

Proceedings of the Fourth International Humanitarian Law Dialogs

August 30-31, 2010, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane



American Society
of International Law

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

*August 30 - 31, 2010
at Chautauqua Institution*

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For over a century, 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 ASIL. As a nonpartisan association, ASIL is open to all points of view in its endeavors. The American Society of International Law holds its Annual Meeting each spring and sponsors other meetings in the United States and abroad.

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Dedicated to Whitney R. Harris, 1912-2010

*2010 Recipient of the Joshua Heintz Award for
Humanitarian Achievement*

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**Prosecutors at the Fourth International
Humanitarian Law Dialogs**



Back row: Serge Brammertz; Bongani Majola;
Stephen Rapp; David Crane

Front row: Robert Petit; Richard Goldstone; Ben
Ferencz; William Caming; Fatou Bensouda;
Andrew Cayley

Introduction

Introduction

David M. Crane*

“Reach for the Stars!” Ben Ferencz declared loudly to the audience gathered at Chautauqua Institution for the fourth annual International Humanitarian Law Dialogs. His keynote address to the assembled, the world’s current and former international Prosecutors from Nuremberg to the International Criminal Court, kicked off a two-day reflection on the events that had taken place at Kampala, Uganda and the plenary session of the Assembly of States Parties earlier in June related to the crime of aggression. A long-time advocate of the creation of the crime of aggression and its codification as an enforceable crime within the Rome Statute, our friend and colleague Ben moved us to tears as he delivered what we all thought was the most impassioned defense of why the international community should begin enforcing this international crime. At the end of his address, we all rose as one in a rousing standing ovation honoring this great man and dear friend.

As always, the International Humanitarian Law Dialogs in 2009 had many special and memorable moments such as Ben’s wonderful keynote address. I can recall, at earlier Dialogs, Whitney Harris reading his poem on peace through the rule of law and Henry King pounding the table and literally shouting, “The Spirit of Nuremberg lives!” in their addresses to us at that special

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

place called Chautauqua Institution. The camaraderie and relaxed discussions among close friends and colleagues from the academy, the international Prosecutors, practitioners, and students, have made these Dialogs significant in their insights and perspectives. The speeches, lectures, discussions, and articles one finds in this year's Proceedings volume will inspire as well as inform.

The Fourth IHL Dialogs began, as always with a reception at the Robert H. Jackson Center in Jamestown, New York, as we gathered to greet one another after a year of hard work advancing the rule of law and facing down impunity. We were still reflecting on the viewing of Rebecca Richmon Cohen's *War Don Don*, and the interesting commentary that followed at the Chautauqua Theater, led by Rebecca herself. As we assembled at the front of the Center, Gregory Peterson, the President of the Robert H. Jackson Center, unveiled a series of bricks set in the sidewalk leading to the front door of the Center that had the names of all of the past and current Chief Prosecutors of the world's international courts and tribunals. From there we enjoyed a wonderful dinner that culminated in the awarding of the first annual Joshua Heintz Humanitarian Award to the late Whitney Harris. Anna Harris tearfully accepted the award on behalf of Whitney with wonderful commentary by John Q. Barrett, Leila Sadat, as well as Joshua Heintz himself.

A two-day event, the IHL Dialogs are centered around the Athenaeum Hotel on the grounds of Chautauqua Institution. After the initial greetings in Fletcher Hall by both the Presidents of the Jackson

Center and Chautauqua Institution and the introduction of the Prosecutors present,¹ the Editor in Chief of *Impunity Watch* recognized the essay contest winner of the Summer Institute for Human Rights and Genocide Studies. That essay is reprinted in this volume.

Ben Ferencz then gave his rousing keynote address, followed by an important update from the current Prosecutors of the various courts and tribunals. Moderated by Professor John Q. Barrett, the Prosecutors spoke frankly about the many challenges they face related to the handover of indicted persons and the closure of their tribunals in addition to prosecuting those still in custody. After lunch, Judge Hans-Peter Kaul gave his reflective thoughts on the crime of aggression from Nuremberg to Kampala, which set up the next panel discussion on the crime of aggression by the key players present at Kampala, including Bill Pace, John Washburn, and Ben Ferencz. Their discussion highlighted their varied opinions related to the definition of the crime of aggression, its future implementation, and the impact of the two week plenary session at Kampala.

The evening address by Ambassador Stephen J. Rapp, a colleague and the current U.S. Ambassador-at-Large for War Crimes Issues, gave an important

¹ Present for the Fourth International Humanitarian Law Dialogs, 2010 were: Benjamin B. Ferencz, David M. Crane, Serge Brammertz, Richard J. Goldstone, Fatou Bensouda, Andrew T. Cayley, Stephen J. Rapp, Robert Petit, H.W. William Caming, James C. Johnson, and Bongani Majola.

perspective on the position of the United States related to the International Criminal Court and the approach that the United States used in participating at the plenary session in Kampala as an observer state. Afterward the participants drifted out to the porch of the Athenaeum Hotel to discuss the events of the first day. There was much to talk about.

On the second day of the IHL Dialogs, the Prosecutors privately met to discuss and consider the wording of the annually issued Chautauqua Declaration, which highlights the concerns, perspectives, and issues that the Prosecutors feel the international community needs to consider acting upon. These are lively discussions, very much off the record, and the only time that we ever “lay it all on the table” in a collegial way, hoping that some attention can be garnered to continue the important momentum started in 1993 with the advent of what is called modern international criminal law. It was agreed that there be mention of the recent passing of our dear friend, Whitney R. Harris of the International Military Tribunal at Nuremberg, and special recognition of him as a leader in the development of the law in this field. The Fourth Chautauqua Declaration can be read in this Proceedings volume.

While the Prosecutors discuss and draft the Declaration, the other participants are treated to a “year in review” lecture related to international criminal law. This year the lecture was given by Professor Valerie Oosterveld from the University of Western Ontario Faculty of Law. Her lecture captivated the audience.

Professor Oosterveld's important lecture is also in these Proceedings for review.

After our last official luncheon, our speaker was Professor William Schabas of the National Irish University at Galway, who spoke about the crime of aggression, his perspectives, and the way forward. It was a perfect capstone to two days of discussion and consideration of that crime and future enforcement. The participants adjourned to another room in the Athenaeum Hotel where Professor Diane Marie Amann, representing the American Society of International Law and IntLawGrrls, introduced the signatories of the Chautauqua Declaration and then read its contents to the world. As is the custom, each Prosecutor then signed the Declaration. With that, Professor Amann asked for comments by the Prosecutors and adjourned the fourth annual International Humanitarian Law Dialogs.

The Prosecutors and invited guests were hosted by Professor Michael Scharf of Case Western Reserve University School of Law for a dinner cruise around Chautauqua Lake, an end to an exciting two days among friends and colleagues.

Events such as the IHL Dialogs cannot happen without a great deal of hard work and support by many people and organizations. A central figure in making the Dialogs happen is Mrs. Carol Drake of the Robert H. Jackson Center and her team. Without them the Dialogs simply would not go as smoothly.

Our thanks also go out to our many sponsoring organizations including Chautauqua Institution; the Robert H. Jackson Center; the American Society of International Law; the Enough! Project; Impunity Watch of Syracuse University College of Law; the Frederick K. Cox International Law Center of Case Western Reserve University School of Law; the Whitney R. Harris World Law Institute of Washington University in St. Louis School of Law; as well as IntLawGrrls; the Planethood Foundation; the Gebbie Foundation; and Chautauqua County. Each of these organizations has given long term financial and substantive support over the years. This effort has made the IHL Dialogs the premier event in international criminal law each year. To them and to all who support the Dialogs, thank you!

I hope you enjoy your perusal of the Proceedings of the Fourth International Humanitarian Law Dialogs, *Crimes against Peace—Aggression in the 21st Century*. There are some extraordinary insights here for the scholar and student alike. I will leave you with a quote from Justice Robert H. Jackson, the Chief American Prosecutor at the International Military Tribunal at Nuremberg, August 12, 1945: “... *our position is that no grievances or policies will justify resort to aggressive war. It is utterly renounced and condemned as an instrument of policy.*”

Lectures

Honoring Whitney R. Harris and His Legacy: Never Retreat

Leila Sadat*

I am deeply honored to have been asked to introduce Whitney Harris to you today and thankful to the Robert H. Jackson Center for organizing this evening's event and the Fourth International Humanitarian Law Dialogs. My thanks, as well, to David Crane for his superb leadership in bringing us all together and, of course, to Joshua Heintz for his generosity in supporting these Dialogs and in bestowing the first annual Award for Humanitarian Achievement upon Whitney R. Harris, our dear departed friend and colleague.

Whitney R. Harris died on April 22, 2010, at the age of 97, at his home in St. Louis, Missouri, with his loving wife Anna at his side. Anna and Theresa, I'm so glad you could be here today. Whitney was an extraordinary individual who led an extraordinary life; he was a great friend and a wonderful benefactor of the Institute that bears his name, which I have the honor to direct. I miss him very much, as do we all.

* Henry H. Oberschelp Professor of Law and Director, Whitney R. Harris World Law Institute, Washington University School of Law. This publication is based on Professor Sadat's remarks, on August 29, 2010, at the Fourth International Humanitarian Law Dialogs held in Chautauqua, New York.

Whitney's role at Nuremberg is well-known, especially to the individuals gathered here today. What you may not know is that he had a long and distinguished career as a law professor at Southern Methodist University and then as a practicing attorney following his military and government service. He also served as Chairman of the International Law section of the American Bar Association (ABA), and later as the ABA's first Executive Director. He also served as legal counsel to Southwestern Bell and, in 1985, earned the Distinguished Lawyer of the Year award from the Bar Association of Metropolitan St. Louis.

Whitney served as trial counsel at the *Trial of the Major German War Criminals* before the International Military Tribunal at Nuremberg from August 1945 to the conclusion of the trial on October 1, 1946. He was the last surviving podium prosecutor from Justice Jackson's team. He had been a line officer in the U. S. Navy during World War II, and towards the end of the war, the Navy assigned him to the Office of Strategic Services, which sent him to Europe to investigate Nazi war crimes. He joined the staff of Robert H. Jackson, the Chief Prosecutor for the United States for the trial of the major Nazi war criminals, and Whitney moved with the first contingent of prosecutors to Nuremberg in 1945. He was assigned to prosecute Ernst Kaltenbrunner, Chief of the Reich Main Security Office, and two organizational defendants, the Secret Service (SD) and the *Gestapo*. He obtained convictions against all three defendants and was awarded the Legion of Merit for his efforts.

Whitney's experiences at Nuremberg as a young lawyer made an indelible impression upon him and he quickly emerged as one of the major spokesmen for the Nuremberg legacy. He wrote extensively about his role at Nuremberg and in 1954 published the first definitive book on the trial, entitled *Tyranny on Trial: The Evidence at Nuremberg*. *The New York Times Book Review* described the book as a "masterly and meticulous condensation" of the documentary evidence and "a book of enduring importance." I can attest to the same, having often relied upon the book in my own work. Two subsequent editions of the book were published, and it has since been translated into German.

Whitney shared the dream of many that one day a permanent international criminal court would be established. He was an NGO delegate to the 1998 Rome Conference for the Treaty establishing the ICC, as were many of us here, including myself. Like his good friend Ben Ferencz, Whitney represented the Committee of Former Nuremberg Prosecutors for a Permanent International Criminal Court at the Rome Conference, which championed the view that the rule of law must displace the rule of force and that establishing a permanent international criminal court would confirm the principles laid down by the Nuremberg Tribunal half a century earlier. One cannot underestimate the effect that these living witnesses to Nuremberg had upon the 165 governments and 250 NGOs present in Rome. Whitney and the others had witnessed unspeakable horrors but saw these terrible events as a clarion call to action, not as a rationale for their own despair. Whitney

later wrote of the importance of the Nuremberg trials and the Rome Conference that “Nuremberg and Rome stand against the resignation of humankind to its self-debasement and self-destruction. The achievements of that great trial and historic conference in elevating justice and law over inhumanity and war give promise for a better tomorrow.” As an aside, it took some real courage to support the ICC as American citizens, given the tepid support of the U.S. government for the child it had birthed in 1945, but neither Whitney, nor Ben, ever wavered. They always were men ahead of their time.

Whitney kept the Nuremberg dream alive through his writings and his advocacy, and later, to all of our great benefit, through his philanthropic generosity. In 2001, he endowed the Whitney R. Harris Institute for Global Legal Studies at Washington University School of Law. In 2008, he and Anna Harris endowed the Institute’s World Peace through Law Award at a ceremony during which the Harris Institute’s name was changed to the “Whitney R. Harris World Law Institute,” the name it bears today. We honored Richard Goldstone at that time.

Whitney loved the Institute, and often came in to spend time there. He had a warm relationship with all of the staff and was especially supportive of the directors, including myself. He participated actively in our conferences, lectures, and debates, and made himself available to our students. He entranced the students with his presentations, telling them about his experiences as a former Nuremberg Prosecutor, discussing with them the

issues of the day, and patiently answering their questions. They would often tell me that their sessions with him were one of the highlights of their law school careers.

Whitney was always kind and gracious, elegant and distinguished, witty and articulate. He had a beautiful baritone voice and a manner of speaking that was riveting, and remained so, right up until his passing. Indeed, in his final remarks at a Harris Institute event (which were taped in St. Louis on February 24, 2010, and delivered at a Harris Institute Conference, *Forging a Convention for Crimes Against Humanity*, held at the Brookings Institution on March 11, 2010), his voice was strong, his bearing proud, his spirit indomitable.

Whitney inspired all of us, including myself, to do our best. He fully supported our Crimes Against Humanity Initiative, perhaps the most ambitious undertaking for international rule-of-law development by an academic center since the Harvard Research Project was published in 1935. I wish he had lived to see it bear fruit. He understood the need to continue to reinforce and build upon the Nuremberg legacy and to complete the work that was begun in 1945. He also recognized the importance of not becoming complacent about the future of international criminal justice given the continuing presence of terrible human suffering on the Earth. Yet Whitney had no Pollyannaish naiveté about the world; he understood the capacity of humans for evil, just as he believed in their penchant for good.

Whitney witnessed terrible things in Germany, and the testimony of those guilty of perpetrating the atrocities of the Second World War remained seared in his memory for his entire life. His experiences shaped his determination to help human society move forward. He wrote in *Tyranny on Trial* that “[a] civilized world must be a law-ordered world . . . tomorrow’s world [must] remember what today’s world has learned through the bitter experience of th[e] [Nazi] regime – that tyranny leads to inhumanity, and inhumanity is death.” Whitney was one of those individuals who never wavered from his principles, who lived dedicated to bettering the world and establishing rules and institutions that could help to do that.

As the Prosecutors, judges, and activists who have gathered here on the shores of Lake Chautauqua know well, it is all too easy to become cynical and discouraged when faced with the difficult challenges and beastly inhumanity they deal with day in and day out. Add to that the difficult environment of international politics, and the task of delivering justice for the commission of atrocity crimes seems almost impossible. Even constituencies seemingly committed to the cause of international criminal justice are quick to criticize, and international justice is often faulted both for being too weak and too strong at the same time: too weak as regards enforcement of arrest warrants and the inability to adequately protect victims and witnesses; too strong in its erosion of national sovereignty and the privileges of the sovereign, and in its displacement of local or indigenous processes.

In the face of such criticism, it is easy to lose heart or to falter. International criminal justice is a bold experiment. It is a reaction to impunity – to business as usual – but perhaps the whole endeavor is a waste of effort. Why not take the 100 million Euros spent per year on the ICC and host another Olympic Game (except that closer to a billion Euros would be needed for that) or buy another B-1 Bomber? Or use the money as direct assistance to refugees of war? If suffering is an inevitable part of the human condition, why waste time and money trying to change that paradigm? Justice, at least in Western countries, is expensive and unsurprisingly, international justice is no exception. Mayor Bloomberg has estimated 200 million dollars in security costs alone for Khalid Sheikh Mohammed's trial, not to mention the cost of the trial itself.

Moreover, there is still tremendous resistance to the accountability paradigm. President Omar al-Bashir has managed to convince two African ICC States Parties to let him travel freely to their countries, in spite of the issuance of arrest warrants against him by the ICC, pursuant to a Chapter VII referral by the Security Council. Is international justice worth the price that must be paid in terms of effort and cost? Whitney certainly thought so. Indeed, one of Whitney's most inspiring traits was the depth of his convictions. He knew deep in his heart that the only way to overcome the kind of death and destructiveness that he had witnessed was to hold accountable those who had perpetrated those atrocities. He never lost faith in that idea – that the rule of law could one day triumph over inhumanity – and he

never shied away from doing the hard work to help make that happen. Always courteous, always kind, and always willing to listen to people's points of view, whatever they were, Whitney at the same time also knew that insofar as the principles of law and justice demanded, one should never retreat.

A wise man once said that we should steer by the stars, not by the lights of the passing ships. Whitney did that and the world was a better place for it. Whitney will never walk among us again here at Chautauqua but his spirit remains very much alive in our hearts, and what he stood for is embodied in each of you: Prosecutors, former Prosecutors and supporters of international justice. I think he would be so honored to be here, and so proud to be with us and receive this award. Joshua, thank you so much for honoring Whitney's memory in this wonderful way and for helping keep his dream alive. Whitney, we miss you very much, but are grateful for the many years we had together to benefit from your leadership, the steadiness of your convictions, and your inspiration. We who are left will carry on your work. Like you, we will never retreat.

Remembering Departed “Nurembergers”

John Q. Barrett*

When we gathered here in August 2009,¹ we had just lost our dear friend Henry T. King, Jr., a Nuremberg Prosecutor, teacher, and voice of conscience. Henry’s spirit is very much with each of us, including his Nuremberg prosecuting colleagues William Caming and Benjamin Ferencz, tonight.

We also, a year ago, had just lost Budd Schulberg. Budd had enormous talents and a life of big accomplishments, including great novels and other

* 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 publication is based on my August 29, 2010, remarks at the Jackson Center dinner that opened the fourth annual International Humanitarian Law Dialogs. I am very grateful to David M. Crane, Gregory L. Peterson, Adam C. Bratton, Lucy F. Reed, Elizabeth Andersen, Thomas Becker, Syracuse University College of Law, the Robert H. Jackson Center, the American Society of International Law, Chautauqua Institution, the Whitney R. Harris World Law Institute at Washington University, the Frederick K. Cox International Law Center at Case Western Reserve University School of Law, the Gebbie Foundation, the Planethood Foundation, Enough!, IntLawGrrls, and Chautauqua County, New York, for co-sponsoring the Dialogs.

¹ See PROCEEDINGS OF THE THIRD INTERNATIONAL HUMANITARIAN LAW DIALOGS (American Society of International Law, Studies in Transnational Legal Policy No. 42, Elizabeth Andersen & David M. Crane eds., 2010).

writings such as his Academy Award-winning *On the Waterfront* (Best Story and Screenplay, 1954). His link to us and his notable place in the history of international humanitarian law was that, as an Office of Strategic Services (OSS) officer in World War II and immediately afterward, Budd was, with his brother Stuart, at the center of capturing and assembling powerful, undeniable film evidence of the Nazi rise to power, Nazi concentration camps, and other atrocities – the film evidence that was played before the International Military Tribunal (IMT) at Nuremberg.

Tonight we remember and commemorate five other remarkable people whose lives were parts of the Nuremberg tableau and the connection that links Nuremberg to contemporary international law and justice. Each of the following, recently departed, contributed energy and skill, vision, friendship, and great personal charm to the endeavors that mattered after World War II and that still matter so much, to the world and to each of us.

* * *

The first person to recall, especially here at the Robert H. Jackson Center, was not a lawyer or a member of Justice Jackson's Nuremberg staff. Nancy-Dabney Roosevelt Jackson, who passed away this spring, instead was "only" Jackson's only daughter-in-law. But that meant that during 1945 and 1946, she became a very young "Nuremberg widow" in the sense that her husband, Ensign (later Lieutenant (j.g.)) William Eldred Jackson (United States Navy Reserve), served as his

father's Executive Assistant at Nuremberg and thus left Nancy behind in the United States in the first year of their marriage.

Nancy's marriage to Bill Jackson lasted fifty-five years. They built a strong family, had accomplished careers, and contributed much to their family legacies. But in some ways their long and full lives were shaped fundamentally and permanently by their respective Nuremberg experiences. For the rest of Bill's life following Nuremberg, his work there and his continuing Nuremberg writing and legacy projects were among the things that mattered most to him. In the midst of his work as one of New York City's and the world's leading private lawyers,² Bill Jackson wrote, spoke, and constantly thought about Nuremberg. Nancy Jackson did the same and, especially in her pre-motherhood years immediately after Nuremberg, assisted Bill intensely in his Nuremberg-related research and writing. Bill and Nancy thus both had Nuremberg in their long marriage, and it, along with their love for Justice Jackson and their devotion to his memory, was part of their partnership and family.

I luckily got to know Bill before he passed away and thereafter to know Nancy very well – she became a dear friend and she generously assisted my research and writing on Justice Jackson in countless ways (as her

² See Wolfgang Saxon, *William Jackson Dies at 80; Lawyer with Wide Clientele*, N.Y. TIMES, Dec. 10, 1999, at C19. From 1946 until his death, Bill Jackson practiced law with Milbank, Tweed, Hadley & McCloy, rising to become the firm's managing partner.

children continue to do). Nancy Jackson visited the Robert H. Jackson Center in May 2003 and gave an oral history interview then about her beloved father-in-law.³

As far as I know, Nancy and Bill's September 1944 wedding was the only occasion at which Robert H. Jackson was officially the best man. Across the dozen or so years that Justice Jackson knew Nancy, his regard and affection for her could not have been higher – he adored her and treasured all that she brought to his life and of course to his son's. And he was right.

* * *

We also remember and miss people who were important parts of the United States staff in Europe, including Nuremberg, during the 1945-46 IMT process. One such friend, who in recent years was a spellbinding speaker at Chautauqua Institution and many other venues, was Richard W. Sonnenfeldt. Richard was the chief interpreter – not to be confused with the translators of documents, or with the courtroom interpreters during the IMT proceedings – on the U.S. Prosecution staff at Nuremberg. His service, personally and as the head of a staff that grew to be quite large, was live, out-of-court, German-English interpretation of interrogations of prisoners, prospective defendants, and prospective witnesses before and during the trial.

³ *Nancy Jackson (2003) on Justice Robert H. Jackson*, YOUTUBE (May 2003), www.youtube.com/watch?v=5SPqOfUJ_PA.

Richard Sonnenfeldt was a German Jew, a refugee from Hitler and the Holocaust, a lucky boy whose parents got him to England in 1938 and, through a miraculous saga that he described in his internationally-acclaimed memoir,⁴ made it in 1941 to the United States and obtained U.S. citizenship . . . only to become a U.S. soldier sent back to fight the Nazis. In 1944 and early 1945, he was an infantryman fighting across France and into Germany.

After the Nazi surrender, Private Sonnenfeldt was working in a U.S. Army motor pool when he, possessing native German language skills and the very fluent English of his refugee stops in England, Australia, India, and his immigrant home city of Baltimore, was called out from under a jeep in Austria to serve as an interpreter for Major General William J. Donovan (U.S. Army), head of the OSS. Soon thereafter, Justice Jackson recruited his western New York State friend Bill Donovan to serve as his deputy in the prosecution of Axis war criminals in Europe, which resulted in Donovan's interpreter Sonnenfeldt also joining the Jackson staff.

“Chief Interpreter” Richard always smiled as he explained his lofty title when he was all of twenty-one years old. But in fact he was vital to the work and the

⁴ RICHARD W. SONNENFELDT, *MEHR ALS EIN LEBEN: VOM JÜDISCHEN FLÜCHTLINGSJUNGEN ZUM CHEFDOLMETSCHER DER ANKLAGE BEI DEN NÜRNBERGER PROZESSEN* (2002); RICHARD W. SONNENFELDT, *WITNESS TO NUREMBERG: THE CHIEF AMERICAN INTERPRETER AT THE WAR CRIMES TRIALS* (2006).

successes of the Nuremberg prosecutions – he was, for example, Hermann Goering’s preferred (really his personally-demanded) interpreter and functioned, in those sessions and many other interrogations, as a leading interrogator whose language skills and effective personality elicited important admissions and explanations. As the IMT trial year was concluding, Justice Jackson himself suggested that Sonnenfeldt be decorated for his work, and in fact the U.S. Army awarded him the Army Commendation Ribbon.⁵ We lost Richard in October 2009.

* * *

We also lost, in January 2010, Roger W. Barrett, a Chicago lawyer of great distinction.⁶

In summer 1945, the U.S. Army detailed then-Lieutenant Barrett (Judge Advocate General Division) to Justice Jackson’s staff. They worked together closely, in

⁵ See John Q. Barrett, *Richard W. Sonnenfeldt (1923-2009), Chief U.S. Interpreter at Nuremberg and “Single Most Important Person,”* THE JACKSON LIST (2009), www.stjohns.edu/media/3/fbd2e0f2be21484b9abbdce0edb71609.pdf?d=20091030%20Jackson%20List%20Sonnenfeldt.

⁶ See Trevor Jensen, *Roger W. Barrett, 1915-2010: Chicago Lawyer, Army Veteran Who Aided Prosecution of Top Nazis at Nuremberg Trials*, CHI. TRIB., Jan. 10, 2010, available at http://articles.chicagotribune.com/2010-01-10/news/1001090257_1_mr-barrett-nazis-luftwaffe-commander-hermann-goering. For many years, Barrett (no relation) was a partner and leading litigator in the Mayer Brown law firm.

London and then in Nuremberg, where Barrett became the central keeper of, and expert on, the Prosecution's documentary evidence, the backbone of the case. When the trial started late that November, Barrett's courtroom seat, particularly when Jackson was speaking from the podium, was just across the connected table, next to binders of documents, and within Jackson's reach (and he did reach, regularly, for documents that Roger handed up to him).

In early 1946, Jackson, knowing Barrett well and liking him a lot, sent him back to Washington to begin the process of publishing Nuremberg's record. Now-Captain Barrett, working closely with Bill Jackson and others, meticulously assembled and carefully edited the U.S. Government publications that we know as the Nuremberg "Red Series," *Nazi Conspiracy and Aggression*.⁷

⁷ See, e.g., Roger W. Barrett & William E. Jackson, *Preface to 1 OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION*, at v-xviii (U.S. Gov't Printing Off., 1946) (describing the ongoing Nuremberg trial and the document collection and evaluation process resulting in the publication, jointly agreed to by U.S. and U.K. prosecutors, of approximately 2,200 captured Nazi documents translated into English, including witness affidavits, other statements, explanatory essays, counsel statements, IMT rulings, and relevant treaties), available at http://avalon.law.yale.edu/imt/nca_voll_preface.asp. In addition to these eight volumes, each published in 1946, the "Red Series" concluded with two additional volumes of Nazi documents, "Supplement A" and "Supplement B," which were published in 1947 and 1948, respectively.

Roger Barrett's work first helped to build and then preserved, for global dissemination, the record of Nuremberg. In later years, he spoke of Nuremberg with precision, fervor, and justified pride.⁸

* * *

In April, we lost our dear friend Whitney Harris. He was the last surviving Prosecutor who appeared in a speaking role – a “podium prosecutor” – before the IMT at Nuremberg. At that trial, Lieutenant Commander (United States Navy Reserve) and U.S. Trial Counsel Harris was primarily responsible for the prosecutions of defendant Ernst Kaltenbrunner, former Chief of the *Reichssicherheitshauptamt* (RSHA, or Reich Main Security Office), and defendant organizations RSHA, the *Gestapo*, and the *Sicherheitsdienst* (SD, or Security Service). Whitney Harris also was a principal, trusted aide to Justice Jackson and assisted him throughout the trial, including during his cross-examination of defendant Hermann Goering.

Following Nuremberg, Whitney Harris served successively as Chief of Legal Advice for the U.S. occupation military government in Berlin, as a law professor at Southern Methodist University, as Director of the Hoover Commission on the Organization of the Executive Branch of the Government of the United States, Legal Services & Procedure, as the first

⁸ See, e.g., *Roger Barrett (2008) on Justice Robert H. Jackson at Nuremberg*, YOUTUBE (July 2008), www.youtube.com/watch?v=UBjvhtnwH10.

Executive Director of the American Bar Association, and as General Solicitor at Southwestern Bell Telephone Company in St. Louis. He authored *Tyranny on Trial*, a monumental account of the Nuremberg case and evidence.⁹ He also became a generous philanthropist – Washington University in St. Louis was among the beneficiaries – and a leader and conscience in his community.

In recent years, Whitney Harris devoted his energies primarily to speaking, writing, teaching, and embodying the past, the progress, and the hopeful future of international law and justice. He was a strong supporter of modern tribunals, including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. As Whitney knew best and explained powerfully, each of those Tribunals, and the world progress they embody and assist, grew from and builds upon the principles and achievements of Nuremberg.

⁹ 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* (1954; reissued 1995; rev. ed. 1999) (with Foreword by Robert G. Storey and Introduction by Robert H. Jackson).

Whitney Harris was a colleague, friend, and special teacher to each of us. He played a key part in making Nuremberg work, in teaching its lessons, in bringing it back to vitality as the 20th century closed, and in handing it up to the future.¹⁰

* * *

We also lost, just in the past two weeks, Benjamin Kaplan. At age 99, Ben Kaplan was the last surviving member of the U.S. legal team before the IMT at Nuremberg.¹¹

In early 1945, Lieutenant Colonel Benjamin Kaplan (U.S. Army) was a War Department lawyer. He was working in Washington for Colonel R. Ammi Cutter (General Staff Corps) and reporting to Assistant

¹⁰ See, e.g., John Q. Barrett, Whitney R. Harris, Henry T. King, Jr., and Benjamin B. Ferencz, *Nuremberg and Genocide: Historical Perspectives*, in PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-54 (American Society of International Law, Studies in Transnational Legal Policy No. 40, Elizabeth Andersen & David M. Crane eds., 2009); see also John Q. Barrett, Whitney R. Harris (May 23, 2010) (unpublished eulogy), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729754.

¹¹ See Bruce Weber, *Benjamin Kaplan, 99; Crucial Figure in Nazi Trials*, N.Y. TIMES, Aug. 25, 2010, at B9; Bryan Marquard, *Benjamin Kaplan, 99, Esteemed Jurist, Law Professor*, BOS. GLOBE, Aug. 20, 2010, available at http://articles.boston.com/2010-08-20/bostonglobe/29287479_1_civil-procedure-chief-justice-associate-justice.

Secretary of War John J. McCloy. As McCloy and his boss, Secretary of War Henry Stimson, were getting Jackson off the ground there, Kaplan was told that Jackson needed him. And so Kaplan became a senior member of Jackson's original, core team.¹² In summer 1945, Kaplan and Colonel Telford Taylor (General Staff Corps) ran Jackson's Washington operation while he worked in London. After Allied negotiations produced the August 8, 1945 London Agreement that created the IMT, Kaplan and Taylor, along with Sidney Alderman and Allied (principally British) colleagues, wrote the Nuremberg indictment. By all accounts, Benjamin Kaplan was the leading author of Count One, the charge of the defendants' common plan or conspiracy to commit crimes against peace, war crimes, and crimes against humanity. And at Nuremberg that fall, Kaplan was a senior lawyer leading many aspects of the trial preparatory work.

¹² They were, as described on the official roster that the War Department issued on May 24, 1945, a staff of twenty: Justice Jackson; assistants Maj. Gen. Donovan, Sidney Alderman and Francis M. Shea; staff members Col. John H. Amen, Col. Telford Taylor, Col. Murray C. Bernays, Lt. Col. Benjamin Kaplan, Lt. Col. John C. Street, Capt. Ralph L. Morgan, Lt. Gordon E. Dean, Ens. William Jackson, and 2d Lt. Raymond W. Ickes; associates Lt. Col. Warren Farr and Lt. James B. Donovan; and civilian employees Elsie L. Douglas, Ruth M. Sternberg, Betty I. Stark, Anna G. Pill and Eleanor S. Waldo.

Interestingly, Ben Kaplan kept rather quiet about all of that during the rest of his long life.¹³ For him, Nuremberg was a complicated memory. This came through in something that he told me in old age. I asked when he last had seen Nuremberg and he replied, in a soft voice, “December 1945 – I never went back.” He left Nuremberg, in other words, after the trial had begun in November 1945 but long before its summer 1946 conclusion. Jackson wanted Ben Kaplan to go to the podium and present part of the U.S. case to the IMT. But Kaplan had a young wife and a young son in the United States and enough points to be discharged from military service. So he decided to depart. In hindsight, he somewhat regretted that choice. He marveled at Jackson’s risk-taking in accepting the Nuremberg assignment and his vision that it could succeed.¹⁴

Benjamin Kaplan went on to become an esteemed professor at Harvard Law School. He was one of the creators of the Federal Rules of Civil Procedure. He wrote a foundational book on modern copyright law. He became a judge of the Massachusetts Supreme Judicial Court and, after reaching its mandatory retirement age, he served until recently as a judge of the Massachusetts

¹³ Cf. Benjamin Kaplan, *Book Review*, 68 HARV. L. REV. 1092 (1955) (reviewing WHITNEY R. HARRIS, *TYRANNY ON TRIAL* (1954)).

¹⁴ See *Ben Kaplan on Nuremberg* (Boston 1995), YOUTUBE (film from an April 1-2, 1995, conference at Boston College Law School), http://www.youtube.com/watch?v=q-sqQ_p2piE.

Court of Appeals. He was one of the most learned, capable, thoughtful jurists in modern history.¹⁵

Benjamin Kaplan lived to the age of ninety-nine. In his later years, he became physically frail but remained mentally sharp. As he reflected back on his life and accomplishments, he very rightly felt proud to have played front-end roles in the Allies getting to, and in their ultimately succeeding at, Nuremberg.¹⁶

We stand on the shoulders of these greats. We were lucky to be their friends. We remember them with deep affection.

¹⁵ See generally *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1345 (2011) (essays by Justice Stephen G. Breyer, Justice Raya Dreben, Justice Ruth Bader Ginsburg, Marjorie Heins, Arthur R. Miller, Martha Minow, and Lloyd L. Weinreb).

¹⁶ See generally John Q. Barrett, *Benjamin Kaplan (1911-2010), Nuremberg Architect & Prosecutor*, THE JACKSON LIST (2010), available at www.stjohns.edu/media/3/b7b43b16285b47a5b5ed7b6bbfa5704a.pdf?d=20100822.

Aggressive War: The Biggest Crime Against Humanity

Benjamin B. Ferencz*

The program says I'm to engage in a meaningful dialog concerning international criminal law, past, present, and future. So all I have to do is tell you all about the past, tell you all about the present, and tell you all about the future, and the future is easy for me. It's limited. I'm over 90 years of age. I don't want to project too far.

But let me go back not too far in history. It's been mentioned that I was a poor immigrant boy and managed to get through Harvard Law School somehow. One of the things I did in school, which turned out later to be rather eventful in my life – and I say this for the benefit of the students – is that I got a job working for the leading criminologist in America, Professor Sheldon Glueck at Harvard. He wanted to write a book on war crimes, and like many professors, he wanted a student who would do the work. I was selected because I had gotten a scholarship based on my criminal law exam.

So I was required to read every book in the Harvard Law Library in any language I understood and

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summarize it for him, and I did. One of the books I read was by a Romanian diplomat by the name of Vespasien Pella. You can forget the name. He wrote a book called *La Criminalité Collective des Etats et le Droit Pénal de L'Avenir*. In English that means the criminal law of the future. I'm just showing off with my French, which I have forgotten in the meantime.

The point of the book was that if you have international crimes, for example if you were dealing with counterfeiting, you should have an international court to deal with them. That seemed to me to be a pretty sensible idea. I still have the same idea. You have international crimes, you should have an international court to deal with them.

It has been mentioned that I was a soldier in World War II. The Army, knowing of my great scholarly background and intensive knowledge in the field of war crimes, immediately assigned me as a Private in the artillery, as a typist. I couldn't type but we got over that. By the time we landed on the beaches of Normandy, I was already a Corporal. I was making good progress. And we went through all the battles. I don't need to spell them out. In the final Battle of the Bulge, when the 101st Airborne Division was entrapped in Bastogne, Patton said every man who can carry a gun goes to the front, and off we went. Anyway, I don't want to recite all the horrors of war, even though that's what the young people here would like me to do. But I'll give you some taste of it perhaps.

One of my assignments, as we reached Germany and France, was to go into the concentration camps and collect evidence of the crimes because the President of the United States and the other leading powers had warned the Germans that they would be held to account. We had a pretty good idea of what was going on because of reports from refugees coming out and they all went in to this Harvard professor. He was a member of a committee dealing with that, and so I knew what was going on.

Well, the experience in the concentration camps is not something I want to recite to you before lunch or at any time for that matter. The horrors are unimaginable to a rational human mind where you see human beings who are dying. You think they're dead. You step past them, and they move. Skeletons lined up in front of a crematorium waiting to be burned; inmates running out trying to catch a guard; inmates being killed, beaten to death, burned alive. I've seen all of that, smelled all of that. I don't like to talk about it. I usually can't talk about it much.

I don't want to talk about it, but for the benefit of those young people who are here, it certainly had a traumatic effect on my thinking in that I was convinced that the worst thing that we could do was to have a war. The challenge for me as a young man was the question of what I could do to prevent another Holocaust. I could see that we had a system of settling disputes between states whereby if the leaders couldn't agree, they sent their Army, Navy, Air Force, and Marines, and killed a lot of young people. That's how you hope to settle your

disputes. Well, that seemed to be a crazy thing to do. You were killing people. I didn't even know who they were, they didn't know who I was, and they had no good reason. They were fighting in distant lands they had never heard of, and they're still doing it today.

So, with that kind of a reference to the past, along comes Robert Jackson. Justice Jackson, others will talk more about him. You've heard Professor John Barrett, who is the great biographer of Jackson. Jackson got the point that the supreme international crime is the crime of aggression. Aggression meant an illegal war, a war in violation of treaties and agreements, and it encompasses all of the other crimes. There has never been a war without the rape of women. It goes with it. There has never been a war without killing thousands and thousands of innocent people. It goes with it. There's never been a war without murdering little children. That goes with it. This is all part of war-making. If we can stop the war-making, we may have some deterrent effect on that type of crime.

That was the very simple conclusion that Jackson reached. It was shared later by Telford Taylor. It was shared by Whitney Harris who wrote about it, as has been mentioned. It certainly was shared by me and many others, but these were not the people in power. They were the people who did the suffering and were told to be quiet – the diplomats are working on it at the United Nations.

For 20 years, I personally attended every meeting, I think, of discussions on the crime of aggression. What is

aggression? That's not the point. The point is to stop the damn thing. You stop killing people. Stop the war-making. Don't come to me with big drawn out definitions and discussions and this and that and that.

But I sat through all that. I wrote big books about it, too, and all of my books and all of my lectures incidentally are available free of charge on my website, which is benferencz.org, courtesy of the United Nations. You're at liberty to copy, steal them, do whatever you want. No accreditation, no payment is necessary. All you need is a determination to try to do what you can to stop war-making and make it a more humane world.

So there we had Justice Jackson setting a precedent for dealing with the past. That was a keystone activity in the past, the Nuremberg trials, hailed throughout the world and approved by the General Assembly of the United Nations. It became the foundation for what was hoped to be a new legal order consisting of international courts and a code of crimes to define what is permissible and what is not permissible. They're still working on it. That was a long time ago, but they've been making some progress. They've been going forward.

So you want to know what the present is. Well, in order to judge the present, you must bear in mind what I learned after many years of study and writing and so on. In order to have an orderly society, there are three fundamental things that you need, whether it be in Chautauqua, in New York, in Germany or France, or anywhere else. You need laws to define what is permissible and what's not permissible. You need courts

to determine whether the laws are violated or as a medium for settling disputes, and you need a system of effective enforcement. Those three elements – laws, courts, and enforcement – are the foundation for every lawful society. To the extent that they are operative and good, you have peace. To the extent that you don't have them, you have turmoil.

The world has moved away from the system of nation states. We are now an international planet. Planetary thinking is what is now required to recognize that we are all inhabitants of one small planet in a vast cosmos of billions of planets. We must organize our affairs in such a way that everyone on that planet can live in a minimum standard of peace and human dignity.

It can be done. I refuse to believe that it cannot be done. I see the money that's spent on armaments, useless armaments . . . nuclear weapons which are already obsolete because, in the next war, attacks will be from cyberspace, attacks that can cripple the electronic net of every city.

So the old system of national thinking is obsolete, and we have to have international thinking, but in the international sphere, the laws are just beginning. We're beginning. When I started with this, 50 years ago at least, people said, "Ben, that's a fool's errand. It will never happen. You will never have an international criminal court. Nations are not going to accept it. They don't want to give up their sovereign rights. They've fought for their sovereign rights. Going to war is a glorious thing. It's the road to power, to conquest, to

riches. They're not going to give that up." And I said, "Yes, they will, because if they don't, they'll be dead."

So we began to make progress with regard to the international laws growing out of Nuremberg; a big step forward. We made some more progress on that in Rome with the Statute. We had a consensus definition of aggression. Consensus means everybody agreed. I mentioned they worked on it for 30 years. I wrote two volumes, the consensus definition of aggression, which they then forgot about. "Aggression has not been defined," became the big excuse.

And what is still missing, in addition to the laws, is the courts. We are now beginning to build the courts. We have the Prosecutors here, the founders, the first Prosecutor of the first international criminal court since Nuremberg, and the other courts that are growing up. These are part of an emerging process, creating the legal institutions necessary to try to maintain peace in an international society.

One thing is missing: enforcement. We have no enforcement yet. A court without enforcement is just a hope. It's not a legal system, and we haven't gotten there yet, so we have to look at it in somewhat of a historical perspective and see what do we do now. Quite logically, you need three legs on a stool to be able to stand on it, and with the Court, you only have two legs and they are weak. What do you do? You don't kick out one or two of the legs. You strengthen those legs, and you start to build a third leg. And when you have the three of them in place, then you can begin to reach the

heights for which you needed the stool. We have not yet begun to work on the third leg, so that is something for the future.

I'm glad we have young people here, because that future is beyond my vision at the moment, but let me go back now to where do we stand. You've heard about Kampala. In Rome, we took a big step forward. We had a thousand points of difference for 20 years in negotiating all the fine points of all these treaties, and they finally settled down. The most difficult point was the crime of aggression, the biggest crime of all. They couldn't reach agreement on it because those who had the power to dominate the world or to use military force to achieve their goals were not eager to have somebody else looking over their shoulder telling them they shouldn't do it. And that's understandable from a logical point of view. From a human point of view, it's a disaster. It's a disaster. What do you say? Those with the power are free to go around and kill anybody they like, and nobody can stop them? What kind of a world is that?

So, in Rome, they said, "Aha, we're going to have an international criminal court. Here it is. Here is the Statute." They worked it out. Everybody was fine. Whitney Harris was there. I was there. But they stumbled on the crime of aggression, the most dangerous crime of all.

By this time, the United Nations had also been formed as part of our original dream. They were going to have courts to enforce the law. The United Nations

would build a more humane society and would prescribe in a Charter what was permissible and not permissible. What was not permissible was the use of armed force against the sovereignty or territorial integrity of a state. That was prohibited. The use of armed force was prohibited except in self-defense or when authorized by the Security Council.

The Security Council, or the five victorious powers of World War II, had the ability to enforce the law. Nobody else had the ability, so they gave them the power. At the time, I was a soldier who just came home from the war with ten million other unemployed people looking for a job. I thought that's a good idea. I wouldn't want some foreigners telling me I have got to go back and start all over again. So it happened that way, that the Security Council members got an exercise of veto power. Veto power is very important because it keeps coming up again. It will come up in a moment when I talk to you about what happened in Kampala.

So we had this Nuremberg set up, and we had the room set up, and they couldn't agree on the crime of aggression. It's very easy to reach a consensus on some things and impossible to reach a real consensus on other things, things of substance. So what did they do? You want to get a consensus, you postpone the decision or you drop it. That's also possible. But the best thing is postpone it. Put it in the back room. We'll deal with that one later. That's what they did with the crime of aggression.

Now, meanwhile, we've set up this whole slew of international criminal courts, crimes in Rwanda; crimes in Yugoslavia. First, they had to rape 10,000 women in Yugoslavia before we got a little impetus. "It's time to do something, boys. Raping 10,000 women is not nice." And you can't send in the troops to stop it because they're going to commit more rapes. So we began to set up the system of courts, which is still growing and suffers from their problems.

These are prototypes. They are the beginnings of an international, rational, legal system, and with the prototypes, of course, you have all kinds of problems: it's too expensive, it takes too long, people are incompetent, there are undue political influences, all those kinds of arguments. But the courts are there. They're there, and that never happened before. So, to all the first row gentlemen, don't prosecute me. I'm an innocent guy. I didn't do it, but I thank you for the fact that you are here, that you are functioning. It's the beginning in most cases, not in all cases, however.

So what do we do now? We come to Kampala. The thing had been postponed, and they now have big discussions about defining aggression. Let me say at the outset, I am by temperament and policy a realistic optimist. I'm a realist because I see all these problems, and I do see the problems. Many of them are not mentioned by anybody, and I don't mention them because I'm an optimist. I'm an optimist because I see solutions and I see the progress, and the progress has been fantastic.

But before we get into the progress, with which I hope to end, what are the difficulties that we have? We came out of Kampala with a consensus, and I've given you my opinion of consensus. Consensus means everybody has a veto over everything. Try to work out a system with that. Everybody can veto everything. I am quite sure that if you put on the agenda how to peel a potato, you couldn't get a hundred nations to agree. They would say, "postpone it," or, "it depends on what you mean by a potato," you know.

You can always put in language which allows everyone to interpret it in any way they see fit. That's good. That's a good way to reach consensus. That's how you do it, and I learned the tricks. I've been hanging around.

So we come to Kampala. What's the situation? I will leave Ambassador Rapp – who is a very competent man, who came out of your ranks, too – to explain the U.S. position. I won't go into it in detail, but basically what's the scene?

This is a great country to which I am eternally indebted. It's been mentioned that I came from a poor immigrant family and I'm grateful for the wonderful opportunities I've had. The United States is a powerful country. It's a great democracy, and it's normal that in any democracy, you have people with different opinions. That's the way it should be. That's what democracy means.

So you have some people in the United States who say we are powerful, we are the sole remaining super power, like Ozymandias, king of kings:

Look on my works, ye mighty, and despair!
Nothing beside remains. Round the decay
Of that colossal wreck, boundless and bare,
The lone and level sands stretch far away.

The great monarchies, the great dynasties, the great empires of yesterday – the Roman empire, the British empire, the Spanish empire, all of the colonial powers, where are they now? They're sending representatives to a court to deal with crimes that are being committed against innocent people. So, when it came to the question of aggression, first of all, they put a lot of things in the Statute that said if you don't want to be bound, you're not bound. Hey, hooray. What kind of an agreement is that? If you don't want to be bound, say I don't want to be bound. Okay, you're out, but you're in. And you have to tell us that you don't want to be bound. Okay, we'll tell you, you don't have to be bound. Okay, you're out.

So they play that game which, if you look at it stripped down to its bare essentials, it's ridiculous. What are you doing? You're reaching an agreement on points on which there is no agreement. Some people want it and are ready to accept it. Chad, Malawi, Seychelles, they're ready to go; they will give up their right to commit aggression. But the big powers, Russia, China, the United States, the United Kingdom, France, they say, "Let's wait. We've got the power. We've got nuclear

weapons. Let's see. Let's not rush into giving away that power, because our military will be hesitant to go."

Some of you remember the Downing Street Papers discussing the illegal war against Iraq, which had not been approved by the United Nations General Assembly. The General in charge of the British Forces said, "I'm not going unless I get a legal opinion that says it's lawful." Nuremberg precedent, your precedent. It didn't work, because they gave him the legal opinion he wanted.

First, there were many debates. Our colleague, Elizabeth Wilmshurst, who was the U.K. expert on aggression for many years, said, "I have to resign. I can't serve a country that's committing the crime of aggression." And she did resign. Hooray for her. Hooray for Elizabeth. I said, "Lizzy, you finally got the point."

So we had a situation, but the United States, the big power, was doing things that, in the minds of some people, constituted the crime of aggression. In the minds of others, it was a projection of our power and our interest, and we only did it for noble and humanitarian reasons. Everybody knows that. Well, not everybody knows that. We haven't defined humanitarian intervention, and if everybody says, "Well, I only did it for humanitarian reasons," where are we?

Now, here, for some of the kids in the background, I have a little problem. It's been mentioned I was the

Chief Prosecutor for the United States in a case against *Einsatzgruppen*. Forget the word. Nobody knows how to translate it. It refers to special extermination squads whose job it was to go in and murder, without pity or remorse, every single Jewish man, woman, and child, and do the same with the Gypsies. Wipe them all out, liquidate them root and branch. That was their job, and in they went, and they did it as best they could.

We found their records. They didn't expect that. We found their top secret records where they listed all of the crimes in all of the towns. They never called them "crimes." They never even called them "killings." They said that the towns were resettled, they were taken care of, they were eliminated, you know. And we had all of those crimes. I calculated them up on a little hand adding machine, and when I found over a million people dead, I said, "That's enough. That's enough. We go to trial. I don't need any witnesses. I don't need anything. I've got the proof. It's right here in these top secret documents with the names of the people. How many of them do we have in the prison?" If you haven't got the defendants, you also can't go to trial. If you've got the defendants and no evidence, you can't go to trial.

We had enough of both of them to make a sampling, a sampling of 3,000 men who every day went out and murdered men, women, and little children. Since some of the young people want me to talk about blood and guts, I'll mention that there was some debate about murdering the children. Some of the extermination squad members would use the children as targets, throw them up into the air and shoot them. But my lead

defendant, who was an honest man, Dr. Ohlendorf – most of my defendants had doctoral degrees, were Generals, and so on – he said, “No, no. The mother should hold the infant child. Aim for the mother, and then you kill both of them in one shot. The woman stops screaming, and you save ammunition.” And this was the mentality. What were they thinking?

I asked Ohlendorf, “How do you justify this? Your reports show you killed thousands and thousands of children.” He said, “Well, it’s self-defense.” “What do you mean self-defense? Nobody attacked you. You attacked France, Belgium, Holland, Norway, Denmark, Sweden, Poland. Where do you come off with self-defense?” “Ah, yes. But we anticipated that Russia was going to attack us. The Soviet Union was going to attack us, so it was self-defense. We preempted, and we went in first.” “And why did you kill all the Jews?” “Well, everybody knows the Jews are in favor of the Communists. We’ve got to kill them, too.” “And why did you kill all the Gypsies?” “Well, the Gypsies, you know, nobody can trust the Gypsies, and so you have to get them out of the way.” “And why did you kill all the little children?” “Well, if they grew up and they knew that we had eliminated their parents, they would be enemies of Germany, so we were interested in long-term security.”

This is called justification for murdering thousands of little children, young people like those sitting in the audience, too. If you were the age of most of those in the audience, they didn’t kill you right away. They worked you to death: they bundled you up and sent you

off to a concentration camp, whipped you, beat you, starved you, and when you couldn't work anymore, gassed you and burnt you. Then they used the ashes for fertilizing the field and used the fat to make soap. Hooray for them. Cut off their hair; make mattresses.

That's what this is about. It's not about Paragraph 125. It's about whether you're prepared to stop this kind of inhumane, rotten way of dealing with our disputes, in violation of the existing law. The law in the Charter is very clear. It lists a dozen ways of settling disputes by non-violent means but we still have a long way to go.

Now, where are we going as a result of Kampala? A few weeks ago, I was lecturing in Berlin on the way to Kampala. They gave me a big iron cross to hang around my neck. When the Germans put a rope around my neck, I'm always afraid they'll pull it up. They put that big cross around my neck. It was a sign of appreciation, I'm sure, of the work done in Nuremberg and I was moved by the fact we had a new German government. I had some hesitation about accepting it, frankly, but I was moved by the fact that it was a new government, a new regime, a new way of thinking. The Germans had suffered enough, and they had come to the conclusion that war has got to go. And it was a German initiative which put the crime of aggression into the Statute when we were at Rome. It was the German initiative, largely inspired by Judge Kaul, whom you will hear later in the day.

There had been fighting to have aggression listed as a punishable crime rather than as a mere epithet and I

thought it was quite ironic that while the Germans were welcoming Nuremberg's precedent and showing their appreciation, the U.S. representatives were saying, "That was then. Now is now. Forget it." Forget the biggest step forward that we had taken toward a rational world order. It was painful.

I respect the views of people who have a different perception of how to make a peaceful world, and they should be respected. But what happened to the wonderful reputation we had when we came out of World War II? If you were an American then, they came to embrace you. "J'ai débarqué en Normandie." When I said that to a Frenchman, that I had landed in Normandy, he would give me a big hug and a kiss. It has since changed. "You're an American? When are you going to indict the President?" I have had many such requests. I didn't draw up any indictments, but I've got the books, and I wrote an introduction to several, in which I wrote, "Look, this is my country. Can't we do better?"

So where do we go? I think I would like, for the sake of the children, to tell you a little story. Well, let me first tell you my own reaction to Kampala. I was there from the beginning, before the beginning, and I gave them a big pep talk. I don't know exactly what I said. I never have a prepared text and usually I don't remember what I say because I just speak from the heart. But I gave them a big talk, and I said something like, "Come on, guys. Here's your chance. Let's get aggression condemned as a deterrent. I don't think it's going to end all wars, of course not. But it may have

some deterrent effect and if it has some deterrent effect, that's good enough. That's good enough."

I wrote to Admiral Mike Mullen, who is the Chairman of the Joint Chiefs of Staff. I've heard him on television saying that he would rather deter a war than fight one. I said that's my boy. That's what I'm talking about. I'm talking about deterring a war.

Ambassador Rapp, Sandra, and I, we went together to West Point and I said to the soldiers, "Look, I am here because I don't like you getting killed. I don't like you coming home maimed. I don't like you going to war at all and killing other people either." Everybody was happy and said yes, that's sensible.

And I said to Admiral Mullen, "Look, I'm with you. They say the Pentagon is the cause of the trouble. Take a stand." He wrote back, "Your country loves you for your duty to your country. Oh, we love you, Benny. We love you, you know, but that's a legal problem. I don't deal with legal problems." So he referred it over to the State Department. The State Department takes the position that it doesn't want to overburden the Prosecutor. They say, "That's a wobbly bicycle. If you're giving him more cases in aggression, you are overloading the poor Prosecutor." So I asked the Prosecutor, "Would you feel overloaded with that?" He said, "No, of course not." The State Department also claimed that the Prosecutor is going to be politically motivated. I asked him, "Will you be politically motivated?" He said, "How can I be politically motivated? I have the law. It says I have to carry it out.

I'm sworn to carry it out. I do carry it out. Politics has nothing to do with that." Well, who would make such a complaint about the Prosecutor being politically motivated? It happened to be the Permanent Members of the Security Council, which is the most politically motivated organization that ever existed in human history. And they say, "Oh, we can't have that," and they claim aggression has never been defined.

That one killed me. I have written books and articles on the definition of aggression. It was good enough for Justice Jackson. If the crime had not been defined, it would have been unfair to try a man for it. Every lawyer knows that. The Nuremberg trials were absolutely fair. That was a basic principle. You gave the defendants every possible right, and it certainly is a principle today, even more so, and perhaps too much so, in the existing courts.

But trying somebody for an action that had not been defined as a crime, that would have been an illegal trial. Jackson would have violated the law, which of course, was not so. Jackson wouldn't do that, and he didn't. The Nuremberg judgment was affirmed not only by the four powers and their expert legal staffs but also by the General Assembly of the United Nations, by the International Law Commission, by precedents in Tokyo, by precedents in England where the judges recently said that the crime of aggression was clear enough at the time of Nuremberg. It hasn't become more ambiguous since then, it's defined. But the big argument was aggression hasn't been defined. That sounds like a wonderful argument. If you come to somebody who doesn't know

anything and you say, “Look, they want to try somebody, but the crime hasn’t been defined.” Well, you can’t try him. It hasn’t been defined. It has to be defined.

I kept hearing that argument, and it was driving me crazy, because I wrote not only two volumes on it, which specified all of the problems, but I also wrote dozens of articles. And it’s as though nothing had been written.

So they finally reached a new definition. The problem is over. I don’t like to dwell on old problems. It’s finished; it’s solved. I like to think positively. The American position, which was supported by other nations – and I want to repeat that I am a firm American patriot – was not persuasive, to put it politely. The arguments that they brought out against the crime of aggression were not persuasive. Why did good lawyers make such foolish arguments? Because they didn’t want to say, “Hey, we’d rather go to war because we think we can win it.” You can’t win a war. The only winner in war is death. But it would look too stupid to say, “we’re in favor of war.”

My website has a caption, “Law. Not War.” and that sums it up. They don’t want to accept it. They’re afraid that something will happen, that they will lose some of their vital interests or some of the things they’re concerned about. And what are people concerned about? It’s fear that drives them: that their particular religion may be suppressed, that their country will lose its power, that they will lose their oil or their wealth. These are the things that motivate people to go out and send innocent

people out to kill other innocent people, as if it will solve anything, and it doesn't. It doesn't solve a damn thing.

So I'm sitting there in Kampala. I was honored to make an opening speech and called on in between to give them a little pep talk. "Ben, it's sagging. The thing is sagging. It's going downhill." I said, "Look, it's not a matter of just kicking the ball around the court. We have to hit it into the goal box. That's what we're after. We're trying to stop war-making, illegal war-making. That's what we're trying to do. We're not just kicking the ball around, we've been kicking it here for 20 years. That's not the point. We have to stop the killing that's going on right now. Now. And as we sit here, there are American boys and others as well – I'm not only concerned with the Americans, but with all of them – who are being killed right now. For what? They can tell them, 'humanitarian intervention.'"

The ICC Statute deals with humanitarian intervention. It says that the Court has to take everything into consideration, all of the circumstances of the crime. They must prove intent and motive. That's part of the prosecution. The Prosecutor is not going to bring a case against someone where we really went in because the people were being murdered by the regime in power, and we stopped it and then we got out, without any particular benefit to ourselves and where we used the minimum force necessary. We haven't bothered to define humanitarian intervention because we don't want to. We want a free hand.

Alright. That's enough complaining about the world. What have we really got? I can't end with a negative note. I will end with two things. First, I will point out to you specifically what progress has been made. When I get through with my griping and crying, I still see the big picture. It's been a long life and I've been at it more than anybody, dead or alive, I think. The progress has been fantastic, absolutely fantastic.

When I began, Harvard Law School did not admit women. Women were not admitted to any reputable law school. The first seven judges elected to the International Criminal Court were women. Fatou Bensouda, who sits here, serves as Deputy Prosecutor, and is a woman.

We had no international criminal courts. There was no such thing as international criminal law. There was no such thing as humanitarian law. I knew René Cassin, who won the Nobel Prize for the Universal Declaration of Human Rights. I knew Raphael Lemkin, who coined the term "genocide." Genocide was listed as a crime in the Statute of the International Criminal Court, without debate, without discussion. It took the United States forty years to ratify the Genocide Convention. Forty years. We introduced it, and it took us forty years.

None of those things existed. It's a shame we allowed the Rwandan genocide to happen in our lifetime; another holocaust, even more intense than the Nazi Holocaust. There were 10,000 rapes in the former Yugoslavia, and we got an international criminal court

there. Then we went on with Rwanda. My poor friend here, Richard Goldstone, had to run both Courts.

Sitting here, you see the evolution, right here in the first row, of international criminal law, and it's fantastic. It really is fantastic. I remember discussing international criminal law with some very learned people and I realized that it was not likely that we would accomplish anything. The immediate goal was to get an international criminal court. They said it would never happen. Nations would never be willing to give up their sovereign rights. Well, they were almost right but not quite; in fact, they were wrong, with difficulties.

So let me tell you about the conclusion of Kampala where a revised definition of aggression was finally accepted. Instead of being a violation of the Charter, it's a manifest violation of the Charter. Hooray, we'll buy that. Okay? We argued for hundreds of hours whether it should be a flagrant violation of the Charter or a manifest violation of the Charter. What difference does it make? It's a violation of the Charter. You're going out and killing people. It has to be of concern to the international community as a whole. What are you doing playing games with the lives of people like this? But they said, "Okay. A manifest violation – that we'll buy." So we now have a consensus definition of aggression.

Of course, in that consensus it says that if the Security Council decides it's not aggression, then it's not aggression, and if it decides that something else is aggression that isn't listed, then it is aggression. And if

somebody does this for noble causes, such as freedom from alien domination or self-determination, that's not aggression. That's a justification.

So they have this nice definition, which even nations without much imagination can interpret to suit their own needs. It's a very, very weak foundation, but it's there. The lack of definition of aggression is no longer an excuse for nations not to accept the Court. We've buried that, I hope, but now come the other excuses.

The Statute says very clearly that if you don't want to be bound, you're not bound. It says so in several places. The Security Council wrote that in all over the place. The Security Council can stop it. A nation can decide for itself if it wants to try the people, and if they're able and willing to do so, the Prosecutor must turn the case over to that nation. That's the principle of complementarity. The United States could just add one sentence to the Criminal Code saying federal courts are authorized to try any of the crimes listed in the Statute of the International Criminal Court, the effect of which would be that the United States has priority jurisdiction on anything in the Statute. It can pull the case back at any time they're ready to go to trial. But they don't do that. Why not? They'd rather have it this way. Other nations can do the same. It's a clause they wrote in giving themselves that option. Why don't they do it? Because they're afraid, they don't know what's going to happen. It's a new system and they don't know who's going to come in. They like it the way it is. They're not the ones who are dying. It's somebody from Alabama

and from, I don't know where, Oklahoma, somewhere else.

So, all in all, I see the positive things. Aggression is still listed as a crime, thanks to the German initiative, and crimes against humanity are punishable. Nobody raised that. Wonderful, wonderful. I kept my fingers crossed. As Prosecutors, charge them with aggression. If you can't do it because it's not in accordance with the Statute, you can charge them with crimes against humanity or charge them with war crimes. It's inevitable in every war. There's no such thing as a war without crimes against humanity. War is the biggest crime against humanity.

Leila Sadat is drawing up a convention on crimes against humanity. I can think of nothing more detrimental to the right to life – the first right of human rights as laid down by my friend, René Cassin – than sending innocent boys out to war to kill people they don't know and run the risk of being killed themselves, and all of the suffering and pain that goes with it. If you are drawing up a convention on crimes against humanity, you must include a reference to the fact that those who wage illegal war must be held responsible. I'm not talking about the common soldiers. There were no enlisted men in my dock; they were all Generals. The leaders who send people out for that purpose are committing a criminal act, which is punishable, and hopefully, that will deter some of them.

Now let me tell you a little story. It's primarily for the kids. I have a study at home that has a glass door.

It's a little alcove where I write my books, not for publication, but my notebooks. They've been published, but they were my notebooks, and they had all the documents. The sign on my door says, "Here lies Tycho Brahe ad infinitum." It was put on by my oldest daughter about 30 years ago, and it explains me. I'm sure there's nobody here who knows what that means. I'll tell you what that means.

Tycho Brahe was a Danish astronomer who lived before Columbus. It was believed at that time that astronomers, like Copernicus and Galileo and others, would be able to understand the meaning of the universe if they could study the stars. They would see what's happening in the vast firmament. Tycho was a nobleman who persuaded the King to let him build an astronomical observatory on the island of Ven, right off the coast of Elsinore. Brahe invented the telescopes, built an observatory there, and he charted the stars. He made a note every night. He'd go out and make a chart of the stars.

Well, he did that for about 20 years, and the old King died. A young Prince came to the throne and he asked, "What's going on over there? We have a budget, why are they spending money?" He sent some of his men out, the equivalent of representatives from the General Accounting Office, and they said, "Hey, wake up, Tycho," because you know astronomers, they have to sleep during the day since they work at night.

They said, "Wake up, Tycho. What have you been doing for the last twenty years?" Tycho said, "I have

been charting the stars.” “You’ve been what?” “I’ve been charting the stars. Each one is very precise. I can swear to it myself. I’ve observed it very closely every night, and I tracked its movements in relationship to the other stars.”

He said, “Well, what have you got to show for it?” Tycho said, “Well, I have 75 volumes of all these charts.” “What is it you hope to achieve?” “If I live long enough, I hope to reach 100.” They said, “Are you mad? What’s the use of it?” “Well,” he said, “I must admit that I have not yet been able to figure out the meaning of the universe from this, but I believe that someday, somebody will, and I will have saved that person 25 years of labor.” The interesting sequel is that when our astronauts landed on the Moon, they had with them the tables of Tycho.

So perhaps I’ve been wasting my life, but someday, you may land on the Moon, too.

From Nuremberg to Kampala – Reflections on the Crime of Aggression

Hans-Peter Kaul*

It has become a tradition in the late summer days of each year for the Robert H. Jackson Center to hold the International Humanitarian Law Dialogs at Chautauqua Institution in the state of New York. Initiated in 2007, the Dialogs include some of the most renowned international Prosecutors from all possible backgrounds – from Nuremberg through the present day – as well as international judges, experts, and scholars. The Fourth Dialogs were organized around the theme *Crimes against Peace—Aggression in the 21st Century* as a follow-up to the ICC Review Conference that took place in Kampala, Uganda, from May 31 to June 11, 2010.

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This article is based on a speech that the author gave at the Fourth International Humanitarian Law Dialogs at Chautauqua Institution in the state of New York. The conference, entitled *Crimes against Peace—Aggression in the 21st Century*, was mainly hosted by the Robert H. Jackson Center, the American Society of International Law, and the Whitney R. Harris World Law Institute at Washington University, St. Louis.

Being fully aware of the significant roles played by the U.S. Prosecutors at Nuremberg – Robert H. Jackson, Whitney R. Harris, and Benjamin B. Ferencz – in the development of the concept of “crimes against peace” and the recognition and codification of the crime of aggression, it seemed befitting to honor these three outstanding American lawyers. This will also highlight that the proposal concerning the crime of aggression that was adopted in Kampala, as well as the advocacy of the Federal Republic of Germany during the Review Conference for the adoption of these amendments, are simply the natural continuation and concurrence of these three important Prosecutors’ life work and convictions.

The article concludes with the hope that the articles of the Rome Statute on the crime of aggression that have been adopted in Kampala will one day be applicable to all States, as Robert Jackson envisioned.

I. American Trailblazers in Establishing Crimes against Peace

Tradition has established that this meeting be primarily a gathering of renowned international Prosecutors, spanning from Nuremberg through the present day. Given that the main topic of this meeting is aggression in the 21st century, I will speak on the role and enormous contribution of three American Prosecutors, namely Robert H. Jackson, Whitney Harris, and Benjamin Ferencz, to the recognition of aggression as a crime under international law. I will do so from the perspective of a citizen of Germany, who was born

during the Second World War, who is reasonably aware of the history of the 20th century and who, by the unpredictable circumstances of life, became in the 1990s, the German Chief Negotiator for the future International Criminal Court and, in 2003, one of its first judges.

But before I go *medias in res*, I would also like to mention the following: two days ago, on Saturday, my wife Elisabeth and I were honored to meet for the first time Mr. Bill Caming, another Nuremberg Prosecutor, at the airport in New York where we arrived on the same plane. When I speak of the legacy of Nuremberg, I am aware that it also encompasses so many other distinguished Americans, such as Telford Taylor and Bill Caming. Mr. Caming, it is wonderful that you are here.

II. After the Review Conference

On June 11, 2010, the ICC Review Conference in Kampala adopted a package proposal on the crime of aggression,¹ which, beginning in 2017, will probably provide the ICC with jurisdiction, to some extent, over future crimes of aggression. Before the Review Conference, pessimism prevailed internationally as to the likelihood that such an agreement could be reached. The successful outcome of the ICC Review Conference on the crime of aggression would not have been possible

¹ The Crime of Aggression, Assembly of States Parties Res., RC/Res.6 (June 11, 2010), available at <http://www.icc-trialcompetition.org/cms/images/Crime%20of%20Aggression%20Definition.pdf>.

without the vision and the groundwork of Robert Jackson and the lifelong commitment of Whitney and Ben to the cause of peace and justice.

I never had the chance to meet Robert H. Jackson in person. Yet, in the 1990s, and during the ICC negotiation process, I had the chance to become acquainted with, and even befriend, outstanding American jurists and former Nuremberg Prosecutors, in particular Whitney and Ben. It is on the basis of my memories from a number of personal encounters together that I will try to illustrate their exemplary work against aggressive war-making, work which has given hope to so many in our global community.

In Berlin, on May 3, 2010, two weeks after Whitney passed away, a conference was held on the crime of aggression in preparation for the ICC Review Conference in Kampala. Ambassador Wenaweser, the President of the ICC Assembly of States Parties, was present, as well as a number of Bundestag Members and government officials, a good audience, and some journalists. The situation for me as ICC Vice-President was a bit difficult, as I was involved in formulating the Court's policy that ICC judges should not comment on the forthcoming negotiations in Kampala; the discussion of the crime of aggression is a matter for the States Parties alone. Eventually, I said, with some hesitation – and I recall this almost by heart:

As an ICC judge, I cannot speak on the crime of aggression and the forthcoming negotiations. But as a German citizen who

was born during the Second World War and who knows Article 26 of our Constitution,² the Basic Law, containing a prohibition on aggressive wars . . . I feel very close to two American pioneers in the proscription of the crime of aggression, both of them U.S. Prosecutors at Nuremberg, namely Whitney Harris and Benjamin Ferencz. As you may know, Whitney Harris passed away recently in St. Louis, on April 21, 2010. He was a Prosecutor of the International Military Tribunal in the case against Kaltenbrunner, the head of the Nazi Secret Police, the *Gestapo*. Whitney published a book in 2004 called *The Tragedy of War*. I would like to cite a single phrase out of the epilogue of this book: “The crime of aggressive war must be recognized, defined and punished when it occurs, for war is the greatest threat to the survival of civilization.”³

Benjamin Ferencz, Prosecutor in the *Einsatzgruppen* trial, was just awarded with the Erasmus Prize at The Hague Royal Palace for his lifelong work. The headline of his website reads, “Law. Not War.” Ben will

² Article 26 (1) of the Basic Law reads: “Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.” BASIC LAW, May 23, 1949, art. 26 (1) (Ger.).

³ WHITNEY R. HARRIS, *THE TRAGEDY OF WAR* 118 (2004).

soon travel to Kampala to attend the discussions on the crime of aggression, with tremendous energy and charisma, despite his age. Both Whitney and Ben basically agree on the following: the common task is about repressing, preventing, and banning the waging of aggressive war.

And I concluded:

It seems essential to me – it would indeed be wonderful – if Kampala would bring about real progress and a breakthrough for the outlawing and penalization of the crime of aggression.

Why do I report this episode, which may seem insignificant, to all of you? To demonstrate to you, an American audience, that on this 3rd of May 2010, in Berlin, 6000 kilometres from here, the principles, the ideals, and the lifelong commitment of Whitney and Ben, two former aides to Robert H. Jackson in Nuremberg, were present in the capital of Germany. They had an impact. I am not sure that many Americans really understand what the ideas, principles, and vision of Robert Jackson, Whitney, and Ben have done internationally for this country, the United States of America.

III. Towards the Rome Conference

It is wonderful that Anna Harris and Ben are with us today. Ben, you are indeed the first former Nuremberg Prosecutor whom I met back in 1996, at the August Preparatory Committee on the Establishment of an International Criminal Court (PrepCom). It was obvious to all that Ben was already then the leading and most eloquent advocate for the inclusion of the crime of aggression in the Statute of the future International Criminal Court.

As we prepared for the February 1997 PrepCom meeting, I received the green light from the top level of the German Foreign Office to table a new concrete text proposal on the crime of aggression. Before flying to New York, I sought the advice of leading international lawyers in Germany, including Professors Christian Tomuschat, Bruno Simma, the current ICJ judge from Germany, Abraham Frowein, and Rita Bernhardt. Needless to say, they were all quite aware of the historic complexities of the issue of crimes against peace and aware of the painful and often frustrating efforts to achieve progress. They hardly managed to hide their scepticism, even irony, when they said, "Good luck, good luck, Mr. Kaul!"

When my delegation arrived in New York at the PrepCom meeting, the discussion on the crime of aggression was low-key, if not dormant. But in May 1997, the International Criminal Court Monitor, a newsletter by the NGO Coalition for the ICC, commented: "[D]uring the February PrepCom many of

the States spoke in favor of [the] inclusion [of the crime of aggression]. Germany's proposal on aggression was particularly helpful in lending focus to this debate."⁴

Two months later, Lionel Yee, the respected Head of the Singapore Delegation, added, "A draft consolidated text defining aggression is . . . before the Committee now, and much credit for this should go to the German delegation's efforts..."⁵

It was during the Rome Conference that I became quite close, and developed a relationship of trust and confidence, with Whitney and Ben. Those who know the story of the Rome Conference will also know that both of them were, time and again, a source of encouragement and inspiration, particularly for the German delegation. You might even say that they sometimes acted as informal advisers to my delegation. Whitney and Ben were unanimous in their view that the crime of aggression should be within the jurisdiction of the ICC. Having them on our side was an invaluable source of encouragement to the German delegation not

⁴ Donna K. Axel et al., *Governments Resume Difficult Task of Finding Consensus on Draft Text*, INT'L CRIM. CT. MONITOR (NGO Coalition for an International Criminal Court, New York, N.Y.), May 1997, at 1, available at <http://www.coalitionfortheicc.org/documents/monitor04.199705.pdf>.

⁵ Lionel Yee, *Finding the Right Balance*, INT'L CRIM. CT. MONITOR (NGO Coalition for an International Criminal Court, New York, N.Y.), Aug. 1997, at 5, available at <http://www.coalitionfortheicc.org/documents/monitor05.199708.pdf>.

to give up on our quest for a credible International Criminal Court.

The ICC is the direct heir of Nuremberg, which followed the downfall of Germany to barbarism under the Nazis. First, the persecution of Jews, then the invasion of Poland on September 1, 1939, a textbook example of a war of aggression that led directly to the Second World War, with all of the crimes against peace, crimes against humanity, and war crimes that ensued. Given our own past, it is, I believe, only right that Germany did its utmost to promote the establishment of an effective, functioning, independent, and thus credible, International Criminal Court.

It is also widely accepted, if not common knowledge, that without Germany, the crime of aggression would not have been incorporated into Article 5 of the Rome Statute, our founding Treaty. The German proposal, which was the last on the table in Rome, at least made sure that the crime of aggression was reaffirmed as an international crime, once and for all, in the Statute.

From today's perspective, it seems obvious that this was of fundamental importance.

If the crime of aggression had not been recognized as such, at least though the place-holder provision of Article 5 of the Statute, we probably would have faced the following consequences:

- (1) It would have been a serious obstacle, if not dramatic regression, in international law. It probably would have been interpreted, or misinterpreted, as a rejection of the lawfulness of the concept of crimes against peace as enshrined in the Charter of the International Military Tribunal of Nuremberg. It would have even meant an implicit rejection of the vision and crucial role of Robert Jackson.
- (2) It would have been a triumph for all those who continue to argue that it is simply impossible to regulate power politics and the use of military force through the norms of law.
- (3) There would have been no mandate and no basis for further work on the codification of the crime aggression.
- (4) There would have also been no basis for this special Assembly of States Parties Working Group⁶ on the crime of aggression,⁷ which over

⁶ A complete overview of the documents and papers can be found in *THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION* (Stefan Barriga et al. eds., 2009).

⁷ For an overview of the discussion of the crime of aggression between the years 2000 to 2002, see Hans-Peter Kaul, *The Crime of*

seven years, in Princeton and New York, prepared the ground for the breakthrough in Kampala, with Ben and Whitney acting time and again as inspiring advisers.

IV. Tribute to the Work of the IMT at Nuremberg

With Anna Harris' permission, I would like to recall once more, before this audience, the memorable visit of Whitney and Anna to Berlin in October 2000, when Whitney was a guest of honor of the German Parliament. Why? Because one can see, in a nutshell, what the work of Robert Jackson, Telford Taylor, Whitney, Ben, and others meant for many in Germany.

You will now see four pictures covering 55 years, from 1945 to 2000, which Whitney and Ben also saw as witnesses of history.

Aggression – Toward its Effective Inclusion in the Subject-Matter Jurisdiction of the International Criminal Court, in INTERNATIONAL CRIMINAL COURT: A NEW DIMENSION IN INTERNATIONAL JUSTICE - QUESTIONS AND PROSPECTS FOR A NEW HUMANITARIAN ORDER, PROCEEDINGS OF THE SANTORINI COLLOQUIUM 105 (Stelios E. Perrakes ed., 2002); Hans-Peter Kaul, The Crime of Aggression: Definitional Options for the Way Forward, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 97 (Mauro Politi & Giuseppe Nesi eds., 2004).

The first picture is a picture that even nowadays most Russians know, old and young, from war veterans to school kids. It symbolizes the victory of the Red Army and its conquest of Berlin. One should not forget that the war of aggression waged on June 21, 1941 by Hitler against the Soviet Union and Russia – a proud nation – caused the loss of 20 million Russian lives alone.



© Sovfoto SOV-B-194517. Photo by Victor Grebnev.

The next picture shows the Reichstag in ruins in 1945, another consequence of the wars of aggression ending in that year.



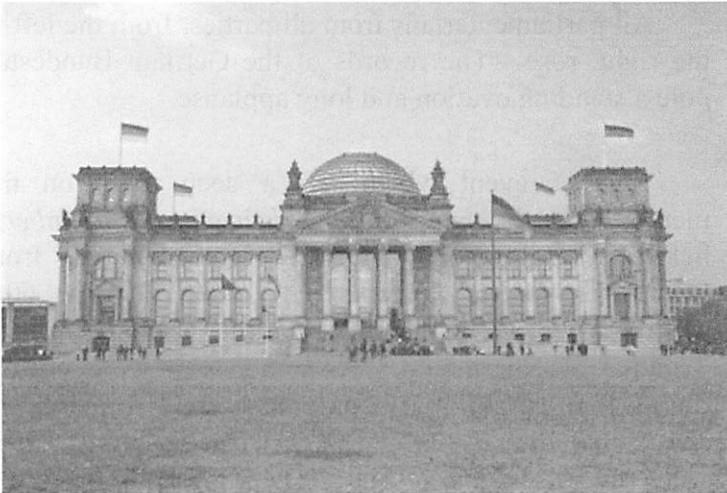
© Bundesarchiv, Bild 183-V00397 / photographer: unknown

The following picture shows an officer whom we honored last night, Whitney Harris, in Nuremberg in 1946.



© Whitney Harris Collection

Here is the Reichstag rebuilt, as it looked in 2000 – only in 1999, the German government moved from Bonn to Berlin.



© istockphoto.com/narawon

It was the special wish of Whitney to be present when the German Parliament adopted the ratification law for the future International Criminal Court. On October 27, 2000, Whitney, elegant and distinguished as ever, sat on the gallery of the Reichstag reserved for the guests of honor, the only one on this gallery above us. I myself was sitting behind Chancellor Schroeder and Foreign Minister Fischer, on the bench reserved for senior civil servants. When the ICC law was adopted, Deputy Foreign Minister Vollmer took the floor and said, “Dear Colleagues, as many of you are already aware, we have as guest of honour Whitney R. Harris, a former Nuremberg Prosecutor and aide of Robert H. Jackson.

May I propose that we rise from our seats in honour of his work and all what Nuremberg has done for the German people.”

All parliamentarians from all parties, from the left to the right, rose. The records of the German Bundestag note a standing ovation and long applause.

Another event which left a deep mark on my memory was the symposium *Judgement at Nuremberg*, held at Washington University in St. Louis, from September 29 to October 1, 2006, on the 60th anniversary of the judgment of the International Military Tribunal at Nuremberg. As many who were present during this extraordinary conference are also among us today, including Anna and Ben, I can be brief. There were several aspects of this outstanding conference, the proceedings of which were published in a volume of the *Washington University Global Studies Law Review*,⁸ which I found particularly impressive. In hindsight, it seems clear that in particular Whitney and Leila⁹ were the driving force for this excellent conference.

Firstly, there was the quality, profoundness, and impartial fairness of the speeches and contributions

⁸ Symposium, *Judgment at Nuremberg*, 6 WASH. U. GLOB. STUD. L. REV. 483 (2007).

⁹ Leila Nadya Sadat, Henry H. Oberschelp Professor of Law, Director, Whitney R. Harris World Law Institute, Washington University School of Law.

made. This includes in particular those of Whitney,¹⁰ Ben,¹¹ and Henry T. King Jr.,¹² the three Nuremberg Prosecutors. Secondly, the entire seminar was future-oriented. If I remember correctly, I have rarely participated in a conference that attempted so seriously to identify the lessons for the present and the future to be drawn from the terrible crimes and human catastrophes that had to be dealt with at Nuremberg. We were all reminded, in a powerful way, of what Jackson thought about the crime of aggressive war. Today, I am among the many Germans who believe that the most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, would henceforth be punished as an international crime.

V. Crimes against Peace – Lessons from the 20th Century

As Ben has said, this was a revolution in thinking. As we are talking about the lessons from the last century, please permit me to mention a brief correspondence I

¹⁰ Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court*, 6 WASH. U. GLOB. STUD. L. REV. 689 (2007).

¹¹ Benjamin B. Ferencz, *A World of Peace Under the Rule of Law: The View From America*, 6 WASH. U. GLOB. STUD. L. REV. 663 (2007).

¹² Henry T. King, Jr., *Without Nuremberg – What?*, 6 WASH. U. GLOB. STUD. L. REV. 653 (2007).

had with Ben in early 2008. I will again use three pictures to introduce this episode.

In the first picture you see the ruins of the Brandenburg Gate and the Reichstag in Berlin in 1945. I am quite familiar with pictures of such destruction; they were the almost daily reality of my childhood and youth.



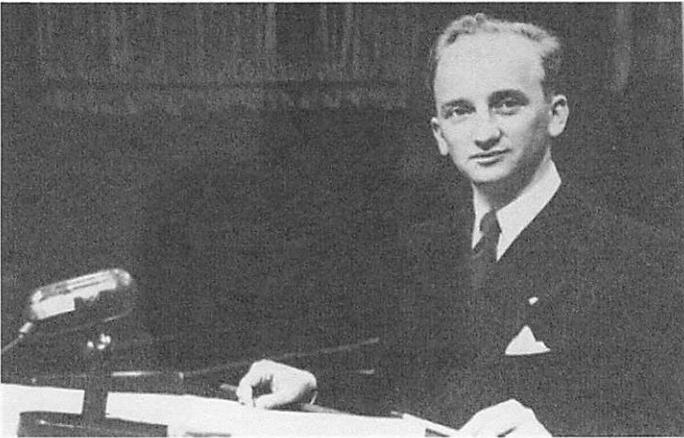
© Landesarchiv Berlin, Nr. 282278

I was born in nearby Dresden, the capital of Saxony, one of the most beautiful cities of Europe. Dresden was totally destroyed by devastating air raids from February 13 to 15, 1945, after which it looked like Sodom and Gomorrah. Dresden is the first city of which I have vivid memories as a child in 1946 and 1947. It was a totally ravaged Dresden, a city littered with ruins where beaten tracks through the rubble served as streets

– although at the time, as a small boy holding his mother’s hand, I found this quite normal.

When I became an adult, it did not take long for me to understand that the wiping out of Dresden in those murderous air raids – certainly a particularly serious war crime pursuant to Article 8 of the Rome Statute and current standards of international humanitarian law – was yet another terrible consequence of the aggressive wars started by Adolf Hitler and his followers.

Ben – seen in this picture as a Prosecutor in the *Einsatzgruppen* case – was in Berlin a number of times after the war.



© United States Holocaust Memorial Museum, courtesy of Ben Ferencz ¹³

¹³ The views or opinions expressed in this volume, and the context in which the images are used, do not necessarily reflect the views or policy of, nor imply approval or endorsement by, the United States Holocaust Memorial Museum.

The following picture also has to do with the catastrophic situation into which Germany was plunged after its aggressive wars and it also has to do with Ben. I found this picture around Christmas 2007 in the Academy of Arts near the Brandenburg Gate. It caught my interest. The picture is of Berlin in 1945 and shows ruined buildings and piles of rubble. And on a wall that had somehow remained standing, somebody had written three words, only three words, in large white letters: “*Nie wieder Krieg*” – “Never again war.”



© Gundula Schulze Eldowy

We know how hungry the people were in Berlin in 1945, what deprivations they suffered, how they fought to survive each day.

Nevertheless, there were individuals or small groups who criss-crossed the ruined city with a bucket of paint

and a brush to spread the message as widely as they could: “Nie wieder Krieg.” I was moved by this idea.

Since I knew that Ben Ferencz had been in Berlin after the war, my wife and I sent this card to him in America with our greetings. We soon heard back from him, on January 6, 2008. With his permission, I would like to read you his e-mail:

I vividly recall the scene depicted in your photo of Berlin, “Nie wieder Krieg.” I hope one day with your help, we can add a postscriptum “Krieg ist strafbar!” [war is a criminal offence]. I am still working on it.

Yes indeed, Ben, you and Whitney and so many good people kept working on it, with steadfastness and determination.

VI. Conclusion – Some Personal Thoughts

And now, against all odds, against most expectations, we have, since June 11, 2010, a full and agreed upon package proposal on the crime of aggression. It closes, in all likelihood, the last remaining important lacuna in the substantive law of the Rome Statute. We now have an agreed upon standard by which to determine whether the crime of aggression was committed or not. It is not my role as a judge of the ICC, nor my intention, to delve into the intricacies – and maybe even weaknesses – of the complex proposal that

was adopted.¹⁴ In this regard, I already look forward to the dialog on the crime of aggression that will take place immediately after my remarks. Instead, let me share three or four considerations of a more general nature.

First, it was, in my view, absolutely right and timely that the organizers of this important symposium devoted it to a dialog on *Crimes against Peace—Aggression in the 21st Century*. The outcome of the ICC Review Conference is, in my view, also part of the legacy of Nuremberg and of the pioneering role of Robert Jackson, Whitney, Ben, and others. What is needed now is a meaningful dialog on the implications and consequences of this major step in the development of international criminal law. Not only the distinguished participants of this conference, but leaders all over the world, including those in Washington, should reflect on what conclusions may be drawn from the adoption of the consensus amendment to the Rome Statute on the crime of aggression. They may reflect on which policies they may henceforth follow in this field.

Second, please permit me to share with you some personal thoughts on the use of military force for political purposes and on the phenomenon of war in general. I note that my own thinking with regard to these issues has changed and evolved considerably over the past decades. Like Whitney and Ben, I also served in

¹⁴ For a careful and balanced analysis of the resolution reached in Kampala concerning the crime of aggression, see Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179 (2010).

the military, as a Captain and paratrooper in the German army. Then, after the Cuban Missile Crisis, at the peak of the Cold War, I, like others, wanted to defend the West against the Communist threat. I therefore believe that I am not in danger of falling for naïve pacifism. But when we reassess crimes against peace today, let me reaffirm what I said two years ago in Cologne, another 2000-year-old treasure of a city founded by the Romans and totally destroyed as a consequence of Hitler's aggressive gamble:

War: this is the ultimate threat to all human values. War is sheer nihilism; it is the total negation of hope and justice. Experience shows that war, the injustice of war in itself, begets massive war crimes and crimes against humanity. And once again, in my own words, this time as bluntly and unpleasantly as the reality itself: war crimes are the excrement of war – they are an odious, inevitable, inescapable consequence of war. We have seen this time and again, in World War II, in Vietnam, in the former Yugoslavia, in Iraq, also in practically all African situation States with which the ICC is currently seized. As in the past century, a terrible law seems to hold true: war, the ruthless readiness to use military force, to use military power for political interests, regularly begets massive and grievous crimes of all kinds.

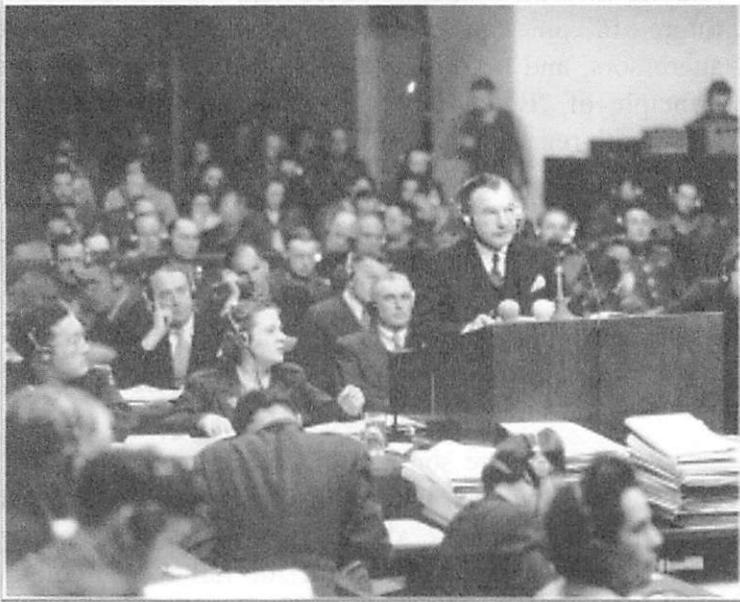
Recently, Michael Bohlander, a German professor now teaching in the United Kingdom, reminded me

about a further appalling aspect of this evil. Even nowadays, in modern warfare, in the time of so-called surgical strikes, 80 to 90% of war casualties are civilians, mostly children and women.¹⁵ This is an ongoing scandal and a shame for all concerned.

Third, given this situation, it will not surprise anyone that when I learned about the outcome of Kampala with regard to the crime of aggression, I felt not only relief, but satisfaction. I also heard, from various sources, that the German delegation in Kampala, most of them my former collaborators in Berlin or even members of my delegation at the Rome Conference, including Claus Kress, had again played an important and constructive role in the negotiations. Ten days ago, Dr. Wasum-Rainer, the current Legal Adviser of the German Foreign Office, told me in an informal meeting at the ICC that Germany will endeavour to ratify quite soon the amendment to the Rome Statute on the crime of aggression adopted in Kampala. There is little doubt that this Treaty, the Rome Statute, will soon include Article 8 *bis* and Articles 15 *bis* and 15 *ter*, incorporating the crime of aggression.

¹⁵ Michael Bohlander, *Killing Many to Save a Few? Preliminary Thoughts About Avoiding Collateral Civilian Damage by Assassination of Regime Elites*, in *INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE* 207, 229 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

My last remark concerns a point that Robert Jackson made in his opening statement before the International Military Tribunal on November 21, 1945, in Nuremberg. In my view, this announcement continues to be of fundamental importance for the crime of aggression today. You will probably recognize again these well-known sentences, when I quote the following words:



© Robert H. Jackson Center. Photo by Ray D'Addario

But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes,

and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.¹⁶

Now, why are these farsighted sentences of such tremendous importance even today? Because they set out the vision and the promise that international law relating to crimes against peace will be applied in the future in an equal manner vis-à-vis all possible aggressors, and because they set out the vision and the principle of “Equal Law for All, Equality Before the Law” with regard to crimes against peace.

The principle of “Equal Law for All, Equality Before the Law” is a general principle of law recognized by civilized nations within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. Yes, law must apply to everyone equally.

While there are some in this world, and also in this country, who want to ignore this principle, who want to push it back, there are also many in this great country who actively support and work for full respect of the principle of “Equal Law for All, Equality Before the Law.”

This gives hope, much hope, and encouragement.

¹⁶ 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 154 (1947).

International Justice and the Use of Force

Stephen J. Rapp*

It is really good to be here among so many colleagues and friends, including first and foremost my friend Ben Ferencz. He mentioned that we traveled as a team to West Point, but we have also gone together to churches in Africa and to points in between to discuss the legacy of Nuremberg and the crime of aggression. I hope that we are called for many encore performances.

Ben is a great advocate, becoming only better with age, but we can never forget his first great advocacy and step onto the world stage, when at the age of 27, he looked over that podium in Nuremberg in the *Einsatzgruppen* trial at 22 men who had led their forces in the murder of one million innocents, and called their crime for the first time in human history, in a court of law, by its true name: “genocide.”

It is great to be back here at Chautauqua and to be learning with you. I have been here for three of the four annual Dialogs. I missed you in 2009 because I was in my last innings in Sierra Leone, in the oral arguments on the *Revolutionary United Front* (RUF) appeal, the case that features in the movie *War Don Don* that you saw on Sunday. Being here is always a learning experience, and

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that was again the case this afternoon when we heard Bill Caming recount his experience in the *Ministries* trial, one of the subsequent proceedings in Nuremberg like Ben's *Einsatzgruppen* case and the *Judges* case featured in *Judgment at Nuremberg*, but one that few of us knew much about.

I was fascinated by Bill's description as to how, in the *Ministries* case, they had been successful in holding certain Nazi leaders responsible for their aggression against Austria in March 1938, and against Bohemia and Moravia, the unoccupied parts of Czechoslovakia, in March 1939, when there had been no armed resistance. Bill's team won the aggression convictions, despite the lack of resistance, because of the overwhelming force used by the Nazis, the threat, the pressure, the intimidation, and the whole context in which the occupations took place.

This reminded me of a struggle that we faced in the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY) on the rape issue. We had evidence of the rape of large numbers of women in the course of campaigns of violence against civilians, but were challenged by the traditional requirement that made it necessary to prove that the victims did not consent or had resisted. The Prosecution won that issue in the first trial at the ICTR in *Prosecutor v. Akayesu*, which held that such proof was unnecessary in the context of widespread violence against civilians. But this legal victory was reversed at the ICTY, and the issue has gone back and forth with a somewhat successful resolution but not as successful a resolution as Bill

achieved. We probably should have been citing the *Ministries* case.

It is also great to be back with colleagues who are doing the difficult work and accomplishing a mission none thought possible, day after day and week after week, in the international courts of the present. Bill Pace's comment this afternoon could not have been more appropriate. We need to hear it again and again. International justice, as it has developed in this post-Cold War era, is the greatest success of the international system. It has not been easy. The resources are not always there. We have heard of court officials having to go hat in hand to capitals to raise necessary funding, at peril of seeing their courts close and all of the accused set free. We have heard that these courts lack the power and reach to achieve compliance with their orders. When I was a United States Attorney in Iowa, when a warrant was issued by a judge or an indictment handed up by a grand jury, we could have the person arrested. We could be sure that he or she would face trial. The lack of such powers remains an immense challenge in these international institutions.

But despite this challenge, these courts have successfully brought chiefs of state to trial: Slobodan Milosevic and Charles Taylor. They have convicted a head of government, Jean Kambanda, for genocide. They have achieved justice in scores of cases of military commanders and militia leaders and others responsible for the gravest crimes committed against humankind. It is a work in progress, an imperfect one, and one that requires consistent dedication and commitment.

I am not now a Prosecutor. I have been, for a year now less a week, a diplomat. That is a changed position, though one that also involves trying to find the resources and provide the power to make possible the success of these tribunals and the achievement of justice for the victims of these grave crimes.

It is, however, quite different to be a diplomat working for a single government, albeit the government of a mighty country, than it is being a Prosecutor. When I was a Prosecutor, if an ambassador might suggest that my Office was not following the proper course, I could say, "Well, I took an oath, Your Excellency, never to take instructions from any government or any organization." That independence is crucial to the role of the International Prosecutor. On the other hand, those of us involved in the process needed those governments, needed their forces to succeed in a world where only states could provide us with the muscle necessary to accomplish our task. But it was all important that Prosecutors made the decisions about who was investigated and charged, and judges made the decisions about who was convicted or acquitted. These were not decisions for the governments of any state.

Now I am a diplomat, and rather than not taking instructions, my job is to take instructions every day. But a good thing about the job is that I can be involved in writing those instructions, particularly on the issues that we are here to talk about: the crime of aggression and U.S. engagement with the ICC. I am proud that my Office has been engaged within our government in developing our policy, our approach, and deciding the

content of the instructions that would guide us as we went as observers to the ICC Assembly of States Parties in The Hague in November 2009, the first U.S. appearance at an ICC meeting in eight years, and went again to the ICC Assembly of States Parties in New York in March 2010, and then participated as observers at the ICC Review Conference in Kampala in June 2010. While these instructions were developed in a process where no one got his or her own way, the result was policy that we were able to vigorously support and advance as the representatives of the government of the United States.

As I said on behalf of the United States when we made our first appearance at the Assembly of States Parties in November 2009, we recognize that the United States has been absent and that it was not our desire to lecture those that have been involved in previous debates but rather to listen and to learn. But we also emphasized that while we had been absent from the ICC, we had not been silent in the face of crimes that shocked the universal conscience, and had actively supported the International Courts for the former Yugoslavia, Rwanda, Sierra Leone, and elsewhere. We had not just paid our dues and provided experienced staff but we had provided informational leads, victim and witness protection and assistance, and powerful support for conditionality as to foreign aid and E.U. accession that had been so important in bringing those responsible for genocide, war crimes, and crimes against humanity to justice.

We also emphasized that these are the crimes on which we had focused because they were the grave

crimes that were committed in the 1990s and continue to be committed in the world of the 21st century. We are not in an age of cross-border conflict. This is not the age of Louis XVI or Napoleon I or Bismarck. It is not 1914 or 1939 when great armies crossed borders, when hundreds of thousands of soldiers faced each other across trenches or battlefields.

We are now in an age where it is often far more dangerous to be a civilian, an innocent woman or child, than it is to be a soldier. In the eastern Democratic Republic of the Congo (DRC), you rarely hear of a soldier or militia fighter being killed or raped, but you hear of thousands of people murdered and raped that are uninvolved in the conflict: innocent men, women, and children intentionally targeted by armed groups.

At the Rwanda Tribunal, I once asked a former officer who fought on the government side of the 1990-1994 civil war how many soldiers of the Rwandan armed forces were killed defending against the Rwanda Patriotic Front (RPF) that eventually won the war. He said probably fewer than a hundred. I asked how many RPF soldiers were killed and he said probably even fewer. But during the last 100 days of that civil war, 800,000 innocent men, women, and children were killed. They were not killed in the cross-fire between the combatants. They were the defenseless targets. These are the crimes that we face today.

I was just in Goma, in the DRC, near where at Walikale earlier this month more than 300 women and girls were raped by members of the Democratic Forces

for the Liberation of Rwanda (FDLR) and related armed groups. These are the crimes to which the world needs to respond, to say enough, and to bring those responsible to justice. These crimes are committed within a non-international armed conflict, but it is also important to note that innocent civilians are sometimes targeted for widespread or systematic attack in situations that are not associated with an ongoing armed conflict.

For instance in Guinea, in West Africa, more than a hundred civilians were shot to death at an opposition political rally in a stadium on the afternoon of September 21, 2009, and then women were raped on the stands and taken off to houses where rapes continued for days. There was no ongoing conflict, no civil war there, but these acts were committed as part of a systematic attack, on political grounds, against a civilian population, which could constitute crimes against humanity. Fortunately, it was possible to marshal the support and resources for an international commission of inquiry that interviewed almost 700 witnesses and published a report that revealed the truth about what had happened. This helped lead to a transition to democratic rule and opened the possibility for justice.

I am spending probably a third or 40 percent of my energy now on trying to establish a similar commission of inquiry for Kyrgyzstan where, in June, there was an eruption of ethnic violence between those of the Kyrgyz and Uzbek ethnic groups in which more than 400 people were murdered and 300,000 fled their homes. If the perpetrators are not held to account this could be the harbinger of further ethnic violence between these or

other ethnic groups in Central Asia. We are trying to send the message that even powerful individuals must be held accountable, and trying to do it in a place where democracy has barely taken hold and where there is little tradition of independent judicial institutions. We are doing it, not in a situation of armed conflict, but because we are faced with what appears to be crimes against humanity.

We all know how difficult it can be to achieve justice for these crimes. In some places it may only be possible, if at all, at the national level. For it to happen there, we need to help them find the truth through inquiry commissions, and thereafter push for domestic investigations and prosecutions. If possible it is best that it happen at the national level, close to the victims and affected communities, with international assistance and participation, if necessary, for capacity and independence. But if there is no way at the national level, and the crimes are serious and widespread, you need an international court.

We are now coming to the end of the era of the Yugoslavia and Rwanda Tribunals and Sierra Leone Special Court – institutions with narrow jurisdictions and *ad hoc* mandates. In the future, for crimes committed after 2002, there will not be the will to establish temporary international courts for single situations. If international justice is required, it will be delivered at the International Criminal Court. That is where these trials will be conducted. That is where the mass butchers and rapists will face justice, and that is where the United States needs to provide support to ensure success.

So the message that we delivered in The Hague and in New York and in Kampala was that we want to work with this Court to succeed, that we are worried when we see 13 arrest warrants and only four persons arrested. We are angered and disappointed when we see persons who are subject to these warrants travel freely to and from ICC member states, such as Chad and Kenya, without any effort to arrest them and transfer them to The Hague. We support all of the cases where arrest warrants have been issued and we want the ICC to bring these individuals to justice.

At this stage, we want to help this institution succeed in the cases that it has undertaken. We want to be, as was recommended by the Council of Foreign Relations, something like a non-Party partner, to make it possible, in particular, to make these arrests. In that regard, I should note that when we focus on specific cases there is broad support for international justice in our Congress. We have recently seen the United States Congress overwhelmingly pass legislation supporting U.S. efforts to arrest and bring Joseph Kony to justice – a commitment underlined by President Obama in his signing statement – and by our active assistance to Ugandan efforts in pursuit of Joseph Kony and other leaders of the Lord's Resistance Army (LRA).

The United States also speaks out forcefully in support of cooperation with the ICC in other cases. Several days ago, after President Bashir made a brief trip to Kenya, President Obama issued a statement on what should have been a proud day for Kenya: the beginning of its Second Republic by the ratification of a new

constitution that provides for the separation of powers and that offers hope for Kenyan democracy. President Obama issued a three-paragraph statement, and in the third paragraph, the longest paragraph, he expressed disappointment about the country of his father failing to honor its commitment to the ICC to arrest Omar al-Bashir.

We are also seeking other ways to assist the Court in a manner consistent with our laws. There are statutes passed by Congress in 2001 and 2002, which to some extent restrict our ability to be helpful. However, their provisions do allow in-kind assistance on a case-specific basis, so we are now working to provide assistance for victims and witnesses whose protection is so important if there are to be successful prosecutions.

With the requirement of a two-thirds vote in the Senate, it is a challenge for the United States to ratify treaties, and there are a number of international human rights conventions that we have yet to approve. You are probably familiar with the fact that the Convention on the Rights of the Child has been ratified by every country in the world except the United States and Somalia. This Convention contains principles that I believe every American could support, and we hope that in the near future it can be ratified by our Senate. However, there is a rumor that the Transitional National Assembly of Somalia – a parliament that cannot safely meet in the capitol at Mogadishu because of the ongoing conflict in that country – may soon put the Convention on its agenda and beat the United States to ratification.

When I recently mentioned our failure to ratify the Convention on the Rights of the Child to my friend Navi Pillay, the U.N. High Commissioner for Human Rights in Geneva, she kindly and wisely said, “But you in America protect the rights of the child so much better than many of the countries that have ratified that Treaty.” This is true, and it reflects a tradition of self-reliance, an aspiration to do what is right in our own way, and a pride in the protections provided by our constitution and laws. Convincing Americans to cede any part of their decision-making to international organizations is always difficult. This is true even for international institutions that prominent Americans have championed. Remember that President Wilson went to Paris in 1919 and convinced the rest of the world to establish a League of Nations, but went home and could not convince the United States Senate to ratify the Treaty that would have allowed us to be a member.

But when you move to the practical level of joining with the rest of the world to accomplish a specific task or to achieve justice in a particular case, Americans are ready to jump right in. I am reminded that when my predecessors as Prosecutors of the Special Court for Sierra Leone, David Crane and Sir Desmond de Silva, went to the U.S. House of Representatives and sought a resolution in support of the arrest of Charles Taylor, the vote was about 434 to 1, with only Ron Paul voting against.

For all of the ICC cases, there is a massive number of Americans on both the right and the left who want justice: for the victims in Darfur, for the victims of

Joseph Kony and the LRA, for the victims of the post-election violence in Kenya, or for the innocent victims anywhere who have been intentionally targeted for atrocity. Americans want those who are responsible to be held to account, and in the absence of will or capacity at the national level, will support the delivery of justice at the ICC.

Of course, I have been speaking about atrocity crimes: of genocide, war crimes, and crimes against humanity. These are the crimes over which the international courts created since the 1990s have had jurisdiction and on which they have built their record of success. A major question at the Review Conference in Kampala was whether the ICC should be empowered also to prosecute the crime of aggression. In answering that question, it must be remembered that the trials at Nuremberg dealt not only with atrocity crimes committed by the Nazi leadership, but also with “crimes against peace,” for the defendants’ criminal responsibility for planning and waging an aggressive war.

First, I want to state clearly that this administration, this government, and this country believes in and supports what we did as a nation, in concert with our allies, and is proud of what brave men like Justice Jackson and Ben Ferencz and Bill Caming and Whitney Harris and others accomplished at Nuremberg, including the successful prosecution of Nazi leaders for conspiracy to wage an aggressive war and for waging an aggressive war.

Were this a battle over the Nuremberg principles and putting the law of Nuremberg into the international statute book, it would be different. Ben says the crime has been defined. It was, indeed, defined at Nuremberg, but what has been proposed by the ICC Working Group is a crime different than that prosecuted at Nuremberg. Now I recognize that we are restrained in challenging the wording of the definition adopted by the Working Group because U.S. representatives stayed away from all of its sessions from 2002 through 2008. The past administrations should have been sending representatives but they did not, even when representatives were sent by Russia, a country that signed the ICC Statute but did not ratify, and China, a country that neither signed nor ratified. Nevertheless, it needs to be said that the definition that was developed in that process departed significantly from what was used at Nuremberg.

As the definition was finalized by consensus in the Working Group, it spoke of a manifest act – an act of such character, gravity, and scale that would constitute a manifest violation of the U.N. Charter. As a Prosecutor, I would find it hard to draw elements out of that definition and to determine how to prove a case in the same way as one must for other crimes. The language looks like a political compromise, and as we began to talk to people about it, we discovered that different people saw different things in that definition.

We made the argument that this could well bring the ICC into minor border conflicts and into cases involving the pursuit of internal armed groups across borders.

What is a manifest violation? Is it one that is “serious”? Is it one that is “egregious”? No, the word that is closest is “clear.” It means that if your forces were on this side of the border, and the border is here, and then they clearly crossed over it, you have a manifest violation. Now, is that realistic?

I remember talking to representatives of several Western Hemisphere countries about the Colombian intervention in Ecuador two years ago in March. Colombian forces crossed over into Ecuador and attacked a camp of the Revolutionary Armed Forces of Colombia (FARC), which is a Colombian-based group that is involved in kidnapping and other horrendous acts, including victimizing civilians on a political basis. Colombian forces went over the border and attacked the FARC base, killed some of the FARC combatants, seized some computers, and returned to the Colombian side of the border. The Ecuadorans accused Colombia of aggression. They even charged a Colombian officer in Ecuadoran courts for aggression.

I asked them whether this was aggression under the proposed definition. I remember several responded, “Absolutely not. That was not aggression. That was not a manifest violation.” Others said, “This could be aggression. This is what the Court should decide.” So what is the Prosecutor to do? Well, I will tell you what I think he or she should do. The Prosecutor should look at the facts and the circumstances and conclude that it was not serious, that it was not grave, and decide not to proceed on the case. At that point, countries would say, “That Prosecutor is in the pocket of the Yankees. He

will not proceed because Ecuador's government is friendly with Caracas and Colombia's is friendly with Washington." Adding the crime of aggression, as defined by the Working Group, would involve the Prosecutor in the political thicket of cross-border issues, and the Court, which already has difficulty getting cooperation even on issues concerning mass atrocities, would suddenly find itself cast on one side or the other of these conflicts.

Richard Goldstone put it well in a very persuasive op-ed that came out in the days before the Conference in Kampala. He described his experience on taking on the position of Chief Prosecutor for the ICTY and ICTR in 1995. He said that he was pleased that he did not have the crime of aggression on his plate. Even today if you go to the Balkans, you will hear Croats speaking of defending their homeland from a war of aggression by the Serbs. They viewed the Yugoslav national army, Yugoslav People's Army (JNA), as an invading force. If you talk to Serbs, you will discover that they still see the JNA as having been like the Union Army of Lincoln and Grant fighting an insurrection. Goldstone was happy that he did not have to settle that dispute. He could focus on the crimes that shocked the universal conscience: attacking and murdering innocent civilians, acts of "ethnic cleansing" that terrorized civilians into leaving their homes and land, as well as other mass atrocities.

Moreover, criminalizing acts of aggression without a clear understanding of the character of the conduct to which it would apply could restrain actions to protect

innocent civilians from atrocities. As Michael Scharf said today, the United States was concerned about how the crime as defined would apply to cases where there was humanitarian justification for the use of force, but where, for political reasons, it was not possible to obtain Security Council approval before taking necessary action. This was the case with the NATO operation to stop ethnic-cleansing in Kosovo in 1999.

What if the leaders of a state were responsible for a humanitarian intervention where no civilians were killed, where every law of war was observed, and where they went in and promptly got out? Would that be aggression? The answer should be clear, but instead we heard: "Did you get approval of the Security Council before you intervened? If not, then it was aggression. You should be prosecuted. Maybe you could receive a lighter sentence because of your good motives." We asked if there could be an amendment that would make it clear that it did not apply in such a case. The response that we heard: "Somebody tried to exempt humanitarian interventions during the discussions in the Working Group when you were not there. There was opposition from a non-Party State that was there as an observer, so it was not approved." So we discovered that the crime as defined could have repercussions in terms of the role that we are called upon to play in the world when, for the best motives, and to prevent genocide, to prevent war crimes, to prevent crimes against humanity, we act to protect the innocent.

I think it is time for a word about the necessary use of force in our world. This is usually not part of my

speeches on international justice, but it is important to say it here. All of us have been involved in achieving justice in the courtroom. But a very few here, like Ben, have participated in the use of force to defeat the armies led by the authors of these crimes and to make it possible to hold them to account in a courtroom. We owe a large debt to those who went into harm's way; without whose victories, justice would not have happened.

The Nazi leaders, Goering or Ribbentrop or Hess or Speer, would never have been in the dock if the world had not committed more treasure than it had ever spent and more lives than it had ever lost, including millions of soldiers on the Allied side, to defeat the Nazis, destroy their government, erase their scourge, and bring those responsible to justice. The Nazis and their descendants would still be there in power, had it not been for that effort.

I was in Cambodia for the announcement of the first judgment of the Extraordinary Chambers a month ago on July 26, 2010, and I met afterwards with two survivors of S-21. They were among only a dozen people that survived a camp that tortured and sent to their deaths more than 15,000 men, women, and children. They lived because the Vietnamese invading army conquered Phnom Penh and freed them. If it had not defeated the Khmer Rouge, those survivors would have died: their torture would have continued, they would have confessed, they would have been taken to the killing fields, and iron bars would have been used to crush their skulls. And thousands of others would have followed.

You remember, of course, that the invasion by Vietnam was disfavored in the world, including by our government, and that as a result, the genocidal regime of Pol Pot remained in control of the U.N. seat for at least another ten years, because it was argued that it was illegitimately displaced by force despite the fact that this use of force had stopped one of the worst crimes of the 20th century.

I was in Rwanda a week and a half ago and took a boat with my wife and daughter from Goma and Gisenyi in the north to Cyangugu in the south, the full length of the great Lake Kivu. It was a beautiful trip. This is what passes as a vacation when you are in my line of work. As we were crossing Lake Kivu, I remembered one of the broadcasts that I had presented in court at the ICTR during the *Media Trial*. It was one of the 30 broadcasts that we had selected because they most clearly demonstrated incitement to genocide. They formed a body of devastating evidence. Amazingly, there was even one in which one of the broadcasters recognized the possibility of international justice. The announcer was Kantano Habimana and the program was broadcast on about June 25, 1994. He was reading from a wire service report that the RTL radio station had just received about a meeting at the United Nations in New York where there was the first mention that there might be an international criminal tribunal for Rwanda. At this time Kigali and most of western Rwanda were still in government hands and the genocide was continuing. Habimana said in the broadcast, "We have to win this war. We have to win this war because if we lose, there is

no trench in Lake Kivu so deep that they won't be able to fish us out and put us on trial."

Well, in three more weeks, they lost the war. The RPF defeated the genocidal government. Its leaders were forced to cross Lake Kivu, and some of them continued running to places of refuge around the world. They were now individuals without a state, without a capitol, without the diplomatic and political protection that goes with the control of a government. It was possible to chase more than 80 of them to the ground in 26 different countries, obtain state cooperation for their arrests, and bring them to Arusha to stand trial.

In regard to Sierra Leone, let us not forget that it was military forces that defeated the RUF and made it possible to bring them to justice. The Lome Peace Plan of 1999 contained an amnesty that would not have allowed them to be brought to justice because it was negotiated from weakness when the RUF was in control of two-thirds of the country. It was only after the RUF broke the Lome peace by refusing to disarm, and attacked and killed peacekeepers in the field and citizens on the streets, that the U.N. forces were strengthened and a British contingent intervened and finally made it possible to defeat the RUF, establish a Special Court, and bring the leaders responsible for atrocities to justice. We remember that it was almost two years after the end of the war in Sierra Leone that Charles Taylor was indicted for his role in the crimes in Sierra Leone. When that indictment was issued he was President of Liberia, safe in his mansion in Monrovia. Later that year it was the armed force of Liberian rebel groups – the Liberians

United for Reconciliation and Democracy and the Movement for Democracy in Liberia – that caused him to abandon his office and his country, preferring exile to a possible violent end in Liberia. He fled from power to refuge in Calabar, Nigeria, where it was eventually possible to effect his arrest.

Now, in bringing up all of these examples, I want to make it absolutely clear that no matter what the goal, even if it is stopping genocide, one cannot commit atrocities; one cannot violate the laws of war. One of the prouder things that I did in Sierra Leone was to conclude the case brought courageously by David Crane against the surviving Civil Defense Forces (CDF) leadership. These were men who had organized and commanded a force that fought against the RUF, against the group that was hacking off arms, gouging out other organs, raping women by the thousands, enslaving people to dig diamonds. However, certain units of the CDF, in the course of its campaign, committed atrocities and brutalities against people in areas that they thought had been sympathetic to the rebels. It is that kind of conduct caused when one side thinks that the other side's brutality justifies its own, that multiplies the threat to the eyes, the hands, the bodies, the lives, of innocent civilians in conflict zones. It teaches us that when both sides have committed atrocities, it is necessary to prosecute both sides for justice to be effective.

And finally, let us remember that Nuremberg taught us that force alone is not the answer. This means that after defeating those responsible, you do not just send them into exile with some of their stolen money, or line

them up against the wall and shoot them. Investigating the crimes, developing the evidence, charging those responsible, and showing the public what happened, who was killed, why, when, and where, is a critical part of preventing it from happening again. We certainly see this most classically in Cambodia where, after this invasion of 1979, for the next 25 years, people had little knowledge of what had happened and why it happened. This is why the Extraordinary Chambers are so critical in providing that knowledge, that truth-seeking, that justice, without which Cambodians risk it all happening again.

In regard to this use of force, I wanted to quote for a moment from the President of the United States in his Nobel Peace Prize acceptance speech last December in Oslo. As he said, “[M]ake no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler’s armies.”

Let me digress from his words for a moment to add: None of us, not the most committed Prosecutor, thinks that an arrest warrant sent to the Reich chancellery at any time between 1939 and 1945 would have stopped the conflict or atrocities.

Let me continue with the President’s words: “Negotiations cannot convince al Qaeda’s leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason.”

As the President went on and said, “I raise this point . . . because in many countries there is a deep ambivalence about military action today, no matter what the cause. And at times, this is joined by a reflexive suspicion of America, the world’s sole military superpower.” That was the challenge that we, in Kampala, had to confront. How do we deal with the role of the world’s superpower, the only power that in many cases stands between the butcher and his victim, between those that would kill 3,000 people before their morning coffee, innocently going about their daily work? How do we deal with that reality in the world while signaling our desire for a world where law can eventually replace force?

We engaged in this process, and I am proud of the result. And I think those who are interested in international justice, including those interested in the development of the crime of aggression, can be proud of the result. The term “manifest” in the definition was imprecise but we did achieve the addition of understandings that became part of the resolution of adoption that said that this applied only to the most serious and dangerous uses of force in the world.

We additionally obtained an understanding that said that none of the elements, “character, gravity, or scale,” on their own could be sufficient to constitute aggression, but that the Prosecutor and judges would have to find all three. The existence of only one factor would not justify an international prosecution. So we think that the definition was improved by these understandings, even

though it had already been written and was already the subject of international consensus.

Two amendments were also passed in Kampala dealing with the exercise of jurisdiction over the crime of aggression. One, denominated as Article 15 *ter*, would empower the Security Council to consider any case of alleged aggression, make necessary findings, and send that case to the ICC. It could do this to acts committed in any country in the world, whether that country had ratified the ICC or not, in the same way that it sent the Darfur situation to the ICC. Some will say the Security Council will protect its own, and that this is an imperfect solution. But we recall that the Security Council overwhelmingly adopted ten resolutions to penalize Iraqi leaders for their 1990 invasion of Kuwait. We can imagine that if confronted with a similar case, they would add to their resolutions a referral to the ICC for the crime of aggression.

This provision would take effect if 30 countries ratify it, and then if there is a decision after January 1, 2017, made by the ICC membership by the same majority required for adoption of amendments, which is two-thirds by statute, but consensus in practice. If it is approved in 2017 or thereafter, it could go immediately into effect.

There is a more controversial amendment, from our point of view, denominated as Article 15 *bis*, which would allow such a case to start on state referral or on the Prosecutor's own motion, subject to a decision by the Pre-Trial Division, but in neither situation would

Security Council approval be required. Putting that provision into effect would also require 30 ratifications and a super-majority decision after January 1, 2017. But even then it will not apply to the nationals of non-Parties. It will not apply to the nationals of Parties that ratify the amendment and then opt out, and in our view, it will not apply to nationals of Parties who do not ratify the amendment.

Even if put into force in 2017, I know that this is an imperfect solution from Ben's point of view because it will not apply to the nationals of all countries, in the absence of Security Council action.

If all of it is put into force in 2017, it is also an imperfect solution from the United States' point of view because it might discourage those of our allies who might approve the amendment from participating in coalitions to take necessary action to protect individuals because of the possibility that they might subject their officials to prosecution.

But this is a long-term process. It is not the end of the road. It is the beginning. The United States is supporting the ICC in each of its cases involving atrocity crimes, and we are engaging now in trying to achieve an understanding of how the crime of aggression would be defined in practice. In the next seven years, as we can look forward to building a closer relationship with the ICC, we hope to see the Court achieving successes in cases of atrocity crimes and building confidence across the globe. Perhaps in 2017, the Security Council route for aggression prosecutions will be approved and we will

see if all of the appropriate cases are referred. Perhaps in 2017, the other route may be approved, and we will see if states that consent to jurisdiction will find themselves subject to prosecutions for aggression. Maybe in the further future, ICC jurisdiction over the crime of aggression will become more universal, for as we know, international justice is always a work in progress.

In a speech last night, John Barrett mentioned how some at Nuremberg thought that this was going to be a difficult challenge, that it might all come to naught. I think that all of us who have been engaged in this process have sometimes felt that way. We have experienced the absence of resources, the slow processes for recruiting those who can be the most effective in investigating the crimes and presenting the evidence in court, the difficulties of achieving state cooperation for arrests and for protecting witnesses from harm. We have faced these challenges, and we have surmounted them.

I am certain that with the kind of effort that those in this room have brought to international justice, that with the young people that we saw this afternoon who are in record numbers inspired to join this field, these challenges can continue to be overcome. I am confident that we can build a future where individuals will be deterred from committing the kind of crimes that were judged at Nuremberg and The Hague and Arusha and Phnom Penh, and where the promise of “never again” can truly be fulfilled.

**International Criminal Law Year in Review:
2009-2010**

Valerie Oosterveld*

The International Criminal Court (ICC) and the international and hybrid criminal tribunals – the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL) – are all part of an interlinked network of international criminal justice. I will explore developments between September 2009 and August 2010 within and around these tribunals, and therefore within international criminal justice, through three themes: review, cooperation, and closure.

Under the theme of review, I will focus on the Review Conference of the Rome Statute of the ICC held in Uganda in June 2010 and – in a different sense of the term “review” – on the pressures facing the Special Tribunal for Lebanon. In focusing on cooperation, I will explore the contradictions in state, regional, and individual cooperation we have seen over the past year with respect to the ICC, ICTR, ECCC, and Special Court

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for Sierra Leone. Finally, in exploring the theme of closure, I will discuss preparations for the impending closure of the Special Court for Sierra Leone, as well as the coming closure of the ICTY and ICTR. I will also mention some positive steps taken by the Special Tribunal for Lebanon this year to ease closure in the future.

I. Review

The Review Conference of the Rome Statute of the ICC was held on the shores of Lake Victoria, near Kampala, Uganda, from May 31 to June 11, 2010. The main focus at that Review Conference was the negotiations surrounding the crime of aggression. As many of the other speakers at these Dialogs have discussed the outcome of the aggression negotiations, I will focus on other issues discussed at the Review Conference, particularly those that had an impact on how the ICC addresses gender issues.

Gender issues were not as obvious at the 2010 Review Conference as they were at the 1998 Diplomatic Conference at which the Rome Statute of the ICC was adopted. In 1998, there were a number of gender issues on the negotiation agenda. For example, there were complex discussions surrounding the inclusion of the crime against humanity and war crime of forced

pregnancy.¹ There were also contentious negotiations on the definition of the term “gender” in the context of the inclusion of the crime against humanity of gender-based persecution.² There was agreement to include provisions on the elections of judges and selection of officials and staff, with some of these to have expertise in the field of sexual and gender-based violence or violence directed against women or children.³ There was also agreement on the inclusion of various victim and witness provisions,⁴ based on lessons learned (in large part) through the involvement of women and girls in testifying before the ICTY and ICTR about rape and other gender-based crimes.⁵

At the 2010 Review Conference, the discussions focused on the crime of aggression, the inclusion of war crimes in internal armed conflict like the use of certain poisonous gases, and taking stock of the impact of the Rome Statute system on victims and affected

¹ See Rome Statute of the International Criminal Court arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm> [hereinafter Rome Statute].

² See *id.* at art. 7(3).

³ See *id.* at arts. 36(8)(b), 42(9), 43(6), 44(2).

⁴ See *id.* at arts. 68, 75.

⁵ Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 357, 359 (Roy S. Lee ed., 1999).

communities, cooperation, complementarity, and peace and justice.⁶ There was no direct and specific focus on gender issues. For example, there was no discussion of gender in the state discussions on aggression, either in Kampala (largely because the definition was not debated) or in earlier negotiations. This is despite the fact that aggression can be a profoundly gendered crime⁷ – for example, Iraq’s invasion of Kuwait was accompanied by the rape of Kuwaiti women and girls by Iraqi soldiers.⁸ However, in Kampala, the gendered nature of aggression was highlighted in testimonies before the Women’s Court, an all-day nongovernmental event held on June 1, 2010, on the margins of the negotiations, organized by the Women’s Initiatives for Gender Justice.⁹ Despite the lack of state analysis of the

⁶ See generally Review Conference of the Rome Statute, Kampala, Uganda, May 31-June 11, 2010, *Official Records*, RC/11 (2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf [hereinafter *Review Conference Official Records*].

⁷ See, e.g., Beth Van Schaack, *The Grass that Gets Trampled when Elephants Fight: Will the Codification of the Crime of Aggression Protect Women?*, 15 *UCLA J. INT’L L. & FOREIGN AFF.* (2011) (forthcoming); Beth Van Schaack, *The Crime of Aggression: A Feminist Project?*, 11 *INT’L CRIM. L. REV.* (2011) (forthcoming).

⁸ JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 144, 239 (2001).

⁹ WOMEN’S INITIATIVES FOR GENDER JUSTICE, *REPORT ON THE 10-YEAR REVIEW CONFERENCE OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT* 7, 18-39 (2010), available at <http://www.iccwomen.org/documents/RevConf2010-REPORT-v10.pdf>.

gendered implications of aggression, the non-governmental discussion illustrated that, if the ICC prosecutes the crime of aggression in future cases, it will need to examine the gendered aspects and effects of this crime, just as it does, and should continue to do, with respect to genocide, crimes against humanity, and war crimes.

Gender issues arose most frequently in the stocktaking exercise examining the impact of the Rome Statute system on victims and affected communities. In the preparatory documents and in that stocktaking discussion, several important themes emerged. First, the ICC's experience has demonstrated that it is important to provide protection to intermediaries, where needed.¹⁰ Intermediaries are non-ICC employees who locate, or act as a go-between for, potential witnesses in the field on behalf of the Office of the Prosecutor. Intermediaries are crucial in helping the ICC gain access to victims. This is especially so in the case of gaining access to victims of sexual violence, such as girls and women in the Democratic Republic of the Congo (DRC).¹¹ Second, the ICC faces challenges in getting sufficient information to women and girls, who may not, for example, have access to the family radio, an important

¹⁰ See *Review Conference Official Records*, *supra* note 6, at para. 23.

¹¹ Victim's Rights Working Group, *Comments on the Role and Relationship of "Intermediaries" with the International Criminal Court*, 1-2 (Feb. 6, 2009), http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf.

source of information about the ICC in the DRC.¹² Third, the ICC must effectively manage victims' expectations of what the Court can do for them, including those who have suffered gender-based violence.¹³ Fourth, there is a need for the ICC to improve its two-way dialog with victims.¹⁴ Finally, it was recognized that States Parties need to improve cooperation with the Court so as to better protect victims, including victims of gender-based violence.¹⁵

The stocktaking focus on victims also prompted a number of excellent side-events that delved much deeper into the gender issues inherent in assisting and protecting victims and witnesses. These were held by the ICC's

¹² Victims' Rights Working Group, *The Impact of the Rome Statute System on Victims and Affected Communities*, 8 (Apr. 2010), http://www.vrwg.org/VRWG_DOC/2010_Apr_VRWG_Impact_of_ICC_on_victims.pdf; Review Conference of the Rome Statute, May 31 - June 11, 2010, *The Impact of the Rome Statute System on Victims and Affected Communities*, para. 11, RC/ST/V/INF.4 (May 30, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.4-ENG.pdf [hereinafter *Victims Stocktaking Discussion Paper*].

¹³ Final Report by the Focal Points (Chile and Finland), *The Impact of the Rome Statute System on Victims and Affected Communities*, Ninth Sess., Dec. 6-10, 2010, ICC-ASP/9/25, Annex II, para. 14(b)(iii) (Nov. 22, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-25-ENG.pdf.

¹⁴ *Id.* at para. 14(c)(i).

¹⁵ *Victims Stocktaking Discussion Paper*, *supra* note 12, at para. 36(a)(vii).

Trust Fund for Victims, Redress, DOMAC, the Women's Initiatives for Gender Justice, and many others.¹⁶ These were accompanied by the issuance of a number of important reports, for example the World Vision report entitled *Protecting Children: Improving the International Criminal Court to Respond to Children and Armed Conflict, a Policy Briefing*.¹⁷ Thus, the stocktaking exercise, which focused on the impact of the Rome Statute system on victims and affected communities, plus the related events, helped to "surface"

¹⁶ For example, some events on victims' issues during the first week of the Review Conference included: International Society for Traumatic Stress Studies, "Trauma and Reparative Justice" (May 31, 2010); Women's Initiatives for Gender Justice, "Women's Court" (June 1, 2010); World Vision, "The Plight of War Victims and Affected Families in Northern Uganda: Implications for the Rome Statute System for Child Victims and Affected Families" (June 1, 2010); Chile and Finland, "The Trust Fund for Victims" (June 2, 2010); No Peace Without Justice, "Sexual Orientation, Gender Identity and Article 7(3): Prosecuting Persecution on the Basis of Gender" (June 2, 2010); International Center for Transitional Justice, "Taking Stock of the Impact of the ICC in Kenya, Uganda, the Democratic Republic of the Congo, Sudan and Colombia" (June 2, 2010); Victims' Rights Working Group, "Implementing Victims' Access to Justice" (June 3, 2010); DOMAC, REDRESS, Denmark and South Africa, "The Joint Role of International and National Courts in Prosecuting Serious Crimes and Providing Reparations: The African Experience" (June 4, 2010); and War Crimes Research Office, American University Washington College of Law, "Launch of *The Case-Based Reparations Scheme at the International Criminal Court*" (June 4, 2010).

¹⁷ WORLD VISION, *PROTECTING CHILDREN: IMPROVING THE INTERNATIONAL CRIMINAL COURT TO RESPOND TO CHILDREN AND ARMED CONFLICT, A POLICY BRIEFING* (2010).

gender issues, even though they were not explicitly on the Review Conference agenda.¹⁸

On a different theme of review, I will turn the focus to the Special Tribunal for Lebanon. The Special Tribunal's mandate is limited to events surrounding the 2005 death of former Lebanese Prime Minister Rafiq Hariri and other related deaths.¹⁹ This Tribunal is under a great deal of scrutiny, not only because of the political situation in which it operates, but also because it has no ongoing or upcoming trials on its roster.²⁰ Some might, as a result, conclude that the Court has been inactive, but this would not be correct.

¹⁸ The term "surfacing" comes from the late Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994).

¹⁹ Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, S.C. Res. 1757, Annex, art. 1, U.N. SCOR, 5685th mtg., U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Agreement].

²⁰ Since the 2010 International Humanitarian Law Dialogs, the Prosecutor of the Special Tribunal for Lebanon has filed his first indictments: Press Release, Special Tribunal for Lebanon Office of the Prosecutor, Prosecutor Daniel A. Bellemare Files Indictment in the Hariri Case (Jan. 17, 2011), <http://www.stl-tsl.org/sid/240>; Press Release, Special Tribunal for Lebanon Office of the Prosecutor, Prosecutor Daniel A. Bellemare Files an Amended Indictment (Mar. 11, 2011), <http://www.stl-tsl.org/sid/255>. See also Press Release, Special Tribunal for Lebanon, STL Prosecutor Submits an Indictment to the Pre-Trial Judge (Jan. 17, 2011), <http://www.stl-tsl.org/sid/239>.

President Cassese's annual report, issued in March 2010, outlined various activities of the Court over the past year.²¹ The judges built the legal and regulatory framework needed to try cases, by drafting, *inter alia*, the Rules of Procedure and Evidence. They also negotiated agreements with international entities such as INTERPOL and the International Committee of the Red Cross.²² The Registry devised a court management system and signed a Memorandum of Understanding with Lebanon regarding the Beirut Field Office.²³ It also supervised the building of a courtroom, the stocking of a library, and the hiring of staff.²⁴ The Office of the Prosecutor has been investigating the attacks falling within its mandate. It sent more than 240 requests for assistance to Lebanon and 60 to other countries, conducted over 100 missions, and interviewed over 280 witnesses.²⁵ The Defence Office established its organizational structure and started preparing lists of counsel eligible to represent indigent accused.²⁶ The

²¹ Antonio Cassese, STL President, Annual Report (2009-2010) (March 2010), available at http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf.

²² *Id.* at para. 56.

²³ *Id.* at para. 130.

²⁴ *Id.* at paras. 135(b), 135(f), 130.

²⁵ *Id.* at paras. 189, 190-191.

Special Tribunal for Lebanon has 276 staff members, with a budget of \$55.4 million USD.²⁷

There is obviously a great deal of pressure on the Prosecutor to issue indictments. There have been a number of rumors that the Prosecutor was about to do so, and he has felt the need to address these rumors from time to time. For example, in a press release issued in August 2010, the Office of the Prosecutor said: “The Prosecutor will determine when and against whom an indictment will be submitted to the Pre-Trial judge for confirmation. However, no indictment will be issued until the Prosecutor is satisfied that, in light of all of the circumstances, it is based on solid and convincing evidence.”²⁸

II. Cooperation

The theme of cooperation by states, individuals, and regional or international organizations is at the heart of international criminal justice. Without it, the international system could not function. We saw a number of different kinds of cooperation – and non-

²⁶ *Id.* at paras. 204, 225-226.

²⁷ *Id.* at paras. 153, 157.

²⁸ Press Release, Special Tribunal for Lebanon, The Office of the Prosecutor of the Special Tribunal for Lebanon Requests Additional Information and Evidence Held by the Secretary General of Hezbollah (Aug. 24, 2010), <http://www.stl-tsl.org/sid/196>.

cooperation – come into play over the past year. Cooperation is best illustrated by the carrying out and conclusion of prosecutions and appeals within the international tribunals, because this means that there was coordinated assistance at a variety of levels in securing custody over accused persons and evidence, cooperation from witnesses, cooperation from the tribunal's host state, and cooperation within the tribunal itself.

I would like to begin by noting the cooperation issues inherent in the Cambodia Tribunal's *Duch* case.²⁹ Duch was the first person to stand trial before the Cambodia Tribunal. He had served as Deputy and then Chairman of S-21, a detention center that operated between 1975 and 1979 that specialized in the interrogation and execution of at least 12,000 persons considered enemies by the Communist Party of Kampuchea. During the trial, Duch demonstrated cooperation with the court process by providing extensive testimony about the operation of the prison. He also apologized repeatedly to the victims and their families. However, in the final days of trial, he and his

²⁹ Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (Extraordinary Chambers in the Cts. of Cambodia, Trial Chamber July 26, 2010) [hereinafter *Duch Judgment*].

lawyer did an about-face, and argued that he was simply acting on the orders of others and should be acquitted.³⁰

On July 26, 2010, the Trial Chamber of the Cambodia Tribunal found Duch guilty of crimes against humanity – specifically, persecution on political grounds (as linked to extermination, imprisonment, and torture) and grave breaches of the Geneva Conventions, and sentenced him to 35 years imprisonment.³¹ The Trial Chamber found that Duch showed a high degree of efficiency and zeal in carrying out his functions.³² Based, in part, on Duch’s cooperation with the Chamber, and his admission of responsibility, the Chamber decided not to impose a sentence of life imprisonment.³³ The sentence was reduced by 11 years for time served in pre-trial detention, and then reduced again by five years because the pre-trial detention exceeded the period allowed under Cambodian law.³⁴ The Chamber ordered the compilation and publication of all statements of

³⁰ This was highlighted in a blog post by Beth Van Schaack, *Closing Arguments Part II: Duch Addresses the Court*, INTLAWGRRLS (January 21, 2010), <http://intlwgrrls.blogspot.com/2010/01/closing-arguments-part-ii-duch.html>.

³¹ Duch Judgment, *supra* note 29, paras. 559, 631.

³² *Id.* at para. 555.

³³ *Id.* at para. 629.

³⁴ *Id.* at para. 632-633.

apology made by Duch during his trial.³⁵ As well, 66 of the 90 victims (either survivors or close relatives of prisoners) who applied to be civil parties will have their names and relationship to the S-21 prison included in the final judgment.³⁶ The judgment is currently on appeal.³⁷

Cooperation and outreach by civil society has meant that there is a relatively high degree of knowledge and interest in the trial in Cambodia. Close to 30,000 people watched the trial proceedings from the public gallery and the trial was also widely televised in Cambodia, with millions watching.³⁸

The Tribunal operates with the cooperation of the government of Cambodia and yet that same government has also demonstrated non-cooperation. The Open Society Justice Initiative released a report in July 2010 providing compelling evidence of political interference in the Tribunal by Cambodia's leadership, including

³⁵ *Id.* at para. 652.

³⁶ *Id.*

³⁷ The Co-Prosecutors' Notice of Appeal was filed on Aug. 16, 2010. Office of the Co-Prosecutors, Statement of the Co-Prosecutors (Aug. 16, 2010), <http://www.cambodiatribunal.org/images/CTM/ocp%20eccc-pr%2016aug2010%20eng.pdf>.

³⁸ Press Release, Open Society Justice Initiative, Duch Verdict Marks Milestone for Khmer Rouge Tribunal (July 26, 2010), http://www.soros.org/initiatives/justice/focus/international_justice/news/cambodia-duch-20100726.

pressure on the Cambodian officials not to investigate certain well-connected Khmer leaders.³⁹ This is disappointing (though perhaps not surprising). Earlier this summer, the U.N. Secretary-General appointed a U.N. Special Expert on the Extraordinary Chambers in the Courts of Cambodia, Clint Williamson. It is hoped that he will be able to “help curb political interference.”⁴⁰

Turning to the ICTR, state cooperation (particularly from Uganda) has led to additional arrests. On October 5, 2009, Idelphonse Nizeyimana, former second in command in charge of intelligence and military operations at the Ecole des Sous Officiers in Butare, was arrested in Kampala and transferred to the ICTR on October 6, 2009.⁴¹ He is charged with, among other things, having sent a section of soldiers to the home of the former Queen of Rwanda and ordering her execution,

³⁹ Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia* (July 2010), http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf.

⁴⁰ Press Release, Open Society Justice Initiative, Khmer Rouge Tribunal to Benefit from UN Oversight (July 6, 2010), http://www.soros.org/initiatives/justice/focus/international_justice/news/eccc-un-oversight-20100706.

⁴¹ Press Release, International Criminal Tribunal for Rwanda, Idelphonse Nizeyimana Arrested and Transferred Today to Arusha, ICTR/INFO-9-2-616.EN (Oct. 6, 2009), <http://www.unictr.org/tabid/1155/Default.aspx?id=1003>.

which was subsequently carried out.⁴² He is also said to have known or had reason to know that many Tutsi women were being raped before killed by individuals under his authority.⁴³

On June 30, 2010, Jean-Bosco Uwinkindi was arrested in Kampala and transferred to the ICTR on July 2.⁴⁴ He was the former Pastor in charge of a church in Kigali Rural préfecture, and he is charged with leading a group to exterminate Tutsi in his church and elsewhere.⁴⁵ On July 9, he entered a plea of “not guilty.”⁴⁶

⁴² Prosecutor v. Ildephonse Nizeyimana, Case No. ICTR-2000-55-PT, Second Amended Indictment, para. 23 (Int’l Crim. Trib. for Rwanda Sept. 29, 2010), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CNizeyimana%5Cindictment%5C100929.pdf>.

⁴³ *Id.* at para. 30.

⁴⁴ Press Release, International Criminal Tribunal for Rwanda, Uwinkindi Arrested and Transferred to Arusha, ICTR/INFO-9-2-648.EN (July 5, 2010), <http://www.unictr.org/tabid/155/Default.aspx?id=1149>.

⁴⁵ Press Release, International Criminal Tribunal for Rwanda, Jean-Bosco Uwinkindi Pleads Not Guilty, ICTR/INFO-9-2-649.EN (July 9, 2010), <http://www.unictr.org/tabid/155/Default.aspx?id=1152>.

⁴⁶ *Id.*

The ICC has seen a number of interesting positive developments for cooperation. First, its network of cooperation has expanded again. The number of States Parties has grown: Bangladesh joined the Rome Statute on March 23, 2010, the Republic of Seychelles on August 10, 2010, and Saint Lucia on August 18, 2010, bringing the total number of States Parties to 113.⁴⁷ Being a State Party brings with it obligations and responsibilities, including various obligations to cooperate with the Court.⁴⁸

Second, there has been a very positive breakthrough in cooperation from a non-Party State. The United States made statements indicating a policy of positive engagement with the ICC at the November 2009 ICC Assembly of States Parties,⁴⁹ and the June ICC Review

⁴⁷ This number has since grown to 116, with the addition of Moldova, Grenada, and Tunisia as States Parties. *See Ratification of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=romeratification>.

⁴⁸ Article 86 contains the general obligation to cooperate, while Article 87 discusses requests for cooperation, Article 89 the surrender of persons to the Court, Article 90 competing extradition requests, Articles 91-92 arrests and surrenders, Article 93 other forms of cooperation (such as identification of persons, service of documents, execution of searches and seizures, etc.), Article 97 State-Court consultations, and Article 100 State-Court division of costs. Rome Statute, *supra* note 1.

⁴⁹ *See* Stephen J. Rapp, United States Ambassador-at-Large for War Crimes Issues, Speech to Assembly of States Parties (Nov. 19, 2009), http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf.

Conference in Kampala. In one of his interventions at the Review Conference, Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, stated that the United States is willing to consider ICC cooperation requests on a case-by-case basis, and this can be done in a number of ways such as making supportive political or diplomatic statements, sharing information, or providing witness assistance.⁵⁰ These statements marked a significant departure from the non-cooperation approach of the previous administration.

Third, participants at the Review Conference engaged in an intriguing initiative to strengthen cooperation by issuing pledges made with the purpose of strengthening the Rome Statute system. One hundred and twelve pledges were made by 35 States Parties, as well as by the United States⁵¹ and the European Union.

⁵⁰ Author's notes, Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, "Civil Society Taking Stock" Side Event (May 31, 2010) (on file with author).

⁵¹ The United States pledged to support rule-of-law and capacity building projects which will enhance states' ability to hold accountable those responsible for war crimes, crimes against humanity, and genocide. It also reaffirmed "President Obama's recognition on May 25, 2010 that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the LRA's wake, to receive those who surrender, and to support efforts to bring the LRA leadership to justice." Review Conference of the Rome Statute, Kampala, Uganda, May 31-June 11, 2010, *Pledges*, 18, RC/9 (July 15, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>.

These ranged from pledges to adopt ICC implementation legislation,⁵² conducting training or seminars at the national level to raise awareness or educate on the Rome Statute,⁵³ reaching an agreement with the ICC on the relocation of witnesses,⁵⁴ providing technical or other assistance to other states,⁵⁵ to quite a few pledges of money for the Court's Trust Fund for Victims.⁵⁶

Fourth, delegates at the Review Conference adopted a resolution on strengthening the enforcement of sentences.⁵⁷ This was brought to the floor at the initiative of Norway. This Resolution recognizes that there may be states that are willing to accept persons

⁵² Colombia, Liechtenstein, Peru, Poland, Switzerland, Uganda, Tanzania, and Venezuela.

⁵³ Argentina, Croatia, Georgia, Italy, Mexico, and Venezuela.

⁵⁴ Argentina, Austria, and Spain.

⁵⁵ Bulgaria, Republic of Korea, Slovakia, Trinidad & Tobago, and the United Kingdom.

⁵⁶ Australia, Austria, Finland, Germany, Ireland, Liechtenstein, Netherlands, Poland, Spain, Switzerland, United Kingdom, and Tanzania.

⁵⁷ Review Conference of the Rome Statute, Kampala, Uganda, May 31-June 11, 2010, *Strengthening the Enforcement of Sentences*, RC/Res.3 (June 8, 2010), available at http://www.iccpi.int/iccdocs/asp_docs/Resolutions/RC-Res.3-ENG.pdf [hereinafter Sentence Enforcement Resolution].

sentenced by the ICC, but that cannot enter into Sentence Enforcement Agreements with the ICC because their prisons do not meet “widely accepted international treaty standards governing the treatment of prisoners,” as required by Article 103 of the Rome Statute.⁵⁸ The Resolution encourages other states, and international and regional organizations, mechanisms or agencies, to cooperate with the interested state to help bring its prisons up to international standards.⁵⁹ The idea is to increase the number of countries willing and able to accept prisoners so ICC convicted can serve their sentences in the same region as their home state. At the Review Conference, the ICC signed Sentence Enforcement Agreements with Belgium, Denmark, and Finland, which joined Austria and the United Kingdom as sentence enforcement countries.⁶⁰ Obviously, there is still a need for more geographic diversity in Sentence Enforcement Agreements.

I will turn now to the opposite side of this theme: non-cooperation. There have been a number of very recent examples of non-cooperation with the ICC. On July 12, 2010, the ICC’s Pre-Trial Chamber permitted a

⁵⁸ See Rome Statute, *supra* note 1, art. 103(3)(b) .

⁵⁹ Sentence Enforcement Resolution, *supra* note 57, at para 3.

⁶⁰ For more information, see Press Release, International Criminal Court, The ICC Signs Enforcement Agreements with Belgium, Denmark, and Finland, ICC-CPI-20100601-PR533 (June 1, 2010), [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr533](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr533).

second arrest warrant to be issued for Sudanese President Bashir, for three counts of genocide carried out in the Darfur region of Sudan.⁶¹ The previous arrest warrant, issued on March 4, 2009, was for five counts of crimes against humanity and two counts of war crimes related to events in Darfur.⁶² On July 21, 2010 – just over one week after the issuance of the second warrant – President Bashir publicly visited Chad, a State Party to the Rome Statute. He was not arrested, and indeed was welcomed by the government of Chad.⁶³

On June 3, 2010, the Attorney-General of Kenya wrote a letter to the Chairperson of the Commission of the African Union (A.U.) on behalf of all African States Parties to the Rome Statute.⁶⁴ There are 31 African

⁶¹ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Int'l Crim. Ct., Pre-Trial Chamber I July 12, 2010).

⁶² Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Int'l Crim. Ct., Pre-Trial Chamber I Mar. 4, 2009).

⁶³ See News Release, Coalition for the International Criminal Court, Urgent Action Appeal to Members of the CICC- Bashir's Visit to Chad (July 2010), http://www.coalitionfortheicc.org/documents/Actions_on_Chad_-_letterhead.pdf.

⁶⁴ Letter from Amos Wako, Attorney General of the Republic of Kenya, to Chairperson of the Commission, African Union, Establishment of a Liaison Office for the International Criminal Court at the Headquarters of the African Union (June 3, 2010),

States Parties,⁶⁵ which together constitute the largest bloc of countries that are Parties to the Statute. The letter requested that the A.U. expedite the establishment of an ICC Liaison Office in Addis Ababa (the headquarters of the A.U.).⁶⁶ This Liaison Office had been approved by the ICC's Assembly of States Parties in November 2009.⁶⁷ In a seeming reversal of the position of these states, on July 29, 2010, the A.U. Summit, taking place in Kampala, Uganda, adopted a decision which "reiterates its Decision that A.U. Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan."⁶⁸ The Summit also decided to "reject for now,

available at http://www.iccnw.org/documents/AULO-African_SPs_Letter.pdf [hereinafter Wako Letter].

⁶⁵ There are 15 Asian, 17 Eastern European, 25 Latin American and Caribbean, and 25 Western European and Other States Parties. The list is available on the ICC's website, <http://www2.iccpi.int/Menu/ASP/States+Parties/African%20States>.

⁶⁶ Wako Letter, *supra* note 64.

⁶⁷ ICC Assembly of States Parties Res. 7, Programme Budget for 2010, the Working Capital Fund for 2010, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for the Year 2010, the Contingency Fund, Conversion of a GTA Psychologist Post to an Established one, Legal Aid (Defence) and the Addis Ababa Liaison Office, 8th Plenary Mtg., ICC-ASP/8/Res.7, para. H (Nov. 26, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.7-ENG.pdf.

⁶⁸ Assembly of the African Union, 15th Plen. Sess., July 25-27, 2010, *Decision on the Progress Report of the Commission on the*

the request by [the] ICC to open a Liaison Office[] to the A.U. in Addis Ababa”⁶⁹ It also expressed concern over the conduct of the ICC Prosecutor, whom the decision accused of “making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir”⁷⁰ This last concern seems to be part of an ongoing information campaign by the Sudanese government to distract attention from the mass atrocities in Darfur and portray itself as the injured victim. Why African ICC States Parties would agree to such a statement being included in the A.U. outcome document is bewildering, to say the least, but is likely best explained through power politics.

While these statements of non-cooperation look like decisions of the A.U. Summit as a whole, we also sense from press reports – and from statements by countries such as Botswana, which stated two days before the adoption of the A.U. Summit outcome document that it

Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec.296(XV), at para. 5 (2010), available at http://www.iccnw.org/documents/AU_Decisions_Declarations_Resolutions__15th_Summit_July_2010_eng.pdf.

⁶⁹ *Id.* at para. 8.

⁷⁰ *Id.* at para. 9.

would not disregard its obligations to the ICC⁷¹ – that this was not a unanimous position.⁷²

One other outcome of the A.U. Summit decision was seeming pressure on African ICC States Parties to continue to press for the revision of Article 16 of the Rome Statute. This is the Article that provides for the possibility of renewable deferral by the U.N. Security Council of an ICC investigation or prosecution for one year.⁷³ In November 2009, at the ICC Assembly of States Parties, South Africa introduced an A.U.-drafted proposal for revising Article 16 to allow states with jurisdiction over the situation before the ICC to request the Security Council to defer the matter. Under the proposal, if the Security Council did not decide on the state request within 6 months, the requesting state may

⁷¹ News Release, Republic of Botswana, Botswana Stands by International Criminal Court (July 28, 2010), http://www.iccnw.org/documents/BotswanaStandsByICC_28Jul2010_en.pdf.

⁷² See, e.g., *African Union Moves Aggressively to Shield Bashir From Prosecution*, SUDAN TRIBUNE, July 29, 2010, available at <http://www.sudantribune.com/spip.php?article35786> (stating that “the resolution on the ICC was changed on Tuesday to a more harsher version to the surprise of many observers who followed the summit closely and it remained unclear what happened behind the scenes at the final hours of the summit”).

⁷³ Rome Statute, *supra* note 1, art. 16.

ask the U.N. General Assembly to assume the Council's power to defer.⁷⁴

When South Africa introduced this proposal for amendment, there was little support from any country – including African countries⁷⁵ – and much concern about expanding the Article 16 exception, and about potentially violating both the U.N. Charter and international law on the interrelationships between the U.N. organs and other international organizations.⁷⁶ The decision of the Assembly of States Parties to establish a Working Group to revisit Rome Statute amendment proposals that were not forwarded to the Review Conference will mean that this proposal will again become an issue in the future, perhaps as early as the upcoming December 6-10, 2010 Assembly of States Parties meeting in New York.⁷⁷

⁷⁴ Assembly of States Parties to the Rome Statute, 8th Sess., The Hague, Nov. 18-26, 2009, *Official Records*, vol. 1, ICC-ASP/8/20, Annex II, paras. 59-62 (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf.

⁷⁵ The author's notes only recorded support from Namibia and Senegal. Assembly of States Parties to the Rome Statute, 8th Sess. The Hague, Nov. 18-26, 2009 (Nov. 23, 2009).

⁷⁶ For example, could a non-United Nations treaty grant the General Assembly powers?

⁷⁷ Assembly of States Parties to the Rome Statute Res. 6, 8th Sess., The Hague, Nov. 18-26, 2009, ICC-ASP/8-Res. 6, para. 4 (Nov. 26, 2009) provides for "the establishment of a Working Group of the

On August 27, 2010, President Bashir attended a celebration of the new Kenyan constitution in Kenya, an ICC State Party and situation country. Kenya did not arrest President Bashir. This visit and Kenyan inaction prompted the ICC's Pre-Trial Chamber to issue a report to the Assembly of States Parties and to the U.N. Security Council on both the Chad and Kenya visits, for action as appropriate.⁷⁸

Assembly of States Parties for the purpose of considering, as from its ninth session, amendments to the Rome Statute," proposed but not forwarded to the Review Conference, and other possible amendments. The Ninth Assembly of States Parties did not directly address the issue, but requested "the Bureau to prepare a report for the consideration of the Assembly, at its tenth session, on procedural rules or guidelines for the Working Group on Amendments." Assembly of States Parties to the Rome Statute Res. 3, 9th Session, New York, Dec. 6-10, 2010, ICC-ASP/9-Res. 3, at para. 56 (Dec. 10, 2010).

⁷⁸ Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Recent Visit to the Republic of Chad (Int'l Crim. Ct., Pre-Trial Chamber I Aug. 27, 2010); Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Presence in the Territory of the Republic of Kenya (Int'l Crim. Ct., Pre-Trial Chamber I Aug. 27, 2010). The ICC Pre-Trial Chamber has since indicated that it is willing to act quickly in requesting information from States Parties about visits by indicted individuals. Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Demande de Coopération et D'informations Adressée à la République Centrafricaine (Int'l Crim. Ct., Pre-Trial Chamber I Dec. 1, 2010).

Still on the theme of cooperation, a number of interesting and thought-provoking reports and studies were issued since the 2009 International Humanitarian Law Dialogs. One which came out on July 29, 2010 – the same month as the A.U. Decision outlined above – is by 24 Hours for Darfur and a number of other organizations that had interviewed more than 2,000 Darfurian refugees on the Chadian side of the Sudan-Chad border.⁷⁹ This study, titled *Darfurian Voices: Documenting Darfurian Refugees' Views on Issues of Peace, Justice, and Reconciliation*, provides us with a radically different view than that reflected in the A.U. Decision: 87.5% of the interviewees indicated that the Government of Sudan or President Bashir was the root cause of the conflict in Darfur⁸⁰ and 98% of all respondents thought that President Bashir should be tried before the ICC.⁸¹

Finally, before turning to my final theme of “closure,” I wanted to highlight one absolutely crucial aspect of cooperation: that of the witnesses who come before the tribunals to tell their stories, often at great risk to themselves. The Special Court for Sierra Leone was

⁷⁹ JONATHAN LOEB ET AL., 24 HOURS FOR DARFUR, *DARFURIAN VOICES: DOCUMENTING DARFURIAN REFUGEES' VIEWS ON ISSUES OF PEACE, JUSTICE, AND RECONCILIATION* (2010), available at http://www.darfurianvoices.org/ee/images/uploads/DARFURIAN_VOICES_DocuVoices_Report.pdf.

⁸⁰ *Id.* at 14.

⁸¹ *Id.* at 29.

given a great deal of press attention over the appearance of supermodel Naomi Campbell in August 2010.⁸² While it was gratifying that more press attention was, finally, paid to the ongoing and fascinating trial of former Liberian President Charles Taylor before that Court, it is easy, in the Campbell spotlight, to forget that the story of the connection of conflict diamonds to Taylor and the Revolutionary United Front largely comes from civilians and insiders who were on the ground in Sierra Leone or Liberia during the conflict.⁸³

Over the past several months, the ICC's *Lubanga* trial, which is focused on charges relating to the recruitment and use of child soldiers, has raised awareness within the international criminal law community on the importance of intermediaries to the operation of the Court in the Democratic Republic of the Congo. Some of the witnesses testifying in The Hague provided accounts that said that intermediaries had made promises to them in exchange for giving fabricated accounts of having served as child soldiers. This resulted in a May 2010 *Decision on Intermediaries*, in which the Trial Chamber ordered disclosure of details on some intermediaries, including P-143, pending

⁸² She appeared before the Special Court on Aug. 5, 2010. Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-T, Court Transcript (Special Ct. for Sierra Leone, Trial Chamber II Aug. 5, 2010).

⁸³ For excellent summaries of witness testimony, see THE TRIAL OF CHARLES TAYLOR, <http://www.CharlesTaylorTrial.org>.

protective measures.⁸⁴ On July 8, 2010, the Trial Chamber granted a stay of proceedings on account of the Prosecutor's non-cooperation with the *Decision on Intermediaries* with respect to P-143.⁸⁵ The Prosecutor argued an interpretation of the Rome Statute which is puzzling, and which was not accepted by the Trial Chamber. The Prosecutor has appealed the stay of proceedings.⁸⁶

III. Closure

The ICC is a permanent institution while the ICTY, ICTR, and Special Court for Sierra Leone are all time-limited. The Special Court will be the first of these Tribunals to close. It is currently hearing its final trial,

⁸⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on Intermediaries (Int'l Crim. Ct., Trial Chamber I May 31, 2010).

⁸⁵ Prosecutor v. Dyilo, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (July 8, 2010).

⁸⁶ This stay of proceedings was overturned by the Appeals Chamber. Prosecutor v. Dyilo, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Int'l Crim. Ct., Appeals Chamber Oct. 8, 2010).

that of the former President of Liberia, Charles Taylor. It will wind up its operations after the conclusion of the *Taylor* trial and any associated appeal, likely in 2012.⁸⁷ Under the latest estimates of their completion strategies, the ICTY and ICTR expect to complete their work in 2014.⁸⁸ The Cambodia Tribunal and the Special Tribunal for Lebanon are also time-limited. Both were originally estimated to have completed their proceedings in approximately three years, putting their potential closure dates at 2012, but these dates are very likely to be extended.⁸⁹

⁸⁷ The prosecution and defense phases of the trial have been completed. A judgment is expected in early-to-mid- 2011. Judgment on any appeal would follow within approximately six months, bringing the likely closing date for the Special Court for Sierra Leone to early 2012.

⁸⁸ Current estimates in the ICTY's *Karadzic* case indicate an end-date for that case of June 2014, while there is an estimated end-date for the ICTR's *Karemera et al.* case of December 2013 (note that closure would not happen immediately after the end of the case). U.N. Security Council, Letter dated May 31, 2010 from the President of the ICTY addressed to the President of the Security Council, U.N. Doc. S/2010/270 Enclosures VIII, IX (June 1, 2010).

⁸⁹ The Agreement between the United Nations and Lebanon on the establishment of a Special Tribunal for Lebanon states, at art. 21, that the Agreement shall remain in force for three years from the date of commencement of functioning of the Tribunal and that the Parties will, in consultation with the Security Council, review the progress of the work of the Tribunal. STL Agreement, *supra* note 19, at art. 21.

The closure of the SCSL, ICTY, and ICTR raise a number of legal and practical issues, such as who or what mechanism will, after closure: conduct trials of outstanding fugitives who may be arrested; provide oversight with respect to proceedings that have been referred to national authorities; monitor and review the sentences of convicted persons; enforce and revise judicially-ordered protective measures for victims and witnesses; and secure, maintain, and provide controlled access to Court records and archives. The legacy and judicial integrity of the time-limited international and hybrid criminal tribunals depend on these residual functions being addressed effectively. Failure to do so could have drastic consequences: witnesses might be killed if adequate protection regimes are not in place following the closure of the tribunals, or individuals may be targeted with threats or physical violence if confidential witness information is not properly secured in tribunal archives.

Quite a bit of progress has been made over the past year in planning for residual issues. The Special Court for Sierra Leone has a plan in place for closure and post-closure, and it has been steadily implementing this plan over 2010. For instance, since the completion of the appeal in the *Revolutionary United Front* case,⁹⁰ work has been ongoing to close portions of the Court's Freetown headquarters. As one example, in October,

⁹⁰ This was the final case to be heard at the Court's headquarters in Freetown, Sierra Leone. The Charles Taylor case is being heard in The Hague.

eight individuals convicted by the Special Court were transferred to Rwanda to serve their sentences.⁹¹ This then allowed for the closure of the Court's Freetown detention facility, the keys to which were handed to the Sierra Leone Prison Service in mid-November.⁹² Sierra Leone's Director of Prisons indicated that the new facility will be used to house female prisoners.⁹³ Also in November, the Special Court launched a month-long training program for Sierra Leonean police officers to raise their skill level in addressing witness protection.⁹⁴ The Special Court, as part of its residual mechanism, will provide continued witness protection for five years for witnesses who testified in Special Court trials.⁹⁵ During that time, Court officials will provide support for the national witness protection and assistance

⁹¹ Press Release, Special Court for Sierra Leone, Special Court Prisoners Transferred to Rwanda to Serve Their Sentences (Oct. 31, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=YiPY3dNd%2fil%3d&tabid=214>.

⁹² Press Release, Special Court for Sierra Leone, Special Court Hands Over Detention Facility to Government of Sierra Leone (Nov. 16, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=MsFlhHi7%2fW8%3d&tabid=214>.

⁹³ *Id.*

⁹⁴ Press Release, Special Court for Sierra Leone, Special Court Launches Witness Protection Training Programme (Nov. 6, 2009), <http://www.scsl.org/LinkClick.aspx?fileticket=kJu0OgoLU2E%3d&tabid=214>.

⁹⁵ *Id.*

programme to build capacity, with the intention that, after five years, Court witness protection can devolve to Sierra Leone (though this will be revisited prior to the five-year mark).⁹⁶ The Special Court also signed an agreement with the United Nations on the establishment of a residual mechanism (not yet available publicly), and has transferred its original archives to The Netherlands⁹⁷ (with copies of the public documents to remain in Sierra Leone).

The ICTY and ICTR have similarly been preparing for their closure. Over this past year, there have been ongoing discussions on ICTY and ICTR residual issues within the Security Council's Informal Working Group on International Tribunals.⁹⁸ In addition, in October 2009, Austria chaired an Arria Formula Meeting at the United Nations in New York on the subject of tribunal

⁹⁶ *Id.*

⁹⁷ Newsflash, Netherlands Ministry of Foreign Affairs, Evidence from Special Court for Sierra Leone Secure in the Netherlands (Dec. 16, 2010), http://www.minbuza.nl/en/News/Newsflashes/2010/12/Evidence_for_Special_Court_for_Sierra_Leone_secure_in_the_Netherlands.

⁹⁸ *See, e.g.*, U.N. Security Council, Letter dated Dec. 30, 2009 from the Chargé d'Affaires a.i. of the Permanent Mission of Austria to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2009/687 (Dec. 31, 2009) (containing a letter summarizing the activities of the Informal Working Group during the period Jan. 1-Dec. 31, 2009).

closure.⁹⁹ As well, in February 2010, tribunal residual matters were discussed in an expert group meeting held in New York, organized by the University of Western Ontario, the International Center for Transitional Justice, and the Permanent Mission of Canada to the United Nations, and at a conference in The Hague titled *Assessing the Legacy of the ICTY*, organized by the ICTY, the Government of The Netherlands, and UCLA School of Law.¹⁰⁰

While discussions on ICTY and ICTR residual matters are still ongoing within the Security Council,¹⁰¹ there has been some indication of the Council's direction in this regard. In March 2010, at the annual American Society of International Law meeting, Huw Llewellyn of the U.N. Office of Legal Affairs and Secretariat to the Security Council's Informal Working Group on International Tribunals noted that the Council was

⁹⁹ This meeting was held on Oct. 8, 2009, and was open to all United Nations Member States. The meeting focused on residual issues of the ICTY and ICTR. Invited speakers included the Presidents of the ICTY and ICTR, Peter Taksøe-Jensen, Assistant Secretary-General for Legal Affairs at the United Nations, and representatives of the International Committee of the Red Cross and the International Center for Transitional Justice.

¹⁰⁰ *Assessing the Legacy of the ICTY* (Feb. 23-24, 2010), The Hague, <http://www.icty.org/sid/10294>.

¹⁰¹ The discussions resulted in the adoption of Security Council Resolution 1966 on December 22, 2010. S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010) [hereinafter S.C. Res. 1966].

discussing the creation of a small, efficient single residual mechanism to handle residual issues for the ICTY and ICTR, but with two branches – one in Europe and one in Africa.¹⁰² He also explained that there were discussions on the start date or dates of the residual mechanism, which are likely to be triggered by the completion of the work of the tribunals. This suggests different starting dates for each of the two branches of the mechanism.¹⁰³

While there seemed to be support within the Council for the idea that high-level ICTY and ICTR fugitives should be tried by the residual mechanism,¹⁰⁴ the question remains, however, where the lower-ranking ICTR fugitives should be tried if they cannot be referred to Rwanda or other national jurisdictions before closure of the ICTR.¹⁰⁵ “New” trials of fugitives by the residual

¹⁰² See *id.* at annex 1.

¹⁰³ This indeed is the case. S.C. Res. 1966 provides: “*Decides* to establish the International Residual Mechanism for Criminal Tribunals (“the Mechanism”) with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively (“commencement dates”), and to this end *decides* to adopt the Statute of the Mechanism in Annex 1 to this resolution.” *Id.*, annex 1, at para. 1.

¹⁰⁴ S.C. Res. 1966 provides for this possibility. S.C. Res. 1966, *supra* note 101, at para. 10.

¹⁰⁵ After earlier denials of his requests, the ICTR Prosecutor has once again requested a referral of cases to Rwanda. See Press Release, International Criminal Tribunal for Rwanda, Prosecutor

mechanism will need a full range of functions close to that of the current tribunals, such as, witness protection, enforcement of sentences, etc.

There are certain challenges in designing and establishing a residual mechanism. One challenge is to ensure a watertight continuity of jurisdiction from the existing tribunals to the residual mechanism and its respective branches. It will need to be absolutely clear that the residual mechanism has the authority to try the fugitive cases, bearing in mind that the indictments were issued by a different institution that no longer exists.¹⁰⁶ A second challenge being considered by the Security Council is how to address the situation where, for example, Mladić is arrested with just a few months of the life of the ICTY left.¹⁰⁷ Should the ICTY be extended to complete this trial? If so, should it pass the case to the residual mechanism at the appeal stage, or also complete the appeal? Or should the residual mechanism commence early to deal with the case from the outset (and thereby run in parallel with the Tribunal

Files New Applications for Referral of Cases to Rwanda, ICTR/INFO-9-2-657.EN (Nov. 4, 2010), [http://www.unictt.org/Default.aspx?TabId=155&id=1174&language=en-US&mid=560&SkinSrc=\[G\]Skins/UNICTR/PrintSkin&ContainerSrc=\[G\]Containers/UNICTR/PrintContainer&dnnprintmode=true](http://www.unictt.org/Default.aspx?TabId=155&id=1174&language=en-US&mid=560&SkinSrc=[G]Skins/UNICTR/PrintSkin&ContainerSrc=[G]Containers/UNICTR/PrintContainer&dnnprintmode=true).

¹⁰⁶ S.C. Res. 1966 addressed this issue by adopting detailed transitional arrangements. S.C. Res. 1966, *supra* note 101, at annex 2.

¹⁰⁷ Mladić was arrested on May 26, 2011, in Serbia, and was surrendered for trial by the ICTY on May 31, 2011.

for a period)? Or should the Tribunal deal with the pre-trial proceedings and then transfer the case to the residual mechanism for trial?¹⁰⁸ A resolution from the Security Council on the joint ICTY-ICTR residual mechanism is expected later in 2010.¹⁰⁹

One difficulty related to closure of the SCSL, ICTY, and ICTR that has become quite evident over the past year is the attrition of staff. In June 2010, the ICTY's President Robinson outlined the depth of the problem both in his report¹¹⁰ and in his statement to the Security Council. In his statement, he indicated his understandable frustration:

Staff attrition, and the desperate need for urgent action in stemming that flow, is a factor that I have repeatedly stressed to the utmost degree in my previous presentations to the Security Council and the General Assembly. I am quite frankly at a loss as to what more might be done or said on my part to turn your attention to this issue. I reiterate that staff *are* leaving the Tribunal in droves – 3 in every 5 days – for greater job security with other

¹⁰⁸ These issues were also addressed by S.C. Res. 1966 in the detailed transitional arrangements. S.C. Res. 1966, *supra* note 101.

¹⁰⁹ *Id.*

¹¹⁰ U.N. Security Council, Letter dated May 31, 2010 from the President of the ICTY addressed to the President of the Security Council, paras. 51-58, U.N. Doc S/2010/270 (June 1, 2010).

institutions, often within the United Nations. I must therefore warn you that this factor, as the report demonstrates, is impacting adversely upon the expeditious completion of all but one of our trials. And it will worsen. Our trials will be further delayed by staff attrition.¹¹¹

He provided some potential solutions – but it is not clear that any of these will be adopted expeditiously.¹¹²

However, all is not dire. The Special Tribunal for Lebanon has learned lessons from the experiences of the ICTY and ICTR and has already begun planning for closure. Specifically, over this past year, it has worked on an STL-wide information management policy with an eye on managing information in a way that makes sense both now and to an eventual residual mechanism, so as

¹¹¹ Patrick Robinson, ICTY President, Statement to the Security Council, at 2 (June 18, 2010), *available at* http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/100618_pdt_robinson_un_sc_en.pdf.

¹¹² *Id.* These measures include: 1) Granting permanent contracts to ICTY staff to finish their work, such that even if the U.N. cannot place them in another position by the time their posts expire, they will nonetheless be compensated and that compensation will buy them the time they need to find another position; 2) Enforcement of the U.N. General Assembly Resolution authorizing the ICTY to offer contracts to staff in line with planned post reductions and prevailing trial schedules – a measure that has not been permitted by the U.N. Controller’s Office; 3) End of service grants; 4) Inclusion of Tribunal staff in the new continuing contractual regime.

to make for a closure that is as seamless as possible when the time comes.¹¹³

IV. Conclusion

I hope that my comments have demonstrated that international criminal law is evolving to face old and new issues in an ever more complex manner. Key to the ongoing development of international criminal law, in my view, is the growing availability of information about the workings of the international criminal tribunals. Increased information – for example through the ICC’s and ICTY’s weekly e-mail updates, the Special Court for Sierra Leone’s Twitter feed, tribunal-specific non-governmental websites like CharlesTaylorTrial.org, LubangaTrial.org, CambodiaTribunal.org, and the Special Tribunal for Lebanon Monitor, or through more general international law blogs such as *Opinio Juris*, *IntLawGrrls*, and *EJILTalk!*, among many others – increases transparency and therefore interaction with not only the legal public but also other publics, including those from the affected communities. For example, the Charles Taylor Trial blog, hosted by the Open Society Justice Initiative, includes an ongoing discussion among Liberians and Sierra Leoneans of very different views, both in those countries and in the diaspora.

¹¹³ Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion on Residual Mechanisms*, in AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS OF THE 104TH ANNUAL MEETING, MARCH 24-27, 2010 (forthcoming 2011).

Dissemination of the results of efforts such as this one is also key to this field. I look forward to the International Humanitarian Law Dialogs review of the 2010-2011 year in international criminal law, and I hope that it contains good news with respect to review, cooperation, and closure within the international tribunals.

Freedom from Fear, Human Rights, and the Crime of Aggression

William Schabas*

Thanks very much, David, for such a nice introduction and for justifying my showing up here without a tie on. I was going to make an apology for doing it, but David justified the informality.

Actually, it was a bit intentional because my remarks follow those of an international judge and an ambassador, both of whom dressed the roles, and now you get the professor, so I have to look like one.

I want to say a word of appreciation for Richard Goldstone and a thought about his remarks as well. Greg, when he introduced him, overlooked – perhaps because it's such a long list of accomplishments – one of his most recent accomplishments: his courageous work chairing the Gaza Inquiry for the United Nations and the work he's done since then to defend its report and uphold its integrity. We are all indebted to you. I think it's in the tradition, Richard, of Justice Jackson and the remarks we heard yesterday about how international law must apply in an evenhanded way to all sides. You are a great symbol of that philosophy.

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The other thing I find interesting is the way Richard Goldstone describes the story of how he became the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. I don't think it was obvious to people in early 1994 that the ICTY was going to be the start of something big. That all seems clear to us now, as we teach the story of the international tribunals. People say, "Weren't people like Richard Goldstone lucky to get in right at the beginning?" But actually, I think that at the time, in 1993 and 1994, people looked at it as a career-ending move, a dead end, a potential flop. It took, I think, some kind of inspired genius to see this happening and to realize that it would be something big. Richard had been appointed to the highest judicial office of his country at a crucial time in its history, yet he took on this job that I think others would have backed away from because of questions about whether it was going to be a waste of time and a failure, which many people did say. I can remember this at the time.

I think that may have been the situation with Robert Jackson in 1945 as well. He was criticized by his colleagues. We know the famous quote from, I think, the Chief Justice of the U.S. Supreme Court talking about Nuremberg being a high-grade lynching party or something like this. It is a remarkable thing that these two men, at different times in history, but again both in the highest judicial office in their countries and at crucial stages in their careers, decided to devote their time, their energy, and their skills to international justice at a time when its success was not obvious. As we honor Robert Jackson, we also have to honor Richard Goldstone and understand that wonderful quality of his.

Last night, as Don Ferencz walked down the staircase with his bagpipes, I was reminded of the final moments of the Conference in Kampala, in June. We were there together at the Conference and we often sat in the evenings and had a drink together and chatted. And when the amendment on aggression was adopted early in the morning, about half past midnight on the 12th of June, Don pulled out his bagpipes and piped the victory. And everybody applauded and cheered, as we did last night.

But as I recall, Don was debating whether it really was an occasion for bagpipes, and his dad – I think you were sitting right next to me, Ben – was also debating whether we'd accomplished something or whether this was actually a moment of great disappointment that didn't deserve commemoration.

I sensed a bit of that also in Ben's comments yesterday in the session when he went through what have we accomplished, and I felt a bit disappointed because I think it is a great accomplishment. So that's what my remarks are going to try and develop for you on the adoption of the amendments on aggression. It saddens me that a man, who, probably more than any other, is responsible for that great accomplishment, still feels ambivalent about what we've done. Ben, I'm going to try and convince you in the next 15 or 20 minutes that this really is such an important development.

It has been said in the different lectures and sessions that this is a very complex amendment, but I think what

happened at the Conference in Kampala can actually be explained somewhat simply.

There was a placeholder in the Rome Statute of the International Criminal Court allowing for amendments that would enable the Court to prosecute the crime of aggression, but there was not obvious agreement on how that would work. That's why only a placeholder was left there when the Rome Statute was adopted in 1998. And we spent 12 years struggling with the various issues, some of which we were aware of in 1998, and some of which we only discovered as the process went along, as we were trying to figure out provisions and alternatives, as we were trying to craft language that could go in the Statute and that would enable this to work.

It was not obvious at any point that this was going to succeed. It was not obvious even at the Kampala Conference. It was not obvious until the final minutes of the Conference that this was going to succeed.

I remember that morning coming back from the pool at the hotel, bumping into Bill Pace and asking, "Bill, what's going to happen?" He said, "They haven't got the votes. They haven't got the votes," and he shrugged his shoulders as if it was a dead duck. We were all surprised, of course, and we waited with great anticipation during the day until it was adopted, well, in the final minutes of the Conference by consensus, because nobody called for a vote. And Bill Pace was right. If someone had called for a vote, there probably would not have been enough votes even for the minimum required to secure the amendment's adoption.

So what the amendment does is it adds an article to the Statute that defines the crime of aggression. It's not as broad and generous as some would have liked, but it's something that works. It's acceptable and it's a beginning. Above all, it does the job of saying that there is a crime of aggression, and we have words that can set out its limits. There is no doubt that if it's ever prosecuted, judicial interpretation will give it some clarity. Like most of the crimes that have been applied by international criminal tribunals, it will not be immune to judicial interpretation, and probably the expansion of the definition, or, at any rate, a liberal approach to its application. So it's too early to tell how that will work out. It may never be prosecuted, which would not necessarily be a bad thing. It would just confirm the deterrent effect of the prohibition of the crime of aggression, as defined in the Statute.

Then we have two other articles that set out how prosecution of the crime of aggression is to be authorized by the Court. The first of them – it's actually the second in the order of the Statute but it's the first in priority – is that the Security Council will always be able to assign the Court prosecution for a crime of aggression, no matter where it takes place in the world.

The second provision allows for a state that has joined the Court, or for the Prosecutor acting on his own initiative, to begin a prosecution when the Security Council doesn't proceed. This part of it was much more controversial and only applies to the states that have joined the Court and have not opted out of jurisdiction over the crime of aggression.

And then we also have some complicated rules about how all of this is to enter into force, because this is not immediately in force. It's adopted, but it still has to be brought into force. But I think – and Ben went through the list yesterday of the difficulties we have along the path – but I don't think they're actually going to be very difficult.

The first requirement is that we have to get 30 of the 113 states, approximately a quarter of them, to ratify the amendment. Judge Kaul yesterday explained that Germany is already working on this, and I suspect many other countries are as well. I think we'll probably get to 30 within two or three years. That won't be hard at all. And then we have to have a resolution adopted by two-thirds of the 113 states. It has to be a two-thirds vote. I think that will be easy. That will be straightforward.

So I don't think these are difficult obstacles. They aren't nearly as difficult as the obstacle we faced in 1998, when we adopted the Rome Statute, of getting to 60 ratifications. In 1998, people thought that was insurmountable. I remember friends at Amnesty International arguing that the 60 figure was an American plot to make sure that the Statute would never enter into force, because we'd never get to 60. Of course, we got to 60 in 3 years and 8 months, and now we're at almost double that amount. So I don't see much difficulty with getting to that point.

And then the third issue is that it's possible for states to make a declaration by which they reject the Court's jurisdiction over them with respect to the crime

of aggression. But I don't think that's going to be a commonly used provision at all. That's a political declaration that governments will have to make, and I think that the lawyers in the Foreign Ministries will go to their Ministers and say, "What do you think? How would you like to do this?" And the Minister will say, "You want me to make a declaration saying that we want to be sheltered from the jurisdiction of an international court over aggression? I don't think I want to do that politically. I'll be roasted in the newspapers. I'll be criticized by civil society and maybe I'll pay for it in an election." I could be wrong. We don't know what the future holds. But I don't think this is going to be very important at all.

So what we're likely, I think, to have within six years, four months, and maybe a few days of today, is a Court with jurisdiction over the crime of aggression, capable of prosecuting the crime if it's committed on the territory of, and by the citizens of, members of 113 states in the world, or close to that. And that's not bad. That's a pretty good accomplishment, very significant and a lot better, I think, than what most people expected that we would get in early June of this year.

There's also another little part of it that I think is interesting: the incentive it creates for states that aren't already members to join the Court because the amendment will protect them. It provides them with an added layer of protection against aggression.

It is a bit special talking here in the United States with the biggest army in the world, the strongest

military, and troops all over the world. But I live in Ireland. Our soldiers stay home. They don't go anywhere. We call them the "Defense Force." That's all they do, and all we're worried about. We're not terribly worried in Ireland, but if we had a worry, it would just be about being victims of aggression, not about being prosecuted for it.

So I think there's an added incentive now in the structure of these amendments that may encourage some states to join the Court precisely because it will add a layer of protection to them against the crime of aggression.

I think all of this is very important, very likely to succeed, and an important accomplishment, even if this crime is never prosecuted, because of what it says about law and the message that it puts out.

Now, we've been reminded since yesterday – even the evening before when we were at the Jackson Center – of these important statements by Robert Jackson and by the judges and Prosecutors of Nuremberg about the link between war and other crimes, and how war is the "supreme international crime." These were the words in the Nuremberg judgment. Judge Kaul, in his wonderful speech yesterday, used an intriguing metaphor where he talked about the other crimes as being the "excrement of the war." But the message was that the war is the center of it; war is the horror that's responsible for these other violations.

To the extent that the adoption of this amendment revives that vision of international atrocities, I think this is a very good development. I think it would have been, by the way, a very negative development in terms of that message if we had not adopted the amendment. That would have done harm to the idea that war is the “supreme international crime.”

There’s another aspect of this that I think is very positive: it refocuses international criminal law’s attention on the role of the state and the role of governments. This is a crime that applies only to governments and only to high officials, leaders in governments. There’s a debate that’s been going on about the role of the state and the role of governments with respect to international crimes – whether it’s an element of international crimes, whether it’s a central feature of them. Again, quite recently, Judge Kaul wrote a marvelous dissenting opinion – and the dissents of today are likely to be the majorities of tomorrow – about the nature of crimes against humanity with regard to the Kenya situation and how the state responsible for these crimes should be the focus of our attention. So, again, to the extent that the adoption of the amendment on aggression brings that back, I think that’s a very positive development as well.

We’ve said that our inability to prosecute aggression for the last 60 years has caused great harm to the world. I’m not sure that’s an accurate characterization of the situation. It’s true that we have had difficulty bringing aggression into the mainstream of international criminal prosecutions, something that was done at Nuremberg,

but that has, to a certain extent, been lost over the years as we focused on the other categories of crimes against humanity, war crimes, and genocide.

When the Yugoslavia Tribunal was set up, aggression was put to the side. It wasn't dealt with, and we dealt with the other categories of crimes. It's not well known, but earlier in the process of reviving international criminal justice at the beginning of the 1990s, there was a proposal to set up an *ad hoc* tribunal to deal with Saddam Hussein's invasion of Kuwait in 1990. That proposal called for prosecuting Saddam Hussein for the crime of aggression. It came from President Bush and Prime Minister Thatcher, and was later picked up within the European Union and the European communities. Although the proposal never went anywhere, it's actually an important step in the story of reviving international criminal justice that led to the establishment of the International Criminal Tribunal for the former Yugoslavia.

But our modern focus on these other crimes, which we might call the "human rights crimes" because they are about criminalizing human rights violations, stands kind of in distinction to aggression, which is a different kind of a crime in a sense. I want to understand why that's the case.

I think that part of the explanation is that in international law, we have dealt with the crime of aggression since 1945, not through international criminal law but through the law of the United Nations, of the Charter of the United Nations. We didn't deal with

human rights violations as well through the United Nations though. While the U.N. Charter prohibited the use of force to settle international disputes in Article 2, Paragraph 4, it left a big hole through Article 2, Paragraph 7, wherein it acknowledged the fact that states were entitled to do what they wanted within their own borders. And that's why the prosecution of the human rights crimes seemed so important to us, because that problem wasn't being addressed by international law in an adequate manner, whereas the crime of aggression or the act of aggression was being dealt with, I think, in a fairly effective way through the law of the United Nations over the years. It hasn't been as urgent to criminalize it for that reason.

Now, we have not had a world war since 1945. We saw the terrible pictures of Berlin yesterday at lunch and how that wonderful city was destroyed and devastated by the war. Maybe they deserved it. There were lots of other cities that were also destroyed in different parts of the world and in the victim countries as well by the war. That terrible destruction has never been revisited on the world in terms of a world war.

In a sense, we solved that problem, maybe not forever, but we've addressed it within the framework of the United Nations. And we've lived through one of the longest periods of peace in terms of international conflict. There have been a few conflicts – I don't deny it – but there's been no world war. There's been nothing comparable. Judge Kaul yesterday reminded us of 20 million Soviet citizens dead in the space of four years, and there's been nothing equivalent to that since 1945.

It's often said that the 20th century was the bloodiest century of all time, and I'm sure that's true, but it's actually the first half of the 20th century that was the bloodiest part.

Now people say, "Yes, but there have been terrible civil wars," and, of course, that's true. That's the bread and butter of our international criminal tribunals. It's probably a flaw still, in terms of making a holistic international criminal law system, that we don't yet have a mechanism to deal with the concept of aggression or of unlawful war when it's a civil war.

If we say – and I accept this – that war is the supreme evil, that war is the cause of this, then how do we deal with civil war within borders? Our amendments on aggression will deal with war when it takes place internationally but they won't enable us to address this other issue. I'm not sure how to do that. I don't have a concrete proposal, but I think that perhaps putting the crime of aggression at the center of the ICC agenda again gives us an opportunity to start to reflect further on how we might address this.

Being an academic, of course, I'm always intrigued going back and looking at old documents. I'm fascinated by this seminal period in history in terms of the development of this body of law, which was basically 1944 to 1948 or 1949. So much happened and so much developed in terms of our understanding. There was so much wisdom – the wisdom of Jackson and others who said that war is the supreme evil. That's a

message that has been somewhat blurred over the decades and to which we now return.

One of the earliest conferences we had within the framework of the International Criminal Court on the crime of aggression was organized by Judge Mauro Politi, now retired, and held at his old university in Italy. I was asked to prepare a paper studying the origins of the crime of aggression and the adoption of the crime against peace in the law of Nuremberg. I went through the documents of a body called the United Nations War Crimes Commission that met during 1944 and that paved the way for the London Conference – the conference at which Jackson played the central role and where the Charter of the Nuremberg Tribunal was adopted.

And when they first started to meet in 1944 to organize the prosecutions, they actually had no intention, from what I can determine, of prosecuting the crime of aggression or crimes against peace. The body was called the United Nations War Crimes Commission, and that's how it started in early 1944. Yet within a year, they were not just talking about war crimes but crimes against peace and crimes against humanity.

Crimes against humanity is another subject. It's another lecture. But crimes against peace, where did that come from? As I studied it and studied these papers, I began to think of it almost as an expedient that the negotiators had adopted. I was puzzled by this because they were searching for a kind of a paradigm, a theoretical construct by which they could encapsulate all of the criminality of the Nazi regime. They were given a

body of law, war crimes law, which applied to a submarine commander or a concentration camp guard. But for the individual crimes, they didn't really have a theoretical model to connect them to Hitler and to Goering and to Ribbentrop and the rest of them.

And so the theory emerged within these negotiations that it wasn't actually about war crimes, but it was about the crime against peace. It was the conspiracy to commit crimes against peace that was the glue that brought them together and enabled a trial of 23 or 24. Twenty-four were originally indicted; twenty-two saw it through until the end of the trial of the International Military Tribunal, but that was the vision.

I was a bit too cynical when I gave the lecture some years ago. We occasionally regret or readjust our thinking on something, and I'm inclined now to be more positive about it and to see this not as an expedient but rather an understanding that war was in fact the root of the evil.

It's also true – I should say in parentheses – that we do have examples of conflicts and of atrocities that take place in the absence of war. That does happen, and we've struggled very much with developing international law so as to cover that. But I think that when we add up all of the atrocities and we look at all the conflicts – Yugoslavia, Rwanda, Sierra Leone – war isn't far away. It's almost always there, if not entirely.

In my last couple of minutes, let me present a few ideas about why, historically, this focus on aggression has become blurred and why it was difficult to get to the result we got to on the June 12, 2010. I think one of the factors is that we have become a bit more militaristic than we should be in terms of thinking about solutions to human rights problems.

Steve Rapp yesterday emphasized the importance of the use of force to prevent atrocities. I don't exclude the possibility that there are very, very special occasions when force is perhaps useful and necessary to prevent human rights violations. But I would not exaggerate the importance of that because war inevitably brings with it all of the horror. Solving a human rights problem with the use of force is more likely to be a case of killing the patient to cure the illness, I think.

We have an example of it recently with the intervention in Iraq. Well, originally, as you know, it was justified on a pretext of the weapons of mass destruction story, which we now increasingly know was nothing more than a fraud of cooked intelligence data that was being prepared by political masters who had wanted to use force in Iraq, regardless of the cause. Then, when that pretext evaporated, the focus became on saving human rights. But, in terms of a cost benefit analysis, the benefits to Iraq of the last seven years of misery brought on by the presence of armed conflict, tanks, aircraft, soldiers, and everything else, versus the illness that was allegedly being corrected, doesn't actually add up. That should just remind us that the use of force to solve human rights problems – again, I won't

exclude the possibility, but as a general rule – does a lot more harm than good. We should be reminded that that’s what happens when we use force. It is the evil that we have to deal with.

So I think that some of that has infected our vision of this. We’ve spoken about the attitude of certain organizations at the Rome Conference to the amendment on aggression. Human Rights Watch, the great non-governmental organization, in its explanation of why it was not going to engage with the crime of aggression, specifically referred to what we call “humanitarian intervention.” Human rights activists do sometimes advocate the use of force in order to deal with violations of human rights, and so I think that’s a piece of the explanation of why we have the difficulty of getting to this point.

The second part of it, another piece of this puzzle, relates to what John Washburn and Bill Pace, representing non-governmental organizations, spoke of yesterday. I want to, by the way, pay tribute to both of them for the wonderful work they’ve done for many, many years in terms of building the International Criminal Court. I was waiting for someone to ask one of them the question yesterday, “Can you put aside the views of your coalition and just tell us what you think personally?” I always sensed that Bill Pace was probably closer to the side of wanting to address aggression properly in the International Criminal Court than the organizations that he represents, but I won’t put words in his mouth. I’ll let Bill speak for himself when he chooses the right time to do that.

But they said that their coalitions had many, many civil society organizations that did not see the importance of the crime of aggression because they dealt only with specific issues or because they had very broad agendas, organizations such as Human Rights Watch and Amnesty International. Michael Scharf then intervened with a wonderful question, but I think one that went unanswered. He referred to Judge Kaul's metaphor of human rights violations being the "excrement of war," and asked whether these organizations didn't understand that. As I said, I don't think it was properly addressed. Let me say it again. They should understand that. They should understand that if war is the supreme evil and you want to prevent human rights violations, whether it's a specific category – violence against women, against children – or whether it's a human rights organization with a broad vision in terms of the areas it addresses, to protect human rights and prevent abuses against vulnerable populations, you have to want to prevent war. That's central to it, and it has to find its place within the human rights discourse.

Amnesty International would be the NGO that's probably tried to articulate this in the clearest way, saying that they don't engage with the issue of aggression because they take their mandate from the Universal Declaration of Human Rights. They said that the Universal Declaration of Human Rights doesn't deal with this question of war but I beg to differ. Read the Universal Declaration of Human Rights. The word "peace" appears in the very first sentence of the Universal Declaration of Human Rights. It's implicit in other provisions.

Ben Ferencz reminded us in his speech about Article 3, The Right to Life. It doesn't refer specifically to war as a cause of violations of the right to life, but it doesn't exclude it either, and there are other provisions where this is implied.

There's the reference in the Preamble of the Universal Declaration of Human Rights, put in by Eleanor Roosevelt using the immortal words of her husband, "freedom from fear." The four freedoms are in the Preamble. They're referred to, and when you say "freedom from fear," aren't you speaking about this issue? Isn't that part of it?

And finally, there's Article 28, at the very end of the Universal Declaration, that talks about the human right to live in a world order where your human rights can be protected. It's that understanding that we need peace in order to protect human rights.

So I think it's a misunderstanding of human rights law, although one that I think is still rather widespread, about the importance of peace to human rights, and the failure to recognize the danger that war, whatever its cause, even war for so-called "noble causes" is threatening to human rights. The fact that this amendment maybe helps to reposition this debate and move this vision of human rights back to the center is welcome and helpful. It doesn't solve everything, but it's a positive contribution.

Let me conclude with a thought about why this amendment is good for the Court in terms of the health of the institution. The fact that we could adopt this amendment after all these difficulties, that we could have such clarity, that we could get to a good, useful, productive result, is a sign of a healthy institution. If we look at the International Criminal Court over the last seven or eight years, it has been a struggling institution, and so we're looking for signs of health. It's important. It's encouraging. It's significant to see them.

I recently went back and read some of the administrative documents of the Court, of the body called the Assembly of States Parties. I read boring things that nobody ever reads, like the budget of the Court. The budget is proposed by the organs of the Court, and then it's adopted by the Assembly of States Parties, which is made up of the countries that belong to the Court. I looked at the proposed budget in 2004. The Prosecutor submitted that he needed so much money because he was going to finish his first trial by August 2005 and be well advanced on his second trial by the end of 2005. Well, of course, that didn't happen.

Then in 2006, the Prosecutor issued a three-year plan – a work plan – and his goal there was to complete two trials within the next three years, that is, by 2009. Well, that wasn't accomplished either. The first trial, still unfinished, only began in 2009, and it probably won't be finished until sometime in 2011.

I'm not saying this to be critical. I'm just saying it to demonstrate how the Prosecutor's expectations have

not been fulfilled about the Court. The Prosecutor expected to be much further advanced in his work when he made these first proposals in 2004 than he is today, and there may be many explanations for this. I don't propose going into any of that, but simply to say that when expectations have not been fulfilled and when there's disappointment in many quarters about how an institution is performing, it's very, very important to have signs of health, and that's what Kampala has done for us.

Others have spoken about the stocktaking exercises that took place in the first week. That may have been positive and helpful, but I don't think that was the main act. I saw the brochure of the Coalition for the International Criminal Court, and its headline read, "Civil Society Welcomes . . ." – I forget the wording, but the focus was on the stocktaking. Civil society should welcome the amendment on aggression. That's the big piece. That's the big success story of Kampala, and it's the big victory. It shows that we have a Court that is still relevant, valid, and moving forward, and that's a very helpful, positive, constructive message for all of us. That we can accomplish this, despite all odds, is a tribute to some of the key negotiators. Some of you know them. I won't mention their names because they'll be unfamiliar to many of the people in this room. But above all, it's a tribute to the determination and the dedication of the man who is sitting right in front of me, looking me in the eye, Ben Ferencz.

Commentary

The Complex Crime of Aggression under the Rome Statute

David Scheffer*

The criminal character of aggression, long endured in world history but so rarely prosecuted in any court of law, no longer is assigned only to the legacy of the Nuremberg and Tokyo International Military Tribunals. Although present in the Rome Statute of the International Criminal Court (ICC) from that Treaty's inception in July 1998, the crime of aggression was stillborn. There could be no prosecution of aggression before the new Court until the crime was activated with a definition and a jurisdictional procedure by which investigations and cases could be initiated. Years of international negotiations led to the Kampala Review Conference from May 31 to June 11, 2010, where the primary set of amendments to the Rome Statute, adopted by consensus, activated the crime of aggression.¹ Prior to Kampala, aggression was a theoretical possibility awaiting an operational ignition by the States Parties to the Rome Statute. After Kampala, the crime of

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¹ ICC Assembly of States Parties Res. 6, 13th Plen. Mtg., June 11, 2010, RC/Res.6 (advance version June 28, 2010) (adopted by consensus); see also David Scheffer, *Aggression Is Now a Crime*, INT'L HERALD TRIB., July 1, 2010, at 8.

aggression is on a slow burn until 2017, when it will either fizzle or boldly light a pathway towards accountability.

In this essay I want to examine four discrete issues that will bear upon how the ICC ultimately addresses the crime of aggression. They are emblematic of the complexities that await the ICC, States Parties, the Security Council, and non-Party States as the crime of aggression takes hold under the Rome Statute.

I. The Magnitude Test for Aggression

The new Article 8 *bis* (Crime of Aggression) distinguishes between a “crime of aggression” in Article 8 *bis*(1) and an “act of aggression” in Article 8 *bis*(2). While there is a gravity, or magnitude, threshold of undefined character that must be factored into any determination of the crime of aggression, no such calculation is strictly required for identifying an act of aggression. The most generous reading of Article 8 *bis* is to regard the crime of aggression as the major transgression that must fall within a gravity context, and the act of aggression as simply identifying the component parts of the crime regardless of the gravity of any particular act of aggression. Under that reading, the gravity test must be met for the big event – the crime of aggression – but not for the smaller sub-events (acts of aggression) that constitute the actions under investigation.

Such an interpretation, however, ignores the reality of how matters are referred to the ICC as well as how one first determines the existence of aggression. Matters, or situations, referred to the ICC by States Parties or the U.N. Security Council are not classified as crimes *per se*. Alleged genocide, crimes against humanity, war crimes, and now aggression (together, atrocity crimes) are referred as situations that merit investigation for the presence of specific atrocity crimes and of individuals who can be charged with committing such crimes. Therefore, in the beginning, either of these two referring entities do not determine the criminality of any particular act, but reach a decision to refer an overall situation where atrocities appear to be committed and the ICC is being asked to investigate the atrocities for criminal conduct by individuals (not states).

Under Article 13(c), the Prosecutor may seek to initiate the investigation of an atrocity crime, but in practical terms this occurs in the context of a situation of atrocities that the Prosecutor seeks to investigate. The most recent initiation of an investigation, into the Kenyan electoral violence, approved by the Pre-Trial Chamber, strengthens that interpretation of the Article 13(c) authority.²

A more logical reading of Article 8 *bis* would have the Article 13 referring body (Security Council, State

² Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Int'l Crim. Ct., Pre-Trial Chamber II Mar. 31, 2010).

Party, or, in practical terms, the Prosecutor) refer a situation of alleged aggression to the ICC for investigation, first, as to whether the situation encompasses any of the acts of aggression defined in Article 8 *bis*(2) and then, if such a determination is positive, whether any such acts evidence the crime of aggression by an individual pursuant to Article 8 *bis*(1). If the Security Council refers an act of aggression, or better yet a situation of aggression, to the ICC pursuant to Article 13(b) and subject to the conditions of Article 15 *ter*, there is no magnitude test to be met. Whatever the Security Council refers automatically qualifies for consideration by the Prosecutor and judges, who need only determine whether the Council's referral satisfies Article 8 *bis*(2) as a particular form of aggression described thereunder and thus eligible for investigation and prosecution by the ICC.

If the Security Council's referral is so categorized by the ICC as an Article 8 *bis*(2) act of aggression, the next step would be discovering a crime of aggression relating thereto pursuant to Article 8 *bis*(1) and, of course, an individual suspect responsible for such criminal behaviour. Interestingly, is it possible to satisfy the gravity requirement for a crime of aggression as it would apply to one suspect under Article 8 *bis*(1) and yet afford no consideration to a gravity requirement under the larger situation of an act of aggression under Article 8 *bis*(2)? In my view, the answer, unfortunately, is "yes," because Article 8 *bis*(2) has no magnitude standard.

This dilemma presents an awkward framework for analysis, as one would logically seek a gravity standard for the mega-event of an act of aggression and then supplement that evaluation with an additional gravity requirement for the suspect's participation in the crime of aggression (falling within the larger framework of an act of aggression). That task probably will be easier if the Security Council refers a situation of aggression under Article 13(b), because it presumably would not trouble itself with such a referral unless it met a common-sense gravity standard as a threat to international peace and security.

However, if the referral arises under either Article 13(a) (State Party) or for all practical purposes under Article 13(c) (Prosecutor) and subject to Article 15 *bis*, the matter could become more precarious. The ICC could ignore magnitude issues in evaluating the referral of the situation of aggression and focus strictly on Article 8 *bis*(2) events that constitute acts of aggression. Having cleared that hurdle, the dilemma arises under Article 8 *bis*(1) of what constitutes a crime of aggression of sufficient gravity associated with an act of aggression. The referring State Party or the Prosecutor may not be as careful or even as prudent as the Security Council would be when the latter uses its Article 13(b) referral power. One might see a State Party or the Prosecutor refer a relatively minor cross-border incursion that technically satisfies Article 8 *bis*(2) for an act of aggression but leaves to a final judicial determination the more complicated issue of identifying a crime of aggression of sufficient gravity.

One can even imagine the ICC's time being wasted with a frivolous referral under Article 13(a) of a relatively *de minimis* act of aggression that satisfies a State Party's narrow political agenda against another state but with no rigorous forethought of whether a crime of aggression, one that would attract the ICC's jurisdiction over any particular individual, has been committed. In other words, a State Party could use the ICC essentially for state responsibility allegations without any objective of finding anyone criminally responsible. The manipulation of the ICC for such an aim, namely to shame or politically corner an opposing nation-state, may be possible if the initial State Party referral is of a situation of aggression that arguably constitutes an act of aggression under Article 8 *bis*(2) but may have no prospect of clearing the "character, gravity, and scale" requirements for a "manifest violation of the Charter of the United Nations" under Article 8 *bis*(1). And the referring State Party may be perfectly aware of that probability but still wish to achieve its aim of libelling another country with state responsibility for aggression.

Prosecutorial and judicial discretion will have to suffice as the guardians at the gate of the International Criminal Court for any such politically motivated referrals that are devoid of expectations that the requirements for a crime of aggression can be met. If the Prosecutor were to seek to manipulate the jurisdictional hurdles in similar manner, if only to make some political point against a government, the Pre-Trial Chamber judges presumably would deny the matter for investigation swiftly and with a sharp rebuke.

Surely in good faith, the U.S. delegation to the Kampala talks pushed through an “understanding” that seeks to inject a gravity standard into determinations of acts of aggression. Understanding No. 7 reads,

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity, and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

However, the wording of Understanding No. 7 is peculiar, as nowhere in Article 8 *bis*(2) is there any reference to a “manifest violation” or the need for a “manifest” determination. The “manifest violation” language resides exclusively in the definition of a crime of aggression under Article 8 *bis*(1), where there already exists the triple-hitter standard of “character, gravity, *and* scale” (emphasis added) for manifest violations of the Charter of the United Nations. Understanding No. 7 errs in that there is no comparable requirement under Article 8 *bis*(2) for there to be any determination of a “manifest violation of the Charter of the United Nations.”

Further, a strictly grammatical reading of Understanding No. 7 points to the need to establish only two of the three magnitude requirements in Article 8 *bis*(1) for a crime of aggression in order to achieve the supposed magnitude standard for an act of aggression.

("No one component can be significant enough to satisfy the manifest standard by itself.") In any event, I question whether judges will create any such magnitude standard for determining acts of aggression based on the erroneous formulation of Understanding No. 7 and the simple fact that the Rome Statute, as amended, requires no such determination for acts of aggression that doubtless will frame the initial assessment by the Security Council, States Parties, or the Prosecutor for any Article 13 referral to the ICC.

Finally, one should recognize that the distinction between an act of aggression and a crime of aggression arises in Article 15 *bis*, and not always in a logical manner. For example, Article 15 *bis*(4) describes a crime of aggression "arising from an act of aggression committed by a State Party," thus identifying the crime as a subset of the act of aggression. That would suggest the referral of acts of aggression from which the crime of aggression then is investigated, just as situations of other atrocity crimes lead, through Article 13 referrals, to investigations of crimes committed within those situations. A similar rationale applies to Article 15 *bis*(6), where the determination of an act of aggression precedes the investigation in respect of a crime of aggression.

Article 15 *bis*(7) speaks to a prior determination by the Security Council of an act of aggression before the Prosecutor may proceed with the investigation of a crime of aggression.

In contrast, Article 15 *bis*(8) permits the Prosecutor to investigate the crime of aggression if the Security Council does not render a determination about acts of aggression. The Prosecutor thus investigates criminal conduct before any determination about acts of aggression. The Pre-Trial Chamber need only first authorize the commencement of the Prosecutor's investigation of a crime of aggression. Whither acts of aggression when the Security Council is silent? The Pre-Trial Chamber should be required to determine that acts of aggression, ideally of some identifiable magnitude, have occurred before authorizing the Prosecutor to investigate possible crimes of aggression arising from such acts of aggression.

II. The Nature of Security Council Action on Aggression

The new Article 15 *bis* ("Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)") omits one significant action by the Security Council that could create a conundrum for States Parties, the Prosecutor, and the judges. Article 15 *bis*(6) requires the Prosecutor first to ascertain, when he or she thinks there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, "whether the Security Council has made a determination of an act of aggression committed by the State concerned." Article 15 *bis*(7) continues: "Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression." Article 15 *bis*(8) states that

“Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation.”

The question arises, what does “determination” mean with respect to the Security Council? The purpose of Article 15 *bis* in part is to provide a means to initiate an investigation if the Security Council remains silent on the issue. But the Security Council could make a determination, whether or not it refers to the ICC in the relevant resolution, that no act of aggression has occurred. This is entirely plausible if the Security Council wants to provide guidance to the ICC not to tread any further into the allegations of aggression, but to accomplish this short of a Chapter VII resolution that satisfies the requirements of Article 16 of the Rome Statute. Or the Security Council may wish to make such a determination for strictly political reasons within the context of managing a threat to international peace and security. If there were such a negative determination by the Security Council, can the ICC nonetheless proceed given the lack of a positive determination by the Security Council on an act of aggression? Nothing in Article 15 *bis* explicitly prohibits the ICC from forging ahead even if the Security Council renders a negative determination. As noted, the only backstop provided for in Article 15 *bis*(8) is if the Security Council renders a Chapter VII enforcement resolution consistent with Article 16 of the Rome Statute deferring the ICC’s investigation and prosecution of the specific matter for at least 12 months. The Security Council members could believe that, in fact, aggression is occurring between two states but still want the ICC to back down for at least 12 months in

order to give negotiators a (perhaps) better chance to stop the fighting.

Article 15 *bis*(7), as agreed to in Kampala, only makes sense if the meaning of “determination” as used therein means a positive determination on acts of aggression by the Security Council. I had hoped in Kampala that the negotiators would draft Article 15 *bis*(7) to reflect the reality that the Security Council may (i) make a positive determination on aggression, thus permitting the Prosecutor to proceed with the investigation in respect of a crime of aggression, or (ii) make a negative determination on aggression, thus prohibiting the Prosecutor from proceeding with the investigation in respect of a crime of aggression. The further prospect of a Security Council resolution under Chapter VII consistent with Article 16 of the Rome Statute, as provided in Article 15 *bis*(8), would arise where the Security Council remains silent on the issue for at least six months. Such silence was the touchstone of negotiators’ speculation for years in the working group discussions and during the negotiations leading to the Rome Statute. Of course, even if the Security Council renders a positive or negative determination on aggression, it still could exercise its Article 16 authority to defer the ICC’s investigation and prosecution for one year or more with additional extensions under Article 16. But the issue here is whether the initial negative determination on aggression by the Security Council should be sufficient to block ICC action.

In the absence of relevant language contemplating a negative determination on aggression, Article 15 *bis*

leaves a yawning gap in the scenarios confronting the ICC on aggression.

III. Temporal Jurisdiction for the Crime of Aggression

As I originally examined in an earlier publication,³ delegations in Kampala laboriously agreed to regard the amendments on aggression as entering into force in accordance with Article 121(5) of the Rome Statute rather than Article 121(4). This was a contentious debate, with Japan, for example, strongly advocating adherence to Article 121(4) for any amendment that was outside the scope of Articles 5, 6, 7, or 8, which pertain to the subject-matter jurisdiction of the ICC and are amended pursuant to Article 121(5). Any nod towards Article 121(4) greatly complicates entry into force procedures for the crime of aggression, because the jurisdictional filter for aggression would be grounded in new Articles 15 *bis* and 15 *ter*. If the jurisdictional filter requires a seven-eighths majority for ratification or acceptance by all States Parties, then it might take a very long time for jurisdiction over the crime of aggression to be fully activated.

The final agreement in Kampala, to which Japan acquiesced while warning that the “dubious legal

³ David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 ASIL INSIGHT (June 22, 2010), www.asil.org/insights100622.cfm. Portions of the discussion under section III are drawn from this essay.

foundation” of the amendments warranted future action by the Assembly of States Parties, allocated all the aggression amendments to the procedures of Article 121(5), which normally would have meant that they would come into force for a State Party one year following the ratification or acceptance of the amendments by that State Party. However, the amendments for new Articles 15 *bis* and 15 *ter* modify the Article 121(5) procedures with two critical and unusual conditions: (i) the ICC may exercise jurisdiction only over crimes of aggression committed one year after the ratification or acceptance of the amendments by 30 States Parties; and (ii) the ICC may exercise jurisdiction only following at least a two-thirds vote of the Assembly of States Parties after January 1, 2017, reconfirming the agreed procedures in the amendment to activate jurisdiction over the crime of aggression.

The first caveat essentially raises the bar for entry into force under Article 121(5) and lowers it under the abandoned Article 121(4) – an artful, albeit fragile, compromise. The second caveat requires the Assembly of States Parties to revisit the issue in 2017 and determine (by consensus or a two-thirds vote) whether to proceed with the agreed procedures. Such radical tinkering with amendment procedures arguably merits an Article 121(4) amendment of the Rome Statute’s amendment procedures – which is what Japan’s concerns revealed – but the alternative course described above ultimately prevailed.

As consensus was reached in Kampala, Japan promised to resurrect its concerns at future meetings of

the Assembly of States Parties. This may prove a disruptive feature of such meetings and it may encourage the ICC's judges in the future to look back at Japan's arguments and ponder the legality, under the Rome Statute, of what was forged in Kampala. States Parties and the ICC itself will need to come to grips with this issue long before 2017 and, ideally, resolve it to everyone's firm assent so that the judges, when challenged by defense counsel in live cases regarding the crime of aggression, at least can rely on a more transparent, reaffirmed, and united interpretation of the Kampala amendments among States Parties and leading scholars of the ICC.

IV. The Patchy Terrain of Aggression

The pragmatic reality of Kampala is that the geography of liability for the crime of aggression will be very patchy, at least for many years to come. At a minimum, Articles 15 *bis*(2) and 15 *ter*(2) inform us that 30 States Parties will have accepted the jurisdiction of the ICC over the crime of aggression before the crime can first be referred, investigated, and prosecuted.⁴ A number of States Parties may not ratify or accept the aggression amendments, in which case they and their nationals will not be subject to the jurisdiction of the ICC for the crime of aggression. Other States Parties

⁴ However, it is possible that one or more of such ratifying or accepting States Parties will file a declaration of non-acceptance of the crime of aggression over itself or its nationals, as permitted by Art. 121(5) and new Art. 15 *bis*(4) of the Rome Statute.

that ratify the aggression amendments may elect to file a declaration of non-acceptance of the crime within one year with the Registrar pursuant to Articles 121(5) and 15 *bis*(4), and thus not be exposed to the ICC's jurisdiction for the crime of aggression. Certain of the States Parties that choose this path may at some point in the future change their policies and withdraw such declarations on aggression and thus become subject to the ICC's jurisdiction.⁵ Finally, the Security Council can determine at any time to extend the ICC's jurisdiction for the crime of aggression over any non-Party State and its nationals and even any non-ratifying or non-accepting State Party and its nationals by adoption of a U.N. Charter Chapter VII resolution referring a specific situation of aggression, probably occurring within a limited period of time and perhaps concerning only a limited category of suspects, to the ICC for investigation and prosecution under Rome Statute Articles 13(b) and 15 *ter*(1) referral authority.

The Prosecutor will need to maintain a map of the world in the office with an updated set of colored pins stuck on countries' territories indicating the current coverage and non-coverage for the crime of aggression globally. There will be differently-colored pins on different categories of States Parties (those volunteering to be covered by the crime of aggression, those covered by a Security Council resolution, those ratifying the aggression amendments but declaring non-acceptance, those that never ratified or accepted the aggression amendments, and those that withdrew declarations of

⁵ Art. 15 *bis*(4).

non-acceptance) and non-Party States (those that are covered by a Security Council resolution or have filed a Rome Statute Article 12(3) declaration that invites investigation of atrocity crimes, including the crime of aggression, on its territory). The patchy coverage for the crime of aggression reflects the complexity of the issue, which bears directly on national political and military policies. But at least after Kampala the crime of aggression has taken hold within international criminal law, including its enforcement, and that is no mean feat. The result is a slap at the equality of states, or at least the theory of equality, but most major shifts in the international system begin that way.

No one claimed that aggression would be an easy crime for the International Criminal Court to investigate and prosecute, and the Kampala amendments demonstrated that truism in spades. But I suspect that, twenty years hence, the ICC will have adjudicated several cases of aggression and demonstrated that impunity for policies of aggression will not stand, at least in some parts of the world. Negotiators could have done far worse in Kampala.

Impunity Watch Essay: What I Can Do

Kelsie Flynn*

The study of human rights and genocide is an important area to every human being, no matter what career you have or background you come from. Ethics is a part of daily life. Whether the decisions are unconscious or well thought out, we are constantly making choices based on our own personal beliefs of what is right and wrong. It is sad to say that in some areas of the world, violence and terror seem to be the way these decisions are handled. Our world leaders have been battling these groups for years in the on-going pursuit of world peace. As the struggle continues, it is time for my generation to come forward and start preparing to resist forces that violate human rights anywhere and everywhere in the world. It is important to listen, firsthand, to accounts of genocide and the mistreatment of humans. It is even more important to apply what you hear and learn in order to make the world a better place.

One of the most unfortunate things about our world is that not enough people understand it. The “big picture” is not always clear to those with a little less insight as to what goes on around the globe. There are too many individuals who focus on getting through daily life and only concentrate on their own pressing

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problems. There is more to life than the routines of one soul.

Hopefully some people at Kenmore East High School will get further involved in future studies and will feel inspired, as I have, by the study of human rights and genocide. I have explored human rights and genocide in my studies at school. As a member of the Model U.N., my partner and I had to study virtually all aspects of world culture. We went into deep discussions with our adviser and frequently talked about the genocides in Rwanda and Darfur. Winning the competition, held at the University of Buffalo, only further encouraged me to learn and understand everything I could about the situations of countries in need. I left with the mindset that I really could make a difference.

As I go to college and discover the adult that I would like to become, human rights will surely play a part in my development. I would love nothing more than to be able to join the United Nations and take part in an organization that focuses on bettering the treatment of human beings around the globe. That future may be a while down the road for me, however certain steps can be taken now that can only help me when I cross that bridge. Learning about the tragedies is imperative to form the building blocks of change. However, one can only get so far from second-hand research.

Hopefully every person makes an impact on several people throughout their lifetime. It is remarkable to think that I could touch millions of people one day. One

person can do that simply by setting a precedent. With my life, I would like to increase my understanding of human rights and genocide in order to start a movement for change. Change the way people view the world and their own lives. Our global society may depend on it.

Prosecutor Sessions

Update from the Current Prosecutors

This roundtable was convened at 11:00 a.m., Monday, August 30, 2010, by its moderator, Professor John Q. Barrett of St. John's University School of Law, who introduced the panelists: Serge Brammertz of the International Criminal Tribunal for the former Yugoslavia (ICTY); Bongani Majola of the International Criminal Tribunal for Rwanda (ICTR); James Johnson of the Special Court for Sierra Leone (SCSL); Andrew Cayley of the Extraordinary Chambers in the Courts of Cambodia (ECCC); and Fatou Bensouda of the International Criminal Court (ICC). An edited transcript of their remarks follows.

JOHN Q. BARRETT: Good morning, friends. Thank you, Ben Ferencz. And thank you, all of you who are gathered here as part of the ongoing work that was the life of Whitney Harris, that was the life of Robert Jackson, that was the life of Henry King, that was and is the life of the international law founders in the modern generation and back to Nuremberg, and that is represented by the five Prosecutors who are on this panel. They walk in Justice Jackson's footsteps, perhaps more directly than they realize.

In October 1946, after Jackson had finished his year away from the Supreme Court at Nuremberg, he returned at the very last minute before the new Court term to resume judicial work in the United States. He subsequently had an opportunity to speak reflectively about Nuremberg to a very large audience here at Chautauqua Institution, where on July 4, 1947, he gave

something of a status report. At that moment Jackson was post-Nuremberg, but Nuremberg was ongoing – Ben Ferencz, Bill Caming, and their chief, Telford Taylor, were all still conducting trials there before U.S. tribunals.

Jackson in 1947, giving a status report here at Chautauqua, was in a sense a predecessor to our Prosecutors giving status reports today. Many of the Prosecutors are returning to Chautauqua. A few are first-time participants in these International Humanitarian Law Dialogs.

I know that we all understand, but it deserves explicit mention, what incredible workloads are parts of their current responsibilities and what complicated, lengthy travels bring the Prosecutors here. This is an extremely generous part of their public service – each feels a responsibility for teaching, and that brings them to us today. Their biographies, in each case extensive and extremely accomplished, are in your conference materials.

We will hear from each of the Prosecutors for about ten minutes. We will proceed in the order in which the four *ad hoc* limited-jurisdiction tribunals were created. Then the fifth speaker will be the representative of the permanent institution, the International Criminal Court, which has perhaps more on its plate (although I'm not sure the others agree with that notion) and thus earns a little more reporting time here. So the sequence will be Serge Brammertz, the Chief Prosecutor for the International Criminal Tribunal for the former

Yugoslavia; followed by Bongani Majola, representing the International Criminal Tribunal for Rwanda; James Johnson, representing the Special Court for Sierra Leone; Andrew Cayley, representing the Extraordinary Chambers in the Courts of Cambodia; and Fatou Bensouda, the Deputy Prosecutor of the International Criminal Court.

SERGE BRAMMERTZ: Good morning, everybody. Thank you very much, organizers, for giving me the opportunity to be here, for the second time, in Chautauqua.

As you know, we are representing tribunals which are each unique in terms of mandate, but are very similar in terms of challenges. We all have to fight for our organizations' budgets. We are all fighting for justice. So coming together here, in this wonderful environment, allows us to exchange views, to increase solidarity among Prosecutors, and to almost have therapy sessions on how we work together. In this context, it was really a privilege to listen to you, Ben, and to your very inspiring speech. So, if ever I have doubts about what we are doing, about whether it's the right thing or not, I will think about your speech here, which serves as an example for all of us. Thank you very much, again, for your speech.

In ten minutes I will try to summarize where we are with the Tribunal for the former Yugoslavia. For those of you who are not too familiar with this Tribunal, it was established in response to the conflicts in Yugoslavia in the 1990s. The Tribunal was set up in 1993, so it has

been in existence for over 15 years, and we are now in its final phase. I will say a few words on where we are with the ongoing trials, where we are with the remaining fugitives – because there are still two people at large – and how are we organizing our work with the regional Prosecution Offices, which, although difficult to imagine 15 years ago, are a reality today. I am referring to the War Crimes Offices in Serbia, in Croatia, and in Bosnia.

So where are we with our trials? Of those 161 cases initiated, there are still nine ongoing cases with 18 accused. Our current timeline requires that we finish all trials by 2013. Out of the nine trials, three will be completed this year, three next year, and three probably afterwards.

We had an extremely important decision that came out of the ICTY in June. It was the *Popovic et al.* decision. Seven important representatives from the military and police were convicted for the perpetration of the massacre in Srebrenica. I am sure you have heard about the massacre in Srebrenica 15 years ago exactly, where, among many other crimes, 8,000 Muslim boys and men were executed by Serbs. This was an especially important decision because, while all seven were convicted, two were specifically convicted for genocide and one for aiding and abetting genocide. This is important because in the former Yugoslavia, especially in the Republika Srpska, people are still saying that genocide was not committed. So there are still people who doubt, who have revisionist theories. It is very important, therefore, to have a decision coming out of

our Tribunal saying very clearly that genocide has been committed.

Among the cases that are ongoing, you have certainly heard about the *Karadzic* case. The trial of Radovan Karadzic – who was arrested two years ago after having been on the run for 30 years – is currently ongoing, despite some initial difficulties. It's going okay, but it's relatively slow. We initially planned for it to be a trial of two years, with the Prosecution's case followed by the Defense case, and then the writing of the judgment. Now it looks like it probably will be closer to two and a half or three years because, the accused, representing himself, is using a lot of time for cross-examination. So we will probably have some delays in this regard.

Our main priority, in addition to making sure that those trials are going on, is the search for fugitives. My colleague from the ICTR will certainly also speak about the problems related to fugitives because the ICTR is dealing with a larger number of them. But we still have two fugitives at large, Mladic and Hadzic.¹ The name of General Mladic must be known to you. If Karadzic was the architect, the political mastermind of the genocide in Srebrenica, General Mladic was the chief commander implementing the military orders. He's been on the run for many years.

¹ General Mladic was subsequently arrested on May 26, 2011, in Serbia, and was surrendered to the ICTY on May 31, 2011. Hadzic was arrested in Serbia on July 20, 2011, and was surrendered to the ICTY on July 22, 2011.

You perhaps heard that a few months ago, his diaries, or his notebooks, were found during a search operation. This is very interesting evidence that has been brought to the Tribunal. We received 3,500 pages of personal notes by Mladic, covering important parts of the war period, and more than 100 taped phone conversations and meetings between him and other officials or representatives of the international community. All this is very interesting new evidence that we have received this year.

We are working with the Serbian, Bosnian, and Croatian authorities in relation to the fugitives, with the most important role being played by the Serbian authorities. We strongly believe that Mladic is in Serbia or in the border regions of countries surrounding Serbia. As has been said here, the most important factor for success is the international community's application of political pressure in the region. Ben mentioned very, very, very strongly this morning that it's great to have an international legal framework, it's great to have tribunals, but somebody has to implement international arrest warrants. I am sure that this will be one of the issues Fatou addresses. It is necessary that the international community puts pressure and creates incentives for countries in the former Yugoslavia to arrest the remaining fugitives.

Today, in Serbia, for example, 65 percent of the population is still against the arrest and transfer of General Mladic because they consider him to be more of a hero than a war criminal. I think this is a big challenge for all of us – international justice representatives, the

international community, NGOs, and those politically responsible – to explain to the citizens there that these are not heroes, they are responsible for the suffering of their own people, and they are responsible, therefore, for the fact that Serbia, Croatia, and other countries are not yet members of the European Union.

I'm regularly in Brussels, New York, Washington, and in other capitals, to really ask countries to support the tribunals. There can be a tendency to think that all this is 15 years old, let's move on, let's take those countries into the international community. But we are saying that there can be no compromise in the fight against impunity; there can be no alternative to the arrest of the fugitives.

That's also one of the reasons why the Security Council has decided to create a residual mechanism. As I have said, our Tribunal, as well as others, will close its doors in two or three years time. We hope, of course, that by then the remaining fugitives will have been arrested. We remind the international political community every day, every week, that it's their responsibility, their credibility at stake, because if they cannot arrest those fugitives, I think it's really a failure from the political side.

But, if the fugitives are not arrested before the closure of the Tribunal, there must be a solution. The solution is a residual mechanism. It's a mechanism that will deal with some remaining issues coming from the region – requests for assistance, early release, etc., – but we will also have a kind of dormant tribunal component

that could be activated once one of the fugitives is arrested. We believe that the Security Council is giving quite a strong signal by creating this residual mechanism, giving the message very clearly that whenever and wherever the fugitives are arrested, there will be an international mechanism to deal with their trials.

The third element, and then I will end my short introduction, is in relation to cooperation with the region. We all know that international justice is not always very easily understood. We are quite far away from the crime scenes and international justice functions in different languages. So it's very, very important to make sure that important parts of this justice are dealt with at the local level. Five years ago, the countries of the former Yugoslavia – Croatia, Bosnia, and Serbia – created war crimes chambers or specialized War Crimes Prosecution Offices. The ICTY has transferred important investigative material to those Offices in order for them to prosecute war criminals, but there are thousands of potential cases that are waiting, especially in Bosnia. We always appeal to the international community to improve capacity in the region and to provide international support, because at the end of the day, the success of the Tribunal for the former Yugoslavia will also depend on how national jurisdictions deal with the cases remaining after its closure. Only if there is a continued fight against impunity in the domestic jurisdictions can we say that the objectives have been achieved.

In order to facilitate this development, we have strong working relations with those War Crimes Prosecution Offices. We have given them remote electronic access to our open databases. Furthermore, since last year, we have integrated liaison prosecutors from those two countries into our Office, and we are extremely pleased with this development. We strongly believe that investing in this new generation of lawyers – we currently have 15 of them in our Office, three as liaison prosecutors and ten as legal interns working on our teams – provides added value from our side.

As I said, in a nutshell, we are trying to deal with our remaining cases, knowing that our resources are diminishing. We are losing 30 percent of our budget over the next two years. We are putting a lot of effort into finding the fugitives by really reminding the international community of its moral obligation to arrest them. But we strongly believe that, at the end of the day, success will depend on what local prosecutors are doing. We, at the International Tribunal, are very much involved in this form of positive complementarity.

JOHN Q. BARRETT: Our second Prosecutor is Bongani Majola, representing the International Criminal Tribunal for Rwanda.

BONGANI MAJOLA: Thank you, Chairperson. My name is Bongani Majola. I'm the Deputy Prosecutor at the ICTR, and I am attending this gathering for the very first time. I am pleased and privileged to give you a brief update on the progress at the ICTR.

The ICTR was established as a response to the genocide that took place in 1994 in Rwanda, where more than half a million people were killed. There were many rapes. There were many killings of very young children. And when Ben was speaking, I was thinking that history does repeat itself, because when you go to churches like Nyamata, outside Kigali, and Ntarama, you'll find the skulls of the small of babies that were killed there.

But since this is an update, I'm just going to deal with a few issues. One is the progress that was made since the last Dialogs. We have disposed of six trials since then. Five of those ended up with convictions and one with an acquittal. It is significant, I think, that two of those cases were of soldiers, military people. Muvunyi, whose case was a retrial, was convicted, and then there was also the trial of Ephrem Setako, also from the military. There were two business people who were convicted. One was the manager of a para-state tea factory, a case in which we negotiated a guilty plea with one of the stars of the documentary we saw yesterday, and the other one was a proper businessman who was just recently found guilty and sentenced.

We have had three successful defenses of appeals, and we lost one appeal on grounds that we thought we shouldn't have. In the *Muvunyi* retrial, which I've spoken about, the Appeals Chamber had, I think, rightly ordered a retrial. In the *Zigiranyirazo* case, we had hoped that the Appeals Chamber would order a retrial as well but the Appeals Chamber found fault with the way in which the Trial Chamber had handled the case and acquitted the defendant. I thought this was a little bit

insensitive to the plight of the victims in the case, but that's water under the bridge.

We are going on with trials. In 2009, we had hoped that we would finish all of our trials by September. That did not happen for a number of reasons, and as a result, we began 2010 with eight ongoing trials, including the case of *Karemera et al.* That trial is still going on, and is now expected to be completed in May 2011. The case originally included three accused persons, but, unfortunately, one of them died on June 30, 2010, so it's continuing with two accused persons.

In addition, in August and in October of last year, we arrested two fugitives who must now be tried at the ICTR, which increases the trial workload that we have to deal with before we close the Tribunal. We recently arrested another fugitive in Uganda, a low-level perpetrator named Uwinkindi, and we are preparing papers to file an application for the referral of his case for trial in Rwanda. We hope that if we're successful, we won't have to try this case. We had similar hopes for the *Ndahimana* case, but because of the difficulties in getting a referral to Rwanda, it was decided that we should try the case in the ICTR, and it is starting now in September. The case of the third arrestee, Nizeyimana, has been earmarked in our completion strategy for trial at the ICTR, and his case is going to start at the beginning of November.

The progress in holding and completing the trials has been slow, and it is slowed down by a number of factors. For example, in *Karemera*, one of the accused,

Ngirumpatse, was sick for a long time, which meant that the case couldn't go on. There had been a decision by the Trial Chamber to sever the case of Ngirumpatse from that of the other two, but that decision was reversed on appeal. This meant that the case would go on with all three accused persons, but then the Trial Chamber had to wait until Ngirumpatse was better, and it's now continuing. Because of the state of his health, he can only attend trial for a certain number of hours, and then he has to take a rest, so we are unable to use the entire day.

Fair trial issues have also been raised, for example, in the *Ngirabatware* case. Ngirabatware is the son-in-law of Félicien Kabuga, the Rwandan businessman accused of bankrolling the genocide. At a certain stage Ngirabatware fired his lead counsel, and the counsel that took over requested additional time. Although the Trial Chamber told him that there had already been a lot of time to prepare the case, he appealed, and the Appeals Chamber felt that more time must be given.

We have also had scheduling problems. The *Gatete* case was supposed to be finished on the third of this month but wasn't because some of the judges in that case are also involved in other cases, and they are not able to sit in two cases at the same time. As a result, the *Gatete* case has been postponed.

Then we had, in *Kanyarukiga*, the death of the lead counsel, which meant that the case couldn't start at the time that it was scheduled to start. It started later. There were other technical issues raised during the trial, issues

of disclosure, that necessitated further postponements, and that case was delayed in concluding.

Finally, because of the often-discussed completion strategy and the Tribunal's pending closure, we are losing experienced staff, staff with institutional memory, and as a result, we find that some of the essential duties are not done in a timely manner. This has been the case, in particular, with the Chambers and the writing of judgments. We were expecting judgments in a number of cases in which there are multiple accused to be delivered towards the end of the year, but we have been informed that, because of staffing shortages in the judgment-drafting department, some of those cases will have to wait until the first half of next year. We are, however, hopeful that we will be able to complete our trials before the end of the first half of 2011.

We have had jurisprudential and other challenges presenting our trials. We note a tendency among the Trial Chamber to convict an accused person for genocide and then sentence him or her – well, him usually – to 20 years, 25 years, 15 years, and so on. As a result, we have a number of appeals that are lined up for decision by the Appeals Chamber, because initially genocide had attracted life imprisonment, and we think that the some of the Trial Chambers are departing from that when they shouldn't. Even in the most recent decision, which was handed down earlier this month, the defendant was sentenced to 25 years imprisonment in spite of the fact that he was found guilty of genocide.

We also have a problem with the corroboration of evidence provided by accomplices. Judges are quite cautious in dealing with evidence coming from accomplices who are either in detention, have served their sentences, or are currently serving their sentences. Where there is no corroboration of such evidence, we have found that even though the evidence is itself quite strong and credible, the judges are on the cautious side.

Finally, it's been so many years since the genocide took place that the quality of evidence that the witnesses are able to provide is deteriorating. It is difficult for them to remember the minute details of what happened in that very tense situation. If you read, for example, the decision that was rendered at the beginning of this month, you will see that the judges acquitted the accused on some of the charges because of minute details, such as one witness saying, yes, this was done, but it was done by so-and-so, and the others saying it was done by someone else. The judges quickly concluded that there was an inconsistency. I think the lesson that we can learn from this is that prosecutions should be done as soon as possible after the commission of the offenses because otherwise guilty people can escape punishment because of the length of time that has passed.

We are still pursuing fugitives. We've been a little bit lucky in the sense that we have been getting more and more fugitives, and we're hoping that we're going to get some more, from where, I will not say. But we are busy; we are following certain important leads. We have three priority fugitives that we are looking for: Kabuga and Mpiranya, who was the Commander of the Presidential

Guard, and Bizimana, the former Minister of Defense. In addition to that, we have a few cases of fugitives that we would like to refer to Rwanda and other national jurisdictions for trial.

You may recall that we filed five applications to refer cases to Rwanda in 2007, and all five were unsuccessful because the Trial Chambers found that the accused would not receive a fair trial in Rwanda. This decision was based on many factors, including that the accused would be subjected to solitary confinement if convicted, that the witnesses for the Defense would be afraid to go to Rwanda to testify; and that it would be unfair if all the Prosecution witnesses appeared in person and the Defense witnesses appeared by video link or other remote methods.

We have been in discussions with the Rwandan government; we have advised them, and they have come a long way in trying to solve those problems. For example, they have now passed legislation removing solitary confinement from cases referred from the ICTR. They have also established the witness protection mechanism in the Office of the Registrar under the Supreme Court and many other things. But I think that the issue of the Defense witnesses being afraid to come to Rwanda persists, and the noises that have been made during the election campaigns, we think, do not make our case easy. We were supposed to file an application for referral in the first half of the year, but because of the elections, we didn't want our obligation to get caught up in electioneering so we decided that we're going to file now. So there is a team presently preparing, as I speak,

an application for the referral of one or two cases to Rwanda.

We have some work that remains to be done. As I said, we have about five ongoing cases that we need to complete. We have two cases that are to start. One is starting in September and the other one in November. The estimate is that we're going to finish those cases in about June of next year. They may spill over a little bit. We're going to finish the other cases that are ongoing much earlier.

We also have to file applications under Rule 11 *bis* for the referral of the eight or so cases to national jurisdictions, mainly to Rwanda. We also got the judges to pass a rule that allows for evidence to be heard before the Court and preserved, even before the accused is arrested. This will help with the preservation of evidence in the case of the fugitives, especially if the Tribunal closes before they are arrested but they are then prosecuted at a later date. So we must hold those proceedings for the preservation of evidence before a single judge for all three of the cases that I mentioned, which are prioritized for prosecution at the ICTR.

Further than that, we have a number of appeals, of course, with which we still have to deal. There is an appeal from the *Bagosora et al.* case, in which one accused was acquitted and three were convicted, which is still proceeding but very slowly because of translation reasons. We are expecting the decision in the *Butare* case either in December or in February next year. The *Butare* trial involves six accused persons so there's

going to be quite a number of appeals springing out of that case.

The *Ntabakuze* case is one case that I referred to earlier, the judgment of which had to be put on hold because of staffing problems. I have no idea when we are going to get a decision in that case, but we again anticipate that there will be a number of appeals springing out of that case when a decision is reached.

We are also dealing with the issue of closure and the archiving and legacy issues, as Prosecutor Brammertz mentioned. The archiving of the Office of the Prosecutor's holdings is unique in the sense that it has to remain open and active as a result of the application of the rules of the Tribunal. For that reason, we are arguing very strongly that the archives of the ICTR should be kept in Africa, in Arusha if possible, but if not possible, maybe in a neighboring country like Kenya. That is still being considered by the appropriate working committees of the Security Council.

JOHN Q. BARRETT: I hope that many of you were able yesterday to view the documentary *War Don Don* about the work of the Special Court for Sierra Leone. For those who weren't, I think we all recommend it, and it will be available on HBO, I believe, in September. On behalf of that prosecution effort, our next speaker is James Johnson.

JAMES JOHNSON: Thank you very much. I want to say just how much it means to me, and I appreciate

being able to be here today to represent the Prosecutor, Ms. Brenda Hollis, and the Deputy Prosecutor, Mr. Joseph Kamara.

Brenda Hollis is really with her first love right now; she is preparing to cross-examine the next Defence witness in the Taylor trial, and so it's very, very hard to get Brenda out of the courtroom, but I know she would love to be here with you but for that.

Joseph Kamara, our Deputy Prosecutor, is right now continuing what I believe to be one of the most important legacies of the Office of the Prosecutor (OTP) for the Special Court for Sierra Leone. Joseph has been nominated by the President of Sierra Leone to take over the Anti-Corruption Commission in Sierra Leone. This is yet another example of a Prosecutor going back into the government, back into the community of Sierra Leone, and taking with them what they have learned, certainly a very important legacy of the OTP. Joseph is preparing for his appearance before Parliament right now, and we assume that he will be easily approved and take over as Chairman of the Anti-Corruption Commission in Sierra Leone shortly.

Where are we in the Special Court for Sierra Leone? We are really focusing on two things, and we hope it happens in this order: completion of the Taylor trial and closure and transition to the residual court. The reason I say that we hope it happens in this order is because funding continues to be a problem for the Special Court for Sierra Leone. Sierra Leone, unlike most of the other tribunals here, is funded by voluntary contributions. As

it stands right now, our current funds will run out in October. So funding continues to be an issue for the Special Court for Sierra Leone. The former Prosecutors and the Registrar spent probably more than half of their time on fundraising just to keep this Court functioning and to give it the ability to continue its very important work.

So where are we with that work? The three trials in Freetown, as everyone here probably knows, have been completed. Appeals are done. All eight of those convicted at those three trials are serving sentences of between 15 to 52 years. On October 31, 2009, almost a year ago, they were transferred from Sierra Leone to serve out their sentences in Rwanda. Moving them out of Sierra Leone has worked out very well for us in taking away security issues that may be associated with their continued presence in Sierra Leone.

Just a quick footnote on that: if Charles Taylor is convicted, he will serve his sentence in the United Kingdom. Part of the condition of moving his trial to The Netherlands in 2006 was that a state would step forward and agree to allow Charles Taylor to serve his imprisonment there in the event that he was convicted.

With the three Freetown trials completed, we have one remaining trial that's going on in The Hague – that of Charles Taylor. The Prosecution case on that trial entailed some 13 months of testimony. During those 13 months, the Prosecution called 94 witnesses live in the trial, plus three additional witnesses that we were able to call earlier this month when the Prosecution was allowed

to reopen its case. We presented the evidence of six other witnesses by putting in statements or expert reports, bringing the total number of Prosecution witnesses to 100.

The Prosecution closed its case in February 2009. The Defence case started in July 2009, and the first witness to take the stand was Charles Taylor. Charles Taylor was on the stand, subject to direct and cross-examination well into the new year. The 20th Defence witness is currently testifying.

The witness who just finished his testimony last week was Issa Sesay. He was one of those convicted in the RUF trial, and he traveled to The Hague from prison in Rwanda to give evidence on behalf of Charles Taylor. His testimony lasted about six weeks. It started in July and just finished last Friday. So they are now on the testimony of the 20th Defence witness.

Indications from the Defence were that they would complete the presentation of their evidence in August, or at the latest in September. A few weeks ago, the judges revisited that with the Defence in a status conference, and they have given the Defence until the November 12, 2010, to complete their presentation of evidence. The Defence has indicated that after the evidence of Issa Sesay, they would have a handful, or maybe up to seven, additional witnesses that must now complete their testimony by the 12th of November.

We are still working on a completion plan for the *Taylor* case. We will hopefully have final trial briefs and oral arguments before the end of the year, but we're probably looking early into the new year, when final trial briefs will be due and closing arguments will be heard. We are hoping to have a judgment in the *Charles Taylor* case by June of next year, with a sentence, if applicable, in August of next year. We hope to see the appeals process completed by February 2012, and transition to the residual court at that time. That's the timetable that we're working off of at this time.

Of course, the Special Court for Sierra Leone, we very much think, will be the first major non-permanent court to close, and we will be dealing with these residual issues – well, we're dealing with them right now. I shouldn't say "soon." We are dealing with those residual issues right now. We're set up a little differently than the other *ad hoc* tribunals. The Special Court for Sierra Leone was set up by an agreement between the United Nations and the Government of Sierra Leone, as opposed to being set up by the Security Council. So, to get to a residual court, the same process has to be followed. The agreement has been signed between the Government of Sierra Leone and the United Nations, and an implementing statute is in place to set up the residual court for the Special Court for Sierra Leone.

I will just hit on a few of the high points of that agreement. Our original archives will be moving out of Sierra Leone to The Hague, with, of course, copies of the public archives remaining in Sierra Leone for access by the public. Also, eventually, the public should be able to

see public versions of the archives available on the Internet.

The residual court will be located in The Hague, where you will have the Registrar and a very, very small staff. A small staff will be maintained in Freetown, principally to deal with witness and victim issues. We are also concerned about the enforcement of sentences and those kinds of issues. However, our principal concern as we go into a residual court is the ongoing protection of witnesses, victims, and confidential sources, those people who may be harmed, who may be in a position to suffer for the support and the evidence that they gave before the Court.

We constantly have reports of witnesses who have testified before the Court being harassed or intimidated, or at least having it made known that they testified before the Court. These are concerns that will not go away when the Court, in its current configuration, goes away. So for that reason, it is very important that an office be maintained in Freetown that is in a position to deal with the protection of witnesses, victims, and possibly confidential sources, or others that have provided support. This isn't just a Prosecution issue. This is also a Defence issue. There's no question about that, because in some instances, Defence witnesses are prone to harassment as well by those who might want to harm or to intimidate them.

So these issues are very, very much ongoing. There has certainly been talk, and it may not be new to many of you, that eventually there may be a joint platform for the

different tribunals, but for right now, the Special Court is going it alone. We're getting there, we have to be prepared, and we will hopefully transition to that residual court in February 2012.

We are also pleased with the additional news coverage around reopening our case. I think it came about because of the celebrity aspect of it, but it did put us back into the public eye. And if you looked at the coverage, and you moved past the analysis of who testified, or whether Naomi Campbell, Mia Farrow, and Carol White testified differently, all of the news coverage did come back to the conflict in the end. They brought the conflict back into the public eye and brought the focus back to the horrible things that happened in Sierra Leone during this period. I think that was very much a good thing to see, to get back to what was going on, and for all of our tribunals to get back into the public eye. In that sense, we were very pleased to see the publicity that came out of it.

JOHN Q. BARRETT: Thank you, James. The fourth Prosecutor, representing the Extraordinary Chambers in the Courts of Cambodia, a body charged with investigating and prosecuting the oldest conduct among the institutions represented here, is Andrew Cayley.

ANDREW CAYLEY: Thank you. Thank you very much indeed. Good morning, everybody. Thank you very much to the Jackson Center for inviting me. It's certainly very interesting and rewarding to be able to

spend time with colleagues and, indeed, with a public audience discussing the work that we're doing.

I would actually like to pay public tribute to my predecessor, Robert Petit, who is also here today. I have the benefit of the very solid foundations that he laid of the Office which I now lead with my Cambodian counterparts. So I thank you, Robert, for all of your work.

I want to talk with you very briefly about four areas this morning. First of all, for the sake of the younger people – following the example of Ben Ferencz – I will provide a snapshot of the events that the Court is addressing. Secondly, I'll talk very briefly about the type of court that it is because actually the Court in Cambodia is unique amongst all of these courts for certain reasons. Thirdly, I will discuss the prosecutions that we are dealing with at the moment. And lastly, I want to talk about the legacy issues that my colleagues already mentioned, capacity building of the legal profession and the judiciary in Cambodia, which is actually part of our mission.

Quite a while before many of the younger people in this room were born, in April of 1975, a Communist movement known as the Khmer Rouge seized power in what is now modern-day Cambodia. The leader of that movement is somebody that you will have heard of, Pol Pot. He died in 1998 and will, in fact, never stand trial for the crimes with which certain of his colleagues within the government are now charged.

The Communist movement in Cambodia was inspired by the idea of creating a utopia, a new society, but actually what they created for their own people was a living nightmare in which up to two million people perished in the space of three and a half years. The Khmer Rouge commenced its regime by evacuating all of the people from the cities to the countryside to work on farming cooperatives where, over the space of three years, people were starved and worked to death.

Like most extremist regimes, eventually it began to devour itself. Its members saw traitors everywhere. They blamed the failure of their Communist system on people within the system who were trying to destroy the revolution. They created security camps, the most notorious one being S-21 in Phnom Penh, where they tortured and murdered people. They essentially exterminated all of the educated people within the country: doctors, lawyers, businessmen, members of the previous government. By the time the regime had finished, it had basically eliminated the entire middle class of the country; anybody with an education essentially vanished within this period of time. They exterminated, to the level of genocide, the Vietnamese minority that was living in the country and also the Muslim minority known as the Cham.

It took the best part of 20 years for the Court to actually be created, mainly because of the reasons that Ben Ferencz was discussing, because of the ongoing Cold War. In the early part of this decade, discussions between the United Nations and the Cambodian government led to an international treaty that created the

Court. But the Court is unique in that it's actually the product of domestic legislation. So it's not an international court, it's actually a court within the Cambodian legal system created by domestic legislation within the Parliament of Cambodia, and it's staffed by both nationals and internationals. So I have a counterpart with whom I work, Chea Leang, who is a Cambodian prosecutor. In fact, she's also the Prosecutor in the Supreme Court of Cambodia, but she's my counterpart, we work together. Every position within the Court that's occupied by an international has a mirror image with a national; we have to work together and we have to try to achieve consensus in moving the Court forward, which is often not without problems.

It's also a court that is exclusively based on civil law as opposed to common law. All of the other courts – apart from the International Criminal Court, which is based on a mixture of both common law and civil law – are based on the Anglo-Saxon common law system, the system that you are used to in the United States and I am used to in the United Kingdom. But the Khmer Rouge Tribunal, the Extraordinary Chambers in the Courts of Cambodia, is a civil law court. This means that the Prosecution, unlike in the other international courts, does not conduct the investigations; this is done by an investigating magistrate, as in France.

My job, as the Prosecutor, and the job of my predecessor, was to simply make an introductory submission to the investigating judges, setting the parameters of an investigation. The investigating judges then investigate, and you will see in a moment that

they've been investigating the next case on the docket for nearly two years.

The first case that the Court addressed was last year. We got the verdict for that case on July 26, 2010. That was the trial of a man, known as Comrade Duch, who was the Commander of the camp that I've already mentioned, S-21, the main murder and torture chamber of the Khmer Rouge regime in Phnom Penh, where upwards of 12,000 people perished in the space of about two and a half years. Duch was charged with, and ultimately convicted of, war crimes and crimes against humanity. He was sentenced to 35 years imprisonment, which was subsequently reduced to 19 years because he had already served some time in pre-trial detention, and also because he was given credit for almost ten years in which he had been illegally detained by the present government in Cambodia. So ultimately, he ended up with a sentence of 19 years. The population in Cambodia was not happy with that length of imprisonment. He is 67 years old. Frankly, if he serves 19 years, the likelihood is that he will die in prison, but we have appealed that sentence, arguing that the Court did not sufficiently take into account the gravity of the crimes that he committed. We've made various other technical appeals in respect of the finding, in terms of the offenses, which I won't go into here.

The next trial, the second case, which I've just mentioned, the investigation in that case has come to an end. We, the Prosecution, have just filed what is known as our final submission, which is essentially our summary of the case. It's about 1,000 pages – in fact,

it's 931 pages with almost 6,000 footnotes. Bear in mind that this is just a snapshot of what happened. We cannot possibly deal with all of the crimes that happened across the country. Essentially, the judicial investigation is limited to an investigation of the most serious events, and, indeed, that's common for all of these courts represented here today. It's simply impossible to do otherwise; you would have trials lasting 20 years if you were to deal with all of the events.

The next trial, which, as I say, we hope will begin in April of next year, involves the four most senior living members of the Khmer Rouge regime. Nuon Chea, who was the deputy to Pol Pot, the Deputy Secretary of the Communist Party; Khieu Samphan, who was the President of what was then Cambodia, known as Democratic Kampuchea; Leng Sary, who was the Foreign Minister; and his wife, Leng Thirith, who was the Minister of Social Affairs. In our final submission, we recommended charging them with the genocide of the Vietnamese and Cham people and with crimes against humanity, war crimes, and – uniquely amongst these courts – with national crimes, because Cambodian law also applies. So we are recommending charging them with murder and torture under Cambodian law.

We anticipate that the trial will last hopefully not more than two years, but we are dealing with four elderly people, each of whom are in varying levels of ill health. I wish they had the spirit and the health of Mr. Ferencz here, but they don't, so I think we're going to have serious problems in terms of how long they can actually sit during any day for a trial. So, as I say, that

will begin in April of next year. We anticipate that it will go on for a period of about two years.

There is also a third and a fourth case. I can't name the individuals whom we have recommended to the investigating judges for investigation, but I can say that it involves five individuals. The investigating judges actually commenced investigation several months ago. I think that the investigation will increase in intensity when the investigating judges are finished their work on the second case that I've just mentioned. We anticipate that that case should be investigated within about a year to 18 months. The trial of that case has to be part of the completion strategy of the Court but there won't be any other cases after that of those five individuals. At the moment, we're trying to find a way of finishing the work in the Court and then transition from a national court with international elements to an exclusively national court, essentially giving the Court back to the Cambodian people.

A significant part of our work – although the Court wasn't established for this purpose – is to try and build capacity within the Cambodian judiciary and the Cambodian legal profession. The Khmer Rouge essentially eliminated the judiciary and the legal profession because they regarded educated people – lawyers, doctors – as a threat to their own regime. It wasn't until the late 1980s, early 1990s, that the Cambodians could actually start rebuilding their legal system. If you can imagine a legal system with no institutional memory, where people have really only been practicing law again, and the judges have only

really served, for the last 20 years . . . it's hard to even imagine. They find themselves in an extremely difficult position. So part of our role is supporting them and developing their confidence and skills as judges, as prosecutors, as defense lawyers, so that when we leave, hopefully part of the trace that we leave behind is a better legal system in Cambodia. That's a very important part of our mission and one that I'm actually trying to develop.

We have the same problems as the Special Court for Sierra Leone. We're a court that's funded by voluntary contributions. States agree on budgets and then don't want to pay. We're very grateful for the help of Ambassador Rapp, who's been working very hard together with the Special Expert appointed by the United Nations, Clint Williamson, former U.S. Ambassador for War Crimes, to help with fundraising. His job, essentially, is to work with the government and with the donors to raise funds for the Court.

It was said earlier that all of us are walking in the footsteps of Robert Jackson, and I very much recognize that, but being the only Brit here, I also have to recognize Sir Hartley Shawcross, who was the Chief British Prosecutor at Nuremberg. I was saying earlier to Robert Petit how so much of the work that we do is interconnected. I was reading about Shawcross earlier today and suddenly realized that his son, William Shawcross, actually has a connection with Cambodia. William Shawcross is a fairly famous journalist in the United Kingdom who, during the Khmer Rouge period, wrote for *The Sunday Times* and was actually, I think,

their Chief Correspondent in Asia. He, in fact, wrote the book, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia*. I was surprised by this connection – Shawcross being the Chief British Prosecutor at Nuremberg, his son being a journalist who wrote about Cambodia.

I will say one last thing, and especially to the youngsters here. When I arrived in Cambodia, the first place that I was taken was to the S-21 security camp in Phnom Penh. It's now a museum. It's known as the Genocide Museum. It was actually a school, it was a place where young people like you were taught, and during the Khmer Rouge regime it was converted into a torture and murder camp. If you get the chance to go to Southeast Asia, go to Phnom Penh and visit it. When you walk into this place, you will see how well organized the Khmer Rouge was because the walls are lined with photographs of the individuals and families who entered that place and, in fact, never left it. They're all standing there with blocks of wood in front of them with their names written in Khmer and a number. It was a very well-organized place, so people were essentially recorded going in, and as they were exterminated, their names were crossed off the list, the list of those going in. And actually, when you look at those photographs, especially those of the families, what often strikes you more than anything is the look of absolute fear on the parents' faces, and often with the younger children, the total absence of any realization of what was to happen to them.

When you read the accounts of the survivors from that place – and there are a few survivors who gave evidence in the first trial, and indeed, they'll give evidence in the second trial – they will often tell of people who suffered so much in that place that they actually committed suicide rather than go on living and being tortured. So much like the camps in Germany that are now museums and places of remembrance, so this place in Phnom Penh in Cambodia is a place where all of us should go to remember what happened during these years and what happened to the Cambodian people.

My sense about Cambodians as a nation – and I think Robert would probably share this – is that they are a completely traumatized nation of people. There isn't one person that you meet within that society who has not, in some way, been affected by what happened in those years; even people who were not yet born during that period will tell stories of how one side of their parents' family completely vanished during this period, while another side of the family survived. So in my view, and I think probably in the view of many in the international community, it is extremely important that this period be put to rest so that Cambodia can move on with a better future and concentrate on its economy and policy issues. But there is enormous interest among the population within Cambodia. We have a huge auditorium in the Court, which was full every single day with members of the population who came to watch the first trial.

JOHN Q. BARRETT: Thank you, Andrew.

Our final speaker, unlike the first four, represents a permanent institution. The International Criminal Court is indeed the world's criminal court. This summer, the 113th state became a signatory. The ICC is no longer a newborn, though it is still young. It is something that belongs to all of humanity and it is represented by the Deputy Prosecutor, Fatou Bensouda.

FATOU BENSOUDA: Thank you. Good afternoon. I'm always happy to be here. I think out of the four Dialogs now, I've been to three, so that speaks for itself. I want to thank the Jackson Center for the invitation and all of the organizers of this annual event. David, Greg, Carol, thank you very much. It's really an opportunity for colleagues to come together and discuss issues of international criminal justice, and in particular, prosecutions of these serious crimes.

I'm glad that John is giving me a little bit more time than my colleagues had to update you on the work of the International Criminal Court, but I'll try to keep it short. We have opened investigations in the situations of the Democratic Republic of Congo, Uganda, the Central African Republic, Darfur/Sudan, and the Republic of Kenya.² Moreover, we are involved in preliminary examinations in six situations on four continents: Colombia, Georgia, Côte d'Ivoire, Palestine,

² On March 3, 2011, the Office of the Prosecutor additionally opened investigations into the situation of Libya. A request for authorization to open an investigation into the situation of Côte d'Ivoire is pending.

Afghanistan, and Guinea.³ It is during these preliminary examinations that the Office of the Prosecutor makes an assessment as to whether there is a reasonable basis to proceed with an investigation into a situation on the basis of precise legal criteria defined in the Rome Statute. These criteria are: first, jurisdiction; second, admissibility – including an assessment as to whether there are genuine proceedings being undertaken in the situations where these crimes are being committed; and third, whether the opening of investigations in these situations will not go against the interest of justice. These factors apply irrespective of the manner in which the jurisdiction of the Court has been triggered; it could be a State Party referral, it could be a United Nations Security Council referral, but this does not bind the Prosecutor into opening investigations in a situation.

By applying the Rome Statute criteria, the Office has opened investigations, as I said, in the Democratic Republic of Congo. In fact, this was the first situation that was referred to the ICC Prosecutor. Initially we focused our investigation on the Ituri district of the Democratic Republic of Congo, as a result of which we brought cases against Thomas Lubanga Dyilo, who was a militia leader in the Ituri district, as well as against Germain Katanga, Mathieu Ngudjolo Chui, and Bosco Ntaganda. The trial of Mr. Lubanga was the first trial of the International Criminal Court, which started in January 2009.

³ In addition, the Office of the Prosecutor is currently involved in preliminary examinations in Nigeria, Honduras, and the Republic of Korea.

Mr. Lubanga was arrested in the Democratic Republic of Congo, transferred to the Court, and charged with enlisting and conscripting children, and using them to actively participate in hostilities. The forced enlistment and the use of children in armed conflict is, I believe, one of the gravest crimes within the jurisdiction of the Court, and we definitely cannot fail to recognize the manifold consequences and enduring impact that this has on the lives of children. In fact, we were actually the first international court to bring charges against an individual based solely on the enlistment of children, and we intentionally did so to show the gravity of this case, of this offense.

We presented evidence at trial to show that Mr. Lubanga is responsible for systematically recruiting these children – children below the age of 15 years – for arming them and for making them commit crimes, as well as being killed themselves. They are taught to rape, they are taught to pillage, they are taught to steal.

During the trial, we addressed the particular issue of sexual violence in the context of child recruitment. We tried to show how, in the camps, the child soldiers were exposed to sexual violence that was perpetrated by Lubanga's men in unspeakable ways. We also tried to show how young boys had been instructed to rape and young girls had been raped and used as wives by commanders, girls as young as 12 years old used as wives and as sex slaves. They were also used as cooks, as fighters and cleaners, as spies, and as scouts. Unfortunately, these girls are left in the margins of demobilization because they are not strictly looked at as

soldiers or ex-child combatants. They therefore suffer a second time.

Prosecution concluded the presentation of our evidence in the case against Lubanga on July 14, 2009. By then, we had tendered about 119 items of evidence and we had called 30 witnesses. Twenty-eight of these witnesses were called by the Prosecution and two of them by the Chamber itself.

Just this past spring, the Chamber ordered the Prosecution to disclose the identity of an intermediary, Intermediary 143. The order was initially for the disclosure to be made after the necessary protective measures had been implemented. However, on July 7, 2010, after hearing that the implementation of these protective measures may be delayed, the Chamber reversed its decision and directed the Prosecution to disclose the identity of the intermediary, even though the disclosure was subject to limitations as to its use. We asked the Chamber to reconsider its decision and then we also asked for a variance of the order to disclose the identity of this individual.

The Chamber considered this to be in defiance of its order, and on July 8, 2010, ordered a stay of the proceedings. As we speak, the proceedings are stayed. The trial is not going on. We applied to the Chamber for leave to appeal and this was granted on July 15, 2010. On that same day, the Chamber also ordered Lubanga's release. We appealed the order releasing Lubanga to the Appeals Chamber for suspensive effect, which was granted. We also appealed the stay of proceedings,

which is pending before the Appeals Chamber. Currently, both the Prosecution and the Court's Victims and Witnesses Unit are working diligently to resolve this situation, which I am glad to say has now been resolved, and we believe that there is no more reason for prolonging the interruption of the trial.

Our second case in the situation of the Democratic Republic of Congo is, as I mentioned, the case of Germain Katanga and Mathieu Ngudjolo Chui. This trial began in November 2009. The two men allegedly conspired to attack a village called Bogoro and to wipe it out. They have been charged with the crimes of murder, cruel treatment, use of children in hostilities, sexual enslavement, and pillaging, which their forces carried out under their command. The two accused were surrendered to the Court by the Democratic Republic of Congo and the case is ongoing.

Bosco Ntaganda is still at large. He was charged together with Thomas Lubanga, but he has not been arrested. There is information suggesting he is actually working with the government of the Democratic Republic of Congo. We have been talking to the Democratic Republic of Congo. In fact, recently I paid a visit to that country to see what can be done on this issue. I think it is an affront that Mr. Ntaganda should still be working as a free man when he is charged with these crimes. We hope that he will be arrested and surrendered to the Court soon.

The Central African Republic is another situation under investigation. Jean-Pierre Bemba, former Vice-

President of the Democratic Republic of Congo, was arrested and surrendered to the Court for crimes against humanity allegedly committed in the Central African Republic between 2002 and 2003.

The then-president of the Central African Republic, President Patassé, invited Jean-Pierre Bemba and his Movement for the Liberation of Congo (MLC) troops to assist him in the Central African Republic when he faced a coup d'état from General Bozizé. Bemba invaded the Central African Republic, together with his MLC troops, allegedly leaving a trail of murders, killings, rapes, and all these heinous crimes, in an attempt to save the presidency of Patassé. Bemba is charged for these crimes. He was surrendered very quickly with the cooperation of Belgium.

The trial was supposed to start in July, but has actually not yet started because of some Defense applications. In fact, this morning we had a status conference to determine the commencement date of trial, and I have just been informed that the date has still not been set. There is supposed to be another status conference on September 15, 2010, to determine the date of trial. But in any event, I think that the trial will start before the end of this year.

Then there is our investigation in the situation of Darfur, Sudan, referred to the ICC by the United Nations Security Council under Resolution 1593. Following the Office's investigation, judges have issued arrest warrants in our first Darfur case against Ahmad Harun and Ali Kushayb, and in our second Darfur case against the

President of Sudan, President al-Bashir. These arrest warrants have not been executed to date. In our third Darfur case, summonses to appear have been issued against three rebel commanders allegedly responsible for crimes committed against African Union peacekeepers in Haskanita in 2007: Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus. All three of them voluntarily surrendered to the Court in response to the summons. The confirmation proceedings of Abu Garda have taken place, but unfortunately the Court did not confirm the charges against Abu Garda. We are considering submitting additional evidence to the Chambers. The other two commanders have responded to the summons too and their confirmation proceedings are scheduled to take place in November.

The Office of the Prosecutor is also investigating the situation in Uganda upon referral of the country itself. Five arrest warrants were issued against the top leaders of the Lord's Resistance Army, namely, Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. Two of these people are now deceased.

Under Joseph Kony's leadership, the Lord's Resistance Army has allegedly committed killings and abductions that continue as we speak. Since early 2008, the Lord's Resistance Army is reported to have killed about 1,500 people, abducted more than 2,250 children, and displaced over 300,000 people, not only in the Democratic Republic of Congo, but now also in the Central African Republic, in the Republic of Sudan, and

in Uganda. So, of course, there have been increased efforts to implement the arrest warrants.

In this light, maybe I should just mention the efforts that are being made by the U.S. President Obama has now signed into law the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act, which requires a presidential strategy to eliminate and mitigate the threat that is posed by the Lord's Resistance Army. Recently, the Central African Republic has also pledged that it would arrest Joseph Kony by working closely with Ugandan forces, as well as with the United States.

Kenya is the last situation that I will just briefly mention. The investigation of the Office relates to the post-electoral violence that took place there in 2007/2008. The former U.N. Secretary-General, Kofi Annan, in his capacity as the Chair of the African Union Panel of Eminent African Personalities, stressed from the beginning the need to ensure justice in Kenya. I am encouraged by what Kofi Annan has said and the promises that we have received from the Kenyan authorities to cooperate with us. The Office of the Prosecutor made a preliminary examination of the post-electoral violence, and on March 31, 2010, the Pre-Trial Chamber authorized the Office of the Prosecutor to open investigations, which are currently ongoing. We are hoping to be able to present our evidence to the judges before the end of this year and to come up with a request for arrest warrants or summonses to appear in that situation.

So this is what the ICC and the Office of the Prosecutor is currently doing, and I thank you for your patience.

JOHN Q. BARRETT: Each of these Prosecutors has given a comprehensive tour of the last year and the matters on each very full institutional plate. I also note that although the media isn't doing, on a global level, the work that it should do to educate and make this kind of information available widely on a regular basis, each Court and each Prosecutor's Office has an extraordinary website. A quick Internet search will guide you to them and there you will find press releases, summaries, and monthly reports, plus e-mail lists that you can join. I congratulate the audience on your interest in this valuable work. I thank all of the Prosecutors for what they do.

Dialog on the Crime of Aggression

This roundtable was convened at 2:30 p.m., Monday, August 30, 2010, by its moderator, Professor Michael Scharf of Case Western Reserve University School of Law, who introduced the panelists: H.W. William Caming of the U.S. Military Tribunals at Nuremberg; Ben Ferencz of the U.S. Military Tribunals at Nuremberg; William Pace of the International Coalition for the International Criminal Court; and John Washburn of the American Non-Governmental Organizations Coalition for the International Criminal Court.

MICHAEL SCHARF: Well, this is a real treat. We're going to have an exciting additional speaker today. We have, joining us, Bill Caming, whom you may have been introduced to last night, but if you don't know him, he was one of the original Nuremberg Prosecutors. He tried the Control Council Law No. 10 *Ministries* case, which dealt with the crime of aggression. So when we're talking about the crime of aggression, we're going to be able to get his insights straight from the horse's mouth instead of through the screen of written history.

In addition, on our panel, we have Ben Ferencz. If you were here this morning, I did a long introduction, but to recap, he was the Chief Prosecutor of the *Einsatzgruppen* trial, and a lifelong advocate of the International Criminal Court and of adding jurisdiction over the crime of aggression to the ICC.

We also have Bill Pace. You heard Ben this morning talk about a 16th century astronomer. Most people know Bill very well because he is the Convener of the NGO Coalition for an ICC, which, I think, has over 3,000 affiliated NGOs, but what you don't know is that he was a college professor of astronomy, so somehow this all is coming together today.

And then we have John Washburn, who is the Convener of the U.S. Coalition for the International Criminal Court.

In this panel, we are going to have a dialog on the crime of aggression. The format will be "crossfire," where I will ask a series of questions of the panelists, including follow-up questions, and attempt to provoke a good debate. It's a lively format that should work quite well with this topic.

I'm going to start with two points before I turn to the first question. The first point is this. As you can see, we don't have on this panel a representative from any of the major powers, which would be the United States, the United Kingdom, Russia, or China, who have certain concerns about the crime of aggression. Lest this be seen as completely one-sided, I do want to tell you a story that will at least help you to understand why a country such as the United States might not be the fastest advocate out of the box for the crime of aggression.

The story takes place in 1999. It is at the tail end of a lot of atrocities that were going on in the former

Yugoslavia, and suddenly there were reports of atrocities surfacing in the area of Kosovo; namely that the Serbs were burning, looting, killing, raping, and altogether committing a series of attacks against the Kosovar Albanians as a way to ethnically cleanse that area. Over 500,000 Kosovar Albanians reportedly had fled to the mountains. Winter was approaching, and the United States was very concerned that genocide would be raising its ugly head once again in the former Yugoslavia if something wasn't done quickly to reverse the situation.

The United States and the United Kingdom went to the Security Council. They asked for authorization to conduct a humanitarian intervention to save the Kosovar Albanians' lives, but Russia, which was historically allied with Serbia and China, didn't like the whole idea of humanitarian intervention, and blocked it with the threat of a veto.

So the United States and its NATO allies got together and started an unauthorized bombing campaign. It lasted 78 days. Around Day 71 or so, there were two files that wound up in the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.

Serge, [speaking to Serge Brammertz, Prosecutor of the ICTY, sitting in the front row], you, I'm sure, have heard this story from your colleagues, and if Dave Scheffer were here, he could tell it because he was personally involved.

One file came from the law professors at Osgoode Hall. They said that the Prosecutor, who had been a former professor from their law school, should indict the heads of NATO and their civilian leaders for all sorts of things. If they could have, they would have thrown in the crime of aggression, but they listed things like dropping bombs from too high, not discriminating against civilians, using depleted uranium weapons and cluster bombs, and so forth. There was a serious concern among NATO countries that the Prosecutor would follow through with that, and in fact, the Prosecutor's Office opened up a preliminary investigation.

About the same time, David Scheffer sends Mike Newton up to meet with Louise Arbor, and he gave her a box filled with all sorts of intelligence information that the Yugoslavia Tribunal had been wanting for years. The United States said, "Look, now you've got the goods. Go after Milosevic." And on that day, four things could have happened. The Yugoslavia Tribunal could have done nothing, it could have indicted the NATO countries, it could have indicted Milosevic, or it could have indicted both.

Now, under most of those scenarios, this would have been a huge setback for U.S. foreign policy. Experts opined that it could have been the end of NATO itself, but fortunately for NATO and for the United States, Louise Arbor ended up indicting Milosevic. Milosevic recognized that the jig was up. He agreed to a negotiated peace, under which Kosovo was put under U.N. administration. The bombing campaign ended, and we ultimately had a transition from power.

How different the world would have been if the indictment had been against NATO. That's the big countries' chilling concern when they think about the ICC. They're not afraid that the ICC is going to get their hands on their leaders, any more than indicted Sudanese President al-Bashir seems to be. What they're afraid of is an indictment that can ruin their foreign policy at a really tricky moment in history, and that is not a concern that anybody should take lightly. Now, having articulated that, I have to tell you that I still support an ICC with jurisdiction over the crime of aggression. I think it serves an important symbolic function in reaffirming the prohibition of aggressive war, that the concerns about politicized prosecutions are overblown, and that the safeguards agreed to in Kampala minimize the risks.

Now, the second story I want to tell is what happened at Kampala from my point of view. It's a tale of three speeches. U.S. Ambassador for War Crimes Issues, Stephen Rapp, was the first of the three Americans to take the floor at Kampala, and his speech was in the vein of President Kennedy's famous *Ich bin ein Berliner* speech. Basically, Stephen said, "Everybody, you know me. You know I've been a Prosecutor at an international tribunal. You know that I live for international justice, and that I think that the International Criminal Court is a great institution. And so, when I tell you that the crime of aggression is bad for the Court, please trust me and take me seriously." You'll be hearing much more from Stephen tonight when he gives his full speech at eight o'clock, and

hopefully, he'll tell us what's going on behind closed doors in the United States as its position evolves.

The second speech was by State Department Legal Adviser Harold Koh, about a week later, and I call this speech "100 Questions and Concerns, No Answers." Basically, Harold listed a large number of concerns that the United States had with the concept of prosecuting aggression and the formulations that were then under consideration. It's the kind of speech that the State Department often gives when it's trying to kill the momentum for some kind of an international initiative that it opposes. But the momentum continued to build, notwithstanding Harold's speech. A lot of that had to do with Ben Ferencz, the NGO Coalition, and like-minded countries.

And then a few days later, you had the final American speech by Col. Bill Lietzau, who was a very well respected military member of the U.S. delegation. It's similar to the concept that only Nixon could go to China; only Bill Lietzau, a high ranking member of the military, could have given this speech. The speech was sort of thoughts about compromise, and I think it calmed a big concern of all the delegations: that the United States would be so upset with the crime of aggression being added to the Statute that it would grab its marbles, go home, and say all sorts of negative things about the International Criminal Court. Bill signaled that might not actually be the case. If the compromise was very nuanced, if certain concerns could be addressed, this could allow everyone to leave Kampala with some measure of satisfaction.

So, having given that kind of introduction to give you the flavor, now I'm going to turn the first question to Bill Pace to ask him to explain the compromise that was worked out in Kampala.

BILL PACE: Well, thank you very much.

Basically, the Rome Statute creates an independent international criminal court; that is, it's a stand-alone Treaty body and a new international organization that the governments that ratified the Rome Statute pay for. They are the governing body. It's one of the most amazing treaties that has ever been drafted in international law in terms of the independence of the Prosecutor, independence of the judges, the advances in gender crimes, and I could go on for a long time.

It does not hold states responsible for crimes. It holds individuals responsible for crimes, and the governments picked initially the three crimes that almost all the governments have ratified in international humanitarian law: war crimes, crimes against humanity, and genocide. These derive from the Genocide Convention, the Geneva Conventions, and, in terms of crimes against humanity, customary international law. And again, it holds the individual responsible.

So, when the governments in Rome listed the crime of aggression, it would be following the same track. It wouldn't be holding a state responsible, but it would be holding an individual responsible. But unlike the other

crimes, the crime of aggression has to be committed by a state. It's a state acting.

In Kampala, it was agreed that, for the purpose of this Statute, the crime of aggression meant the planning, preparation, initiation, or execution by a person in a position to effectively exercise control over, or to direct, the political or military action of a state, of an act of aggression which by its character, gravity, and scale constitutes a manifest violation of the Charter. The second paragraph describes the act of aggression, which again, means the use of armed force by a state against the sovereignty, character, integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. The agreement then specifically describes the armed forces of a state invading or attacking the territory of another state, a military occupation, however temporary, bombardment by armed forces of a state against the territory of another state, the blockade of ports or coasts of a state by armed forces of another state, an attack by the armed forces of a state on the land, sea, or air, etc.

MICHAEL SCHARF: Can I interrupt you for just a second? When you were reading the definition, I happened to hear that you used the words “a manifest violation,” and I remembered that Ben mentioned this morning that there had been a huge debate for a long period of time about whether to use the word “manifest” or “egregious.” I think that the first of all the compromises coming out of Kampala was the insertion of the word “manifest.” Can you explain why that was put in there and what it's intended to do?

BILL PACE: I think that the governments wanted some qualification of the term “violation of the U.N. Charter;” they wanted to have a term like “manifest.” So this would mean that the action has to be a violation of a Security Council decision or resolution, or inconsistent with the Charter, but not in a neutral way – in an egregious way, if you wish.

MICHAEL SCHARF: So just like not all war crimes are covered by the ICC statute—

BILL PACE: That’s right.

MICHAEL SCHARF: —just those part of a policy and plan. Not all acts of aggression, but just those that are particularly egregious, or something that meets this manifest definition. This was so that a case like I described, the bombing in 1999 of the former Yugoslavia for humanitarian reasons, might not be covered.

BILL PACE: So, in this compromise, the definition and the language of individual responsibility has been agreed to by a consensus agreement of the States Parties in Kampala. No country objected, and all of the Permanent Five Security Council members were in the room, plus India, Pakistan, and Egypt, which is one of the most significant things to note about this.

The second aspect of the definition, then, was how the Court would exercise jurisdiction. Essentially, the compromise that was agreed to was that if a country

referred a matter, or if there was a belief that aggression had occurred, the Prosecutor would write to the Security Council and ask the Security Council if it had determined whether an act of aggression had occurred. If the Security Council said yes, then the Court would have jurisdiction. The Security Council could also refer what it determines to be an act of aggression to the Court on its own volition, without the Prosecutor or anyone asking.

MICHAEL SCHARF: And this jurisdiction would be over both Parties to the Statute and also non-Parties, right?

BILL PACE: The Chapter VII power applies to members of the United Nations. So any state that is a member of the United Nations has to submit to the authority of Chapter VII.

If the Council didn't act within six months, then the Prosecutor could go to the Pre-Trial Division of the ICC and make the case that an act of aggression had occurred and that she or he has evidence of the crime of aggression. The Pre-Trial Division could then make a decision on whether the Prosecutor had the evidence or didn't have the evidence. And as you've heard in testimony in the previous panel, sometimes the judges have said the Prosecutor had the evidence, and sometimes they said the Prosecutor didn't have the evidence. So it is an independent Court that has been demonstrating this.

MICHAEL SCHARF: And, Bill, if we consider this then two tracks, the Security Council referral track and the independent Court track, which countries does the independent Court track apply to?

BILL PACE: Well, I need to qualify one more time. Even if the Pre-Trial Division approves the Prosecutor to go forward, the Security Council would still have another bite at the apple in terms of adopting a resolution under Article 16 that says to the Court, “No, don’t go forward with this at all.” So there are a number of checks and balances over the Court to exercise the jurisdiction.

In addition, the Treaty that was agreed to in Rome will treat this fourth crime very differently than it will treat war crimes, crimes against humanity, and genocide. In those three crimes, once a government ratifies the Treaty, they accept the jurisdiction of the Court for those crimes when their nationals commit it or when the crime is committed on their territories.

On the crime of aggression, it is quite a mess, if you wish, of both principles. First, a State Party can file a declaration saying that it does not want to accept the amendment on aggression, and its nationals and its territory would not be subject to the jurisdiction of the Court.

MICHAEL SCHARF: So countries can opt out?

BILL PACE: Countries can opt out, but it is an “opt-out-plus” because not only are they able to opt out, but if their nationals commit aggression on another country’s territory that is a State Party and they’ve opted out, the Court would not have jurisdiction even in a situation like that.

Then, secondly, non-State Parties, which are barely mentioned in the Rome Statute, are given tremendous attention in this amendment. Nationals and territories from a country that is not a State Party to the Rome Statute are exempt from the jurisdiction of the Court, except in the case of a Security Council referral.

MICHAEL SCHARF: So, for example, if the United States were to be accused of committing crimes against humanity in the territory of a State Party like Afghanistan, its officers can be prosecuted, even though the United States is a non-State Party, but if the accusation is for the crime of aggression, they cannot? The crime of aggression doesn’t apply at all to non-State Parties, no matter where their crimes are committed?

BILL PACE: That’s correct.

MICHAEL SCHARF: Okay.

BILL PACE: The governments also agreed that they would not proceed with this jurisdiction until after January 1, 2017. At that point, the governing body, the Assembly of States Parties, would have to basically have a two-thirds vote and agree to turn on this jurisdiction.

In addition, there is the further requirement that 30 countries need to ratify the amendment for it to enter into force. This is common in treaties – that they come up with a number of states that need to ratify a treaty for that amendment to take effect.

This is the compromise. As others mentioned earlier today, there were many countries who, going in, felt that there would be no agreement on aggression. Many of us believed that we would at least get this first piece – the definition of the crime of aggression and the act – and that we would be able to be put it into the Statute. But the ability to resolve the differences on jurisdiction and have an agreement on how to amend the Treaty was not thought possible. As I said, about 130 countries were there: State Parties and all of the Permanent Members of the Security Council and India, Malaysia, Indonesia, Egypt, Pakistan, etc. This was agreed to at 1:00 in the morning by consensus. This is, whether you like it or not – and I think there's hardly anyone who feels really satisfied with the agreement and the compromise – another example of international law-making of historic proportions occurring and once again being almost completely ignored by the international press.

For people like Bill Schabas, Michael Scharf, Valerie Oosterveld, and Leila Sadat, this is the best gift that a treaty body has given to international law professors in, well, 50 years probably, because this will be a gift that will go on for a long time. There are kids in elementary school that will be able to do doctorates on this compromise.

MICHAEL SCHARF: Well, let me ask the next question, then, to Ben. I think everybody knows you're an eternal optimist, and yet, in your remarks this morning, you were a little bit skeptical about the compromises that were just described. Do you think Kampala represents more of an incremental process towards something that you'd like to see or more of a smokescreen?

BEN FERENCZ: Well, it's both. Let me see if I can clarify a bit the point which Bill started with.

In connection with the crime of aggression, it is different from the other crimes because no individual can commit aggression. Aggression has to be of concern to the international community as a whole. It has to be a massive invasion, attack, and so on. No single individual can commit that crime.

On the other hand, a state cannot commit a crime because it's not a human body. This was determined in Nuremberg. You can't take a state and lock it up. A state can only be judged to see whether it has committed an act that is in violation of the U.N. Charter and is therefore illegal and justifies certain restraints or sanctions.

It's similar to a policeman arresting somebody and bringing the evidence first to the District Attorney to examine. He really needs more investigation, going through a jury of some kind, before it's submitted to the Court. The big complaint was always that you have to

be sure that the Court is independent, and of course, the Court has to be independent. But that doesn't mean that every time a policeman arrests someone or every time a District Attorney examines the evidence, or every time it goes to a grand jury, these are interfering with the independence of the Court.

In connection with an act of aggression, which can only be committed by a state, who determines that it's a violation of the U.N. Charter? Shall it be 18 judges elected as criminal experts, or will it be the politicians who sit in the Security Council and who have been charged in the U.N. Charter with that job? That's their job. It's the job of the Security Council to determine the existence of an act of aggression – not a crime but an act of aggression – and then to decide what is necessary to maintain the peace. You must keep those two things separate – a crime committed by an individual, such as a leader who directs the troops to go in and bomb the country or whatever, and a violation of the U.N. Charter by a state – you have to have both of them, just as you must have an arrest by a policeman before you can take a person to court. That doesn't make the court dependent upon the police department. There may be policemen who are crooked or who are stupid or whatever. It doesn't affect the actions of the court.

So I think what Bill was trying to explain was this distinction between an act of aggression and the crime of aggression, which is quite confusing to most people. I must say I was criticizing myself after Kampala for not having made that sufficiently clear to governments. It is not really an infringement on the independence of the

ICC to allow the Security Council to determine whether the actions by a state constitute a violation of the U.N. Charter. In fact, it's required. The U.N. Charter is the agreement reached by all nations who are Member States to be bound by those procedures. If an act occurs or armed force is used, and it's in violation of the Charter, the Security Council must determine whether it is a violation or not. Maybe it was the kind of humanitarian intervention, which was referred to in connection with Kosovo, the thing you started off with.

So I think if you bear in mind those two separate functions, each one is necessary for a conviction. If you haven't proven that the crime has occurred, you cannot convict anybody. You have a whole row of Prosecutors here. The first question is did the crime occur. That's not for them to determine. As far as the illegal use of armed force, that's for the Security Council to determine.

Now, I know everybody hates the Security Council because it has failed miserably to do its job. It was supposed to save succeeding generations from the scourge of war. Have they done it? I'd give them an F, flunk them out. They haven't done it at all, for reasons which we know, Cold War and so on, sovereignty, the sanctity of independent judgment, and so on. So everybody hates the Security Council. When they hear about Security Council involvement, they think, oh no, it affects the independence of the Court. Not so. Not so. On the contrary.

BILL PACE: Except if you only left it with the Council.

BEN FERENCZ: We don't leave it only in the Council. The Council has no authority except—

BILL PACE: Then the five Permanent Members and anyone they're protecting would never be subject to a jurisdiction.

BEN FERENCZ: The Security Council isn't charged with the responsibility of determining guilt under the Charter. It's not qualified to do that and it's not expected to do that. It's there to determine whether the use of armed force has been in a manner prohibited by the terms of the U.N. Charter, and if so, what action should be taken by the Security Council in response thereto. It may decide to refer the main perpetrator to a court for punishment. That the Council may do, but these are two separate and distinct functions.

So this is something which, if properly understood, I think will remove some of the animus about the Security Council, which we all hate.

BILL PACE: We don't hate it.

BEN FERENCZ: Well, he loves it, but I don't know. I think it failed in its job, and I think it's a shame, but that's the way the world is set up, and we try to improve it. And we'll get to it in due course.

But let's take your basic question, about whether it is whitewash or it is progress. Well, at its most, it's both.

The manifest violation that you referred to is one of the compromises. I think that's pure whitewash. The Rome Statute represented a consensus on the crime of aggression, based on Resolution 3314 of 1974, reached after about 20 years, which built on the previous 30 years of definitions. That's what that was all about.

At the last minute, they couldn't get agreement on it. My friend Bob Rosenstock, now deceased, said, "Hey, look, we can't reach agreement. We've been working on this thing for 29 years. Everybody is getting tired of it. Let's do this. Let's say it's only advisory. It's advisory to the Security Council." If it's advisory, you don't have to pay attention. It has no binding effect. Okay. That was a compromise. Make it advisory to the Security Council.

That was not the purpose of 29 years of work. The assignment by the first General Assembly of the United Nations was to build on the Nuremberg principles, to create a code of crimes against peace and security of mankind, and start building an international criminal court to enforce that code. That was the assignment and resolution in the first General Assembly after World War II. And in the end, they switched it around. So you're talking about hocus-pocus. I'm showing you how the game is played.

MICHAEL SCHARF: Well, Ben represents Ben, but, Bill Pace, let me ask you. Since you have 3,000 NGOs under your umbrella, what's your perception of how your coalition thought of the results of the Review Conference?

BILL PACE: Again, I think the amendment is very legally and politically complicated. Honestly, I think most of our groups, even the groups that have fairly significant legal departments, are still trying to analyze how they think this may or may not work.

In short, I should mention two or three things. One is that some of our members did not think aggression was the kind of jurisdiction that the Court should have, and so they will remain neutral on the issue. Some of our groups very much wanted aggression, but they did not want an amendment from which all of the countries that commit aggression could opt out and therefore never be subject. They will be very reluctant to support the amendment.

Others will take a longer term view, I think, and will see that their governments should ratify the amendment, that they should try to secure the 30 ratifications and continue to put pressure on the Assembly of States Parties to activate the jurisdiction. If after 10 or 15 years, it's clear that the current amendment did not work and will not help us prohibit this plague on civilization of aggressive acts of war, then we have to come back to the Assembly of States Parties. And they've built in a Review Conference seven years after the amendment enters into force to review it. So I think there are at least three different kinds of positions.

I think a nuanced fourth position will be groups that don't want their country to opt out, that are one of the 113 countries that are ratified, that will campaign against their country opting out of the crime of aggression.

Lastly, I should mention that the vast majority of members of the Coalition work on human rights issues, the advancement of women issues, victims' issues, humanitarian issues, conflict prevention, peaceful settlement of dispute issues, etc. The issue of the legality of war is not in the mandate of those non-profit organizations, and so a wide range of them simply don't have this as a primary goal; their boards or their membership don't have strong opinions on the issue. Therefore, I think it's going to take us a number of years to see what happens, and I think that regardless of what would have happened in Kampala, it would have taken several years to get the requisite number of countries for the amendment to enter into force. It would have taken three or four years, no matter what.

They've given seven years. So we have a length of time now to work with it and to see what was agreed to, to see what the governments agree on what was agreed to, and to see how the governments are going to move forward.

MICHAEL SCHARF: With respect to your last comment, Bill, Hans-Peter Kaul said during his lunch presentation that everything the NGOs are concerned about is part of "the excrement of war." So they ought to be very concerned about outlawing war, and I think that's something that Ben has said over the years.

Let me turn to John Washburn, who has been very patient. Your organization focuses on the U.S. relationship with the International Criminal Court. What

do you think the effect of Kampala will be on the U.S. approach to the ICC and its relationship with it?

JOHN WASHBURN: Thank you very much. I appreciate everybody being here this afternoon, and it's also a real pleasure to be on this panel with people, most of whom I've worked with for a long time and I consider my friends, supporters, and mentors.

My organization, the American NGO Coalition for the International Criminal Court is the only organization in the United States that works exclusively on the International Criminal Court. We are a very small and much more modest domestic version of Bill's international coalition. We have 32 nationwide NGO members, and we are present in 13 places around the country through various liaison groups or individuals who work with us. We've been working on this issue since it was convened as a program of the United Nations Association in 2002.

I'd be very happy to talk with any of you who would be interested in following up about what we do and the ways in which you might be more informed, or would like to work with us.

I've been asked to address what we see as the impact of the American experience in Kampala on the development of the further relationship and interaction between the United States and the ICC.

I may be a little hampered here because I have right in front of me the U.S. Ambassador for War Crimes Issues, Mr. Rapp, who is a central figure in this and who, of course, is a target of my organization's advocacy. He will have a right to reply, and it may be a pretty extensive one, later today.

As just one sentence or two of background, the Obama administration came into office with a statement that it looked favorably upon the ICC as a part of its overall commitment to the use of multilateral institutions and activities in its foreign policy, but that there would have to be a formal policy about the ICC, which would require the Department of Defense's full participation in its development and full agreement on the results. It was a rather characteristic combination of Obama's broad vision and caution at the same time.

When we first began to interact with Legal Adviser Koh and Ambassador Rapp, shortly after they were confirmed, we found a combination of things. We found a very strong commitment to the ICC as a matter of principle and a much better understanding of what it did, how it works, and what it was about, than was the case with the previous administration. We also found a certain anxiety and caution, which was, I think, understandable.

They had an action-forcing event before them, which was the Review Conference. They had to decide what to do about that. A decision about going to the Review Conference clearly involved a decision about whether, after an eight-year absence, the United States

would again start going to the Court's governing body, the Assembly of States Parties, which is to the ICC what the General Assembly is to the United Nations.

We were impressed by the care with which they approached those decisions. We were also impressed by their sense of realism. Like all incoming people, they started with a certain number of presuppositions. They were quite prepared to test those presuppositions against investigation, action, and consultation, and some of those presuppositions were abandoned in the course of making the decision to go to the Assembly of States Parties and, in particular, in crafting the diplomacy that they used there.

Okay, so much for background. You've heard at length what happened in Kampala. I would remind you that while the last week was about aggression, there was a first week in Kampala, committed to an activity called "stocktaking," which was essentially an assessment, through a series of panels, groups, discussions, and so forth, of the current state of international criminal justice generally and, in particular, of the ICC and its role in that system of international justice. This system is now, because of the ICC's preeminent place, beginning to be called the "Rome system of international criminal justice" or "international atrocity law," a term that David Scheffer and others have begun to introduce and which I find useful since, for a lot of people, referring to war crimes and things like that as "international humanitarian law" has a certain contradictory flavor.

I will get back to stocktaking in a moment, because that did have an influence on the subsequent attitudes of the United States toward the ICC. From my observations, and from those of many working with me, backed up by subsequent conversations we had with people in government in Washington thereafter, it was quite clear that the United States left Kampala very well satisfied with the outcome. It's already been emphasized to you, so I don't have to be the only skunk at the garden party, that a feature of the amendment on aggression is that any country that is paying attention, whether a State Party or not, can completely avoid forever and ever the jurisdiction of the Court over the crime of aggression.

I think that this was probably an outcome that the United States hoped for but was not at all sure it would be able to get in quite such a sweeping way. I don't blame the United States for being extremely pleased that this was the outcome. It was a very good result to be able to take back to people in Washington who were nervous about the United States engaging with the Court in this way and attending these meetings. I think it also made the United States feel that U.S. diplomacy could be deployed even as a non-State Party in the work of the Court in such a way that the United States should be able to achieve most of its objectives, taking into account, of course, its limitations as a non-State Party. However, for a country as powerful as the United States, the limitations of being a non-State Party mean that instead of being the 2,000-pound gorilla in the room, you're the 1,800-pound gorilla in the room.

This outcome, I think, gave the United States and its leading figures, a strong sense that they had been on the right track in the approach that they took coming up to Kampala.

However, from our observations, a certain complacency has set in since this first reaction. The Review Conference challenge is over. The general approach of engaging with the Court and going to the Assembly of States Parties meetings and otherwise interacting has been confirmed and has become generally accepted within the U.S. government as the right way to go about this. At the same time, there has been a great deal of developments and actions, which have necessarily taken the attention of the leading figures, such as Ambassador Rapp and Legal Adviser Koh, to other compelling issues like START, Central Asia, Guantanamo, maybe Burma.

This has had a consequence which I will describe in a moment, but I do want to say that there are certain things I expect that the United States will continue do, regardless of what happens and I want to acknowledge that these are very positive and valuable things. The United States is going to stay open to providing a wider range of assistance to the Court generally, and specifically in cases that the United States considers to be in its national interest. I am not aware of any case presently before the Court that is regarded by the United States as not in its national interest. Secondly, there will be, in particular, ongoing discussions, support, and interaction with the Office of the Prosecutor, and finally, there will be interchanges going on with various parts of

the Court, including the Presidency, largely conducted as a kind of an ongoing maintenance of relationship through the embassy in The Hague.

I can say very briefly that for the people in my coalition, the organizations and the individuals, their reactions are very much the same as those of Bill Pace's CICC membership. Whether you like it or not, whether or not you are willing to accept Judge Kaul's excrement theory, the fact is that a great many organizations that we work with and that are important to Bill and to me, nationally or internationally, simply do not have the legality of the conduct of war as a focus of their mandate. As a Convener in the United States and, as Bill has said, as a Convener internationally, this is a reality that we have to live with. It's one of the reasons why neither his organization nor mine have officially taken an institutional position on aggression. AMICC, my outfit, certainly isn't going to, and everything Bill's organization says about aggression has disclaimers, top and bottom, saying that it does not reflect the position of the CICC.

Now, there's a lot more I could say about this, but I want to focus on a particular point to wrap up, and in talking about this, I particularly want to address the Americans in this audience and particularly the younger members of this audience, the generation that will be using the Court before very long in their positions of power and responsibility in the United States, including in matters of foreign policy.

A major consequence of Kampala from our point of view – this may well not be a major consequence from the government’s point of view, but it is for us – we had intimations before Kampala that the United States would no longer try to create a formal policy on the ICC. This stance has been confirmed to us repeatedly by various officials of the U.S. government afterwards.

What we are told is that it’s no longer necessary to go through a policy-making, policy review process, even though such a process was begun earlier in the administration. It’s no longer necessary to do that because the various speeches, statements, positions taken by the United States about the ICC cumulatively constitute a policy.

There are very serious problems with that. I want to tick off a few. I want to say that in many ways, the Obama administration has been so good about the Court that it may seem churlish to object and to contravene in this way, but there are a series of quite important consequences, for us, that flow from this.

Obviously, in the United States, we look forward over time – and this is time in years – to eventual ratification of the Rome Statute by the United States. Everybody knows how difficult it is to get a ratification. Everyone has heard the horror stories about never being able to get treaties through the Senate for its advice and consent. The law of the sea is the leading horror story. Everyone knows that you only really get one chance at getting advice and consent from the Senate, and if you don’t make it, it goes to the end of a very long line.

Achieving ratification, however, means starting now, and starting now means consciously developing a relationship with the Court which will produce a sense of familiarity and comfort on the part of Congress and the executive branch with the ICC that, in due course, can make it politically practical to try for ratification. This is a long-term perspective. Many administrations normally don't pay an awful lot of attention to issues that are as long range as this because the people in charge now may well not be there in the future, and they have to cope with urgent, immediate problems. But for those of us who are committed to the ICC, this is something we have to start working toward now.

We believe that you can't get a relationship with the Court that will do what I just said unless you have a formal policy matrix. Without a formal policy matrix, you will have a situation where you do not have established machinery in the government to deal with problems that may come up at the Court, and everyone in this room who has had experience with international organizations knows that sooner or later, something is going to happen at the Court that will deeply offend the United States, or the United States may feel that the Court is going in a direction which is contrary to American national interest.

When that comes, you want to be prepared to deal with it in a calculated, considered, and thoughtful way. We saw in Rome the consequences of an absence of policy that could provide guidance to the delegation there when Washington finally woke up to what was happening there. That could happen again if suddenly,

unexpectedly, but almost predictably, we have a very negative development at the Court with which we must cope.

The issue here is that we need a policy that can produce decisions on these emerging issues that are not lower common denominator issues, that are not plagued by the fact that disagreements between different parts of the U.S. government have not been resolved. The policy process can resolve those disagreements, but it will be painful and difficult to do that, and the administration right now has decided that because of other demands on the Department of Defense, and for other reasons, it does not wish to go through that painful process now.

MICHAEL SCHARF: I know others want to chime in on some of the things that you said, but before we do that, I really want to get Bill Caming involved here.

We've been talking a lot about process. In the whole world, there may be a handful of living souls who have actually prosecuted the crime of aggression in a court of law, and I thought it would be wonderful for us to hear your insights about the challenges and obstacles to successfully prosecuting that crime, so we can put this in a real-world perspective.

BILL CAMING: Thank you. I thought that one thing that might be helpful to many members of the audience who are not fully conversant with the Nuremberg process and aggressive war, would be to

discuss its really local contribution, besides reciting a catalog of crimes that were tried and adjudged. First, it must be remembered that the concept of the Nuremberg trials owed greatly to the role of Justice Jackson who overruled by persuasion, diplomacy, and cajoling, the position of France, and particularly England and Russia, who wanted to summarily try the leading figures in the German Third Reich.

Now, in that regard, Jackson, supported by the occupied nations, felt that trials were necessary to establish a historical record that would be based principally upon written evidence in support of oral testimony. Oral testimony can always be criticized 30 or 40 years later as expressing the bias of the times, and therefore, in all of our trials, we tried to have reputable documentary evidence to support the oral testimony and to make the judges more comfortable in reaching their decisions.

As it may have been mentioned, the London Agreement, which provided the procedures and crimes to be adjudged, was decided in London in August of 1945, remembering that Germany surrendered May of 1945.

There were a total of 13 trials held at the Palace of Justice in Nuremberg. The first, and the one most widely known and that still resonates today was, of course, the so-called "IMT trial," International Military Tribunal. The London Agreement defined the crimes, and the one that most interests us today is the precise definition of what was considered a crime against peace: planning, preparing, initiating, and waging wars of

aggression, which Mr. Justice Jackson branded as the ultimate crime, from which the crimes against humanity and war crimes stemmed.

The IMT indictment set forth charges against most of the defendants for being complicit in crimes against peace. The IMT, in its final decision, held that there was an aggressive war brutally committed by the Third Reich, and a number of defendants were found guilty, either of committing crimes against peace or conspiring with the other leaders to commit crimes against peace. Remember, too, that we were only discussing the crimes committed by the very top leaders who created policy and ensured its implementation.

I was involved in one of the twelve trials held at Nuremberg after the first: the *Ministries* case, or the so-called "*Foreign Office* case." It was the last and the longest of all the trials. It was sort of a reprise of the first case but with the next tier down of German leaders. For example, among our defendants was Baron Ernst von Weizsacker, deputy to von Ribbentrop who had been tried in the first case, and Paul Koerner, the all powerful deputy to Hermann Goring in implementing the four-year plan.

We started on November 18, 1947, and did not conclude until 17 months later, in April, 1949. The total record, including counsel briefs, ran through some 70,000 pages. The judgment itself consisted of 692 pages, 71 pages of which was the dissenting opinion of Judge Powers.

The first trial had four judges, one from each of the leading powers and their alternates, and was presided over by the United Kingdom's Chief Justice. The *Ministries* case had three judges, as did all 12 trials that followed the first, and these were all American judges acting under the flag of the International Military Tribunal.

There is a statement about aggressive war, laid down by the International Military Tribunal in the first case, which was frequently used as a benchmark in the subsequent trials. It said that Hitler could not wage aggressive war by himself. He had to have the cooperation of statesmen, military men, diplomats, and businessmen. When they acknowledged his aims and gave him their full cooperation, they made themselves parties to the crimes that he had initiated. The Court emphasized that, just because Hitler made use of them, they were not to be deemed innocent if they knew what they were doing.

The question of whether defendants of the highest rank could be charged with committing aggressive war was a key issue in the early trials following the first. In the Krupp trial, the munitions maker, I.G. Farben in the *Farben* case and in the *Flick* case, industrialists of the highest ranking executives were deemed not to have committed any crimes against peace. This was, in part, due to the fact that in the first trial, Albert Speer, the Minister of Armament Production during the war, was found not guilty of aggressive war, despite his major role in the preparing, planning, initiating, and waging of the war.

I might add that when the first trial was held, enthusiasm was at a very high pitch. The Court was fully supported globally, and the occupied countries cooperated in supplying the necessary evidence of aggressive acts. During our trial, a prosecution's nightmare occurred. There was a complete change in the political interests and atmosphere. It was a bombshell that resonated throughout the remainder of our trials.

You may recall that in mid-1948, the darkening shadows of Russian aggression crept into the courtroom and greatly influenced our judges in the midst of the Prosecution's presentation. The Russians, who had been our allies and one of the judges in the first trial, had initiated the Cold War by a number of hostile acts in 1948. This was aggravated by the blockade of Berlin, which Stalin had ordered and to which Truman responded with the Berlin airlift. The atmosphere suddenly made Russia the target of concern, and in the United States, the decision was made by our leaders to covertly bring Germany into the service of our fight against the Soviet Union. So we plotted forward, but that had a great effect on the leniency of the panel and the penalties awarded.

Turning more now to the facts that are relevant to our discussion, the *Ministries* judgment broke new ground with two critical holdings. In addition to the conviction of all but three of the 21 defendants, five were specifically convicted of crimes against peace. There were three diplomats, including Baron von Weizsacker, Secretary to Ribbentrop and Hans Lammers, the satanic Reich Chancellor who drafted all

of Hitler's decrees and saw to their implementation. These were the first convictions for aggressive war since the first trial, since, as I mentioned earlier, in the other three trials, the defendants were adjudged not to have committed the crimes.

The second aspect of this case created a very poignant memory that still lingers in my mind. I had persuaded the daughter of the president of Czechoslovakia in the days of the Munich Pact and then the subsequent actions against Czechoslovakia, Madam Rádlová, to testify for the Prosecution. She discussed how, on the night of March 14, 1939, Hitler ordered President Hácha to a meeting in the Eagles Nest in Germany.

The Munich Pact was in September 1938, and it pretty well emasculated Czechoslovakia by its ceding of the Sudetenland to the Third Reich. This meeting started at midnight and Hácha was a very old and ailing gentleman at the time. When they met, Hitler and Goering and an assemblage, which included some of our defendants, demanded that the remaining portion of Czechoslovakia that was still free petition the Fuhrer for the right to be protected against Germany. Hácha resisted and Goering threatened to bomb Prague. Finally, Hitler said, "Well, it doesn't really matter. We're just doing this. Our troops are already marching into Czechoslovakia, Bohemia and Moravia." They wouldn't even allow him, despite a urinary condition, to retire to the restroom. At three o'clock in the morning, Hácha finally surrendered and signed the pact asking to be a Reich protector.

In the IMT trial, all the counts of aggression involved invasions by Germany that were militarily resisted by the countries attacked. The IMT trial did not charge the defendants for the invasions of Austria and Czechoslovakia as crimes against peace. So the question arose in our case: did a nation that was small and relatively defenseless against the military threat it faced have to resist, and perhaps be destroyed, before capitulating for the invasion to be considered an act of aggression? Or could the nation, without any blood being shed, recognize the impossibility of successfully facing the invader and capitulate without any military resistance? Our Court held the latter; that it was a crime against peace when a helpless country faces overwhelming force and is threatened with destruction. This invasion was done without a shooting war, and as Telford Taylor, the Chief of Counsel after Bobby Jackson, said, these were acts totally aggressive in character and involving crimes against peace.

BEN FERENCZ: May I add a point here?

MICHAEL SCHARF: Of course you can, Ben.

BEN FERENCZ: Because we've gone floating around in space. I'll bring it down to earth to a very simple question and give you the answers.

Here is the Statute as now amended, but not yet ratified. Under the terms of this Statute, can anybody now be tried for the crime of aggression? The answer is no. Can anybody be tried for the crime of aggression in

the near future? No. Can anybody be tried before the year 2017 at the earliest? The answer is no. Is there any fixed date when this will certainly become effective? The answer is no. That is a clear statement, in my legal opinion, and nobody will challenge that. The instruction given when Rome closed was for them to get together and agree upon a provision acceptable for the crime of aggression for inclusion in the Statute, and they've included it, but put so many conditions around it.

Next question. Can anybody, non-State Party, after ratification be held for the crime of aggression if they don't agree? The answer is no. Can any Party after ratification be held for the crime of aggression if they say we don't want to be held for that? The answer is no. So that is the reality. We're dealing with the crime of aggression. I'm trying to get the crime of aggression to be a punishable offense, so that the license, the immunity, which has been given now under the Statute for any leader to go out and commit aggression without any fear, is revoked. It hasn't been done.

Bill Caming has given you a view of the early days, 60 years ago, when we were hoping that the world would be different. It hasn't changed. It's been pointed out, correctly here, that the State Department should be satisfied. They have every reason to be satisfied. There is no risk to the United States of any kind. Now the State Department and other departments of government can go about the rest of their business – and they are busy – and deal with items that require immediate decision. They don't want to be diverted with this kind

of a complicated and difficult decision, so they welcome it.

Where does it leave us? It's been suggested that we ought to push for ratification. I pointed out that even with ratification, you haven't got anything. We've got to go to another forum. We've got to go to national legislatures. If national states, the United States included, are serious about wanting to punish aggression, they could put a clause in the criminal statute saying that the U.S. courts are authorized to try any of the crimes listed in the Rome Statute or in the ICC Charter. It pulls the rug right out from under the Court. We haven't done it because we don't have a clear policy, and that is correct.

But there is a clear policy. I have brought along with me a little note. It was written by a distinguished American – you will all recognize the name – in which he says, “Democracy does not merely represent our better angels. It stands in opposition to aggression and injustice, and our support for universal rights is both fundamental to American leadership and a source of our strength in the world.” So we were concerned about it. Who was the gentleman who wrote that? You'll recognize the name. It was said on May 20, 2010, just a couple of months ago, in the National Security Strategy, and the signature on it, you'll recognize, is that of Barack Obama. There is a policy set out by the President of the United States as the official policy of the United States. I'm not asking you to do more than carry out the policy of the United States. And that is to penalize aggression, as we did at Nuremberg where we

held ourselves out as a beacon of light. We have no right to disregard the 50 million people who died in World War II. The course is to set up these principles, and we have no right to ignore what they died for.

It's too dangerous for the young people here for us to go on playing this game. It's a game of pretending that we're making progress.

Now, I realize that you've got to have hope, otherwise you can't go forward, and I don't want to go around and discourage people and say it's not been done. We've made advancements. We've cut out that phony argument that aggression wasn't defined. Now we've got a definition. Hooray. We've got a date dangling in the distance, 2017, without knowing exactly what's going to happen at that time. The first question will be how to define aggression again, because there will have been a lot of changes in between. The next thing they're going to say is, "let's postpone the problem," you know, and we'll talk about consensus. Sure, you have a consensus, it's easy to get a consensus without substance. The consensus was to postpone it. That's what they've done. They've just postponed it. They haven't decided anything. They've decided, "If we agree, we'll do it. If we don't agree, we won't do it." I can get a consensus on that, too. And that's what they've got.

So, my friends, it's funny and it's tragic, and I cry because I lived it. I know the consequences of our piddling around with it, as we are doing unfortunately, but I can't say so out loud because we'll lose public

support. We have to try to frighten potential aggression by saying, “You’ll be held liable for aggression. Don’t do that.” Dave Scheffer wrote an article in *The New York Times*. Yes, we now have the crime of aggression. But it’s not in effect – how are they going to be punished?

So we have to continue the illusion that that is so, but the tradesmen who work at this, we have to know where the difficulties lie. We have not been able to change the will of the major powers to accept a peaceful world order under the rule of law. That requires changing the way people think.

That’s why I like to talk to the young people and the students. It takes training from the earliest days, compromise, compassion, understanding, and a willingness to reach agreement. That’s what it takes, and you can’t get it in one generation.

Some of our friends here know that when they have a fundamentalist idea, you cannot change it. Their fear, their ingrained habits, and their slogans blind them to the reality, and that takes a long time to change. So we’re in the process of changing.

MICHAEL SCHARF: Bill Caming, would you like to respond?

BILL CAMING: I will make one comment at that. I think Ben is all too modest about the accomplishments of the Kampala consensus. Confucius once said, and I

paraphrase because I'm not an expert, that each long journey must begin with the first small step. There had been a feeling in this mandatory period, nine years after the creation of the Court, that there was no hope for any action to be taken on defining jurisdiction over aggression. Admittedly, it isn't ideal. In fact, as Ben said, it is an umbrella under which different parties can huddle while the rain comes down.

But I think Ben's done a marvelous job, he and his colleagues, in being able to arrive at any consensus. In horse-racing parlance, if you had to make a bet before the meeting, you would have gotten odds of 100 to 1, so it's pretty good.

MICHAEL SCHARF: All right. I'm going to give, as the Chair's prerogative, Bill Pace the final word on the panel, and then we'll conclude. Go ahead, Bill.

BILL PACE: Well, thank you, because I want to comment. Unfortunately, I don't agree with either the subjective or objective views that Ben announced at the very end.

I just want to make two or three points. One, everything he said about how nothing was said in 1994, '95, '96, '97, '98, '99, 2000, 2001, etc. "It will never happen, you will never get a Treaty." Once you got the treaty, "oh, well, it will take 20-25 years to ratify. It won't work if the United States doesn't come in. No, no, no, no, no," and it's only been "yes, yes, yes, yes, yes." So that is an objective and subjective alternative.

Two, the Review Conference in Kampala also was the largest gathering of experts on international justice ever, from virtually all of the different tribunals, presidents, prosecutors, judges, NGOs, U.N. officials, two Secretaries-General, etc. The first week was a spectacular success at identifying some of the issues in international justice, lessons learned that have to be integrated into this new independent system of international justice. It will be years of work and cooperation to embrace those. How can a country cooperate? How can an international organization cooperate? What has to be done at the national level?

The third point is that since the end of the Cold War – we haven't really talked much about how hugely the Cold War intersected – there's been major progress on a whole range of issues on the peace and security spectrum. In terms of the goal of surrounding and prohibiting war with the institutions of law and justice, without comparison, the most successful sector on the peace and securities spectrum has been the development of international justice since 1993. At the end of the Kampala Conference, I said what I said in Rome, which was that most of history is the story of wars won and peace lost, but the ICC process and the international justice process has been the story of peace winning and war losing.

MICHAEL SCHARF: Nice final points. So that concludes our panel. Thank you very much, Bill Caming, Bill Pace, John Washburn, and Ben Ferencz.

Conclusion

Conclusion

Elizabeth Andersen*

Each year, the International Humanitarian Law Dialogs are organized around a theme, in order to focus the discussions on particular issues or developments in the field. The 2010 theme of “The Crime of Aggression” was particularly timely, as the conference convened on the heels of the historic first Review Conference of the Rome Statute of the International Criminal Court in Kampala and the codification there of a crime of aggression within the Rome Statute. The Chautauqua meeting was the first major gathering of leading scholars and practitioners in the international criminal law field following the Kampala meeting, and, as this volume reflects, it offered an invaluable opportunity to assess the conference, the “new” crime of aggression, and its implications for the future of our field. Three threads run through the lectures, panels, and keynotes captured in this volume, the official record of the gathering.

First, this unique multi-generational gathering of Prosecutors, whose experiences span the 60-plus years of post-World War II accountability efforts, highlights the importance of having an historical perspective on our field. The recollections of the Nuremberg experience from the likes of Ben Ferencz and Bill Caming offer those of us seeking accountability today insight, inspiration, and appropriate modesty. Progress requires

* Executive Director, American Society of International Law.

that contemporary prosecutions not reinvent the wheel, but rather build on the precedents of the past. Too often today, we consider the field of international criminal law to be *terra nova*; Ferencz and Caming remind us that on many issues – including the crime of aggression – they covered the ground long ago. We benefit from connecting the dots between the challenges they faced and those with which we struggle today – as Ambassador Stephen Rapp does in his remarks when he muses about the similarity between proving aggression at Nuremberg in the absence of evidence of resistance by the invaded states and proving rape at the Yugoslavia Tribunal in the absence of evidence of resistance by the victims. Historical understanding also importantly helps us grapple with the limits of precedent. How does the context for those seminal Nuremberg prosecutions of aggression resemble or differ from today’s conflicts? What implications do those comparisons have for the law, for the institutions that apply it?

Second, this record of the 2010 Dialogs and the focus on the crime of aggression underscores the complex matrix of legal and policy issues at play in accountability efforts. The conference convened a group of experts who share a common commitment to accountability, but the record of the discussions of aggression remind us that even among the like-minded, there can be strongly divergent views of how best to achieve accountability. No issue divides the international criminal law community like the crime of aggression, and it is important for the long-term success of the justice project that we not gloss over those differences but rather grapple honestly with them, as was

done in Kampala and again at Chautauqua. We need to understand the relationship between aggression and atrocities, in the past and today, in theory and in practice. To what extent are atrocities, as Judge Hans-Peter Kaul cast them, the “excrement of war?” Does the use of force cause rights violations? Or is it a tool to halt them? If it is both, how can the law capture and respond to such a paradox? Finding the way forward on a crime of aggression requires reconciling competing views on these difficult questions. The result may be a messy (and legally complex) compromise that all find dissatisfying at some level. But it is only through such iterative compromise that we can hope to find solutions that will stand the test of time.

Finally, even as this record of the 2010 Dialogs highlights significant challenges facing the international justice field, we are reminded of the remarkable progress made in a very short period. This is the narrative of efforts to criminalize aggression – which even during the Kampala Conference many thought politically impossible – and applies equally to many other aspects of the international accountability project. The annual Chautauqua Declaration issued by the Prosecutors at the close of the meeting has become something of a benchmark for international justice efforts, and one can mark progress by comparing the text year to year. Particularly telling is the obligatory paragraph about those who remain at large, evading the long arm of justice. Each year, new names of those most responsible for horrible atrocities are added to the list. But each year, new arrests are also hailed.

As I write this conclusion, in June 2011, I am struck by the dramatic developments in our field even in the short time since the 2010 Dialogs, less than a year ago. A year ago participants in the Dialogs worried that the International Criminal Court had achieved only four arrests and had not even completed its first trial. Today, new challenges have emerged and much remains to be done, particularly with respect to arrests, but the ICC has added two new situations under investigation, a total of 14 defendants have come under its jurisdiction (nine by voluntary appearance and five by arrest), and its first trial is coming to a close while three others are under way. Meanwhile, the ICTY now has in custody the last of its at-large indictees, and notably, the 2011 Chautauqua Declaration will not have to include the name of Ratko Mladic as one of those enjoying impunity. Just when we think that contemporary challenges are insurmountable, we need only mark the progress recorded in the Chautauqua Declarations, and we are inspired to “never retreat,” as Leila Sadat urges in her moving tribute to Whitney R. Harris, to whose legacy this volume is so appropriately dedicated.

The Dialogs were, as always, chock full of information and insight, enriching for the experts as well as the interested general public that gathers at Chautauqua Institution each year. I join my co-editor, Professor David Crane, in thanking the many institutions and contributors to the Dialogs and this volume. I want to pay special tribute to ASIL Fellow Shannon Powers, who has carefully edited these Proceedings. And I will add what modesty prevents Professor Crane from noting: without him, the Chautauqua Dialogs would simply not

be possible, and all of the participants are much indebted to him for his vision and diligent leadership in convening this important meeting year after year. The American Society of International Law is privileged to play a role in this annual historic gathering and to keep this record of the Dialogs that we hope will inform and inspire generations to come.

Appendices

Appendix I

Agenda of the Fourth International Humanitarian Law Dialogs

Sunday, August 29 through Tuesday, August 31, 2010
Crimes against Peace—Aggression
in the 21st Century

The fourth annual International Humanitarian Law Dialogs is an historic gathering of renowned international Prosecutors from Nuremberg through present day, and leading professionals in the legal and academic fields. A unique two-day symposium, the Dialogs are held annually on the picturesque Chautauqua Institution grounds. The gathering allows participants, their guests, and the public to engage in meaningful dialog concerning international criminal law's past, present, and future.

Sunday, August 29

Arrival of the Prosecutors & Participants

2:00 p.m. **Film Presentation of *War Don Don*.**

Discussion moderated by Rebecca Richmond
Cohen, Racing Horse Productions.
Chautauqua Cinema.

Monday, August 30

- 7:00 a.m. **Breakfast/Registration.** Athenaeum Hotel.
- 9:00 a.m. **Welcome & Introduction of Prosecutors by Greg Peterson.** Chairman, Robert H. Jackson Center **and Tom Becker**, President, Chautauqua Institution. Fletcher Hall.
- 9:15 a.m. **Awarding of the *Impunity Watch* Essay Contest Winner, Summer Institute.** Introduced by Drew Beiter & Ann Seyse, Editor-in-Chief, *Impunity Watch*. Fletcher Hall.
- 9:30 a.m. **Keynote Address. Ben Ferencz**, Former Prosecutor, International Military Tribunal at Nuremberg. Introduced by Professor Michael Scharf. Fletcher Hall.
- 10:30 a.m. **Break.**
- 11:00 a.m. **Update from the Current Prosecutors.** Moderated by Professor John Q. Barrett. Fletcher Hall.
- 12:30 p.m. **Lunch with the Prosecutors.** Athenaeum Hotel.
- 1:30 p.m. **Keynote Address. Judge Hans-Peter Kaul**, Vice-President, International Criminal Court. Introduced by Professor Leila Sadat. Fletcher Hall.

- 2:30 p.m. **Dialog on the Crime of Aggression.** John Washburn, Bill Pace, Bill Caming, & Ben Ferencz. Moderated by Professor Michael Scharf. Fletcher Hall.
- 4:00 p.m. **Break.**
- 6:30 p.m. **Reception.** Athenaeum Hotel.
- 7:00 p.m. **Dinner.** Athenaeum Hotel.
- 8:00 p.m. **Keynote Address. Stephen Rapp, U.S.** Ambassador-at-Large for War Crimes Issues. Introduced by David Sullivan, the Enough! Project.

Tuesday, August 31

- 7:00 a.m. **Breakfast with the Prosecutors.** Athenaeum Hotel.
- 9:00 a.m. **Prosecutors Colloquium.** (Private – Prosecutors only)
- 9:00 a.m. **International Criminal Law Year in Review: 2009-2010.** Professor Valerie Oosterveld. Assistant Professor of Law and Director of the International Internship Program, University of Western Ontario. Fletcher Hall.

- 10:30 a.m. **Break.**
- 11:00 a.m. **Break-out Sessions with the Prosecutors on Current Issues.** Fletcher Hall.
- 12:30 p.m. **Lunch with the Prosecutors.** Athenaeum Hotel.
- 1:30 p.m. **Keynote Address. Professor William Schabas,** Professor of Law and Director, Irish Centre for Human Rights, National University of Ireland in Galway. Fletcher Hall.
- 2:00 p.m. **Break.**
- 2:30 p.m. **The Issuance of the Fourth Chautauqua Declaration.** Hosted by Professor Diane Marie Amann, Vice-President, ASIL and “IntLawGrrls” representative. Athenaeum Hotel.

Appendix II

The Fourth Chautauqua Declaration August 31, 2010



In the spirit of humanity and peace the assembled current and former international prosecutors and their representatives here at the Chautauqua Institution...

Recognizing the continuing need for justice and the rule of law as the foundation to international security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:

Recognize the tenth anniversary of the Robert H. Jackson Center and its important mandate to preserve, promote, and advance the legacy of Justice Robert Jackson through education, exhibits, and events, which emphasize the current relevance of Jackson's ideas on individual freedom and justice;

Honor the life of our colleague and friend Whitney R. Harris, a prosecutor of the International Military Tribunal at Nuremberg who passed away this year; commend his drive and force in ensuring that the spirit

of Nuremberg continued; and note the awarding posthumously to Whitney Harris the first annual Joshua Heintz Humanitarian Award for distinguished service to mankind;

Applaud the efforts of the states parties to the Rome Statute, and other delegations in Kampala this year in their willingness to openly take stock in the progress of international criminal law in general and the concrete recommendations to ensure justice for victims of international crimes; and for reaching consensus on a definition of the crime of aggression and for their determination to press for appropriate mechanisms for its enforcement and prosecution;

Noting that after thirty years of impunity the first judgment has been rendered in respect of the crimes of the Khmer Rouge in Cambodia;

Reflecting upon the fifteenth anniversary of the genocide at Srebrenica and the continuing need for the accountability of those responsible;

Expressing concern at the continuing plight of civilians caught up in armed conflict and particularly for those crimes committed against women and children;

Now do call upon the international community to:

Keep the spirit of the Nuremberg Principles alive by:

Ensuring the enforcement of the laws of armed conflict and in particular those relating to the protection of civilians;

Calling upon parties in armed conflict to respect international law applicable to the rights and protection of women and girls;

Ensuring that gender crimes are investigated and prosecuted appropriately;

States refraining from the use or threat of armed force and settling their disputes by peaceful means and in accordance with the United Nations Charter and international law;

Supporting and adequately funding the tribunals and courts in their work to maintain the rule of law at both the international and domestic level;

Implementing their obligations under international law in the sharing of information, investigating, prosecuting or transferring to an appropriate judicial body those who violate international criminal law to ensure accountability of all persons, including sitting heads of state;

Considering the adoption of a Convention on the Suppression and Punishment of Crimes against Humanity;

Signed in Mutual Witness:

Fatou Bensouda
International Criminal Court

David M. Crane
Special Court for Sierra Leone

Serge Brammertz
International Criminal
Tribunal for the former
Yugoslavia

Benjamin Ferencz
International Military Tribunal,
Nuremberg

H. William Caming
International Military
Tribunal, Nuremberg

Richard Goldstone
International Criminal
Tribunals for Rwanda & the
former Yugoslavia

Andrew Cayley
Extraordinary Chambers in
the Courts of Cambodia

Brenda Hollis
Special Court for Sierra Leone

Bongani Majola
International Criminal
Tribunal for Rwanda

Robert Petit
Extraordinary Chambers in the
Courts of Cambodia

Appendix III

Biographies of the Prosecutors and Participants

Diane Marie Amann

Diane Marie Amann is Professor of Law at University of California at Davis School of Law, and Director of the California International Law Center at King Hall. She earned a Dr.h.c. in Law from Universiteit Utrecht, a J.D. from Northwestern University School of Law, an M.A. in Political Science from UCLA, and a B.S. in Journalism from the University of Illinois. She was a law clerk for U.S. District Court Judge Prentice H. Marshall in Chicago and for U.S. Supreme Court Justice John Paul Stevens. Ms. Amann has been a Professeur Invitée at the Faculté de Droit, Université de Paris, and a Visiting Professor of Law at UCLA, the University of California-Berkeley, and the Irish Centre for Human Rights, National University Ireland-Galway.

Elizabeth Andersen

Elizabeth Andersen is Executive Director and Executive Vice President of the American Society of International Law. Ms. Andersen first joined the Society in 1995 and became its Executive Director in October 2006. Most recently, she has served as the Executive

Director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI), where she had worked since 2003. Prior to her position at the ABA CEELI, Ms. Andersen was the Executive Director of Human Rights Watch's Europe and Central Asia Division, where she had also worked as a researcher and Director of Advocacy for a total of eight years. Before joining Human Rights Watch, she 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. Ms. Andersen is a graduate of Yale Law School, the Woodrow Wilson School of Public and International Affairs at Princeton University, and Williams College.

John Q. Barrett

John Q. Barrett is a Professor of Law at St. John's University in New York City, where he teaches constitutional law, criminal procedure, and legal history. Professor Barrett is the Elizabeth S. Lenna Fellow at the Robert H. Jackson Center in Jamestown, New York. He has, in the past, been named a "Professor of the Year" by St. John's law students and has received a Faculty Outstanding Achievement Medal from the university. Professor Barrett is a graduate of Georgetown University (1983) and Harvard Law School (1986). Before joining the St. John's faculty, he was counselor during 1994 to 1995 to U.S. Department of Justice Inspector General

Michael R. Bromwich. From 1988 to 1993, Professor Barrett was Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh (Iran/Contra). From 1986 to 1988, Professor Barrett served as a law clerk to Judge A. Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit in Philadelphia.

Fatou Bensouda

Ms. Bensouda was elected Deputy Prosecutor of the International Criminal Court in September 2004 by the Assembly of States Parties and is in charge of the Prosecution Division of the Office of the Prosecutor. Before working in the Office of the Prosecutor, Ms. Bensouda was a Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda in Arusha, Tanzania. She was also the Senior Legal Advisor and the Head of the Legal Advisory Unit for the International Criminal Tribunal for Rwanda. Prior to joining the International Criminal Tribunal for Rwanda, Ms. Bensouda worked for a commercial bank in The Gambia. She also served as the Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General, and Legal Secretary of the Republic. Additionally, Ms. Bensouda was the Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia. She holds a Master's Degree in International Maritime Law and Law of the Sea and is the first international maritime law expert of The Gambia.

Serge Brammertz

Mr. Serge Brammertz is the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. He is from Eupen, Belgium. Mr. Brammertz holds a Law Degree from University of Louvain-la-Neuve, a degree in criminology from the University of Liege, and a Ph.D. in international law from the Albert Ludwig University in Freiburg, Germany. Prior to his appointment as Chief Prosecutor, Mr. Brammertz was the Federal Prosecutor for the kingdom of Belgium, and a prosecutor for the local court in Eupen Belgium. Mr. Brammertz has provided expert advice to the Council of Europe to help “[set] up a mechanism for evaluating and applying nationally international undertakings concerning the fight against organized crime.” Additionally Mr. Brammertz has served on the European Commissions’ Justice and Internal Affairs Committee and as an adviser for the International Organization for Migration, leading studies on cases of cross-border corruption and human trafficking in Central Europe and the Balkans.

H.W. William Caming

H.W. William Caming earned his Bachelor’s Degree in Arts from New York University, his Master’s Degree in Labor Law from New York University Law School, and his Doctorate from Harvard. He then joined the United States Air Force and spent twenty-seven months

in China and Berlin and returned home after the surrender of Japan. He was asked by Robert H. Jackson to be a prosecutor in the Nuremberg trials. Mr. Caming was assigned to case number 11, the *Ministries Case*. Mr. Caming was the Chief Prosecutor of the trial, which he described as the “longest and last of the Nuremberg trials . . . because it incorporated several trials into one.”

Andrew T. Cayley

Mr. Cayley earned his LL.B. and LL.M. from University College London. He worked in private practice following his graduation, before completing an Officer’s Course and working as a Legal Officer for the British Army. He then worked in the Office of the Prosecutor in the International Criminal Tribunal for the former Yugoslavia as Prosecuting Counsel and then Senior Prosecuting Counsel. He also worked as Senior Prosecuting Counsel at the International Criminal Court. Mr. Cayley worked as a defense attorney before the Special Court for Sierra Leone and the International Criminal Tribunal for the former Yugoslavia. In 2009 Mr. Cayley was appointed Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia.

David M. Crane

David M. Crane was the Chief Prosecutor of the Special Court for Sierra Leone from April 2002 until July 15, 2005. He was appointed to that position by the Secretary General of the United Nations, Kofi Annan, on April 19, 2002. Mr. Crane spent thirty years working for the United States federal government. Posts he has held include Director of the Office of Intelligence Review, Assistant General Counsel of the Defense Intelligence Agency, and the Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate Generals School. Mr. Crane has a Law Degree from Syracuse University College of Law and a M.A. in African Studies from Ohio University. For his service to humanity, Case Western Reserve University in Ohio awarded him an honorary Doctor of Laws degree in May 2008. Crane was appointed a Distinguished Professor of Practice at Syracuse University College of Law in the summer of 2006. He teaches international criminal law, international law, and national security law, as well as the law of armed conflict.

Benjamin B. Ferencz

Mr. Ferencz graduated from Harvard Law School in 1943, and soon after enlisted and served under General Patton in World War Two. He was transferred to the newly created War Crimes Branch of the Army to gather evidence of Nazi cruelty and criminal activity and to

apprehend the criminals. From this transfer onward, Mr. Ferencz's work has focused on world peace and other issues of international criminal justice. He addressed the Conference at the affirmation of the Rome Statute in 1998, asserting that "an international criminal court – the missing link in the world legal order – is within our grasp." He has since stayed involved in the ICC, contributing to the Preparatory Commission, and helping to define aggression. He has been a constant force to gain support for the ICC, and continues to work for his goal of replacing the "rule of force with the rule of law."

Richard J. Goldstone

Mr. Goldstone is from South Africa and received a B.A. and LL.B. from the University of the Witwatersrand. After he earned his degree he was an Advocate at the Johannesburg Bar. He eventually rose to be a Judge of the Appellate Division of the Supreme Court, and later, a Justice of the Constitutional Court of South Africa. In the early 1990s Mr. Goldstone served as Chairperson of the Goldstone Commission, or what was formally titled, the Commission of Inquiry Regarding Public Violence and Intimidation. After the Commission he became the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. Mr. Goldstone helped to draft the Declaration of Human Duties and Responsibilities for the Director General of UNESCO, or the Valencia Declaration. Mr. Goldstone is Chairperson

of the Bradlow Foundation, a charitable educational trust, and is the head of the board of the Human Rights Institute of South Africa. He has numerous honorary Doctorates from universities around the world, and was awarded the International Human Rights Award of the American Bar Association.

James C. Johnson

Mr. Johnson is the Chief of Prosecutions for the Special Court for Sierra Leone. He supervised four trial teams, prosecuting ten accused, and is currently directing ongoing investigations and supervising closure issues for the Prosecutions and Investigations Sections of the Office of the Prosecutor. Before assuming duties as Chief of Prosecutions, Mr. Johnson was a Senior Trial Attorney with the Special Court and was responsible for trying the former leaders of the Civil Defence Forces, the pro-government militia that fought in the decade-long conflict within Sierra Leone. Before joining the Special Court in January 2003, Mr. Johnson served for 20 years in the United States Army. Among his tours of duty in the military he served as the Legal Adviser, George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, and as an Assistant Professor of International and Operational Law, United States Army Judge Advocate General's School, Charlottesville, Virginia. He also served as a prosecutor and international/operational law adviser to both conventional and special operations units. His academic degrees include a B.S. (Business Administration) from

the University of Nebraska, a J.D. from the University of Nebraska, and an LL.M. from The Judge Advocate General's School.

Hon. Hans-Peter Kaul

Judge Kaul has served as an International Criminal Court Judge since March 2003 and was appointed Second Vice-President of the Court in March 2009. Before serving as a judge, he participated in the discussions and negotiation processes of the Rome Statute of the International Criminal Court as head of the German delegation. In 2002, Judge Kaul was appointed Ambassador and Commissioner of the Federal Foreign Office for the International Criminal Court. As Head of the Public International Law Division of the Federal Foreign Office, Judge Kaul was responsible, *inter alia*, for several cases involving Germany, which were before the International Court of Justice. Judge Kaul has written extensively on the International Criminal Court and other fields of public international law.

Bongani Majola

Bongani Majola is the Deputy Chief Prosecutor of the International Criminal Tribunal for Rwanda. Before joining the ICTR, Mr. Majola was the Executive Director of the Legal Resources Center, a non-profit

public interest law firm which represents the poor and uses litigation to strengthen constitutional rights through the decisions of the Constitutional Court of South Africa. Mr. Majola was also Professor and Dean of the Faculty of Law at the University of the North in the Limpopo province in South Africa. During part of that time, he was a member of the Committee of Experts advising members of the Constitutional Assembly which drew up the current South African Constitution. Prior to entering academia, Mr. Majola practiced law as a presiding judicial officer (magistrate) in the lower courts and spent years prosecuting in those courts. He also has experience as a court interpreter. Mr. Majola holds an LL.M. from Harvard University, in addition to a Bachelor of Laws and B. Iuris from the University of Zululand in South Africa. He was a visiting professor at the School of Advance International Studies at Johns Hopkins University in 1990 and a research fellow at Yale University in 1993.

Valerie Oosterveld

Professor Oosterveld is an Assistant Professor and Director of the International Internship Program at the University of Western Ontario. She teaches Public International Law, International Human Rights Law, and International Criminal Law. Her research and writing focuses on gender issues within international criminal justice. Professor Oosterveld earned her LL.B. from the University of Toronto and her LL.M. and S.J.D. from Columbia Law School. Before joining the faculty at the

University of Western Ontario, Professor Oosterveld worked in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade, giving advice on international criminal accountability for crimes of war, crimes against humanity, and genocide. She advised for the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, and other transnational justice mechanisms like truth and reconciliation commissions. Professor Oosterveld was a member of the Canadian delegation to the International Criminal Court negotiations and proceeding Assembly of States Parties. She also served on the Canadian delegation to the Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda.

William Pace

Mr. William R. Pace has served as the Convenor of the Coalition for an International Criminal Court since its founding in 1995. He is the Executive Director of the World Federalist Movement-Institute for Global Policy (WFM-IGP) and is a Co-Founder and steering committee member of the International Coalition for the Responsibility to Protect. He has been engaged in international justice, rule of law, environmental law, and human rights for the past 30 years. He previously served as the Secretary-General of the Hague Appeal for Peace, the Director of the Center for the Development of International Law, and the Director of Section Relations of the Concerts for Human Rights Foundation at

Amnesty International. He is the President of the Board of the Center for United Nations Reform Education and an Advisory Board member of the One Earth Foundation, as well as the Co-Founder of the NGO Steering Committee for the United Nations Commission on Sustainable Development and the NGO Working Group on the United Nations Security Council. He is the recipient of the William J. Butler Human Rights Medal from the Urban Morgan Institute for Human Rights and currently serves as an Ashoka Foundation Fellow. Mr. Pace has authored numerous articles and reports on international justice, international affairs and U.N. issues, multilateral treaty processes, and civil society participation in international decision-making.

Robert Petit

Mr. Petit was a Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia until September 2009. He worked with Cambodian Chea Leang from 2006 through 2009 prosecuting violators of international criminal law in Cambodia, specifically Khmer Rouge leaders, for their actions between 1975 and 1979. Petit also served as a Crown Prosecutor in Montreal for eight years, and as a lawyer in the office of the Prosecutor of the International Criminal Tribunal for Rwanda. Between 1999 and 2004, Mr. Petit was a legal adviser for the United Nations Interim Administration Mission in Kosovo, a Prosecutor for the Serious Crimes Unit of

the United Nations Mission of Support to East Timor, and a Prosecutor for Special Court for Sierra Leone.

Ambassador Stephen Rapp

Mr. Rapp started as Ambassador-at-Large for War Crimes Issues in September 2009. Before this appointment Mr. Rapp was a Prosecutor for the Special Court for Sierra Leone, leading prosecutions for former Liberian President Charles Taylor and others. During his time on the Court, the first convictions for sexual slavery and forced marriage as crimes against humanity were achieved. Prior to working for the Special Court for Sierra Leone, Mr. Rapp worked for the International Criminal Tribunal for Rwanda as both Senior Trial Attorney and Chief of Prosecutions. His work helped to achieve the first conviction of leaders of mass media for their efforts that incited genocide. Mr. Rapp also worked as a United States Attorney in the Northern District of Iowa, worked in private practice, and was a member of the Iowa State Legislature. Mr. Rapp received his B.A. from Harvard, and received his J.D. from Drake University.

Leila Nadya Sadat

Professor Sadat is the Henry H. Oberschelp Professor of Law and the Director of the Whitney R. Harris World Law Institute at Washington University School of Law. She is also the Director of the Crimes Against Humanity Initiative, which seeks to study and address the punishment and prevention of these crimes. Professor Sadat served as the Distinguished Fulbright Chair at the University of Cergy-Pontoise in Paris, France in the spring of 2011. In addition to serving as a delegate to the United Nations Preparatory Committee and the 1998 Diplomatic Conference in Rome, she represented the government of Timor-Leste at the eighth session of the Assembly of States Parties, and served as a delegate of the American Branch of the International Law Association at the 2010 ICC Review Conference in Kampala, Uganda.

Professor Sadat is currently the Vice President of the American Branch of the International Law Association and the International Association of Penal Law, and is a member of the American Society of International Law. Professor Sadat earned her B.A. from Douglass College, her J.D. from Tulane Law School, her LL.M. from Columbia University School of Law and a degree from the University of Paris I – Sorbonne (diplôme d'études approfondies).

William Schabas

Professor Schabas currently teaches at the National University of Ireland in Galway, and directs the Irish Centre for Human Rights within the University. He is also a Global Legal Scholar at the University of Warwick School of Law. Professor Schabas earned his B.A. and M.A. in History from the University of Toronto, and his LL.B., LL.M., and LL.D. from the University of Montreal, Canada. He has published more than 250 articles in academic journals, primarily in the field of international human rights and criminal law. Professor Schabas is the Editor-in-Chief of the quarterly journal of the International Society for the Reform of Criminal Law, *Criminal Law Forum*. He is the President of the Irish branch of the International Law Association. He has also served as a delegate of the International Centre for Criminal Law Reform and Criminal Justice Policy to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Professor Schabas served on the Sierra Leone Truth and Reconciliation Commission in 2002.

Michael P. Scharf

Professor Scharf is the John Deaver Drinko- Baker & Hostetler Professor of Law at Case Western Reserve University School of Law, where he is also the Director of the Frederick K. Cox International Law Center,

the U.S. Director of the Canada-U.S. Law Institute, and the Director of the Henry T. King War Crimes Research Office. He teaches international law, international criminal law, the law of international organizations and the war crimes research lab. Professor Scharf co-founded and continues to direct the Non Governmental Organization Public International Law and Policy Group. The group was nominated for the Nobel Peace Prize by the Prosecutor of an International Criminal Tribunal and six governments for the work the group has done to help the prosecution of several major war criminals. Professor Scharf worked as Attorney Adviser for Law Enforcement and Intelligence, Attorney-Adviser for U.N. Affairs, and delegate to the U.N. Human Rights Commission in the Office of the Legal Adviser of the U.S. Department of State. Professor Scharf earned his J.D. from Duke University School of Law. While on sabbatical in 2008, Mr. Scharf served as a Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal.

Ambassador David J. Scheffer

Ambassador David Scheffer is currently the Mayer Brown/Robert A. Helman Professor of Law at Northwestern University Law School and is the Director of the Center for International Human Rights. Ambassador Scheffer graduated with a B.A. from the Honour School of Jurisprudence, Oxford University, and an LL.M. with a concentration in International Human Rights from Georgetown University. Prior to teaching at

Northwestern Law, Ambassador Scheffer served as the U.S. Ambassador-at-Large for War Crimes Issues and subsequently as the Senior Adviser and Counsel to the U.S. Permanent Representative to the United Nations. As Ambassador, he participated in the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in Cambodia. Prior to these appointments, Ambassador Scheffer worked at the international law firm Couder Brothers, went on to work as a fellow for multiple foreign affairs think tanks, and eventually served as a senior consultant to the U.S. House of Representatives Committee on Foreign Affairs. Ambassador Scheffer has also written numerous scholarly articles regarding international law and human rights.

David Sullivan

Mr. Sullivan earned his M.A. in International Relations from Johns Hopkins University Paul H. Nitze School of Advanced International Studies, concentrating his studies on conflict management and international economics. Mr. Sullivan graduated *summa cum laude* from Amherst College. Currently, Mr. Sullivan is the Policy Manager with Enough!, the project to end genocide and crimes against humanity. He served at the International Foundation for Electoral Systems as a Program Manager, and worked on the 2008 Pakistan elections. He has previously worked with relief and development projects across Africa for the International

Rescue Committee. He also served as Grants Manager for the International Rescue Committee in Liberia.

John Washburn

Mr. Washburn is a graduate of Harvard College and Harvard Law School and is currently the Convener of the American Non-Governmental Organizations Coalition for the ICC or (AMICC), Co-Chair of the Washington Working Group on the International Criminal Court (CICC), and a past President of the Unitarian Universalist United Nations Office. Within his role with the CICC, Mr. Washburn attended most of the United Nations Negotiations for the International Criminal Court since 1994, including the 1998 Diplomatic Conference in Rome. Mr. Washburn was a member of the United States Foreign Service and his final assignment in the service was as a member of the State Department's Policy Planning Staff responsible for international organizations and multilateral issues. He also worked in the Bureau of International Organization Affairs within the Department of State on many aspects of international organizations and many multilateral issues. Mr. Washburn was often sent to sessions of the United Nations General Assembly, Economic and Social Council, Economic Commission for Asia and the Pacific, and Committee for Program Coordination. He received a special commendation from the Secretary of State for his service and has also been awarded the State Department's Meritorious Honor Award and Superior Honor Award.

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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.

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