thanking Professor David M. Crane, Gregory L. Peterson, Adam C. Bratton, Lucy F. Reed, Elizabeth Andersen, Thomas Becker, and their respective Syracuse University, Robert H. Jackson Center, American Society of International Law, and Chautauqua Institution colleagues for co-sponsoring this program. We also thank St. John’s law student Andrew W. Dodd for excellent assistance in preparing this transcript, which has been edited for publication.

era of accountability could be underway in our time, there had to be accountability as a concept—accountability in principle—and then, in a “result” moment, accountability as an achievement.

Accountability in principle and accountability first achieved are descriptions of the Nuremberg trials that occurred in the United States occupation sector of the former Germany following the end of World War II in Europe. The Nuremberg trials began with the creation of the International Military Tribunal (IMT) in summer 1945 and the start of its trial that fall. After the IMT trial concluded a year later, Nuremberg was the site of twelve “subsequent proceedings”—United States military trials—during the next three years.

“Nuremberg” is many things. It is that Bavarian city and those moments and trials and legal and historical achievements. It has, as a word, become one in a very small category of special places, moments, and achievements that have become shorthand labels for some of the core realities and some of the highest things that we share as humans. Perhaps Rome (the International Criminal Court, or ICC, statute) and The Hague (site of the resulting ICC and other ongoing international criminal courts) also now are on that list—those institutions are young and developing.

The list of shorthand concepts, moments, and achievements definitely includes San Francisco—Lake Success—Turtle Bay—New York, New York: the founding of the United Nations.

From an American perspective, Antietam, Vicksburg, Gettysburg, and Appomattox Courthouse are on that list—those names stand for the United States Civil War and then for the new Constitution, the equality Constitution, that became ours, going forward to this day, following bloody conflict.

Philadelphia—Constitution Hall—1787: that hot summer and the first United States Constitution are on that list, as are Lexington and Concord, the Fourth of July 1776 and the successful revolution. So, too, Bethlehem and Calvary, Mount Sinai and Moses. These shorthand names and locations are permanently significant. They exist in geography and in history as people in places in moments. They also exist much higher, at the levels of principle, creed, and permanence. And Nuremberg, too, is on that list.

Each of these items is very much a work in progress. Never done, they are ours as they were our predecessors' and as they will be our successors'. Each in its manifold meanings is fundamental to the world that we have, and to the potential better world that we can leave to—and I use now a favorite, little noticed phrase from the Preamble to the Constitution of the United States—“our Posterity.”¹ As we talk about international

¹ U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution....”). See generally Charles L. Black, Jr., *And Our Posterity*, 102 YALE L.J. 1527 (1993).

humanitarian law, of course we talk here in 2008, we talk to each other and we work in this moment. But this work and this discussion are not only about us. They are about our Posterity, as is each fundamental topic on that eternal list.

In this humbling context, it is my privilege first to introduce four friends who were at Nuremberg after World War II and who grace us with their presence today: Don Ellison, Raymond D'Addario, William H. Glenny, and Allan Dreyfuss. Don was a communications officer who made cables fly from Nuremberg on TWIX, an early ancestor of fax and email. Ray was the Nuremberg photographer whose work the world knows, and from which we all have learned so much. Bill was a prison guard at Nuremberg—among other things, he cared, properly and commendably, for the spiritual well-being of Hermann Goering and other prisoners. Allan covered the trial as a reporter for the United States Army newspaper, Stars and Stripes.²

It also is my privilege to make four more introductions. The first is a looming, incorporeal presence: Robert H. Jackson. He was a central part of, and he is present for any consideration of, the

² See ALLAN DREYFUSS, THESE 21 (Stars and Stripes 2006) (reprinting his 1946 pamphlet on the Nuremberg trial and defendants).

Nuremberg story.³ He was the architect, the United States Chief of Counsel, the employer and supervisor, and Nuremberg's leading man. He was the presidential appointee who accepted an almost impossible job: to go into the wreckage of Europe, into the undeveloped state of international law, to establish the principle that high leaders were legally accountable for crimes against peace, war crimes, and crimes against humanity. He had to work in alliance with three other nations and quite varying legal systems to gather evidence, build cases, prosecute individuals fairly, carry a burden of proof in public before an independent tribunal and, through that work, with all of his colleagues, to leave trails that we can follow and try to build forward as we work for our posterity.

Working directly for and with Justice Jackson, very closely on a personal level, is the man to my left, Whitney R. Harris. He today is a St. Louis lawyer and the senior Nuremberg trial participant. In his long life, his many, many achievements include always speaking and writing—including his comprehensive book,

³ See generally John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUDIES L. REV. 511 (2007); John Q. Barrett, "One Good Man": *The Jacksonian Shape of Nuremberg*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945* (Die Nürnberger Prozesse: Völkerstrafrecht seit 1945) (Herbert R. Reginbogin & Christoph J.M. Safferling, eds., 2006).

Tyranny on Trial⁴—about Nuremberg and its legacies. Formed by his experience there as a young—not new, but young—lawyer, he understood in a way that none of us can how much it truly matters. It is an honor to be here with Whitney Harris.

I am also very pleased to introduce Henry T. King, Jr. Henry went to Nuremberg in the spring of 1946 as a very young lawyer. He was a kid, one of the youngest in Nuremberg. He was part of assisting the completion of the International Military Tribunal phase, and then he stayed in Nuremberg and worked as a prosecutor in the subsequent American proceedings, including the *Milch* case. Henry today is a Cleveland lawyer, a Case Western Reserve University law professor, a great teacher, writer, and speaker. It is an honor to be here with Henry King.

Finally, even younger than Henry is Benjamin B. Ferencz. Ben also came to Nuremberg in 1946. He earlier had worked on war crimes as a soldier, as an investigator, and as part of the Dachau trial process in 1945. Ben became a key part of Nuremberg's subsequent proceedings: he was the chief prosecutor in the *Einsatzgruppen* case, the single biggest murder case. He also worked on other cases, and in the occupation government—he did not return to the United States until the new Germany, which he helped midwife, had been

⁴ See WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946* (including Foreword by Robert G. Storey and Introduction by Robert H. Jackson) (1954; 1995; rev. ed. 1999).

born. Over the last fifty plus years, Ben has developed path-breaking ideas, written and spoken indefatigably, and devoted his life to the future of international law. It is an honor to be here with Ben Ferencz.

Two final matters to introduce are concepts in the air. One, already introduced, is Nuremberg itself. It began with Jackson's appointment in the spring of 1945. He went to London that summer with a small team, met and recruited more personnel (including Whitney Harris), and reached with British, Soviet, and French allies in August the London Agreement and drafted a charter for the resulting International Military Tribunal. In Nuremberg, they found a mostly-standing courthouse with an adjacent prison. Relocating there, they drafted and filed an indictment in less than two months, gathered, analyzed, and assembled evidence and, by late November, commenced the trial of twenty-one surviving principal Nazi leaders and officials and six Nazi organizations.

That was the one and only international Nuremberg trial. After the completion of the IMT case in the fall of 1946, the United States prosecution effort remained in Nuremberg and alone tried twelve subsequent cases before the Nuremberg Military Tribunals. These cases included *Milch*, the *Einsatzgruppen*, the "Doctors Case," and the "Justice Case" that is the basis for the late Abby Mann's film, "Judgment at Nuremberg"—all important parts of supplying the content that the word "Nuremberg" today contains.

I also wish to introduce the Genocide Convention, which we heard discussed yesterday. It was drafted and agreed upon at the United Nations in 1948, so we are in its sixtieth anniversary year. Through its ratification process over ensuing decades, it became a key part of international humanitarian law. The word “genocide,” a new concept in the 1940s, grew out of the evidence and the Nazi crimes that Nuremberg addressed and proved. Raphaël Lemkin, a Polish lawyer and refugee who lost his family in the Holocaust, coined that word, achieved as a Jackson staff consultant its inclusion in the Nuremberg indictment, and then fought for that international covenant—he poured his life into that achievement, creating a challenge that now is, of course, ours.

I juxtapose that Genocide Convention with this morning’s New York Times. It contains a story of Sudanese armies going on Monday (their time)—literally as we were gathered in Chautauqua Institution’s cinema, watching and then discussing the documentary “Darfur Now”—into a Darfur refugee camp and, according to first reports, killing upwards of fifty people while United Nations forces and African Union military forces were allegedly nearby and doing nothing to stop it.⁵

The topics of our discussion will be Nuremberg, and today, and our posterity. Whitney Harris will be our first speaker.

⁵ See Lydia Polgreen, *Dozens Are Killed in Raid on Darfur Camp*, N.Y. TIMES, Aug. 26, 2008, at A9.

Remarks

*Whitney R. Harris**

Thank you very much, John, and my dear colleagues. These guys are my true friends, not only from Nuremberg but from all the years since, and I really love them. They are dedicated men, they really believe in the rule of law, and I am honored to be gathered here to be in their company.

During World War II, leaders of the Axis powers were repeatedly warned against the commission of acts of cruelty and barbarism. On December 17, 1942, the Allies took note of pogroms against the Jews and condemned in the strongest possible terms this bestial policy of cold-blooded extermination, reaffirming their solemn resolution to ensure that those responsible for these crimes shall not escape retribution.⁶

* Mr. Harris, a graduate of the University of California Berkeley Boalt Hall School of Law, served in the United States Navy and as United States Trial Counsel, International Military Tribunal, Nuremberg, 1945-46. He was primarily responsible for the prosecutions of defendants Ernst Kaltenbrunner, the *Gestapo*, and the *SD*. He served subsequently as Chief of Legal Advice during the Berlin Blockade, as a law professor at Southern Methodist University, as director of the Hoover Commission's Legal Services Task Force, as the first Executive Director of the American Bar Association, and as Solicitor General of Southwestern Bell Telephone Company in St. Louis.

⁶ See *11 Allies Condemn Nazi War on Jews*, N.Y. TIMES, Dec. 18, 1942, at 1, 10 (publishing text of declaration).

The crimes having continued, so far as could be ascertained behind the battle lines, on March 24, 1944, President Franklin Roosevelt declared:

In one of the blackest crimes of all history—begun by the Nazis in the day of peace and multiplied by them a hundred times in times of war—the wholesale systematic murder of the Jews of Europe goes on unabated every hour.

It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished.⁷

At the close of the war in Europe, the major victorious powers, the United States, Great Britain, France, and the Soviet Union, agreed to bring to trial the leaders of the Axis powers responsible for initiating World War II in a commission of incomparable crime. By the London Agreement of August 8, 1945, the International Military Tribunal (IMT) was established with jurisdiction over crimes against peace, war crimes, and crimes against humanity, namely the extermination or other inhumane treatment of civilian populations in connection with other crimes within the jurisdiction of

⁷ *The President Asks That Frontiers Be Opened to Victims of Nazi Oppression and Declares That War Criminals Will Be Tried and Punished, March 24, 1944*, in 13 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT: VICTORY & THE THRESHOLD OF PEACE, 1944-45, at 103, 104 (Samuel I. Rosenman, ed., 1950).

the Tribunal. Following the adoption of the charter of the Tribunal, an indictment was prepared charging twenty-four leaders of Nazi Germany with the commission of crimes within the Tribunal's jurisdiction.

The comprehensive judgment of the Tribunal made no explicit mention of genocide, confining its description of murder and ill treatment of civilian populations to the language of the Charter. Genocide as such was not declared to be a crime in international law by the IMT, but genocide as a legal principle was affirmed by the General Assembly of the United Nations in its resolution of December 11, 1945, when it defined genocide as the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings. Genocide today is a recognized and affirmed crime in international law through both the Genocide Convention and the statute of the International Criminal Court.

Genocide's recognition is the result and principal part of the evidence we assembled at Nuremberg. The subject was covered at length in my book, *Tyranny on Trial*.⁸ I have more recently written a volume on the incredible genocide by the Nazis at Auschwitz, entitled *Murder by the Millions*, which was published by the Jackson Center. It was this Nazi Holocaust which assured the universal recognition of genocide as a crime in international law.

⁸ See HARRIS, *supra* note 4.

Under the Nazi system, the principle repressive agencies, the *Gestapo* and the *SD*, had been combined with the Nazi intelligence system within the Reich Main Security Office, or RSHA. In fall 1945, Justice Jackson's executive trial counsel, Colonel Robert G. Storey, directed me to prepare the case against the *Gestapo* and *SD* and the chief Reich Main security officer, Ernst Kaltenbrunner. I was provided an office in the frigid Palace of Justice, a German secretary, and a secondhand typewriter, and I was told to find the evidence, write the briefs, and assemble the proofs for this aspect of the case.

Shortly after I was given this assignment, I found an interesting letter in our document room. It had been written by a man named Becker to Walther Rauff, the head of the motor vehicles department of the *Gestapo*. In his letter, Becker complained about the malfunctioning of a gas van he was operating in the eastern territories. It was written from an "*Einsatzkommando*." At that time, I knew nothing about *Einsatzkommandos* or criminal activities of the *Gestapo* and *SD* on the Eastern front.

While working on the Kaltenbrunner case, I also learned that British intelligence had taken prisoner a man by the name of Otto Ohlendorf and had him under interrogation in London. Ohlendorf was a head of *Amt III* of the RSHA, which dealt with matters of intelligence within Germany. I had no idea that he might be able to shed light on war crimes but I thought it would be useful to bring him to Nuremberg where I could learn more

from him about the organization of which Kaltenbrunner, my defendant, was a chief.

The British sent him to Nuremberg, and I began the interrogation by asking him what his activities had been during the war. He said that he had served as a chief of *Amt III* of the RSHA except for the year 1941. Naturally, I asked what he had done during that year. When he replied that in 1941 he had been in command of *Einsatzgruppe D*, I immediately recalled the Becker letter that had been written from an *Einsatzkommando*. I was inspired to ask, "Well, Ohlendorf, how many men, women and children did your group kill during that year?" And he answered "90,000." That broke the case on the extermination program of the *Einsatzgruppe* in the eastern territories. We were able to establish through the testimony of Ohlendorf and others that approximately two million persons, and namely Jews, had been murdered by these units of the *RSHA*. It was the initial proof of the Holocaust—genocide by Germany.

Ohlendorf testified before the IMT that he knew of Becker and Rauff, and that the Becker letter was genuine. The Soviet member of the Tribunal, General Ion Nikitchenko, asked the following questions of

Ohlendorf:

Question: In your testimony you said that the *Einsatz* group had the object of annihilating the Jews and the commissars, is that correct?

Answer: Yes.

Question: And in what category did you consider the children? For what reason were the children massacred?

Answer: The order was that the Jewish population should be totally exterminated.

Question: Including the children?

Answer: Yes.

Question: Were all the Jewish children murdered?

Answer: Yes.⁹

In *Tyranny on Trial*, a diagram is displayed containing a report by Stahlecker, the chief of *Einsatzgruppe A*, showing the number of Jews

⁹ IV TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946 ("The Blue Set"), at 337-38 (proceedings of Jan. 3, 1946).

exterminated in the Baltic states, each number encased in the diagram of a coffin.¹⁰ The report stated that in the first four months of operations, *Einsatzgruppe A* had murdered 135,000 Communists and Jews. Estonia was shown as already *judenfrei*—free of Jews.

By the time we had rested our case, we had not found the greatest killer of the regime, Rudolf Hoess, the commandant of Auschwitz concentration camp. It was, therefore, a dramatic moment when I was informed that Hoess had been captured by the British near Flensburg. I asked that he be sent to Nuremberg where I interrogated him over a period of three days, reducing his testimony to an affidavit. Hoess told me, and later testified to the Tribunal in open court, that approximately 2.5 million persons had been murdered at Auschwitz.

Upon completion of his testimony, he was turned over to the Polish government. While awaiting trial in Poland, Hoess recanted his confession, in part stating that the figure he had given me had been supplied by *Gestapo* chief Adolf Eichmann, and that he regarded the total of 2.5 million as far too high. Even Auschwitz had limits to its destructive possibilities, he wrote. Perhaps the figure was inflated. The U.S. Holocaust Memorial Museum estimates that over a million Jews—1.1 million Jews—were killed at Auschwitz. In addition, gypsies, Soviet POWs, Jehovah's Witnesses, and others were consumed in the inferno.

¹⁰ See HARRIS, *supra* note 4, at 361.

There may have been a macabre twist to Hoess's testimony. Since he was to be labeled "the world's supreme murderer" in any case, he may have thought in his morbid mind to establish a record of mass killings never to be surpassed by any other man. This seems a reasonable supposition when it is remembered that Eichmann had said that he would jump laughing into his grave, remembering the killing of six million Jews of Europe.

Hitler and his confederates who led Germany to disaster in the twentieth century are all dead. They were the principal actors in a fearsome drama, but as Prospero foretold they were all spirits and melted into air, into thin air. The tyrant Hitler, and his associates in crime, will someday be forgotten. Forgotten, too, may be their crimes. It is enough that tomorrow's world remembers what today's world has learned through the bitter experience of this fallen regime—that tyranny leads to inhumanity and inhumanity to death. The spirit of Hitlerism was one of the greatest factors for evil in all of history. For Hitler had the advantage over tyrants of earlier times of modern technology through which his propaganda could be constantly pounded into the German people, and his war machine could be made to strike his enemies with shattering force. The consequence of that spirit was the commission of genocide and other crimes against humanity which staggered comprehension.

After hearing the confession of Rudolf Hoess to the Nuremberg tribunal, the defendant Hans Frank, the Governor General of occupied Poland, declared: "That

was the low point of the entire trial—to hear a man say out of his own mouth that he exterminated 2½ million people in cold blood. That is something that people will talk about for a thousand years.”¹¹

We must have an effective system of international justice crowning our national systems of law. Our scientists have not feared to make thermonuclear weapons which could destroy civilization. Certainly, we should not fear to establish the principles of law which will permit civilization to survive. We must find the way to make laws supreme in international relations, or we shall live forever under a pall of fear.

Nuremberg stands firmly against the resignation of men to the inhumanity of man. Because of Nuremberg and the efforts which it represents—man’s attempt to elevate justice and law over inhumanity and war—there is a hope for a better tomorrow. Thank you.

¹¹ G. M. GILBERT, NUREMBERG DIARY 266 (1947).

Remarks
*Henry T. King, Jr. **

I thought I would give you a personal speech in terms of my personal experience incident to going to Nuremberg and then endeavor to try to set a model for other people in the future. My philosophy is that you can either stumble ahead in life, one foot ahead of the other, or you can keep your eyes on the stars. You can dream dreams of a better world. You can tithe for humanity. I learned that from my father and also at Nuremberg.

In 1946, I had just graduated from the Yale Law School. I was a very good student there, was sought after by every law firm there was, and I suddenly began working in the caverns of Wall Street. And I never saw my wife. So we agreed to have dinner every Wednesday night at Schrafft's at six o'clock. I said, "What do you do all day?" She said, "I can't tell you." I said, "Well, I am your husband, theoretically at least." She said, "You heard what I said." It developed she was working at the

* Professor of Law, Case Western Reserve University School of Law, and United States Director of the Canada-U.S. Law Institute. After graduating from Yale Law School, Mr. King practiced law in New York City with Milbank, Tweed & Hope, then served as a Nuremberg war crimes prosecutor, and then had a long career as a corporate counsel, including more than twenty years with TRW Inc., where he was chief corporate international counsel. He is former chairman of the American Bar Association's Section of International Law and Practice, served on the ABA's special task force on war crimes in the former Yugoslavia, and was U.S. chairman of a joint working group, organized by the American, Canadian, and Mexican bar associations, on the settlement of international disputes.

SAM labs on the atom bomb which was dropped at Hiroshima.

She said, "What do you do all day?" "Well, every afternoon at two o'clock I go to Chase Bank. I review corporate trust department documents. I work hard. And sometimes I work late at night." She said, "My God! There is a world out there. We ought to be part of it."

It wasn't long thereafter that I got very restless, so I agreed to go with a smaller law firm. I had an opportunity for partnership there even though I was very young at the time—I had done law school in two years instead of three. I invited Ted Fenstermacher, my classmate at Yale, out for a nice roast pork dinner, and I made my job announcement. He said nothing at first. Then he said, "Henry, I hate to upstage you, but I am joining the U.S. prosecution staff at Nuremberg."

My wife would not let me get to bed that night—I never got a moment of sleep. The following day, I was on the steps of the Pentagon, applying to join him. And I was hired.

Every other friend I had said, "You're giving up a sure partnership on Wall Street"—I did not agree, but they thought I was a sure thing. They said, "When you get back, there will be no jobs, you'll have insecurity, the veterans will be here, they'll have priority, you'll be out on the street." But I'm proud of my wife, who had a needle in my back.

I set sail for Nuremberg. I arrived there in March 1946 in a blinding rainstorm. I walked into the Grand Hotel, which was to be my home for a year and a half there. I didn't sleep much that night. The following morning, I walked through the ruins of Nuremberg and there was nobody there—the only human beings were a few old women with depressing black shawls. They had no food. And as I walked to the courthouse for the first time, I said I'm going to dedicate my life to the prevention of this. Since then, I have dedicated my life to it.

I got to the courthouse, and I had no supervision whatsoever. They said, "Prepare cases against von Brauchitsch," who was Commander-in-Chief of the German Army, "Guderian," who was the Chief of Staff of the German Army, "and Erhard Milch," who was head of the German Air force under Goering. Nuremberg was geared for self-starters. I am if anything a self-starter. I didn't like supervision. I had too many layers of supervision in the Milbank firm: there was a junior partner, a senior associate and this and that, and by the time anything got done it had been watered down so that it didn't mean as much as I wanted it to mean.

I worked on the human experiments case. I saw the crimes—I saw what Dr. Rascher had done at Dachau concentration camp. I saw the slave laborers—we had witnesses from the slave laborers, the largest slaving operation in history, nothing even remotely like it.

I also met some of the defendants. I talked with Hermann Goering. He was very entertaining—he was

quite a raconteur. The last time I saw him was a Saturday afternoon, September 28, 1946. We spent a couple of hours hearing about the gossip between Hitler and Count Ciano, who he hated, the Italian foreign minister of Italy and Mussolini's son-in-law. Goering was an unreconstructed Nazi. He was a person who believed that Hitler would come back, that there would be a return in sixty years.

I also met Albert Speer, who was the Minister of War Production—I wrote a book about him.¹² I had prepared a case with Speer against Erhard Milch, who was a leader of the Central Planning Board that governed Germany's economy in war time. I tried to get testimony against Milch from Speer. He did not have any testimony he wanted to give me. He said, "I am responsible, I was the chairman of the Central Planning Board, I take responsibility for it." So I got a dry hole in other words—in the oil industry, that's bad.

So I had to make conversations with Speer. I saw that he was drawing a picture of a woman with a black shawl, sitting on a park bench and looking into a dark sky. I said, "Who is that picture of?" He said, "It's my mother." I said, "Why is she so depressed?" He said, "Because I am here." I told him I thought the painting was very good—my mother was an artist and so was my mother-in-law, and so I got talking with him. I said, "You were the one who influenced Hitler more than anybody else. How did you do it?" He said, "Well,

¹² See HENRY T. KING, JR., WITH BETTINA ELLES, *THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR* (1997).

every Wednesday night I took the night plane about 7:00 p.m. from Tempelhof aerodrome in Berlin to Hitler in Berchtesgaden, and I'd pre-dialog my conversations with Hitler." And I said, "What do you mean?" "Well," he said,

Let me give you an example. Bormann, who was party chief, wanted to destroy all the industrial installations in the Low Countries and in France, and I didn't want that. So on the way down from Tempelhof to Berchtesgaden, I conceived of a plan for handling the meeting and for destroying Bormann's objective. When I got down there, after my pre-rehearsal, I told Hitler, "You have this directive which Bormann has asked you to sign. You don't want to sign that! We are coming back! You told us we are coming back," and Hitler ripped up the directive.

So Speer intrigued me a great deal. He was the only one who effectively pleaded guilty—he said "I am responsible," and he certainly knew very well he did some terrible things. I learned a lot in Nuremberg, through Speer and through many other people, particularly on the prosecution staff.

When I got back from Nuremberg, I served my time like Milch. (He was the head of the air force and he was convicted for slave labor, but he was not convicted of the human experiments). With a good record from Yale Law School, which at that time was the top law school

and still is, I had to look hard for a job. I found that the Bar had a lot of misconceptions about Nuremberg, that lawyers were worried about the *ex post facto* element of Nuremberg. I had trouble getting a job. But I finally succeeded.

Since that time, I have been carrying the torch, first through the United World Federalists, then through the American Bar Association where I was chairman of the Section of International Law, and through other activities.

What I am saying is this: I am in the autumn of my life—perhaps the late autumn, I don't know, although I hope I have a few years left. As I look at it, Nuremberg was the most meaningful part of my life. I don't say that in a selfish stance—we have to sell young people on the substance. Peace is a concern of all persons who are going to be here on the planet and want a world in which weapons don't destroy men. We want men to control weapons—that's the important thing.

I return to my first premise: you have got to keep your eyes on the stars, live on hope, and keep idealism about the future. We have a special responsibility because we are a free society, a society where dreams can become reality. We have the American dream which becomes a reality in the business world. Let the American dream become a reality in the international political world. Thank you.

Remarks
*Benjamin B. Ferencz**

I find that numbers mean very little to an audience. What does it mean to say a million people killed? Or two million people killed? The story of Anne Frank everybody knows, but who were among the millions? How many fathers? How many children? And so on. It is a little too grim.

Henry has told you the inspiring story of how he was saved from Wall Street by going to suffer in the Grand Hotel, where whiskey was fifty cents a bottle or something like that. Not exactly Washington crossing the Delaware, but in fact we had no idea at that time that we would be sitting here sixty years later and discussing it. I am sure that none of us would have dreamt that that was at all possible.

Most of you, I am sure, have heard during this conference about how difficult it is in the various tribunals, the difficulties with the statutes, of various provisions and all that, all of which is correct if you are a

* Mr. Ferencz, a graduate of Harvard Law School, served as Chief Prosecutor of the *Einsatzgruppen* trial at Nuremberg in 1947. Upon returning to the United States in the 1950s, he was in private law practice in New York City. In the 1970s and 1980s, he wrote prolifically on issues of peace and international law. Since the close of the Cold War, he has been active at preparatory commission sessions for the International Criminal Court (ICC), monitoring and making available his expertise on current efforts to define aggression. He also has continued to mobilize support for the ICC, to take on pundits, and to educate often misinformed media.

technician or an expert on it. I would like to take a step back and take another view of it.

Let me follow Henry's lead by telling you how I got involved in this business. I was a graduate of a very good law school, Harvard, and soon after that event occurred the Army recognized my talent and made me private in the artillery. In that capacity, I landed on the beaches at Normandy, chased the Germans halfway to Berlin and went through all the battles. When the war was over, I had reached the exalted status of Sergeant of Infantry. I got an honorable discharge and five battle stars for having participated in leading battles and not having been wounded or killed, which I thought was a very good idea. I am not sure whether the bullets went over my head or whether I was just lucky, but in any case, those were my experiences.

As we got into Germany, we began getting reports of atrocities. I was reassigned from the artillery to General Patton's headquarters as a war crimes investigator. In that capacity—I won't go into the gory details—I was with liberating forces in all the concentration camps liberated by General Patton's army. Buchenwald, Mauthausen—these are names that no longer mean anything to the new generation, but there I personally witnessed the horrors of the camps as they were being liberated: total chaos; inmates dying and lying on the ground and chasing the guards; guards trying to flee; guards who had been caught being beaten to death or burned alive. I did not want to go into all of that, but I was a personal witness to all that in its most

horrible form. It was not just a statistic for me. It was much more than that.

I stayed on in Germany after that for the trials. I'm indebted to Whitney for having interviewed Ohlendorf and obtained from him, an *SS* General, the confession that the unit under his direct command had killed 90,000 Jews. I became the chief prosecutor in that trial, the *Einsatzgruppen* trial. We had found the daily reports from the front saying specifically which unit entered which town, who was the commanding officer, what was the date, how many people they killed, the different categories—Jews, Gypsies, Communist functionaries, and others. I personally totaled them to add up to over a million people.

At that point, I said that's enough. I flew from Berlin, where we did our research, down to General Telford Taylor, who was my Chief of Counsel at that time—he followed Justice Jackson for the twelve subsequent trials and was a very fine lawyer (from Harvard). We were later law partners before he became a professor at Columbia and Cardozo. Anyway, he appointed me chief prosecutor in what was known as the *Einsatzgruppen* trial. Nobody, of course, could pronounce it or translate it, but these were special extermination squads and their job was to do as Whitney described—their assignment was to go and kill all the Jews, men, women, and children. Wipe them out! Extirpate them. We couldn't find the right translation of the German language for it.

One point which is worth noting is in the examination on trial of Ohlendorf and twenty-two of his colleagues for the mass murder of over a million people. Ohlendorf was asked to explain why did he do that. It is important to understand that Ohlendorf was an intelligent man. Most of my defendants had doctorate degrees; I had six SS Generals in the dock. And why did they do that? He said it was self defense. What do you mean, self defense?—nobody attacked Germany. Germany attacked all the other countries all around them: France, Belgium, Norway, Sweden, Denmark, Poland, Russia. Well, he said, we knew that the Russians, the Soviets, were planning to attack us. Well, why did you kill all the Jews? Well, we knew that the Jews were sympathetic to the Bolsheviks; therefore, we had to kill them all. And why did you kill the children? The explanation was, look, if you are going to eliminate—they never used the term kill—the parents, then of course the children will grow up and be enemies of the state, and we were interested in long-term security, so we had to kill them, too. It's very logical.

These units used the gas vans which Whitney described in the documents that led him to the trail of SS officer Becker. I got the details of that. Ohlendorf didn't like the vans—they were not very good. He said we could only jam a certain number of people, usually of the age where they couldn't walk or the children who couldn't walk, into the vans. They had to throw them into the vehicle. They would throw them in, close the door, and the plan was when they got to their destination about twenty minutes away, a ditch somewhere, they would just dump them like you'd dump the garbage. But

Ohlendorf complained that sometimes some were still alive and it was terrible—a man had to unload them by hand, with the blood and the scratches and the feces and urine. He said this was very hard on my men. So Ohlendorf, really a sort of humane guy, was sentenced to death and hanged in Landsberg prison. It takes eight minutes to die, before you get a death certificate, after you've been dropped.

Enough of that. I mentioned this only because I see the picture in its goriest details. I, of course, have been traumatized by that experience, and I am trying to do as Henry and many others are doing as well, what the Jackson Center is doing as well: trying to change the world, trying to eliminate that kind of behavior. Well, how do you go about doing that? It's very easy to be discouraged. We hear all the complaints: you need a budget; you need to have an approval; you have to have judges; you have to have this; you have to have that. I take a long-term view even though I am so much younger than my colleagues here. I see the enormous problems, but I am terribly optimistic. You say, how could you be optimistic? It's like when people ask me, how do you feel? I say I am always feeling fine. How could you always be fine? It is very easy: I am aware of the alternatives.

It is the same with the experience we had here with international courts. When I went to school at Harvard (I don't know how it was at Yale), they didn't teach international criminal law. There was no such thing—it didn't exist.

After Nuremberg, the campaign for an international criminal court began. It was inspired by Jackson and by Taylor—if you have international crimes, it is logical you need a court in order to deal with it. That is what the first General Assembly of the United Nations decided. It passed a resolution saying we approve the Nuremberg principles and the judgment of the International Military Tribunal and we want to set up committees to establish a new court of international crimes. They referred also to genocide, which was not in the statutes of the International Tribunal or the subsequent trials, specifically as tribute to Raphaël Lemkin, who was also working there, pushing the UN on that.

So what happened to these instructions to follow the Nuremberg precedent? They set up committees. I got interested and began to sit in on those committees in no official capacity. I had big advantages over everybody there: nobody could fire me because nobody hired me and I could speak the truth. I began to write articles, books and all that.

Eventually, we had growth of international courts. First we had the international criminal tribunal for Yugoslavia, created by the United Nations Security Council itself—10,000 women had to be raped before we woke up to that. Then we had 800,000 people butchered in Rwanda. It was a disgrace to our whole world that after the Holocaust in Nazi Germany we allowed that to happen again. People killing people with machetes—no one needed to use nuclear weapons. So we set up a court in answer to that. Then we set up other

courts—you have heard about Cambodia and Sierra Leone, and gathered here are lawyers who are now responsible for prosecuting some of the people who were involved in those crimes.

After about sixty years from Jackson's effort, we do have an international criminal court, and it is quite a remarkable thing—the delegates had about a thousand points of dispute before they went to Rome, so to reach an agreement was very remarkable. Both of these gentlemen were in Rome. The only thing the delegates could not reach agreement on was the crime of aggression.

It is often overlooked that none of these war crime trials is intended to or capable of doing complete justice. At Nuremberg, we did not try all the criminals—we had a small sampling only. In the *Einsatzgruppen*, there were 3,000 men in the four different units. Every day they went out and their assignment was to kill Jews and others, and they did that for about two years and they reported on it. Three thousand men did that directly—they would strip people first, then line them up ten in a row, shoot them, and push them into a ditch. How many were tried? Twenty-two. Twenty-two! Why only 22 when there were 3,000 mass murders? Well, the ridiculous—absolutely ridiculous—answer is that we only had twenty-two seats in the dock. We weren't trying to do more. We couldn't. We were under pressure to move quickly. If we tried to try 3,000 people, we'd still be sitting in Nuremberg with probably not more convictions than we got in that one case. The trials petered out as time went by.

So no war crimes trial can do more than just a sampling of some of the leaders who bear top responsibility for the crime. If we succeed in doing that and creating a historical record, we make a great achievement, showing the victims that we know and we care what happened to them.

In her speech, Lucy Reed, president of the American Society of International Law, referred to the fact that we now have, for the first time in a criminal statute, a provision that victims are entitled to representation during the course of a trial and compensation for injuries. The details are still to be worked out and there will be enormous difficulties, but it is another step forward. I like to look at the alternatives, at the progress, and from that point of view it is fantastic.

When I started working for an international criminal court, people said I must be crazy. I said I know that, but I am going to try. And lo and behold, unfortunately, the tragedies came along which stimulated the creation of the courts. I hope we will be able to go further without waiting for tragedy, that we will follow Jackson's advice that the greatest tribute that power ever pays to reason is to subject villains to the judgment of the law.

In order to succeed, we have to change the way people think. You heard what Ohlendorf thought. He thought it was defensible to go out and kill somebody who you believe might attack you first—a preemptive strike. The U.S. government, in the trial of *United States v. Ohlendorf*, held that such a view was no justification,

that such killing was an international crime punishable by death. Ohlendorf was hanged, together with some of his colleagues.

Have we learned much? Well, a lot of people believe only in power and war. They say if you have the power, use it—power is the only thing that counts. The history of mankind is written as a history of warfare, but it is getting to be very dangerous—nuclear weapons and chemical weapons can kill everybody several times over. When are we going to start to change the way people think? It's enough to frighten you, except if you're like me—if you look at the alternatives, you can see the progress.

Since the creation of the International Criminal Court, I have been devoted to only one topic: aggression. I can't focus on everything. I did for a while: improving the United Nations; disarmament; a review conference for the UN Charter; an international military force. Now I am focusing on the crime of aggression.

Remember what Justice Jackson said was the most important accomplishment of his life (and Telford Taylor echoed the same): to condemn what had been a national right; making an international crime of aggressive war. The arrangement made was that the use of armed force was prohibited by the United Nations Charter. It binds all nations, including the United States, except if the Security Council authorizes armed force or it is used in defense against an immediate armed attack (and then only until the Council can intervene). Those

are the rules of the game. But aggressions have been committed in many places and are being committed as we speak.

It seems to me important to try to carry out the sense of what Jackson and Taylor and others worked on and said and meant. My motivation is not to diminish the United States. On the contrary, my motivation is to save the lives of all those poor soldier guys like me, and girls now, and the civilians, who are being killed and who will be killed in wars. I want to save their lives. I have seen what war means, and I don't know how to save their lives except by trying to prevent war-making.

How would the world look if we could prevent war-making? Imagine if we had an international court in existence before the first Iraq war, if on the outskirts of Baghdad we had told General Schwarzkopf to go in and arrest the criminals who were responsible for attacking Kuwait, a neighboring state, in a clear act of aggression. What would the world look like today if we had arrested them, put them on trial, convicted and sentenced them? We would have no Iraq war. We would have saved thousands of lives. We would have saved billions of dollars. We could have found authorization to do that in the Security Council resolution, which said to go in and expel the aggressors from the countries they invaded and restore peace in the area. We would have had to stretch that clause a bit because they did not have in mind to put Saddam Hussein on trial, but stretching that would have been better than stretching the UN Charter, ignoring the Security Council, and undermining the rule of law.

Let me conclude with this: international law is a very slowly evolving process. It is like a newborn baby. It cannot function. It needs help. It needs training. It needs experience. It has to be nurtured. But it certainly is moving in the right direction, and we must not be discouraged by little incidents that come up or the difference of opinion among people of good will. Differences of opinion are natural in a democracy, and America is a great democracy where you expect many opinions. Rational people must weigh the alternatives and say which way is better, not only for us but for all the rest of the world. I call this planetary thinking. We must recognize that we are inhabitants of one small planet. We must share the resources so that everyone on it can live in peace and human dignity.

It can be done. Don't tell me it can't be done! Don't tell me it can't be done because it has never been done before. Nothing that is new has been done before. If we could go to the moon, why can't we arrange the system to settle a dispute by peaceful means as required by law today? Why can't we do that? There is no good reason for that. We could fly airplanes which have ten thousands of parts and if any one part is defective the plane would crash. But we fly the planes and they do fly and we have Blackberries in our pockets and we can speak to the world. We have these miracles of accomplishment and we have to let women be raped in Darfur? We have to let African people starve to death? Why? I don't believe that's beyond human capacity. You need to generate the political will without waiting for someone to kill another few hundred million people.

So I say basically, on that happy note, that we are making good progress. Even if we weren't, even if the progress is slow and difficult, I think we have an obligation, a moral obligation, to those who have perished, to those who are in the military, to those who are yet to come, to try to make this a more humane, civil world under the rule of law. If we all set our minds to it, I am confident it can be done. I wish you luck and thank you.

Questions & Answers

Q. I am really curious about your frame of mind as you accepted this daunting task in your youth—was it pure trepidation? You were so young.

King: Well, I think you have to be willing to take a chance. I had training from my father, who was in politics. He said that you have to tithe for humanity a bit—there are too many takers, there are not enough givers, and somebody has to put something into the pot to create a better world for future generations. So I had that idealism. I also got that at the Yale Law School, where they seemed to take the socially desirable result and work backwards to figure out how to achieve it. So I was ready for Nuremberg in that sense. Somehow you have to instill in people what's important in life, that I am not just one person on earth, that there are future generations who can live in a better world. So it is idealism. It also is fulfilling, particularly at this point in life—it's wonderful to keep your eyes on the future and on the stars.

Ferencz: Well, I could say that they took me for my size and my beauty. My wife would say it's largely fate—it's chance. But it so happened that I was the most knowledgeable and experienced man in the world at the time I was given that responsibility. My knowledge came from having been the research assistant to Professor Sheldon Glueck at Harvard. He wrote a book on war crimes¹³ for which I did the research—I read every book in the Harvard Law Library that had to do with war crimes. My experience in the Army as a war crimes investigator, going into the camps, capturing the evidence, interrogating the criminals, was also unmatched.

Then I was in charge of the office in Berlin that had to collect evidence for all the trials. I had a staff of about fifty people doing that, and I had to screen the evidence and send it down to Nuremberg. When we came upon a complete set of *Einsatzgruppen I* reports, I brought them down to Telford Taylor, who was a General and Chief of Counsel. I said we have to put on a new trial. He said we haven't planned a new trial, we don't have staff or budget or Pentagon support and all that. I said we just can't let these guys go—we had our own dog in the can, as we called it. He said, well, can you do it in addition to your other work? I said sure and so he said, okay, you are the chief prosecutor.

So I became the chief prosecutor of the biggest murder trial in human history. I was twenty-seven years

¹³ See SHELDON GLUECK, *WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT* (1944).

old. It was my first criminal case—my only criminal case in my life. I rested the case after two days. I didn't have enough brains to call witnesses—I said I don't need them. I convicted all the defendants on their own affidavits. There were thirteen death sentences. I was a totally immature, young, perhaps incompetent young man, but I did it.

Harris: I was practicing law in Los Angeles when the war broke out, unfortunately for me. I was not married at that time so I realized that I was going to have to take care of myself. As a matter of fact, my senior law partner tipped me off. He was very hard of hearing. He called me up on December 7, 1941, which was a Sunday, and said, "Whitney, the Japs have just bombed Pearl Harbor." I said, "Well, Mr. Goodspeed, thank you very much" and completely dismissed his statement, thinking he had misheard what the radio broadcast was. But when it proved to be true, then I squared around and finally got myself commissioned as an ensign in the United States Navy.

I served in the Navy throughout the war, except at the very end of the war, the Navy transferred me to the Office of Strategic Services (OSS) and the OSS, after some training, sent me to Europe to be in charge of the investigation of war crimes. I set up my headquarters down on St. James's, close by British intelligence, and there did my work for OSS collecting as many incriminating documents as I could, most of which I obtained from British intelligence. I turned them over to Justice Jackson's office, which had just been established there in London, and in that way they were very glad to

see me because they had no evidence and these documents were very helpful to them.

Colonel Robert Storey, who was Jackson's assistant, did the same thing in Paris with the American forces there. He collected evidence through the Army—captured documents, of course—and then, when we got to Nuremberg, we set up a document center and put all these German documents into the center. We were able to obtain some very brilliant individuals who translated thousands of documents, as it ultimately turned out, into English and other languages which were used in court. So we had this tremendous volume of documentary evidence which was incriminating to the Germans.

My chief, General Bill Donovan of OSS, was supposed to be Justice Jackson's top assistant. He came to Nuremberg a little bit late. By that time, Jackson realized that we were going to be able to prove the case against the Germans through documentary evidence. Now this was very important because in history the documents cannot be changed. Witnesses can be—the statements of witnesses can be denied and challenged in history, but documentary evidence cannot be. So Justice Jackson had made the decision that we would proceed as far as we could and build our case with documentary evidence. General Donovan, when he came to Nuremberg, found that decision had been made. He returned to the United States but he left me behind.

* * *

Q. We've heard the name Raphaël Lemkin. History credits him as the father of the Genocide Convention. He was a Polish lawyer, a refugee, a U.S. government consultant and employee in various capacities, and then he came back to Europe and was in and about London and Nuremberg during the times you were there. Do you have memories of Lemkin?

King: I knew Raphaël Lemkin—he was always bothering me outside of the Grand Hotel. He was unkempt looking, unshaven, had wild hair, and finally I got weary of going into the Hotel, which I had to go to for meetings. He had a concern about the fact that the International Military Tribunal judgment covered only wartime genocide, not peacetime genocide, and he wanted me to do what I could to change it. Well, they did change it in Allied Control Council Law No. 10, which covered peacetime genocide as well as wartime. That was the basis for the trials of defendants in the subsequent proceedings. He also got a resolution passed by the UN to condemn genocide on December 11, 1946, the same date they endorsed the Nuremberg principles. At the same time, he also was the author largely of the Genocide Convention, which was passed by the UN in 1948. He made a magnificent contribution, so you can't tell a book by its cover. I think he is a good example of an individual who wanted to change the face of the world and who did so. He was very persistent—he

published a book just before the Nuremberg trial,¹⁴ and he got genocide mentioned in the fall 1945 indictment of the defendants at Nuremberg. He published a very good article that the reason for endorsing genocide as a crime is the value of diversity of people—every group makes some contribution to the progress of civilization. So he is a hero, to my way of thinking. I have good memories of my contact with him. But I have always regretted that I didn't have a comb to help him with his hair.

Ferencz: I also knew Raphaël Lemkin. My observations were similar to Henry's in many respects. He was a traumatized man. His entire family had been exterminated by the Nazis. He went around pleading, saying, "Look, there has to be a special name for this. They killed my entire family. They didn't even know them and they killed them just because they were Jews. It's just not plain murder—there's got to be a different name for that." He was a scholarly man, so he put "genus" and "-cide" together, the killing of a whole group.

He was very persistent and he was rather unkempt. He came to see me in my official capacity when I was executive counsel to General Taylor, handling questions of housekeeping, assignment of staff, and so on. He was attached somehow to the Polish delegation at Nuremberg, but he had no official status with them. He always needed something. I had to get him a courtroom pass. I always gave him something, as I did to other

¹⁴ See RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (Carnegie Endowment for International Peace, 1944).

victims who came and needed help. Logistically at that time in Germany everything was controlled by the Army. There was no food, there was no housing, there was no currency—cigarettes were the currency of the day. He gave me a copy of his very scholarly book, *Axis Rule in Occupied Europe*.

Then he came to the United States. He was working on trying to get the Genocide Convention accepted in the United Nations. He was working together with the man who I think invented the idea of an international criminal court, a Romanian diplomat by the name of Vespasien Pella. He had written a book on counterfeiting and there was nobody who tried counterfeiters, so he said we need an international court to deal with that crime. The two of them, aided by scholars from Lithuania, the Robinson brothers, Jacob Robinson and Henry Robinson, were working on drafting the Genocide Convention and trying to get it through the United Nations.

Lemkin was not married. He had no children. He had a brother living in New York and the brother had a son—a nephew. Raphaël Lemkin is buried in a cemetery in Queens with a simple stone identifying him as the father of the Genocide Convention. I share Henry's opinion: he is the example of what one persistent individual can do if he is right and continues to press despite opposition. So he's been a model.

There are many people I can name the same way. One is René Cassin. He was a refugee lawyer from Paris who retreated to London with General de Gaulle. One day he sat down and, with the help of Eleanor

Roosevelt's politics, drafted the Universal Declaration of Human Rights. I always carry it in my bag and can get it with my eyes shut. Another is Arvid Pardo from Malta with regard to the law of the sea—he said the seabed is the common heritage of mankind and should and does belong to everybody. Rachel Carson said the birds are not singing, there is something wrong with the environment, wrote *Silent Spring*, and sparked the environmental movement.

So one individual can make a difference. You may have to be a little bit crazy and a little bit unkempt, but if you persist and you are right, don't give up. You'd be surprised—you might make it.

Harris: You've all explained Raphaël Lemkin very well. The word "genocide" was new. But the concept was not, for as early as 1933, he had submitted to the Fifth International Conference for the Unification of Penal Law in Madrid a proposal to establish a crime of barbarity—the destruction of racial, religious, or social groups—in the law of nations. Reports of the deliberate murder of the Jews of Europe added urgency to the recognition of this hideous crime.

Ferencz: I'd like to add something which I forgot to mention. The *Einsatzgruppen* trial was a classic case of genocide—their instructions were to kill all the Jews because they were Jews, period. Gypsies the same. In the opening statement, I used the term genocide. I think that's one of the earliest times the term was used in the actual presentation of a case.

* * *

Q. As much as you hear about Nuremberg, you don't hear as much about the other side of the ocean, the Japanese. Did any of you get involved as advisors or were you ever consulted about anything that was done with the trials for the Japanese war criminals?

King: I was not.

Harris: Well, the Japanese trial had more judges than we did, but they followed the Nuremberg precedent faithfully. We count the Japanese trial as an affirmation of the principles of law which were approved at Nuremberg.

Ferencz: Japan recently ratified or signed the statute for the International Criminal Court. A Japanese woman was elected a judge of the ICC.

* * *

Q. Where is the United States on the International Criminal Court?

King: Well, we signed the treaty the last night of President Clinton's term. Then President Bush unsigned it, which was pretty unusual. So we are not anywhere. You are getting at the problem that we talk about among ourselves. We've got to sell Congress and the Executive Branch on what's right. There should be a legal agenda for peace before Congress, to sloganeer it, but the important thing is that the focus should shift from the

United States to Europe. Most nations have ratified the International Criminal Court, big issues are pending and we should want to play a role. An Assembly of States committee is trying to draft a definition of aggression and we are not allowed to participate. That's the important thing—the world is passing us by. We can kid ourselves with the tiny progress we are making, but I think the important thing is the big issues.

The United States, which has had dreams in the past, particularly under Justice Jackson, can be a leader again in the world instead of a follower. It is very important that we note what we have not done, including a number of treaties. The requirement of two-thirds Senate approval for treaties is at this time a handicap. The world is our beat but we have to take steps from the progress that has been made to create a more secure peace in the world, so that all nations are participating. I think we can do it.

Harris: The three of us were at the Rome conference and, of course, we are very strong supporters of the United States joining the ICC treaty. There will be a conference next year on possible amendments to the treaty. One of the things that we are concerned about is aggression. It was left out of the treaty because up to the last moment an agreement could not be reached among the delegates on the definition of aggression. I don't have any trouble with defining it—it's very simple. But the delegates couldn't agree. Fortunately for us, Hans-Peter Kaul of the German delegation came up with the idea at the last moment not to worry about the definition—to put aggression in the treaty subject to

subsequent definition. That is what has happened. So now we have the daunting problem facing us of finding a suitable definition for aggression. That has got to be done for the safety of mankind. It must be done.

Ferencz: I explained, or tried to, that there are differences of opinion in every democracy. There are differences of opinion in the United States on the subject of whether we should surrender any of our rights to any foreign court. There's a sizable body of opinion which says that the answer to that question is no. The departed Senator Jesse Helms was a champion of that. He said over my dead body and, well, he's died in the meanwhile. But he expressed a point of view that is a serious point of view for a large number of Americans. As Henry mentioned *en passant*, you need two-thirds of the U.S. Senate to ratify a treaty. There was no way in a conservative country frightened by the threat of terrorism and nuclear bombs that they were going to surrender any part of American sovereignty to a foreign court. President Clinton recognized that, but putting his signature on this thing indicated that in principle we were in favor. President Bush said no. John Bolton erased Clinton's signature. Now Bolton has been erased from his State Department job. So things keep changing and there is some hope that there will be some change in the future. But it won't be easy. It took forty years for the United States to ratify the Genocide Convention, which was easy compared to defining aggression.

On aggression, look at my website, www.benferencz.org. You will find there references to many volumes that I have written on that subject and hundreds of articles and dozens of speeches. They give

you all the details. The gist of it, in one sentence, is simply that we don't need a definition of aggression. Justice Jackson didn't need a definition of aggression. Neither did the International Law Commission. And we don't need it now. It is an excuse to avoid the jurisdiction of any court. As long as that happens, you are in deadly danger. Good luck!

* * *

Closing Remarks
John Q. Barrett

I find myself very much in agreement with Henry King's late wife, Betty. As we are studying and talking intensely about these topics, there is a world out there, and the better life to live, the higher path to take, is one that gets involved with it, that takes part in it, that works on it. We are not going to do the living for "our Posterity"—they will have that opportunity for themselves. But we will hand off to them the progress we can make on complex challenges and our examples in addressing them.

These men have taken, and blazed, higher paths, and it is very inspiring to know them and to learn from them. Please join me in thanking Whitney Harris, Henry King, and Ben Ferencz.

(Applause)

The Legacy of the Modern Era

Reflections on Genocide

Serge Brammertz*

The ICTY's Contribution to the Law of Genocide

Introduction

The pattern of crimes perpetrated during the war in the former Yugoslavia raises some complex and novel issues concerning the legal definition of the crime of genocide. The media reporting on the war was quick to proclaim that the Bosnian Serbs were committing genocide via ethnic cleansing campaigns targeting the non-Serb population of Bosnia and Herzegovina.¹ The International Court of Justice ordered the Federal Republic of Yugoslavia (Serbia and Montenegro) to prevent the commission of genocide² and the crime of

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¹ See, e.g., sources cited in William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 *FORDHAM INT'L L.J.* 23, f.n. 10 (2001).

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 16 (Order of April 8). See also S.C. Res. 819, U.N. Doc. S/RES/819 (April 16, 1993).

genocide was included in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).³

However, the ICTY Office of the Prosecutor has been judicious in charging suspects with genocide. The ICTY has issued far fewer indictments containing genocide charges than its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR). The reasons for this are obvious. The 1994 genocide in Rwanda bears many of the hallmarks of historical genocides such as the Holocaust: a clear policy or plan to physically destroy the targeted group; hundreds of thousands killed and subjected to physical or mental harm during a sustained campaign of destruction engulfing most of the country; and men, women, and children targeted for destruction without distinction. The events in Rwanda fit the historical genocide formula so indisputably that the ICTR has taken judicial notice of the 1994 genocide in Rwanda, thereby recognizing it as a fact of common knowledge.⁴

The ICTY genocide cases have been less straight forward. As a result, the ICTY has been called upon to clarify several complex aspects of the legal definition of genocide and the factual scenarios within its reach. By

³ Statute of the International Criminal Tribunal for the former Yugoslavia, art. 4., S.C. Res. 827, annex (May 25, 1993), 32 ILM 1203 (1993) [hereinafter ICTY Statute].

⁴ *E.g.* Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶¶ 33-38 (June 16, 2006).

way of illustration, this paper comments on three issues that have arisen in the case law of the ICTY:

- (a) does the crime of genocide require proof of an official plan or policy?;
- (b) what constitutes intent to destroy a group “in part”?; and
- (c) can killing members of the armed forces constitute genocide?

Requirement of a Plan or Policy: The Jelisić Case

Many historical examples of genocide are oriented around a clearly documented stated-based policy or plan to destroy the targeted group. Is such a plan or policy required to prove genocide, or is the legal definition of genocide broad enough to encompass, for example, an individual acting without the backing of a state system?

The ICTY confronted this scenario in the *Jelisić* case. Jelisić was not a high level military or political figure, but a young man with a diagnosed personality disorder. During the war, the twenty-three year-old Jelisić had assumed considerable defacto power over non-Serb detainees in the Luka camp in Brcko in north-east Bosnia and Herzegovina. Jelisić admitted to killing thirteen people in or around the Luka camp by shooting them in the back of the head at point-blank range. He also admitted to, among other things, cruelly treating four people—conduct that included beatings with clubs,

truncheons, and a fire-hose, sometimes to the point of unconsciousness.⁵

The Prosecution did not prove that Jelisić's crimes were part of an over-arching Bosnian Serb plan to destroy the Muslim population in Brcko or elsewhere.⁶ However, there was evidence that Jelisić killed and harmed his victims with intent to destroy the Bosnian Muslim population—however unlikely his prospects of individually realizing that goal might have been. For example, Jelisić was a self-proclaimed “Serbian Adolf”—he even referred to himself as “Adolf” in his first ICTY appearance—who stated he had gone to Brcko to kill Muslims. He claimed that he wanted to rid the world of “Baliyas”—a derogatory term for Bosnian Muslims—and that he would leave only a small fraction of them to be used as slaves for cleaning the toilets. He said he wanted to cleanse the extremist Muslims as if cleaning the head of lice and that he had to execute twenty to thirty Muslims before drinking his coffee each morning. He also said he wanted to sterilize Muslim women so that they could not bear children. Jelisić's pronouncements were not empty threats. There was evidence that a refrigerated van took away up to twenty bodies each day from the Luka camp.⁷

⁵ Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶¶ 37-40, 42-44 (Dec. 14, 1999) [hereinafter *Jelisić Trial Judgment*].

⁶ *Id.* at ¶ 98.

⁷ *Id.* at ¶¶ 102-103; Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgment, ¶¶ 66-71 (July 5, 2001) [hereinafter *Jelisić Appeal Judgment*].

The *Jelisić* Trial Chamber accepted the theoretical possibility that an individual acting without reference to a broader policy or plan could be guilty of genocide. However, the Trial Chamber considered that, in practice, it would be difficult to prove that such an individual was acting with intent to destroy the targeted group “as such,” as required for the crime of genocide.⁸ Based on the evidence before it, the Trial Chamber was not satisfied that a reasonable trier of fact could find that *Jelisić* was acting with the required genocidal intent.

The Appeals Chamber confirmed that a plan or policy is not an element of genocide.⁹ Unlike the Trial Chamber, the Appeals Chamber was satisfied that a reasonable trier of fact could have found that *Jelisić* acted with genocidal intent. However, by majority, the Appeals Chamber declined to remit the matter for retrial on the genocide charge.¹⁰

Consequently, ICTY case law confirms the theoretical possibility of the lone genocidaire. Nevertheless, the *Jelisić* Appeals Chamber might be understood as signalling that resources in the international justice system are most appropriately directed towards genocide cases involving a more systematic pattern of conduct.

⁸ *Jelisić* Trial Judgment, *supra* note 5, at ¶¶ 100-101.

⁹ *Jelisić* Appeal Judgment, *supra* note 7, at ¶ 48.

¹⁰ *Id.* at ¶ 77.

Destruction of a Part of the Group: The Srebrenica Cases

During genocides like the slaughter of Jews by the Nazis during World War II or of Tutsis by Hutus in Rwanda in 1994, no one—regardless of sex or age—was spared. Can genocide still be proved when the killing targets only a segment of the population, such as the men? Can this constitute destruction of a “part” of a group, within the meaning of the Genocide Convention? The ICTY has confronted these questions in a series of genocide prosecutions arising out of events in Srebrenica, a small town in the north-east of Bosnia and Herzegovina.¹¹

After Bosnian Serb forces took over Srebrenica in July 1995, 25,000 Bosnian Muslims, mostly women and children, were uprooted, terrorized, crowded into buses, and moved out to Bosnian Muslim-held territory. The so-called “military aged” Bosnian Muslim men, many of whom attempted to flee in a column through the woods, were taken prisoner and then executed *en masse*. More than 7,000 men were never seen again.¹² The events in

¹¹ See particularly, Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (April 19, 2004) [hereinafter *Krstić Appeal Judgment*]; and Prosecutor v. Blagojevi & Joki, Case No. IT-02-60-A, Judgment (May 9, 2007). A third Srebrenica trial is presently under way. See Prosecutor v. Popovi et al., Case No. IT-05-88-T.

¹² See generally, Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Trial Judgment, ¶¶ 31-84 (Aug. 2, 2001) [hereinafter *Krstić Trial Judgment*].

Srebrenica have been described as Europe's worst atrocity since World War II.

Krstić was the first Srebrenica genocide case prosecuted before the ICTY. The Prosecution argued that the Bosnian Muslims of Srebrenica were targeted for destruction and that they constituted a "part" of the Bosnian Muslim national group as required for the crime of genocide.

Quite predictably, the defense argued that the Prosecution had failed to prove genocide because, among other things, the Bosnian Muslim women and children in the Srebrenica area had not been targeted for physical destruction along with the men.¹³ How could the Serb perpetrators be acting with intent to destroy the 40,000 Bosnian Muslims of Srebrenica, the defense argued, when 25,000 Muslim women and children were transported out without being physically harmed?

These arguments met with little success before the Appeals Chamber, which affirmed that the July 1995 events in Srebrenica satisfy the legal elements of genocide.¹⁴ The Appeals Chamber emphasized that destruction of a group "in part," means destruction of a "substantial" part of the group that is significant enough to "have an impact on the group as a whole." This requirement reflects the fact that genocide is both a

¹³ *E.g. id.* at ¶ 593; *Krstić* Appeal Judgment, *supra* note 11, at ¶ 31.

¹⁴ *Krstić* Appeal Judgment, *supra* note 11, at ¶ 38.

crime of massive proportions and one that has an impact on the “overall survival of the group.”¹⁵

In concluding that genocide occurred in Srebrenica, the Appeals Chamber looked at factors such as: the strategic importance of Srebrenica and the surrounding area for the Bosnian Serb leadership in pursuit of a unified political entity; the “emblematic” character of Srebrenica because it was an internationally designated safe-area and the executions served as a “potent example” of Serb dominance and Muslim defenselessness; and the limited sphere of influence of the Bosnian-Serb perpetrators, which was confined to the Central Podrinje region, of which Srebrenica formed a significant part.¹⁶

The Appeals Chamber was not persuaded that the transfer of the women and children out of Srebrenica negated genocidal intent. The Chamber considered that, in combination, the forcible transfer of the women and children and the execution of the men had “severe procreative implications” for the Srebrenica Muslims, “potentially consigning the community to extinction.”¹⁷ From a pragmatic point of view, the Appeals Chamber also noted that the international community was monitoring the events in Srebrenica, which limited the

¹⁵ *Id.* at ¶ 8.

¹⁶ *Id.* at ¶¶ 15-17.

¹⁷ *Id.* at ¶¶ 28-29.

perpetrators' capacity to engage in a more comprehensive killing campaign:

The decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure.¹⁸

The Srebrenica cases have required the ICTY to move outside of traditional genocide paradigms and to distill the essence of the crime of genocide in the twenty-first century. The combined effect of killing upwards of 7,000 men and expelling the women and children was the physical elimination of the Bosnian Muslims in Srebrenica as a distinct group—a group that was emblematic of Bosnian Muslims in general. In common with other genocides, these events have detracted from “the manifold richness [that humanity’s] nationalities, races, ethnicities and religions provide”¹⁹ and deserve to be sanctioned as genocide.

¹⁸ *Id.* at ¶¶ 31, 32.

¹⁹ *Id.* at ¶ 36.

Targeting members of the military: Krstić, Sikirica, and Branin

Another unique feature of the Srebrenica genocide cases is that the killings targeted many men who were members of the Bosnian Muslim armed forces (ABiH). The evidence suggests that about one-third of the column of Muslim men attempting to escape through the woods were members of the ABiH 28th Division.²⁰ Does the crime of genocide encompass destruction of members of the armed forces?

The *Krstić* Appeals Chamber did not distinguish between victims who were members of the armed forces and those who were not. Rather, the Chamber specifically ruled that the crime of genocide does not require proof that the victims were civilians:

The intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a

²⁰ E.g. *Krstić* Trial Judgment, *supra* note 12, at ¶ 61.

protected group because of their membership in that group.²¹

In cases where participants in the hostilities feature among the victim group, it is necessary to prove that the death or injury inflicted was not part of lawful combat. If the conduct was lawful under international humanitarian law, then no crime has been established. In addition, ICTY case law suggests that a trier of fact might be more reluctant to infer that crimes have been committed with intent to destroy a group as such when the victims are members of the armed forces.²² However, as the Appeals Chamber has confirmed, if the evidence establishes that the perpetrators were acting with genocidal intent, the fact that the victims are members of the armed forces is not a legal barrier to a genocide conviction. The events in Srebrenica are a compelling example of such a scenario.

Conclusion

Notwithstanding that the definition of genocide has “remained textually static” over the last sixty years, it has been “interpretatively somewhat fluid.”²³ Developments in the ICTY’s case law have assisted in

²¹ *Krstić* Appeal Judgment, *supra* note 11, at ¶ 226.

²² *E.g.* Prosecutor v. Branin, Case No. IT-99-36-T, Judgment, ¶ 79 (Sept. 1, 2004).

²³ Patricia M. Wald, *Genocide and Crimes against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 621 (2007).

ensuring that the Genocide Convention remains a living document that, while retaining its fundamental core, can adequately respond to contemporary atrocities threatening the existence of human groups.

**The Genocide Convention:
A Sixtieth Anniversary Celebration**

Fatou Bensouda*

*The Second Annual International Humanitarian Law
Dialogs at the Chautauqua Institution*

Introductory Remarks

Ladies and Gentlemen,

Let me start by thanking the Chautauqua Institution and the Robert H. Jackson Center for giving me the opportunity to speak in front of you today. It is a great honor to be here. As you may know, the Prosecutor is visiting Colombia and could not be here today. He conveys his greetings.

Sixty years ago with the Nuremberg trials, for the first time, those who committed massive crimes were held accountable before the international community. For the first time, the victors of a conflict chose the law to define responsibilities.

Nuremberg, and the adoption of the Genocide Convention, were landmarks. However, the world was not ready to transform such a landmark into lasting institutions. The Cold War produced massive crimes in Europe, Latin America, and Asia; Africa was still under the rule of colonialism and apartheid.

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In the end, the world would witness again two genocides—first in the former Yugoslavia, and then in Rwanda—before the Security Council decided to create the ICTY and the ICTR. The contribution of the ad hoc tribunals is yet to be fully recognized and measured. They developed the law, and prosecuted the worst perpetrators, generals, members of governments. They contributed to restore lasting peace in conflict-torn regions. The recent arrest of Karadžić after thirteen years has also been a determining event, a reality check for all those who believed the Courts were just paper tigers.

The ad hoc tribunals for Yugoslavia and Rwanda, as well as the Special Court for Sierra Leone, paved the way for the decision to establish a permanent criminal court.

The International Criminal Court (ICC) was built upon the lessons of decades when the world had failed to prevent genocides. It was built upon the simple recognition that all the old recipes to stop violence and conflicts—amnesties or golden exiles for dictators, sharing of power with massive criminals—just did not work.

The ICC is a new instrument in a world where conflicts transcend borders. The ICC is about ideas, ideals, and altruism. It is also about self-interest. If states do not deal with massive crimes, there are no safe borders for the global community. A global problem needs a global solution.

Yet again, today, for each of our cases, voices are raised to say that justice comes too soon, at the wrong time, against the wrong targets, and in the wrong countries. Yet today, the same countries and leaders who have been heard to say “never again,” who have shamed the international community for letting Rwanda and other massive atrocities happen, are asking the Court to look away.

Well, let me repeat again the Prosecutor’s words: we don’t have the luxury to look away, because we have evidence, and because crimes can and must be stopped now, and because women and girls can and must be saved from rape now.

We have heard it all before. Don’t do justice before a peace agreement because it makes negotiations difficult, and don’t do justice after a peace agreement because it makes implementation difficult. Don’t present a case against Bashir now, don’t arrest Kony now. When will we have enough raped women, enough abducted children? I think now, sixty years after the adoption of the Genocide Convention, is the right time to act.

Among the characteristics of the Court are its permanence and its independence, with the possibility for the prosecutor to select cases at any time *proprio motu*. The Rome Statute is also the first instrument to integrate in a detailed way the content of existing conventions, among them, of course, the Genocide Convention. Furthermore, the Statute already integrates as substantive law elements of the fantastic

jurisprudence of the ad hoc tribunals, especially in relation to gender violence and crimes against children. In our recent work on Darfur, the Office has been inspired by the *Akayesu* Judgment and the recognition of massive rapes as an integral part of the destruction of the communities. Rapes, to kill the will, the spirit, and life itself; rapes, the silent weapons; rapes, which officially do not exist in Sudan; rapes, which the international community seems to consider as normal for little girls abducted years ago by Kony in Uganda and whom this criminal now calls his wives.

As an African, as a lawyer, as a woman, I want this year of celebration of the Genocide Convention to be a year when the international community united from South Africa to Canada, from Russia to China, from the United States to Costa Rica, to speak with one voice to make all perpetrators of massive atrocities accountable for their acts.

We can create a global community based on respect for the law. The law is not only for the poor and the weak, the law does not only apply to the enemies. With our Court, we apply on a permanent basis one standard to all. It is a challenge, and it is an opportunity. We have to rise to the challenge and use the opportunity proffered.

It is a challenge because the Rome Statute creates a system different from past models, forcing us to rethink how the law works, in the courtroom and beyond. This system is new, and when we put it in practice, as the organs of the Court have for the last years, it can create tensions: tensions in the courtroom and tensions on the

field. Political leaders and international negotiators have to adjust to this new framework.

Is it easy? No.

Is it necessary? Yes.

Ladies and Gentlemen,

Justice is part of a comprehensive solution in Darfur, in Northern Uganda, in the Democratic Republic of the Congo, and in the Central African Republic. Political negotiations, security, and delivery of humanitarian aid are the remit of states and international organizations. Our mandate is justice. Each of our cases and situations are a test for our ability to connect those elements together.

The Prosecutor is trying to be as clear and predictable as possible. This is the Office's contribution. Denying the facts is not an option. Sequencing between justice and peace is not an option. Selecting the targets on the basis of their political status is not an option: we cannot go after well known figures because it would give our courts more recognition and we cannot go after lower targets just because it would make arrests easier. Criminal responsibility and the evidence are the key factors. And in the Darfur case or in any case, they will be assessed by the judges and the judges only.

Our shared goal should be to turn the challenges of justice into an opportunity. By virtue of the Statute, each state party must support the Court whether it decides to indict, convict, or acquit. The ICC offers a tool to

control violence in the world: the law. There are no more immunities and amnesties for those most responsible for serious crimes. This could and does create difficulties in the short term, but in the long term, our legitimacy will bring new opportunities: individuals sought by the Court can be isolated.

With the ICC, the values *and* interests of the international community as a whole can converge.

Ladies and Gentlemen,

The ICC represents a unique opportunity for the world to come together; to protect each citizen of the world to isolate those sought by the court. Our cases are about the individual responsibility of criminals. There can be no political or ethnic solidarity with individuals alleged to have committed massive crimes. There can be no solidarity with ICC indictees and fugitives from the Court. The work of justice can help communities to come together and move forward.

I know there are skeptics. People saying: what can I do?

Let me emphasize the role of the citizens. As prosecutors, we will do our work, but we need global citizens to create a global community.

Individuals, as always, will make the difference. Human rights defenders, victims daring to speak up.

Raphaël Lemkin was just a citizen. A citizen who decided to do something. A citizen who worked tirelessly to promote a treaty prohibiting the crime of genocide. He gave himself a mission: “my basic mission in life is to create a law among nations for the protection of national, racial and religious groups from destruction.” He sent thousands of handwritten letters to ambassadors. He said, and I quote him, “I learned to love the obstacles by making them a test of my moral strength.”

And you know what? He succeeded. The Genocide Convention was signed in 1948.

The Rome Treaty, creating a permanent court to prosecute massive crimes and genocide was approved in 1998.

The Court is in motion. Thank you for your attention.

Commemorative Speeches and Papers

Luncheon Keynote, August 25, 2008

Clint Williamson *

This is a unique opportunity and, indeed, a rare event when prosecutors from all of the tribunals are assembled in one place, not to mention all of the other key actors in this field who are here as well. So, I want to use this occasion to talk about where U.S. policy stands at the closing days of one administration and as we prepare to transition to another. Obviously, at this point, we don't know who the next President will be nor what the next administration will look like. Nevertheless, on most aspects of international justice policies, there is a fairly broad bipartisan consensus. The narrowing of the gap between political parties has taken place over time and to a large extent because the views of the Bush Administration have evolved over the last eight years, but particularly during the second term.

As I'm sure all of you are aware, the current administration came into office in 2001, implacably opposed to the International Criminal Court—the ICC—and frankly, somewhat suspicious of the whole concept of international justice. There are, no doubt, some in the administration and some in Congress whose views have not changed since 2001 and who remain very wary of international tribunals. I would suggest, though, that this is not the prevailing view and it is not reflected in day-to-day policy.

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That said, there are some differences of opinion within the U.S. government and between the United States and other governments. Sometimes these differences manifest themselves in surprising ways as we have seen in Security Council deliberations on Sudan—an issue I'll come back to in a few minutes.

The fact that we are even having these discussions between governments, though, is an indication of how far we have come. As all of us here know, this rebirth of international justice is a fairly recent phenomenon. The decision to set up the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 marked the beginning of this era. At that time, very few people could have foreseen the growth and development of this field that has occurred over the last fifteen years. I certainly did not when I started work at the ICTY in May 1994, the seventh person to join the Office of the Prosecutor, at a time when we were all sitting in one room borrowed from a Dutch insurance company. I could not have imagined the growth of the ICTY, nor the fact that we would see the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the ICC, the Cambodia Court and others created in such a short period. I think very few could have imagined that we would see sitting heads of state indicted, but we have now seen Slobodan Milosevic, Charles Taylor, and Saddam Hussein brought to trial. Most recently, we've had a process initiated against Omar Al Bashir and we may one day see him in The Hague. While I wouldn't go so far as to say such trials are now routine, there is an expectation, that didn't exist fifteen years ago, that even national leaders will be

held accountable when they orchestrate and oversee large-scale atrocities.

This is a huge change. As this change has come about over the last fifteen years, the United States has played a significant role. Some might say that the U.S. role has not always been a positive one, and I would be the first to concede that I have not always agreed with positions taken by the U.S. government over this period. I would argue, though, that on balance the U.S. engagement has been much more positive and beneficial than it has been negative and detrimental. Going back to 1993, the United States was the strongest proponent for the creation of the ICTY and pushed hard for its establishment by the UN Security Council. Lawyers from the State Department and Justice Department drafted most of the Tribunal's statute. In an effort to jump-start its operations, the United States seconded around twenty lawyers, investigators, and analysts to the Court in 1994—of which I was one of the first. In the aftermath of the genocide in Rwanda, the United States again played a pivotal role in the creation of the ICTR. Since that time, the United States has contributed over five-hundred million dollars for the operation of these two institutions alone. The position I now hold, the Ambassador-at-Large for War Crimes Issues, was established in 1997 to ensure coordinated U.S. support for these courts. Since that time, my predecessors and I have done a tremendous amount of diplomatic outreach on behalf of the tribunals, engaging governments that are subject to the jurisdiction of the courts—urging them to cooperate, to arrest fugitives, and to provide evidence. Likewise, we have worked closely with allies to ensure

that the international community remains unified in support of these tribunals. Also, we have from very early on provided any assistance we could in the form of evidence or witness testimony that would aid the prosecution or the defense cases. And, since my office was first created in 1997, its role has expanded to cover the other courts established subsequently—the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Bosnian State Court, the Iraq High Tribunal, and the ICC.

The United States actively promoted the establishment of these institutions and has provided political, diplomatic, and financial support to most of them and to a number of domestic initiatives dealing with war crimes issues around the world. As I just indicated, though, U.S. political and financial support has not been universal. While we worked for many years to see the ECCC established, we have nevertheless had misgivings about corruption and other problems at that court. A concerted effort has been made over the last year to address those problems and we have now decided to start funding the court.

A more contentious issue has been the U.S. position on the ICC. While initially open to the proposal to create the ICC and an active participant in the negotiations on the Rome Treaty, the United States veered away from the Court and from most of our allies on this issue, culminating in the “un-signing” of the Rome Treaty in the early days of the Bush Administration.

This position has, at times, overshadowed the very positive role the United States plays in international justice issues, as I laid out a moment ago. In relation to the ICC, though, the United States is not in the same place it was in 2001. Many of the concerns expressed about the ICC at that time, and put forward by the Clinton Administration during the Rome negotiations, still remain. These cannot be easily overcome. That said, the openly hostile position taken toward the court in the first years of the administration has largely disappeared. The policy advocated by some at that time, of not just non-participation but active opposition to the court has faded away. Instead, you have seen since 2006 a shift toward more positive engagement with our allies regarding the court and with the court itself, achieving the *modus vivendi* long promoted by Javier Solano. The rhetoric on all sides is much more constructive, less accusatory.

But, it goes beyond the tone of the language being used; this shift has translated into actions. The decision to allow the Darfur investigation to be referred by the United Nations Security Council to the ICC, support for the Charles Taylor trial at the ICC, and the expressed willingness to share information with the court in the same way we do with the other tribunals are indications of the changes that have taken place.

Ultimately, all of this reflects the now-accepted position that the ICC is the appropriate forum for some cases and, in fact, will be the only accountability mechanism available in certain situations. I think there was some grudging acceptance of this fact when the

United States abstained on the Security Council Resolution referring the Darfur case to the ICC—the United States was not going to block the referral but there was still not a full embrace of the Court exercising its jurisdiction in this case. How far we have come since then was made evident by a recent vote in the UN Security Council on the renewal of the mandate for the UN Peacekeeping Mission in Darfur—UNAMID. In the vote on July 31, the United States abstained because language was inserted in the resolution which we felt undermined the work of the ICC and the pursuit of accountability in Darfur. The resolution passed 14-0, with the United States abstaining. In our explanation of vote statement, we made very clear that we were absolutely supportive of UNAMID being extended and that the sole reason we were abstaining was because of the inclusion of language that was not supportive enough of the ICC's work. We also stated explicitly that Sudan had to fulfill its obligations and cooperate with the ICC. For those who have been attentive to past Security Council resolutions and the language that the United States has used in relation to the ICC generally, this is a significant change.

I do not want to imply that all of the U.S. concerns about the ICC have been resolved—they have not. But, I think the way this played out shows that the gap between the United States and our European allies on this issue has narrowed, and over the last few years, this has been the single most notable point of disagreement on international justice issues. We have generally been in lock-step on most other matters, so seeing us speak with the same voice—or in this case, with the United States

being even more supportive of the ICC than our European partners—is a positive thing. In fact, since the July 31 vote, I have been very involved in discussions with the United Kingdom and France—our P-3 partners—trying to ensure a coordinated approach by our governments on this matter. The United States feels strongly that the prosecution should move forward, and at this time, we have seen nothing that would justify an Article 16 deferral by the Security Council.

My point in going through all of this is not to imply that every difference of opinion between the United States and every other government or with all of the courts has been resolved. There will always be differences of opinion—we see this every day among governments inside the European Union, not just with the United States—but in the area of international justice, those differences have become much less significant over the last three years.

So, as we prepare to transition to a new administration in Washington, whoever wins, I don't think you will see stark policy changes from where we are now on most international justice issues. And, I should note here that when I refer to international justice, I am referring to accountability processes, not the broader field of international law, where significant changes may occur. There will, however, obviously be some changes in emphasis and some shifts here and there, but my guess is that nothing will change drastically. Regions that are impacted by ongoing atrocities—places like Darfur and the Democratic Republic of Congo will continue to feature

prominently—as will new crises that emerge in places like Georgia, Somalia, Burma, Zimbabwe, and Kenya, places where there have been concerns over the last year regarding atrocities.

One of the biggest challenges we will face over the next two or three years is ensuring that the ICTY, ICTR, and SCSL complete their work successfully. We will continue to be very supportive, but the degree of political engagement necessary to allow these tribunals to operate smoothly is likely to increase. I mentioned earlier the financial and political investment the United States has made into these courts. Particularly in relation to the ICTY and ICTR, where everything will have to be managed through the UN Security Council, we will likely confront more challenges. Some members of the Security Council have been insistent that the ICTY and ICTR complete their work in accordance with the schedule laid down previously by the Council (i.e., trials completed by the end of 2008 and appeals by the end of 2010). We have known for some time that there would be some slippage in these dates and there has been a tacit understanding among Security Council members that some flexibility would be required. This is even more necessary now with the recent arrest of Radovan Karadžić, whose trial at the ICTY won't even start until next year. The patience of some members is running out, though, so getting consensus on the Council, which has been difficult but achievable up until now, may become more problematic as we look ahead into 2009 and beyond. We will confront this very soon as we try to finalize agreement on the residual and legacy

mechanisms that will have to be established once the tribunals close.

In a related matter to ICTR and ICTY completion goals, the next administration will almost certainly inherit the problem of fugitives—individuals indicted by those courts who still remain at large. The numbers have decreased significantly and with the recent arrest of Karadžić, only two fugitives remain for the ICTY. One of those is Ratko Mladić, who like Karadžić, was one of the most culpable people in the Balkan wars. It is unthinkable that he escape justice, just as it is unthinkable that Felician Kabuga—the financier of the Rwanda genocide—escape with impunity.

Another matter related to completion is the need to develop domestic capacity in Rwanda and the Balkans. We've been working intensively on this for the last few years and this will continue in the years ahead.

Finally, one last area that I think will be a priority for the next administration will be in enhancing U.S. capabilities and global cooperation in the area of genocide prevention and response. And, while I use the term "genocide" here, this really encompasses mass atrocities of any kind. There has been a lot of discussion about this issue over the last couple of years, driven in part, I believe, by the frustration that many people have felt at the inability to do something about Darfur. I think everyone recognizes, though, that more can be done to improve our approach to genocide prevention and response and there is bipartisan support for this idea. So,

again, no matter which party wins the election, I think this will be a priority for the next administration.

Some progress has been made but there are four areas, in particular, where I believe we can and should do a better job: monitoring potential atrocities; implementing preventative measures; immediately responding to on-going atrocities; and planning for potential accountability mechanisms.

An obvious first step towards the prevention of genocide is the accurate and precise monitoring of areas where atrocities may potentially occur. In this regard, the United States has developed a fairly comprehensive monitoring system, given our current resources devoted to this issue. Policy-makers receive in-depth and timely information on potential atrocities.

A successful system of monitoring atrocities is dependent on officers in the field having a clear sense of the warning signs of potential atrocities and knowing what to report and when. Many officers are trained to focus reporting on political or other issues; many may miss important warning signs of impending atrocities because they do not know how to see them. We need to do more to ensure that diplomats, intelligence officers, and aid and development specialists are attentive to warning signs. This should become integrated into regular reporting responsibilities; these types of reports should not be anomalies. Officers heading to posts where atrocities are most likely to occur should receive more thorough training on what warning events merit reporting and further follow-up. Once reported back to

Washington, information has to be channeled into accurate pieces of analysis that weigh all factors. This analysis then needs to find its way to the right policy-makers

In this information gathering process, there is a major role for non-governmental organizations (NGOs), not just human rights monitors, but also relief organizations and others that often maintain a larger and more geographically robust field presence than governments can in conflict zones. Their input of information strengthens the system of reporting and monitoring. I find this to be an invaluable tool and, for this reason, since I have been in this position as ambassador, I have met on a monthly basis with a number of NGOs working in the human rights field to get their thoughts and to have frank discussions about crisis areas around the world. We have sought, thereby, to broaden the scope of information gathering.

The U.S. government monitoring system has worked fairly well. Nevertheless, gaps remain. More can be done. In order to make use of this effort to track early warning signs, we must develop a system of tools to address problems that are identified at the earliest point possible. Policy-makers must do a better job listening to their analysts and integrating prevention concerns into their general political calculus. This is one area in which I believe, despite some progress, the United States still lags. We have not adequately assembled a toolbox of responses to different warning signs. To provide a few examples, in advance of any specific incident, we could develop a range of strategies

that could be pulled off the shelf to deal with cases that we believe might potentially lead to atrocities. Among these could be a press strategy to counter hate-speech, the assignment of a team to strategize about how to engage local leaders diplomatically, or a strategy for diplomatic efforts to build international consensus for action before events spiral out of control. These are all things that the United States does presently, when faced with potential impending incidents. However, our efforts to date have been reactive, ad hoc responses to specific crises. We have not looked at these tools through the lens of prevention and focused on developing best practices.

The next area where I believe we can enhance our ability to deal with atrocities is in the field of immediate response. Over and over again, post-conflict stabilization and reconstruction operations are organized in an ad hoc fashion. I once heard Senator Biden describe it like this: “Every time we go into a post-conflict or peacekeeping situation, we do it like it’s the first time it’s ever happened, and when we shut it down, we act as if it’s never going to happen again.” As a consequence, plans often focus on short-term political expediency at the expense of permanent solutions. Better advanced planning—having a concrete coordination mechanism in place to deploy the necessary personnel given the nature of the conflict—will help build in longer-term considerations to stabilization operations.

However, we also need to be careful not to be too rigid in our coordination. We must not sacrifice our

flexibility to respond to various crises in an effort to seek broad consensus or a one-size-fits-all approach to planning and coordination. Each country and each conflict is different. Each requires a different response.

One concrete example of the need for long-term planning, one that falls within this judicial area, regards securing evidence of atrocities. In the immediate aftermath of a conflict, there is often a short window when certain types of evidence are easily accessible that could later be useful in prosecutions. Oftentimes, obtaining that same information at a later date is difficult or impossible. It is therefore imperative that future post-conflict stabilization operations include in them individuals who are qualified and capable of preserving the evidence necessary to support ensuing accountability processes.

During my time at ICTY, I personally participated in efforts of this sort in Bosnia and Croatia in 1995 and in Kosovo in 1999 and then with the U.S. government in Iraq in 2003. In none of these instances were resources adequate to deal with the scale of the problem we faced. During the Kosovo conflict, we had a sizeable team of investigators and lawyers in Albania and Macedonia, but no where near what was needed to deal with the crisis situation as hundreds of thousands of refugees flooded across the border, many with pertinent information on crimes that we would later prosecute. When the war ended, I went into Kosovo itself with the first North Atlantic Treaty Organization (NATO) troops in June 1999, and within days, we were being inundated with reports of mass graves. Although we had done a lot of

pre-planning and had arranged a multi-national group of forensic teams, NATO did not have the resources to secure all of the grave sites and we could not deploy the forensic teams quickly enough. Nor did we have the ICTY resources on the ground to adequately prioritize mass grave sites or to secure incriminating documents before they were destroyed or just pilfered. Likewise, in Iraq, after Saddam's fall, people who were free for the first time to go find their loved ones started digging up mass graves all over the country, buildings with crucial records were looted, and so on. These, unfortunately, are not isolated incidents. Most interventions have been under-resourced and not adequately supported by military forces to deal with the issue of war crimes.

Recently, the United States has begun to tackle this general problem through the creation, in the State Department, of the Office of the Coordinator for Reconstruction and Stabilization—known by its acronym S/CRS. I was very involved in this initiative during my time at the White House, and my interest in this issue stemmed directly from the experiences I have just recounted. I put forward a proposal to create a U.S. government equivalent of the UN Department of Peacekeeping Operations that could enhance U.S. participation in UN peacekeeping missions, NATO missions, or interventions by the United States and other interested states. Because of my direct experience, I felt strongly that the most robust component of a civilian response mechanism should be in the rule of law area, recognizing that one of the most pressing concerns, from the outset of any mission, would be dealing with war crimes.

The U.S. efforts to create this sort of capability have not gone on in isolation, however. A number of other governments, including the United Kingdom, Germany, and Canada, have undertaken similar initiatives over the last few years. The more governments that do this, the better. It is also vitally important that these types of undertakings not be limited just to North America and Europe. Having strong regional actors in Latin America, Asia, and particularly Africa, will strengthen any framework that is created. The more robust framework there is for response, and the more diverse it is, the more it will benefit the UN, the ICC, and other international, hybrid, and domestic justice initiatives.

And so that brings me to the last component of a genocide prevention/response strategy and that is in the area of accountability. It is often necessary to focus resources on post-conflict justice for years following a conflict. From our experience in the Balkans, in the Great Lakes region of Africa, in Cambodia, and elsewhere, it is clear that the full resolution of conflicts can take years beyond the conclusion of hostilities. Coupled with the fact that a prior case of violent conflict is one of the strongest indicators of risk for future conflict, it becomes increasingly apparent that long-term follow-through in dealing with past conflicts is itself a tool of genocide and atrocities prevention. Thus, it is a critical element in our broader strategies for stabilization of regions in conflict.

The U.S. approach to accountability, interestingly, tracks very closely with the ICC's approach of complementarity. Our first preference, like the ICC's,

would be for domestic institutions to deal with crimes committed in a given conflict. Recognizing, though, that in many post-conflict settings, it may be impossible for reasons of lack of political will, inadequate capacity, or ethnic bias to rely on domestic capabilities, we would then turn to some sort of mixed international-domestic process.

This could take the form of a hybrid court like SCSL or ECCC; of inserting international judges and prosecutors into existing courts, as in Kosovo; or by providing technical or financial support as was done in Iraq.

The final option is a fully international process, which would presumably now be the ICC—I can't imagine any new international ad hoc tribunals like ICTY or ICTR being created. Although a new administration may emphasize one of these areas more than others, I feel certain that the same general approach will be pursued.

Right now, the United States contributes close to one hundred million dollars a year into transitional justice processes through the various tribunals and a number of domestic initiatives. It is critical that we continue to maintain this level of support, and I'm sure that will be the case with the next administration.

We need to do everything we can to bolster these mechanisms, whether we're talking about viable options for accountability or tools for prevention and response. In so doing, we can continue moving in the direction of a

robust framework for preventing and addressing genocide.

Having all of these tools available makes it much easier for a government to respond to genocide or mass atrocities. At the end of the day, though, no matter how solid a structure we create, the effectiveness of our efforts will ultimately be determined by the exercise of political will. The will to speak out and call a genocide what it is, the will to use diplomatic and, in some instances, military means to address it, and the will to throw the government's full support behind efforts to ensure accountability for perpetrators.

The legacy that we inherited from Nuremberg to the work that is done today in the tribunals—this continuum of confronting genocide puts incredible pressure on political leaders to act. It makes it more difficult for anyone to credibly say that they don't know these sorts of things are happening and to just do nothing.

So, as we stand here today, I think we can look back with some satisfaction on how much has been achieved over the last fifteen years. But, all of us who are here—whether we are prosecutors, academics, NGO representatives, or diplomats—need to continue pressing for this concept of accountability.

Too often, we have heard people say “never again” but time and time again, we have seen that those are empty words. If that is going to change, it will be because of the work that all of us here need to do. Thank you.

Sixtieth Anniversary of the Genocide Convention: The Power of a Word

Mark A. Drumbl*

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted sixty years ago. The legacy of the Genocide Convention is inextricable from the legacy of Nuremberg and the legal work of the Nuremberg prosecutors, some of whom join us today. To this end, celebrating Nuremberg also means celebrating the Genocide Convention.

It is an honor to be asked to deliver the introductory lecture to these Second Annual International Humanitarian Law Dialogs. I thank David Crane for the kind invitation to appear before such a diverse audience. Assembled with us are the prosecutors whose work creates the law as well as many non-lawyers whose interest in the law constitutes our future. At this wonderful gathering, we have heard from victims and survivors who depict the human face of great evil. The challenge for the international criminal lawyer is to articulate the humanity of this suffering, and the need for justice, in the narrative language of the law. The language of law is not lyrical. Rather, it is technical. Yet,

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we call upon the sterility of law to capture the emotion of justice: therein lies the challenge. In light of the actual arrest of Radovan Karadžić and the issuance of an application for the arrest warrant of Sudanese leader Al Bashir, both of whom face the prospect (Karadžić very real, Al Bashir more conjectural at the moment) of a genocide trial, there is an urgent topicality to this challenge.

I hope to accomplish three things in this introductory lecture. Firstly, to set out some of that law—in particular, the law of genocide. Secondly, to ask some questions about challenges that the law of genocide faces. And thirdly, to underscore the expressive value of the criminalization of genocide and, in this regard, flag the power of the word and its transcendence of the technical.

Let's start out with the basics. The Genocide Convention defines genocide as,

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about

its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.¹

The Genocide Convention definition reappears in other international legal instruments, such as Article 2(2) of the statute of the ad hoc International Criminal Tribunal for Rwanda (ICTR, 1994),² Article 4(2) of the statute of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY, 1993),³ and Article 6 of the Rome Statute of the International Criminal Court (ICC, entered into force in 2002).⁴ As Cherif Bassiouni

¹ Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

² Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex (Nov. 8, 1994), 33 ILM 1602 (1994).

³ Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, annex (May 25, 1993), 32 ILM 1203 (1993).

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

observes, genocide “remains a single instrument crime” owing to the influence of the Genocide Convention.⁵

Looking beyond the treaty framework, the prohibition of genocide is a *jus cogens* (peremptory) norm;⁶ this prohibitive obligation is owed to the international community as a whole and, consequently, also is of an *erga omnes* nature.⁷ Genocide is, therefore, a crime under customary international law.⁸ Pursuant to Article VII of the Genocide Convention, genocide shall not be considered as a political crime for the purpose of extradition. This means that the requested state may not refuse extradition of a genocide suspect on the grounds that the crime is determined to be political in nature.

Article I of the Genocide Convention states that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [contracting parties] undertake to prevent and to punish.”⁹ Genocide “is a crime simultaneously directed

⁵ M.C. BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 139 (2003).

⁶ *Id.* at 507; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 88 (May 21, 1999).

⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 ICJ Rep. 15, 23.

⁸ Prosecutor v. Musema, ICTR-96-13-T, Judgment (Jan. 27, 2000).

⁹ Genocide Convention, *supra* note 1, art. 1.

against individual victims, the group to which they belong, and human diversity.”¹⁰ Along with crimes against humanity, war crimes, and the crime of aggression, genocide takes its place among the core international crimes. That said, the ICTR has identified genocide as the “crime of crimes.”¹¹ Although there is no explicit ordinality among extraordinary international crimes, genocide is perceived to be of particular gravity.¹²

Genocide also may give rise to individual civil liability. For example, survivors, acting as *parties civiles*, have brought civil damage claims in Rwandan courts against persons accused of genocide.¹³ Victims of atrocity have filed civil damage claims under the Alien Tort Claims Act in U.S. District Courts for a variety of

¹⁰ R. CRYER, H. FRIMAN, D. ROBINSON, AND E. WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 165 (2007).

¹¹ Prosecutor v. Kambanda, ICTR-97-23-S, Judgment, ¶ 16 (Sept. 4, 1998). W. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 9 (2000).

¹² The International Military Tribunal at Nuremberg identified aggression (crimes against the peace) as the “supreme international crime.” The ICC has jurisdiction over the crime of aggression. The crime, however, remains undefined in the Rome Statute and, consequently, the ICC cannot prosecute it.

¹³ M. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 80-83 (2007).

international crimes, including genocide.¹⁴ Genocide may also give rise to state responsibility. In 2007, the International Court of Justice ruled that states—in that particular case, Serbia—can be responsible for failing to prevent or punish genocide.¹⁵

The crime of genocide can be prosecuted and punished by international or national tribunals.¹⁶ Three elements must be found in order to criminally convict an individual for genocide. One is the special mental intent to destroy a protected group in whole or in part. Another is the mental intent to commit the underlying offense (e.g. killing, causing serious bodily harm). Third, the physical element—namely, the specified underlying offense committed in a manner that entails individual penal responsibility—also must be established.

¹⁴ See, e.g., *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007).

¹⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf?PHPSESSID=4035476c6c7926d1026c168e28d194cc>. See also M. Milanović, *State Responsibility for Genocide*, 17 EUR. J. OF INT'L L. 553 (2006).

¹⁶ Genocide Convention, *supra* note 1, art. 6 (“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

Archetypically, genocide is a collective crime. The victim is singled out not because of her conduct as an individual, but because of her membership in a despised group. The victim may be unknown to the attacker; the victim may be a neighbor; or the victim may even be a family member. In all cases, however, the victim faces attack not because of a grievance the attacker has with her individually, but because of a grievance the attacker has with the group to which she belongs. Genocide is a crime involving “a denial of the right of existence of entire human groups.”¹⁷ Although some social science evidence suggests that perpetrators may also be motivated to eliminate “the other” for private material gain or out of social coercion,¹⁸ *génocidaires* remain ideologically motivated agents. The instantiation of genocide often is preceded by years of hate propaganda, which baptizes the perpetrator group with infallibility and supremacy, and denigrates the target group as vermin, maggots, and scum. As a result, many low-level perpetrators may see the commission of genocide as a day’s labor in service to the state, and intermediary and even senior officials may see the crime as discharge of bureaucratic and professional duties. For this reason,

¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 7, at 23.

¹⁸ P. Verwimp, *An Economic Profile of Peasant Perpetrators of Genocide: Micro-level evidence from Rwanda*, 77 J. OF DEV. ECON. 297-323 (2005). *See also*, S. STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* (2006).

Hannah Arendt has described crimes like genocide as epitomizing the “banality of evil.”¹⁹

Genocide emerged as a legal term in response to the Holocaust. Raphaël Lemkin, a Polish lawyer, developed the word in his 1944 work, *Axis Rule in Occupied Europe*.²⁰ As William Schabas notes, Lemkin created the term genocide from “two words, *genos*, which means race, nation or tribe in ancient Greek, and *caedere*, meaning to kill in Latin.”²¹ Genocide formally became an international crime first in January 1951, when the Genocide Convention (adopted on December 9, 1948) came into force. That said, genocide had been recognized as an international crime as early as December 1946, when the United Nations General Assembly adopted Resolution 96(1). In any event, although the Holocaust constituted genocide and would today be prosecuted as such, genocide “was not a crime within the jurisdiction of the Nuremberg Tribunal [*n.b.* International Military Tribunal (IMT)], and the term was not mentioned in its judgment.”²² (As a sidebar, the

¹⁹ H. ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1965).

²⁰ R. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944); CRYER, *supra* note 10, at 166; SCHABAS, *supra* note 11, at 14 (noting that “[r]arely has a neologism had such rapid success”).

²¹ SCHABAS, *supra* note 11, at 25.

²² CRYER, *supra* note 10, at 166.

Prosecutor's indictment did include the term genocide).²³ Assuredly, Nazis were pursued for genocide in proceedings subsequent to the IMT, whether held by military tribunals or by national courts.²⁴ In 1961–1962, Israeli courts convicted and executed Adolf Eichmann, the architect of the Final Solution, for crimes against the Jewish people. Still, the first truly *international* convictions for genocide occurred in the 1990s at the ICTR; specifically, the convictions of Jean-Paul Akayesu (a Rwandan mayor) and Jean Kambanda (former Rwandan Prime Minister) in 1998. To date, three atrocities have been identified by international judges as genocide: the Holocaust, Rwanda, and Srebrenica. If ICC judges grant the Prosecutor's application for an arrest warrant for Al Bashir (and if custody is obtained over him), then the ICC may oversee a genocide trial for the atrocities in Darfur. National courts have gone further in denouncing other tragedies as genocide. For example, the Iraqi High Tribunal has held that the Anfal campaign undertaken by Saddam Hussein in northern Iraq constituted acts of genocide against the Kurds.

²³ G. METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 194 (2005). Paradoxically, as Mettraux notes, "the very absence of any reference to 'genocide' in the Nuremberg Judgment may have prompted states to establish such a prohibition via an international treaty and may have facilitated the adoption of the Genocide Convention [...]." *Id.*, at 198.

²⁴ SCHABAS, *supra* note 11, at 48–49; A. CASSESE, *INTERNATIONAL CRIMINAL LAW* 96 (2003).

Colloquially, the term genocide has been “used for any large-scale killings.”²⁵ Furthermore, the phrase “cultural genocide” appears in the popular lexicon despite the fact that the drafters of the Genocide Convention rejected the notion of cultural genocide.²⁶ Thus, the legal meaning of genocide is much more circumscribed than the colloquial or popular meaning. The hallmark of genocide, as a crime, is the intended destruction in whole or in part of a national, racial, religious, or ethnic group. The destruction must be of the biological or physical existence of the target group, although attacks upon cultural characteristics of the group could support the finding that the group was being targeted for physical or biological destruction.²⁷ This very high level of intention gives genocide its special intent, or *dolus specialis*, which can make it very difficult to prove. The larger-scale the crime, the more administrative the massacre, the more difficult it may be to locate individual criminal responsibility.

Following codification in the 1948 Genocide Convention, there was little formal international law-making activity involving the crime of genocide. All

²⁵ CRYER, *supra* note 10, at 165.

²⁶ SCHABAS, *supra* note 11, at 179–185.

²⁷ Prosecutor v. Krstić, IT-98-33-T, Judgment, ¶ 580 (Aug. 2, 2001); *see also* Prosecutor v. Krstić, IT-98-33-A, Judgment, ¶ 26 (Apr. 19, 2004); C. Kress, *The International Court of Justice and the Elements of Genocide*, 18 EUR. J. OF INT’L L. 619, 626–27 (2007).

this changed with the tragedies in the Balkans in the 1990s and in Rwanda in 1994. Responding to these tragedies, and unencumbered from the sclerosis of the Cold War, the Security Council in 1993 and 1994 created the ICTY and ICTR, respectively. Both tribunals were given authority to prosecute genocide, and both have done so. In terms of internationalized institutions, the Special Court for Sierra Leone is not empowered to prosecute genocide. The Special Panels for Serious Crimes with jurisdiction over serious criminal offenses in Timor-Leste, which ceased operations in May 2005, had jurisdiction to prosecute genocide, though in practice did not issue genocide convictions (in one case, a genocide conviction was entered by the East Timor Court of Appeal). The Extraordinary Chambers in the Court of Cambodia (ECCC) also have jurisdiction to prosecute genocide. Article 4 of the Law on the Establishment of the Extraordinary Chambers once again borrows from Article II of the Genocide Convention.²⁸ The ECCC also permits civil parties to participate in the process. Were the ECCC to proceed in earnest with genocide trials, the jurisprudence regarding this “crime of crimes” would continue to grow.

The codification of genocide in the ICTR and ICTY statutes, as well as the tribunals’ jurisprudence, has “done a great deal to liberate genocide from the historical and sociological environment in which it was born.”²⁹ In other words, the judicial determination that

²⁸ See http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

²⁹ METTRAUX, *supra* note 23, at 199.

atrocities in Bosnia and Rwanda was genocide applied the crime—as a generally applicable legal norm—to tragedies other than the Holocaust. As Mettraux notes, this jurisprudence has given “some welcome precision and foreseeability to a body of law characterized by a high degree of uncertainty and generalization,” thereby moving the field of international criminal law “from paper into reality.”³⁰ Assuredly, the extension of genocide to cover atrocities in other places has not been without controversy. Examples of elasticity in the legal interpretation of genocide include the Srebrenica massacre in Bosnia³¹ and the ECCC’s judicial mandate where the factual circumstances are unclear whether genocide actually occurred.³²

³⁰ *Id.*

³¹ Prosecutor v. Krstić, IT-98-33-T, Judgment (Aug. 2, 2001); Prosecutor v. Krstić, IT-98-33-A, Judgment, (Apr. 19, 2004); see Bosnia v. Serbia, *supra* note 15. For early discussion of this controversy prior to the *Krstić* judgments, see W. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the former Yugoslavia*, 25 *FORDHAM INT’L L. J.* 23 (2001).

³² For an argument in favor of the existence of auto-genocide (namely that the perpetrator group can also be the target group) in Cambodia, see H. Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 *HUM. RTS. Q.* 82 (1989).

In accordance with Article V of the Genocide Convention,³³ and consonant with the complementarity framework established by Article 17 of the Rome Statute, many states have criminalized genocide in their national laws and have empowered their national courts to convict offenders. As Schabas notes, the vast majority of states “have borrowed the [Genocide] Convention definition, [. . .] but occasionally they have contributed their own innovations.”³⁴ The involvement of national courts in the accountability matrix means that, in some jurisdictions, prosecutions for genocide occur at multiple levels. Rwanda is an example. Senior leaders of the Rwandan genocide appear before the ICTR. Approximately 10,000 individuals have been convicted by Special Chambers of Rwanda’s national courts, and 100,000 individuals have appeared before neo-traditional *gacaca* courts (where it is now estimated that up to 760,000 individuals may be adjudged).³⁵ Transfer of cases to national courts in Bosnia, Croatia, Serbia, Rwanda, and elsewhere is central to the ICTY and ICTR completion strategies. The ability of the international tribunals to transfer cases hinges on a number of factors,

³³ Genocide Convention, *supra* note 1, art. 5 states: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.”

³⁴ SCHABAS, *supra* note 11, at 5.

³⁵ DRUMBL, *supra* note 13, at 72, 91 (citing the work of Schabas).

including the ability of national penal frameworks to receive cases owing to the adoption of national laws proscribing genocide. ICTR judges thus far have been reticent about transferring cases to the Rwandan national courts. Independent of transfers, genocide trials can also occur within the national courts of states distant from the atrocity. In some instances, these foreign national courts may have taken offenders physically present in their jurisdictions into custody. In still other cases, foreign national courts may elect to exercise universal jurisdiction over the crime of genocide. The interactions between international institutions, on the one hand, and national and local institutions, on the other, in the prosecution of extraordinary international crimes have been the subject of considerable academic research and commentary.³⁶ National juridical institutions that have convicted for genocide include the Iraqi High Tribunal for the Anfal campaign,³⁷ Germany in regard to atrocity in the Balkans, Ethiopia, and Israel in regard to crimes against the Jewish people. Also, the Brazilian courts have treated the Helmet massacre of the Tikuna people in 1988 as genocide.

The International Court of Justice (ICJ) has ruled that state responsibility can issue from a breach of the

³⁶ See generally Drumbl, *supra* note 13; W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49:1 HARV. INT'L L. J. 53-108 (2008).

³⁷ Article 11 of the Statute of the Iraqi High Tribunal proscribes genocide.

Genocide Convention, which accords the ICJ jurisdiction under Article IX.³⁸ The ICJ adjudges contentious disputes between states and also renders advisory opinions. Although states cannot commit crimes *per se*, they can be held responsible for breaches of their international obligations, including their obligations to prevent and punish genocide. On February 26, 2007, the ICJ held that, although Serbia was not directly responsible for committing genocide in Bosnia and Herzegovina, it was responsible for having failed to prevent genocide at Srebrenica, where 7,000 Bosnian Muslim men and boys were massacred in July 1995.³⁹ The ICJ also found that Serbia breached the Genocide Convention for its failure, in the wake of genocide at Srebrenica, to fully cooperate with the ICTY (in particular its failure at the time to bring notorious suspects General Mladić and Radovan Karadžić into custody).⁴⁰ However, the ICJ did not award damages against Serbia. Instead, it ruled that the issuance of the judgment alone constituted satisfaction for Bosnia.

³⁸ Genocide Convention, *supra* note 1, art. 9 (“Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”).

³⁹ See *Bosnia v. Serbia*, *supra* note 15.

⁴⁰ Karadžić has since been brought into custody through action taken by the Serbian Government.

Although the ICJ is not a criminal court, this judgment is of considerable importance for criminal lawyers and political scientists concerned with transitional justice. *Bosnia v. Serbia* is the first time a state has sued under, and another state has been found responsible as a whole, for breaching the Genocide Convention. Though the ultimate finding and remedy were somewhat anemic, it is important not to underestimate the relevance of the fact that Bosnia's application actually led to a judgment. After over a decade of jurisdictional wrangling, counterclaims, and an application for revision by Serbia, the ICJ found that states can be responsible for genocide, meaning that the prospect of accountability for genocide extends beyond individual penal responsibility. Accordingly, and in line with the arguments that Bosnia had raised, individual penal responsibility does not extinguish collective state responsibility. Assuredly, awarding damages against an entire state also gives rise to difficult questions. Who ends up paying? Are all citizens of that state on the hook? Is that fair? Although prosecuting a small number of criminal defendants undercaptures the many layers of public complicity that makes atrocity truly massive, sanctioning an entire state may lead to overcapture in that individuals who resisted, or were themselves victimized, are found responsible. How is the international community to strike the balance? Does collective state responsibility so dehumanize the state that it impedes reconciliation efforts? On the other hand, might the legal fiction of collective innocence serve reconstitutive purposes? Notwithstanding the legal and moral complexities, collective responsibility schemes

may more truthfully reflect the broad societal forces that often are a condition precedent to wide-scale genocide.

That said, our focus here is individual penal responsibility. Under international criminal procedure, proof of genocide must be established beyond reasonable doubt.⁴¹ Several complex interpretive questions have arisen regarding the application of the crime of genocide. These questions are: (1) which groups, exactly, are protected groups?; (2) what is the requisite physical element (*actus reus*)?; (3) how can individual penal responsibility for genocide be established?; (4) what is the requisite mental element (*mens rea*)?; (5) what are possible defenses to genocide, including immunities?; and (6) how are perpetrators sentenced? We all look forward over the course of these dialogs to exploring these complex questions. In addition, the international community's commitment to advancing the dialog from punishing to actually preventing genocide is worthy of discussion. This is an important issue insofar as Article I of the Genocide Convention mandates both the punishment and prevention of genocide. Although clearly a subject for considerable debate, my impression is that there is limited cause to believe that retrospective criminal punishment serves much of a preventative function.⁴² Much more settled is the fact that, although

⁴¹ Rome Statute, *supra* note 4, art. 66; ICTR Rules of Procedure and Evidence, Rule 87(A), available at <http://69.94.11.53/ENGLISH/rules/150607/rop-150607.pdf>; ICTY Rules of Rules of Procedure and Evidence, Rule 87(A), available at <http://www.un.org/icty/legaldoc-e/index-t.htm>.

⁴² DRUMBL, *supra* note 13, at 149.

genocide is explicitly signaled out as investing states with a preventative duty, states have not taken effective measures to *anticipatorily* prevent genocide. Whatever the effect of retrospective criminal trials, we all must agree that these trials cannot substitute for, or foreclose conversations about, how to anticipate and intervene prospectively to quell incipient genocide. Retrospective judicial interventions, whether undertaken by criminal prosecutions, civil liability, or communal and indigenous forms of justice, can only do so much. In order for “never again” truly to mean “never again,” some sort of effective emergency interventions—whether forcible or non-forcible—would have to be staged. In this regard, Ambassador Williamson’s presentation elucidates a number of concrete avenues of political and military inquiry.

In addition to debates over the deterrent value of criminal trials, scholars also debate the retributive value of punishing an individual for genocide. Although judges at international tribunals view retribution as a principal justification for imposing criminal punishment for genocide, it is unclear how a *génocidaire* can receive just deserts for a crime of such magnitude. Assuredly, there are other justifications for sentencing individuals convicted of the “crime of crimes.”⁴³ Among these other justifications, I find that expressivism value bears the greatest promise. Expressivism captures the communicative, pedagogical, didactic, and narrative value of prosecuting and punishing genocide. It is

⁴³ *Id.*

related to both retribution and deterrence, but is materially distinct on a number of important fronts.

In my other published work,⁴⁴ I describe how the expressivist punishes to strengthen faith in rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it. Expressivism also transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public. For the expressivist, punishment can impede the early indoctrination phases in which ordinary people become assimilated into the machinery of mass violence. Punishment can decelerate the mainstreaming of hate-mongering as politics—it can flag the moral unacceptability of such a resentful politics. Instead of viewing the politics of hate as legitimate discourse, the law may articulate a norm that discrimination-based violence is manifestly illegal.⁴⁵

⁴⁴ The remainder of this paragraph draws from M. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1182-1184 (2007).

⁴⁵ Assuredly, the determination whether an atrocity is or is not genocide may create confusing semantic diversions. This determination also may present an inaccurate perception of the violence as entirely one sided. The public debate over whether atrocity in Darfur constitutes genocide evidences both of these phenomena. See, e.g. S. Straus, *Darfur and the Genocide Debate*, 84:1 FOREIGN AFFAIRS 123 (2005); J. FLINT AND A. DE WAAL, *DARFUR: A NEW HISTORY OF A LONG WAR* 167-199 (2008).

Herein lie key legacies of the Genocide Convention—namely, the introduction of a new and particularly heinous crime to our lexicon, the stigmatization of group-based eliminationism, and the marshalling of support behind this prohibition as a central element of *jus cogens*. All these legacies flow from the power of a single word. The perpetrator of genocide, by busting the global trust, commits a violation against us all. None of this denunciation would be possible, conceptually as well as practically, without the legal work of the prosecutors of all the international criminal tribunals, beginning with Nuremberg, and continuing to this date. Nor would it be possible without a Genocide Convention, arising from the abyss of the Holocaust, to cast a global moral minimum.

The Promise and Perils of International Justice

Omer Ismail*

International justice and accountability are going through an interesting time: a time of promise and peril with respect to the future of the tribunals and their contribution to serving justice and benefiting international jurisprudence. The promise afforded by the ad hoc tribunals such as the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Special Court for Sierra Leone (SCSL) can be traced in the outcomes of these tribunals that resulted in successful arrests and prosecution of some of the most notorious international criminals.

The legacy of the International Criminal Tribunal in Rwanda, besides being empowered to apply customary international law, has established a new precedent as the first international tribunal to apply international law to mass atrocities committed within the context of internal conflict. The Rwandan tribunal is paving the way for the survivors of the Darfur conflict to seek justice. The Special Court in Sierra Leone delivered the first conviction by an international tribunal for the crime of recruitment and use of child soldiers in armed conflict. In March 2004, the Special Court set another precedent in its historic decision to refuse to recognize the applicability of national amnesty for crimes against humanity and war crimes. This particular decision is very significant in the fight against impunity, by serving

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notice to those who hide behind amnesty offered by the state to prevent international courts from exercising jurisdiction over individuals accused of heinous crimes.

These promises are now threatened by many perils that may jeopardize the future of these tribunals and the International Criminal Court, or ICC. The enemies of the ICC are working hard to torpedo the very court that the world long dreamed of having. The Europeans who claim to have fathered the ICC are now mute in the face of these vicious attacks on the court. Their absence from the debate on whether the ICC was correct in indicting a sitting president is conspicuous, considering that this indictment constitutes the biggest move in history for the ICC.

The gloom and doom scenario predicted by some opponents of the ICC is that if the Sudanese President Omar Al Bashir was indicted, that will threaten the fragile peace process in Darfur. As a Darfurian, I fail to see the “peace process” that these people are talking about. The Darfur Peace Agreement, or the DPA, which was signed by only one faction of the Darfur rebel groups in May of 2006, has never been in such jeopardy as it is in right now. Minni Minawi, the leader of the Sudan Liberation Army faction that signed the DPA, has left Khartoum and is now with his troops in the bush, amidst strong rumors that he might return to rebellion. The Government of Sudan is frantically trying to rally support for undermining the ICC. In the beginning, the Sudanese government dismissed the application to indict President Bashir, declaring they do not recognize the court. Al Bashir’s government also claimed that the

court has no jurisdiction over Sudan and reiterated its refusal to surrender Ahmed Haroun and Ali Koushayb, the two Sudanese officials indicted earlier by the ICC. To understand why the Sudanese government is attacking the ICC and leading the chorus of court bashers, we have to look at the history of the head of the regime: President Omar Al Bashir himself.

In June of 1989, Omar Al Bashir led his fellow officers in a military coup against the democratically-elected government of Prime Minister Sadiq Al-Mahdi. He claimed he led the coup to “save the country from rotten political parties.” Al Bashir hosted Osama Bin Laden from 1991 through 1996 and turned Sudan into the terrorism headquarters of the world. Perhaps the most awful highlights of his dark records were declaring jihad against the people of the Nuba Mountains, which started a genocidal campaign similar to the genocide he later perpetrated against the people of Darfur. The arbitrary detentions, disappearances, and torture of political opposition became normal practices for this criminal regime. The dreaded “ghost houses” located all over the Khartoum were known around the country as torture chambers where political dissidents were frequent visitors. Many of these dissidents never left the ghost houses alive.

The engineered famine of the Bahr Al-Ghazal region of southern Sudan is one of the true manifestations of the criminal nature of this regime. The lethal combination of militia attacks on civilians and systematic denial of humanitarian aid transformed a

drought into a coordinated, outright attack on civilians and a crime against humanity.

Finally, we only have to look at Darfur in order to understand the magnitude of the devastation that the Sudanese people have endured under the rule of Bashir. The killings, rape, and orchestrated insecurity against the Darfurians has led to the death of close to half a million people. Over two million people have been forced from their homes and displaced into camps, and up to a quarter of a million people have sought refuge in eastern Chad. In places like Oure Cassoni, a Chadian camp that is home to around thirty thousand refugees, I met a blind woman of over sixty years who trekked to the camp from her village in Darfur. She was seeking shelter for her seven grandchildren orphaned by the death of her son, who was killed in the attacks by the janjaweed, and her daughter whom she lost in an Antonov attack on Tine, near the Chadian border.

This long history of violence against the Sudanese people clearly shows who the victim here is, and it is not President Omar Al Bashir. The victims are the people of Darfur, the Nuba Mountains, southern Sudan, and the brave men and women who have fought for democracy and the respect for human rights and ended up in the ghost houses, or worse, killed in the process. That is why supporting the ICC is essential in bringing justice and peace to the Sudanese people. The indifference of the Europeans and the reluctance of the Africans will render the ICC an organization supported by Latin and South American countries, with a handful of others, and will expose it to attacks by the powers that work hard to

defeat its principles. It is incumbent upon all of us gathered here, and those who support the ICC elsewhere, to stand up to see to it that the ICC remains a beacon of hope for the oppressed and those who seek justice. By supporting the ICC, we ensure the triumph of the principles of accountability and the rule of law.

**Transnational Judicial Dialogue and
the Rwandan Genocide:
Aspects of Antagonism and Complementarity**

Leila Sadat*

I. Introduction

In earlier writings, I have addressed the fascinating interplay between international and national jurisdictions, particularly as regards the question of amnesty for *jus cogens* crimes.¹ Examining cases from several jurisdictions, my central thesis has been that international criminal law has become an important arena in which boundaries between national legal systems and the international legal order are being continuously negotiated and tested, as a rudimentary constitution for the international community emerges. Much of the “testing” is going on in national judicial systems and international courts, which are interacting in a fascinating example of transnational judicial dialogue wherein courts in different legal orders are examining similar problems.

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¹ Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006).

One issue not addressed by my earlier work is the appropriate balance between exercises of jurisdiction by the territorial state on which the crimes in question were committed, third party states (generally using universal jurisdiction), and international courts. That is, to the extent that several jurisdictions may exercise their jurisdiction in a manner generally deemed acceptable under international law, what outcomes are preferable, and what factors should influence the outcome in particular cases? There is now an extensive literature, of course, on universal jurisdiction and its application, but much of that work is highly abstract or addresses civil litigation.

The question whether a particular state or international criminal tribunal has the authority in a particular case to exercise jurisdiction over the accused presents itself largely as what Yuval Shany calls “unregulated interactions”² between national courts and international courts, where no international treaty or rule of customary international law provides clear guidance as to the proper outcome. Certainly as to national courts, it would be difficult to argue that any international rule governs the proper application (or not) of a particular exercise of universal jurisdiction. The horizontal application of international criminal law is still a relatively contested arena by courts, academics, and political elites, although I have argued that at least with respect to *jus cogens* crimes such as genocide, universal

² YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 39 (2007).

jurisdiction does and should apply.³ International courts are bound by their statutes, of course, and their jurisdiction constrained thereby. Their relationship to national courts may be one of “complementarity,” as in the case of the International Criminal Court (ICC),⁴ or “primacy,” as with the International Criminal Tribunal for Rwanda (ICTR),⁵ meaning that the international legal order has essentially established a vertical hierarchy of adjudicative mechanisms, as well as postulated the supremacy of international law. Yet, tribunals endowed with primacy are the exception, not the rule, and their use of their primacy jurisdiction is rarer still. Thus, in considering the exercise of universal jurisdiction in an essentially unregulated world, there is still much work to be done. The *Princeton Principles on Universal Jurisdiction* endeavored to address this issue indirectly, and Principle 8 usefully suggests various factors to be balanced in ascertaining the appropriateness of a particular exercise of universal jurisdiction in a potentially antagonistic situation including (without ranking): the place of commission of the crime; the nationality of the perpetrator; the nationality of the victim; any other connection between the requesting state and the alleged perpetrator, the crime, or the victim; the likelihood, good faith, and effectiveness of a

³ Sadat, *supra* note 1, at 974-75.

⁴ Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90.

⁵ Statute of the International Tribunal for Rwanda, art. 8(2), S.C. RES. 955, annex (Nov. 8, 1994), 33 ILM 1602 (1994) [hereinafter ICTR Statute].

prosecution in the requesting state; the fairness and impartiality of the proceedings in the requesting state; convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and the interests of justice.

The commentary to Principle 8 is brief, noting only that a decision was made not to rank the principles in order of precedence, while at the same time acknowledging that “traditional jurisdictional claims” such as the territorial principle will often take precedence, given that they will generally satisfy other criteria as well.⁶ Abstract Principles, however, tell us little about how universal jurisdiction should work in practice. When is it legitimate for a state to adjudicate the guilt or innocence of an individual only tangentially connected to it? Does that legitimacy rest upon the gravity of the person’s alleged crimes? Is it a result of no other forum being available? Are there countervailing political considerations that might delegitimize an otherwise appropriate exercise of universal jurisdiction, including the fact that the state seeking to exercise that jurisdiction may have “unclean hands”? What does “the interests of justice” mean? Should national judges take account of political considerations in their consideration of whether or not a particular exercise of jurisdiction is appropriate? These difficulties continue to plague discussions of universal jurisdiction,

⁶ THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23, 22 (Stephen Macedo, ed., 2004). Principle 8 posits a situation in which extradition has been requested, but is a useful starting place for determining the suitability of a forum even in the absence of an extradition request.

and in the absence of any centralized authority in the legal order, will certainly continue to do so for some time.

As a vehicle to explore these questions, this paper examines the interplay between the Rwandan courts (and Gacaca), the French courts, and the ICTR as an example of a situation in which multiple jurisdictions have asserted a right to exercise criminal jurisdiction over the perpetrators of serious atrocity crimes. This scenario largely fits Shany's categorization of "unregulated interactions," for, other than the primacy provisions in the ICTR Statute and the jurisprudence regarding immunities emanating from the International Court of Justice (along with interesting dicta regarding the exercise of universal jurisdiction), the Rwandan genocide has spawned prosecutions in multiple fora with few mandatory rules operating to apportion jurisdiction between them. Cases have been brought in Belgium,⁷ Canada,⁸ France,⁹ and Switzerland,¹⁰ and one expert

⁷ On the four Belgian prosecutions, see http://www.trial-ch.org/en/trial-watch/profile/db/facts/vincent_ntezimana_162.html (describing the Vincent Ntezimana, Alphonse Higaniro, Julienne Mukabutera, Consolata Mukangango cases).

⁸ A trial is currently underway in Canada as well. See http://www.trial-ch.org/en/trial-watch/profil/db/facts/desire_munyaneza_423.html.

⁹ See *infra* Part IV.

writes of “rumors of an impending case in Finland.”¹¹ I tentatively conclude that although the territorial state (Rwanda) would in principle be the most satisfactory forum, the difficulties Rwanda has experienced surpass its capacity to either provide effective justice for victims, or face some of the unpalatable truths about the conduct of all parties in the 1994 genocide, specifically the allegations of war crimes against the Rwandan Patriotic Front (RPF), at least at the present moment. Although the ICTR has had many successes, overcoming many early difficulties and making important contributions to international criminal jurisprudence and to historical narrative, it has not brought indictments against the members of the RPF or proceeded with investigations of the plane crash that sparked the genocide. There may well be good reasons for this (including political necessity); however, these omissions may render the ICTR’s intervention incomplete, particularly given the pressure it is under to terminate its work. If so, in spite of the political friction they may engender, investigations in third party states using either universal jurisdiction or other bases of jurisdiction accepted under international law, may remain necessary vehicles for addressing justice and reconciliation for the people of Rwanda. At the very least, like other experiments with universal

¹⁰ William A. Schabas, *Transfer and Extradition to Rwanda* (unpublished manuscript dated July 1, 2008), at 2, citing Niyonteze, Military Court of Cassation, April 27, 2001, Arrêts du Tribunal Militaire de Cassation 2001/220, No. 21, pp. 1-32m para, 9(e) (Switz.).

¹¹ *Id.* at 2.

jurisdiction, they may serve as a catalyst for change in Rwanda itself.¹²

The Rwandan genocide remains one of the most horrific atrocities of the twentieth century, resulting in the death of an estimated 500-800,000 human beings, massacred over a one hundred day period.¹³ In a ghastly narrative that has become all too familiar, a tale of planned, systematic extermination of an ethnic group, the Tutsi of Rwanda, has emerged to shock the world by its barbarism and senselessness. After years of fighting and tension between the Tutsi-dominated RPF and the Hutu-led government of Juvenal Habyarimana, it is commonly accepted that what sparked the genocide was an attack on Habyarimana's plane on April 6, 1994, an attack that killed Habyarimana and Burundian President Cyprien Nyaryamira. Immediately following the attack, on April 7th 1994, the Rwandan military and two militia groups appertaining to extremist Hutu, the Interahamwe ("those who attack together") and the Impuzamugambi ("those with a single purpose") began killing moderate Hutu as well as Tutsis.¹⁴ The attacks were well-coordinated and fueled by radio propaganda referring to

¹² Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 512-13 (1990).

¹³ See also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 11 (2001).

¹⁴ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 107 (Sept. 2, 1998).

the Tutsis as *iyenzi* (cockroaches) and calling for their total elimination.¹⁵ Among those killed were Rwanda's Prime Minister, Agathe Uwilingiyimana, and the ten Belgian UNAMIR soldiers who tried to protect her.¹⁶ The killing ended only when the RPF, led by General Paul Kagame (now Rwanda's President), mounted a successful military campaign to establish control of the country and topple the government of interim Prime Minister Jean Kambanda, a Hutu extremist, who had seized control of the country after President Habyarimana's death. (Kambanda subsequently pled guilty to genocide before the ICTR and was sentenced to life imprisonment).¹⁷ The Hutu-dominated government fled the country and the RPF established a national unity government composed of a moderate Hutu President (Pasteur Bizimungu), a Hutu Prime Minister (Faustin Twagiramungu), and a Tutsi Vice President/Minister of Defense (General Paul Kagame, now Rwanda's President).¹⁸

The political climate following the genocide was highly charged, as the Unity Government re-established control, and it became apparent that the international

¹⁵ Akhavan, *supra* note 13, at 11.

¹⁶ VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 54 (1997).

¹⁷ Prosecutor v. Jean Kambanda, ICTR Case No. 97-23-S, Sentence (Sept. 4, 1998), *aff'd on appeal*, Jean Kambanda v. Prosecutor, ICTR Case No. 97-23-A, Judgment (Oct. 19, 2000).

¹⁸ MORRIS & SCHARF, *supra* note 16, at 58.

community had completely failed Rwanda both in preventing and stopping the genocide. Because the politics of the Rwandan genocide continue to weigh heavily upon efforts to bring perpetrators to justice, it is necessary to briefly consider the political context before taking up jurisdictional issues. The United Nations missed the opportunity to stop the genocide even before it started, and arguably made matters worse once the killing began. Even though the head of UN forces in Rwanda, General Roméo Dallaire, knew of the Hutu plans in advance and requested permission to raid arms caches he had been informed of, UN headquarters denied him permission to intervene.¹⁹ As the genocide unfolded, Rwanda not only remained a UN member state but even retained its seat on the Security Council, “its ambassador privy to every discussion about how to stop the killings his government was carrying out.” Indeed, as news of the slaughter emerged, the Security Council not only refused to reinforce UNAMIR, but actually reduced its size.²⁰

The United States bore its own share of the blame, “passing up countless opportunities to intervene” and

¹⁹ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 344-35 (2002).

²⁰ ADAM LEBOR, “COMPLICITY WITH EVIL”: *THE UNITED NATIONS IN THE AGE OF MODERN GENOCIDE* xii (2008). *See also* MORRIS & SCHARF, *supra* note 16, at 59 (describing Rwanda’s interventions in the Security Council). *See* S.C. Res. 912, at 4, U.N. Doc. S/RES/912 (April 21, 1994).

stop the killing,²¹ refusing to act itself, and crippling UN efforts.²² Indeed, the United States, like France, Belgium, and Italy, focused upon evacuating its own personnel as the killing began, giving little thought (and virtually no assistance) to the Rwandans, many of whom had worked with and for them, and who were about to be slaughtered.²³ Belgium, too, shared some role in creating the ethnic tensions festering in Rwanda, having issued the identity cards ultimately used to identify Rwanda's Tutsis during the genocide, but following the murder of the ten Belgian UNAMIR members, Belgium completely withdrew its forces, leaving the Tutsis (and moderate Hutus) to fend for themselves.²⁴

France was perhaps most closely involved in Rwandan politics, and therefore, the Rwandan genocide.

²¹ Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, THE ATLANTIC MONTHLY, Sept. 2001, at 84.

²² PHILLIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 150-51 (1998).

²³ POWER, A PROBLEM FROM HELL, *supra* note 19, at 352-54.

²⁴ See *Belgique-Rwanda-ONU*, AGENCE FRANCE PRESSE, 5 Dec. 1997, Belgian Senate, Parliamentary Commission of Inquiry Regarding Events in Rwanda, *Report in the Name of Commission of Inquiry by Mr. Mahoux and Mr. Verhofstadt*, available at <http://www.senate.be/english/rwanda.html>.

Journalists such as Philippe Gourevitch have argued that France arguably facilitated the genocide by:

[A]dopting the official position of Rwanda's genocidal government: that far from being a matter of policy the massacres of Tutsis were the result of mass popular outrage following Habyarimana's assassination . . . that the killing was an extension of the war with the RPF; [and] that the RPF started it and was the greater offender. . . .²⁵

He also points to France's military intervention that took place after the killing was virtually complete (*Opération Turquoise*), which was ostensibly to protect Tutsis as well as Hutus, but created more problems than it solved. Like the Hutus, who had, in the words of human rights activist Alison Desforges, been playing "mirror politics" in order to justify their attacks on the Tutsis,²⁶ committing atrocities, then blaming the Tutsis for them in order to justify a campaign (and later a genocide) against the Tutsis, France argued that military intervention on behalf of "Hutu Power" was required to protect the Hutus from the RPF's onslaught. Gourevitch explains:

From the start of the war with the RPF in 1990, Hutu extremists had promoted their

²⁵ GOUREVITCH, *supra* note 22, at 154.

²⁶ Akayesu, *supra* note 14.

genocidal aspirations with the world-upside-down rhetoric of Hutu victimization. Now Hutu Power had presided over one of the most outrageous crimes in a century of seemingly relentless mass political murder, and the only way to get away with it was to continue to play the victim.²⁷

Although it is admitted that the French intervention may have saved many thousands of lives, overall France's role in the genocide has been seen by many observers as deeply problematic.²⁸ A 1998 French Parliamentary Commission of Inquiry concluded that France was not implicated in the genocide,²⁹ but many experts continue to maintain that France bore "some responsibility, however indirect, for the genocide,"³⁰ either by arming Hutu extremists or through its own

²⁷ GOUREVITCH, *supra* note 22, at 157.

²⁸ See, e.g., *id.* at 161; GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995).

²⁹ France, Assemblée Nationale, *Mission d'information parlementaire sur le Rwanda, Enquête sur la tragédie rwandaise (1990-94)*, CD-ROM (Dec. 1998).

³⁰ See e.g., PRUNIER, *supra* note 28; Shiva Eftekhari, *International Criminal Justice: Rwanda and French Human Rights Activism*, 23 *HUM. RTS. Q.* 1032, 1053 (2001).

military interventions.³¹ In August of 2008, a Rwandan Commission of Inquiry issued a report stating that “French forces directly assassinated Tutsis, Hutus accused of hiding Tutsis [and] . . . French forces committed several rapes on Tutsi survivors.” The French government denounced the report as “unacceptable,” and the accusations as untrue.³²

In the dominant narrative recited above, the Kagame government and the RPF emerge as heroes in an epic struggle to save Rwanda’s Tutsi minority. Yet, there is a counter-narrative as well. The RPF was found to have committed both war crimes and crimes against humanity by the United Nations Commission of Experts investigating the atrocities, accusations that were corroborated by human rights organizations and others since the genocide ended. (A Spanish indictment recently accused forty RPF officers of involvement in mass killings immediately following the genocide.)³³ More controversially, Kagame and members of his government are accused of shooting down Habyarimana’s plane, bringing about (either recklessly or intentionally, depending upon the interpretation one gives to the facts) the genocide that they then battled fiercely to contain. These allegations surfaced in a recent French indictment issued by a French judge, Jean-

³¹ See, e.g., PRUNIER, *supra* note 28, at 165; GOUREVITCH, *supra* note 22.

³² BBC News, *France Denounces Genocide Claims*, available at <http://news.bbc.co.uk/2/hi/europe/7545168.stm>.

³³ *Rwanda’s Fury at Spanish Warrants*, BBC News, Feb. 11, 2008.

Louis Bruguière.³⁴ Bruguière's indictment presents the findings and conclusions of an eight-year investigation.³⁵ It alleges that the current President of Rwanda and leader of the RPF, Paul Kagame, gave the final order for the Presidents' plane to be shot down.³⁶ According to Bruguière, Kagame orchestrated the assassination of Habyarimana in order to provoke reprisals against his own ethnic group, the Tutsi, and thus provide legitimacy for the RPF to renew hostilities and provide him with an opportunity to seize power from the Hutu-dominated government.³⁷ The allegations in

³⁴ Bruguière served as a leading French investigating magistrate in charge of counter-terrorism and played a major role, for example, in bringing to justice such individuals as Carlos the Jackal and Libyan intelligence officials responsible for aircraft bombing in 1989. Henri Astie, *Profile: France's Top Anti-terror Judge*, BBC News Online, available at <http://news.bbc.co.uk/2/hi/europe/3031640.stm>. See also Katrin Benhold, *French Judge Sets Sights on Kagame: Rwandan President Could Face UN Court*, INT'L HERALD TRIB., Nov. 22, 2006; *Rwanda Asks UN Court to Overturn French Arrest Warrants over Genocide*, U.N. News Centre, Apr. 18, 2007, available at <http://www.un.org/apps/news/story.asp?NewsID'22251&Cr'rwanda&Cr1'>; *Rwanda: le Juge Bruguière Recommande des Poursuites contre le Président Kagamé*, LE MONDE, Nov. 20, 2006, available at http://www.veritasrwandaforum.org/dossier/Le_Monde_%20Rwanda.pdf.

³⁵ See Jean-Louis Bruguière, *Delivrance de Mandats d'Arret Internationaux*, Tribunal de Grande Instance de Paris, Nov. 17, 2006, available at <http://www.lexpress.fr/info/monde/dossier/rwanda/PDF/rwanda.pdf> [hereinafter Bruguière Indictment].

³⁶ *Id.* at 60.

³⁷ *Id.* at 61.

Bruguière's indictment have been disputed by the Rwandan government, leading to a rupture of Franco-Rwandan relations, and his indictment was widely criticized by many experts who noted that he never conducted any investigations in Rwanda and believed that it was the RPF, not extremist Hutus, that was caught off guard by the plane crash.³⁸ Indeed, many experts have argued that given the improbability of Bruguière's thesis, the allegations are again, a sort of mirror politics, in which France is attempting to assert the culpability of the RPF in order to divert attention from its own actions as regards the genocide. At the same time, the question of who shot down the plane has remained a mystery, and the ICTR never conducted an investigation itself, leading to continued speculation.³⁹

This brief essay does not attempt to unpack the historic truth about what happened in Rwanda and who, or which government, bears the greatest responsibility for the cataclysm of 1994. Instead, it has a much narrower objective—to consider what the competing narratives and the litigation spawned in various fora mean for the project of international and transnational

³⁸ For example, the *Los Angeles Times* noted that “[c]ritics accuse Bruguière of grandstanding and sloppiness.” His indictment contains “disconcerting errors” such as misspelled names, according to *Le Monde*. Additionally, one of the witnesses, a former Kagame soldier living in Europe, has reversed his testimony and denied that he participated in shooting down the plane.

³⁹ See *Rwanda Breaks Diplomatic Ties with France*, USA TODAY, Nov. 24, 2006, available at http://www.usatoday.com/news/world/2006-11-24-france-rwanda_x.htm.

criminal justice. The Rwandan genocide has sparked litigation around the globe, in an effort to identify and prosecute the perpetrators. Cases have been filed in Belgium, defendants have been pursued in the United States, and the Rwandan government has attempted to bring prosecutions itself for more than 100,000 suspected perpetrators still in Rwanda (many perpetrators are to be found outside the reach of most efforts, located in refugee camps in the Kivu region of the Democratic Republic of the Congo, Zaire, other African nations, or even Europe). France has served as a forum for universal jurisdiction cases brought against Hutu *génocidaires*, as well as the most recent, sensational case brought by investigating Judge Bruguière. All the cases have been brought in a tense political atmosphere involving accusations and counter-accusations between governments and factions within governments, and in the midst of this political maelstrom, international justice has attempted to function as the International Criminal Tribunal for Rwanda has endeavored to fulfill its mandate.

This essay examines three fora in which Rwandans have been (or will be) tried to explore the complementary and antagonistic aspects of each: the ICTR, the Rwandan Gacaca, and the French courts; and it offers a tentative conclusion about the utility of international criminal justice in the midst of crisis. The clash between France and Rwanda over the legitimacy of French judicial action suggests an enduring and important role for international justice mechanisms: not just as mediators between competing narratives extant within a single nation that has been torn apart by the

commission of atrocities, but, potentially, as a vehicle for the filtration of international politics. At the same time, the ICTR has not been insulated from the narratives and counter-narratives that have swirled around the Rwandan genocide, and it has had persistent difficulties with the Rwandan government concerning its effort to investigate allegations against the RPF.

With respect to the issue of who was responsible for the downing of Habyarimana's plane, the ICTR never took up the challenge of pursuing that case, and the competing narratives of Judge Bruguière and the Kagame government remain. This is unfortunate, for given the conflict between the French and Rwandan narratives of the 1994 genocide, and the highly charged political atmosphere surrounding the allegations, the ICTR could have served as a more neutral forum to mediate the dispute, using the crucible of the criminal justice process and the constraints of the rules of evidence as techniques to build an authoritative and impartial record. Even if such an investigation is needed, having French judges conduct it is deeply problematic from both a practical and juridical perspective, not to mention the allegations of "unclean hands" that could surface. Indeed, it is curious that France has refused to hear cases against Hutu *génocidaires in absentia*, requiring the presence of the accused upon French territory to proceed, but has not required presence to bring a terrorism case based largely upon passive personality jurisdiction (intertwined with the universality principle).

Rwanda continues to remain a forum for the prosecution of *génocidaires*, and the ICTR prosecutor has been transferring files of unindicted suspects to the Rwandan government,⁴⁰ although three recent requests by the Prosecutor to transfer cases to Rwanda were denied by Trial Chambers, due largely to concerns that the accused would not receive a fair trial.⁴¹ That decision was upheld on appeal, making it difficult to envisage the successful completion of the ICTR's work on time. Some human rights experts have sharply criticized the tribunal's reasoning. Certainly, Rwanda's construction of a new detention facility that meets international standards, adoption of legislation in March 2007 to govern the transfer of cases from the tribunal,⁴²

⁴⁰ U.N. SCOR, 60th Sess., 5328th mtg. at 15, U.N. Doc. S/PV.5328 (Dec. 15, 2005).

⁴¹ These concerns have been questioned by experts (comments of William A. Schabas, ILA Meeting Brazil, Aug. 18, 2008); *see also Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, A/62/284-S/2007/502 (Aug. 21, 2007). *See also* ICTR Newsletter, June 2008, at 6-7.

⁴² Organic Law No. 11/2007 of 16/02/2007 concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, Official Gazette of the Republic of Rwanda, Year 46, Special issue of March 19, 2007.

abolition of the death penalty,⁴³ appointment of qualified judges, and permitting monitoring of proceedings by the ICTR, suggests that the Rwanda judicial system has matured considerably since the genocide of 1994.⁴⁴

At the same time, it has clearly taken a decade for Rwanda's legal infrastructure to be rebuilt. The Rwandan courts and Gacaca tribunals have been overwhelmed with large numbers of perpetrators, eviscerated institutions, poverty, and weak social cohesion, making the process of investigation and prosecution extraordinarily difficult. At least at the outset, international assistance, and international prosecutions, appear to have been vital to the restoration of peace and combating impunity. Indeed, international law may have assumed a pivotal role, offering an "alternate construction of law that, despite substantial political change, is continuous and enduring."⁴⁵ It is not clear that the ICTR will be given sufficient time and resources to fully complete its mandate—indeed, the question remains whether the international community will support international justice—particularly for forgotten African nations—any better than it supported

⁴³ Organic Law No. 31/2007 of 25/07/2007 relating to the abolition of the death penalty, Official Gazette of the Republic of Rwanda, Year 46, Special issue of July 25, 2007.

⁴⁴ Indeed, Trial Chamber I said as much in the *Munyakazi* case, while at the same time denying the transfer on the basis that the improvements were insufficient.

⁴⁵ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 105 YALE L.J. 2028 (1997).

efforts to stem the conflict in the first place. The answer, at least for Rwanda, may be “no,” although several other African nations may fare better with the ICC, given its status as a permanent institution.

If, as hypothesized, it is possible that neither the ICTR nor Rwanda jurisdictions can completely fill the need to pursue perpetrators, the efforts of third party states may remain important—although the legitimacy of their actions remains controversial and a subject of international concern. Indeed, while many national courts have tempered their own extensions of universal jurisdiction through the development and application of doctrines of comity, subsidiarity, and complementarity, the *Brugière* indictment (based not upon universal jurisdiction, but on the nationality of the victims) presents a potent counter-example.

II. The International Criminal Tribunal for Rwanda

As it did with the conflict in the former Yugoslavia, and more recently in Darfur, the United Nations Security Council voted, on July 1, 1994, to establish a Commission of Experts for Rwanda to investigate what had taken place during the genocide and determine whether, and by whom, serious violations of international humanitarian law had taken place.⁴⁶ On October 2, 1994, the Commission submitted an interim report to the Security Council concluding that both sides to the armed conflict had perpetrated war crimes and

⁴⁶ S.C. Res. 935, at 11, U.N. Doc. S/INF/50 (1996).

crimes against humanity in Rwanda, and that “acts of genocide were perpetrated by Hutu elements in a concerted, planned, systematic, and methodical way.”⁴⁷

As the Commission conducted its investigations, the international community debated whether to establish an international tribunal for Rwanda. The Tutsi-dominated Rwandan Unity government pressed for domestic trials, but was ultimately persuaded that international trials would be necessary as well. The Rwanda judicial system had been eviscerated by the genocide, and many leaders of the genocide had fled either to neighboring countries or abroad, rendering international efforts at prosecution imperative.⁴⁸ Yet, the Rwandan government had a difficult relationship with the ICTR right from its creation. It had formally requested the establishment of an international tribunal, but as the contours of the institution began taking shape, the Rwandan government raised several objections to the proposed statute, including an insistence that the Tribunal be authorized to impose the death penalty.⁴⁹ The members of the Security Council refused, however, to compromise on the death penalty question, and Rwanda ultimately voted

⁴⁷ *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935* (1994), at ¶¶ 146-149, U.N. Doc. S/1994/1125 (1994).

⁴⁸ MORRIS & SCHARF, *supra* note 16, at 66.

⁴⁹ *Id.* at 68-71. The Rwandan government also objected to various elements of the Tribunal’s jurisdiction and wanted proceedings to be in Rwanda.

against the resolution establishing the Tribunal,⁵⁰ although Paul Kagame, then Vice President and Defense Minister, stated at the time that Rwanda would cooperate with the Tribunal.⁵¹

The structure adopted for the Rwanda Tribunal also engendered difficulties, and the ICTR suffered, particularly at the outset, from the same international neglect that Rwanda had endured during the conflict. The initial question was whether the ICTR would be an “add-on” to the Yugoslav Tribunal, or be established specific to the situation in Rwanda. Although the Security Council adopted a statute tailor-made to the Rwandan crisis in terms of jurisdiction and substantive law, the organizational structure of the ICTR was problematic. Although it now has sixteen judges (seven of whom sit on the Appeals Chamber which is common to the ICTY) and up to nine ad litem judges, it was initially accorded only two trial chambers of its own, a very small organization, indeed, to preside over trials involving the murder of nearly one million souls. It was also contemplated that it would share a common prosecutor with the ICTY, but would have an

⁵⁰ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., qt 15, U.N. Doc. S/INF/50 (1996).

⁵¹ Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT’L L. 501, 504 (1996).

investigative office in Kigali, manned by a deputy prosecutor. The seat of the Tribunal, however, was not situated in Rwanda, but in neighboring Arusha, Tanzania, seventeen hours away from Kigali by car.⁵² The Tribunal had initial difficulties attracting qualified personnel,⁵³ had only one courtroom for its work, and was plagued with security problems, difficulties with the Rwandan government, and financial mismanagement.⁵⁴

These difficulties notwithstanding, the ICTR acquired custody of key defendants more easily than the ICTY, and appointing a common prosecutor gave the Yugoslav and Rwanda tribunals equal weight.⁵⁵ First, Richard Goldstone, then Louise Arbour took on the challenge of Rwanda—the challenge of prosecuting a genocide with few resources, little international support,

⁵² See also *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, GA 51st Sess., Doc. No. A/51/789, Feb. 6, 1997, ¶ 41.

⁵³ *Further Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, U.N. Doc. S/1995/533 (June 30, 1995), ¶ 4.

⁵⁴ In 1997, a UN audit stated that there were serious operational deficiencies in the management of the Tribunal. These involved financial problems as well as administrative, leadership, and operational problems. *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, GA 51st Sess., Doc. No. A/51/789, Feb. 6, 1997, at 1.

⁵⁵ CARLA DEL PONTE & CHUCK SUDETIC, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY* (2009) (unofficial English translation).

and not a great deal of international interest. On the specific question of who bore responsibility for the attack on President Habyarimana's plane, no indictment was ever brought, and in spite of rumors that have surfaced to the contrary, no investigation conducted. The Office of the Prosecutor has consistently taken the position that the plane crash was not within the ICTR's jurisdiction, a proposition that one might debate. Certainly, it is within the temporal jurisdiction of the Tribunal, which extends from January 1, 1994 until December 31, 1994. The thornier issue is whether it falls within the Tribunal's subject matter jurisdiction, either as an act complicit in the ensuing genocide, as part of a campaign to commit crimes against humanity, or as a violation of Article 4 of the Statute, which includes acts of terrorism and murder as war crimes within the ICTR's jurisdiction.⁵⁶

A constant challenge for the ICTR has been its relationship to the Rwandan government. Del Ponte was denied a visa to travel to Rwanda when she first arrived, and acquired it only with difficulty. She has written in her memoirs that the Rwandan government had security escorts trailing her wherever she went, to provide security, but also to "make sure we were investigating Hutu attacks upon Tutsis instead of Tutsi attacks upon Hutus."⁵⁷ In her report to the Security Council in 2001, she noted her intention to address allegations of crimes

⁵⁶ ICTR Statute, *supra* note 5.

⁵⁷ DEL PONTE, *supra* note 55, at ch. 3.

committed during 1994 by members of the RPF forces.⁵⁸ Del Ponte continued to pursue these investigations, meeting resistance from the Rwandan government, which made it difficult for witnesses to travel from Kigali to Arusha to testify,⁵⁹ and probably costing her her position when ultimately, on August 28, 2003, the Security Council voted to split the job of the Chief War Crimes Prosecutor between the ICTY, where Carla Del Ponte remained, and a new Chief Prosecutor for Rwanda.⁶⁰ The resolution also set out a time table for completing the work of the two ad hoc tribunals by 2010.

Many had previously urged a separate prosecutor for the Rwanda tribunal on the grounds that one prosecutor simply could not do the job of taking on the cases for both courts. According to *The Economist*, Del Ponte spent an average of only thirty-five days a year in Africa and left the two most important posts in her office vacant

⁵⁸ *Address to the U.N. Security Council by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs. Carla Del Ponte, 27 November 2001, available at www.unictr.org/ENGLISH/speeches/delponte271101sc.htm.*

⁵⁹ DEL PONTE, *supra* note 55, at ch. 9.

⁶⁰ S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003). The resolution amended Article 5 of the statute so that as of September 15, 2003, the ICTR had its own prosecutor. Some have also suggested that certain permanent members of the Security Council have wished to remove Del Ponte altogether, but compromised by allowing her to remain at the ICTY for an additional four years. William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT'L HUM. RTS. 382, 389 (2008).

for a considerable time, drawing the ire not only of human rights groups, but also of the United Nations.⁶¹ (Del Ponte adds some interesting nuances to these critiques in her memoirs, suggesting many reasons for both the delays and the difficulties experienced with the Rwanda Tribunal). Yet, although Del Ponte and her predecessors may have been stretched very thin, the Council's decision seems undoubtedly to have been influenced by Rwandan complaints about Del Ponte's activities, specifically her attempt to indict Tutsis for the crimes committed against Hutus committed by RPF forces during, and immediately after, the genocide.⁶² Kagame had obstructed the ICTR's investigations into RPF activities, and consistently complained to the Security Council and Secretary-General Kofi Annan about Del Ponte's performance.

Following Del Ponte's removal, the Security Council appointed a Gambian judge, Hassan Bubacar Jallow, as the new Chief Prosecutor for the ICTR. Jallow, a well-respected African lawyer and jurist, headed up a UN Commission charged with preparing a report on the functioning of the tribunals and how they could be improved. Although Jallow has repeatedly stated that he has been "making progress" in the investigation of allegations against members of the

⁶¹ *The Rwandan Genocide Tribunal: Did Carla del Ponte do Too Little or Too Much in Rwanda? Both*, THE ECONOMIST, Aug. 23, 2003.

⁶² *Turning a Blind Eye to Increasingly Dictatorial Ways of Rwanda's Leader*, IRISH TIMES, Aug. 27, 2003.

RPF,⁶³ no indictments were ever issued, and the Office of the Prosecutor's strategy now seems to be to leave this issue to the Rwandan government. While this may be understandable, given that the Security Council has pressured the ICTR to complete its work by 2010, this may lead to a serious credibility gap in the ICTR's ultimate legacy, as discussed below.

III. Domestic Prosecutions in Rwanda

During the Rwandan genocide of 1994, Rwanda's justice system was completely eviscerated.⁶⁴ Rwanda endeavored to address the problem by adopting a law (under which the offenders would be punished) that effectuated a four-part triage of offenses, ranging from the most serious⁶⁵ to the least egregious (defendants who

⁶³ U.N. SCOR, 62d Sess., 5796th mtg. at 13, U.N. Doc. S/PV.5796 (Dec. 10, 2007).

⁶⁴ More than 80 percent of Rwanda's judges and magistrates were killed or disappeared, and the system faced extraordinary infrastructure challenges. See, e.g., Evelyn Bradley, *In Search for Justice—Truth in Reconciliation* [sic] *Commission for Rwanda*, 7 J. INT'L L. & PRAC. 120 (1998). But see Jose Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999) (critiquing the establishment of the ICTR).

⁶⁵ Category one offenders include organizers or planners of the genocide, persons in positions of authority, and "notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves . . . and persons who committed acts of sexual torture." Bradley, *supra* note 64, at 134-35.

had committed crimes against property).⁶⁶ The law also provided for a “confession and guilty plea procedure” to permit offenders in the second, third, and fourth categories to obtain significant reductions in penalties in exchange for a full confession.⁶⁷ Unfortunately, the sheer numbers of prisoners involved (more than 100,000 at times), and the influence that the *génocidaires* continue to exert over the prison population,⁶⁸ rendered the confession and guilt procedures ineffective, and the trials that were held under the new law were often criticized as unfair.⁶⁹ Thus, as a practical matter, imposing individual criminal responsibility was a

⁶⁶ *Id.*

⁶⁷ William A. Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L. FOR. 536 (1996).

⁶⁸ If true, it is arguable that Rwanda would be worse off if it released prisoners still under the influence of the *génocidaires*.

⁶⁹ Defendants often had little or no access to legal counsel during critical periods of the investigation or trial, trials were unduly rapid and conducted in an atmosphere hostile to the defendants, and the trials often resulted in death sentences that were expeditiously carried out. Bradley, *supra* note 64, at 144-45. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 124-25 (1998).

difficult strategy.⁷⁰ At the same time, releasing the detainees and admitting the impossibility of the task could have led to further outbreaks of violence and degradation of the rule of law.⁷¹

In July 1999, Rwanda responded by creating "Gacaca tribunals," comprised of ordinary citizens who will hear cases involving Category two, three, and four offenses under the Genocide law. Under Gacaca, suspects are brought before nineteen-member lay tribunals sitting in the village where the crimes occurred. Anyone can speak for or against those charged, and the accused may confess and seek forgiveness or deny the charges and defend themselves. The accused is not protected by many of the rights normally available to criminal defendants, however, leading some

⁷⁰ John Dugard suggests an alternative reason that criminal prosecutions may be thwarted following a transition to democracy: sufficient evidence may simply be unavailable to support a criminal conviction, given that the repressive regime in question may quite probably have operated under a shroud of secrecy that makes information gathering after the fact quite difficult. He suggests South Africa is a case in point. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 286 (1998).

⁷¹ Schabas, *Justice, Democracy and Impunity*, *supra* note 67, at 547-48. Avoiding some of these difficulties is one reason the establishment of an international criminal tribunal for Rwanda appeared desirable. The Security Council resolution establishing the Tribunal expressly suggests that international cooperation will "strengthen the courts and judicial systems of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects." S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

international observers to express concern about the ultimate fairness of the result.⁷² Moreover, according to at least one report, discussion is forbidden about whether RPF members committed atrocities during and after the genocide,⁷³ suggesting a lack of impartiality.⁷⁴

Although Rwanda's pursuit of the Gacaca process suggests the continued importance of accountability and justice to Rwanda society,⁷⁵ some Rwandan observers have expressed concern that perpetrators coming forward to confess may in fact not feel that what they did was wrong: in the chilling assessment of one Rwandan, "they believe that the real crime is not what they did, but is not

⁷² Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BRIEF No. 3, 15 (2001). The procedure departs considerably from the traditional Gacaca model, which was developed to handle property or marital disputes, not criminal trials or genocide.

⁷³ Abraham McLaughlin, *Rwanda Bucks Blind Obedience*, CHRISTIAN SCI. MONITOR, Apr. 9, 2004, available at <http://www.csmonitor.com/2004/0409/p06s01-woaf.htm> (last visited Jan. 14, 2005).

⁷⁴ The ICTR has also avoided the question whether or not the RPF was engaged in the commission of atrocities. IRISH TIMES, *supra* note 62, at 14. See also THE ECONOMIST, *supra* note 61.

⁷⁵ Sudarsan Raghavan, *Rwanda Prepares to use Tribunals for Genocide but Community Courts Ill-Prepared*, SAN JOSE MERCURY NEWS, June 20, 2002.

to confess what they did.”⁷⁶ If so, there is probably little doubt that maintaining pressure on the Rwandan government and the now out of power Hutu majority is still an important component of maintaining a stable peace in Rwanda. This may be particularly true given that the Rwandan government has been releasing thousands of prisoners as a means to address prison overcrowding,⁷⁷ and still has not pursued allegations of RPF crimes.

IV. France's Attempts to Exercise Universal Jurisdiction over Alleged Participants in the Rwandan Genocide and the Brugière Indictment

Universal Jurisdiction Cases:

France has had an interesting history of bringing cases based upon the Charter of the Nuremberg Tribunal, both as regards to crimes against humanity cases arising

⁷⁶ Remarks of Gerard Gahima, International Conference on Atrocities, Galway, Ireland, July 2004 (Author's notes).

⁷⁷ *Kagame Accused*, BBC World Service, Jan. 30, 2007, available at www.bbc.co.uk/worldservice/programmes/newshour/news/story/2007/02/070206_kea. See also George Yacoubian, Jr., *Releasing Accused Genocidal Perpetrators in Rwanda: The Displacement of Preventative Justice*, 3 LOY. U. CHI. INT'L L. REV. 21 (2005-06).

out of World War II⁷⁸ and, more recently, in bringing actions based upon universal jurisdiction laws available to bring cases involving the Bosnian war and the Rwandan genocide.⁷⁹ The early cases were brought under a 1964 law that incorporated by reference Article 6(c) of the Nuremberg Charter on crimes against humanity, and allowed the French courts to try and ultimately convict both German perpetrators and French collaborators, most famously, Klaus Barbie and Maurice Papon, the latter of whom was convicted of authorizing the deportation of more than 1600 Jews from Bordeaux to the East.⁸⁰ Subsequently, France adopted laws to permit the exercise of universal jurisdiction over perpetrators of atrocities outside of France, based either upon universal or passive personality jurisdiction, although the French courts have placed various limitations upon the exercise of universal jurisdiction, generally requiring the presence of the accused upon French territory (at least at the outset of a case) before a crimes against humanity, war crimes, or genocide case

⁷⁸ Leila Nadya Sadat, *The Application of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994) (formerly Wexler).

⁷⁹ Leila Nadya Sadat, *The Nuremberg Paradox* (forthcoming). See also Brigitte Stern, *Universal Jurisdiction over Crimes Against Humanity under French Law*, 93 AM. J. INT'L L. 525 (1999).

⁸⁰ Sadat, *Nuremberg Paradox*, *supra* note 79.

can proceed.⁸¹ Particularly as regards the Rwandan conflict, France was the *situs* of several efforts to bring Hutu perpetrators to justice, efforts that were largely unsuccessful until the *Munyeshyaka* case was filed.⁸² Munyeshyaka was a priest implicated in the commission of atrocities during the Rwandan genocide, who had fled to France and taken up a position as a priest in a small village in the South.⁸³ On July 25, 1995, an official investigation was opened against Munyeshyaka by the *juge d'instruction* of Privas for genocide, crimes against humanity, and participation in a group already created for, or having as intent, the planning of these crimes.⁸⁴ Looking at the *Pinochet* and other precedents, the lower court held that it had universal jurisdiction under the Torture Convention to institute proceedings.⁸⁵ The Court of Appeals of Nîmes reversed,⁸⁶ holding that the French courts had no basis to exercise universal jurisdiction over the Rwandan genocide. This result was

⁸¹ *In re Javor*, 1996 Bull. Crim., No. 132, at 379, French Court de Cassation, Chambre Criminelle, Mar. 26, 1996.

⁸² Stern, *supra* note 79, at 527.

⁸³ *Id.*; Trial Watch, Wenceslas Munyeshyaka, http://www.trial-ch.org/fr/trialwatch/profile/db/facts/wenceslas_munyeshyaka_112.html (last visited Nov. 26, 2007).

⁸⁴ *Id.*

⁸⁵ Stern, *supra* note 79, at 528.

⁸⁶ *Id.*

ultimately reversed by a new law⁸⁷ providing for universal jurisdiction over genocide, and jurisdiction over the *Munyeshyaka* case was affirmed by the Court of Cassation in 1998.⁸⁸ On June 21, 2007, the ICTR published an arrest warrant for Munyeshyaka as well as for Laurent Bucyibaruta,⁸⁹ who was also residing in France and already under formal investigation by French authorities for alleged crimes committed during the

⁸⁷ Two days later, on May 22, 1996, a new law (Law No. 96-432) was adopted to adapt French law to Security Council Resolution 955 creating the International Criminal Tribunal for Rwanda.

⁸⁸ Cass. crim., Jan. 6, 1998, Bull. crim., No. 2, at 3 [hereinafter *Munyeshyaka I*].

⁸⁹ Bucyibaruta was the former prefect of the Rwandan province of Gikongoro. The ICTR indicted him on six counts, including direct and public incitement to commit genocide, genocide, complicity in genocide, and the crimes against humanity of extermination, murder, and rape. Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Indictment (June 16, 2005). When the ICTR released the arrest warrant for Bucyibaruta, he had already been the subject of a criminal investigation in France for genocide and crimes against humanity. See Trial Watch, Laurent Bucyibaruta, available at www.trial-ch.org/fr/trial-watch/profil/db/legal-procedures/laurent_bucyibaruta_653.html (last visited Feb. 22, 2008); La Fédération Internationale des Ligues des Droits de l'Homme, *France Should Arrest Wenceslas Munyeshyaka, Laurent Bucyibaruta and Dominique Ntawukuriryayo Immediately*, June 7, 2007, http://www.fidh.org/article.php?id_article'4467. As with *Munyeshyaka*, the French judiciary determined that Bucyibaruta could be tried on the basis of universal jurisdiction.

Rwandan genocide.⁹⁰ The ICTR ultimately referred the two cases to French judicial authorities,⁹¹ and on February 20, 2008, the French judiciary accepted the referrals. Although progress on the *Munyeshyaka* case has been slow,⁹² it represents a relative success.⁹³

⁹⁰ Trial Watch, Wenceslas Munyeshyaka, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/wenceslas-munyeshyaka_112.html (last visited Feb. 22, 2008).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Complaint, Kalinda et al. (T.G.I. Paris filed July 4, 1994); Complaint, Depaquier et al. (filed July 19, 1994), T.G.I. Paris, Order, Feb. 23, 1994 (*noted in* Stern, *supra* note 79, at 527). For discussion of the Javor, Munyeshyaka, and Kalinda cases, see also Michel Massé, *Ex-Yougoslavie, Rwanda: Une compétence virtuelle des juridictions françaises?* REV. SCI. CRIM. 893 (1997). The imposition of the presence limitation on the exercise of universal jurisdiction has been highly criticized as it prevents prosecutors or investigating judges from investigating crimes abroad unless, as illustrated in *Munyeshyaka*, the suspect is living openly within French territory and readily identifiable. See, e.g., Claude Lombois, *De la Compassion Territoriale*, REV. SC. CRIM. 399 (1995); Brigitte Stern, *La Compétence Universelle en France: le cas des Crimes Commis en ex-Yougoslavie et au Rwanda*, 40 GER. Y.B. INT'L 280 (1997) [hereinafter Stern, *Compétence Universelle*]; Rafaëlle Maison, *Les Premiers cas d'application des Dispositions Pénales des Conventions de Genève par les Juridictions Internes*, 6 EUR. J. INT'L L. 260 (1995). See also Jean-François Roulot, *La Répression des Crimes contre l'humanité par les Juridictions Criminelles en France: une Répression Nationale d'un Crime International*, 3 REV. SCI. CRIM. 545, 560-61 (1999).

Because France requires the presence of the accused on French territory, at least at the outset of the case, the French universal jurisdiction cases involving the Rwandan genocide do not appear “exorbitant” in perspective, but seem to fulfill the criteria requirements of Principle 8. In Munyeshyaka, for example, the accused had sought refuge in France following the genocide, and had re-established a new life for himself there. Many of his victims were also found in France, and France thus had links of residency, at least, with both perpetrator and victims. Moreover, the ICTR specifically noted, in its approval of Munyeshyaka’s transfer, that France could provide him with a fair trial, did not apply the death penalty, and had jurisdiction to proceed.⁹⁴ While France’s “presence” requirement for the exercise of universal jurisdiction has been criticized as neither required by customary international law nor practically useful, since it impedes even an investigation proceeding with the suspect’s presence, it has also served to insulate France from some of the political controversies surrounding the use of universal jurisdiction in cases with fewer connections to the forum, such as the criticisms Belgium faced prior to amending its laws a few years ago.⁹⁵

⁹⁴ Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, *Decision on the Prosecutor’s Request for the Referral of Wencelas Munyeshyaka’s Indictment to France* (Nov. 20, 2007).

⁹⁵ Sadat, *Exile, Amnesty and International Law*, *supra* note 1, at 1009-11.

The Bruguière Indictment—Terrorism Allegations:

In some ways, the Munyeshaka indictment represents complementary jurisdiction—a situation in which an international and national jurisdiction (and presumably the territorial state as well) are in agreement as to the most efficient use of judicial resources and prosecutorial initiative. The situation with the *Bruguière* indictment, of course, could not be more different,⁹⁶ representing antagonism between the Rwandan and French governments, and possibly international jurisdictions as well. As noted earlier, this indictment not only covers matters not investigated by the ICTR, but has led to a rupture of diplomatic relations between France and Rwanda. Bruguière, First Vice President of the Tribunal de Grande Instance of Paris, served as a leading French investigating magistrate in charge of counter-terrorism and played a major role, for example, in bringing to justice such individuals as Carlos the Jackal and Libyan intelligence officials responsible for the aircraft bombing in 1989.⁹⁷ The investigation was originally opened in response to a complaint filed in

⁹⁶ LE MONDE, *supra* note 34 ; Benhold, *supra* note 34; *Rwanda Asks UN Court to Overturn French Arrest Warrants over Genocide*, U.N. News Centre, *supra* note 34.

⁹⁷ Henri Astie, Profile: France's Top Anti-terror Judge, BBC News Online, *supra* note 34.

France in 1998 by the family members of the French flight crew⁹⁸ who all died in the plane crash.⁹⁹

On November 22, 2006, based on findings made in his indictment, Bruguière issued international arrest warrants for nine ranking Rwandans accused of involvement in shooting down the plane carrying Rwanda's then-President Juvenal Habyarimana on April 6, 1994.¹⁰⁰ The arrest warrants target several current senior Rwandan government and military officials with close ties to Kagame, including James Kabarebe, a Major General in the Rwandan Defense Forces; Charles Kayonga, the current Chief of Staff of the Rwandan Army; and Faustin Nyamwasa-Kayumba, the Rwandan Ambassador to India.¹⁰¹ Warrants were also issued for individuals suspected of firing the missiles which destroyed the plane, including Franck Nziza, believed to be a captain in the presidential guard, and Eric

⁹⁸ The crew included Jacky Heraud, pilot; Jean-Pierre Minaberry, co-pilot; and Jean-Marc Perrine, flight engineer. Bruguière Indictment, *supra* note 35, at 1.

⁹⁹ Sebastian Rotella, *New accusations Jar Rwanda's Bad Memories*, L.A. TIMES, Feb. 17, 2007, available at http://seattletimes.nwsources.com/html/nationworld/2003581458_rwanda21.html.

¹⁰⁰ *Rwanda Breaks Diplomatic Ties with France*, USA TODAY, Nov. 24, 2006, available at http://www.usatoday.com/news/world/2006-11-24-france-rwanda_x.htm.

¹⁰¹ Bruguière Indictment, *supra* note 35, at 62.

Hakizimana, of the secret service.¹⁰² Overall, Bruguière alleges that these nine Rwandans were responsible for plotting the assassination or actually shooting down Habyarimana's airplane.¹⁰³ Not based upon universal jurisdiction, the crime alleged is terrorism and the action was brought by the survivors of the victims—their French family members as well as members of Habyarimana's family. Thus, unlike the genocide cases, this case involves the exercise of jurisdiction "*in absentia*"—linked juridically to the passive personality principle, but arguably "exorbitant" nonetheless, if that is its only basis for proceeding.¹⁰⁴ Additionally, French authorities sent the indictment to the UN Secretary General along with a request that Rwandan President Paul Kagame, who is immune from French prosecution

¹⁰² *Id.* at 61, 63-64.

¹⁰³ USA TODAY, *supra* note 100.

¹⁰⁴ See, e.g., Kevin M. Clermont and John R. B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473 (2006).

as a head of state,¹⁰⁵ should stand trial at the ICTR for his alleged involvement in shooting down the plane.¹⁰⁶

Rwanda's Response to the French Allegations:

The Rwandan government was outraged by the allegations in the Bruguière indictment.¹⁰⁷ Following the issuance of the arrest warrants, some 25,000 Rwandans reportedly took part in a government-organized demonstration against France.¹⁰⁸ Rwandan President

¹⁰⁵ Bruguière Indictment, *supra* note 35, at 61.

¹⁰⁶ U.N. News Centre, *supra* note 96; Rotella, *supra* note 99. The International Criminal Tribunal for Rwanda (ICTR) has reportedly brushed aside suggestions from Judge Bruguière that Mr. Kagame should stand trial there. *France Issues Rwanda Warrants*, BBC News, Nov. 23, 2006, available at <http://news.bbc.co.uk/2/hi/africa/6177370.stm>. Everard O'Donnell, the spokesman for the ICTR, expressed that "The prosecutor takes instructions from nobody in the world." *Id.* He also added that "The crash did not create the genocide." *Id.*

¹⁰⁷ Even prior to the issuance of Bruguière's indictment, relations between France and Rwanda have been strained during the last several years, in part due to Kagame's accusations that France did little to stop the genocide as well as accusations that France had links to those who carried out the genocide. *Id.*

¹⁰⁸ *Id.* Protesters reportedly marched through the streets carrying signs reading: "France: stop organizing a second genocide" and "France get out of Rwanda." *Id.* Additionally, at a rally in Rwanda's Amahoro National Stadium, protesters chanted anti-French slogans and burned the French flag. *Id.*

Kagame also publicly responded, denying any involvement in shooting down the plane that carried Habyarimana and stating that the allegations were politically motivated.¹⁰⁹ In an interview with France-Culture radio, Rwandan President Kagame denounced Bruguière as "an impostor, a politician,"¹¹⁰ stating that "[i]f he were a judge, he would raise the question of the implication of France in the genocide of the Tutsis in Rwanda."¹¹¹ (Kagame allegedly raised the issue with Carla Del Ponte in meetings with her as well).¹¹² Kagame also promised that ties between both countries would suffer.¹¹³ Shortly thereafter, Rwanda severed diplomatic ties with France,¹¹⁴ a move described by

¹⁰⁹ *Id.* French Foreign Minister Philippe Douste-Blazy has expressed, however, that the request for international arrest warrants against nine ranking Rwandans in the case "is not at all a political decision by the French government." *French Foreign Minister Laments Rwanda's Move to Cut Diplomatic Ties*, INT'L HERALD TRIB., Nov. 26, 2006, available at http://www.iht.com/articles/ap/2006/11/26/europe/EU_GEN_France_Rwanda.php. In private conversations with French government officials, the Author has been told the same thing—that this is a matter of *indépendance judiciaire*.

¹¹⁰ Rotella, *supra* note 99.

¹¹¹ *Id.* .

¹¹² DEL PONTE, *supra* note 55, ch. 9.

¹¹³ USA TODAY, *supra* note 100.

¹¹⁴ *Id.*

Rwandan Justice Minister Tharcisse Karugarama as a response to French "bullying," expressing that there was "no reason why there should be diplomatic relations with a country that is actually attempting to destabilize the institutions of Rwanda's government."¹¹⁵

The Bruguière indictment has also raised questions of international law presented to the International Court of Justice, although France has not agreed to jurisdiction in the case. On April 18, 2007, Rwanda applied to the ICJ in the dispute,¹¹⁶ asking it to declare that by issuing the arrest warrants in the case, France "has violated, and is continuing to violate, international law with regard to international immunities generally and with regard to diplomatic immunities particularly," as well as "the sovereignty" of Rwanda, and thus that France is "under an obligation to annul such international arrest warrants

¹¹⁵ *Id.* In January 2008, French Foreign Minister Bernard Kouchner visited Kigali, during which he and Rwandan Foreign Affairs Minister expressed their interest in working to restore relations between the two countries. See *Rwanda, France Govt. Move to Repair Diplomatic Ties*, WEEKLY OBSERVER (Kampala), Jan. 31, 2008, available at <http://allafrica.com/stories/200801310631.html>. In August, Rwanda issued a report suggesting that France was complicit in the genocide, further exacerbating tense relations between the two countries. Philippe Bernard & Arnaud Leparmentier, *Paris ne veut pas répondre aux accusations du Rwanda*, LE MONDE, August 8, 2008, at 6.

¹¹⁶ Press Release, ICJ, The Republic of Rwanda applies to the International Court of Justice in a dispute with France (Apr. 18, 2007), available at <http://www.icj-cij.org/presscom/index.php?pr'1909&p1'6&p2'1>.

forthwith.”¹¹⁷ With respect to France’s request that President Kagame should stand trial at the ICTR, Rwanda argued that France “has acted in breach of the obligation of each and every state to refrain from intervention in the affairs of other states” and “is under a duty to respect the sovereignty” of Rwanda.¹¹⁸ The case, of course, is reminiscent of the disputes in other cases brought to the ICJ, including the *Yerodia* case and *Congo v. France*.

V. Antagonism and Complementarity: The Unfinished Business of the ICTR

Cases involving the commission of atrocities pose unique challenges for the international legal order. For although states increasingly take the position that impunity for the commission of *jus cogens* crimes is legally, socially, and politically unacceptable, they have also generally been reluctant to adjudicate cases involving crimes committed by individuals with little connection to the forum. That is, as the normative structure of international criminal law has arguably been

¹¹⁷ *Id.*

¹¹⁸ *Id.* In its application to the Court, Rwanda bases the Court’s jurisdiction in the matter on Article 38, paragraph 5, of the Rules of Court and expressed its “full confidence that France . . . will accept the jurisdiction of the Court to settle the dispute.” The application by Rwanda has been transmitted to the French government and, in accordance with the rules of the Court, no action will be taken in the proceedings unless and until France consents to the Court’s jurisdiction in the case.

strengthened, increasingly, political constraints have been coming to the fore in other ways. Indeed, just as the ICC employs the notion of “complementarity” to apportion cases between the ICC and national courts, national courts are employing filtering mechanisms to distinguish appropriate from problematic exercises of universal jurisdiction, such as the subsidiarity doctrine employed by Spain. The French/Rwandan example confirms this hypothesis as regards the cases against Hutu *génocidaires* given that the French courts will only exercise jurisdiction if the accused is present upon French territory at the outset. Moreover, the *Munyeshyaka* and *Bucyibaruta* cases demonstrate international and national jurisdictions working in complementary fashion to the same end. The Bruguière terrorism case, however, is more problematic. It suggests that states may invoke jurisdiction without the link of the accused upon their territory, and arguably exorbitantly, if there is a sense that an important national interest is threatened or that their nationals have been victimized. It is correct that some international terrorism treaties, such as the Hostage Taking Convention, provide that states may exercise criminal jurisdiction based upon the nationality of the victim,¹¹⁹ and other countries (such

¹¹⁹ See, e.g., International Convention Against Taking of Hostages, G.A., Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983, at art. 5(1)(d). The hostages taking convention specifically permits the nationality of the victim to be a basis for jurisdiction; other terrorism conventions, however, such as the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, do not. Both create a form of universal jurisdiction by treaty, requiring the states to exercise jurisdiction if the alleged offender is “present in its territory.” *Id.* at art. 5(2).

as the United States)¹²⁰ have done so. Yet, passive personality as a sole basis for jurisdiction in such cases would appear to many as exorbitant and has been vociferously criticized in the literature. One option, of course, is to consider terrorism a universal jurisdiction crime, which Security Council Resolution 1373 certainly suggested was the case.¹²¹ But even if this were true, it seems odd that French courts would exercise jurisdiction over acts bringing about the plane crash, but not the resulting genocide itself. Although the *Princeton Principles* suggest the existence of several links that may render jurisdiction proper in that case—several victims were French, and no other jurisdiction appeared willing to conduct a criminal investigation into the crime—the politics surrounding the case, and particularly France’s arguable complicity in the 1994 genocide, render France a forum that may appear antagonistic to the interests of international and Rwandan justice. After all, if the French government was either directly or indirectly involved in the Rwandan genocide, the uproar over the Bruguière indictment is understandable. Indeed, one might argue that if a state arguably has “unclean hands,” it should not be the situs of universal jurisdiction cases that may touch upon its own complicity. One can also make a strong counter-argument to the effect that if one disaggregates the notion of the “state,” and a state has an independent judiciary, the unclean hands doctrine should have no application. In any event, given the weaknesses

¹²⁰ U.S. v. Yunis, 681 F. Supp. 896 (1988).

¹²¹ Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. UNIV. GLOBAL STUDIES L. REV. 135, 150 (2004).

of the Bruguière indictment, it is not clear that a French trial will ever be held or be successful if it is held.

At the same time, the most apparently capable and appropriate forum, the ICTR, appears to have been hamstrung by political considerations that prevented it from proceeding given the realities of *realpolitik*. Indeed, in discussing Bruguière and his case, Del Ponte notes that the ICTR would have been “shut down” if it had commenced an investigation of Kagame, and that the important genocide trials would never have been brought.¹²² Given the conflict between the French and Rwandan narratives of the 1994 genocide, it would seem important for the ICTR to mediate the dispute, using the crucible of the criminal justice process and the constraints of the rules of evidence as techniques to build an authoritative and impartial record. It is true that the Rwandan government has now been charged with that activity, under the watchful supervision of the ICTR. But the pressure on the ICTR to complete its work early probably means that it will not be able to effectively undertake this task, suggesting that it may still be important for third party states such as France to be able to proceed. It would seem more useful to permit the ICTR to continue for some time so as to permit the proper closure of ongoing work, and allow a smooth transfer of jurisdiction to the Rwandan legal system. Otherwise, the international community may fail the

¹²² DEL PONTE, *supra* note 55, at ch. 9. She writes, “If Bruguière provided sufficient evidence to indict Kagame . . . we would do so only as the Rwanda Tribunal approached the end of its lifetime, when the genocide trials were almost concluded and the Tribunal was less vulnerable . . .” *Id.*

project of Rwandan justice—just as it failed the Rwandan people in the first instance when the genocide was unfolding.

Power not Process—The New Frontiers of Internationalized Justice

Michael A. Newton*

It is a rare and special privilege to be with you today. Many of you in this audience are longstanding friends, and it is with some trepidation that I rise to share my perspectives in the midst of so many learned colleagues. Some of you have been mentors and shaped my views in ways you scarce could know. I respect those of you who are simply citizens of our great Republic who have gathered because of your intellectual curiosity and your thirst for the principles of truth and the inherent morality of justice. I think it especially appropriate to pause and recognize those in our midst who have served our nation as its accredited representatives and in doing so have sacrificed to serve the ends that we all seek to make more commonplace. Ambassador Robert C. Krueger is a former U.S. Senator and Ambassador to Burundi, whose experiences are recounted in a recent book that I can highly recommend,¹ and my good friend Ambassador Clint Williamson, the currently serving U.S. Ambassador-at-Large for War Crimes Issues, have both been kind enough to lend their perspectives to this gathering. As

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¹ AMBASSADOR ROBERT KRUEGER AND KATHLEEN TOBIN KRUEGER, FROM BLOODSHED TO HOPE IN BURUNDI: OUR EMBASSY YEARS DURING GENOCIDE (2007).

my first point of order, I want to thank them for their service.

My eyes sweep across the first row to my right, and I see the ranks of assembled greatness. Elderly men whose professional excellence has been emblazoned in history have gathered across those seats. We are deeply honored today to have these men assembled who worked to do justice during the period of the International Military Trial (IMT) at Nuremberg and in the subsequent proceedings held under the authority of Allied Control Council Law No. 10. It is I who would sit at the feet of these living legends so long as we could persuade them to revive their memories. Each of them has provided me with lasting inspiration. Henry King provided me some years ago with one of the lasting professional truths that since has animated my legal perspective. Ben Ferencz has inspired and personally challenged me, along with countless others, to remain true to the principles of justice and the ends of liberty. Of course, one need only listen for a moment to the sonorous timbre of Whitney Harris's rhetoric to imagine this dashing and eloquent advocate as he stood before the judges of the IMT some sixty-two years ago.

These men embody a legacy of service that arose from their deep sense of commitment and personal courage. Gentlemen, I can scarcely express the combination of personal respect and enduring gratitude that I feel towards each of you, and I can only hope to take advantage of this occasion to mark the growth and development of the professional discipline that you helped to establish and that you have helped to sustain through the decades.

As I look into the faces of these servants to the law, I cannot forget that their successors are gathered even as we speak to discuss the promulgation of the Second Annual Chautauqua Declaration. It is a rare and special thing to have the extant international and hybrid tribunal prosecutors represented in one place at the same time. This is the kind of event that is special to Chautauqua. Just as you come from around the nation to attend the Chautauqua Festival, these servants of the law have assembled from around the globe: Serge Brammertz, the Prosecutor for the International Criminal Tribunal for the former Yugoslavia in The Hague; Hassan Jallow, of the International Criminal Tribunal for Rwanda seated in Arusha, Tanzania; Stephen Rapp, serving with the Special Court for Sierra Leone in Freetown; Fatou Bensouda, representing the Office of the Prosecutor for the International Criminal Court in The Hague; and Robert Petit, who has come to New York all the way from the Extraordinary Chambers sitting in Cambodia, on the verge of beginning trials against the Khmer leaders who destroyed a society. This is a singularly remarkable event.

Thinking of this distinguished gathering of prosecutors, as well as the fact that we are in New York, recalls to my mind a special incident in our history that happened not too far away, from which I distill the animating spirit that unites each of these prosecutors. On the afternoon of December 30, 1776, George Washington stood at the head of his ragged little army. Despite the victory they had won over Hessians at Trenton just a few days previously, they had suffered

enormous privation, and stood in formation in six inches of snow—many with bare feet.² Washington faced the imminent dissolution of his army as enlistments expired and with it the hopes of a free people. In private correspondence he confided that “I shall know today how many of Colo [sic] Glover’s Regt. are willing to continue in the land Service. I don’t expect many will be prevailed upon to stay”³

General Washington wheeled his horse in front of them and exhorted them to remain in the service of freedom. He sat impassively as regimental officers barked out the orders for the volunteers to step forward. Not one man moved in the icy silence. General Washington rode again to the front of the formation. As soldiers shuffled in embarrassment, he told them,

You have done all I could have asked you to do, and more than could be reasonably expected; but your country is at stake, your wives, your houses, and all that you hold dear. You have worn yourselves out with fatigues and hardships, but we know not how to spare you. If you will consent to stay only one more month longer, you will render that service to the cause of

² RALPH PUCKETT, *WORDS FOR WARRIORS: A PROFESSIONAL SOLDIER’S NOTEBOOK* 265 (2007).

³ Letter from George Washington to Robert Morris, George Clymer, and George Walton (Jan. 1, 1777), in *GEORGE WASHINGTON’S WRITINGS*, at 265 (John Rhodehamel, ed.) (1997).

liberty and to your country, which you probably never can do under any other circumstance. What we are facing today is the crisis which is to decide our destiny.⁴

History records that only 1percent of the eligible men in the Colonies at the time served to win our liberty and alight the flame of freedom and constitutional democracy, but that day every single man who could move of his own accord stepped up to serve. In that tradition, it is wholly fitting that the Jackson Center be one of the cosponsors of this gathering. Robert Jackson embodies an enduring iconic transcendence because he inspired a sense of service and commitment to higher principles that is the hallmark of a visionary leader. He personally touched the lives of these assembled prosecutors and inspired them to serve and to sacrifice. Jackson's enduring oratory captured the spirit and intent of Nuremberg more than any other lasting source, and his legal vision presaged many of the jurisprudential developments that even now are maturing. At the same time, these men came home from Nuremberg to face criticism and second guessing. Henry King recalls that his return was "like the soldiers returning from Vietnam in the 1970s. The Tribunal was a tarnished institution and no one respected what we had done."⁵ Jackson was

⁴ Puckett, *supra* note 2, at 266.

⁵ MICHAEL A. NEWTON AND MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 212 (2008).

not immune.⁶ For those outside the process, the staggeringly complex choreography of legal and practical difficulties that beset each and every day of trial are opaque and unknowable.

Jackson faced numbing logistical difficulties and seemingly insurmountable evidentiary mountains. He had no text searchable computer databases to assist with the collation and collection of the mountains of available information. He had tactical trial issues to balance against the very purposes of prosecution, not to mention the very real issues associated with funding, personnel, media coverage, interpersonal relations, and the uncertainty of dealing with difficult and occasionally temperamental judges. He was forced to commingle the aspirational goals of expressive justice with the harder realities of retribution and capacity building, all in the midst of a larger effort to form the cornerstone of an enduring respect for the rule of law in a shattered nation. On top of those thorny matters, the process was conducted in the midst of a compelling chorus of

⁶ Ten days prior to the execution of the convicted Nazi leaders in Nuremberg, Senator Robert A. Taft spoke and caused a firestorm of public debate with a public address that became a flashpoint in the campaign for President. He opined that “About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hanging of the eleven men convicted will be a blot on the American record which we shall long regret. In these trials, we have accepted the Russian idea of the purpose of trials—government policy and not justice—with little relation to Anglo-Saxon heritage. By clothing policy in the form of legal procedure, we may discredit the whole idea of justice in Europe for years to come.” JOHN F. KENNEDY, *PROFILES IN COURAGE, THE ILLUSTRATED EDITION* (1984).

political interests from the nations represented in the courtroom and others around the world whose interests were affected by the trial processes and their aftermath.

The challenges of the World War II era are really no different from those faced in this modern era. Prosecutors from Baghdad to Buchenwald, from The Hague to the Hariri Tribunal, can each recognize and sympathize with the inherent difficulties they must confront. Of course, major international trials in the modern era are conducted in the glare of an international media and a global audience. There are no easy answers, and yet I am called upon to pronounce in a compressed time on the state of our profession.

In one sense, the discipline of international criminal law has never been healthier. The era of accountability is irreversibly underway. While the challenges of administering justice in the midst of profound political and personal passions remain, there is no current shortage of young and inspired advocates who wish to contribute. Furthermore, they do so against the backdrop of a developed discipline. It cannot be forgotten that the discrete discipline that we term international criminal law, and that many of us teach in our law schools, has taken form and root only over the past fifteen years. Let me quickly summarize the indicia of progress.

In The Hague, the work of the International Criminal Court (ICC) continues as there are today 108 nations that are states parties to the Rome Statute of the International Criminal Court. Of those states, some 30 are from the continent of Africa, 13 are Asian states, 16

are from Eastern Europe, 22 are from Latin America and the Caribbean, and 26 are from Western Europe and other areas. The work of the International Criminal Tribunal for the former Yugoslavia accelerates even as the projected termination of its processes draws within sight. Radovan Karadžić is in custody, and only two indictees remain at large. To date, the Tribunal has indicted over 161 high level officials, including the President of Serbia, one former and one current President of the Republika Srpska, the former Serb member of the Bosnian Presidency, as well as the top generals of the Republika Srpska and the Republic of Serbia, the former Prime Minister of Kosova, and the chief Serbian negotiator at the Rambouillet negotiations.

In Arusha, the ad hoc International Criminal Tribunal for Rwanda was created to prosecute those responsible for the genocide in Rwanda. The Tribunal has indicted over twenty-five high-level Rwandan officials, including former Prime Minister Jean Kambanda and several government Ministers. The Extraordinary Chambers in Cambodia have charged five senior Democratic Kampuchea officials, including the Foreign Minister, Deputy Prime Minister, and chief political strategist. The Office of the Prosecutor recently told media outlets that investigations into additional former cadre may be carried out in the coming months.

The work of the Special Court for Sierra Leone is nearing its culmination, even as the Charles Taylor trial enters a crucial phase in its Hague courtroom, rented from the International Criminal Court. The Special Court has succeeded in disrupting the destabilizing

influence of what David Crane has publicly termed the West African Joint Criminal Enterprise. The Special Court went into a shattered nation and nurtured the fragile seeds of rebuilding domestic capacity as a key component of the larger effort to rebuild democratic institutions. In all, the Special Court indicted thirteen high-level suspects from different sides of the conflict, including the President of Liberia, Charles Taylor; Civil Defense Force officials; and rebel leaders.⁷

The benchmarks of forward momentum are obvious, but let me pause to clarify three dimensions of the international criminal law regime that we must bear in mind as the system matures beyond the rhetoric of the aspiration to end impunity into the reality of a rigorous application of overarching criminal norms. In the first place, the emergence of an integrated system of internationalized justice has taken place almost overnight in the broad sweep of human history. This has been a remarkable achievement. Indeed, international criminal law may be one of the lasting hallmarks of the twentieth century precisely because its advent marked the high water mark of unconstrained state sovereignty. One of the principal contributions of Nuremberg was to sharpen international debate over the balance between the shared norms of civilized nations and the lawful extent of appropriate and, dare I say, essential sovereign

⁷ David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords—Current Lessons Learned and Challenges*, in ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 133, 134 (Edel Hughes, William Schabas, and Ramesh Thakur, eds., 2007).

prerogatives. Learned Hand, who was a peer of Robert Jackson's, wrote that liberty "is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."⁸ If we accept the premise that sovereign autonomy ends at the point that the criminal conduct of a particular regime undermines the rights of the larger community of nations, the development of a regularized system of enforcement was logical and long overdue. The Israeli court intimated this vision in acknowledging that international law is "in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial."⁹

We have now institutionalized the legal precepts that were so novel at the end of World War II into an integrated legal system. Jackson's enduring observation that crimes are committed by men rather than abstract entities served as the precursor for the conception of individual criminal responsibility that has been embedded in every modern tribunal statute. Hannah Arendt remarked in that vein that the "focus of every

⁸ Learned Hand, Address to "I Am an American Day" (May 21, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (collected by Irving Dillard, 3d ed. 1989).

⁹ See *A-G of Israel v. Eichmann* [Supreme Court], reprinted in 36 I.L.R. 18, 26 (Isr. Dist. Ct. Jerusalem 1961), *aff'd* 36 I.L.R. 277 (Isr. Sup. Ct. 1962).

trial is upon the person of the defendant, a man of flesh and blood with an individual history, with an always unique set of qualities, peculiarities, behavior patterns, circumstances. All the things that go beyond that ... affect the trial only insofar as they form the background and the conditions under which the defendant committed his acts.”¹⁰ We thus talk about, and many of us teach, the various cases and the doctrines emanating from them—the Milosevic trial, the Erdomovic trial, the Krajisnik trial, the Akayesu case, the Taylor trial, the Oric trial, and so on. Those each have a distinctive pedagogical and jurisprudential meaning. I think it very important to note that they only take their fullest significance in relation to each other.

The advent of an integrated system, what I term a constellation of cases, is a notable development. When we figuratively relax our vision and step back from the minutiae of a particular case or a particular evidentiary problem or the tragedy of a particular victim in a particularized context, we see the emergence of a broader pattern that is only possible by seeing cases and trends in contradistinction to one another. This is, indeed, revolutionary. At the same time, this constellation of case law also carries with it the very pernicious consequence that the hopes of victims are falsely raised by what Human Rights Watch has termed “a wildly unrealistic impression” of the processes and

¹⁰ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 285 (1994).

pace of international justice.¹¹ Similarly, an overarching system that transcends geographic boundaries can give rise to allegations that its use is merely a pretext for politicized or prejudiced purposes. An organization based in South Africa recently held a seminar in which the International Criminal Court was criticized for using Africa as “a guinea pig.” Charles Villa-Vicencio, the former executive director of the Institute for Justice and Reconciliation, criticized the selectivity of recent prosecutorial decisions by the ICC, and opined that it “seems that the court is using Africa as a test case, to determine in what way international law can obtain more legitimacy on the ground in Africa.”¹²

This debate over the role of the ICC in Africa is the symptom of the second notable systematic reality that

¹¹ HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT’S FIRST YEARS* 129 (2008). The Human Rights Watch observation came from the African context and accords with the Author’s experience in Kosovo during the first judicial training as participants fully expected the international tribunal to prosecute all wrongdoers.

¹² Miriam Mannak, *Proving Ground for International Criminal Court?*, Inter Press Service (Johannesburg), Aug. 20, 2008, available at <http://allafrica.com/stories/printable/200808210008.html> (last visited Nov. 12, 2008). Vincent Nmehielle, former Principal Defender of the Special Court for Sierra Leone, attended the symposium and added that he believes that the ICC has a political agenda. “The court should hold all tyrants accountable, but this is not happening. So far, most of the indictees are African. The powerful—the United States for instance—will never be put on trial,” he says, referring to the fact that the U.S. government does not recognize the court. “Russia will probably not be tried for what is happening in Georgia. And the same counts for China.”

cannot be ignored or underestimated in the coming years. The irreducible reality is that internationalized courts operate to supplement state criminal jurisdiction rather than to supplant the normal operation of domestic enforcement systems. Indeed, the emerging discipline now termed “international criminal law” has been described as “the gradual transposition to the international level of rules and legal constructs proper to national criminal law or national trial proceedings.”¹³ Although international mechanisms provide a necessary forum in circumstances where domestic courts are unable or unwilling to enforce individual accountability for serious violations of international norms, the domestic courts of sovereign states retain primacy for the enforcement of those norms.¹⁴ It must be remembered that the original intent of the Moscow Declaration, issued by the Allied Powers on October 30, 1943,¹⁵ was the preference for punishment in the national courts of the countries where the crimes were committed.¹⁶ The

¹³ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 18 (2003).

¹⁴ Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 24-5 (2001).

¹⁵ MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 146-47 (2007). The text of the Moscow Declaration is available at <http://www.yale.edu/lawweb/avalon/wwwii/moscow.htm> (last visited Oct. 31, 2007).

¹⁶ IX Department of State Bulletin, No. 228, 310, *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11 (1945). The Moscow Declaration was actually issued to the Press

United Nations Secretary-General similarly concluded that “no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable.”¹⁷

On the other hand, authentic justice is not achieved on the wings of societal vengeance, innuendo, or external manipulation; rather, the very essence of a fair trial is one in which the verdict is based on regularized process and on the quantum of evidence introduced in open court. One distinguished scholar has used the phrase “Potemkin Justice” to describe enforcement efforts aimed at achieving only a shadow of justice while undermining the core human rights of those who will face charges under its authority.¹⁸ Avoidance of this is the rationale behind the International Covenant on Civil and Political Rights’ (ICCPR) requirement that a criminal trial be a “fair and public hearing by a

on November 1, 1943. It purported to put criminals on notice that they would be “brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.” For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 86-110 (2001).

¹⁷ The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2004/616 (Aug. 23, 2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf> (last visited Oct. 27, 2007).

¹⁸ M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 703 (2003).

competent, independent and impartial tribunal established by law.”¹⁹

The creation of domestic prosecutorial structures around the globe represents the Third Wave of progress towards achieving a comprehensive criminal regime to address the “crimes of most serious concern to the international community as a whole.”²⁰ Such domestic implementation is partly inevitable as states party to the Rome Statute undertake to modernize their domestic legislation in order to have a basis for invoking the sovereign right of complementarity. The Elements of Crimes document required by Article 9 of the Rome Statute provides a substantive template that can be applied by domestic systems around the world.²¹ At the same time, the elements themselves cannot be applied in a rigid and formulaic manner; rather, they must be adapted into a form of procedural regularity that varies

¹⁹ International Covenant on Civil and Political Rights, art. 14(1), Dec. 16, 1966, 999 UNTS 171.

²⁰ The first two in my view being the post World War II prosecutions around the world in military commissions, followed by the evolution of the discipline beginning in the mid-1990s.

²¹ See Preparatory Comm’n for the Int’l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (establishing the “Elements of Crimes” for the International Criminal Court). Article 9 of the Rome Statute states that the Elements shall “assist the Court in the interpretation and application” of the provisions related to war crimes, genocide and crimes against humanity, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

by nation. Iraqi lawmakers staked the future of their fledgling democracy on a bold gambit, and when we went to Baghdad to teach them the substance of modern international norms, we used the ICC Elements because they were readily available in Arabic. Iraqi lawyers and judges acknowledged that they were establishing a tribunal that would serve as “the doorway to the Arabic speaking world” for those modern precepts, but were able to use domestic law to implement those norms and hold Ba’athist officials accountable for the tyranny they inflicted against the people of Iraq.²²

Judges around the world are now using domestic courtrooms and domestic procedures in the service of their nation and to serve the larger rule of law. Just one month ago, on Tuesday, July 29, the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH) convicted seven Bosnian Serbs charged with genocide over their role in the 1995 Srebrenica massacre. The eleven defendants, police officers and soldiers who were members of the Bosnian Serb wartime authorities, were charged with genocide under Article 171 of the BiH Criminal Code. Seven of the defendants were convicted of committing genocide and received sentences ranging from thirty-eight to forty-two years imprisonment. Four others were acquitted. The men were convicted of taking direct part in the killing of over 1000 Bosniak (Bosnian Muslim) prisoners in the warehouse of Kravica Farming Cooperative on 13 July 1995. Thousands of Bosnian Muslim men attempted to

²² MICHAEL A. NEWTON AND MICHAEL P. SCHARF, *supra* note 5, at 7.

accountability, and helped overturn impunity laws protecting officials who participated in the “dirty war” from 1976-1983. In August 2006, a police official who served during the military dictatorship was the first member of the regime convicted of torture. El Salvador and Guatemala have both supported UN-backed Truth and Reconciliation Commissions, which have brought crimes committed by military regimes to light.²⁵

These developments represent huge progress towards ending the sense of impunity that formerly emboldened tyrants and dictators, and which has caused incalculable human suffering. In the aggregate, domestic progress, paired with the formalized institutional development at the international level, validates the prospect for the first time in human history that prosecutorial power may be the fulcrum towards achieving the interlocking goals of security, stability, sovereignty, and the preservation of human rights. Nevertheless, such a two tiered system in itself creates a form of friction based on the perception of selective prosecution. Some commentators are already complaining that international institutions such as the ICC focus only on economically weak and politically vulnerable countries. International justice cannot exist as a self serving and self sustaining end in itself. Rather, the optimal forum must be used that best advances the underlying objectives, and on nations that are not able or willing to try perpetrators of crimes against humanity.

²⁵ Human Rights Watch, *Universal Periodic Review of Guatemala; Human Rights Watch's Submission to the Human Rights Council*, May 5, 2008, available at <http://hrw.org/english/docs/2008/04/07/global18579.htm> (last visited Jul. 25, 2008).

break out of the Srebrenica enclave following its capture by Bosnian Serb forces in July 1995. The case is the first relating to the crime of genocide in Srebrenica before the Bosnian War Crimes Chamber. All other individual cases relating to genocide during the Srebrenica massacre have been heard at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.

Similarly, after an extradition request by Spain, former Chilean president General Augusto Pinochet was arrested in London and prosecuted in the British House of Lords, who found his acts constituted gross violations of international law.²³ This judgment encouraged the domestic Chilean courts to pursue prosecutions; to date, Chilean courts have convicted upwards of 150 individuals and are seeking further charges against over 400 military officials.²⁴ In Argentina, former President Nestor Kirchner was a strong proponent of

²³ Lord Slynn of Hadley, *Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division), Nov. 25, 1998, available at <http://warcrimes.foreignpolicyblogs.com/category/uncategorized/latin-america/> (last visited July 25, 2008).

²⁴ Peter Walker, *Chilean Judge Orders Arrest of Pinochet-era Soldiers and Secret Police*, THE GUARDIAN, May 27, 2008, available at <http://www.guardian.co.uk/world/2008/may/27/chile> (last visited Jul. 25, 2008); Foreign Policy Association, *The Chilean Investigation: The Legacy of Pinochet*, Apr. 19, 2007, available at <http://warcrimes.foreignpolicyblogs.com/category/uncategorized/latin-america/> (last visited July 25, 2008).

This debate has recently focused on disagreements over whether domestic or international institutions best promote reconciliation, transitional justice, and democracy across swaths of war-torn territory.

The third developmental pillar that I want to briefly observe is that the law itself continues to be in a state of flux. Attention is focused on the preliminary discussions that are setting the predicate for the Review Conference of the International Criminal Court to be held in 2010. At this major international gathering, we may very well see the adoption of a crime of aggression as a formal criminal matter for the first time since Nuremberg. I would add my personal belief that a hastily drafted and poorly conceived crime has the potential to undermine the work of the Court for perhaps a decade or more. I can envision no course of action more likely to solidify the opposition of major nations on an institutionalized and enduring basis than for Court insiders to push for a definition and triggering mechanism for the crime of aggression that binds non-states parties to the Rome Statute, but which permits states that have ratified the treaty to exempt themselves and their officials from its provisions. This may seem like a bizarre and unlikely scenario, but the text of Article 121, paragraph 5, of the treaty would permit precisely such a scenario. The coming years may also see prosecution of the crime of aggression using the domestic legal structure of the Iraqi High Tribunal as the Ba'athists who planned and implemented the invasion of Kuwait are punished in Baghdad.²⁶

²⁶ See AL-WAQA'I AL-IRAQIYA, OFFICIAL GAZETTE OF THE

This is not to imply that other great challenges are not looming ahead. The rights and treatment of victims

REPUBLIC OF IRAQ, No. (4006), Oct. 18, 2005, Law of the Supreme Iraqi Criminal Tribunal, Qanun al-Mahkamat al-Jeena'eyyat al-Eraqiyyat al-'Uliya, No. 10, Oct. 18, 2005, [hereinafter Statute of the Iraqi High Criminal Court], *available at http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf* (Iraq). Articles 11-13 of the Statute establish the competence of the Tribunal to prosecute genocide (Article 11), crimes against humanity (Article 12), and war crimes committed during both international and non-international armed conflicts (Article 13). These substantive provisions are perhaps the most significant aspect of the Statute because they accurately incorporate the most current norms under international humanitarian law into the fabric of Iraqi domestic law for the first time. In addition, Article 14 conveys jurisdiction over a core group of crimes defined in the Iraqi criminal code. The Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts were so corrosive to the rule of law inside Saddam's Iraq. Article 14 reads as follows:

The Tribunal shall have power to prosecute persons who have committed the following crimes under Iraqi law:

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

and witnesses continues to be a major impediment to the search for justice, as witnesses are intimidated and occasionally refuse to testify. Those who have traveled to international courtrooms are increasingly facing persecution and punishment from their home villages. Judges must be on guard to use their authority to oppose the forces that would endanger witnesses and chill testimony, yet must also stand diligent to protect the rights of the defendant in gaining equal access to witnesses and evidence. In another challenging arena, the context of modern transnational terrorism will also spawn efforts to refine the content of international criminal prohibitions in ways that may or may not be ultimately beneficial to the regime as a whole. There are other substantive challenges for which we could devote an entire academic discussion that is beyond the scope of my comments today. The law of genocide continues to evolve as regards the requisite balance of personal knowledge on the part of the defendant when seen against the backdrop of the specific genocidal intent required to sustain convictions. The law of effective responsibility is also under increasing stress as the old regimented lines of authority give way to new channels of influence and manifestations of control and authority in the context of operations by sub-state actors operating beyond the scope of hierarchical military organizations.

All in all, there has never been a more exciting or challenging era to practice in this field. The recent action by the Prosecutor of the International Criminal Court against the President of Sudan should serve to regenerate attention, and much debate, as we move forward. Prosecutor O'Campo derived the authority to

act from United Nations Security Council Resolution 1593, adopted on March 31, 2005. This resolution was adopted under Chapter VII of the United Nations Charter, and as such, is binding on all member states of the United Nations—including Sudan. The resolution decides “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”²⁷ As noted above, the ICC statute is built on the foundation of the complementarity principle, meaning that member states retain jurisdiction over genocide, war crimes, and crimes against humanity unless the country is unwilling or unable to genuinely investigate or prosecute.²⁸

Prior to seeking the Issuance of an Arrest Warrant, the ICC Prosecutor collected evidence from 105 missions in eighteen different countries. This evidence included eyewitness and victim statements, recorded interviews of Sudanese government officials, reports from the UN Commission of Inquiry, as well as the Sudanese National Commission of Inquiry, and other documents and materials from open sources.²⁹ In the

²⁷ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

²⁸ Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 90.

²⁹ On July 14, 2008, Chief Prosecutor of the ICC Luis Moreno-Ocampo presented evidence in a “Summary of the Case” to the Pre-Trial Chamber regarding the situation in Darfur, Sudan in the “Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir;” Article 58 of the Rome Statute provides the ICC Pre-Trial Chamber the authority to issue a warrant for arrest.

case of Sudan, the ICC sanctioned the issuance of an arrest warrant for a number of Sudanese citizens present in Sudan. The Sudanese government has since refused to comply with the arrest warrants and will not consider domestic trials. In fact, Mr. Ahmed Haroun, who is sought by the ICC for war crimes and crimes against humanity allegedly committed in Darfur, currently holds the position of Minister of State for Humanitarian Affairs and is responsible for delivering humanitarian aid to Darfur.

Against the backdrop of these historic events, I want to close by quickly addressing three predominant myths that will continue to be debated in coming years. The media and local civil society have often opined that indicting key leaders undermines the process of restoring peace in the aftermath of conflicts that have ravaged societal structures. In reality, the indictments of Karadžić, Mladic, Milosevic, Taylor, and Kony demonstrate that criminal indictments can be crucial to beginning a genuine and sustainable peace, despite the short-term pressures. In fact, the indictments of Radovan Karadžić and Ratko Mladic in the midst of the Bosnian peace negotiations played an important role in the Yugoslav peace process. Mr. Karadžić and General Mladic were key interlocutors in the peace process. Most commentators and historians now acknowledge that those indictments played an important role, and as explained by Richard Goldstone, the “[a]rrest warrants from The Hague also assisted the Bosnian peace process

by removing hard-liners from the negotiating table.”³⁰ The indictments also hastened the democratic transformation of Bosnia by removing the accused from the post-conflict political process.³¹

Similarly, when the Prosecutor for the Sierra Leone Tribunal indicted Charles Taylor of Liberia, many commentators argued that this would undermine efforts for political transformation both in Sierra Leone and Liberia. As David Crane now notes, “You’ll see that five years after I unsealed the indictment against Charles Taylor ... despite the condemnations, despite the calls that this would hamper peace, Liberia now is on a road of potentially a sustainable peace under the leadership of the first female head of state ever in Africa to be elected in a free and open and fair election there in Liberia.”³²

Finally, the most recent and controversial dimension of this enduring problem relates to the warrant issued for the arrest of Lords Resistance Army (LRA) leader Joseph Kony by the International Criminal Court in September 2005. This legal step was taken pursuant to a

³⁰ Richard Goldstone, *Catching a War Criminal in the Act*, N.Y. TIMES, Jul. 15, 2008, available at <http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?ref=opinion> (last visited Jul. 25, 2008).

³¹ *Id.*

³² Joe DeCapua, *Former Charles Taylor Prosecutor Practices ICC Action Against Sudanese President*, VOICE OF AMERICA, Jul. 14, 2008, available at <http://www.voanews.com/english/Africa/2008-07-14-voa44.cfm> (last visited Jul. 21, 2008).

referral by Ugandan President Museveni. In the intervening years, peace talks between the LRA and the Government of Uganda progressed, illuminated by the piecemeal yet productive discourse made during the talks in Juba with regard to justice and peace-facilitating mechanisms between the Government of Uganda, Kony, other LRA officials, and the Government of South Sudan. The Juba negotiations focused on how best to proceed with ICC's exercise of jurisdiction.³³ In early 2008, Kony and the Government of Uganda agreed that alleged war crimes would be tried domestically in a war crimes court that would reflect, at least in part, traditional Ugandan justice and reconciliation mechanisms.³⁴ Kony failed to sign the peace agreement in March 2008 and the following April 2008, having broken his promises, then dissolved his negotiation team

³³ Under the ICC Rules of Procedure, pursuant to art. 18 of the Rome Statute, the ICC Prosecutor may defer to a state's exercise of jurisdiction. The Rules further stipulate, in art. 17(1)(a), that the ICC shall not assume jurisdiction over domestically investigated and prosecuted matters "unless the State is unwilling or unable to genuinely carry out the investigation or prosecution."

³⁴ James Gatdet Dak, *Uganda and LRA Agree on Accountability Mechanisms*, SUDAN TRIBUNE, Feb. 4, 2008, available at <http://www.sudantribune.com/spip.php?article25807> (last visited Aug. 2, 2008); BBC News, *Uganda Sets Up War Crimes Court*, May 26, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7420461.stm> (last visited Aug. 2, 2008). For a timeline of the conflict, excellent policy papers, and the documentation of this process see <http://www.beyondjuba.org> (last visited Aug. 15, 2008).

and suspended further negotiations.³⁵ Some commentators suggest that had the threat of ICC prosecution not been present, Kony, on the condition of amnesty, would have accepted the terms of the peace agreement, thereby bringing peace to an embattled region.

From my perspective, without the pressure from the ICC, Kony would likely still be in Uganda, would not have retreated into isolation of the Democratic Republic of Congo in order to avoid prosecution, and could still be spearheading the violence that ravaged Uganda for over twenty years. Furthermore, those responsible for the commission of widespread war crimes are not privy to amnesty under the general practice of international law; the Government of Uganda and the ICC needed to take steps to ensure those responsible were brought to justice in order to comply with international law.

Prosecutor O'Campo's request for a warrant of arrest in the case of Al Bashir differs from the Kony case in several ways. First, Kony was referred to the ICC by the Ugandan government based on domestic concerns. The case against Al Bashir was referred under the Security Council's Chapter VII authority. The Security Council referred the case under Chapter VII because it believed Al Bashir's complicity in the crimes in Darfur constituted a threat to international peace and security. Secondly, Kony is a rebel leader and not a sitting head of

³⁵ Frank Nyakairu and Grace Matsiko, *Uganda: Govt Suspends Indefinitely Signing Peace Deal With LRA*, All Africa, Apr. 11, 2008, available at <http://allafrica.com/stories/200804111165.html> (last visited Aug. 3, 2008).

state like Al Bashir. Al Bashir, as the leader of Government of Sudan, has the power to harness the entire state apparatus to perpetrate crimes with little internal condemnation. Al Bashir has not complied with numerous United Nations resolutions and the Prosecutor suggests he is using a wide variety of state resources to perpetrate crimes. Thirdly, previous referrals to the ICC have come under the auspices of state authority, which indicate a greater likelihood of state cooperation.

While the Government of Uganda might have terminated its previous political support for an ICC prosecution of Kony had he actually surrendered, there are no internal political forces calling for the surrender of Al Bashir. No political or legal pressures within Sudan warrant any assurance of good faith domestic justice proceedings, nor are there any indications that the Government of Sudan is willing to cooperate in relinquishing Al Bashir to international justice for the crimes for which he stands accused.³⁶ The Government of Sudan has proved unwilling to assist the ICC in the cases regarding Ahmed Haroun, the presiding Humanitarian Affairs Minister, and Ali Kushayeb, a janjaweed leader. By referring the case to the Office of the Prosecutor at the ICC under their Chapter VII powers, the Security Council made a lasting statement about the role of potential prosecutions in jumpstarting

³⁶ Stephanie Hanson, *In Uganda, Peace Versus Justice*, Council on Foreign Relations, Nov. 17, 2006, http://www.cfr.org/publication/12049/in_uganda_peace_versus_justice.html?breadcrumb'%2Findex (last visited Aug. 2, 2008).

the ongoing political efforts to end the genocide in Darfur and restore regional peace and stability.

Furthermore, Security Council Resolution 1593 places an obligation upon the rest of the international community to facilitate the capture and prosecution of all those responsible for the atrocities in Darfur. The Application for the Issuance of an Arrest Warrant for Al Bashir represents the first time the ICC has sought accountability for the crime of genocide.³⁷ Since the ICC represents the legal incarnation of the “international legal tribunal” foreseen in Article VI of the 1948 Genocide Convention, the Prosecutor’s request for the issuance of an arrest warrant can properly be interpreted as representing the first treaty-based exercise of jurisdiction since the World War II era. Put another way, the expressed desire of the international community to address genocide against the civilian inhabitants of a sovereign state is now taking a judicial manifestation that makes the aspirations behind the very formation of the United Nations come to life.

Secondly, the charges against Bashir should serve to undercut the myth that he is a credible “partner in peace.” This, of course, is not a new wrinkle in the context of major international prosecutions. During the course of the Yugoslav conflict, many peace negotiators and representatives of the international community argued against the indictment of President Slobodan Milosevic on the basis that he was ultimately the

³⁷ Conor Foley, *Justice on Trial*, The Guardian, Nov. 10, 2006, available at <http://www.guardian.co.uk/commentisfree/2006/nov/10/justiceontrial> (last visited Aug. 2, 2008).

international community's indispensable partner in peace despite his alleged involvement in war crimes. President Milosevic was not indicted during the conflict in Croatia. He subsequently oversaw, but was not indicted at the time for the commission of war crimes and genocide in Bosnia. He later facilitated the commission of crimes against humanity in Kosovo and was finally indicted for war crimes and crimes against humanity committed against the civilians in territory under his effective sovereign control. Only after he was in custody in The Hague was he indicted for his crimes in Croatia and Bosnia. In hindsight, the failure to indict Milosevic for his crimes in Croatia may have enabled him to commit genocide in Bosnia and crimes against humanity in Kosovo.

Since the indictment of Milosevic and his transfer to The Hague, Montenegro has peacefully separated from Serbia—an act which would have led to a fourth violent conflict in the Balkans had Milosevic remained in power. Serbia has also made significant strides in its democratic transformation, and recently signed a Stabilization and Association Agreement with the European Union. In the past few years, there has been an increasing recognition that treating suspected war criminals as “partners in peace” is not the most effective means for ending conflicts. Richard Holbrook, the former U.S. negotiator for the Dayton Accords, once said that he negotiated with Milosevic because “you can’t make peace without President Milosevic.”³⁸

³⁸ Jurek Martin, *Holbrooke Sees 'Tough Slog' to Peace in Bosnia*, FINANCIAL TIMES, Nov. 2, 1995.

However, Holbrook later conceded that negotiating an agreement without Milosevic would have been difficult, but it would have been possible. With respect to the indictment of Al Bashir, Holbrook explained that although 75 percent of the high level officials involved believe the issuance of an arrest warrant will undermine the peace process, it is necessary “to let the wheels of justice proceed” against this war criminal, as it is inconceivable that “this man, who was deeply implicated in the mass murder of hundreds of thousands of people in Darfur, was going to change his stripes based on whether he was indicted or not.”³⁹

Some have even argued that the Application for Arrest may actually “advance the interests of peace” because “the increased pressure now placed on the NCP [National Congress Party] governing regime will lead it to take long overdue steps to cease all violence, implement genuine and credible measures to resolve the Darfur crisis—including allowing the full and effective deployment of the UNAMID peacekeeping force—and fully carry out its side of the bargain to implement the North-South Comprehensive Peace Agreement (CPA).”⁴⁰ Media outlets quoted Sudanese Foreign

³⁹ Jeb Sharp, *Examining Past War Crime Cases*, Public Radio International, quoting Richard Holbrook, Jul. 14, 2008, available at http://www.theworld.org/?q'taxonomy_by_date/1/20080714 (last visited Aug. 3, 2008).

⁴⁰ The International Crisis Group, *New ICC Prosecution: Opportunities and Risks for Peace in Sudan*, Jul. 14, 2008, available at <http://www.crisisgroup.org/home/index.cfm?id'5572&l'1> (last visited Jul. 22, 2008).

Minister Deng Alor as saying, "Everything short of the presidency is on the table," which implies that the Government of Sudan may finally be willing to hand over the officials indicted by the ICC.⁴¹

The "saving lives" arguments made during the Dayton negotiations did not ultimately prevent the pursuit of justice. Paul Williams and Michael Scharf noted that "The 'saving lives' rationale, while encapsulated in only two words, is a powerful tool used by the negotiators to undermine the influence of the norm of justice."⁴² In the context of Sudan, there is indeed a risk of increasing violence in the short run, but there cannot be a lasting peace in Sudan without justice. In fact, officials in Al Bashir's Government have already threatened increased violence, particularly directed at peacekeepers and humanitarian aide workers, as a response to the issuance of an arrest warrant.⁴³ Those who oppose the application will likely point to that violence as a vindication of their view; however, such a

⁴¹ Lydia Pologreen and Jeffrey Gettleman, *Sudan Rallies Behind Leader Reviled Abroad*, N.Y. TIMES, Jul. 28, 2008, available at <http://www.nytimes.com/2008/07/28/world/africa/28sudan.html> (last visited Aug. 3, 2008).

⁴² PAUL R. WILLIAMS AND MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 158 (2002).

⁴³ AFP, *Bashir Aide Makes Darfur Peacekeeper Threat*, Jul. 25, 2008, available at http://afp.google.com/article/ALeqM5jGt3x95NIA_P8z1VYgJK9Jcw0zWw (last visited Aug.3, 2008).

correlation is tenuous. Most scholars agree that the Government of Sudan and Al Bashir bear responsibility for the genocide in Darfur. He and his regime alone are responsible for that violence, and for future violence. In no domestic jurisdiction would a government official assert that efforts to prosecute criminals should be curtailed because they may lead to an outbreak of violence; neither should the global community accept a similar espousal by critics of international legal proceedings. Such a result would be an abdication of the state responsibility to protect the interests of law and order within a functioning society. The rule of law at the international level cannot be held hostage by threats of violence or intimidation. The introduction of justice may in fact change the dynamic on the ground in Khartoum, such that the peace process is taken more seriously by Sudan. As argued by John Prendergrast of Enough, "The status quo in Sudan is one of the deadliest in the world. Until there is a consequence for the commission of genocide, it will continue. This action introduces a cost, finally, into the equation."⁴⁴

Finally, despite the mythology and widespread public perception, there is a great practical value in the arrest warrants. In reality, with the prospects of peace in Darfur in the immediate future seemingly nonexistent, the most practical solution to precipitating a change in the region is by holding those responsible for the conflict accountable. In the face of worldwide public

⁴⁴ John Norris, David Sullivan, and John Prendergast, *The Merits of Justice*, Enough, Jul. 14, 2008, available at <http://www.enoughproject.org/node/974> (last visited Jul. 21, 2008).

condemnation, Al Bashir has presided over the conflict in Darfur in a consistent manner with the strategy employed during the civil war with southern Sudan. Al Bashir's "divide-and-destroy" tactics, whereby the Sudanese government arms competing, neighboring militias, has fostered a semblance of deniability of responsibility for the persisting violence on all levels of Sudanese society.⁴⁵

Former UN Ambassador Richard Holbrooke recently illuminated two practical effects the issuance of an arrest warrant for Al Bashir will have on the peace process, through the lens of the lessons learned upon the recent arrest of former President of Republika Srpska, Radovan Karadžić, stating,

[N]umber one, Bashir hasn't been very cooperative up until now. Number two, the lesson of Karadžić is that it may take a long time. Also, when all is said and done, it's important to remember that Karadžić was under constant pressure for the thirteen years following his indictment, he couldn't continue his political movement, which was a genocidal movement, and in the end he was brought to justice.... There is value in having international procedures that legitimize going after these people,

⁴⁵ *Id.*

because they mean we no longer have to have vigilante justice.⁴⁶

According to the authors of a recent report from the Enough Project, accountability of war crime violators is not only a moral imperative, but is also a necessary component to the peace process. Indeed, the prosecution of Slobodan Milosevic in the International Tribunal for the Former Yugoslavia demonstrated that judicial proceedings will not necessarily serve as an impediment to peace negotiations, but “seem to be most helpful in clarifying the minds of dictators that their very existence is at stake;” while the Special Court for Sierra Leone’s prosecution of Charles Taylor illuminated how international justice can facilitate the end of regional impunity for human rights violations.⁴⁷ The request for an issuance of an arrest warrant is a positive development in a peace process otherwise stagnated by the obstinacy of the Government of Sudan.

There is no doubt that these topics will remain at the very center of international political discourse in the coming months. Burmese officials have been anecdotally reported to have asked whether they could be convicted for crimes against humanity for their actions in denying humanitarian relief to affected

⁴⁶ Foreign Policy, *The FP Interview: Richard Holbrooke on Radovan Karadžić*, July 2008, available at http://www.foreignpolicy.com/story/cms.php?story_id'4401 (last visited July 25, 2008).

⁴⁷ Norris et al., *supra* note 44.

civilians in the aftermath of Cyclone Nargis.⁴⁸ This field, for better or worse, will continue to be a growth industry. Even as we gather here in Chautauqua, Prosecutor O'Campo is in Colombia with an investigative team seeking additional information on the pace and process of the domestic investigations being conducted against soldiers and politicians—members of Congress among them—allegedly involved in crimes committed by paramilitaries and guerillas. In addition, in the wake of the recent invasion of Georgia by Russian forces, the Office of the Prosecutor is analyzing that situation. An official from the Georgian government met with the Division of the Jurisdiction, Complementarity and Co-operation of the Office to offer information and co-operation. The Russian Federation has formally delivered information to the Office of the Prosecutor and is continuing to do so. "Georgia is a State Party to the Rome Statute," the Prosecutor has said. "My Office considers carefully all information relating to alleged crimes within its jurisdiction—war crimes, crimes against humanity and genocide—committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or groups alleged to have committed the crimes. The Office is *inter alia* analyzing information alleging attacks on the civilians."⁴⁹

48 See, e.g., http://www.genocidewatch.org/images/Myanmar_08_09_23_Seeking_Justice_for_Burma_A_Case_for_Revoking_the_Credentials_of_the_SPDC.pdf (last visited Nov. 5 2008).

49 See <http://www.icc-cpi.int/press/pressreleases/413.html&l=en> (last visited Nov 8, 2008). Georgia signed the Rome Statute on 18 July 1998 and became a state party on Sept. 2, 2003.

One thing is clear, the only guarantee is that the tasks ahead will be difficult and the progress slower than some would want. More than a century ago, the creator of The Hague Peace Conference, Czar Nicholas, cautioned that “[o]ne must wait longer when planting an oak than when planting a flower.”⁵⁰ I thank you for your time and for your dedication to justice.

⁵⁰ JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* xiv (1915).

International Claims Tribunals: What International Criminal Prosecutors Might Need To Know

Lucy Reed*

Introduction

On behalf of the American Society of International Law, I welcome you and thank you for devoting so much time and attention to this important second set of International Humanitarian Law Dialogs. I thank you especially for inviting me to speak. I am deeply honored: as John Barrett said this morning, we are in the company of true heroes.

My comments will be brief in light of the hour and, at least on first reflection, my total lack of qualification to speak on any aspect of criminal law.

On second reflection, however, I realize that my standing here as the President of the American Society of International Law actually has everything to do with criminal law. My first position out of law school was as a law clerk to U.S. Federal District Judge Barrington D. Parker (Senior) in Washington from 1977 to 1979. Judge Parker presided over a nine-month criminal jury trial arising from the brutal 1976 assassination of former Chilean Ambassador Orlando Letelier and Roni Moffitt, his assistant at the Institute for Policy Studies. The

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defendants at trial were three Cuban mercenaries and an expatriate American member of General Pinochet's Chilean secret police (DINA), Michael Townley, who actually placed the bomb in Letelier's car. Several Chilean secret police officers were also named as defendants but, of course, they were not extradited and were not present. Certain moments from the trial remain vivid to me to this day, including the surprise question to Michael Townley that silenced the courtroom: "Do you regret what you did?" Before defense counsel could object, he answered absolutely impassively: "I was a soldier; he was a soldier."

If anyone had told me back in 1978 that DINA officers Manuel Contreras and Pedro Espinoza would be prosecuted and convicted in Chile in 1993, I would never have believed it. Nor would I have believed the broader legal developments surrounding Pinochet. But such *can* be the power of law, international and national.

It was this trial that sparked my interest in international law and procedure (which I had not studied at the University of Chicago Law School), in particular in comparative law, treaty law, international discovery, and related international relations aspects.

Interestingly, the bombing took place at Sheridan Circle, only some twenty-five yards from ASIL headquarters at Tillar House. And so I cannot enter or leave Tillar House without reflecting on the murders and, far less important, on the impact the Letelier-Moffitt criminal trial had on my career in international law.

On third reflection, I would be remiss not to add that a Nuremberg prosecutor also had a great impact on my career. Bernie Meltzer was by far my most influential professor in law school. The subject matter of his courses does not really matter—well, evidence, yes, but labor law, no. It was Professor Meltzer’s mastery of the Socratic method that matters. I do not think I approach a single hard legal problem without a flashback to his classroom, and his saying: “Now, Ms. Reed, are you sure?—sure?—about that answer? Yes? Then let’s see where that takes us”

It was also Professor Meltzer who suggested the topic for my law review comment, on the necessary liberalization of the evidentiary standards for rape convictions. This has served me well as I watch what international prosecutors are doing with the international prosecution of rape, now recognized as a war crime.

As is obvious, my career has not been in international criminal law. It has been primarily in international arbitration. This is where my opportunities happened to fall, in large part because of the Iranian Revolution in 1979. At my first law firm (Wald, Harkrader & Ross), we represented several claimants before the Iran-United States Claims Tribunal in The Hague, set up under the Algiers Accords after the hostages were released and frozen Iranian assets returned, to resolve government claims and claims of U.S. individuals and corporations against Iran for expropriation and breach of contract. When I joined the State Department Legal Adviser’s Office, I represented the U.S. in claims against the Islamic Republic and

ultimately became the U.S. Agent to the tribunal (equivalent to the U.S. Attorney). Many of us in the international claims field got our start with this tribunal.

Although my private practice now focuses on international commercial arbitration and investment treaty disputes, what bears relevance tonight is my work with international claims tribunals. These include not just the Iran-U.S. Claims Tribunal, but also the UN Compensation Commission (UNCC), the Claims Resolution Tribunal for Dormant Swiss Bank Accounts (CRT) and the Eritrea-Ethiopia Claims Tribunal (EECC). I have been privileged to have many roles with these tribunals: advocate, government agent, arbitrator, director. And, in thinking about what to say tonight—with ASIL Executive Director Betsy Andersen's prompting—I realized that such tribunals have certain interesting connections to what international criminal prosecutors do. This is the case even though none of "my" tribunals was a genocide or other post-atrocity tribunal, which is new territory.

In international claims practice (which is a very small practice area, as is international criminal practice), in one sense we come at what we do from the opposite direction prosecutors do. At the risk of simplifying, the primary goal of prosecutors is to punish the perpetrators of international crimes, (ideally) to deter future violations and (ideally) thereby avoid future victimization. Our goal is to compensate or otherwise directly relieve the suffering of victims of past international law violations, criminal or civil.

But we clearly are working toward the same goal. Bringing criminals to justice is also a tribute to their victims, and it helps restore dignity to victims and bring closure to their families.

I can readily assure you that we recognize and hugely respect the importance of what international prosecutors do and have done. To the extent they are aware of victims' compensation tribunals and programs, I am confident they recognize the importance of what we do. Viewed together, these two "pieces" make a great deal of sense, potentially creating a synergy and magnifying the results of what each group does.

Despite the potential synergy, I actually do not expect that—other than in connection with the Victims Trust Fund under the Rome Statute—international prosecutors likely know a great deal about claims tribunals or programs. Nor should they. You could say we operate in a universe parallel to theirs: we try to obtain very small amounts of money or assets for very large groups of people, very fast, on the basis of very low standards of proof and overall very "rough justice."

Before discussing certain characteristics of claims tribunals, I will alert you that I want you to remember only one thing from my talk tonight. It is this: *if* those of you who are prosecutors are asked to lend your provenance to assist with a compensation program for victims of your defendants, *please* do not let your colleagues start them from scratch. This has happened all too often in the past. The expertise necessary is different than that at your disposal. The expertise is now

available. So, *please* do not do the victims the disservice of not calling upon it.

*Victims' Compensation Commissions versus
International Criminal Prosecutions*

My plan is to describe certain aspects of international claims programs that should catch the attention of international criminal prosecutors.

As background, it is easy to think of the compensatory, deterrent and retributive functions of a justice system as inextricably linked because the need for compensation and the need for deterrence and retribution so frequently arise from the same wrong. Particularly in the international arena, however, the systems aimed at deterring and punishing criminals do not resemble the systems aimed at directly compensating victims. No brief talk could do justice to the dozen or so claims commissions that have succeeded at their tasks over the past twenty years, but I will give a flavor of what they add to the international plane by sketching three institutional characteristics that many of them share. All three—which are different aspects of “rough justice”—highlight points of contrast with international criminal proceedings.

(1) Fixed Compensation Categories

First, in keeping with their civil nature, victims' claims commissions give remedies in the form of monetary compensation or asset restitution. There is no

punishment component. Commissions that award monetary compensation, in particular, approach remedies very differently than criminal tribunals do. Typically, claimants are grouped into broad classes based on the type of harm they suffered, and each member of the same class receives the same fixed amount if she or he satisfies certain criteria.

This fixed amount can be extremely small relative to the harm suffered. For example, let me mention the UN Compensation Commission, set up after Iraq's unlawful invasion of Kuwait. There, the UN found Iraq at fault; the UNCC's job was to identify and compensate victims. Successful individual claimants who were classified as Categories "A" (those forced to flee Kuwait after the invasion), "B" (those who suffered serious personal injury or death of close family member) and "C" (business losses of less than \$100,000) received priority early payment of the fixed sum of \$2,500 each. On the one hand, this sum may appear insultingly insufficient: in no way can \$2,500 make a victim who has lost a child or parent "whole." However, given that *2.6 million claims* were filed with the UNCC—all but 7,000 of which were filed by individuals—only broad classifications and small fixed sum awards could avoid both the Scylla of a never-ending process and the Charybdis of inadequate funds. At the end of the day, millions of "small claimants" received "small awards" that added up to billions of dollars. (Payment, of course, came from the UN Oil for Food Program, but that is a story for another day.)

I am particularly proud of this aspect of the UNCC. Several of us at the State Department Legal Adviser's Office who helped set up the UNCC after the Gulf War were veterans of the Iran-U.S. Claims Tribunal. There, we had been responsible for prosecuting cases for "small" U.S. claimants—those with claims of \$250,000 and less—against Iran. For reasons too complicated to go into (but not for want of our trying), the small claims were delayed for many years and corporate claimants were paid first. This meant that those who needed funds the most—the individuals who had to flee Iran after the Revolution, in many cases leaving all their belongings and new small businesses behind—were among the last to be compensated. We were all determined not to let this happen again with Iraq, especially to the many "guest workers" who had to flee Kuwait with nothing. Hence the priority treatment of individual small claims at the UNCC. The operative theory is that "rough justice"—getting lower sums to more people, quickly—is better than justice long delayed or no justice at all.

Not all claims tribunals award funds. Some seek to restore assets following a conflict. The recent real property commissions have been surprisingly successful. The mandate of the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), set up under the Dayton Peace Agreement, was to identify and return real property to claimants who had been forced to sell or abandon their homes during the war in Bosnia and Herzegovina. There was a significant infrastructure, but the arbitrators also worked on foot in the field. The Commission processed approximately 300,000 claims. Although Dayton envisioned the award

of monetary compensation to claimants who could not or elected not to return to their homes, funds were limited and so claimants in fact often took Commission-awarded certificates of title. A parallel real estate market developed, as they swapped those certificates for valid title to homes in places where they could realistically relocate. A second such tribunal, the Kosovo Housing and Property Claims Commission (HPCC), had processed 29,000 real property claims as of 2006. All in this audience surely recognize the value of secure homes in restoring victims' lives post-conflict.

(2) Low—Very Low—Standard of Proof

A second notable feature of claims commissions is that they process victims' claims in ways resembling arbitration or administrative proceedings. From the criminal perspective, the administrative proceeding must appear particularly foreign: neither side has an advocate, the tribunal has extremely broad fact-finding powers, and sometimes claims are determined solely on the strength of written applications processed by non-legal field staff.

Both arbitration-style and administrative-style claims commissions employ a "relaxed standard of proof" to establish the facts of a particular case or category of cases. A "relaxed" standard is necessary either because of, first, the sheer number of claims based on the same or a related set of events (for example, an ethnic cleansing campaign) or, second, the lack of "normal" evidence following those events (for example,

when those fleeing a conflict cannot be expected to have land records).

Let me give you some concrete examples. First, in the UNCC, there was a presumption of unlawful expulsion for any individual Category “A” claimant who could produce a passport or other basic document showing he or she had been in Kuwait at the time of the invasion and had left. Second, the Bosnia-Herzegovina Real Property Commission did not require proof of ethnic cleansing, or of a causal link between an act of ethnic cleansing and a property transfer, to grant a claim. Rather, the Commission operated on the presumption that any displaced person was displaced because of the war, and made its decision based only on the claim as filed and available public materials.

Third, let me mention the Claims Resolution Tribunal (CRT) for Dormant Swiss Bank Accounts in Switzerland, where I served as co-director for the first phase. This was the tribunal set up as a result of the extraordinary efforts and persistence of Paul Volcker and the World Jewish Congress (and others) to find and return funds in post-World War II dormant Swiss bank accounts to the rightful owners or their heirs. The first phase of the CRT involved the efforts to match approximately 5000 accounts to claimants. The standard of proof was “*plausibility in light of all the circumstances*” that a claimant was entitled to a particular dormant account. I hardly need mention to this audience that relatives of Holocaust victims lacked the death certificates and account passbooks that Swiss banks had originally demanded to allow withdrawals.

The relevant rule (Rule 22 of the Rules of Procedure) elaborated on the standard of “plausibility” as follows:

The Sole Arbitrators or the Claims Panels shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts. A finding of plausibility requires, inter alia, that all documents and other information have been submitted by the claimant regarding the relationship between the claimant and the published account holder that can reasonably be expected to be produced in view of the particular circumstances, including, without limitation, the history of the claimant's family and whether or not the published account holder was a victim of Nazi persecution; and that no reasonable basis exists to conclude that fraud or forgery affect the claim or evidence submitted; or that other persons may have an identical or better claim to the dormant account.

Such “relaxed” standards of proof obviously are wholly inappropriate in a criminal proceeding, which demand proof of a defendant’s guilt beyond a reasonable doubt. But, they are perfectly legitimate in a civil

proceeding where the *fact* of loss and not *fault* for loss is the central concern to the tribunal.

(3) Mass Processing Techniques

My third and final point of contrast is that claims commissions, unlike international criminal prosecutions, must employ specialized methodologies to process hundreds, thousands, or even millions of claims. These have come to be called, aptly, “mass claims techniques.” Those of you familiar with mass tort and insurance litigation in the United States will recognize many of these techniques, such as statistical sampling and modeling, computerized “matching,” and standardized methods for verification and valuation of claims. The UNCC, for example, pioneered the acceptance of computerized claims forms, and then used computer programs to match and group similar claims together. Here is a simplified example of how the techniques might work: country X submits business loss claims for 500 nationals, each with its own claim form and supporting evidence; the commission staff or arbitrators scrutinize a statistically relevant sample of files; if only 40 percent of the claimants meet the standard of proof, that group of claimants receives only 40 percent of the fixed recovery amount—a process that encourages careful national review of claims before submission.

These techniques are essential to getting compensation fairly but urgently to the neediest victims. Because “mass claims techniques” are critical to the success of any victims’ claims program, the

administrative and technological needs of any criminal victims' commission will be quite different from those in most cases before an international criminal tribunal. Criminal tribunals must manage vast quantities of evidence for one defendant; claims commissions must manage small amounts of evidence for vast numbers of claimants. There is a great premium on, among other things, computer programming skills.

This is not to say that claims commissions are all "process" and no empathy. The staff and judges also read and listen to many, many victims' stories. That was certainly our experience during the first phase of the CRT. It is the case for me now on the Eritrea-Ethiopia Claims Commission, where we receive witness statements and some oral testimony.

Let me just say a word about the Eritrea-Ethiopia Claims Commission, on which I sit as one of five commissioners. The other commissioners are George Aldrich, John Crook, James Paul, and President Hans van Houtte. We are the first international tribunal set up to decide civil liability for violations of international humanitarian law committed in the course of the hugely destructive boundary war between those countries that ended with a peace agreement in 2000. Eritrea and Ethiopia chose not to pursue mass individual claims, as was allowed in the peace agreement, but instead to espouse their nationals' claims. This means that the EECC is not a mass claims tribunal, although it shares common features of "rough justice" with such tribunals, because the governments' claims are based on large classes of people: POWs, expellees, national civilian

victims of various alleged abuses. The record includes written witness statements, claims forms, and collations of factual evidence. If you read the Commission's liability awards, which are posted on the website of the Permanent Court of Arbitration, you will see that we found each government liable for various violations of international humanitarian law, including mistreatment of POWs and detainees, physical abuse and mental abuse, occasional rape, forced labor, and property destruction. We also found that Eritrea violated the *jus ad bellum* in its original invasion of Ethiopia. We are deliberating the damages award now. You will appreciate that I cannot comment. But, if you ever wondered what countries might claim for Geneva Convention violations in the course of a war—if you ever wondered about the math—I am comfortable telling you that these two countries are claiming many, many billions of dollars from each other. Whether or not there is exaggeration, the truism holds that the costs of a war on the civilian population far exceed the costs of waging that war.

Recent Developments and Existing Resources

I could describe more characteristics of compensation commissions, but these should serve to illustrate that their goals, methods, and infrastructures differ significantly from international criminal tribunals. The conventional wisdom—and I share it—is that international civil and criminal tribunals are most effective when they operate as separate institutions. Criminal justice must be slow and careful if it is to

provide a fair conviction; victims of crime must be compensated quickly with “rough justice” if they are to regain dignity and rebuild their lives. International criminal justice has traditionally assigned victims a limited role in the proceedings, typically only as witnesses (if they will come forward). While this is changing some in ICC practice, my guess is that, even there, victims will not be at the heart of proceedings, as they are in compensation commissions.

In my view, to unite the processes of criminal justice with compensatory justice in a single international institution could set up that institution for double failure: first, failure to compensate effectively, and second, failure to establish legitimacy on the world stage. The first failure is clearly the more important to victims, but the second is important to those of us who believe that effective international criminal institutions—and the end of impunity—are a prerequisite of international justice.

The idea that criminal prosecution and victims’ compensation should be separate has been criticized by commentators who, in my view, confuse the separation with a judgment valuing one over the other. It is not a matter of the relative importance of these two functions, but of their procedural and evidentiary differences. The ICTY recognized this in the late 1990s, when international pressure prompted it to consider amending its authorizing statutes so that it could award compensation to victims of convicted defendants. The ICTY Rules Committee rejected the proposed changes, concluding that a victims’ compensation function would create incentives for shorter trials, increase prosecutor

workload, undermine the legitimacy of convictions, and put pressure on already-tight budgets. The “far better approach,” in its view, would be to establish an international claims commission to operate parallel to the tribunal.

The drafters of the Rome Convention followed this “better approach” when they established the ICC in 1998. Instead of appending a compensatory function to the Court itself, the drafters created a separate institution—the Trust Fund for Victims—to “advocate for and assist” victims of genocide, war crimes, and crimes against humanity. The Assembly of States Parties to the Rome Convention adopted final regulations for the Victims Trust Fund in 2006, which specify that the Fund’s directors may provide assistance to victims before, after, or during an ICC prosecution, or in spite of an ICC decision not to prosecute. With only four formal links with the ICC under the Rome Convention, the Fund effectively operates independently. The four formal links are these: (1) the Fund exists as a resource only for states that have agreed to ICC jurisdiction; (2) the Fund may act only where the ICC *could* have jurisdiction, that is, where a state party, the UN Security Council, or the Prosecutor could make a plausible case that an individual committed serious international crimes within the boundaries of another state party; (3) where the Fund seeks to act after an ICC prosecution has begun, it must so inform the relevant Chamber, observe certain waiting periods, and cease or modify its efforts if they would pre-determine an issue or interfere with the rights of the accused; and (4) where the ICC chooses to order a convicted defendant to pay

compensation or reparations, such funds will be deposited with the Fund for disbursement to victims.

The Trust Fund's formal connections with the ICC do not impede its directors from adopting the mass claims techniques, administrative approach, and lower standards of proof that characterize other claims commissions. In fact, although the Fund only began operations in early 2007, it has developed standard claim forms accessible on-line, which are designed much like UNCC or CRT claim forms. The Fund is presently conducting outreach efforts in Uganda and has begun planning assistance efforts for war victims in the Congo. It is early days for the Fund, which has limited resources, but it is definitely worth watching and supporting. I have some concerns about mixing witness testimony and compensation, but others who know more than I must have thought this through. What I do know is that it is *not* an impossible dream that convicted war criminals who have stolen and hidden vast assets (for example, from trade in diamonds or slaves) may one day see their fortunes found and given to victims. Prosecuting Letelier's Chilean assassins, and finding dormant Swiss bank accounts, were once also thought to be impossible.

This does not have only to do with the ICC. I expect that all international criminal prosecutors care deeply about victims' rights and reparations. More practically, I expect that international criminal prosecutors are, or will be, approached to support victims' compensation efforts, or at least to lend their substantial provenance to such efforts. I certainly do not argue, as some do, that prosecutors are *responsible* for

ensuring that criminal tribunals compensate victims for their losses. But, as someone coming from the victims' claims side of the fence, I see prosecutors as *well-placed* to support such efforts.

In the spirit of the International Humanitarian Law Dialogs—which is to share lessons learned, to strengthen IHL from one prosecutor to another and from one court to another—I want to share one of my greatest frustrations. My experience is that those who are involved with the concept or birth of a claims program—for which they deserve great credit—understandably want to run the program: write the rules, draft the claims forms, set up the systems. They feel entitled to *own* the program. Many unnecessary mistakes follow. I have written about the procedural shortcomings of the Claims Resolution Tribunal; for example, the claims forms were not drafted to allow sorting by age, so the oldest Holocaust victims could not be identified and prioritized; the Swiss banks controlled the budget on a short term basis; claimants had no advocates. I offered advice pro bono to one of the major Holocaust tribunals that followed the CRT, to no avail, and was sorry to learn later that the staff—idealistic but inexperienced staff—was repeating the same mistakes. This tendency could well be compounded for war crime compensation commissions.

Hence my plea: *if* those of you who are international criminal prosecutors are asked to support or help establish a victims' claims compensation program, *please* be aware that there are now excellent resources to call upon. Both the Permanent Court of Arbitration

(PCA) in The Hague and the International Organization for Migration (IOM) in Geneva have developed best practice guides that distill the experience of past commissions for new arrivals to the field. The IOM, in particular, has substantial computer and other technical expertise, having run a number of programs, including the German Forced Labour Compensation Program, the Holocaust Victim Assets Program, and the Iraq Property Claims Program. It is true that each new commission must be tailored to its unique circumstances—whether ethnic cleansing, mass murder, unlawful treatment of civilians in a border war—but many procedural basics remain constant across those circumstances. Much is specialized management.

This is not just about practice guides, but also about people. Talented and dedicated people. The commissions are frequently staffed with alumni of former commissions, who are more than willing to assist in, or at least advise on, new efforts. I hesitate to use the charged word “mafia” with this group, but there *is* something of an international claims mafia, dating from the Iran-U.S. Claims Tribunal days. I refer you in particular to Dr. Norbert Wuehler, head of IOM claims programs.

As I said, we are not too proud to admit that we learned many lessons the hard way. We would rather not see them repeated. There are enough legitimate problems in any new program for deserving victims, especially for victims of genocide and other atrocities.

Conclusion

It has been a long and productive day, and tomorrow will bring another one. I hope I have left you with some interesting and useful information about international compensation commissions and, most important, with a few concrete starting points for those of you who—by choice or necessity—wish to learn more. In a nutshell: you know where to find me, or Norbert Wuehler, or others.

I'll conclude with this. Like many, I've been following the recent and long overdue capture of Bosnian Serb leader Radovan Karadžić. I've read about the celebrations by the victims of his vicious ethnic cleansing campaign in Bosnia. Knowing I would give this talk, I clipped a story about a Mrs. Sabaheta Fejzic, whose husband and only child were among the 8,000 murdered at Srebrenica. She expressed hope to a reporter that Karadžić would be punished and that such punishment would enable her to move on from her loss.¹ I have no doubt that Mrs. Fejzic would also benefit from monetary compensation—no matter how small, as the symbolic value will always dwarf the dollar or euro amount. The capture of Karadžić presents—afresh—the

¹ *Karadžić Trial Revives Bosnian Hopes for Justice*, ASSOCIATED PRESS, July 26, 2008, available at <http://www.cbsnews.com/stories/2008/07/26/ap/world/main4296958.shtml> (last visited Aug. 1, 2008). See also David Berry, *Karadžić Arrest Hailed as a Triumph for Victims and for Justice*, Open Society Justice Initiative, July 22, 2008, available at http://www.justiceinitiative.org/db/resource2?res_id'104118 (last visited Aug. 1, 2008).

opportunity not only for victims like Mrs. Fejzic to obtain a sense of justice for their losses, but also for us as an international community to reflect on whether international criminal justice is adequate—and, if not, how to mine lessons learned from international claims commissions to complement it.

If Professor Meltzer were here, he would ask if I were “sure? sure?” I had said all I wanted to say. That I’m not sure of, but I am sure that I have said all you—in the international criminal prosecutors’ community—need to hear. I thank you.

Conclusion

**A Bright and Shining Light:
The Genocide Convention and the Establishment
of Modern International Criminal Law**

David M. Crane*

*Concluding Reflections on the
2nd Annual International Humanitarian Law Dialogs*

Each year in the waning days of summer, on a lake in upstate New York, a remarkable group convenes to discuss key issues related to international humanitarian law. The International Humanitarian Law Dialogs at the Chautauqua Institution are remarkable in the depth and scope of the discussions surrounding those key issues that challenge modern international criminal law.

The dialogs in the summer of 2008 considered the Genocide Convention, its history, its importance, and its future viability in the twenty-first century. As always, most of the current and past international prosecutors were in attendance from the International Military Tribunal at Nuremberg to the International Criminal Court.¹

* Professor, Syracuse University College of Law and former founding Chief Prosecutor, Special Court of Sierra Leone, 2002-2005.

¹ Present were the three living trial counsel at Nuremberg: Whitney Harris, Henry King, and Ben Ferencz; representing the ad hoc tribunals were the current Chief Prosecutors, Serge Brammertz from the International Criminal Tribunal for the Former Yugoslavia (the ICTY) and Hassan Jallow from the International Criminal Tribunal for Rwanda (the ICTR); from the hybrid international tribunals were

Additionally, leading practitioners and academics enriched the dialogs with their commentary and perspectives.

The Genocide Convention has had an interesting history. Conceived by Raphaël Lemkin in the middle of the last century, this tireless advocate of justice literally walked the halls seeking support for this new international crime he called genocide. The history of the twentieth century is one of horror and atrocity. I call it *the bloody century* which saw the destruction of over 200 million human beings, half of them at the hands of their own governments. Mega murderers such as Mao Tse Tung, Joseph Stalin, King Leopold II of Belgium, Adolf Hitler, and Pol Pot collectively were individually criminally responsible for the murder of around 115 million human beings, a staggering statistic indeed! Sadly, none of them were held accountable for these atrocities.

It is only in the late 1940s where one sees what I call a “bright and shining moment” in time with the establishment of key legal principles that formed the cornerstone to modern international criminal law. The first stone set was the principles established at Nuremberg. The second stone was the Charter of the United Nations, followed by the laying of a third stone, the Universal Declaration of Human Rights. The fourth

David Crane and Stephen Rapp, both of the Special Court for Sierra Leone; from the Extraordinary Chambers in the Courts of Cambodia was Robert Petit; and, finally, from the International Criminal Court, Fatou Bensouda.

stone was the Genocide Convention² and, a year later, the Geneva Conventions of 1949. From all this, the political, diplomatic, and legal floor was laid for holding accountable those who act with impunity.

Sadly, this important legal floor, so to speak, was carpeted with the bizarre and insane political paradigm of the Cold War that saw two super powers locked in a death grip of mutually assured destruction. The world split in two with tyrants, thugs, and cynical warlords taking political advantage of the nuclear stalemate to stay in power and have their way with their own citizens. War crimes, crimes against humanity, and genocide were not addressed by the international community during this time despite the mandate that they be investigated and prosecuted.

It was only after “the fall of the wall” that we see efforts made to account for international crimes such as genocide. The first test was in the Balkans, the second in Rwanda, followed several years later in Darfur. Indictment and convictions for genocide followed with the creation of the various ad hoc tribunals. It looked as if the “crime of crimes” was finally being dealt with. Several years later in Darfur, the mass killings stymied the international community as debate raged on whether

² The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A, at 78, U.N.T.S. 277 (Dec. 9, 1948).

what was allowed to happen there was genocide. That debate continues to this day.³

The crime of genocide has been forever codified in the Rome Statute. The convention drafted and signed in the 1940s lives on in that statute. The challenge to finding genocide is not just a legal one, but a political one. The bright red thread of politics that runs throughout international criminal law is a very real challenge to the Genocide Convention. Mouthing the word “genocide” causes mandatory actions by nations all too weary of international crimes. Politically, the word “genocide” is a bombshell, its very invocation apparently to be avoided at all costs. For this, the practical validity of the Genocide Convention remains in doubt. Coupled with a so-called “semantic indifference” related to mass atrocity, the confusion with a crime against humanity and genocide allows cynical politicians and diplomats to use that semantic confusion to act in ways that may go against the very intent of the convention itself.

Despite these challenges, the very fact that mankind has identified a crime of such magnitude which encompasses acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, will hopefully deter future genocide. Of such a crime, “never again” is entirely appropriate. The insights, discussions, and commentary contained in this

³ It will be interesting to see whether the Pre-trial Chamber of the International Criminal Court returns the indictment against President Omar Al Bashir of the Sudan with or without the charge of genocide.

volume highlighting the proceedings reflect the challenges, controversy, and the difficulty of preventing and punishing genocide. From my point of view, we are only at the beginning of a beginning of mankind's reigning in the beast of impunity that fed so ravenously around the periphery of civilization in the twentieth century, the bloody century. The Genocide Convention will be one of the legal weapons to slay that beast.

The editors of this book on the proceedings of the Second Annual International Humanitarian Law Dialogs honoring the sixtieth anniversary of the Genocide Convention wish to thank its many sponsors: the American Society for International Law; the Chautauqua Institution; the Enough Project; the Fred K. Cox Center of Case Western Reserve University School of Law; the Harris Center at Washington University in St. Louis School of Law; the Robert H. Jackson Center; and Impunity Watch of Syracuse University College of Law. Without their support, these dialogs could not take place.

Special thanks go to the staff of the Robert H. Jackson Center and the Chautauqua Institution, who worked tirelessly behind the scenes to ensure that the dialog participants enjoyed a comfortable and relaxed event. They were magnificent in this effort. The quiet professionalism displayed by the law students from Impunity Watch of Syracuse University College of Law in acting as rapporteurs helped capture the key aspects of the dialogs themselves.

We look forward to the 3rd Annual International Humanitarian Law Dialogs to be held at the Chautauqua

Institution, August 31 – September 1, 2009, honoring women in international criminal law from Nuremberg to the International Criminal Court.

Appendices

Appendix I

Second Annual International Humanitarian Law Dialogs August 25 - 26, 2008 at the Chautauqua Institution

Rapporteurs' Summary of the Dialogs

The Genocide Convention: A Sixtieth Anniversary Celebration

Prosecutors:

- Whitney R. Harris, *International Military Tribunal (IMT), Nuremberg*
- Henry T. King, Jr., *IMT & United States Military Tribunals, Nuremberg*
- Benjamin B. Ferencz, *United States Military Tribunals, Nuremberg*
- Serge Brammertz, *International Criminal Tribunal for the former Yugoslavia*
- Hassan Jallow, *International Criminal Tribunal for Rwanda*
- David M. Crane, *Special Court for Sierra Leone*
- Stephen Rapp, *Special Court for Sierra Leone*
- Fatou Bensouda, *International Criminal Court*
- Robert Petit, *Extraordinary Chambers in the Courts of Cambodia*

Speakers:

- Robert C. Krueger, *former United States Senator and Ambassador*
- Mark A. Drumbl, *Washington & Lee University School of Law*
- Omer Ismail, *ENOUGH! Project*
- Clint Williamson, *Ambassador at Large for War Crimes Issues, U.S. Department of State*
- Michael P. Scharf, *Case Western University School of Law*
- Leila Nadya Sadat, *Washington University School of Law*
- Lucy Reed, *American Society of International Law, President*
- Michael A. Newton, *Vanderbilt University School of Law*
- John Q. Barrett, *St. John's University School of Law*
- Grace Akallo, *former child soldier in the Lord's Resistance Army*

**Second Annual International Humanitarian Law
Dialog Summary**

***Around the World Report from the Current
Prosecutors on the Current Issues They Face Today***

Leila Sadat opened the dialogue by welcoming the audience and thanking them for attending a gathering that she referred to as “sacred.” She told the audience that each of the individuals on the panel was serving on a war crimes tribunal and that in doing so he/she had been “called upon in a significant way to do God’s work.” She expressed delight in the privilege to moderate the discussion, and she thanked David Crane for his leadership in assisting with the event. She then assured the audience that they would have the opportunity to engage the panel in a question and answer session after they had the opportunity to make some introductory remarks about themselves and the work they do.

Ms. Sadat began the discussion with the theme that “international criminal justice is about ideas, it’s about changing the way people think.” She remarked that each of these prosecutors has an extraordinary job—each has been tasked to provide remedies to unspeakable atrocities that even politicians and ambassadors have been unable to resolve. She reminded the audience that these attorneys work without the benefit of police and investigation resources, and that their work necessarily spans a variety of languages and cultures, which in many cases are foreign to them. She also noted that these lawyers work on a limited budget, and that to be

successful, they must be “brilliant lawyers both in and out of court.” Turning her attention to the panel, Ms. Sadat then invited Serge Brammertz, prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY), to talk for a few minutes about his work at the ICTY.

Mr. Brammertz began with a brief explanation of the history of the ICTY. He explained that the ICTY is fifteen years old, and that 161 people have been indicted since the court’s inception in the early ‘90s. He then told the audience that several cases are still ongoing, with only two persons still at large.

Mr. Brammertz then talked about the recent arrest of Radovan Karadžić and how important it was for the overall success of the tribunal. He noted that it took much longer to arrest Karadžić because of the difficulty in acquiring evidence. He explained here that the cooperation we see now between Serbia and the ICTY was not always there, and that this, in part, caused some delays. Reflecting on the importance of Karadžić’s arrest to him personally, Mr. Brammertz explained that, during his first visit to the region, he met with an organization called ‘Mothers Against Srebrenica.’ This group consisted of mothers whose sons had been executed during the Bosnia wars of the 1990s. When Mr. Brammertz thinks about the prosecution of Karadžić, he recalls this group who lost their loved ones.

Referring to the two remaining fugitives at large, Mr. Brammertz expressed his hope that the Government of Serbia will assist in their capture. He explained that

cooperation with Serbia was crucial, because there is simply no other way to capture these fugitives—the ICTY is without a police force. And while the ICTY is set to expire soon, Mr. Brammertz remarked that “what is as important as a tribunal is what happens after a tribunal.” He explained that there will be a great need to transfer hundreds of cases from the tribunal to regional courts that are equipped to handle the prosecutions. In this regard, Brammertz said that the ICTY is quite extraordinary: fifteen years ago it was impossible to imagine that war crimes prosecutors in Bosnia could conduct their own investigations with any success.

Ms. Sadat then thanked Mr. Brammertz for his talk and introduced Mr. Hassan Jallow, prosecutor for the International Criminal Tribunal for Rwanda (ICTR).

Mr. Jallow introduced himself as a lawyer from Gambia and as prosecutor of the ICTR since 2003. He also began with a brief history of the court, saying that the tribunal was created in 1994, and that since that time, eighty-nine people had been indicted. Thirty-four of these cases have been completed thus far, with twenty-eight convictions. Thirty-eight persons are under indictment, but have yet to be arrested. Mr. Jallow also noted that, like the ICTY, the ICTR is an ad hoc court that depends upon the cooperation of foreign governments for the administration of justice.

Mr. Jallow discussed the fact that the ICTR operates from Tanzania, far from the scene of the crimes occurring in Rwanda for which its defendants are on trial. Like the ICTY, a large number of trials will need

to be transferred to other courts, and he pointed out that this is a big loophole in the system. “Without other courts stepping up to take on these cases,” he commented, “people will be walking around free.”

Mr. Jallow also noted the importance that the ICTR has had on legislative reform. In Rwanda, the ICTR influenced the legislature to abolish the death penalty. While many other jurisdictions still provide for death as a punishment, Rwanda now caps its maximum penalty at life imprisonment.

Continuing the discussion, Ms. Leila Sadat briefly commented on the nature of the ad hoc tribunals established by the United Nations Security Council. She noted that the ad hoc tribunals were criticized on the basis of cost and being too international rather than community-based. Ms. Sadat mentioned the Special Court for Sierra Leone and its hybrid design—integrating both international and national authorities. Stephen Rapp then began his report from his post as the third Chief Prosecutor of the Special Court for Sierra Leone.

Mr. Rapp began his report emphasizing the difference of the Special Court, noting that it has a more limited mandate. The court, Mr. Rapp explained, is not prosecuting those who are simply responsible for criminal acts. The court is only prosecuting those who bear the greatest responsibility for the atrocities that occurred in Sierra Leone. Further describing the court’s mandate, Mr. Rapp stated that there were thirteen initial indictments and no guilty pleas. Emphasizing

Ms. Sadat's comments on the hybrid nature of the court, Mr. Rapp described the appointment process of judges to the court, conducted by both the United Nations and the authorities of Sierra Leone. The audience was informed that 60 percent of those working in the court are from Sierra Leone. Concerning funding, Mr. Rapp explained that the court is supported by voluntary contributions, which it can only raise from states. While this arrangement may present funding difficulties, Mr. Rapp pointed out that it does allow the court to have more flexibility as far as the employment of personnel is concerned. Furthermore, Mr. Rapp emphasized that alliances have been developed with human rights organizations, which contribute to the realization of an immense mission well on its way to completion.

Mr. Rapp then described the history and current work of the court, including the indictment of Charles Taylor, the former President of Liberia, by former Chief Prosecutor David Crane. Mr. Taylor was never expected to be brought into custody after seeking refuge in Nigeria. But, he is now on trial at The Hague, and the prosecutors expect a judgment by the end of 2009. Mr. Rapp explained that the greatest criticism of tribunals is that these institutions take too long. He argued that Sierra Leone seems to be operating along a reasonable timetable.

The Special Court is currently attempting to show the linkage between Taylor's actions and the human rights violations that occurred—violence, recruitment and use in hostilities of child soldiers, forced labor, pillage, and sex crimes. Mr. Rapp acknowledged that

many individuals have blood on their hands, like any other instance of joint criminal operations. He advanced the position that the court must define those who were involved in order to get their testimony and prosecute those who bear the *greatest* responsibility for crimes, including heads of state. At this point, Mr. Rapp provided more details of the prosecution record of the court.

The Special Court included the first convictions in the world for the recruitment and use in hostilities of child soldiers, and convictions involving sexual slavery as an outrage against personal dignity, terrorism in accordance with Protocol II of the Geneva Conventions, and perhaps for the crime of forced marriage, which is a charge still pending at the court. Mr. Rapp explained the difficulty of prosecuting individuals who fought on the side of the government against the rebel movements. These forces also committed atrocities but have remained enormously popular within the country. Mr. Rapp then described the active outreach programs in the country, which assist efforts of community engagement and explanation of charges. Thousands of meetings are held each year throughout the country. As a result, 80 percent of the citizens of Sierra Leone consider the tribunal a force for peace and justice.

Mr. Rapp ended his report concerning the design and work of the Special Court with the assertion that the institution must be closed within the time period and within the means of their limited budget in order to have a lasting legacy within the country and beyond.

The discussion then moved to the topic of atrocity in Cambodia. Robert Petit currently serves as the Chief Prosecutor of the Extraordinary Chambers of Cambodia—a hybrid court and the latest addition to the family of tribunals. The court was formed after an agreement between the international community and Cambodia under which judges would have to apply Cambodian law and international law wherever applicable. Mr. Petit considered this blending of two distinct bodies of law the most exacting task upon the tribunal. But, Mr. Petit argued that Cambodia was able to preserve its sovereignty while international norms of due process would be honored.

Mr. Petit turned to the subject of the court's mandate, explaining that it included prosecuting those most responsible for the atrocities in Cambodia, including senior leaders. Mr. Petit explained that this mandate is not the same as the Special Court for Sierra Leone where prosecutions were conducted against those who bore the greatest responsibility—a more limited mandate. The Extraordinary Chambers' mandate, Mr. Petit informed the audience, is bound by the time frame that the Khmer Rouge was in power and undertook its efforts to drastically alter Cambodian society through force and economic policy—1975 – 1979. The tribunal has jurisdiction over genocide, crimes against humanity, war crimes, and national crimes, among others. Victims can become full-fledged parties to criminal prosecutions by filing motions, responding to appeals, introducing witnesses at trial, and requesting the judge to take certain action. Mr. Petit identified this accessibility to the tribunal as a necessity

in its mission due to the fact that it allows victims to personally tell their stories in court. Eighty civil parties, Mr. Petit explained, took part in the first trial—a fact that does admittedly present procedural challenges.

Mr. Petit closed with discussion concerning the problems he has experienced at the Extraordinary Chambers and the issues he expects to persist. He initially emphasized the difficulties of prosecuting crimes that occurred decades ago. The challenge of putting together the most representative image of crimes and identifying those responsible for making the atrocity possible in such a context is formidable. Mr. Petit explained that the ability to prosecute the accused, gather witnesses, ensure the reliability of witnesses' memories, and gather physical evidence is further complicated by continued translation issues and administrative problems, including allegations of corruption. But, he emphasized the importance of convicting the architects of the Cambodian atrocities. Finally, the issue of budgetary concerns was taken up. Mr. Petit described the financial shortages the tribunal has experienced due to its dependence on voluntary contribution. He commented that most of the tribunal's money comes from Japan and France and that the United States is not contributing. He pointed out that the new budget calls for an end to the tribunal's activities in 2011. Mr. Petit expressed his hopes that the time remaining would enable the tribunal to deliver a limited measure of justice in terms of the number of people accused and in terms of how much of the story can be told.

Lastly, Fatou Bensouda described the International Criminal Court (ICC) and her experience as the Deputy Prosecutor of the world's first permanent and independent judicial body of its kind.

Mrs. Bensouda explained the jurisdiction of the ICC after first acknowledging the significance of the date of the Second Annual International Humanitarian Law Dialogs—both the sixty year anniversary of the United Nation's adoption of the Genocide Convention and the ten year anniversary of the adoption of the Rome Statute. The ICC's mandate, Mrs. Bensouda explained, includes prosecution of crimes against humanity, genocide, and the crime of aggression. Mrs. Bensouda emphasized that the ICC must first formally define aggression before it can investigate and prosecute those who commit the requisite crimes.

Describing new legal aspects absent from the ad hoc tribunals, Mrs. Bensouda underscored the fundamental importance of the legal concept of complementarity to the work of the ICC. The ICC's jurisdiction is not primary like that of its member states. Rather, the ICC functions as a court of last resort, pursuing only those cases where a country lacks the capacity or is unwilling to take necessary legal action within its national jurisdiction.

Further describing the structure, mechanics, and current work of the ICC, Mrs. Bensouda informed the audience that the court is based on a treaty, the Rome Statute, and currently 106 countries are "parties" to the treaty. The ICC, Mrs. Bensouda explained, has

jurisdiction over the territory of a state party or a national committing a crime overseas. The United Nations can also refer a case to the ICC for whatever member state, even if that member state has not accepted the court's jurisdiction. The court's investigation and prosecution started in 2005 with its first case referral by the Democratic Republic of Congo (DRC). It is now handling about four active case dockets and investigations have been opened following a referral by the DRC, Uganda, Central Africa Republic, and Sudan.

Mrs. Bensouda explained that the prosecution of Thomas Lubanga Dyilo, former leader of the Union of Congolese Patriots, would likely be the first trial of the ICC. Dyilo will be prosecuted for the serious crime of recruiting and using child soldiers in hostilities. Mrs. Bensouda noted that the Special Court of Sierra Leone had brought similar charges in its work in that African nation. Joseph Kony of the Lord's Resistance Army, which has committed serious crimes in Uganda, was identified as another high profile criminal currently being prosecuted by the ICC. Recently, following a referral by the United Nations, the ICC has sent visitors to Sudan to see if the Sudanese were investigating and following through on allegations of serious crimes. Mrs. Bensouda acknowledged that the Sudanese were not taking the necessary actions. As a result, the ICC was able to start investigations and begin the preparation of criminal indictments. The crime of genocide, Mrs. Bensouda pointed out, was not initially charged due to its high mental requirement, but she argued that the ICC is now satisfied that they can charge the person who

organized atrocity from the highest level of government, Sudan's head of state, Omar Hassan Ahmad Al Bashir.

To conclude, Mrs. Bensouda described the prosecutorial challenges posed by Sudan, and the Darfur region, in particular. She accounted for the primary criticism of the ICC's work concerning Sudan that the peace negotiations should be allowed to continue undisturbed by legal process. Pointing out that there are no effective negotiations going on and peacekeepers are in danger within the country, Mrs. Bensouda argued that the ICC's recent action allows the world community to speak with a strong, clear, and unified voice following a sluggish response and criminal involvement of national authorities in the ongoing hostilities. Criminals, she insisted, most responsible for serious crimes have been emboldened by the slow national and international response, and the world continues to be silent in the face of ongoing crimes.

Following Mrs. Bensouda's concluding remarks on the ICC's work pertaining to Sudan, Leila Sadat closed discussion on the work of the current prosecutors.

Appendix II

Biographies of the Prosecutors and Contributors

Elizabeth Andersen

Elizabeth Andersen is Executive Director and Executive Vice President of the American Society of International Law (www.asil.org), the United States' premier institution for advancing the study and use of international law. ASIL was founded in 1906 by Elihu Root, who served as both Secretary of War and Secretary of State for President Theodore Roosevelt.

Ms. Andersen became Executive Director of the Society in October 2006. Previously, she served as the Executive Director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI) and as the Executive Director of Human Rights Watch's Europe and Central Asia Division.

Before joining Human Rights Watch, Ms. Andersen served as Legal Assistant to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia and as a law clerk to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York.

Andersen is a graduate of Yale Law School, the Woodrow Wilson School of Public and International Affairs at Princeton University, and Williams College. Her area of expertise is international humanitarian, human rights, and refugee law.

John Q. Barrett

John Q. Barrett, a Professor of Law, has been a member of the St. John's University faculty since 1995. Professor Barrett is a graduate of Georgetown University (A.B. 1983) and Harvard Law School (J.D. 1986). From 1986-89, he was a law clerk to Judge A Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit in Philadelphia.

Professor Barrett is the Elizabeth S. Lenna fellow at the Robert H. Jackson Center in Jamestown, New York. He currently is working on the biography of Justice Jackson that will include the first inside account of his year (1945-46) away from the Court as the chief American prosecutor of the principal surviving Nazi leaders at the International Military Tribunal in Nuremberg, Germany.

The Jackson List: Professor Barrett sends out periodic emails with information that relates to Robert J. Jackson. To join the list (where recipient identities and emails remain private), send a note to barrettjstjohns.edu.

Before joining the St. John's faculty, Barrett was Counselor to U.S. Department of Justice Inspector General Michael R. Bromwich, who supervised a staff of almost 400 attorneys, criminal investigative agents, auditors, and inspectors, and had jurisdiction over misconduct and management issues involving DOJ's components and its more than 100,000 employees worldwide.

From 1988-1993, Barrett was Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh

(Iran/Contra), where he was responsible for federal grand jury investigations and related litigation and participated in the criminal prosecutions of Lt. Col. Oliver L. North, Vice Admiral John M. Poindexter, former Assistant Secretary of State Elliott Abrams, and former Secretary of Defense Caspar W. Weinberger.

Professor Barrett's edited version of *That Man: An Insider's Portrait of Franklin D. Roosevelt*, the late Supreme Court Justice Robert H. Jackson's previously unknown memoir of FDR and the New Deal, is now available in paperback from Oxford University Press, in bookstores nationwide and online.

That Man, a Main Selection of the Book of the Month Club and the History Book Club and a Choice outstanding Academic Title for 2005, has been reviewed prominently in the New York Times Book Review, the Washington Monthly, the New Republic and Legal Times, among other publications. Professor Barrett has discussed *That Man* in many major media outlets, including National Public Radio's "All Things Considered." He also speaks regularly about *That Man*, Franklin D. Roosevelt, the Supreme Court, and Justice Jackson in venues throughout the country.

Fatou Bensouda

Fatou Bensouda is currently the International Criminal Court Deputy Prosecutor in charge of the Prosecution Division of the Office of the Prosecutor.

Prior to her current role, Mrs. Bensouda worked as a Legal Advisor and Trial Attorney at the International Criminal Tribunal for Rwanda in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of the Legal Advisory Unit. Before joining the ICTR, she was the General Manager of the leading commercial bank in The Gambia. Between 1987 and 2000, she was successively Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, then Attorney General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia.

Mrs. Bensouda holds a masters degree in International Maritime Law and Law of the Sea, and as such, is the first international maritime law expert in The Gambia.

Serge Brammertz

Serge Brammertz is currently the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. Mr. Brammertz served as Deputy Prosecutor, then Chief Deputy Prosecutor at the Court of First Instance in Eupen (Belgium), before becoming Deputy to the Prosecutor-General at the Liege Court of Appeal. While a National Prosecutor of the Kingdom of Belgium from 1997-2002, Mr. Brammertz was also Scientific Assistant, then Professor of law at the University of Liege. He has served as the Federal Prosecutor of the Kingdom of Belgium and assisted the Council of Europe as an expert mandated with “setting up a mechanism for evaluation and applying

nationally international undertakings concerning the first against organized crime.” He has also served on the Justice and Internal Affairs committee of the European Commission and as an advisor for the International Organization for Migration, leading major research studies on cases of cross-border corruption and trafficking in human beings in Central Europe and the Balkans.

In September 2003, the Assembly of State Parties elected Mr. Brammertz of Belgium as Deputy Prosecutor of the International Criminal Court. In January 2006, UN Secretary-General Kofi Annan appointed him head of the International Investigation Commission into the murder of former Lebanese Prime Minister Rafiq Hariri.

An author on global terrorism, organized crime and corruption, he has published extensively in European and international academic journals.

David M. Crane

David M. Crane was appointed a professor of practice at Syracuse University College of Law in the summer of 2006. For the year prior, he was a distinguished visiting professor of law at Syracuse University. Prior to that time, he was the Chief Prosecutor of the Special Court for Sierra Leone, an international war crimes tribunal, from 2002-2005, appointed to that position by then Secretary General of the United Nations, Kofi Annan, on 19 April 2002. With the rank of Undersecretary General, Professor Crane’s mandate was to prosecute those who bear the greatest responsibility for war crimes, crimes against

humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990s. In March of 2003, he indicted sitting President Charles Taylor of Liberia for war crimes and crimes against humanity—the first African head of state to be so charged.

Professor Crane teaches international criminal law, international humanitarian law, and national security law at the College of Law. Additionally, he is a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture with the Maxwell School of Citizenship and Public Affairs at Syracuse University.

In 2007, Professor Crane launched Syracuse University College of Law's first online law review and public service blog, called Impunity Watch, at www.impunitywatch.net.

Professor Crane served over thirty years in the Federal Government of the United States. Appointed to the Senior Executive Service of the United States in 1997, Mr. Crane has held numerous key managerial positions during his three decades of public service, to include a Senior Inspector General, Department of Defense, Assistant General Counsel of the Defense Intelligence Agency, and Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School.

Various awards include the Intelligence Community Gold Seal Medallion, the Department of Defense/DoDIG Distinguished Civilian Service Medal, and the Legion of Merit. In 2005, he was awarded the Medal of Merit from Ohio University and the Distinguished Service Award from

Syracuse University College of Law for his work in West Africa. Professor Crane was awarded a George Arents Pioneer Medal from Syracuse University in 2006 for his work in international criminal law. Also, in 2006, he was given the keys to the City of Highland Park, Illinois where he went to high school. Prior to his departure from West Africa, Professor Crane was made a Paramount Chief by the Civil Society Organizations of Sierra Leone.

Professor Crane lectures all over the world on bringing justice to victims of atrocity and has written extensively and been interviewed widely on national security and international humanitarian issues.

Mark A. Drumbl

Mark Drumbl is the Class of 1975 Alumni Professor at Washington & Lee University, School of Law, where he also serves as Director of the University's Transnational Law Institute. He has held visiting appointments on the law faculties of Oxford University (University College), Université de Paris II (Panthéon-Assas), Vanderbilt University, University of Ottawa, Trinity College-Dublin, University of Western Ontario, and University of Illinois College of Law.

Professor Drumbl's research and teaching interests include public international law, global environmental governance, international criminal law, post-conflict justice, transnational legal process, and contracts. His book, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007), which has received

critical acclaim, rethinks—in theory and in practice—how individuals who perpetrate genocide and crimes against humanity should be punished.

Atrocity, Punishment, and International Law received the 2007 Book of the Year Award by the International Association of Criminal Law (U.S. national section). Reviews of *Atrocity, Punishment, and International Law* appear in the legal literature, including in the Buffalo Law Review, Jura Gentium, Michigan Law Review, the Journal of International Criminal Justice, the American Journal of International Law, the Journal of Criminal Law and Criminology, the Chinese Journal of International Law, the International Journal on World Peace, the International Journal of Transitional Justice, the Leiden Journal of International Law, the Melbourne Journal of International Law, Peace and Change, Human Rights Quarterly, and the N.Y.U. J. Int'l L. & Pol.; H-Net Book Review; with briefer reviews in the human rights and political science literature.

Professor Drumbl's articles have appeared in the *NYU*, *Michigan*, *Northwestern*, *George Washington*, *Tulane*, and *North Carolina* law reviews, a number of peer-review journals, including *Human Rights Quarterly*, with shorter pieces in the *American Journal of International Law* and many other periodicals. Professor Drumbl also has authored chapters in edited volumes. He is a frequent presenter at academic symposia, conferences, invited endowed lectures, and workshops. His article, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 Nw. U. L. Rev. 539 (2005), received the Association of American Law Schools Outstanding Scholarly Papers Prize. His work on Rwanda has been

reviewed as "exemplary" in its treatment of "the possibilities of the coexistence of victims and survivors within the same society after the event" by the *Times Literary Supplement* in its Learned Journals review.

Prior to entering law teaching, Professor Drumbl was judicial clerk to Justice Frank Iacobucci of the Supreme Court of Canada. His practice experience includes international arbitration, commercial litigation, and he was appointed co-counsel for the Canadian Chief-of-Defense-Staff before the Royal Commission investigating military wrongdoing in the UN Somalia Mission. Professor Drumbl has served as an expert in ATCA litigation in the U.S. federal courts (expert for the successful plaintiffs in *Almog v. Arab Bank*, 2007 WL 214433 (E.D.N.Y., 2007)) and in U.S. immigration court, as defense counsel in the Rwandan genocide trials, has consulted with various organizations including the International Center for Transitional Justice, and has taught international law in Pakistan, Italy, and Brazil. Prior to joining Washington & Lee, he served on the faculties of Columbia University, School of Law, as Associate-in-Law, and the University of Arkansas-Little Rock.

Benjamin B. Ferencz

Benjamin Ferencz graduated from Harvard Law School in 1943, after which time he joined the U.S. Army. As an enlisted man under General Patton, he fought in every campaign in Europe. As Nazi atrocities were uncovered, he was transferred to a newly created War Crimes Branch of the Army to gather evidence of Nazi brutality and

apprehend the criminals. After being honorably discharged with the rank of Sergeant of Infantry in 1945, he returned to New York to practice law. Shortly thereafter, he was recruited for the Nuremberg war crimes trials, and became Chief Prosecutor for the United States in the Einsatzgruppen Case. The Associated Press called this case “the biggest murder trial in history,” as twenty-two defendants were charged with murdering over a million people.

In 1970, Mr. Ferencz decided to gradually withdraw from the private practice of law in order to dedicate himself to studying and writing about world peace. He has been active at Preparatory Commission sessions for the ICC, monitoring and making available his expertise on current efforts to define aggression. He is currently Adjunct Professor of International Law at Pace University and founder of the Pace Peace Center. He continues to write and speak worldwide for international law and global peace.

Whitney R. Harris

Whitney Harris was a line officer in the United States Navy throughout World War II. Toward the end of the war, the Navy assigned him for special duty with the Office of Strategic Services (OSS). OSS sent him to Europe for the investigation of Nazi war crimes in the European theater. In Europe, he joined the staff of Robert H. Jackson, the United States Chief Prosecutor for the trial of major Nazi war criminals, and moved with the first contingent of prosecutors to Nuremberg in 1945. He was assigned the

prosecution of Ernst Kaltenbrunner, the chief of the Reich Main Security Office and two other organizations, the *SD* and the *Gestapo*. Harris obtained the conviction of all three defendants.

Whitney Harris assisted Justice Jackson in the cross-examination of Hermann Goering. He obtained the confession of Rudolf Hoess to the extermination of two and a half million Jews and other victims at Auschwitz concentration camp. Harris sat at the American prosecution table on October 1, 1946, when the Tribunal delivered its final sentences and was the only prosecutor present in the Palace of Justice on the night of the executions.

Harris is the author of *Tyranny on Trial*, first published in 1954, the authoritative account of the trial of the major war criminals at Nuremberg and declared by the *New York Times Review* as “masterly and meticulous...a book of enduring importance,” and *Murder by the Millions, Rudolf Hoess at Auschwitz*, 2005.

Omer Ismail

Omer Ismail was born in the Darfur region of Sudan. He has spent over twenty years working both independently and with international organizations on relief efforts and human rights. Omer fled Sudan in 1989 as a result of his political views. He helped found the Sudan Democratic Forum, a think tank of Sudanese intellectuals working for the advancement of democracy in Sudan. In addition, he co-founded the Darfur Peace and

Development organization to raise awareness about the crisis in his troubled region.

He currently works as policy advisor to several agencies working in crisis management and conflict resolution in Africa. He was a Fellow at the Kennedy School of Government at Harvard University's Carr Center for Human Rights Policy.

Hassan Jallow

In 2003, Hassan Jallow was appointed the new Chief Prosecutor of the Rwanda genocide court by the Secretary General of the United Nations to take charge of cases stemming from the 1994 genocide in Rwanda. Prior to this appointment, Hassan Jallow had extensive experience serving the United Nations and its international courts. In 1998 he served as a legal expert and carried out judicial evaluation of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia. In 2002, Mr. Jallow was appointed Judge of the Appeals Chamber of the Special Court for Sierra Leone.

Before his work for the United Nations, he held many esteemed positions in his own country. Jallow worked as State Attorney in the Attorney General's Chambers from 1976 until 1982, when he was appointed Solicitor General. He then served as Gambia's Attorney-General and Minister of Justice from 1984 to 1994 and subsequently as a Judge of Gambia's Supreme Court from 1998 until 2002, when he was removed by Gambia's president for allowing a case

to go forward alleging the government's role in suppressing a student protest.

Amidst his many positions, Justice Jallow also worked on drafting the African Charter on Human and People's Rights (adopted in 1981) and served the Commonwealth as chair of the Governmental Working Group of Experts in Human Rights. Jallow was awarded the honor of Commander of the National Order of the Republic of Gambia.

Henry T. King, Jr.

Henry T. King Jr. is a graduate of Yale College and Yale Law School. A former U.S. Prosecutor at the Nuremberg Trials, a former General Counsel of the U.S. Foreign Economic Aid Program, as well as a former Chairman of the Section on International Law and Practice of the American Bar Association, Mr. King is U.S. Chairman of the Joint ABA (American Bar Association), CBA (Canadian Bar Association), Barra Mexicana Working Group on the Settlement of International Disputes, whose recommendations for the settlement of disputes under the North American Free Trade Agreement (NAFTA) were incorporated into the Agreement. He is U.S. Director of the Canada-United States Law Institute and Professor of Law at Case Western Reserve University School of Law, where he teaches international arbitration. He is also of Counsel to the law firm of Squire, Sanders & Dempsey. Mr. King served as a member of the ABA Task Force on War Crimes in the former Yugoslavia.

He was a founder of the Greater Cleveland International Lawyers Group and is a former president of the Cleveland World Trade Association. Mr. King is a former chair and long-time member of the Northern Ohio District Export Council. He has published over seventy articles on international legal subjects, including international business transactions, international arbitration, and Nuremberg related topics.

Mr. King has written a book on Albert Speer, one of the Nuremberg defendants, entitled, *The Two Worlds of Albert Speer*. The University of Pittsburgh School of Law named Mr. King a Fellow *honoris causa* of the Center for International Legal Education on March 9, 2002. On June 4, 2002, Mr. King was awarded an honorary degree of Doctor of Civil Law by The University of Western Ontario. Mr. King was a guest of the Government of the Netherlands on March 11, 2003, for the inauguration of the International Criminal Court at The Hague.

Michael Newton

Mike Newton is an expert on accountability and conduct of hostilities issues. Over the course of his career, he has published more than forty articles and book chapters, as well as opinion pieces for the *New York Times*, *International Herald Tribune*, and other papers. Professor Newton is a member of the International Institute of Humanitarian Law and the International Bar Association. At Vanderbilt, he developed, and teaches, Vanderbilt's innovative International Law Practice Lab and fosters externships and other educational

opportunities for students interested in international legal issues.

Professor Newton is currently serving on an Experts' Group in support of the Task Force on Genocide Prevention established by the U.S. Holocaust Memorial Museum and the U.S. Institute of Peace. He has supervised Vanderbilt law students working in support of the Public International Law & Policy Group to advise the governments of Afghanistan, Kosovo, Sri Lanka, and other nations.

Professor Newton negotiated the "Elements of Crimes" document for the International Criminal Court, and coordinated the interface between the FBI and the ICTY while deploying into Kosovo to do the forensics fieldwork in support of the Milosevic indictment. As the Senior Advisor to the United States Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Professor Newton implemented a wide range of policy positions related to the law of armed conflict, including U.S. support to accountability mechanisms worldwide. He was the senior member of the team that taught international law to the first group of Iraqis who began to think about accountability mechanisms and a constitutional structure in November 2000. He subsequently assisted in drafting the Statute of the Iraqi High Tribunal, and served as International Law Advisor to the Judicial Chambers in 2006 and 2007.

Professor Newton has taught Iraqi jurists on seven other occasions, both inside and outside Iraq, and as part of the academic consortium he assists Vanderbilt students in

providing substantive advice to the lawyers in Iraq. He served as the U.S. representative on the UN Planning Mission for the Sierra Leone Special Court, and was also a member of the Special Court academic consortium. From January 1999 to August 2000, he served in the Office of War Crimes Issues, U.S. Department of State.

Professor Newton began his distinguished military career as an armor officer in the 4th Battalion, 68th Armor, Fort Carson, Colorado until his selection for the Judge Advocate General's Funded Legal Education Program. As an operational military attorney, he served with the United States Army Special Forces Command (Airborne), Fort Bragg, North Carolina in support of units participating in Desert Storm. Following duty as the Chief of Operational Law, he served as the Group Judge Advocate for the 7th Special Forces Group (Airborne). He deployed on Operation Provide Comfort to assist Kurdish civilians in Northern Iraq, as well as a number of other exercises and operations.

From 1993-1995, he was reassigned as the Brigade Judge Advocate for the 194th Armored Brigade (Separate), during which time he organized and led the human rights and rules of engagement education for all Multinational Forces and International Police deploying into Haiti. He subsequently was appointed as a Professor of International and Operational Law at the Judge Advocate General's School, Charlottesville, Virginia, from 1996-1999.

Robert Petit

Robert Petit began his professional career in Canada in 1989, where he served both as a provincial (Quebec) and federal prosecutor. Since 2001, he is a Counsel with the War Crimes Section of the Canadian Department of Justice from where he is currently on leave. In 1996, he joined as a Legal Officer in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), where he served for three years. After ICTR, Robert Petit joined the United Nations Mission in Kosovo to work as a Regional Legal Advisor. In 2002, he became a Prosecutor for the Serious Crimes Unit as part of the United Nations Mission of Assistance to East Timor. One year later, he was appointed a Senior Trial Attorney in the Special Court for Sierra Leone. On 3 July 2006, Robert Petit was sworn in as the International Co-Prosecutor of the ECCC.

Stephen J. Rapp

In December 2006, the Secretary-General of the United Nations appointed Stephen J. Rapp as the third Prosecutor for the Special Court for Sierra Leone. Mr. Rapp was previously Chief of Prosecutions at the United Nations-International Criminal Tribunal for Rwanda (ICTR) from May 2005. In this position, Mr. Rapp was responsible for supervising the prosecution of military, government, and political leaders responsible for the Rwandan genocide in trials at the ICTR in Arusha, Tanzania.

Before that, he served as Senior Trial Attorney of what has been called the "Media Trial," against the principals of

RTLTM radio and the editor of the Kangura newspaper. In December 2003, the Trial Chamber pronounced each of the defendants guilty of Genocide, Direct and Public Incitement to Commit Genocide, and other crimes. Rapp, the lead prosecutor, became renowned internationally for winning the most controversial case stemming from the Rwandan civil war.

Prior to his service at the ICTR, Mr. Rapp was United States Attorney for the Northern District of Iowa from November 1993 until May 2001. Rapp was one of the first federal prosecutors to convict repeat abusers under the Violence Against Women Act. Prior to his service as US Attorney, he was in private practice of law in Waterloo, Iowa. He also served as a Staff Director and Counsel at the U.S. Senate Judiciary Committee and as an elected member of the Iowa Legislature.

Lucy F. Reed

Lucy F. Reed, partner at Freshfields Bruckhaus Deringer, LLP, is a specialist in international commercial arbitration, particularly in investment treaty disputes. As an arbitrator, she has served on the Eritrea-Ethiopia Claims Commission and as co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (the Holocaust tribunal). Ms. Reed is one of five attorneys nationwide to be named a tier one international arbitration practitioner by Chambers USA (2006). In 2001, she lectured on private international law at The Hague Academy of International Law.

Ms. Reed was the first general counsel of the Korean Peninsula Energy Development Organization and, while with the US State Department, was the U.S. agent to the Iran-US Claims Tribunal and deputy assistant legal adviser for international claims and investment disputes. She received her BA magna cum laude from Brown University and her JD from the University of Chicago Law School (1977), where she was a member of the Law Review.

Leila Sadat

Professor Sadat is the Henry H. Oberschelp Professor of Law at the Washington University School of Law and the Director of the Whitney R. Harris World Law Institute. She is an internationally recognized authority in international criminal law and human rights and a prolific scholar, publishing in leading journals in the United States and abroad. Trained in both the French and American legal systems, Sadat brings a cosmopolitan perspective to her work. She is particularly well-known for her expertise on the International Criminal Court, and was a delegate to the 1998 diplomatic conference in Rome at which the Court was established. She has published a series of articles on the Court and an award-winning monograph, *The International Criminal Court and the Transformation of International Law*, which was supported by the United States Institute of Peace.

An expert in international criminal law and procedure, Sadat has written extensively on the question of amnesties for atrocity crimes as part of the Princeton Project on Universal Jurisdiction, and authored several follow up

pieces including, *Exile, Amnesty and International Law* (Notre Dame Law Review). Her commentaries on U.S. foreign policy following the September 11th attacks are highly regarded and include, *Terrorism and the Rule of Law, Nightmares from the War on Terror* (George Washington Law Review) and *Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Criminal Law* (Yale Journal of International Affairs). From May 2001 until September 2003, Sadat served on the nine-member U.S. Commission for International Religious Freedom.

At the School of Law, Sadat teaches international, comparative, and U.S. law courses and directs the Law School's highly successful international Moot Court program. She also founded the Law School's "Summer Institute for Global Justice," which brings together U.S. and foreign law students in a summer course of study held at the University of Utrecht. Sadat has also established a war crimes research program for students who are working directly with the Special Court for Sierra Leone, drafting memos on research topics assigned by the Court's Prosecutor, and supervises students working at the Extraordinary Chambers of Cambodia, the ICTY, ICTR and the International Criminal Court.

Professor Sadat is often heard on national media and has an active speaking schedule. She currently serves as Chairwoman of the International Law Students Association (which runs the Philip C. Jessup International moot court competition), Vice-President of the International Law Association (American Branch), and the International Association of Penal Law (AIDP) and is a member of the

American Law Institute. Sadat has also served as a member of the Executive Council, Executive Committee, and Awards Committee for the American Society of International Law, and as Secretary of the American Society of Comparative Law.

Sadat received her B.A. from Douglass College, her J.D. from Tulane Law School, *summa cum laude*, and holds graduate law degrees from Columbia University School of Law (LLM, *summa cum laude*) and the University of Paris – Sorbonne (*diplome d'etudes approfondies*), Sadat practiced international business law for several years in Paris, France, prior to entering law teaching, and is admitted to the bar in France and in the United States. She clerked for Judge Albert Tate, Jr. on the U.S. Fifth Circuit Court of Appeals, as well as both of France's Supreme Courts, the *Cour de Cassation* and the *Conseil d'Etat*.

John Clint Williamson

John Clint Williamson, a career federal prosecutor, serves as the U.S. Ambassador-at-Large for War Crimes Issues, a post to which he was confirmed by the U.S. Senate on June 29, 2006.

Immediately prior to his appointment in the Department of State, Ambassador Williamson served as the Acting Special Assistant to the President and Senior Director for Relief, Stabilization, and Development at the National Security Council (NSC). From 2003 to early-2006, he served as the Director for Stability Operations on the NSC staff. While at the NSC, he was instrumental in developing the proposal for creation of a standing U.S. government

post-conflict response capability, which was realized with the establishment of the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in the State Department in mid-2004.

Early in his posting to the NSC, Ambassador Williamson served a rotation in Baghdad, from April to July 2003, as the first Senior Adviser to the Iraqi Ministry of Justice. From late-2001 through 2002, he served in the UN Department of Peacekeeping Operations as the Director of the Department of Justice in the United Nations Mission in Kosovo (UNMIK), overseeing the justice and prison systems for the UN-administered province.

For seven years before that, from 1994 to 2001, he worked as a trial attorney at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands. While at the ICTY, he supervised investigations and field operations in the Balkans, compiled indictments, and prosecuted cases at trial. Among the cases handled by Ambassador Williamson were those against Slobodan Milosevic and the notorious paramilitary leader Zeljko Raznatovic, aka "Arkan," as well as cases arising from the Yugoslav Army attacks on Vukovar and Dubrovnik, Croatia.

Prior to joining the ICTY, Ambassador Williamson served as a trial attorney in the U.S. Department of Justice Organized Crime Section and as an Assistant District Attorney in New Orleans.

Ambassador Williamson holds a bachelors degree from Louisiana Tech University and a law degree from Tulane University.

About the ASIL

The American Society of International Law (ASIL) is a nonpartisan membership association committed to the study and use of law in international affairs. Organized in 1906, the ASIL is a tax-exempt, nonprofit corporation headquartered in Tillar House on Sheridan Circle in Washington, DC.

For over a century, the ASIL has served as a meeting place and research center for scholars, officials, practicing lawyers, judges, policy-makers, students, and others interested in the use and development of international law and institutions in international relations. Outreach to the public on general issues of international law is a major goal of the ASIL. As a nonpartisan association, the ASIL is open to all points of view in its endeavors. The ASIL holds its Annual Meeting each spring, and sponsors other meetings both in the United States and abroad. The ASIL publishes a record of the Annual Meeting in its Proceedings, and disseminates reports and records of sponsored meetings through other ASIL publications. Society publications include the American Journal of International Law, International Legal Materials, the ASIL Newsletter, the ASIL occasional paper series, Studies in Transnational Legal Policy, and books published under ASIL auspices. The ASIL draws its 4000 members from nearly 100 countries. Membership is open to all—lawyers and non-lawyers regardless of nationality—who are interested in the rule of law in world affairs.

For information on the ASIL and its activities, please visit the ASIL Web site at <http://www.asil.org>.