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Proceedings of the Fifth International Humanitarian Law Dialogs, August 28-30, 2011, Chautauqua Institution

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August 28-30, 2011, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane



American Society
of International Law

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

*August 28 - 30, 2011
at Chautauqua Institution*

Edited by

Elizabeth Andersen

Executive Director
American Society of International Law

and

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*Dedicated to
Benjamin B. Ferencz and H.W. William Caming,
2011 Recipients of the Joshua Heintz Award
for Humanitarian Achievement*

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



Left to right: James Arguin, Daryl Mundis, Stephen Rapp, Fatou Bensouda, Andrew Cayley, David Crane

Introduction

Introduction

David M. Crane*

*“...the proceedings taken have been so **carefully premeditated and systematically** carried out, with a ruthless efficiency previously unknown among the Turks.”¹*

These chilling words were a clarion call to the world warning mankind that a crime which harmed civilization itself was being perpetrated against Christian Armenians by the Turks—a crime which would later become known as the Armenian massacre/genocide. Little results came from these words or the resolution passed by the British parliament condemning Turkish actions. In those days, there was little interest or law to deal with such atrocity. That interest would not resurface until the International Military Tribunal at Nuremberg, where the various defendants were charged with “crimes against civilization,” which we now call, “crimes against humanity.”

Of all of the international crimes, this crime reflects the horror that governments can cause to their own citizens. Over one hundred million died at the hands of their own governments in the bloody twentieth century.

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

¹ Lord Bryce, October 1913 before the House of Commons during questions regarding the reported deportation and mass killings of Christian Armenians in the desert of eastern Turkey.

The twenty-first century augers poorly for future atrocity, or does it? Today we have the ability to hold accountable governments who systematically, or in a widespread manner, intentionally target civilians. Heads of state have been indicted, tried, and convicted for such crimes—an idea that was almost unthinkable merely twenty years ago. This international crime, however, faces additional challenges somewhat unique to the twenty-first century, such as the increasing frequency of non-state actors committing widespread or systematic attacks on civilians. Additionally, we grapple with the question of whether there is a need for a separate convention on crimes against humanity.

With this by way of background, the Chief Prosecutors of the world's international courts and tribunals met once again at Chautauqua for the fifth annual International Humanitarian Law Dialogs, held from August 28-30, 2011. The focus of these historic Dialogs was crimes against humanity. Distinguished academics and practitioners from around the world came to reflect on this horrific crime on the banks of Lake Chautauqua. As in the past, the discussions, porch sessions, commentary, and lectures captured the past, the present, and the future of this international crime and its evolution.

Upon review of the *Proceedings of the Fifth International Humanitarian Law Dialogs* which follows, one will be struck by how far we have come in a century. Governments are now in large measure being held accountable for what they do to their own citizens, and crimes against humanity is the tool by which this is now

done. Frankly, without this crime, it would be difficult indeed to prosecute governments for all of their atrocities, as the other categories of atrocity crime—war crimes and genocide—are only available under certain legal circumstances. The jurisprudence that has evolved related to crimes against humanity makes this international crime the “work horse” of accountability as we face down impunity in the twenty-first century.

Despite the challenges of traveling to the Dialogs in 2011 due to a hurricane, a vast majority of the scheduled participants were able to attend. Their important contributions follow. Additionally, one will find the Fifth Chautauqua Declaration in the Appendices. It reflects the considered judgment of the Chief Prosecutors, past and present, on the ways in which crimes against humanity serve as an important tool for practitioners in seeking justice for victims of atrocity around the world. The Declaration points out, however, that there are still challenges ahead for modern international criminal law, and it must continue to evolve.

Of course, these annual International Humanitarian Law Dialogs could not happen without the support of our sponsors, many of whom have been with us from the very beginning. The editors and the executive committee of the Dialogs wish to thank the Gebbie Foundation, the Jefferson Educational Society, IntLawGrrls, Chautauqua County, Chautauqua Institution, the American Society of International Law, Impunity Watch of Syracuse University College of Law, the Enough Project, the Planethood Foundation, the Frederick K. Cox International Law Center of Case Western Reserve

University School of Law, along with the Whitney R. Harris World Law Institute of Washington University in St. Louis School of Law, the Johnson Foundation, Titan Corporation, and the Scandinavian Studies Program. Additionally we recognize the quiet and consistent professionalism of our managing editor, Shannon Powers.

We also want to recognize the recipients of the second annual Joshua Heintz Award for Humanitarian Achievement, Ben Ferencz and H.W. William Caming, colleagues who prosecuted Nazi defendants at Nuremberg. We acknowledge and thank Joshua Heintz for his important support of the Dialogs and for advancing the concepts of international humanitarian law.

Special recognition goes to Ms. Carol Drake and the Robert H. Jackson Center team for making the Dialogs an annual reality and huge success. Without the Jackson Center, the Dialogs would not be nearly as special.

Lectures

Politics and Prosecutions: From Katherine Fite to Fatou Bensouda

Diane Marie Amann*

“Certainly mankind has been befouled with a stain that won’t be removed in a week or a month.”¹ So wrote

* Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law; Vice President of the American Society of International Law, 2009-2011; founder, *IntLawGrrls: Voices on International Law, Policy, Practice*. This essay, which reflects developments through July 2012, revises and updates the First Annual Katherine B. Fite Lecture that I presented on August 29, 2011, at the Fifth Annual International Humanitarian Law Dialogs in Chautauqua, New York. My thanks to David Crane and the folks at the Robert H. Jackson Center, without whom these Dialogs and this lecture would not be possible, to Georgia Law student Sarah Hassan for research assistance, and to Georgia Law librarian Thomas J. Striepe for archival assistance. Special thanks to my colleague, John Q. Barrett, who set the stage for this lecture series with his own 2009 lecture, which introduced Chautauquans to the woman here honored and which has been published as John Q. Barrett, *Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945* [hereinafter Barrett, Fite], in PROCEEDINGS OF THE THIRD INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-30 (Elizabeth Andersen & David M. Crane eds., 2010) [hereinafter 3D IHL PROCEEDINGS]. This essay has benefited from John’s comments. Nevertheless, by way of caveat, it must be stressed that this essay—part of a larger and ongoing project that examines the roles women played at Nuremberg—is based largely on archival sources, many of which admit of multiple meanings, and some of which are contradictory. Every effort has been made to present facts accurately and to draw inferences fairly.

¹ Letter from Katherine Fite to Mr. and Mrs. Emerson Fite (Oct. 28, 1945), *available in* the Truman Library digital archives list at

Nuremberg lawyer Katherine Fite while preparing for the post-World War II trial of nearly two dozen Nazi leaders. In that single sentence, Fite not only remarked that the memory of atrocity may shred human ties for generations, but also admitted that prosecution alone cannot bind war-torn societies. Essential, her letters made clear, is politics—robust political support for social recovery as well as criminal accountability. Fite’s insights resonate more than six decades later as lawyer Fatou Bensouda begins her term as Chief Prosecutor of the International Criminal Court (ICC) on July 1, 2012.² Like the Nuremberg Tribunal before it, the ICC must work within a political context in order to achieve a modicum of criminal justice.

http://www.trumanlibrary.org/sitesearch.htm?cx=008710743933556765127%3Ag3_3qxxfiqg&cof=FORID%3A10&ie=UTF-8&q=letter+from+katherine+fite&sa.x=0&sa.y=0&siteurl=www.trumanlibrary.org%2Fwhistlestop%2Fstudy_collections%2Fnuremberg%2Fdocuments%2Findex.php%3Fdocumentdate%3D1945-07-25%26documentid%3D20-31%26studycollectionid%3D%26pagenumber%3D1 [hereinafter Fite letters list]. This essay hereinafter will denote Fite’s correspondence to her parents solely by the letter’s date; for example, the above will appear as “10/28/45 letter.” All quotes repeat spelling and punctuation as in the original.

² See Fatou Bensouda, *A Global Mandate to End Impunity & Effect Justice*, INTLAWGRRLS (Dec. 14, 2011), <http://www.intlawgrrls.com/2011/12/global-mandate-to-end-impunity-effect.html> [hereinafter Bensouda, *Mandate*] (reprinting her speech to the Assembly of States Parties upon her December 12, 2011, election).

It is my great honor to explore the interrelation of politics and prosecutions by means of this First Annual Katherine B. Fite Lecture. To establish a frame for future speakers, this lecture first introduces IntLawGrrls, which is responsible for this session at the International Humanitarian Law Dialogs. It then outlines the career that Fite, the lecture's namesake, built for herself. Drawing from Fite's experiences, the lecture concludes by examining how international politics affect Nuremberg's contemporary counterpart, the International Criminal Court.

IntLawGrrls

The blog, *IntLawGrrls: Voices on International Law, Policy, Practice*, has welcomed more than 1.1 million page viewers since its founding in 2007. By the kind invitation of Professor David Crane, IntLawGrrls joined the Dialogs as a co-sponsor of the 2009 Dialogs, "Honoring Women in International Criminal Law, From Nuremberg to the International Criminal Court."³ Among the speakers was then-Deputy Prosecutor Fatou

³ See Diane Marie Amann, *Go On! IntLawGrrls Cosponsors 3d IHL Dialogs, on 'Women in International Criminal Law,'* INTLAWGRRLS (July 16, 2009), <http://www.intlawgrrls.com/2009/07/go-on-intlawgrrls-cosponsors-3d-ihl.html>. Presentations at this fall 2009 meeting were published at 3D IHL PROCEEDINGS, *supra* note *. All IntLawGrrls' posts about the Dialogs may be found at <http://www.intlawgrrls.com/search/label/IHL%20Dialogs>.

Bensouda,⁴ who would contribute to IntLawGrrls two years later.⁵ Many IntLawGrrls contributors have taken part in the Dialogs: Kelly Askin, Laurie Blank, Rebecca Richman Cohen, Neha Jain, Marilyn J. Kaman, Valerie Oosterveld, Lucy Reed, Susana SáCouto, Leila Nadya Sadat, Jennifer Trahan, Beth Van Schaack, and Pamela Yates.⁶

⁴ See *Gender Crimes at the International Level*, in 3D IHL PROCEEDINGS, *supra* note *, at 191-227 [hereinafter *Gender Crimes*] (containing panel remarks by Bensouda). For her other Dialogs presentations, see Fatou Bensouda, *The Genocide Convention: A Sixtieth Anniversary Celebration*, in PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS 69-75 (Elizabeth Andersen & David M. Crane eds., 2009) [hereinafter 2D IHL PROCEEDINGS]; *Update from the Current Prosecutors*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL HUMANITARIAN LAW DIALOGS 1195-235 (Elizabeth Andersen & David M. Crane eds., 2011) [hereinafter 4TH IHL PROCEEDINGS] (including remarks by Bensouda at pages 227-235).

⁵ See Bensouda, *Mandate*, *supra* note 2; Diane Marie Amann, *Guest Blogger: Fatou Bensouda*, INTLAWGRRLS (Dec. 14, 2011), <http://www.intlawgrrls.com/2011/12/guest-blogger-fatou-bensouda.html>.

⁶ *Proceedings* contributions include: Marilyn J. Kaman, *Reflections on Women in International Criminal Law*, in 3D IHL PROCEEDINGS, *supra* note *, at 103-14; Valerie Oosterveld, *International Criminal Law Year in Review: 2009-2010*, in 4TH IHL PROCEEDINGS, *supra* note 4, at 111-49; Lucy Reed, *International Claims Tribunals: What International Criminal Prosecutors Might Need to Know*, in 2D IHL PROCEEDINGS, *supra* note 4, at 207-27; Lucy Reed, *Introduction to What Do Women Want From War Crimes Tribunals?*, in 3D IHL PROCEEDINGS, *supra* note *, at 115-20; Leila Sadat, *Transnational Judicial Dialogue and the Rwandan Genocide: Aspects of*

Another IntLawGrrls contributor is past Dialogs speaker Patricia M. Wald, who served as a judge on the International Criminal Tribunal for the former Yugoslavia.⁷ Wald's move to The Hague in 1999 capped a long career stateside, where she was the first woman Chief Judge of a U.S. Court of Appeals, in the District of Columbia Circuit. After returning to Washington in 2001, Wald continued to promote international criminal justice; for example, she co-chaired the American Society of International Law Task Force on U.S. Policy toward the International Criminal Court.⁸ In 2010, IntLawGrrls and ASIL held a roundtable which

Antagonism and Complementarity, in 2D IHL PROCEEDINGS, *supra* note 4, at 123-69; Leila Nadya Sadat, *Terrorism and the Rule of Law*, in PROCEEDINGS OF THE FIRST INTERNATIONAL HUMANITARIAN LAW DIALOGS 119-54 (Elizabeth Andersen & David M. Crane eds., 2008); Leila Sadat, *Honoring Whitney R. Harris and His Legacy: Never Retreat*, in 4TH IHL PROCEEDINGS, *supra* note 4, at 9-16. *See also Gender Crimes*, *supra* note 4 (panel moderated by Susana SáCouto); *Roundtable With Current Female Trial Attorneys*, in 3D IHL PROCEEDINGS, *supra* note *, at 229-65 (panel moderated by Kelly Askin). Other IntLawGrrls named in the text spoke at or attended the Dialogs, but did not publish remarks.

⁷ Patricia M. Wald, *What Do Women Want From War Crimes Tribunals?* in 3D IHL DIALOGS, *supra* note *, at 121-39. Wald published a series at IntLawGrrls. *See* Diane Marie Amann, *Guest Blogger: Patricia M. Wald*, INTLAWGRRLS (Oct. 5, 2009), <http://www.intlawgrrls.com/2009/10/guest-blogger-patricia-m-wald.html>.

⁸ *See* U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT: REPORT OF AN INDEPENDENT TASK FORCE (Am. Soc'y Int'l L., 2009), *available at*

produced “Women and International Criminal Law,” a special issue of the *International Criminal Law Review* dedicated to Judge Wald.⁹

A theme of that special issue was women as creators of international criminal law. The women featured included many of the female prosecutors at the Nuremberg trials, as well as Cecilia Goetz and Hannah Arendt, a philosopher who influenced the development of international criminal law.¹⁰ This lecture is named after yet another international criminal law creator, Katherine Fite.

<http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>. See also Independent Panel on ICC Judicial Elections, *Report on International Criminal Court Judicial Nominations 2011*, 1 (Oct. 26, 2011) (listing Wald as Panel’s Vice-Chair), available at <http://www.iccindependentpanel.org/document/independent-panel-report-international-criminal-court-judicial-nominations-2011>.

⁹ Special Issue: Women and International Criminal Law Dedicated to the Honourable Patricia M. Wald, 11 INT’L CRIM. L. REV. 365-662 (2011). Contributions included Ruth Bader Ginsburg, *Remarks in Honour of Patricia M. Wald*, 11 INT’L CRIM. L. REV. 371 (2011); Martha Minow, *Taking up the Challenge of Gender and International Criminal Justice: In Honour of Judge Patricia Wald*, 11 INT’L CRIM. L. REV. 365 (2011); Patricia M. Wald, *Women on International Courts: Some Lessons Learned*, 11 INT’L CRIM. L. REV. 401 (2011).

¹⁰ Diane Marie Amann, *Cecelia Goetz, Woman at Nuremberg*, 11 INT’L CRIM. L. REV. 607 (2011) [hereinafter Amann, *Goetz*]; David Luban, *Hannah Arendt as a Theorist of International Criminal Law*, 11 INT’L CRIM. L. REV. 621 (2011).

Katherine Fite, Woman at Nuremberg

Boston-born Katherine Fite was a Vassar woman who earned her law degree from Yale University in 1930.¹¹ After graduation, she served as an attorney on the U.S.-Mexico Claims Commission for a couple of years. In 1937, Fite began practicing at what would be her work home for the next twenty-five years—the Office of the Legal Adviser of the U.S. Department of State, known simply as “L.” Her boss throughout the war years was Legal Adviser Green Hackworth, the editor of a major international law digest who would later become the first American judge and President of the International Court of Justice.¹²

¹¹ See Harry S. Truman Library & Museum, *Katherine Fite Lincoln Papers*, <http://www.trumanlibrary.org/hstpaper/lincoln.htm> [hereinafter Fite papers]; see also Barrett, *Fite*, *supra* note *, at 14. In 1928, Fite won a Van Loon Fellowship to enter the law school. *Eleven Fellowships Bestowed by Vassar*, N.Y. TIMES, Feb. 29, 1928, at 31. Judge Wald, another creator of international criminal law discussed *supra* text accompanying notes 7-9, would enter twenty years later. Kelly Askin, *Tribute to Patricia Wald*, 11 INT’L CRIM. L. REV. 375, 375 (2011). Yale Law first admitted women in 1918. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 84 (2001). See also Barrett, *Fite*, *supra* note *, at 15-16.

¹² See United Nations, *LA COUR INTERNATIONALE DE JUSTICE / THE INTERNATIONAL COURT OF JUSTICE* 249, 255 (2006); Green Hackworth, *DIGEST OF INTERNATIONAL LAW* (8 vols. 1940-44); *Green H. Hackworth Dies; Former World Court Head*, N.Y. Times, June 26, 1973, at 48.

In July 1945, the State Department assigned Fite to work with Justice Robert H. Jackson, who was on leave from the Supreme Court and serving as the Chief U.S. Prosecutor at Nuremberg.¹³

This photograph, taken eleven weeks after Germany surrendered, is emblematic of Fite's significance to the Nuremberg era. It depicts the arrival of the first Allied lawyers at Nuremberg to tour the Palace of Justice and its surroundings. Fite is easy to spot in the photo: hers is the only skirt.¹⁴



¹³ See *Woman Joins Staff of War Crimes Group*, N.Y. TIMES, July 11, 1945, at 4. On Jackson's work at Nuremberg, see, e.g., Barrett, *Fite*, *supra* note *, at 11-13; for a recent account discussing that work in relation to Jackson's work on the Supreme Court, see generally NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010).

¹⁴ See Barrett, *Fite*, *supra* note *, at 18 (reproducing photograph and observing that it "shows nineteen people wearing pants and one wearing a skirt—Katherine B. Fite"); see also 7/23/45 letter (describing trip).

Days later, Fite accompanied Jackson to the Potsdam Conference and then into central Berlin. In one of her many chatty letters home, Fite wrote of rummaging in what had been, not so long before, the office of the Nazi Führer, Adolf Hitler. They found a swastika-embossed cross hanging from a grosgrain ribbon, and in a mock ceremony, Jackson presented this “Cross of Honor of the German Mother” to Fite.¹⁵ Back in England, Jackson and Fite met with Cambridge jurist Hersch Lauterpacht.¹⁶ After another of their pre-trial trips—this one to the Dachau concentration camp where more than 40,000 persons perished—Fite commented, “It is really impossible to believe that the neighborhood didn’t know about it.”¹⁷

¹⁵ 7/27/45 letter; *see* Medal, Cross of Honor of the German Mother, used during World War II and obtained by Katherine Fite, July 25, 1945, http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-07-25&documentid=20-32&studycollectionid=&pagenumber=1.

¹⁶ 8/5/45 & 8/12/45 letters. *Cf.* WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 51, 53 (2012) (stating that in a late July 1945 meeting with Jackson in London, Lauterpacht proposed the term “crimes against humanity” be used to describe certain offenses made punishable by the Charter of the International Military Tribunal at Nuremberg).

¹⁷ 9/17/45 letter. *See Introduction*, KZ-GEDENKSTÄTTE DACHAU, <http://www.kz-gedenkstaette-dachau.de/index-e.html> (stating, at Dachau Memorial website, that “[i]n the twelve years of its existence over 200,000 persons from all over Europe were imprisoned here and in the numerous subsid[i]ary camps, 41,500 were murdered”).

Fite spent six months as an assimilated officer. She had the rank of Major. But on receipt of a letter calling her “Major Fite,” she wrote her parents “to warn you never to address me as Major,” as “the army despises assimilated rank.”¹⁸ She enjoyed ration privileges, and a card in the Truman Library archives indicates that she made full use of the opportunity to purchase cigarettes, toothpaste, and other essentials.¹⁹ Luxuries, however, were hard to come by. Fite worried that her clothes were “shabby,” and asked her parents for stockings and curlers.²⁰ “Altogether hair is a problem,” she reported.²¹ One letter began in an urgent tone: “Please send me immediately via APO 403, four bath towels and four hand towels. Not necessarily in good tip-top condition, but at least absorbent.”²² Hot water was a hot commodity.

¹⁸ 11/20/45 letter.

¹⁹ See Army Ration card issued to Katherine Fite, July 16, 1945, http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-07-16&documentid=20-28&studycollectionid=&pagenumber=1.

²⁰ 8/19/45 letter; see 8/12/45, 11/11/45, 11/19/45, and 12/9/45 letters.

²¹ 11/11/45 letter.

²² 9/10/45 letter.

Havoc lay all about her. In London there was “still devastation on a large scale.”²³ Nuremberg was “a shambles” and Frankfurt “a mass of destruction”; destruction in Berlin was “staggering and unreal,” while Potsdam stank “like a charnel house.”²⁴ Within weeks Fite wrote, “I’m sick to death of ruins.”²⁵

Fite expressed little sympathy for vanquished enemies. “Somehow I hated to look at the Germans—some looked at you boldly and curiously,—others looked very stupid and sullen,” she wrote after her first visit to Nuremberg.²⁶ Of the news from Hiroshima and Nagasaki, she mused: “The atomic bomb is something awful to contemplate. I’m torn between wishing we hadn’t been the ones to launch it and being so

²³ 8/19/45 letter.

²⁴ 7/23/45 & 7/27/45 letters.

²⁵ 8/5/45 letter.

²⁶ 7/23/45 letter. In the same letter, Fite reported no qualms about displacing Germans who owned what became her billet: “After all we are military occupants.” *See also* 8/5/45 letter (“The German countryside is lovely, and they should have stuck to it.”); 9/17/45 letter (stating, after visit to Dachau, that “all” Germans had “a pinched, unpleasant look”); 10/8/45 letter (Germans in Bayreuth were “a hard, evil looking lot”). In contrast, Londoners she encountered were “invariably friendly and courteous.” 8/19/45 letter.

profoundly thankful it has ended the war. I suppose it's no worse to kill civilians one way than another."²⁷

Katherine Fite was a hard-working, well-educated, upper-crust woman who cared very much about the opinion of her father, a Vassar professor of political science.²⁸ She was forty years old and single.²⁹ Her letters suggest that she was lonely. In an apparent reference to lower-ranking staffers, she wrote: "The girls have a sort of dormitory in an apartment house which I have a horror of—and anyway I find only one or two of them companionable."³⁰ Fite relished talks with the few women like her, such as Aline Chalufour of France, who would help prosecute a war crimes case in the British

²⁷ 8/12/45 letter.

²⁸ 8/12/45 letter (asking in postscript what her father thought of the Nuremberg Charter); *see also* 7/23/45 letter.

²⁹ Fite would marry Francis F. Lincoln, a State Department economist, a decade later. *Katherine Fite Wed: Bride of Francis F. Lincoln—Both in State Department*, N.Y. TIMES, Feb. 1, 1957, at 16. She retired in 1962 and died in 1989, in Massachusetts. Fite papers, *supra* note 11.

³⁰ 9/23/45 letter; *see* 10/21/45 letter (writing that "the circle of socially, how shall I say, mixable women" was "very restricted"). *Cf.* Barrett, *Fite*, *supra* note *, at 21 (writing that Fite initially stayed at the Grand Hotel, and so "was at least spared staying in the adjacent building, known informally as 'Girls' Town,' where secretaries, stenographers and other women lived in quarters where men were at least theoretically not permitted").

sector.³¹ Other women did practice law at Nuremberg, but Fite had left by the time they arrived. Thus, Fite probably never met Cecelia Goetz, who would become the only woman to deliver an opening statement at the trials, nor other Nuremberg Prosecutors, like Sadie Arbuthnot, Mary Kaufman, Belle Mayer, and Dorothea Minskoff. Nor would Fite likely have met Elisabeth Gombel, the only female lead defense counsel, or other defense attorneys, such as Erna Kroen and Agnes Nath-Schrieber.³²

Artifacts suggest that Fite struggled to maintain her status as a professional, as an attorney.³³ Her Soviet-

³¹ See 10/14/45 letter (writing that Chalufour was “really very intelligent and congenial—and I lack congenial feminine companionship”). See also Diane Marie Amann, *Portraits of Women at Nuremberg*, in 3D IHL PROCEEDINGS, *supra* note *, at 31, 40 & n.26 (describing Chalufour).

³² On the women named, see generally Amann, *Goetz*, *supra* note 10; Amann, *Portraits*, *supra* note 31, at 31-54; “Women at Nuremberg” series, INTLAWGRRLS, <http://www.intlawgrrls.com/search/label/Women%20at%20Nuremberg>. See also KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 34 (2011) (naming women prosecutors at Nuremberg).

³³ Cf. Barrett, *Fite*, *supra* note *, at 26-28 (quoting archival materials other than those discussed in this essay to make observations about how Fite’s sex might have played into her experience at Nuremberg).



Photo courtesy of the Harry S. Truman Library Digital Archives

issued pass to the Potsdam Conference read: “Miss Katherine Fite, Secretary.”³⁴

In one photo, a balding U.S. Army officer held the hand that a younger, taffeta-clad woman, seated to his right, had slipped into the crook of his elbow; to the officer’s left sat an evening-gowned Fite, looking as if

she wished to be somewhere other than on that couch.³⁵ Fite’s letters indicate that she was far more comfortable in the thick of the work.

³⁴ See Pass into Potsdam Issued to Katherine Fite, July 25, 1945, available at http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-07-25&documentid=20-31&studycollectionid=&pagenumber=1. In fact, she had her own secretary. See Letter from Katherine Fite to Kitty Gilligan (June 16, 1945), Fite letters list, *supra* note 1 (indicating at bottom, in stenographic style of the period, that Fite had dictated the letter to “fje”).

³⁵ See photo captioned “General Betts, Katherine Fite Lincoln, and others in Nuremberg, Germany,” <http://www.trumanlibrary.org/photographs/displayimage.php?pointer=11296&rr=&people=Lincoln%2C+Katherine+F.+%28Katherine+Fite%29%2C+1905-1989&listid=1>. The Truman Library thus has identified the balding officer as General Edward C. Betts, the Army’s Judge Advocate in Europe—a man with whom Fite told her parents she had a prickly planning session early on. See 7/23/45 letter (“We went over a bit of business and I felt as tho I were in very high quarters, but spoke up

Though assigned to the Office of the U.S. Chief of Counsel for the Prosecution, Fite was not herself a line prosecutor. Earlier that year, she had been at the Allies' summit at Yalta.³⁶ At Nuremberg, she helped interrogate defendants von Ribbentrop, Keitel, and Frick.³⁷ Often she was "too busy" to attend the courtroom proceedings, which she found "dull."³⁸

Fite complained that the Nuremberg Charter contained an error, that the indictment was rushed. The start of the trial was rushed too, in her view, for political

nevertheless."). In correspondence with this author, however, John Q. Barrett, who as Jackson's biographer is quite familiar with the personnel at Nuremberg, has identified the officer as Colonel Robert J. Gill, Executive Officer at the Office of Chief of Counsel (and the woman at left as secretary Mary Burns). The precise identity of the officer does not alter a viewer's reading of the photograph—a reading that likely will differ among viewers.

³⁶ *See Personalities Who are Mentioned in Record of the Big Three Conference*, N.Y. TIMES, Mar. 17, 1955, at 49.

³⁷ 9/17/45, 10/1/45, 10/14/45, 11/19/45, & 11/20/45 letters. All three men would be convicted and hanged in October 1946. *See* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 607-10 (1992).

³⁸ 11/19/45, 11/20/45, 11/27/45, & 12/9/45 letters. *See also* Barrett, *Fite*, *supra* note *, at 17-18 (including in Fite's contributions work at London drafting the Nuremberg Charter and framing "arguments, based on the Kellogg-Briand Treaty, which answered the objection that it would be retroactive criminalization to prosecute German defendants for waging aggressive war").

reasons.³⁹ Such reasons would have registered with her: she was, by her own description, a “political observer.”⁴⁰ What she observed did not always please her. “I think the Justice has most unnecessarily given offense to the other countries,” she wrote after Jackson, at a press conference, had led “the papers to understand that only the U.S. means business. I get the impression that the other 3 have now ganged up to put the heat on us & maybe rush us through.”⁴¹ On occasion, she took issue with what she saw as Jackson’s penchant for acting as “his own Sec’y. of State.”⁴²

³⁹ 11/19/45 letter (writing that Claude Pepper, a Florida Democrat, wanted to see the opening day, and adding, “I suppose when you have Senators here you hurry the trial”).

⁴⁰ 12/9/45 letter. *Cf.* SCHABAS, *supra* note 16, at 75 (writing of personnel at Nuremberg with missions more political than legal, such as William J. Donovan, U.S. Deputy Prosecutor and “head of the major United States intelligence agency,” there “to ensure that indictments were not issued against senior Nazis with whom the Americans had made deals in the final months of the war,” and Andrey Vyshinsky, who led a Soviet commission that “gave instructions to their Prosecutor on matters such as the handling of the Katyń forest massacre issue”).

⁴¹ 10/8/45 letter. *See* Barrett, *Fite*, *supra* note *, at 22 (reprinting excerpt of same letter, and noting that criticism occurred during a period when “Fite worked more independently of Jackson”).

⁴² 12/9/45 letter. Notwithstanding these criticisms, Fite kept in close contact with Jackson after her year in Nuremberg. *See* Barrett, *Fite*, *supra* note *, at 28-29.

Ending her tour in December, Fite wrote from France: “Paris sad—no food—no sidewalk cafes. Goods in the stores are lousy and frightfully high.”⁴³ This last letter concluded:

Europe is a sad worn out continent. I’m glad to leave. The U.S. is sitting atop the world. . . . We have to run the world—but the vast majority have no idea what the rest of the world is like. And how can equilibrium be maintained between wealth and energy on the one hand and poverty and exhaustion on the other?⁴⁴

Like the sentence quoted at the beginning, this passage bears resonance with today’s world. Fite foresaw that World War II had thrust the United States into the position of a rich and powerful global leader. She understood, as well, that the new role carried a new responsibility to rebuild, to extend good fortune to others less fortunate. The United States had already joined the United Nations, assumed a permanent seat on its Security Council, and helped to forge a global financial structure; soon it would launch an unprecedented plan for economic recovery. The United States retained the isolationist elements that had held sway after the first

⁴³ 12/28/45 letter. Fite’s letters indicate that she had secured permission to stay longer; they do not make clear when or why she decided to go. *See* 10/28/45, 11/3/45, & 12/9/45 letters.

⁴⁴ 12/28/45 letter.

global conflict—a “vast majority” of Americans, to quote Fite, had “no idea” of “the rest of the world”—yet the United States helped to establish a complex of international institutions. Judicial bodies figured in the project. After World War II, the International Military Tribunal at Nuremberg, where Fite worked, was established, followed by its counterpart in Tokyo, and the World Court to which Fite’s State Department superior was elected weeks after she returned home.⁴⁵ Once the Cold War concluded, a new spate of international criminal tribunals was established.⁴⁶ They were, of course, bounded by law; nevertheless, the success of each often hinged on how its participants operated within a larger political context. Politics mattered at Nuremberg, as Fite’s letters underscored. Politics likewise matter at Nuremberg’s progeny, the International Criminal Court.

⁴⁵ See Sydney Gruson, *15 Judges Elected for World Court: Three of the Judges Named by UNO Yesterday*, N.Y. TIMES, Feb. 7, 1946, at 8 (noting, with reference to the Permanent Court of International Justice set up after World War I, that “[a]lthough the Americans had sat on the old court at The Hague from its inception, the United States was never a member”).

⁴⁶ For an insider’s account of the United States’ role in the establishment of late twentieth-century international criminal justice mechanisms, see DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012).

Politics and Prosecutions

Speaking at the 2011 Annual Meeting of the American Society of International Law, Fatou Bensouda said of the Court for which she then served as Deputy Prosecutor, “I think the relevance of the ICC over the years, especially now, has been established.”⁴⁷ She situated the Court within its global context:

I would quickly quote the unanimous decision by the United Nations Security Council referring Libya to the ICC. I think this has shown the ICC to be a player, not only for the international criminal justice, but also one of the solutions to bring peace and security to the conflict-torn societies. It has become a relevant player.⁴⁸

Bensouda’s metaphor prompts many questions: What is the game that is being played? Is the ICC winning? If not, what is to be done by persons who care about international criminal justice, persons who are as sick now of seeing charnel houses as Katherine Fite was then, who look to adjudication as one means of effecting

⁴⁷ American Society of International Law, *A Conversation with Fatou Bensouda*, FORA.TV, 00:29:47 (Mar. 25, 2011) [hereinafter *Bensouda Conversation*], http://fora.tv/2011/03/25/A_Conversation_with_Fatou_Bensouda.

⁴⁸ *Id.* (referring to S.C. Res. 1970, ¶¶ 4-8, U.N. Doc. S/ RES/1970 (Feb. 26, 2011) [hereinafter S.C. Res. 1970]).

justice? Potential answers fill the academic literature and popular commentary. This lecture explores just one avenue: that of improved interrelation between the ICC and other political entities that bear responsibility, as Bensouda put it, “to bring peace and security to conflict-torn societies.”

Politics has long been seen as a source of the ICC’s troubles. In 1998, after 120 state delegations had voted in favor of the Rome Statute of the International Criminal Court,⁴⁹ officials of a prominent naysayer, the United States, asserted that the Court would become too politicized. Pointing to the Statute’s grant of “power to initiate prosecutions without a referral from the Security Council or state parties,” a Republican Senator fretted, “There will be no effective screen against politically motivated prosecutions from being brought forward.”⁵⁰

⁴⁹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; see Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 188 (Ige F. Dekker & Wouter G. Werner eds., 2004) (describing vote at Rome).

⁵⁰ Is a U.N. International Criminal Court in the National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Senate Comm. on Foreign Rel., 105th Cong. 3 (1998) [hereinafter Hearing] (remarks of Senator Rod Grams (R-Minn.), Chairman of the Subcomm. on Int’l Operations). At issue was Article 15 of the ICC Statute, *supra* note 49, which set forth conditions under which ICC prosecutors “may initiate investigations *proprio motu*”—on their own motion—“on the basis of information on crimes within the jurisdiction of the Court.”

The Democratic administration's envoy expressed similar concern that *proprio motu* prosecution would "embroil the Court in controversy, political decision making, and confusion."⁵¹ In 2010, amendments that would empower the Prosecutor to pursue individuals for the crime of aggression provoked all sides to conjure up the loathed specter of politicization.⁵²

⁵¹ Hearing, *supra* note 50, at 14 (statement of Hon. David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues).

⁵² Compare Press Release, Amnesty Int'l, Proposals Threaten International Criminal Court's Independence (June 8, 2010) (objecting to proposal to require Security Council authorization, and so "calling on states to reject proposals which could seriously undermine the integrity of the Rome Statute and deeply politicize the International Criminal Court"), <http://www.amnesty.org/en/for-media/press-releases/proposals-threaten-international-criminal-court's-independence-2010-06-08>, with Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, *U.S. Engagement With The ICC and the Outcome of the Recently Concluded Review Conference*, Special Briefing at U.S. Dep't of State (June 15, 2010) (warning that if the ICC "were to get into the political area and to deal with crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states and the crime of aggression, it would find it even more difficult to obtain cooperation"), transcript available at http://www.state.gov/g/gcj/us_releases/remarks/143178.htm. The amendments may be found in The Crime of Aggression, Assembly of States Parties Res., RC/Res. 6, adopted by consensus June 11, 2010 (June 28, 2010, advance version), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

The politicization critique has always surprised me, not only on account of my own experience, but also on account of the experience of the international criminal tribunals on whose foundation the ICC was built.

Having been trained as a lawyer and having practiced federal criminal defense in the United States, I always regarded the prosecutor as part of the political system. A leader of the U.S. Department of Justice carries out the policies—the results of the politics—of the system within which she operates no less than does a deputy in one of the country’s myriad District Attorney’s offices. Certainly, she must act with impartiality and independence; in so doing, she is embedded even more deeply into the political framework. The Supreme Court recognized as much in its oft-cited description of the federal prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.⁵³

⁵³ Berger v. United States, 295 U.S. 78, 88 (1935).

It is because she enforces widely shared decisions of the American polity that the American prosecutor is seen to do justice. The few occasions when prosecutions are called into question typically expose division within society. For example, the crack-versus-cocaine controversy and the Starr investigation of President Bill Clinton were salient issues at the time of the Rome Conference.⁵⁴ In both instances, complaints about prosecutorial acts derived in part from the fact that the prosecution's mandate lacked sufficiently widespread public support.

The experience of the post-Cold War *ad hoc* tribunals ought to have reinforced understanding of the essential interaction between political context and the criminal justice mission. The International Criminal Tribunals for Rwanda and for the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon—each has been charged with

⁵⁴ A witness at a 1998 Senate hearing noted that “some U.S. officials” had labeled the potential for ICC investigation absent request by a state or the Security Council “the international Ken Starr problem.” Hearing, *supra* note 49, at 36 (statement of Michael P. Scharf). He referred, of course, to the ongoing probe that took a landmark turn in Washington on the very day that delegates in Rome approved the ICC Statute. See James Bennet, *Clinton Guards Begin Testimony in Starr Inquiry: A President's Protectors Are Put in a Position to Damage Him*, N.Y. TIMES, July 18, 1998, at A1. On debate over disparate sentences for crack as opposed to powder cocaine, see Steven A. Holmes, *Clinton Panel on Race Urges Variety of Modest Measures*, N.Y. TIMES, Sept. 18, 1998, at A1.

prosecuting the authors of violence that political actors in the international community refused to tolerate. The mandate of each demanded action. Prosecutors often deemed most successful adhered to an active-prosecutor model. The courtroom was but one of their venues. No less important was the court of public opinion, before which they not only presented the case against a person suspected of international offenses, but also endeavored to build public support, called for broader accountability, and urged deterrence and prevention. In so doing, these prosecutors enforced, even pushed, the policy decisions of their time.

A recent example is that of Serge Brammertz, who has served as the Chief Prosecutor of the ICTY since 2008. At the 2010 International Humanitarian Law Dialogs, he insisted that Serbia not be permitted to join the European Union unless and until it secured custody over the last ICTY fugitives in Serbia: Ratko Mladić and Goran Hadžić.⁵⁵ Both men now reside in the same Dutch jail as the former Bosnian Serb President, Radovan Karadžić.⁵⁶ Brammertz's adoption of an active prosecutorial role no doubt contributed to this result.

⁵⁵ See Diane Marie Amann, *Prosecutorial Parlance*, INTLAWGRRLS (Sept. 12, 2010), <http://www.intlawgrrls.com/2010/09/prosecutorial-parlance.html> (quoting Brammertz).

⁵⁶ See *The Cases*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4>. Thereafter, Serbia appeared on track to join the European Union. See Stephen Castle, *Serbia, Once Outcast, Is Candidate to Join E.U.*, N.Y. TIMES, Mar. 2, 2012, at A8. At this writing, Mladić's trial was scheduled to

The question is not whether an international prosecutor should participate at some level in the process by which the international community determines and implements policies. The question that emerges, rather, is this: Whose politics will the prosecutor serve? The answer is elusive, in no small part because politics are part and parcel of the political compromise called the Rome Statute.⁵⁷

begin on May 16, 2012. See Mike Corder, *Start of Mladic Trial Delayed by 2 Days*, GUARDIAN (Apr. 24, 2012), <http://www.guardian.co.uk/world/feedarticle/10210295>.

⁵⁷ Despite the contrary protestations set forth *infra* in the text, this statement ought not to surprise; rather, as others also have observed, it seems evident in the general nature of treaty drafting and the specific nature of international criminal justice. See, e.g., SCHABAS, *supra* note 16, at 3 (stating that “[a]t the international level, policy and politics seem to sit much closer to the centre of the justice agenda”); *id.* at 90 (observing that “[t]he provisions in the Rome Statute concerning the relationship between the Prosecutor and the Security Council were probably the most contentious of the entire negotiations”). A powerful statement respecting the significance of politics appeared in the memoir of the United States’ first ambassador at large for war crimes issues:

I learned through extraordinary journeys that *international justice* has as much to do with the vagaries of global politics and our own moral strength as it does with treaties, courtrooms, prosecutors, judges, and defendants. The modern pursuit of international justice is the discovery of our values, our weaknesses, our strengths, and our will to persevere and to render punishment.

SCHAEFFER, *supra* note 46, at 8.

By the terms of that Statute, the ICC Prosecutor does have the power to bring cases on her own—but only in limited circumstances, and only if she wins approval from the ICC Pre-Trial Chamber.⁵⁸ Only one matter on the Court’s docket to date derives purely from the exercise of *proprio motu* power; the rest arrived via state consent or Security Council referral.⁵⁹ These are quintessentially political entities, of course. Perhaps the only thing more political than a country’s request for investigation is concurrence by the five permanent members of the Council in making a similar request.

As might be expected of an instrument reached through political compromise, the Rome Statute leaves open to interpretation how the Office of the Prosecutor is to operate when its actions stir political debate. The first Prosecutor, Luis Moreno-Ocampo, stressed that “I was given a clear judicial mandate. My duty is to apply the

⁵⁸ ICC Statute, *supra* note 49, arts. 13(c), 15(3), 15(4). Although intended as a check against prosecutorial abuse, the requirement of Pre-Trial Chamber approval carries the risk of drawing the Court’s judicial organ uncomfortably close to contemporary geopolitics. Full exploration of this judicial risk is beyond the scope of this prosecution-focused lecture.

⁵⁹ See *Situations and Cases*, INT’L CRIM. CT., <http://icc-cpi.int/Menus/ICC/Situations+and+Cases/> [hereinafter ICC, *Situations*]; see ICC Statute, *supra* note 49, arts. 13(a), 13(b) & 14 (describing state and Council referral process); see also *id.*, art. 16 (requiring year-long deferral of prosecution upon resolution by the Council).

law without political considerations.”⁶⁰ Contending that the Statute deprived his office of discretion over cases once the ICC had exercised jurisdiction, he insisted that “there can be no political compromise on legality and accountability.”⁶¹ The Prosecutor issued a policy paper in September 2007 likewise construing Article 53 of the Rome Statute as only allowing him to decline a case in a few narrow circumstances, related to security, prevention of crime, and protection of victims and witnesses.⁶² The paper then stated that “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”⁶³

Experts have advanced cogent arguments that the Prosecutor labored under a misinterpretation of a statutory provision for ending prosecutions “in the

⁶⁰ Luis Moreno-Ocampo, Keynote Address at the International Conference: Building a Future on Peace and Justice 3 (June 25, 2007), *available at* <http://www.peace-justice-conference.info/download/speech%20moreno.pdf>.

⁶¹ *Id.* at 4.

⁶² INT’L CRIM. CT., OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE (Sept. 2007) (analyzing ICC Statute, *supra* note 49, art. 53(1)(c), 53(2)(c) (authorizing the Prosecutor to decide that a case should not go forward upon consideration of “the interests of justice”)), <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>.

⁶³ *Id.* at 9.

interests of justice.”⁶⁴ Be that as it may, one thing is certain. In declaring its Statute inflexible and its mandate apolitical, the Office of the Prosecutor did not extract itself from the political context. To the contrary, it exposed itself to the critique that it was playing a covert game of politics, not only when it exercised jurisdiction, but also when it chose not to do so.⁶⁵

Such criticism is by no means unique to the ICC. The tribunals for Rwanda and for the former Yugoslavia, to name two, have endured charges of selectivity throughout their existence.⁶⁶ Political turmoil marked the

⁶⁴ E.g., James A. Goldston, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 383 (2010); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731 (2008).

⁶⁵ Compare, e.g., Scott Stearns, *African Union Says ICC Prosecutions Are Discriminatory*, VOICE OF AMERICA (July 4, 2011), <http://www.voanews.com/english/news/africa/-African-Union-Says-ICC-Prosecutions-Are-Discriminatory-125012734.html>, with Khalaf al-Habtoor, *No International Justice for the Powerful*, DAILY STAR (Aug. 2, 2010), <http://www.dailystar.com.lb/News/Local-News/Aug/02/No-international-justice-for-the-powerful.ashx#axzz22oucZYSp>.

⁶⁶ See Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 116-17 (2002) (discussing selectivity and randomness); see also HELLER, *supra* note 32, at 370 (citing statistics on selectivity respecting defendants in Nuremberg trials, and quoting MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 151 (2007), on how selectivity hinders

years of negotiations that led to the Cambodia Tribunal, and owing to political turmoil since its establishment, that Tribunal has often seemed on the brink of collapse.⁶⁷ Indeed, Katherine Fite's letters remind us today that politics dogged the first international criminal tribunal at Nuremberg.⁶⁸ That said, political vagaries pose a far greater challenge to the ICC. Every other charter limited its tribunal's competence by both time and place. Jurisdiction was limited to a distinct conflict, occurring on a defined territory, and within a particular cultural context. Early tribunals, moreover, were given free rein to pursue scores of suspects. None of this obtains in the ICC. The Rome Statute extends the Court's competence to a world of atrocities—involving not only the 121 ICC States Parties, but also—Security Council willing—any non-Party State. No tie to armed

the retributive function of international criminal justice); SCHABAS, *supra* note 16, at 82 (stating that international criminal “tribunals, and their budgets, were never conceived to deal with *all* crimes” within their jurisdiction, a fact compelling the conclusion that “[b]y nature, they are selective”) (emphasis in original).

⁶⁷ See Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 13-59 (Jaya Ramji & Beth Van Schaack eds., 2005) (discussing politics before establishment); Beth Van Schaack, *Continued Chaos in Cambodia*, INTLAWGRRLS (Jan. 16, 2012) (treating political woes during operation), <http://www.intlawgrrls.com/2012/01/continued-chaos-in-cambodia.html>.

⁶⁸ See *supra* text accompanying notes 35-43. For a biting analysis of politics in the Nuremberg era, see *generally* PETER MAGUIRE, LAW AND WAR (rev. ed. 2010).

conflict is required, so that incidents that the law not long ago deemed internal, such as post-election violence, are now attended to by the ICC. It is expected to target only those persons most responsible for atrocity, a numerical limitation that already has led to the pursuit of three heads of state⁶⁹—prosecutions that inevitably stir political controversy.

Having opened its first investigation fewer than eight years ago,⁷⁰ today the Office of the Prosecutor is responsible for 15 cases in seven situations, and is

⁶⁹ They are: Sudanese President Omar al-Bashir, the subject of an ICC arrest warrant since 2009; the now-deceased leader of Libya, Muammar Gaddafi; and Laurent Gbagbo, formerly the President of Côte d'Ivoire, in ICC custody since December 2011. *See* ICC, *Situations*, *supra* note 59. At this writing, some sought to add to the list another head of state, Syrian President Bashar Assad, whose security forces had been engaged for many months in a lethal crackdown on protesters and insurgents. *See* Dana Khraiche, *Lebanese Lawyer Says His Case Against Assad at ICC Strictly Legal*, DAILY STAR (Apr. 19, 2012), <http://www.dailystar.com.lb/News/Local-News/2012/Apr-19/170741-lebanese-lawyer-says-his-case-against-assad-at-icc-strictly-legal.alashx#axzz1t6XFINKX>; United Press Int'l, *Pillay Backs Referring Syria to the ICC* (Feb. 28, 2012) (referring to repeat by U.N. High Commission for Human Rights of her call for Security Council referral of situation in Syria), http://www.upi.com/Top_News/Special/2012/02/28/Pillay-backs-referring-Syria-to-the-ICC/UPI-47241330459214/.

⁷⁰ *Uganda*, INT'L CRIM. CT. (noting the decision to open the investigation issued on July 29, 2004), <http://icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/>.

conducting preliminary examinations in eight additional countries, located on four continents.⁷¹ It is asked to do everything for everyone all the time, everywhere. Some recent examples include Colombia, Greece, Iran, Maldives, Mexico, Nigeria, Syria, Thailand, Turkey, Yemen, and the Vatican.⁷² Despite this stream of pleas

⁷¹ ICC, *Situations*, *supra* note 59.

⁷² See Innocent Anaba, *Subsidy Protest: 11 Rights Groups Drag Jonathan to ICC*, VANGUARD (Jan. 12, 2012), <http://www.vanguardngr.com/2012/01/subsidy-protest-11-rights-groups-drag-jonathan-to-icc/>; Mike Corder, *Nobel Peace Laureate Calls for ICC Yemen Probe*, GUARDIAN (Nov. 28, 2011), <http://www.guardian.co.uk/world/feedarticle/9968592>; Eleanor Johnstone, *Lawyers Forward Chief Judge's Case to International Criminal Court*, MINIVAN NEWS (Jan. 23, 2012), <http://minivannews.com/politics/lawyers-forward-chief-judges-case-to-international-criminal-court-31113>; Khraiche, *supra* note 69; Mark Lowen, *Greeks Seek Austerity Trial at The Hague*, BBC (Apr. 23, 2012), <http://www.bbc.co.uk/news/world-europe-17811153>; Aylish O'Driscoll, *Colombia Court Calls on ICC to Investigate Former President*, COLOMBIA REPORTS (Jan. 31, 2012), <http://colombiareports.com/colombia-news/news/21877-colombias-former-president-should-be-investigated-over-forced-disappearance-of-civilians-superior-tribunal.html>; Reza Pahlavi, *Crimes Against Humanity in Iran: Report on Crimes Against Humanity Committed in Iran on the Orders of Mr Ali Khamenei – Supreme Leader of the Islamic Republic of Iran* (Jan. 2012), <http://www.rezapahlavi.org/media/related/articles/225.pdf>; Reuters, *Kurd Party Refers Turkish Air Raids to Hague Court*, DAILY STAR (Jan. 27, 2012), <http://www.dailystar.com.lb/News/Middle-East/2012/Jan-27/161322-kurd-party-refers-turkish-air-raids-to-hague-court.ashx#axzz1t6XFINKX>; Karla Zabludovsky, *Mexico: Complaint Over President Is Filed With Hague Court*, N.Y. TIMES, Nov. 26, 2011, at A8; Ruth Pollard, *Rights Chief Urges Syria Indictment*, AGE (Melbourne), Dec. 14, 2011, at 12; 2010

for help, the Court has operated for years without any significant budget increase.⁷³

Compounding matters is the fact that the ICC is not, if you will, your grandmother's criminal court. As one would expect, it investigates allegations of crime, prosecutes suspects, and imprisons convicted persons. Less recognized are the considerable duties of public outreach and transitional justice that the Rome Statute imposes on the Court. Its organs must give support to victims and witnesses, meet with members of affected communities, prod States Parties to hold their own accountable, give technical assistance when states choose to do so, and exhort all states to cooperate with its work. These tasks, while alien to most attorneys who practice in domestic criminal justice systems, are

Crackdown Complaint to ICC, BANGKOK POST (Nov. 28, 2011), <http://www.bangkokpost.com/lite/topstories/268276/crackdown-complaint-going-to-icc>; Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity, ICC File No. OTP-CR-159/11 (Sept. 13, 2011), available at <http://s3.documentcloud.org/documents/243877/victims-communication.pdf>. A number of these complaints pertain to matters well outside the jurisdiction of the ICC.

⁷³ See *ICC Budget Cuts Halt Probes Into Mass Rapes*, RADIO NETHERLANDS WORLDWIDE (Dec. 19, 2011) (reporting on statement, by then-Prosecutor Moreno-Ocampo to the ICC Assembly of States Parties, that budgetary limitations threatened investigations in Libya and Côte d'Ivoire), <http://www.rnw.nl/english/bulletin/icc-budget-cuts-halt-probes-mass-rapes>.

essential to the mission of the ICC. In the words of Prosecutor Bensouda, the Rome Statute founded “a *sui generis* model for global justice,” “a system of its own kind.”⁷⁴

The states that established a new system of justice at Rome in 1998, and those that now belong to its Assembly of States Parties, ought to pay for, and otherwise bolster, the Court. They have not always done so. As a result, ICC resources have been spread so thin as to raise doubts about traditional casework. Conduct of the ICC’s first trial—that of a former militia leader charged with recruiting child soldiers in the Democratic Republic of the Congo—proved to be a lightning rod for criticism from judges and commentators alike.⁷⁵ The judgment of conviction did little to allay such concerns, given that the ICC Trial Chamber devoted the first third of its nearly 600-page *Lubanga* verdict to recounting failures of proof, misconduct by persons working with the Prosecution, and its own outright rejection of many

⁷⁴ Fatou Bensouda, *The ICC Statute – An Insider’s Perspective on a Sui Generis System for Global Justice*, 36 N.C. J. INT’L L. & COMM. REG. 277, 277 (2011).

⁷⁵ See, e.g., Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL’Y & L. 339, 341-46 (2009) (describing objections to decision not to prosecute sexual and gender-based violence in *Lubanga*); Heikelina Verriijn Stuart, *The ICC in Trouble*, 6 J. INT’L CRIM. JUST. 409 (2008) (discussing controversy surrounding use of anonymous representatives of nongovernmental organizations as “intermediaries” between prosecutors and witnesses).

witnesses' testimony.⁷⁶ Adding to the investigative and evidentiary challenges inherent in any criminal justice forum are the Court's many novel duties with respect to witnesses and others. Political compromise created this *sui generis* system in 1998, but the political context since that date has not afforded it adequate support.

This is true even with respect to the Security Council's two referrals to the ICC. The Council's referrals of the situations in Darfur in 2005 and in Libya in 2011 explicitly excluded payment for any of the costs of ICC investigation or prosecution.⁷⁷ When the ICC moves into a region for the first time, it needs personnel with new areas of expertise and often new linguistic abilities. In short, it requires new expenditures of money; the Council disregarded that patent need.

Politics ill-served the Prosecutor in other ways as well.

⁷⁶ See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Trial Chamber I Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

⁷⁷ See S.C. Res. 1593, ¶ 7, U.N. Doc. S/ RES/1593 (Mar. 31, 2005) (stating "none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily"); S.C. Res. 1970, *supra* note 48, ¶ 8 (reiterating above proviso).

The Prosecutor duly undertook investigations following both Security Council referrals, and the Pre-Trial Chamber confirmed requests to issue arrest warrants. In the case of Libya, the Court's organs acted within months—lightning speed in international criminal justice.⁷⁸ Rather than being praised, however, the ICC incurred wrath. Critics cited these situations—along with those in the Central African Republic, the Democratic Republic of Congo, Côte d'Ivoire, Kenya, and Uganda—as proof that the ICC has paid undue, even “neo-colonialist,” attention to Africa.⁷⁹ Prosecutors noted that all but one case had come by referral and that victims in Africa welcomed the Court's aid, but their response tended to gain less traction than the charge that provoked it.

Having issued arrest warrants, moreover, the Court encountered less than full assistance in the execution of those warrants. Years after being charged with responsibility for genocide, crimes against humanity, and war crimes in Darfur, Omar al-Bashir remains the President of Sudan. Nor is he confined to his own, non-cooperative state. He has traveled not only to non-Party

⁷⁸ See Situation in the Libyan Arab Jamahiriya: Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11 (Pre-Trial Chamber I June 27, 2011), <http://www.icc-cpi.int/NR/exeres/3136001F-7D3E-45A1-B1D4-B7D8F145F79C.htm>.

⁷⁹ See, e.g., *Gadhafi Indictment Hinders Peace: African Union*, CBC NEWS (July 2, 2011), <http://www.cbc.ca/news/world/story/2011/07/02/world-african-union-gadhafi.html>.

States but also to a few ICC States Parties. The Court complained to the Security Council, but the Security Council failed to act.⁸⁰ Bashir made an official state visit without incident to China, a permanent member of the Security Council that, by withholding its veto, had effectively acquiesced in the 2005 Darfur referral to the ICC.⁸¹

China affirmatively supported UNSC Resolution 1970, which referred the situation in Libya; As Bensouda stressed in her talk at the American Society of International Law, the Security Council vote was unanimous.⁸² Yet as events unfolded, Council members seemed less than eager for the now-deployed justice

⁸⁰ See, e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05/01/09 (Pre-Trial Ch. I Dec. 13, 2011), <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/140?lan=en-GB>. On ratifying the Rome Statute, states parties obligate themselves to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” ICC Statute, *supra* note 49, art. 86; see *id.*, arts. 87-93.

⁸¹ See Malcolm Moore, *Sudan’s Al-Bashir Given Red Carpet Treatment by China*, TELEGRAPH (June 29, 2011), <http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html>.

⁸² See *supra* text accompanying note 48.

mechanism to discharge its duty to dispense justice. Three weeks after the referral, states in the North Atlantic Treaty Organization launched a Security Council-sanctioned military intervention.⁸³ Any NATO member that did not belong to the ICC—in effect, the United States—could take part in the attack with the expectation that a provision in the referral resolution immunized its actions from ICC scrutiny.⁸⁴ The leaders of Britain, France, and the United States then wrote in a joint op-ed that the ICC “is rightly investigating the crimes committed against civilians and the grievous violations of international law,” and insisted that Gaddafi “must go and go for good.”⁸⁵ Notably, they did not say that Gaddafi must go to The Hague. The implication that these permanent members of the Security Council would

⁸³ See S.C. Res. 1973, ¶ 4, U.N. Doc. S/ RES/1973 (Mar. 17, 2011) (authorizing regional organizations “to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”).

⁸⁴ See S.C. Res. 1970, *supra* note 48, ¶ 6 (stating that the Council “[d]ecides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State”). A similar provision appeared the Darfur referral. S.C. Res. 1593, *supra* note 77, ¶ 6.

⁸⁵ Barack Obama, David Cameron & Nicolas Sarkozy, Op-Ed, *Libya’s Pathway to Peace*, INT’L HERALD TRIB., Apr. 15, 2011, at 7.

be happy for him to go anywhere was confirmed in July 2011 when officials of the three governments showed interest in allowing Gaddafi to remain in Libya but removed from power, if Libya's new government were to agree.⁸⁶ By this point in time, the ICC Pre-Trial Chamber had issued a warrant for Gaddafi's arrest upon request of the Office of the Prosecutor. The French-British-American signal of "never mind" must have left ICC officials feeling as if their legs had been cut out from under them.

In the case of Libya as in other instances, states' behavior toward the International Criminal Court has shifted with political winds. Born of political compromise, the ICC—itsself governed by the state officials who comprise the Assembly of States Parties—has struggled to proceed with proper juridical independence and impartiality. In the Court's first decade, ICC officials' categorical protestations that it is apolitical did not shield it from claims that it played

⁸⁶ See Steven Erlanger, *France Says Qaddafi Can Stay in Libya if He Agrees to Give Up His Power*, N.Y. TIMES, July 21, 2011, at A10; Richard Norton-Taylor & Chris Stephen, *Gaddafi Can't Be Left in Libya, Says International Criminal Court*, GUARDIAN (London), July 26, 2011, at 18. The fall of Tripoli and death in a gunfight mooted the issue with respect to the former leader; however, questions lingered about the fate of his co-accused. See Chris Stephen, *Saif Gaddafi Sets Libya's New Rulers a Test of Commitment to Human Rights*, GUARDIAN (London), Jan. 7, 2011, at 26.

political favorites. A more nuanced approach seems in order; indeed, it may be on the horizon.⁸⁷



*Fatou Bensouda, Chief
Prosecutor of the ICC
(2009 photo by Max
Koot Studio)*

Although the new Prosecutor, Fatou Bensouda, invoked the term “judicial mandate” in her talk before the American Society of International Law, she contrasted it with “a humanitarian mandate”—a different tone than that of the first Chief Prosecutor.⁸⁸ At another time, Bensouda stated that officials at the Court “have nothing to do with politics,” yet recognized, “We operate in a political atmosphere.”⁸⁹ She has made clear that hers is a mandate to be exercised in cooperation with those of others. The ICC “recognizes itself as a player with the other stakeholders who have different mandates,” said

⁸⁷ Cf. SCHABAS, *supra* note 16, at 87 (observing, after critique of Moreno-Ocampo’s policy respecting selection of situations, that “the Prosecutor’s career at the Court is confined to a single nine-year term,” and adding that “[f]uture prosecutors may view this differently”).

⁸⁸ *Bensouda Conversation*, *supra* note 47, at 00:31:42.

⁸⁹ Fatou Bensouda, *quoted in* Pascal Airault & Brandice Walker, *Fatou Bensouda: The Victims are African*, AFR. REPORT (Dec. 22, 2011), <http://www.theafricareport.com/index.php/news-analysis/fatou-bensouda-the-victims-are-african-50178052.html>.

Bensouda. Specifically, the ICC is “bringing to the table that justice is part of the components that can be used to bring peace and security to these conflict-torn situations.”⁹⁰ This metaphor of cooperation played out in an achievement Katherine Fite would have approved of—the November 2011 arrival at The Hague of a former head of state pursuant to a sealed ICC warrant.⁹¹

Conclusion

Persons who care about international criminal justice should welcome new prosecutorial willingness to grapple with the challenges of the political context. They should, in fact, do more. When it does well, the ICC deserves support, through execution of the warrants it issues, the provision of adequate funding, and other means. When it falters, the Court also deserves support, from civil society as well as from states. What the Court needs is not uncritical defense of its failings, but rather deep thought about advisable structural, procedural, and other changes. Through such collaboration we may take up the task that Katherine Fite and her Nuremberg peers left to us—the work of freeing humanity from atrocity’s stain.

⁹⁰ *Bensouda Conversation*, *supra* note 47, at 00:31:42.

⁹¹ See *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/icc02110111?lan=en-GB>.

Tribunal Influence in Recent U.S. Jurisprudence on Corporate Liability for Atrocity Crimes

David Scheffer*

In this address, I examine what has been occurring in U.S. federal courts over the last two years on the enforcement of the Alien Tort Statute (ATS), including federal rulings at the district court and court of appeals levels that draw upon, and have a very direct bearing on, the jurisprudence of the international criminal tribunals. Anyone presuming that U.S. federal courts are somehow oblivious to tribunal jurisprudence or that the Rome Statute of the International Criminal Court is irrelevant would be seriously mistaken. There is much to learn from recent rulings in the United States because corporate responsibility for the commission of genocide, crimes against humanity, and serious war crimes is at the center of these cases, albeit for civil and not criminal remedies. The tribunals should understand how U.S. courts are addressing the corporate liability issue, for some day the existing personal jurisdiction of the International Criminal Court may well be invoked to reach corporate executives, just as occurred in the

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International Criminal Tribunal for Rwanda in the *Media* case.¹ The time may also arrive when either the International Criminal Court or some other newly-conceived tribunal holds corporations, as juridical persons, accountable with civil or criminal penalties for commission of, or complicity in, atrocity crimes.

After all, Republican presidential candidate Mitt Romney recently opined on an Iowa bale of hay that “corporations are people.”² In 2010, the Supreme Court ruled in the *Citizens United* case that corporations, for the purpose of the First Amendment free speech clause, are equal to human beings.³ If that is indeed the case, as our conservative brethren believe, then such so-called “people” should be capable of committing atrocity crimes and be held responsible for them just as are natural persons.

The Alien Tort Statute is a 1789 law, passed by Congress, that is one sentence long: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

¹ Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-A (Nov. 28, 2007).

² Ashley Parker, “Corporations Are People,” *Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES (Aug. 12, 2011), <http://www.nytimes.com/2011/08/12/us/politics/12romney.html?scp=1&sq=Romney%20corporations%20as%20people&st=cse>.

³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

nations or a treaty of the United States.”⁴ As the U.S. Supreme Court explained in its famous 2004 judgment on the Alien Tort Statute, *Sosa v. Alvarez-Machain*:

[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the laws of nations Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.⁵

Those paradigms from the 18th century are three in number: offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy.

The Alien Tort Statute is unique to the United States; no other nation has a law of comparable content. In fact, it is a remarkable extension of U.S. jurisdiction to events and perpetrators overseas in order to uphold the

⁴ 28 U.S.C. §1350 (2010).

⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

most significant human rights norms of our times, and that is why it has proven so controversial both at home and abroad. The law was necessary at the time, in the late 18th century, to demonstrate the new nation's commitment to international law generally, and to the protection of foreign diplomats and various interests on the high seas, in particular. But it was very rarely enforced until the 1980 path-breaking case, *Filartiga v. Pena-Irala*, concerning a Paraguayan inspector general of police who kidnapped and tortured to death a 17-year-old Paraguayan boy.⁶ He was sued in U.S. courts by the boy's sister, who won the case with monetary damages awarded to compensate for those acts of torture. Thereafter, a significant number of Alien Tort Statute cases were brought against individual violators of the law of nations. In the early 1990s, beginning with the *UNOCAL* case in Burma,⁷ corporations began to be targeted for civil damages under the Alien Tort Statute. Both natural persons, like the thuggish torturer, and multinational corporations, including the major oil companies and other extractive and manufacturing operations, became targets for civil actions in U.S. federal courts.

The results of these complaints have been mixed, with far more actions against natural persons succeeding and far fewer surviving against corporations. The latter often have been short-circuited on political question or other jurisdictional grounds, such as *forum non*

⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁷ *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

conveniens or non-exhaustion of local remedies, or have been settled prior to judgment to the benefit of the particular victims bringing the suit. But for two decades, from 1990 to 2009, the federal courts never questioned the applicability of the Alien Tort Statute to corporations as tortfeasors. Nor did it seriously undermine the most common form of corporate liability, complicity in the commission of the torts, with any challenge to the knowledge standard for aiding and abetting.

The federal courts have clarified that the reference to “torts” in the Alien Tort Statute includes commission of atrocity crimes: genocide, crimes against humanity, and serious war crimes.⁸ This is of fundamental significance because the courts have turned to the international criminal tribunals to understand precisely what kind of torts, or atrocity crimes, actually fall within the subject matter jurisdiction of the Alien Tort Statute and thus unleash this powerful weapon for civil damages against corporations.

The Supreme Court, in *Sosa v. Alvarez-Machain*, explicitly noted, in describing the subject matter jurisdiction of the Alien Tort Statute, “that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”⁹ The Court set the bar very high and federal courts since 2004 have applied that high bar to legitimize only the most

⁸ See DAVID J. SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 428-437 (2012).

⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

serious violations of international law, almost always in the realm of egregious violations of human rights (such as torture) or the related field that is the subject matter jurisdiction of the international criminal tribunals—atrocity crimes.

In fact, it would be difficult to identify an atrocity crime—in which a corporation may be either complicit or a direct perpetrator—that is also free of ATS liability. Certainly, federal courts would not ponder too long the ATS's applicability to the atrocity crimes. The statutes of the international criminal tribunals, as well as their respective jurisprudence, have established substantiality thresholds for charges of atrocity crimes.¹⁰ This means that once a particular crime is charged and prosecuted before any one of the tribunals, it almost certainly will enter the realm of ATS liability. The International Criminal Court is a permanent court and the determination of what level and character of criminal conduct falls within its jurisdiction will continue to evolve each year. A federal judge twenty years from now will have a rich body of jurisprudence, built upon that already generated by the tribunals, to ascertain what does or does not constitute an atrocity crime. He or she will be able to use this knowledge to establish the parameters of ATS liability.

Thus, when presented with an Alien Tort Statute claim, federal courts very often turn to the international criminal tribunals to understand whether the violation

¹⁰ See David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 238-244 (2006).

meets the high bar set by the tribunals for the crime itself. The federal courts also turn to the tribunal jurisprudence in determining modes of liability—whether the individual has directly committed an atrocity crime or whether the individual or corporation has aided and abetted in the commission of the atrocity crime.

Even though the tribunals only prosecute natural persons, that fact is irrelevant when the federal courts are trying to determine what constitutes a violation of international law that meets the 18th century paradigms underpinning the Alien Tort Statute. If the violation constitutes an atrocity crime, then the federal courts will embrace it within the norms intended by the Alien Tort Statute. But when it comes to aiding and abetting, some recent federal rulings—now greatly contested—have abandoned the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda (“Yugoslav Tribunal” and “Rwanda Tribunal”) and have seriously misinterpreted the Rome Statute of the International Criminal Court so as to replace the “knowledge” standard with an “intent” standard for aiding and abetting. Through it all—the many federal judgments and the copious briefings that accompany federal cases of this nature—the statutes and jurisprudence of the Yugoslav and Rwanda Tribunals, the Special Court for Sierra Leone, and the International Criminal Court, as well as the Nuremberg judgments, take center stage and indeed have become the primary sources of law for the federal courts.

Consider the debate in political, academic, and judicial circles in the United States, stretching back a

decade or so now, about whether there should be any reference by federal judges in their opinions to international tribunal or foreign court judgments, or even to customary international law that has not yet been internally codified as treaty law for the United States.¹¹ In fact, the federal courts are bursting at the seams with full-scale reliance upon the jurisprudence of the international criminal tribunals to determine the proper interpretation and enforcement of federal law. This paradox—of American courts fully embracing tribunal jurisprudence to determine the fate of claims under federal law while some political, academic, and judicial dialogue paints foreign and international rulings as somehow poisonous to our system—becomes particularly stark when some senior conservative judges on the federal bench warmly invoke the Rome Statute and then misinterpret it to establish both an intent standard for aiding and abetting and the denial of corporate liability under the Alien Tort Statute altogether.

As the U.S. negotiator for the Rome Statute, I am somewhat astonished to witness conservative judges rushing to endorse the Rome Statute as the guiding light

¹¹ See, e.g., David Scheffer, *Introductory Note to Military Commissions Act of 2006*, 45 I.L.M. 1241, 1242, (2006); *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (finding that proposed “Save Our State” constitutional amendment violated the Establishment Clause of the U.S. Constitution and granting a preliminary injunction to prevent certification of the referendum results), *aff’d*, 670 F.3d 1111 (10th Cir. 2012); Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011).

for their rulings despite the fact that the far right's mantra for two decades has been to bury that treaty and all who subscribe to it. The Rome Statute has not become treaty law of the United States as Washington, though signing the treaty in 2000, has never ratified it. The world witnessed nearly a decade of the George W. Bush Administration trying to undermine the Court. Would any right-thinking federal judge, particularly one of long-established conservative bearing, rely on the presumptively toxic Rome Statute for his or her reasoning on a federal statute such as the Alien Tort Statute? In fact they do, shamelessly.

This might best be described by relating my own journey in recent years through several Alien Tort Statute cases, and one Yugoslav Tribunal case—itsself infected with one of the federal rulings—in which I filed *amicus curiae* (friend of the court) briefs to help clarify some issues for the judges.

The story begins with *Presbyterian Church of Sudan v. Talisman Energy* in 2009.¹² This case concerned Alien Tort Statute claims by the Presbyterian Church of Sudan and many non-Muslim Sudanese victims of human rights abuses who sued the Canadian oil company, Talisman Energy, in relation to its drilling operations in southern Sudan, now an independent nation. The plaintiffs alleged complicity by Talisman in genocide and ethnic cleansing, including massive civilian displacement, extrajudicial killing of civilians, torture, rape, and the

¹² *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

burning down of villages, churches, and crops. While the issue of corporate liability *per se* did not yet arise in this case, the critical issue was the standard for aiding and abetting liability.

The Court of Appeals for the Second Circuit (which includes New York) relied upon a novel interpretation of Article 25(3)(c) of the Rome Statute of the International Criminal Court to conclude that customary international law now requires that the aider and abettor essentially share the intent of the perpetrator of the atrocity crime. This would contrast with the aider and abettor being held to a knowledge standard, namely possessing knowledge of, or awareness of, the perpetrator's commission of the atrocity crime and assisting or abetting such action, but not requiring the prosecutor to prove that the aider and abettor shares the perpetrator's specific intention.

The Second Circuit's interpretation rested upon the use of the word "purpose" in Article 25(3)(c) of the Rome Statute, in which this form of individual criminal liability is described as, "For the *purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission..." The Second Circuit in *Talisman* read "purpose" to reflect a requirement of "shared intent" and since, in its view, the Rome Statute reflects customary international law, it must mean that aiding and abetting liability requires demonstration of a shared intention with the perpetrator. Significantly, a knowledge standard for corporate aiding and abetting already had been confirmed by the U.S. Court of Appeals for the Eleventh Circuit, by two district

courts in the U.S. Court of Appeals for the Ninth Circuit, and by several district courts in the Second Circuit, itself, including the *Agent Orange Product Liability Litigation* in 2005 and the *South Africa Apartheid Litigation* in 2009.¹³

In the corporate realm, and in *Talisman*, it would be extremely difficult to prove corporate intent, shared with the government of the country of investment, to unleash government soldiers and militia to ethnically cleanse a swath of territory for oil exploration. Instead, one looks to aiding and abetting theories of liability, which are far more prevalent for corporate operations. The Second Circuit Court of Appeals knocked the legs out from under corporate liability with this interpretation of the Rome Statute and then required U.S. federal law to adhere to a significant misinterpretation of the Rome Statute. While the Second Circuit conveniently satisfied a conservative inclination to minimize corporate liability for human rights violations, how odd it is that conservative jurists would resort to the Rome Statute to make the case for corporate freedom from liability.

In my *amicus* brief, filed alongside the plaintiff-appellants' effort to seek an *en banc* ruling from the Second Circuit, I argued that the Rome Statute was never intended, in its entirety, to reflect customary

¹³ See David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 345-346 (2011).

international law.¹⁴ Articles 5, 6, 7, and 8 of the Rome Statute indeed were negotiated to record customary international law regarding the substantive crimes. If one applies the *Sosa* standard to the Rome Statute, one can confidently identify the international crimes defined therein as representing the types of crimes that have universal character and are of a magnitude such that they fall within the jurisdictional scope of the Alien Tort Statute. But that sharp focus on customary international law for subject matter jurisdiction was never the aim of the negotiations regarding many other provisions of the Rome Statute. While some of these other articles, including within general principles of law, could be viewed as expressions of customary international law, Article 25(3)(c) is not one of them.

That provision was negotiated not to codify customary international law but to resolve the competing views of common law and civil law experts in a compromise on individual criminal responsibility with which both camps could live. I do not recall a single discussion prior to, or during, the Rome negotiations in which the text of Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law.

¹⁴ Brief for David J. Scheffer, Director of the Center for International Human Rights as Amicus Curiae in Support of Petitioner and Rehearing En Banc at 2-3, *Presbyterian Church of Sudan, v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir. Oct. 28, 2009).

In earlier drafts, we stumbled repeatedly over what eventually was consolidated in Article 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes. For the longest time, the common law delegations and civil law delegations could not agree on precisely how the *mens rea* language would be resolved. The Preparatory Committee draft in 1998, which was the initial working draft in Rome, reflected this continued indecision in the aiding and abetting language of what would become Article 23(7)(d): “[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists”¹⁵

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. We knew that Article 30 of the Rome Statute, which deals with the required mental element, was our agreed-upon formula on how both intent and knowledge would be described and applied as the mental element for all of the crimes. Article 30(2)(b) had long been settled and easily captured the *mens rea* requirement for aiding and abetting, namely, “[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” In the negotiations, we did not relegate aiding and abetting only to the first prong of “means to cause that consequence” or to the second prong of “is aware that it will occur in the ordinary

¹⁵ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Official Records*, 31, U.N. DOC. A/CONF.183/13 (Vol. III) (2002), available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf.

course of events.” Of course, it is within the second prong of awareness or knowledge that aiding and abetting traditionally occurs and is validated under Yugoslav and Rwanda Tribunal jurisprudence.¹⁶

Even if one were to argue successfully that the Rome Statute requires specific intent for an aider or abettor, it would be a feature unique to the Rome Statute; there is no evidence to seriously suggest that it represents international customary law. Since the judges of the International Criminal Court have not ruled on this issue yet, there is no guidance from them on how to interpret the Rome Statute. I argued in my *amicus* brief that the inquiry into what constitutes customary international law for aiding and abetting should be conducted elsewhere, namely in the jurisprudence of the international and mixed criminal tribunals and in scholarly textbooks of recent date, almost all of which confirm a knowledge standard for aiding or abetting. My footnotes in the *Talisman amicus* and subsequent *amicus* briefs in other cases, and my co-authored article on this issue in the *Berkley Journal of International Law*, are replete with citations to tribunal jurisprudence upholding the knowledge standard.

¹⁶ See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 211, 214-18 (2d ed. 2008); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 236-45 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12-15, Presbyterian Church of Sudan v. Talisman Energy, Inc., 131 S. Ct. 79 (2010) (No. 09-1262).

Talisman Energy, having avoided liability under the high bar for aiding and abetting set by the Second Circuit, once again prevailed when the Second Circuit denied the application for a rehearing *en banc*. In a last ditch effort, the Sudanese victims filed a petition for *writ of certiorari* before the Supreme Court. I filed a new *amicus* brief at the Supreme Court in support of that petition.¹⁷ The Supreme Court denied the petition, without comment, in October 2010.¹⁸ Thus the Second Circuit's novel interpretation of aiding and abetting liability, relying heavily on a misinterpretation of the Rome Statute and casting aside years of *ad hoc* tribunal jurisprudence, still stands as federal law in the Second Circuit.

The *Talisman* judgment was quickly followed by *Kiobel v. Royal Dutch Petroleum Co.*, again in the Second Circuit.¹⁹ This Alien Tort Statute case involved Nigerian residents accusing the Royal Dutch Petroleum Company and Shell Transport and Trading Company, acting through a Nigerian subsidiary, of aiding and abetting the Nigerian government in committing human rights violations, including killings, torture, and forced

¹⁷ Brief for David J. Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari at 9-11, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262).

¹⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.* 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010) (No. 09-1262).

¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

exile, among other crimes. The plaintiffs alleged that Royal Dutch Shell aided these violations by providing transportation to Nigerian forces, allowing its property to be used as staging grounds for attacks, and providing food and compensation to soldiers. The Second Circuit invoked the new *Talisman* intent standard for aiding and abetting to dismiss the claims against Royal Dutch Shell. But the Court of Appeals in *Kiobel* went much further, ruling for the first time in American jurisprudence, and in defiance of two decades of Alien Tort Statute litigation against multinational corporations, that there is no corporate liability under the Alien Tort Statute. The judges' source of law for this remarkable ruling was none other than the Rome Statute.

Two of the three judges on the Second Circuit Court of Appeals panel concluded that because the Rome Statute excluded juridical persons from criminal prosecution for atrocity crimes before the International Criminal Court, then the negotiators must have concluded that corporate liability of any character for such crimes must not exist under international law. The Circuit Court misinterprets footnote 20 of *Sosa v. Alvarez-Machain* to require that corporate liability be a "specific, universal, and obligatory" legal norm in order to hold Royal Dutch Petroleum or any other corporation liable under the Alien Tort Statute. Footnote 20 of *Sosa* requires, when ruling on ATS claims, consideration of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being

sued, if the defendant is a private actor such as a corporation or an individual.”²⁰

By so misconstruing footnote 20, the Second Circuit required that the character of the tortfeasor must be firmly established as a matter of international law in order to attract liability. The Court of Appeals then went on to misinterpret the drafting history of the Rome Statute as revealing that the global community lacks a “consensus among States concerning corporate liability for violations of customary international law.” The two Appeals Court judges relied heavily on the Rome Statute to argue for the lack of corporate liability under international law, thereby shielding multinational corporations from even civil liability. But they do so by utterly misinterpreting both Supreme Court precedent (the *Sosa* decision) and then misinterpreting what negotiators were examining in Rome when corporations were excluded from the personal jurisdiction of the ICC.²¹

Judge Leval, the third judge, wrote a dissenting opinion that thoroughly rebutted the views of Judges Jacobs and Cabranes on corporate liability. Applying a common sense reading to both U.S. and international law, he found ample authority to solidly lock in

²⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

²¹ See David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 359-365 (2011).

corporate liability under the Alien Tort Statute. The *Kiobel* judgment was appealed to the Supreme Court in a petition for *writ of certiorari*; I filed an *amicus* brief at the Supreme Court explaining what happened to corporate liability in the Rome Statute talks. I wrote in that brief:

While it may be true that some countries allow certain civil penalties to arise within domestic criminal actions, *Sosa*, 542 U.S. at 762, the negotiators at Rome could not agree either on criminal liability for corporations or the punishment for “convicting” a corporation, including the formula for imposing civil penalties alongside mandatory criminal penalties. As a result, we decided to retain our narrow focus on criminal liability of individuals only—under a statute designed to create an international criminal court—and left civil damages for natural and juridical persons out of the discussion and the court’s jurisdiction. To read the failure to agree on and resulting omission of *criminal* liability for juridical persons under the Rome Statute as an “*express rejection...of a norm of corporate liability in the context of human rights violations,*” *Kiobel*, 621 F.3d at 139 (emphasis in original), is incorrect. To then posit that one can infer, under *Sosa*, that lack of criminal liability in the Rome Statute should dictate a lack of civil liability for juridical persons under the Alien Tort statute is both a

misunderstanding of the negotiations at Rome and an illogical reading of *Sosa*.²²

The Supreme Court considered the petition for *writ of certiorari* in *Kiobel* on September 26, so we will all know very soon whether the Court will be seized with this case.²³ It is very important, because there is now a pronounced circuit-split in the U.S. federal courts on both the aiding and abetting liability standard and on corporate liability for atrocity crimes as they are framed under the Alien Tort Statute. Much has happened in recent months to sharpen that circuit split. In the Seventh Circuit, which includes Indiana and Illinois, a district court in Indianapolis held in *Flomo v. Firestone Natural Rubber Co.* (a child labor case in Firestone rubber plantations in Liberia) that the *Kiobel* ruling in the Second Circuit was persuasive enough on corporate liability to scuttle the plaintiffs' case in the Seventh

²² Brief for Ambassador David J. Scheffer, Northwestern University School of Law as Amicus Curiae in Support of the Issuance of a Writ of Certiorari at 8-9, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011) (No. 10-1491).

²³ The Supreme Court granted the petition for *writ of certiorari* and held oral arguments on February 28, 2012. The Supreme Court thereafter requested re-argument on additional issues and that re-argument should be heard during the 2012 term. Order in Pending Case, *Kiobel v. Royal Dutch Petroleum Co.*, 132S. Ct. 1738 (2012) (No. 10-1491). I filed a supplemental *amicus* brief for the re-argument. Supplemental Brief for Ambassador David J. Scheffer, Northwestern University School of Law as Amicus Curiae in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 13, 2012).

Circuit.²⁴ That case went on appeal to the Court of Appeals for the Seventh Circuit, sitting in Chicago, and I attended the hearing in early June 2011.

The oral arguments were remarkable. There sat before us perhaps the three most conservative judges on the Seventh Circuit, led by one of the most famous conservative Court of Appeals judges in America, Judge Richard Posner. Posner crucified Firestone's counsel on the issue of corporate liability, at one point telling the appellate litigator—who seemed not to appreciate the importance of Nuremberg or any international law since then and who argued that *Kiobel* absolved Nestle of all responsibility—"Well, you lost me!" The judgment, handed down relatively quickly on July 11, 2011, completely upheld corporate liability under the Alien Tort Statute.²⁵ But the judges dismissed the case against Firestone because, in their view, the plaintiffs had not substantiated their claim that the child labor charges rose to the standard of violations of international law required by *Sosa*. In other words, they were not shown to be atrocity crimes or even human rights violations of indisputable character under customary international law, and thus they fell outside the subject matter jurisdiction of the Alien Tort Statute. Nonetheless, this was a victory for corporate liability under the Alien Tort Statute, and created a split with the Second Circuit.

²⁴ *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).

²⁵ *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

Meanwhile, over in the Ninth Circuit, which includes California, a district court sitting in Sacramento had also followed *Kiobel* on both the aiding and abetting and corporate liability standards in dismissing the case of *Doe v. Nestle*. That case concerned Malian child slaves who were trafficked from Mali to Côte D'Ivoire and forced to work 12- to 14-hour days with no pay, little food or sleep, and frequent beatings—all for the corporate profits of Nestle, Archer Daniels Midland Company, and Cargill Cocoa.²⁶ The case is now on appeal to the Court of Appeals for the Ninth Circuit, sitting in San Francisco, and I have filed an *amicus* brief contesting the district court's findings on both aiding and abetting and corporate liability.²⁷ If the Ninth Circuit overturns the district court's ruling, the circuit split with the Second Circuit will be even more pronounced.

But the most significant development during the summer of 2011 may have occurred in the D.C. Circuit Court of Appeals in the case of *Doe v. Exxon Mobil Corp.*, a complaint brought under the Alien Tort Statute by 15 Indonesian villagers from the Aceh territory alleging that Exxon's security forces committed murder, torture, sexual assault, battery, false imprisonment, and various common law torts.²⁸ They alleged that Exxon

²⁶ *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

²⁷ Brief for David J. Scheffer as Amicus Curiae in Support of Appellants and Reversal, *Doe v. Nestle S.A.*, No. 10-56739 (9th Cir. July 1, 2011).

²⁸ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

took actions both in the United States and at its facility in the Aceh province that resulted in their injuries. In a judgment handed down on July 8, 2011, the Court of Appeals rejected the entire *Kiobel* analysis on aiding and abetting and on corporate liability, citing my *Talisman* brief before the Supreme Court and in five instances citing my co-authored *Berkeley Journal of International Law* article of early 2011, all to clarify that the Rome Statute simply does not mean what the two Second Circuit appeals judges interpreted it to mean.

The D.C. Circuit Court of Appeals also looked to international criminal tribunal jurisprudence to confirm the knowledge standard for aiding and abetting liability. The Court of Appeals held:

The court therefore looks to customary international law to determine the standard for assessing aiding and abetting liability, much as we did in addressing availability of aiding and abetting liability itself. Important sources are the international tribunals mandated by their charter to apply only customary international law. Two such tribunals, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, are considered authoritative sources of customary international law. *See, e.g.*, [Hamdan, Abagninin v. Amvac Chem. Corp., Ford v. Garcia]. They have declared the knowledge

standard suffices under customary international law.²⁹

The majority reversed the lower court's dismissal of the Alien Tort Statute claims and remanded the combined cases to the district court. The majority opinion occupies 112 single-spaced printed pages, and is, in my humble view, a definitive treatment of both the aiding and abetting and corporate liability issues.

Thus, the Seventh, Eleventh, and D.C. Circuit Courts of Appeals have confirmed corporate liability under the Alien Tort Statute, and the Eleventh and D.C. Circuit Courts of Appeal have confirmed the knowledge standard for aiding and abetting. We await the judgment of the Ninth Circuit Court of Appeals on both issues. The Second Circuit is the outlier. The Supreme Court may engage to resolve the gathering circuit split with the Second Circuit, and when it does, the briefing will be dense with tribunal jurisprudence and interpretation of the Rome Statute. We can expect the Supreme Court, when it renders its judgment, to rely on the international criminal tribunals and the Rome Statute for guidance. Of course, we may hear a different perspective from some of the justices on whether the Court dare look to international sources of this character to interpret the Alien Tort Statute, but I suspect others may look towards The Hague, Arusha, and Freetown for guidance and consequently strengthen liability under the Alien Tort Statute. The most interesting element of this endgame at the Supreme Court (and already at play in the Courts of

²⁹ *Id.* at 33.

Appeals) undoubtedly will be the federal courts' reliance on tribunal jurisprudence and statutory interpretation to confirm the character of federal law. Who would have predicted such reliance in the early 1990s, when the Alien Tort Statute began to be enforced against corporations and when the tribunal-building era began?

The Appeals Chamber of the Yugoslav Tribunal still could influence the end game for the Alien Tort Statute. There is a long-standing appeal before the Appeals Chamber by former General Dragoljub Ojdanic, who was sentenced to 15 years' imprisonment for crimes against humanity against Kosovo Albanians.³⁰ He amended his appeal on the heels of the *Talisman* ruling to argue that the *mens rea* requirement of aiding and abetting as established under customary international law has been defined properly by the *Talisman* judgment of the Second Circuit Court of Appeals, such that the Yugoslav Tribunal was required to abandon its long-standing knowledge standard and embrace the intent standard, which probably would be more difficult for the prosecutor to prove.³¹ I filed an *amicus* brief with the Appeals Chamber, which was accepted, challenging resort to *Talisman* and urging the Appeals Chamber to

³⁰ See *Prosecutor v. Sainovic, Ojdanic, Pavkovic, Lazarevic & Lukic*, Case No. IT-05-87-A, Scheduling Order (Int'l Crim. Trib. for the Former Yugoslavia Mar. 29, 2012).

³¹ *Prosecutor v. Sainovic, General Ojdanic's Motion to Amend His Amended Notice of Appeal*, Case No. IT-05-87A (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2009).

stay the course with the knowledge standard on aiding and abetting.³²

If the Appeals Chamber confirms the knowledge standard in its judgment on the *Ojdanic* appeal, and does so by rejecting the misinterpretation of the Rome Statute by the Second Circuit, that will constitute powerful evidence for federal courts in the United States, demonstrating that the Second Circuit is wrong and that the Supreme Court should so conclude (and before that the Ninth Circuit Court of Appeals if the *Ojdanic* judgment is handed down prior to the *Nestle* judgment and any Supreme Court review). The Yugoslav Tribunal Appeals Chamber should benefit from the recent reasoning of the D.C. Circuit Court of Appeals on the knowledge standard for aiding abetting, as well as the Eleventh Circuit Court of Appeals, and many district court judges in the Second and Ninth Circuits. That kind of cross-fertilization, moving in both directions across the Atlantic, should facilitate well-reasoned opinions.

What happens in the United States if the Supreme Court upholds the Second Circuit's judgment in *Kiobel* on corporate non-liability, including civil liability, for atrocity crimes? In that event one should follow the advice of the Second Circuit Court of Appeals. The majority invited American litigators to give much more

³² Brief for David J. Scheffer, Director of the Center for International Human Rights, Northwestern University School of Law as Amicus Curiae, *Prosecutor v. Sainovic, Ojdanic, Pavkovic, Lazarevic & Lukic*, Case No. IT-05-87-A (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2010).

serious consideration to civil actions against corporate officers and their often considerable personal assets for such individuals' critical roles in guiding corporate conduct leading to atrocity crimes and other human rights abuses. As they wrote: "We note only that nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law."³³ While bringing a civil action against a corporation is perhaps easier than against a chief executive of that company, in terms of discovery and remedies, the Second Circuit opened the door wide for the legal academy to strategize ways of holding corporate executives accountable with civil remedies before federal courts. So this story is by no means over in the United States, either for corporate liability or CEO liability.

Former Prosecutor Luis Moreno-Ocampo of the International Criminal Court got into some hot water back in 2004 when he told reporters during an International Bar Association meeting in San Francisco that corporate officials who participate in atrocity crimes may be subject to prosecution by the Court.³⁴ The

³³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010).

³⁴ James Podgers, *Corporations in Line of Fire: International Prosecutor Says Corporate Officials Could Face War Crimes Charges*, 90 A.B.A. J. 13, Jan. 2004, available at

American business community pounced on him, as did federal judge Michael Chertoff (later to become Secretary of Homeland Security under President George W. Bush) who criticized the dangerous overreach of the International Criminal Court.³⁵ I trust that the Office of the Prosecutor did not let a little criticism from the corporate guardians deflect it from worthy investigations. When the crime of aggression is activated, perhaps as early as 2017,³⁶ such codification of the individual's criminality could have a profound impact on corporate officers in terms of criminal prosecution. It also could expose corporations engaged in war-related enterprises, such as arms manufacturing and military contracting, to ATS liability. A ruling by the ICC invoking its jurisdiction over the crime of aggression could be easily interpreted by a federal court as establishing the basis for ATS liability over an

http://www.abajournal.com/magazine/article/corporations_in_line_of_fire/.

³⁵ Michael Chertoff, *Justice Denied: The International Criminal Court is Even Worse Than its Critics Have Said*, 9 WKLY. STANDARD, Apr. 12-19, 2004, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/956xhybq.asp>.

³⁶ See David Scheffer, *The Crime of Aggression*, in BEYOND KAMPALA: NEXT STEPS FOR U.S. PRINCIPLED ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT AT 87, 88 (Am. Soc'y Int. Law Discussion Paper Series, Nov. 2010), available at http://www.asil.org/pdfs/2010_beyond_kampala.pdf; David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 ASIL INSIGHT, June 22, 2010, <http://www.asil.org/insights100622.cfm>

atrocities crime, as similar rulings by the international criminal tribunals since 1995 have deeply influenced the range of torts, or atrocities crimes, that fall within the violations of the law of nations established by the Alien Tort Statute.

While the tribunals have in the past, and can in the future, prosecute corporate executives for commission of atrocities crimes, I would propose that we give some thought to an expanded jurisdiction of the International Criminal Court to hold corporations responsible for civil remedies for complicity in, or direct commission of, atrocities crimes. What crippled the negotiators in Rome was the idea of holding corporations accountable under criminal law, as that concept is not uniformly held among national jurisdictions across the globe (in contrast to civil liability). In the United States, civil liability is a powerful weapon against corporate malfeasance in the realm of atrocities crimes, and if that principle survives the challenge by the Second Circuit Court of Appeals, perhaps it is a signal that the time has arrived for some serious thinking about how to hold corporations accountable with civil remedies before the International Criminal Court. After all, U.S. courts have long concluded that it is criminal conduct (the most egregious torts) that triggers so much of the Alien Tort Statute liability, including against corporations. That assessment would fit logically within the mandate of the International Criminal Court.

I therefore propose more focused attention to the criminal prosecution of corporate executives, which is already within the International Criminal Court's

jurisdiction, and an amendment to the Rome Statute that authorizes civil remedies against multinational corporations found to be complicit in, or directly engaged in, the commission of atrocity crimes falling within the jurisdiction of the International Criminal Court. One can only imagine the complexities of such a proposal, but the fate of so many innocent victims of corporate complicity in atrocity crimes requires that we finally consider the possibility of corporate accountability.

Evidentiary Challenges in the Srebrenica Prosecutions

Andrew T. Cayley*

*The following text is an edited transcript of
Prosecutor Cayley's keynote address on August 29,
2011, at the Fifth International Humanitarian Law
Dialogs held in Chautauqua, New York.*

* * * * *

As many of you know, Ambassador Hans Corell, the former Legal Adviser to the United Nations, was supposed to give this address, but he unfortunately got delayed as a result of the storms along the East Coast, and I think he is still stuck in Sweden. But I am told he will come next year. So this, I have to tell you, is a bit of a jerry-rigged presentation. It concerns a case in which I was involved some years ago now, thirteen years ago to be precise,—and I think it was probably the case that has most profoundly affected me during my career in international criminal law. There were certain unique elements in this case related to the law and facts which made it a very memorable case.

The case concerned the first prosecution, at the International Criminal Tribunal for the former Yugoslavia (ICTY), for events that had occurred in Srebrenica in Bosnia-Herzegovina in July 1995. At that

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time, I was what we call in England a “junior” on the case. The case was being led by an American prosecutor named Mark Harmon, who was a very distinguished prosecutor at the Yugoslav War Crimes Tribunal, and is now retired. We prosecuted this case together with another individual named Peter McCloskey—who is currently prosecuting General Ratko Mladić, who was arrested this year in Serbia—and also with another Australian prosecutor name Magda Karagiannakis.

I think this case particularly affected me because of the community of victims, which I will touch on a bit, and because of the forensic evidence. As I mentioned in my Prosecutor’s Update, the crimes we are dealing with in Cambodia are nearly 30 years old. Any physical evidence that existed is now just skeletons, many of which are enclosed in memorial sites within Cambodia. In Srebrenica, the crimes took place during the early existence of the Yugoslav War Crimes Tribunal. Although we initially had problems of access, by 1997 or 1998, we traveled to the region where the crimes had taken place, and we literally dug up the fleshed bodies that we would use as evidence in the case.

My two principal responsibilities in this case revolved around the forensic evidence and evidence establishing the military command structure. Because of my military background, they had me trying to sort out and understand the military command structure, using experts. We had an in-house expert named Richard Butler, who was a former intelligence officer in the U.S. Army, and he did a lot of this work together with external experts. We also had a British Major General

who came in and gave evidence on the military structures to the judges. But those were my two main areas of responsibility, and they are what I will touch on in this presentation.

In this photograph, you can actually see one of the exhumed graves. It is a photograph that obviously leaves a lasting impression. You will see it again later. It depicts a particular site by the name of Kozluk. But let me first go over some of the facts of this case. I apologize to my professional colleagues who have worked on associated cases and who know this evidence as well as I do, but we have a mixed audience here and not everyone is familiar with the most recent war in Yugoslavia or the work of the Yugoslav War Crimes Tribunal.

This particular case arose out of the conflict in Bosnia-Herzegovina from 1990 onwards specifically, the fall of the Srebrenica enclave in July 1995. I will show it to you on a map.

The principal criminal act committed by Serb forces in Srebrenica was murder—the unlawful killing of over 8,000 men between 16 and 60 years of age. There were other crimes committed as well but murder was the main one. Bear in mind that the Prosecution began working on this case in 1995. The figure of 8,000 has since increased, but by the time of the first prosecution, that was the figure that we knew—that upwards of 8,000 men were killed. We only recovered the remains of 2,000 individuals. Many thousands more have been recovered over the last fifteen years for the purposes of identifying

them and informing their relatives. All of those human remains are actually stored in a salt mine underneath the city of Tuzla.

The second criminal act was the forcible displacement of the rest of the civilian population—woman, children, and the elderly—out of Srebrenica and into Bosnian Muslim-controlled areas. We charged the murder as genocide and as the crimes against humanity of extermination, murder, and persecution, and we also charged murder as a war crime. We charged the forcible movement of upwards of 25,000 people as the crime against humanity of deportation.

The following words are from the beginning of the judgment in this first Srebrenica case, which I believe were mostly written by the American judge on the panel, Patricia Wald. She wrote beautifully. She still writes beautifully. She is retired now, but she served on the Yugoslav War Crimes Tribunal for two years. We were really fortunate to have her on this case, because she was an extremely experienced appellate judge from the D.C. Circuit. She had enormous experience dealing with complex trials. We were very, very fortunate to have her as the judge in this case.

And this is part of what she wrote: “The events of the nine days from July 10-19, 1995 in Srebrenica defy description in their horror and their implication for humankind's capacity to revert to acts of brutality under the stresses of conflict. In little over one week, thousands of lives were extinguished, irreparably rent or simply wiped from the pages of history.”

If you get the opportunity to visit the ICTY's website, I recommend that you read the first three pages of this judgment, because it is beautifully written, and it really encapsulates what happened in Srebrenica.

For those less familiar with the region, this is the municipality of Srebrenica, in Bosnia-Herzegovina. By July 1995, this was an area which had an enclave within an enclave. Within that municipality, there was a tiny area in which about 50,000 Bosnian Muslims were completely surrounded by Bosnian Serb forces. You can see the strategic position of Srebrenica—it is on the border with Serbia. One of the Serbian aims during the Yugoslav conflict was to eliminate that border, so that the Serbs living in Bosnia would be contiguous with the Serbs living in Serbia proper. Srebrenica was one of the few Bosnian Muslim enclaves on the border with Serbia by July 1995, which the Serb forces wanted to remove. Most of the people that were in the enclave were civilians. There were some Bosnian Muslim armed forces, but the majority of the people were civilian males, women, and children.

What was very significant about this case, and fairly unique—at least at that time, in 1999—was the great deal of forensic evidence that we were able to present to the Court. In the first trial I did before the ICTY, the *Blaškić* case, there was absolutely no forensic evidence at all. In the Srebrenica case the Court found our forensic evidence extremely compelling for a number of reasons, which I will list. But the Court also made the express statement in its trial judgment that the Prosecution's forensic evidence provided corroboration of survivor

testimony that, following the takeover of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions.

We had to prove that 8,000 people had been murdered. We had to counter the Defence position that many of these people were combat casualties—that they were people who had been killed in combat. You will see that the evidence was not absolutely conclusive. But one of the most persuasive demonstrations we were able to make was that the gravesites where people had been buried after being executed had been robbed. In other words, Serb forces executed individuals, buried the bodies, and then when international media—when your Secretary of State at the time released aerial photographs revealing the locations where the bodies had been buried—the Serb forces went back, dug up the bodies, and put them in secondary graves. You would not bother doing that if the victims were combat casualties.

We exhumed 21 gravesites in connection with the events in Srebrenica. Of the 21, 14 were primary gravesites—meaning they were the original gravesites in which people had been buried following execution. Eight of those gravesites had been robbed. To put this in perspective, there were many, many more gravesites in connection with Srebrenica than the 21 we exhumed. We subsequently exhumed another ten, and then the Bosnian authorities went on exhuming graves. Obviously, there were gravesites across Bosnia and not just linked to Srebrenica, but this was where we limited our focus in this case. Seven sites we exhumed turned out to be

secondary sites—sites to which the body parts had been transferred after they had been dug up from their original graves.

At that time—in 1999, we established that there were a minimum of 2,028 bodies that we could identify from these sites. The figure was quite low because, in a number of the gravesites, particularly the secondary sites, the bodies were “commingled,”—bodies had decomposed and, as they were dug up and moved, they fell apart, meaning that in the secondary graves it was a pit full of a jumble of bits and pieces of bodies. In some instances, we did try to put bodies back together. I know it sounds absolutely hideous, but that is what we had to do in order to both try to identify people and to try to establish the number of people murdered. Obviously, it was a lot easier to establish numbers of bodies in the primary gravesites, because these graves had not been disturbed.

We were able to positively identify people from items they had on their person; in some instances, very distressing things like photographs of children and gifts from loved ones. It was very, very sad to hand these over to a relative, but because of these objects we were able to identify many of these people as having been inhabitants of Srebrenica prior to its fall in July 1995.

We were able to help establish that people killed were of Muslim ethnicity—these were Bosnian Muslims who had been murdered—because a significant number of them had parts of the Koran in their inside pocket.

We were able to corroborate demographic evidence that the overwhelming majority of the missing people from Srebrenica were men. We had a demographics expert go through all of the Red Cross lists to establish who was missing at the end of the war. We could match the fact that the majority of those reported missing from Srebrenica were men with the fact that all of the bodies we were pulling out of the graves were men. We were also able to corroborate the evidence that the expert had managed to formulate on the age ranges of individuals. So the forensic pathologists' assessments of the ages of the bodies broadly matched the demographics that were established from the Red Cross's lists of people that were missing from Srebrenica.

Again, we were able to corroborate the fact that many of the bodies were not combat casualties.

We were able to recover 448 blindfolds at ten sites and 423 ligatures at 13 sites. So the bodies were recovered wearing blindfolds. Bodies had hands that were tied. People going into combat are not blindfolded with their hands tied behind their back. That is classic execution pose. The robbed sites demonstrated a concerted effort to conceal the crime.

We were trying General Major Radislav Krstić, who was then Commander of the Drina Corps. His superiors had been charged but not yet arrested at the time. Dr. Radovan Karadžić was the President and Supreme Commander of the Bosnian Serb forces, and General Ratko Mladić was the Chief of Staff of the Bosnian Serb forces. They are now both in custody at the ICTY and

have both have been charged with crimes emanating from this event. Dr. Karadžić is currently on trial, and Mladić has only just been arrested this year and will be facing trial, I think, next year.

So the individual that we were looking at was this man, Major General Radislav Krstić, who was a Corps Commander in the Bosnian Serb forces in this particular area, including Srebrenica. Many of his units were actually involved in these particular crimes. To be fair to Krstić, other units were involved as well, but a number of Krstić's units were engaged.

One of the issues that arose very early on in the trial was that Krstić denied being the commander during the period of the executions. He claimed not to have been appointed. At the beginning of the trial, we could not conclusively prove that he had been the commander. We had an order, which I will show you in a minute, issued by him on July 13, 1995—the period leading up to the executions, but we could not conclusively prove that he had been appointed until the end of the trial when we were provided with this document. This is obviously a translation of the original, which was in the Serbian language. This document was produced by the Administrative Officer of the Corps recording the handover of command from the former commander, whose name was General Živanović, to General Krstić. The judges considered the Prosecution and Defence positions, and then concluded, on the basis of this document, that Krstić must have assumed command of the Drina Corps on July 13, 1995.

This was the other document, issued by Krstić on July 13, 1995, which he signed as Commander of the Drina Corps. Having been an army officer, I looked at this, and I remember I told Mark Harmon, “Look, if you sign a document headed Command of the Drina Corps, and under your name and signature is the word Commander then you must be the commander of the corps.” As self-evident and incontrovertible as this issue should have been, the Defence claimed that Krstić was not signing as Commander of the Drina Corps but that he was actually signing as Commander of the Žepa group, which was a tiny fictional unit that Krstić invented in order to convince the judges that he was not Commander of the Drina Corps. We had a British Divisional Commander come in and testify that the documents meant that Krstić was the Drina Corps Commander and could not mean anything else. The British Commander said, “If Krstić was the Commander of the Žepa group, it would have said Commander, Žepa group.” The judges, not being military people, needed this kind of expert evidence to be certain of the interpretation of the document.

If you look at the document, you can see there is a handwritten part at the bottom. It says July 13, 20:30, and has a legible signature. When I first saw the original document, I recognized it immediately, because the British Army does this exactly the same way. It was basically the signaller’s stamp from the Corps Communications Centre recording when this order was transmitted to the units of the Corps. So Krstić writes the order, the clerk types it up, he signs it, then it goes to a

communications center, and it is transmitted to all of the units in the Corps.

If you look at the documents you will see that they were sent out by the same signaller. I think one was sent at 20:30, and the other was sent at 20:35. And the signatures are identical—they were studied by document examiners. So those two documents actually were sent by the communications center at the same time, which would make sense, because Krstić was issuing his first operational order as Commander of the Drina Corps, and at the same time, notice was going around to all of the units in the Corps that he was now the head man—he was the Corps Commander. So, taken together, those two documents were extremely important.

We were also able to show political documents revealing the strategic objectives of the Bosnian Serbs. You can see that their second aim was to establish a corridor in the Drina River Valley that would eliminate the Drina as a border between the two Serbian states. They expressly stated their desire to eliminate that border as a political objective so that Serbians would be contiguous across that border. This has been used in evidence at the ICTY in multiple cases. It is signed by Momčilo Krajišnik, who was the President of the Serbian Assembly and was also tried by the ICTY. I think he was sentenced about two years ago, after a very long trial. I cannot remember the exact sentence, but I think it was for at least 35 years in prison. So the gentleman that signed that document was subsequently tried and convicted.

Here is another interesting order. This is an order from the main staff of the Bosnian Serb Army—the unit above Krstić's. It is issued in 1992 to the commander—the Chief of Staff personally—and it is an operational directive. Krstić was the second in command of the Drina Corps at the time this order was issued. It is a military strategic document which, amongst other things, orders the Drina Corps to attack the population—and here it is talking here about Bosnian Muslims—“and force them to leave the Birač, Žepa, and Goražde areas.” So this was a military order directed not just at Bosnian Muslim combatants but also at the population. It was literally directed at the Bosnian Muslim civilian population.

This next document is an order to the Drina Corps issued three months before the attack on Srebrenica. Krstić is still Deputy Commander. The man I mentioned earlier, Živanović, is the Commander, and these are the orders that are given from the Supreme Command—so from Karadžić's level—to the Drina Corps. The Drina Corps are ordered to pursue the complete physical separation of Srebrenica from Žepa, which was another Muslim enclave in Bosnia-Herzegovina just south of Srebrenica. The order says that this should be carried out “as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well thought-out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa.”

This is a very telling order, an illegal order, an order that makes absolutely clear the military objective in Srebrenica. The objective was to create a humanitarian catastrophe in that enclave and to force the population out. Of course, we presented this directive to the judges. It was a very powerful piece of evidence. I was always astonished that this had actually been recorded in writing.

Interestingly, the Drina Corps issues its own order in response to this order, but in much, much more conservative language that basically orders the Drina Corps to split apart the enclaves of Žepa and Srebrenica and reduce them to their urban areas. So there is no mention of creating a condition of total insecurity with no hope of further survival and life, etc. Yet, that is actually what subsequently happened. But this order was a much more clinical order without any indication of criminal intent.

This is the Srebrenica enclave, and you can see that this is the enclave here. The entire Bosnian Muslim population was in that area, and it was protected by a very small U.N. protection force. Much has been written about this Dutch unit. It was a unit of the Dutch army which was not properly equipped to deal with a full-scale attack by a Bosnian Serb Army Corps. The U.N. protection in Srebrenica disappeared very quickly. There was also confusion within U.N. headquarters in Sarajevo and in Zagreb about the use of air power. Essentially, the United Nations did not react properly to the ongoing crisis.

Ultimately there was very little air support for the Dutch forces that were in that pocket. A number of Bosnian Muslims have been pursuing the Dutch government, trying to recover civil damages in the Dutch courts. I think there has recently been a successful case brought by the son of two individuals—his mother and father—who were killed by Serb forces in Srebrenica. A lot of Dutch officers from the unit in Srebrenica gave evidence during the trial at the ICTY. The problem that they really had, I think, was that at that time, the Dutch had a conscripted army, so many of these Dutch kids really did not want to take on the Serbs. They were just doing a year of national service. So the defense collapsed very quickly.

On the night of July 10, 1995, the male population—15,000 men—left the enclave as the Bosnian Serbs were closing in, because they were extremely concerned that the Bosnian Serbs would basically kill them all. Many of them did eventually suffer that fate. Within that group of 15,000 people, there were—if my memory serves me—about 2,000 fighters. So at the front end, there were Bosnian Muslim combatants who pushed a hole through Bosnian Serb forces. But behind that, there were 12 or 13,000 unarmed civilian males, between the ages of 16 and 60, fleeing the enclave. That red line indicates the route of flight.

Most Muslim men were captured at the bottom end of that red line as they came out. The Bosnian Muslims were walking along a ridge, and the Bosnian Serbs set up an offensive position along this line, and they started to shell the column as it was fleeing. Many people simply

came down and surrendered to the Serbs. There is video footage of this. They would capture somebody, and then the Serbs would get the person captured to shout up and tell their relatives to come down.

Nobody really knows the total number captured. There were very, very few survivors. We will talk about that in a moment. Of the captured, I think there is only a handful. Of the survivors, I think we had about 15 or 20 people testifying who had been in the column and who had been captured and had managed to escape. Few people who were captured survived; a few thousand other than the combat forces actually did make it north to Bosnian-controlled territory.

This particular trial, unlike the first trial in which I was involved at the ICTY, attracted a lot of media attention. Bosnian Serb journalists were in Srebrenica as this was happening. Here, you have men in Potočari, the U.N. compound within the Srebrenica enclave—this was the town where the Dutch forces had their headquarters in the enclave—so this is video footage being taken by a Bosnian Serb journalist as Muslim men were being separated by Bosnian Serb forces. As the years went by even more material became available—some of it extremely probative of the crime—literally photographic, video footage of bodies piled up next to execution sites, which we did not have available to us in this first Srebrenica trial.

Another unique aspect of this particular case was that the U.S. government provided us with aerial photography taken at the time over Srebrenica and the

surrounding areas. Secretary of State Madeleine Albright essentially went to the media with these aerial photographs said, “Look, we know what’s happened,” which caused the Bosnian Serbs to then start digging up all of the gravesites. But we were able to use a lot of this material in the first prosecution. It was declassified by the U.S. government, and frankly, this is some of the best evidence I have ever seen in any case.

This aerial photograph is from July 12. The Bosnian Serb forces had overrun the enclave. They were moving, placing a stranglehold around the enclave within Srebrenica, and here, you can see a group of people. That is a group of people outside the U.N. compound trying to get in, because they were seeking the protection of the U.N. forces. People were absolutely terrified. You can see those factories—that warehouse on the left-hand side. Many people went to that building, but people were desperately trying to get into the U.N. compound. Essentially, the Dutch had to close the gates because there were so many people inside the compound.

Many people who could not get inside the U.N. compound fled to that warehouse. I was involved in interviewing a number of witnesses who had fled to the warehouse. Women mostly. Also Dutch soldiers who had been inside. There were a number of Bosnian men who had not fled with the main column and who were stuck in that warehouse. A number of these people were so terrified that they committed suicide by hanging themselves from the rafters of the warehouse. So imagine families—children—gathered in this place seeking refuge, and male members of the population so

terrified of the Bosnian Serb forces that they are hanging dead from the beams in the ceiling.

I had one Dutch soldier describe the scene. He described small children running around and crying, and these bodies literally swinging from the tops of the rafters in this factory site.

You cannot see it very well, but in the background there is smoke rising. I was given this photograph on the day a Dutch soldier came to testify. We had evidence from Bosnian Muslim witnesses that all of the men who had not fled with the main column, but had gone to Potocari and had been arrested by the Bosnian Serb forces, had been subsequently executed. The Bosnian Serbs said that the belongings of these men had been taken away, but we did not have any physical evidence of these belongings. In fact, a Dutch soldier showed me this photograph and said, "Well, that's where they actually took all the belongings of all of these individuals who were murdered. They put them in a massive pile, poured gasoline over them, and burnt them to destroy any record of these people's existence; identity cards, clothes, suitcases. It all just went up in smoke." And this was a photograph that he handed to me on the day he was to testify. So evidence would come in as we were prosecuting the case, which happens often in these very large cases.

The square that you see in the middle of that field surrounded by hedges is a group of Bosniak men from the column who had been captured. We had military photographic image experts who could look at these

photographs and identify groups of people and other objects. That is a group of people gathered on a football field on July 13, just outside the town of Srebrenica.

The Bosnian Serb forces were extremely careless about radio communication security. Oftentimes, they would either speak on open military telephone lines or over open radio transmission. We had one particular radio intercept that was a conversation between two officers in the Bosnian Serb Army confirming that there was a group of individuals on a football field. It's called a "playground" here because it's a poor translation. That conversation is referring to the individuals I have just shown you, because that was a football field in Nova Kasaba, and these guys were basically stating, "Yes, there is a group of captured individuals on a football field."

On some occasions, interestingly, Serb forces involved in conversations said: "Shut up. Be careful what you are saying, because this is an open line, and people may be listening." In fact, the people that were listening were Bosnian Muslim forces quite some way away. They were listening on an old VHF radio, and they had reel to reel tape recorders just constantly recording all of the transmissions that were being picked up.

We discovered these intercepts by accident in the basement of a military headquarters in Sarajevo. The Bosnian Muslim armed forces converted the records into usable intelligence by having individuals sitting all day with headphones, writing out a transcript of what they

could hear from recorded transmissions. We had to have translators go through hundreds of these books, look at the relevant dates and pull out the material we needed. It was a very rich source of evidence. Things sort of corroborated each other backwards and forwards. The photographs corroborated the radio transmissions. The intercepted radio transmissions corroborated the photographs.

This is another aerial photograph. You can see the group of prisoners here. I examined a survivor who was at this site. I did not show him the photograph until he was in the courtroom, but he was able to describe this scene. Then once he had done that without the aid of the photograph, we pulled out this photograph and showed the judges. He described these six coaches—those white squares that you can see. These were coaches that were used to transport the captured male Muslims to the execution sites. He was able to describe that scene almost perfectly, and then we produced the photograph, which absolutely corroborated his evidence.

This is another radio intercept where they are openly talking about male prisoners. I will read this one. “Well, tell them right away to come. There are about 6,000.” Military aide: “Shut up. Don't repeat.” “At each point, roughly 1,500 to 2,000.” So, again, they are talking about very significant numbers of individuals who have been captured, and they are concerned about the fact that somebody might be listening, so he tells his interlocutor to shut up.

This is a report, an interesting report from one of the Bosnian Serb brigades under Krstić's command. The brigade is a unit below the corps in the Bosnian Serb Army structure and under its command. This document shows a Brigade Commander reporting on July 15—so the operation to round up all the Bosnian Muslims has been going on for about 48 hours—and he says, “An additional burden for us is the large number of prisoners distributed throughout schools in the brigade area, as well as obligations of security and restoration of the terrain. The command cannot take care of these problems any longer, as it has neither the material nor other resources. If no one takes on this responsibility, I will be forced to let them go.”

Now, the interesting thing about this document is that most of our survivor-witnesses confirm that after they had been captured, they were taken to a school in the region. This was an extremely rural area. Other than community halls, schools were the only large buildings where you could contain hundreds and thousands of people. Most of the survivors confirmed that they had been taken to a school by a bus and then removed from the school to the execution site where they, for whatever reason, had survived.

This is an interesting photograph. It is the Pilica Cultural Hall, which is the building in the middle that you can see with a pitched roof. There were actually no survivors from this building at all. It was a major execution site. There were about 2,000 people killed in that building. We were the first people to get into that building after it had been used as an execution site. We

went there in 1999, and the execution had taken place on July 17, 1995. The building had been locked after the bodies had been removed. We turned up in 1999, four years later. Investigators from the Tribunal used bolt clippers to take the chains off the door.

We went in, and you could see that there had been a mass execution in this place. Why? Because the walls were riddled with the pockmarks from gunfire. It was a community hall at the back, and we went under the stage where blood had congealed and dried. You could see just from the physical evidence on the ground that something absolutely terrible had happened in this place. The only way that we ultimately proved that this was an execution site was that we located a Bosnian Croat in the Bosnian Serb forces who had been present when this particular execution took place. He claimed that he had not been involved in this particular execution but that he had been present. He essentially confirmed that a lot of people were rounded up in this building and then executed by machine gunfire. So that is how we proved that event, because there were no known survivors from this site at all.

On this map, the red discs are primary gravesites, and the green discs are secondary gravesites. In other words, the bodies were dug up from the primary gravesites—the red circles—and moved to the green circles. We were able to connect the bodies from the primary sites to the secondary sites by examining the contents of the gravesites. We managed to match soil, pollen samples, shell cases, and material used to make blindfolds and ligatures that we found to be identical in

both gravesites, thus linking primary and secondary gravesites.

Kozluk was an execution site behind a bottling plant. They executed people where a lot of the broken bottles from the plant were just thrown away. When the Bosnian Serbs dug up the primary gravesite, they ended up digging up green glass from the bottling plant, which we then discovered in all of these secondary grave sites. We found pieces of smashed green glass, shell cases, blindfolds, ligatures, soil, pollen—all of this material which matched one grave site with the other.

This is a photograph of the Kozluk mass grave site. This is the photograph I showed you at the beginning. You can see a body that we recovered with a blindfold, providing evidence that this individual was not a combat casualty. He received a fatal gunshot wound while blindfolded.

Here is another blindfold, and that is a ligature tied around somebody's wrists.

Another blindfold. That is an interesting one. You can see the top of the cheek bone there on the left, and that is the rear of the skull. Now, I led a lot of the forensic pathology, and as many of the criminal lawyers in the room will know, you cannot assess the distance from which a shot has been fired unless the body is fleshed. When a weapon is fired at somebody at close range, it leaves a lot of the discharge on the skin. If you do not have skin, you cannot assess the distance. So the

forensic pathologist who gave evidence, a man named Dr. James Clark, was unable to determine the distance from which somebody had been shot because the bodies were no longer fleshed. But this photograph shows one instance where he was able to say that the person had been shot in the back of the head. If you look at the forensic literature—a lot of it comes from the United States, from the Vietnam War—people in combat are generally hit in the largest area. That is the target that somebody shoots at. They are normally shot in the chest. It is very rare that you are in combat and you are shot in the back of the head. So whereas it was not conclusive proof that this was an execution, it certainly seemed more like an execution than it did a combat injury to the head.

This photograph is of Branjevo Farm, another execution site. This is from July 17. By September 27, two months later, it was being dug up. The military imagery experts identified digging equipment, a newly excavated trench, and somebody digging up bodies that had been buried back in July. The graves had been disturbed; the bodies were being moved.

That is a photograph of the excavation of Branjevo. This is Dr. Haglund, a forensic anthropologist who worked for the ICTY.

This is an interesting photograph because it actually shows a secondary grave. You can see how the bodies are “commingled.” The bodies have been dug up. They have lost flesh, parts of bodies detach, and all become

mixed up together. That is, in fact, a very easy way of demonstrating that it is a secondary grave.

Bosnian Serb forces buried these bodies under a road in the hope that nobody would dig up a road looking for them. But this site was discovered by a French Army officer who had been deployed to Bosnia with NATO forces. He was driving down this road during a very heavy rainfall, and his car slid off the side of the road. He alighted from his vehicle, and it was about eleven o'clock at night, very dark, and the water had essentially washed away the top of the road.

That is what he discovered. He very quickly got back in his car and drove off to headquarters and reported what he had found, and then we came and exhumed that site.

Here, again, you can see that, unlike in a primary grave site, all of the bodies commingled, because these are bodies that had been transported from another site.

Here is another photograph from the end of October 1995. The killings had taken place in July. The military imaging experts identified a front loader digging up the grave sites. So, three months later, they are there, digging up a primary grave site.

This rather gruesome photograph is of the Nova Kasaba mass gravesite. The forensic pathologist confirmed that the individual in this photograph had a serious injury to his leg at the time that he was executed.

This again demonstrates that he could not possibly have been a combat casualty because the man could not have walked with this injury. His body was found in that gravesite, with that injury, on a stretcher. He had been killed by a gunshot to the head.

These words represent part of a harrowing but ultimately very human story concerning a 16-year-old survivor of the Srebrenica massacre who gave evidence. At the end of his testimony, the presiding judge asked him whether he had anything to add. He said: “From whatever I've said and what I saw, I can come to the conclusion that this was extremely well-organized. It was systematic killing, and that the organizers, in fact, do not deserve to be at liberty. And if I had the right and courage in the name of all of those innocents and all of those victims, I would forgive the actual perpetrator of the executions because they were misled. That's all.”

At the end of his testimony, you could have heard a pin drop in the courtroom, and the bench retired. And I remember that as Patricia Wald left the bench, her microphone was still on, and she said to the other judges, “That kid deserves a break in life,” because his evidence was so powerful.

Now, the boy was a survivor of what's known as the Petkovci Dam execution. He was 16 years old, captured, taken to a school, and taken from the school to an execution site at a remote dam at Petkovci. He was on a truck, from which people were dragged, pushed forward, and mowed down with machine gunfire by a machine gun on a tripod.

The man in front of him tried to run, so the machine gun traversed on the tripod to fire at the man that was escaping, and the boy went into the next row. By the time the gun had traversed back again, there were another two rows of people behind him. So as the people behind the boy were killed, the bodies all fell on top of one another and the boy remained alive under a pile of dead bodies. He had his hands tied behind his back. The next morning, soldiers came around to execute the people who were still alive, because a number of people had not been killed during the mass killing. There was a man lying parallel to the boy who had obviously also been protected by the death of those people behind him. But this man had suffered a serious leg injury from a bullet that hit him when it deflected off of somebody else. He was moaning. A Serbian soldier came up with a pistol and shot him in the head, and the head injury made such a mess on the boy that the Serbian soldier did not want to actually look at the boy to find out whether he was dead or alive. When all of the soldiers left, the boy managed to get his hands free, climb up from under the bodies, find another man alive at the front of all of these bodies, and together they escaped.

It is very hard to estimate numbers of bodies, but we actually took him back to the dam site, and he was able to walk a line as to where all the bodies were. We estimate there were probably about 1,500 people killed at that site. He and this other man are the only two known survivors.

Now the positive aspect of this story is that years later, after President Clinton had completed his second

term, his staff came to me and said that the President wanted to meet a survivor from Bosnia, because Clinton was going to visit Bosnia-Herzegovina. You may recall that Clinton was loved in Kosovo and Bosnia. He was seen as somebody who had really done something to stop the conflict, and indeed, he had. I identified this boy, and the plan was that Clinton would spend something like 15 minutes with him. In the end, the boy met him at the Holiday Inn in Sarajevo, and Clinton spent nearly two hours with him. I think President Clinton is quite an emotional man, and I believe he felt genuine compassion towards the boy. And there is a photograph of President Clinton, after spending two hours with this boy, holding him and weeping, having heard this story.

I subsequently met the boy again, because he was testifying in another case. He was absolutely delighted to have met the President of the United States. So that was a small positive thing that came out of this. Sadly, every single male member of this boy's family was killed in Srebrenica. Not one of them survived. It's now just him, his mother, and three sisters.

These words were spoken by a social worker working with the female survivors of Srebrenica. At the end of her testimony, she was asked by Judge Rodrigues whether she had any further comments. And I will read what she said:

The Hague Tribunal, all the victims and the women with whom I have had a chance to work, has a very great significance to them.

They expect justice will be done. We believe we are members of a civilized society, of a society where good will be compensated for and evil punished. They do trust that the real causes of what happened would be identified, and that the people will muster enough courage, including victims, to tell the story of what happened. Those who did it, they too will be able to speak out, so that we can all have a future, so that we can all have a basis for a common life together one day. Great expectations are being placed upon the Tribunal. People expect that justice will be done and the right decisions will be reached.

I often use this quotation in Cambodia, because I think that in many ways, it reflects people's expectation of what these special courts can do. This was a lady who had worked with the survivors of Srebrenica. Most of the men were killed, so she was working with women's groups in the area, trying to help people rebuild their lives, find somewhere to live, and find a way of surviving. I find that what she said reflects the essence of what these courts are supposed to do.

It is worth reading the U.N. Secretary General's report on Srebrenica. It came out two months before we started the first trial. It was really a long letter of apology from the United Nations for what happened in Srebrenica. They admitted the United Nations never learned its lesson. Srebrenica happened and then subsequently Kosovo. They stated, "In both instances, in Bosnia and Kosovo, the international community tried to

reach a negotiated settlement with an unscrupulous and murderous regime. In both instances, it required the use of force to bring a halt to the planned systematic killing and expulsion of civilians.” That report, interestingly, heavily relied on evidence that we had already gathered. So we had actually provided a significant amount of material for the Secretary General's report.

Here is another extract from the report: “No one regrets more than we the opportunities for achieving peace and justice that were missed. No one laments more than we the failure of the international community to take decisive action to halt the suffering and end a war that had produced so many victims. Srebrenica crystallized the truth understood only too late by the United Nations and the world at large that Bosnia was as much a moral cause as well as a military conflict. The tragedy of Srebrenica will haunt us forever.” That report is worth reading—it is a very interesting account of the U.N. failures in Bosnia.

Well, ladies and gentlemen, that, as I say, is a very rapid journey through a long trial that profoundly affected all of us who worked on it—dealing with the victims, who were extraordinary people, dealing with the evidence, which was traumatic for many of the younger people involved in that trial. Krstić was eventually convicted of genocide, persecution as a crime against humanity, and murder as a war crime. On appeal, a number of charges were accumulated. The crime of persecution essentially accumulated other charges that we had charged, but on appeal, the conviction for extermination was re-entered, which had been dismissed

at trial. At trial, Krstić was found guilty of these crimes on the basis of what's called a "joint criminal enterprise" under Article 7(1) of the ICTY Statute.

The Trial Chamber found Krstić guilty as a principal within a joint criminal enterprise, but on appeal, he was found guilty of aiding and abetting a joint criminal enterprise to commit genocide, which I have always had great difficulty understanding as a legal concept. Judge Shahabuddeen issued a strong dissenting opinion on appeal. He found that, on the evidence, Krstić was still a principal within a joint criminal enterprise, as the Trial Chamber had found, for genocide. If you want to read a very clear judgment, read Shahabuddeen's dissent. It is beautifully written and he actually makes a lot more sense than the majority does in its judgment.

At trial, Krstić was sentenced to 46 years, which was reduced to 35 on appeal. He was sent to the United Kingdom to serve his sentence, and he was imprisoned in Wakefield Prison, which is a high-security prison and which also contains a number of Muslim terrorists who had been convicted quite recently. After Muslim prisoners discovered what he was inside for, he was attacked in prison and nearly died. He was stabbed in the neck with a bottle. Krstić survived and then gave evidence at the subsequent trial in Leeds in the United Kingdom of the Muslims who had tried to kill him.

Thank you very much.

Evaluating State Capacity to Conduct War Crimes Trials Consistent with the Rome Statute

Mark Ellis*

Since 1945, there have been 313 armed conflicts in which an estimated 92-101 million people have died—twice the number of victims in World War I and II combined.¹ While a staggering number of these deaths are directly attributable to war crimes and atrocities, international and regional courts have indicted only 823 persons.² Most crimes have gone unpunished. Responding to the need for justice and accountability, the international community took a leap forward on July 1, 2002, when it established a permanent international criminal court to prosecute the most egregious international crimes: genocide, war crimes, and crimes against humanity. This vanguard court is a remarkable development in international law.

* Dr. Mark Ellis is Executive Director of the International Bar Association, London. This publication is based on Dr. Ellis's keynote address on August 30, 2011 at the Fifth International Humanitarian Law Dialogs held in Chautauqua, New York. It is also based on Dr. Ellis's upcoming book, *Sovereignty and Justice: Creating Domestic War Crimes Courts within the Principle of Complementarity*, which will be published by Oxford University Press in 2012. Dr. Ellis would like to thank Aleisha McLean for her research assistance on this article.

¹ THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2010).

² *Id.*

Debate continues, however, over whether and when gross violations of international criminal law should be tried by international courts or by national courts. It is reasonable and appropriate to question the role of domestic actors in handling the most heinous international crimes. There is incontrovertible evidence that national accountability for such crimes can be slow.³ Yet this is slowly changing, and the Rome Statute of the International Criminal Court (ICC) offers an important new mechanism to promote uniformity in the exercise of jurisdiction by *domestic* war crimes courts. As the ICC evolves and continues to be tested, national jurisdictions will be challenged to build and showcase their capacity, and will increasingly become “accountability centers” for international criminal trials.

The core mechanism for the devolution of judicial authority is the principle of *complementarity*. The Preamble and Article 1 of the Rome Statute establish that the ICC “shall be complementary to national criminal jurisdictions.”⁴ Complementarity gives national courts primary authority to prosecute individuals who have committed gross violations of international criminal law. The Statute specifies that it is “the duty of every

³ See Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT'L SEC. L. & POL'Y 111, 112 (2006).

⁴ Rome Statute of the International Criminal Court pmb., art.1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force July 1, 2002), *available at* <http://untreaty.un.org/cod/icc/statute/romefta.htm>.

State to exercise its criminal jurisdiction over those responsible for international crimes.”⁵ As Judge Fausto Pocar, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), and former Chairman of the U.N. Human Rights Committee, stated: “Developing domestic capacity for the prosecution of international crimes and the application [by domestic judiciaries] of international law as clarified by international courts [by domestic judiciaries] is . . . a primary objective to be achieved.”⁶

Complementarity addresses the presumed conflict between state sovereignty and the pursuit of supranational justice for the most pernicious international crimes, between a nation’s right to control and enforce its own laws and the victims’ right to objective justice. It is no surprise that most people believe it is better to prosecute crimes in local rather than international courts.⁷ The current ICC Prosecutor, Luis Moreno-Ocampo, concurred when he stated: “National investigations and prosecutions, where they can properly

⁵ *Id.* at pml.

⁶ Judge Fausto Pocar, Statement to the Dialogue with Member States on Rule of Law at the International Level Organized by the Rule of Law Unit: “UN Approach to Transitional Justice” 2 (Dec. 2, 2009), <http://www.unrol.org/files/TJ%20panel%20discssion%20-%20FP%20statement.pdf>.

⁷ See a discussion of Serbia’s views on the International Criminal Tribunal for the former Yugoslavia (ICTY) in DIANE F. ORENTLICHER, OPEN SOC’Y JUSTICE INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA (2008).

be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses.”⁸

The ICC *will not* undermine national sovereignty, nor interfere with judicial matters that fall naturally within the jurisdiction of states. Through the principle of complementarity, the ICC dramatically expands the role of national courts in trials involving international crimes. This is because the ICC has jurisdiction only if there is a breakdown in the national system of justice or if a State Party simply fails to prosecute. The ICC *must* defer its jurisdiction to national courts except in situations where national jurisdictions have been “unable genuinely” or “unwilling” to investigate and/or prosecute the accused.⁹ This is an irrevocable principle.

The ICC’s impact on domestic law and national capacity-building will be significant and far-reaching. Most dramatic will be the increase in the number of domestic war crimes courts, even in non-State Party jurisdictions. Complementarity will likely push states to retain control over investigating and prosecuting nationals charged with gross violations of international criminal law. Both States Parties and non-States Parties

⁸ INT’L CRIM. CT., OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (Sept. 2003), http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

⁹ Rome Statute, *supra* note 4, art. 17(1)(a).

will stress the preeminence of domestic over international jurisdiction where they have the capacity to undertake domestic trials.

The risks are high if a state fails to maintain control over the proceedings—it will lose jurisdictional control. Because states will be naturally reluctant to admit inadequacies that might result in the transfer of a case to the ICC, they will do everything possible to retain jurisdiction unless it is in the state's clear interest to delegate matters to the Court. For instance, in a politically charged post-conflict environment, it might be less contentious to transfer a former head of state to the ICC. For most situations, however, it is inconceivable that a state with a functioning legal system would not at least investigate alleged crimes.

The Complementarity Principle

There nevertheless remains confusion as to when the ICC should intervene. Rome Statute Article 17(1)(a) states that a case is inadmissible to the ICC if it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁰

¹⁰ *Id.*

In consideration of the terms “genuinely unwilling” and “unable,” the Statute offers a limited definition. Article 17(2) states:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court...;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹¹

¹¹ *Id.* at art. 17(2).

The ICC has considered a number of issues that may demonstrate a state's *unwillingness* to prosecute. For example, the Court has held that certain extra-judicial proceedings, such as truth and reconciliation commissions, have been used to shield suspects from ICC jurisdiction. Blanket amnesties, which allow for a defendant's acquittal, short sentencing, and general disregard of material evidence, may also demonstrate a state's unwillingness to prosecute. The use of these tools for the sole purpose of avoiding prosecution contravenes Article 17, and the ICC would be fully within its right to declare jurisdiction. However, an investigation would be required to determine if a state is acting in pursuit of reconciliation or to protect those criminally responsible. Such a determination should be made by an impartial, objective party independent of the ICC.

In consideration of whether a state is shielding a suspect from conviction, the ICC must conduct an "assessment of the subjective nature of the state's action." The Rome Conference decided that simple undue delay resulting from state action is too low a threshold in determining whether there is an unjustified delay in proceedings.¹² Instead, the Court would need to look toward the "usual procedures and time-frames within each individual state"¹³ to determine whether there may be an indication that the state is unwilling to

¹² See Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591, 610 (2003).

¹³ *Id.*

conduct proceedings. Intent is an important factor which must not be overlooked. If the Prosecutor can prove that a state's inaction or delay, relative to usual timeframes, is for the purpose of evading prosecution, then the Court is within its right to claim jurisdiction.

Regarding lack of ability, the Rome Statute defines a state as *unable* if there is a “substantial collapse or unavailability of its national judicial system . . . [in such a way that] the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹⁴ There are a number of circumstances which may lead the ICC to question a state's ability: states engaged in domestic or international conflict; states experiencing a political or economic crisis that threatens judicial independence; states lacking the rule of law and a judicial system capable of meeting international standards of fairness; states in transition that invariably lack a properly functioning judiciary; states that fail to incorporate necessary legislation into the judicial system; and states that fail to ensure fair trial proceedings.

States experiencing or emerging from armed conflict or civil unrest are unlikely to have the judicial capacity to properly investigate and prosecute those responsible for crimes against humanity. Yet, if all states currently engaged in conflict were deemed unable to conduct trials, it would fall upon the ICC to investigate and prosecute all cases. Given limited resources, however, it

¹⁴ Rome Statute, *supra* note 4, art. 17(3).

would be impossible for the ICC to investigate or obtain jurisdiction over all of these cases.

To be sure, the criteria described in the Statute are vague, and the burden of proof rests squarely with states. Perhaps as a result, there are a number of inconsistencies in the reasoning behind ICC jurisdiction claims. One could argue that the ICC has too much freedom to impose on state sovereignty and organize its own domestic courts. At the very least, however, there is an unresolved tension between the legitimate concerns of the ICC and states regarding the prosecution of heinous international crimes.

Early Test Cases

Between 2007 and 2008, targeted ethnic killings in Kenya left over 1,100 people dead, 3,500 injured, and 600,000 displaced.¹⁵ The ICC reported that, “During 60 days of violence, there were hundreds of rapes, possibly more, and over 100,000 properties were destroyed . . . They were crimes against humanity as a whole.”¹⁶ Initially, it was believed that Kenya had the ability to

¹⁵ Press Release. International Criminal Court Office of the Prosecutor, Kenya’s Post Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010), <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>.

¹⁶ *Id.*

conduct proceedings. It was argued that “Kenya has strong capacity in many parts of its justice sector” and government officials, representatives of civil society, and the international community “all agreed that there are no insurmountable technical challenges to the conduct of credible investigations, prosecutions and trials for international crimes in Kenya.”¹⁷ However, numerous reports implicated “serving police officers, security officials and powerful legislators for ordering attacks that were widespread, well-orchestrated and which unfolded in notable patterns.”¹⁸ While Kenya may have had the judicial capacity to conduct proceedings, the government—marred by corruption, judicial interference, and a lack of public confidence—was reluctant to prosecute members of its own ranks.¹⁹

Kenya’s reluctance was clear from its relaxed approach to criminal investigation and prosecution.

¹⁷ Open Soc’y Just. Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, 84-86 (2011), <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf> at 86.

¹⁸ Paul Seils, *ICC’s Kenya Decision is No cause For Celebration*, AL JAZEERA (Jan. 31, 2012, 9:23 AM), <http://www.aljazeera.com/indepth/opinion/2012/01/2012128125931617297.html>.

¹⁹ See Int’l B. Ass’n Hum. Rts. Inst., *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya*, 54 (Feb. 2010), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

Although the government was adamant that it would conduct a thorough investigation, the ICC ruled that merely taking steps to launch an investigation does not demonstrate willingness. Instead, the government would have to “[take] . . . steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.”²⁰ Moreover, the government ignored the recommendations in the Kenya National Commission on Human Rights report,²¹ Parliament failed to form an investigative tribunal comprised of local and international judges,²² and the Waki Commission findings, recommending a Truth and Reconciliation Commission and Special Tribunal for Kenya, were disregarded.²³

As a result of Kenya’s general unwillingness to do as required under international law, the Prosecutor claimed jurisdiction on behalf of the ICC. On

²⁰ Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No ICC-01/09-02/11 OA, Judgment on the Appeal of Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” ¶ 40 (Aug. 30, 2011).

²¹ Seils, *supra* note 18.

²² *Id.*

²³ *Id.*

January 23, 2012, the ICC confirmed it was formally charging four high-ranking Kenyan officials with crimes for their alleged roles in the post-election violence.²⁴ Charges included “murder, persecution, and ethnic cleansing.”²⁵

In another example, the U.N. Security Council referred the situation in Libya to the ICC Prosecutor in February 2011. The Prosecutor subsequently issued arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi for a “systematic policy of suppressing any challenge to . . . authority” through abductions, mass arrests, torture and killing civilians.²⁶ The National Transitional Council has always declared its intention to hold trials in Libya’s domestic courts, but with the backing of prominent governments such as the United States, the ICC Prosecutor is considering whether the trial should be

²⁴ The leader of the Opposition, William Ruto, and Jushua Arap Sang were formally charged “with planning attacks on supporters of the ruling party,” while Uhuru Kenyatta and Francis Muthaura were charged with “financing and organizing retaliatory attacks.” Francis Njubi Nesbitt, *Principled Intervention in Africa*, THE EPOCH TIMES (Feb. 5, 2012), <http://www.theepochtimes.com/n2/opinion/principled-intervention-in-africa-186875.html>.

²⁵ *Id.*

²⁶ Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Public ICC-01/11-4-RED (May 16, 2011).

held at The Hague.²⁷ There are compelling arguments for holding proceedings in The Hague. Despite the Libyan government's insistence that suspects would receive a fair trial in Libya, many believe that unlikely. Evidence from international human rights organizations suggests there is "rampant torture of inmates in makeshift prisons operated by militias accused of seeking to exact revenge against the slain leader's former supporters . . . various former rebel groups are holding as many as 8,000 prisoners in [sixty] detention centers around the country."²⁸ Furthermore, Amnesty International has claimed that "torture is being carried out by officially recognized military and security entities as well as by a multitude of armed militias operating outside any legal framework,"²⁹ leading to a general belief that the government lacks the capability and willingness to control the armed groups.³⁰

²⁷ See Ivana Sekularac, *ICC Rejects Gaddafi Daughter's Appeal on Jailed Brother*, REUTERS (Feb. 2, 2012, 3:06 PM), <http://uk.reuters.com/article/2012/02/02/uk-icc-libya-gaddafi-idUKTRE8111EB20120202>.

²⁸ See Rami Al-Shaheibi, *Libya to Niger: Al-Saadi Gaddafi Must Be Handed Over*, HUFFINGTON POST (Feb. 11, 2012, 9:28 AM), http://www.huffingtonpost.com/2012/02/11/libya-niger-al-saadi-gaddafi_n_1270293.html.

²⁹ *Libyan Detainees Die After Torture, Says Amnesty International*, BBC NEWS (Jan. 26, 2012, 11:16 AM), <http://www.bbc.co.uk/news/world-africa-16741937>.

³⁰ See Vivienne Walt, *Why Libya is Becoming More Dangerous After Gaddafi's Fall*, TIME (Feb. 17, 2012), <http://www.time.com/time/world/article/0,8599,2107024,00.html>.

Also at issue is the treatment of Saif Al-Islam Gaddafi, who has been held in the remote mountain village of Zintan since his capture on November 19, 2011. According to reports, he is being held in isolation, without access to “newspapers, radio, or television[,] . . . unable to contact anyone of his own choosing, including by telephone.”³¹ Consequently, Saif al-Islam has not yet had access to a lawyer, although the National Transitional Council has said that he will be provided legal representation once he has been transferred to Tripoli.³² If Saif Al-Islam Gaddafi is found guilty, Libya could impose the death penalty whereas the ICC could only impose a life sentence.³³ The Libyan government has stood its ground and maintained that Saif Al-Islam Gaddafi will receive a fair trial.³⁴

Were Saif Al-Islam to be tried in The Hague, there is little doubt that he would receive a fair trial, but the ICC risks being accused of interfering with state sovereignty. That the United States—not even a

³¹ See Fred Abrahams, *In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer*, HUMAN RIGHTS WATCH (Dec. 30, 2011), <http://www.hrw.org/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>.

³² *Id.*

³³ Sekularac, *supra* note 27.

³⁴ See Ashley Hileman, *Libya Prime Minister Assures Fair Trial Success for Gaddafi Son*, JURIST (Nov. 22, 2011, 12:14 PM), <http://jurist.org/paperchase/2011/11/libya-prime-minister-assures-fair-trial-for-Gaddafi-son.php>.

signatory to the Rome Statute—is involved in the U.N. Security Council’s referral suggests just how politically charged the Libyan situation is.

To maintain a sense of legitimacy and objectivity, it is imperative that an independent and impartial third party analyze the situation and provide input on which party is more capable of conducting fair proceedings; otherwise, it is likely the ICC will attract much criticism from those who believe it to be a tool used by the West to exert authority over other nations.

Recently, the conflict in Syria has led to international pressure to remove President Bashar Al-Assad from power and try him for crimes against humanity. Inspired by the democratic protests of the Arab Spring, Syrians began calling for an end to Assad’s authoritarian rule in March 2011.³⁵ The regime responded with a brutal crackdown. In the twelve months since, over eight thousand people—many women and children—have been killed.³⁶

There are reports of “continuing widespread, systematic and gross violations by security forces against

³⁵ See Khaled Yacoub Oweis and Suleiman al-Khalidi, *Syria Sends Tanks Into Deraa Where Uprising Began*, REUTERS (Apr. 25, 2011, 5:46 PM), <http://www.reuters.com/article/2011/04/25/us-syria-idUSLDE73N02P20110425>.

³⁶ See Jonathan Head, *Syria Unrest: Arab League Calls for Neutral Inquiry*, BBC NEWS (Mar. 13, 2012, 5:42 PM), <http://www.bbc.co.uk/news/world-middle-east-17353542>.

civilians”;³⁷ in August 2011 the United Nations named fifty people suspected of committing crimes against humanity, including murder, torture, and rape.³⁸

As the conflict in Syria continues to escalate, calls for accountability against those responsible for atrocities will also increase. The Security Council may ultimately refer the case to the ICC for prosecution.

Situations like those in Libya and Syria, in which there is ongoing conflict and a desire to prosecute domestically, present a dilemma as to whether and how the ICC should take jurisdiction. This, in turn, raises important issues of credibility. While the complementarity principle is a valuable mechanism, the Rome Statute simply fails to articulate how it should be interpreted and exercised.

At the time of the Rome Conference, many states expressed concern that the Court would have too much discretion in determining whether and when a state is

³⁷ See *Political Solution Only Way to End Syria Crisis*, UN Chief Stresses, UN NEWS CENTRE (Feb. 24, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41359&Cr=syria&Cr1=>.

³⁸ See *UN: Syrian Officials Should be Sent to ICC*, JERUSALEM POST (Feb. 10, 2012, 3:25 PM), <http://www.jpost.com/MiddleEast/Article.aspx?id=257315>.

willing and able to prosecute.³⁹ States were concerned that they would not be able to prevent the Court from exercising jurisdiction over national or international crimes committed on their territory.⁴⁰ They were uncomfortable with the idea of the ICC passing judgment on their own courts.

Given the high stakes and sometimes politically charged judgments that must be made, it would be advantageous for an objective, non-vested third party to evaluate domestic legal capacity. Not only could this help mediate claims of state sovereignty and ICC jurisdiction, it would bolster the legitimacy of the courts and the process.

The Argument for an International Advisory Group

The ICC was established as an independent and unbiased organization to preside over the “most serious crimes of concern to the international community.”⁴¹ As

³⁹ See JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 153 (2008); see also Benjamin Perrin, *Making Sense of Complementarity: The Relationship Between the International Criminal Court and National Jurisdictions*, 18 SRI LANKA J. INT’L L. 301 (2006).

⁴⁰ John T. Holmes, *Complementarity: National Courts Versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese et al. eds., 2002).

⁴¹ See *About the Court*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>.

an international court, it is important that the ICC has the power to conduct proceedings when necessary, but the international community must also protect state sovereignty rights. Currently, the ICC relies on its own investigations to determine whether a state is willing and able to conduct fair and proper investigations and proceedings into alleged crimes against humanity. However, an International Advisory Group (IAG) could conduct independent investigations, thereby acting as a buffer between states and the ICC. While not binding, an independent body such as an IAG could provide an expert opinion on which both the state and the ICC could rely.

The legal basis for such a group can be found in the Rome Statute. Article 54(3)(c) allows the ICC Prosecutor to “[s]eek the cooperation of any state or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate” during the investigation. Similarly, Article 15(2) allows the ICC Prosecutor, when initiating investigations *proprio motu*, to “seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.”⁴² Finally, Article 42(1) of the Statute stipulates that the Prosecutor is “responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for

⁴² Rome Statute, *supra* note 4, art. 15(2).

examining them and for conducting investigations and prosecutions before the Court.”⁴³

The authority granted under Articles 54, 42, and 15 is extraordinarily broad and would certainly allow the ICC to cooperate with an International Advisory Group.⁴⁴

The purpose of an Advisory Group would be to ensure that an objective, impartial, and non-political evaluation is made regarding a state’s willingness and ability to carry out judicial proceedings that are consistent with international standards. The evaluation’s focus would be on a state’s *national judicial system* and on areas germane to the investigation and prosecution of war crimes. An IAG would consult with a wide range of people, including legal experts and academics who might interview ministers, government officials, prosecutors, judges, lawyers, and local civil society groups familiar with a state’s domestic legal system.

The IAG would ask questions such as: Can the proceedings be conducted impartially and independently? Does the domestic court have extensive backlogs resulting in long pre-trial detention? Is there adequate security for court personnel? Does the state have a sufficient number of trained defense lawyers and

⁴³ *Id.* at art. 42(1).

⁴⁴ See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (2008).

an effective legal aid program for indigent defendants? What is the level of court management? Are there undue delays in conducting trials? Are there sufficient guarantees against outside pressure on the judiciary? Is there unwarranted prosecutorial discretion in conducting investigations and trials? Does the state impose the death penalty? Can the court provide witnesses and victims with medical, psychological, and material support during and after trial through a victim and witness support office? Can the court provide these witnesses and victims with security protection prior to, during, and after the trial? Has the country concluded conventions on mutual assistance in criminal matters? Is there ongoing political strife and repression in the country? Does the state have detention facilities that meet international standards?

As an unbiased and objective party, an IAG could also monitor domestic trials to ensure that the proceedings were consistent with international norms. Such monitoring would assist the Prosecutor in carrying out his or her duties under Article 53(2) of the Rome Statute. Finally, a body such as the International Bar Association might oversee the group, or draft a standard of ethics and protocols for the investigative and monitoring process.

Conclusion

The ICC was created as a permanent international criminal court to ensure that those most responsible for egregious atrocities are brought to justice. Yet the Court

does not stand alone; the Rome Statute facilitates a new and symbiotic relationship with domestic jurisdictions. Under the principle of complementarity, the Court has jurisdiction only over situations in which a nation state is unable or unwilling to prosecute the perpetrators. Still, there is a natural tension between international and domestic courts, and in times of conflict or state breakdown, there can be conflicts between claims of sovereignty and the need to protect vulnerable people from the state. The creation of an International Advisory Group would help to resolve these tensions while bringing perpetrators to trial.

As the number of violent conflicts grows, the ICC will continue to evolve and be tested. Also, as justice and accountability are increasingly focused within national jurisdictions, the need for careful, unbiased assessment of state judicial capacity has increased. Currently, when states are found to be lacking the willingness or capacity to prosecute, ambiguity surrounding the principle of complementarity makes it difficult for the ICC to justify jurisdictional claims. The creation of an independent, unbiased group tasked with assessing whether a state is able and willing to fairly conduct war crimes trials would give greater legitimacy to these decisions. In addition, an IAG would be a useful tool to ensure that proceedings conducted at both the state and international levels meet international standards. As the ICC continues to play an increasingly important role in the pursuit of international justice, the need to establish an IAG has never been greater.

**International Criminal Law Year in Review:
2010-2011**

Beth Van Schaack*

The following text is an edited transcript of Professor Van Schaack's remarks on August 30, 2011, at the Fifth International Humanitarian Law Dialogs held in Chautauqua, New York.

* * * * *

Introduction

It is a great pleasure to be here, and I am honored to have been invited to give this overview of developments in the field of international criminal law over the last year. I have tried to come to this event in the past but have not been able to for various and sundry reasons, so I am really excited that I have the opportunity to be here now. This gathering is even better than everyone had told me it was. So, I am going to consider myself a permanent member from this point going forward.

You have had the update from the Prosecutors, and I am going to touch on some of the same cases, but there are certain things that they could not speak about, so I will try to give you the back stories that were perhaps implicit in some of their comments. I also want to give

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you a snapshot of the field of international criminal justice—some of the complexities, the challenges, and the accomplishments of the field over the last year. Then, I will try to give you a sense of where we are going in the future, so you can be on the lookout for these developments as they unfold.

One of the major observations I have made in reading the opinions of the last year—particularly those emerging from the Yugoslavia and the Rwanda Tribunals—was how uneventful some of them were. The opinions applied established law to new, and sometimes different, facts, but we did not see the bold innovations in the law that characterized judicial opinions issued five or so years ago. At that time, international criminal law was still such a new field that everything was a question of first impression. The judges were forced to draw analogies from Nuremberg-era law and to adapt domestic law principles—from both civil and common law systems—to the international context in order to identify the best rules for the international criminal justice system going forward. These early opinions were incredibly innovative; as such, there were lots of complaints by defendants that the law was being applied to them *ex post facto*. In particular, defendants argued they could not have known at the time they acted that their conduct would later be considered criminal.

We are not seeing those sorts of arguments anymore, and in many respects, this absence marks a maturation of this field of law. Judges are no longer boldly innovating; rather, they are merely tinkering with

the doctrine at the edges. This is a great thing: we now have an international criminal justice system.

Whereas the substantive law has stabilized, we now face a situation of profound institutional flux. The *ad hoc* tribunals are starting to wind down, as you have gathered, pursuant to Security Council-mandated completion strategies. Meanwhile, the Special Tribunal for Lebanon (STL) is finally gearing up. It has issued its first indictments and is on the verge of either moving forward without the defendants or waiting to see whether or not it can get custody over some or all of the defendants. The ICC has yet to issue its first judgment, but it is going to undergo a major overhaul in its professional staff. And finally, the Cambodia Tribunal, I think it is fair to say, is in a state of political crisis. That may have been implicit in the comments yesterday, but I will try to give you some of the back story there.

International Criminal Court

I will begin this discussion with the International Criminal Court (ICC), which is becoming the flagship institution of the international criminal justice system. The ICC has not yet issued a final judgment, although there have been lots of interim rulings. It remains to be seen to what extent the ICC charts its own course, or rather relies on citations to the jurisprudence of the other *ad hoc* tribunals that came before the ICC. All elements of the ICC—from the Prosecutor's Office to the Defence to the judges—have been very clear in saying that they are not bound by any of those rulings as a matter of

precedent, although they will look to them as helpful and persuasive authority.

Last year, the subject of the International Humanitarian Law Dialogs was the crime of aggression, whose definition and jurisdictional regime had just been negotiated at the Review Conference held in Kampala, Uganda. At the time, state representatives made strong statements in favor of the amendments, but it is not clear whether these were mere rhetoric and whether the support that was expressed at the Review Conference was shared back in capitals. The amendments are quite complex and they contain a number of jurisdictional loopholes. Moreover, the crime itself is very controversial. Interestingly, not a single state has ratified the new amendments thus far, even though five states have joined the Court since the Review Conference last summer. So, it remains to be seen whether or not the States Parties are going to line up behind those amendments. Indeed, thirty states must ratify the amendments for them to be activated. There are thus many steps along the way before the crime of aggression can be prosecuted. So at the moment, that crime is lying dormant within the Statute.

The big institutional news at the ICC concerns an impending personnel turnover. Six judgeships, the Chief Prosecutor position, and the Presidency of the Assembly of States Parties (ASP) are all up for grabs. This will be the biggest overhaul of the staff since the Court's inception, and it is unfortunate that the Statute enables such a drastic turnover at such a crucial time in the Court's development.

I will start with the position of Chief Prosecutor. The Assembly of States Parties has created a committee to accept statements of interest from potential new Chief Prosecutors, and the front-runner is someone whom you have met and have had the opportunity to spend some time with: Fatou Bensouda, who is currently the Deputy Prosecutor. Other candidates in play have been, of course, everyone else that was sitting at this table and others who are here: the former Chief Prosecutors and current Chief Prosecutors of the other tribunals.

Interestingly, one of the most obvious candidates would have been Hassan Jallow, who is the Chief Prosecutor at the Rwanda Tribunal. He is barred from the position, however, so long as Fatou remains the Deputy Prosecutor. One of the requirements listed in the Rome Statute is that the Deputy and Chief not be of the same nationality, and both of them hail from The Gambia. Who could have predicted that The Gambia would be such a fount of fabulous international criminal jurists? So, Hassan Jallow has withdrawn his name and is not in formal consideration for that role.

It will be difficult for some of the other current Chief Prosecutors to leave their institutions at this point were they to be offered the post at the ICC. Those tribunals are enjoying their swan songs, and a number of important—and long fugitive—defendants are now in the courts' custody. This has opened up other jurists for consideration, and the human rights community has put some names forward. To date, the list remains confidential, although it will be released sometime in the next couple of weeks.

Six judgeships will become available, and there is an ongoing process whereby states can nominate one of their nationals for a judgeship. A state does, however, have to be a member of the Court in order to be able to nominate someone for a judgeship, so the United States is not participating in this process. A search committee has been formed for the judicial positions as well, although some troubling developments have emerged. First, the Court is supposed to have individuals on the bench who have either criminal law experience or law of war/human rights experience. These are considered two distinct competencies, and the states wanted to keep an equal representation between these types of experts on the bench. As it turns out, almost all of the candidates who are now on the list for a judgeship—nine of the ten names put forth—have only criminal law experience. Only one individual can credibly claim to have humanitarian law or human rights experience.

Also of concern on the diversity front is that there are no women on this list. The Rome Statute mandates that there be a fair representation of both men and women on the bench. Women have great representation at the moment, but three of the six judges who are currently stepping down are women, and no women candidates have been put forward. The nomination period is still open, however, and there are rumors that the Philippines and others states may have candidates percolating out there. In terms of regional diversity, Africa and Europe are well represented in terms of judicial candidates. Asia has not put forward a candidate, and so it will be an important development if the Philippines nominates someone.

Concerns have also arisen about the process by which the judges will be chosen. Of course, many aficionados of the field are hopeful that decisions will be based on merit. But we know that in the international system, we often see instead very cynical vote trading that goes along the lines of, “We will support your candidate for the ICC if you support our initiative here or candidate for this position there.” It would be unfortunate if judges of this importance would be chosen by mere vote trading of this nature. As Professor Amann mentioned at the end of her remarks last night, it is crucial to get good people into these positions, and that will not happen if we do this by virtue of vote trading. Decisions have to be based on the candidates’ merits and qualifications.

Also up for grabs is the head of the Assembly of States Parties, which is the political body representing those states that have joined the Court. The United States is only an observer before the ASP because we have not joined the Court, although we have signed the Treaty. The Bureau of the ASP, which is the political body within the political body, has nominated Tiina Intelmann, the Estonian Ambassador to the United Nations to head the ASP, who would be the first woman to run the ASP. She would be taking over from Christian Wenaweser from Lichtenstein, who had a very strong tenure as head of the ASP. He was in charge of the aggression negotiations, among other things.

ICC Situations

Turning to the situations before the ICC, all of them are in Africa. This is one reason why both Fatou Bensouda and Hassan Jallow were considered front-runners for the position of Chief Prosecutor. This has created some tension within the African Union (AU), which is the political body of all African states. From the beginning, the African Union was very supportive of the Court. Thirty one out of 53 African states have joined the Court, and the African states were also very active in the Review Conference. But, the indictment of President Al-Bashir of Sudan soured the relationship with the AU. In reaction, the AU has issued some statements calling upon Member States not to cooperate with the Court, notwithstanding the fact that all States Parties have pledged to cooperate with the Treaty by virtue of joining the Court. There is thus a tension between the formal AU position and some Member States' treaty obligations. In the Sudan context, there are also U.N. Charter obligations. The situation in Sudan was referred to the Court by the Security Council, which is the executive body of the United Nations. All U.N. Member States are obliged to cooperate with, and implement, decisions of the Security Council, which in this case involves cooperating with the Court.

The AU does not speak with one voice in this regard, however. There are individual Member States, such as Botswana, that have come out in support of the situations that are now pending before the Court. So there is an internal struggle happening within the AU over support for the Court.

There are three mechanisms by which a situation can come before the Court. A state can refer a situation, the Security Council can refer a situation, and the Prosecutor—acting on his or her own determination—can initiate an investigation after securing the approval of the Pre-Trial Chamber. When these procedures were designed in Rome, it was envisioned that one state would refer another state. For example, it was expected that a state might refer a neighboring state in which atrocities were occurring, or a Good Samaritan state, such as one of the European states, would refer an African state or a Latin American state where there was an internal conflict. But, to the surprise of many, states have actually been using the state-referral mechanisms to refer themselves to the Court. As a result, three of the six situations before the ICC stem from such state self-referrals: Uganda, the Democratic Republic of Congo, and the Central African Republic. These states have essentially said, “We can’t handle the justice implications of the atrocities happening in our midst. We need help.” These referrals were somewhat controversial, but the Court has just breezed over the controversy, accepted those situations, and is currently hearing cases emerging from these states.

Libya

The Security Council has referred two cases. The most recent referral is the Libyan referral. It is obviously highly contentious. The situation was referred unanimously by the Security Council, and Luis Moreno-Ocampo—the ICC’s Chief Prosecutor—requested three

arrest warrants. Interestingly, he charged the defendants with crimes against humanity and not war crimes. The theme of the International Humanitarian Law Dialogs this year is crimes against humanity, and this situation starkly demonstrates the utility of that charge under international criminal law. In charging crimes against humanity, a prosecution does not have to worry about whether or not there is an armed conflict, whether the threshold of armed violence has been crossed, who the parties are, or whether the conflict is internal or international. With crimes against humanity, a prosecutor can dodge all of this difficult doctrinal work, and the only threshold question becomes whether there is a widespread or systematic attack against a civilian population. That, of course, is easily satisfied in Libya. So, this is why this charge has been pursued.

The theory of the Libyan cases is that there was a state policy of using violence to quell the uprisings at all costs and a reliance on the state security apparatus to do so. Gaddafi has become the sixth head of state to be indicted by an international criminal tribunal, joining Jean Kambanda of Rwanda, prosecuted by the International Criminal Tribunal for Rwanda (ICTR); Charles Taylor of Liberia, prosecuted by the Special Court for Sierra Leone (SCSL); Slobodan Milošević, prosecuted by the International Criminal Tribunal for the former Yugoslavia; Omar Al-Bashir, under indictment before the ICC; and Karl Dönitz, who was prosecuted at Nuremberg. Everybody forgets about Dönitz, incidentally, but he succeeded Hitler after the latter's suicide and was head of state for 23 days. We now have a fairly consistent practice of abrogating any head of

state immunity for those being prosecuted before an international tribunal.

One of the key defendants in the Libyan situation is Gaddafi's son, Saif, who is considered one of the most influential members of Gaddafi's inner circle. He holds, however, no formal government position. So the theory of liability is that he had *de facto* power within Gaddafi's inner circle to implement this repressive regime. There were allegations that he had been taken into custody and that the government is in conversation with the ICC. These conversations were made public, creating an enormous embarrassment when it turned out that Gaddafi's son was no longer in custody. It is not exactly clear what happened, but there may have been an inside job that enabled him to be released—a major setback in terms of this indictment.

An interesting little factoid of concurrent jurisdiction: there is an Africa-wide Court of Human Rights that has also asserted jurisdiction over the situation in Libya, and that Court has essentially issued an injunction stating, "Stop repressing your citizens, stop attacking innocent, unarmed civilians." The Libyan government, of course, ignored this ruling. Nonetheless, we have a situation of concurrent jurisdiction: the ICC exercising individual criminal responsibility over identified individuals and the African Court of Human and People's Rights applying state responsibility to the entity that is Libya. These cases are now happening in parallel.

Sudan

Turning to the situation in Darfur, Fatou Bensouda was sensitive to the issue of symmetrical indictments. In this situation, both sides—the government and the rebels—have been indicted. Interestingly, all three rebels under indictment voluntarily turned themselves into the ICC. This was an incredible development and a real testament to the fact that they believed they could exonerate themselves before the Court. One of the individuals, Abu Garda, managed to block the confirmation of his indictment, and so the case was dismissed. The Prosecutor could, of course, conduct an additional investigation and re-charge him, but—at the moment—he is a free man. The other two are now before the Court facing charges for an attack on African Union and international peacekeepers. All of the government individuals under indictment and a leader of the janjaweed—a shadowy paramilitary force that was working in conjunction with the government forces—remain at-large.

Although he is under indictment, Al-Bashir has traveled to ICC member states Kenya and Chad whose authorities should have immediately taken him into custody and handed him over to the ICC. But, the Court still does not enjoy the full cooperation of its members; because it does not have a dedicated police force, some defendants remain at-large. The Court can turn to Interpol, and, although we think of Interpol as this amazing international police force, all it can do is issue an international arrest warrant. That's it. They cannot

surveil or apprehend suspects. So that is the situation we are in now.

Kenya

The situation in Kenya is interesting in that it was initiated by the Prosecutor after a very long diplomatic dance with the authorities in Kenya. The Kenyan authorities said, “We are going to create a special tribunal. We are going to take on the obligation of prosecuting post-election violence. Let us handle it. Look, we have this legislation.” But ultimately that legislation continued to stall in Parliament. There was never a quorum when the legislation came up for a vote, and so, time after time, no real progress was made on implementing this conceptual idea. Finally, the ICC Office of the Prosecutor said, “We are going to move forward,” and it did, opening an investigation *proprio motu*.

In the Kenya situation, the defendants have been charged with the crimes against humanity of persecution, deportation, rape, and forcible transfer. Here too there are symmetrical indictments. We have three cases from each opposing political party, appeasing concerns that the Court is one-sided. But it remains to be seen whether the facts will bear out equal responsibility for the crimes. Kenya is now actively fighting admissibility. Article 17 of the Rome Statute embodies the idea of complementarity. The ICC is meant to stay its hand in the event that a national system, either the nationality state or the territorial state or some third state, is credibly

moving forward with prosecutions. Kenya has argued that, “We have done enough. We have amended our constitution. We have made a number of judicial reforms. We have created an ombudsman. We have created an independent prosecutor position. We are going forward with investigations. ICC, you should stand down.” So far, however, the Chief Prosecutor and the Pre-Trial Chamber have both reasoned that the actual individuals the Court is targeting must be the subject of domestic prosecutions for the case to be inadmissible, which Kenya cannot show. Kenya can only show some investigations of related cases and a putative intent to investigate these particular cases.

Other transitional justice mechanisms often work in parallel with international criminal justice efforts. In Kenya, for example, a Truth, Justice, and Reconciliation Commission (TJRC) is operating under a much broader mandate. Whereas as the ICC case is limited to the post-election violence, the TJRC will take a longer perspective and look at the underlying causes of that violence, which allows it to look at the allocation of land, the fomenting of ethnic violence, and political patronage since independence. It is doing so on the theory that the post-election violence was the culmination of grievances with much longer roots. The Commission can also undertake many more activities than can the Court: it can hear testimony from a whole range of victims and witnesses, contemplate reparations, and make recommendations for structural reform within the country.

Unfortunately, the institution was plagued by conflicts of interest in the early days. It turned out that the Chair of the Commission was potentially a witness in one of the Commission's key cases, and he may also have benefitted from some of the land transfers that took place after independence. Notwithstanding this obvious conflict of interest, he refused to step down, claiming he was innocent and that he could do the job. His refusal to step down brought the Commission to a standstill. The only non-African on the Commission is Professor Ron Slye from Seattle University Law School. He threatened to resign if the Chair did not step down. The Chair finally relented, and so now the Commission is running full force ahead. The Commissioners are in the field, hearing testimony, and writing a definitive report about the way in which some of the post-independence policies laid the groundwork for the conflagration that occurred after the 2007 elections.

Uganda

Turning to Uganda, there is unfortunately not a lot to report. The defendants from the Lord's Resistance Army are still at large. They are reportedly now wreaking havoc in the Democratic Republic of Congo and perhaps in the Central African Republic as well. We are hopeful that some new initiatives involving the satellite imagery and on-the-ground inter-governmental teamwork will eventually flush the defendants out and get them in front of the Court. There is a sense that if the Lord's Resistance Army was decapitated, its members

would dissipate because replacing a messianic figure like Joseph Kony would be impossible.

One important development is that Thomas Kwoyelo, who was a Commander of the Lord's Resistance Army, has been taken into custody. Uganda has created a special international crimes division within its domestic system in order to enable the prosecution not only of individuals from the Lord's Resistance Army, but also, it is hoped, the Ugandan People's Defense Forces, who have also been accused of committing atrocities in the field. So the hope is that there will be some equality of prosecutions going forward.

Democratic Republic of Congo

The DRC has been the most active situation. The Court has individuals in custody and cases moving forward. The parties have actually put the *Lubanga* case before the judges, which will result in the first substantive judgment issued by the Court. One interesting little development is that some individuals who testified on behalf of the defendants have applied for political asylum while they were in The Netherlands. This created somewhat of a political crisis because it had never been done before. A question arose as to the obligation of the Court in respect of the right of individuals to apply for asylum. The Court had an agreement with the DRC that witnesses before the Court would not have outside contact while they were testifying. Nonetheless, somehow these witnesses were

able to retain Dutch lawyers and get petitions filed before the Dutch authorities. The Court ultimately ruled that, in essence, “We think it is safe to return these individuals, that they will not fear persecution if they were to return home, but we recognize that this is ultimately a decision of the Dutch government.” As a result, those asylum proceedings are moving forward.

The main charge in these cases involves the recruitment and use of child soldiers in armed conflict. The Defence has churned up some very interesting counter-evidence, including witnesses testifying as follows: “Listen, the data that you have from this region on child soldiers comes primarily from demobilization centers, where child soldiers come forward, they turn in their weapon, they get a kit of materials, they get some rehabilitation, and then they are brought back to their home communities.” A nongovernmental organization working with child soldiers conceded that the word had gotten out that if you walked into one of these centers and you said you were a child soldier, you would get a great little kit with a blanket, and you would get some food, and you would get clothing. So there is some contestation about how many child soldiers were actually being used.

Central Africa Republic

The one individual from the Central African Republic before the Court is Jean-Pierre Bemba, who is actually a citizen of the DRC, although he is accused of leading a militia that had been brought into the CAR by a former president to quell an insurrection there. The situation here is strongly characterized by gender-based violence, which is one of the reasons why having experts on gender-based violence at the Court is vital. Indeed, all of the situations involve claims and allegations of gender-based violence.

A quirky development with regard to Bemba is his plan to run for President of the CAR. He has applied a number of times for pre-trial release in order to pursue his candidacy, but it has never been granted. He is now arguing that he can campaign from his cell in The Hague. Some lawyers in the CAR have raised the argument that candidates must be physically present in order to run for president. Bemba has, however, squeezed out other potential candidates from his political party, so it remains to be seen whether he ends up running.

Article 12(3) Referrals

Another country to keep an eye on is Côte d'Ivoire. I have already mentioned the two jurisdictional preconditions for the Court to go forward absent a Security Council referral: either the territorial state must

be a member of the Court or the accused must be a national of a State Party. The Security Council can override either of these preconditions, which explains why the Court has jurisdiction over the situations in Sudan and Libya, neither of which is a State Party. Notwithstanding these two preconditions, the drafters of the Statute cleverly created a mechanism for a state to accept the Court's jurisdiction on an *ad hoc* basis. In essence, a state can declare that it accepts the jurisdiction of the Court with respect to a particular crime. It is not yet clear what exactly this means or how broadly the concept of a particular crime is going to be defined. Côte d'Ivoire has made such an *ad hoc* declaration with respect to the post-election violence that occurred when ex-President Gbagbo refused to accept the outcome of the election, giving rise to clashes all over the country between his supporters and those of his political opposition. That *ad hoc* referral has now been reaffirmed by President Ouattara, and so the Court is moving forward with an investigation.

The *New York Times* just reported that the Ivoirian authorities have issued 12 indictments, triggering the question of complementarity. Is Côte d'Ivoire doing enough such that the ICC should stand down, or are those indictments insufficiently parallel to the indictments that might be brought before the ICC? Although I have not seen these domestic indictments, I have heard that they tend to focus more on corruption crimes and not on crimes of violence. So there may be room for concurrent jurisdiction here.

The only other Article 12(3) *ad hoc* declaration that has been made was by the Palestinian Territories, and—as Fatou Bensouda mentioned—the declaration is still under consideration. There are very complex jurisdictional questions about whether the Palestinian Authority constitutes enough of a state such that it has the ability to refer itself to the ICC.

International Criminal Tribunal for the former Yugoslavia

Moving on to the ICTY, this Tribunal is under a Security Council-mandated completion strategy. The ICTY itself will continue with a limited staff on the current, high-level cases. The remaining lower-level cases have been transferred back to national authorities. A residual mechanism will handle issues that arise with respect to completed or transferred cases, such as the emergence of new evidence, motions to review judgments based on such evidence, contempt proceedings, proceedings regarding interference in the process of justice, parole questions, etc. The Residual Mechanism will not be empowered to issue new substantive indictments involving the former Yugoslavia, but it will be able to issue, for example, contempt indictments if there are allegations of witness tampering or retaliation against witnesses.

The big news at the ICTY—and this is an incredibly important development in the international criminal justice movement—is that every individual from the former Yugoslavia under international indictment is now

in custody. The last two remaining fugitives—Ratko Mladić and Goran Hadzić—were recently captured and crossed off the list. Mladić was the second-in-command behind President Radovan Karadžić of the Republic of Srpska, the self-proclaimed Serbian entity within Bosnia-Herzegovina. Hadzić is accused of ethnically cleansing the Krajina region of Croat residents in order to create a Serbian enclave.

Another case I want to mention is the case against Ante Gotovina, which is, in many respects, the inverse of the Hadzić case. Gotovina is accused of re-cleansing the Krajina of Serbian inhabitants who had moved in after Hadzić cleansed the area of Croats. What is interesting about this case is that Gotovina received a lot of support from the United States in implementing what was called “Operation Storm,” which was billed as an effort to reassert constitutional control over the Krajina region and essentially take it away from this self-proclaimed Serbian political entity. He had state-of-the-art technology, including U.S. drones, and targeting assistance. The full extent of American involvement in Operation Storm is not fully known, but it is clear that this country had an interest in Gotovina not only succeeding but in doing it in a way that was completely lawful under the laws of war. In fact, the Tribunal found that 95 percent of the targets that were the subject of Operation Storm were in fact military objectives, and that a proportionate or appropriate amount of force was utilized.

Nonetheless, with respect to the other five percent of instances in which artillery was used, the Court

concluded that civilians were purposely targeted in the implementation of Operation Storm. Operation Storm coincided with a massive exodus of the Serb population of the region, and the question is whether there is a causal link—i.e., were individuals being targeted such that they were forced to leave, in which case the Prosecutor could prevail on the charge of deportation through an unlawful attack against civilians, or did they leave prior to Operation Storm because they wanted to avoid the impending armed conflict? The timing and the evidence of the way things transpired over this two-day operation remains very unclear. The Trial Chamber ultimately convicted Gotovina on the basis of a finding that he was part of a joint criminal enterprise to purposely target civilians. All of the other findings of criminal liability hinge on that finding. This determination has been appealed, and if the Defence prevails, most of the other convictions will be overturned.

There is another interesting case that brings into question the way in which the international community structured the two *ad hoc* tribunals. In the American system, we have three tiers of appeal: a district (or trial) court, a court of appeals, and the Supreme Court, the ultimate authority. In international criminal justice, there are usually only two levels. One defendant, Veselin Šljivančanin, was convicted by the Trial Chamber for his alleged participation in an incident in which all of the patients were removed from a hospital in Vukovar, taken to a detention center, mistreated, and then executed. He was charged under the theory of command responsibility

as a commander of the Yugoslav National Army for his soldiers' participation in that incident.

The Trial Chamber found that he could not be held responsible for the murder of the victims, but he could be held responsible for their mistreatment, because he knew that his subordinates were in the area and that there were going to be paramilitaries in the vicinity who had been associated with abuses in the past. The theory of responsibility is that of command responsibility: that he failed to prevent the harm or to punish it after the fact.

The Appeals Chamber actually reversed the acquittal on the murder charges and imposed a conviction. So, on appeal, his sentence was actually increased from five to 17 years. Because the Appeals Chamber is the court of last resort, there was no opportunity for Šljivančanin to appeal that conviction. In 2010, he applied for a review of that judgment by the Appeals Chamber on a theory of new evidence. Specifically, he argued that he did not know that his troops were going to be in the area or that there would be paramilitaries there. The Appeals Chamber, looking at this new evidence, determined that the murder conviction was a mischarge of justice, and so it reversed itself.

Judge Fausto Pocar of Italy has, since he took the bench, consistently dissented from the practice of the *ad hoc* tribunals entering a conviction on appeal without offering the defendant an opportunity to appeal the conviction. His theory is that all of the omnibus human rights treaties protect the right of appeal of individuals

who are subject to conviction. Judge Pocar has argued that the Appeals Chamber should remand the case to the lower court and have it enter the conviction, which would then be subject to appeal.

International Criminal Tribunal for Rwanda

Switching to Rwanda, the Rwanda Tribunal has been very busy. It issued six Trial Chamber judgments, and if you have ever looked at one of these judgments, you will know that they can run to hundreds of pages with thousands of footnotes, so issuing a judgment is a big deal for one of these tribunals. The ICTR also heard three appeals. All of the Trial Chamber judgments are under appeal, so the Appeals Chamber is going to be very busy moving forward.

Given this body of work, I will just touch on some of the highlights. One aspect of the completion strategy involves prosecuting defendants together when there is a thematic or geographic connection between them. This practice of joint indictments has raised some fairness issues for accused who are charged with their subordinates or their superiors or where there are other sorts of conflicts of interest between defendants. Nonetheless, the tribunals have moved forward with these mega-indictments. *Military II* is one of them.

The *Butare* case is quite interesting, because it involves one of the few female defendants to be brought before an international tribunal. Her name is Pauline

Nyiramasuhuko, and she is the former Minister for Family Welfare and the Advancement of Women. She was indicted alongside her son, Arsene Shalom Ntahobali. The two of them were convicted of genocide—she will be the first women to serve time for this crime—and rape as a crime against humanity. The theory of responsibility for her was one of command responsibility—individuals under her command and control committed rapes against Tutsi women and girls who were seeking refuge in her prefecture office. There was even evidence in the record of her ordering her son to commit rape and of her handing out condoms so her subordinates could rape but still avoid HIV. Interestingly, the Tribunal in its judgment chided the Prosecutor for only charging on the basis of this command responsibility theory. They said in effect, “she should be considered directly responsible, because she actively ordered subordinates under her command to rape these women.” Both have been sentenced to life imprisonment, and both have appealed their sentences.

Another feature of the completion strategy is this idea of transferring lower-level cases that could be handled by a domestic system. Two cases have gone to France, but to date, all of the other low-level defendants have had to stay before the Rwanda Tribunal because there has not been another state that has been willing or able to bring these prosecutions. This has created a real source of friction between the Rwanda Tribunal and Rwanda. Rwanda has argued that, “We can handle these cases. You should transfer some of the lower-level defendants to us.” The Prosecutor in the past has tried to do so, and every time the Tribunal has said, “We cannot

trust the Rwandan system to prosecute these individuals pursuant to internationally recognized due process principles.”

Over the years, the ICTR has had a number of concerns about the Rwandan system. Number one was the death penalty, so Rwanda abolished the death penalty. Number two was the possibility of life imprisonment in solitary confinement, so Rwanda abolished that penalty. There was concern about the independence of judges, so Rwanda created a better system of oversight and independence. The final sticking point was concern about the protection of victims and witnesses and ensuring that individuals who came forward to testify would not face retaliation when they went back to their communities. Finally, in the *Uwinkindi* case, the Rwanda Tribunal allowed for the transfer of a case to the national system. The Prosecutor has now moved to send six of the nine outstanding indictments back to the Rwandan system, and retain jurisdiction over three at large defendants. We will see if those individuals are brought into custody so that the Rwanda Tribunal can finalize its work.

In Rwanda there is a parallel system of justice. In the immediate aftermath of the genocide, it quickly became abundantly clear that the Rwanda Tribunal would not be able to prosecute the bulk of the individuals who were involved in the genocide, so it has focused on very high-level defendants. Virtually the entire Hutu government was under indictment as well as all of the top military leaders and many of the prefects who were in charge of regional areas within Rwanda.

For lower-level defendants, Rwanda adapted a traditional, community-based dispute resolution mechanism called *gacaca*. *Gacaca* means “grass” or “grass courts,” and the idea is to bring eminent individuals from the community together to hold a hearing, invite the testimony of victims, perpetrators, and witnesses; and then issue a sentence, which may involve prison time, community service work, or some other way to pay back the community. The idea was that these *gacaca* courts would handle the bulk of the low-level defendants. Nine thousand of these courts were deployed around the country over the last 10-15 years to work through all of these cases.

It has just been announced that Rwanda is poised to close down the *gacaca*. They have essentially done the job that was put to them. Although they have been subject to the criticism that their proceedings infringed upon some of the rights of victims and defendants, the ultimate conclusion is that some measure of justice and accountability was meted out in an imperfect way in an impossible situation. The regular Rwandan judicial system would never have been able to process all of these cases. So that chapter is now coming to a close in Rwanda.

Extraordinary Chambers in the Courts of Cambodia

This brings us to Cambodia, and the Extraordinary Chambers in the Courts of Cambodia (ECCC). This Tribunal has a unique hybrid structure in that every key post is a co-post. There are Co-Prosecutors, Co-

Investigating Judges, Co-Defence Counsel, and Co-Victim's Representatives. The Tribunal itself cannot make any decisions unless at least one of the international judges agrees. This hybrid structure has created tension, at times, between the international and the Cambodian staff.

Case One, the case against Duch, is now on appeal. The case came to a stunning conclusion. Throughout the trial, Duch's approach was to accept responsibility and ask for forgiveness. Unlike a U.S. court, the Tribunal is not empowered to accept a guilty plea in the way that ends the proceeding and results in a sentence. The Tribunal insisted on going through a process of hearing evidence, notwithstanding what was essentially a guilty plea. During the closing arguments, we witnessed a stark manifestation of the problems of this hybrid structure. The international Defence counsel spoke first, reiterating this defense, asking for forgiveness, pointing out the ways in which Duch had cooperated in the trial by, for example, giving evidence, helping the Prosecution, and laying the groundwork for future cases. His Cambodian counterpart then stood up and completely changed the strategy, attacking the jurisdiction of the Court, seeking to undermine every single charge, asserting the innocence of the defendant, and demanding an acquittal.

Everybody was stunned, and nobody knew what to do. The Tribunal members began conferring among themselves. Finally, the presiding judge asked Duch, "Which is it? Are you accepting responsibility, asking for forgiveness and expressing your remorse, or are you demanding your acquittal and a finding of not guilty?"

And Duch ultimately sided with his Cambodian lawyer, and said, “I want to fight the charges.” His international lawyer stepped down at that point, and Duch ultimately received a 30-year sentence, which he has appealed on the ground that it is too long and does not reflect the degree of remorse he expressed or his participation in the Tribunal. The Prosecution has also appealed Duch’s sentence, saying that undue weight was given to so called “mitigating factors,” and that he should have a life sentence, if only for symbolic reasons. That said, the defendant is in his seventies, so a 30-year sentence is essentially a life sentence.

Interestingly, the Civil Parties, the victims, have also appealed, arguing that they are entitled to broader reparations from the Tribunal. In the original judgment, all they received by way of reparations was their names listed in the judgment. The Tribunal took a very conservative approach, basically saying, “Listen, there is no money. He is indigent. So what we are going to give you is acknowledgement in the judgment.” In their appeal, they have asked for more: memorials, psychological and medical assistance, and a whole range of symbolic reparations. Duch himself is not in a position to provide any of the reparations sought, so the victims are essentially asking the Tribunal to make a recommendation as to what the Cambodian government should do.

Case 002 is now teeing up. This is the case against the surviving leaders of the Khmer Rouge regime. The defendants have health concerns, and the case against Ieng Thirith will probably not go forward. The fitness

hearing was just held yesterday. I saw her in her initial appearance, and she looked quite frail and could not remember the number of children she had, although there was some concern that she was putting on an act. Her case will likely be severed from the other cases so that they can go forward.

The real controversy lies with respect to *Cases 003* and *004*. In terms of personal jurisdiction, the ECCC is supposed to prosecute “those most responsible.” The question is how far down the hierarchy to go. *Case 003* involves the former heads of the Navy and the Air Force. *Case 004* involves among others a mid-level Khmer Rouge cadre, Im Chaem, who was in charge of a massive irrigation project that allegedly utilized forced labor as well as a detention center in which upwards of 40,000 people may have been executed.

The international Co-Prosecutor who preceded Andrew Cayley, Robert Petit, wanted to move forward with both *Cases 003* and *004*. His Cambodian counterpart disagreed. The legal argument that has been made is that these people are not the “most responsible,” and that the ECCC should stop with the regime leaders. Under the Statute, these sorts of internal splits are to be put to the Tribunal. The Tribunal did not reach a majority to block the cases, so they can go forward. As a result, *Cases 003* and *004* were sent to the Co-Investigating Judges for investigation and to draw up what amounts to an indictment.

It was always said that because of this Tribunal’s weird hybrid structure, it would only be as strong as its

weakest international member. The Co-Investigating Judges conducted what many have criticized as a very perfunctory investigation into both cases. They did not interview witnesses. They may not have even interviewed the potential defendants. Because these cases languished, many staff members quit out of frustration.

Despite the substantive argument that these defendants do not represent the “most responsible,” the real concern is that there has been political interference. The government has made it very clear that it does not want any other cases prosecuted beyond *Case 002*. There are some allegations that the Prime Minister has promised those suspects that they will not be subject to prosecution. There is some concern that the Cambodian Co-Prosecutor and the Cambodian Co-Investigating Judge are under pressure to drop those cases. The International Co-Investigating Judge, Judge Blunk, has emerged as the weak link in the hybrid system. It is said that he is not strong enough to stand up for these cases and to enable them to go forward. It remains to be seen how this impasse is resolved.

Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) is in the final stages of its operations. The final case—against Liberian ex-President Charles Taylor—is going forward but in The Hague because it was feared that bringing Taylor to Sierra Leone would be too unsettling to that country. The Chief Prosecutor for that case is Brenda

Hollis, an American. Her theory of the case has been that although Taylor was in Liberia during the Sierra Leonean civil war—and the SCSL only has jurisdiction over crimes committed in Sierra Leone—he was nonetheless controlling the Revolutionary United Front, one of the rebel groups in Sierra Leone, in order to gain access to the great mineral wealth in that country. She has charged him with being an essential part of a joint criminal enterprise, which is essentially a conspiracy.

Courtenay Griffiths, a Jamaican-born lawyer, is the lead defense counsel. He has put on evidence showing that there were arguments between the various factions operating in Sierra Leone, and a conspiracy cannot exist amongst factions that are fighting each other. Thus, he has argued, Charles Taylor cannot be held responsible for what these various factions were doing within Sierra Leone. He has also argued that even if there was a joint criminal enterprise or a conspiracy between these various factions to get access to the mineral wealth, Taylor—although he may have been in support of such arrangements—did not make a substantial enough contribution to that endeavor to be held criminally responsible for it. These two competing narratives are before the Special Court, and we will have to wait and see where the judgment comes out.

The Special Court is also hearing some cases against individuals accused of interfering with, and even attempting to bribe, witnesses. These contempt proceedings are going forward and will be heard by a residual mechanism. Interestingly, one of the accused in these contempt proceedings has gone state's witness. He

has pled guilty and agreed to help the Prosecution in exchange for some leniency.

Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) was established in the wake of the assassination of Prime Minister Rafiq Hariri, who was, in many respects, an incredible figure within the Middle East—a voice of moderation, a reformist, someone dedicated to bringing factions together within Lebanon, and a leader devoted to creating a peaceful future in the region. His assassination was a tragedy.

This Court also has a very interesting hybrid structure. The judges are domestic and international, but they are applying purely domestic law governing terrorism. There was some talk about including crimes against humanity as an international crime within the STL Statute, but that did not happen.

The full reach of this Tribunal remains indeterminate. We know it has jurisdiction over the Hariri assassination and related acts, but then there is a question about whether other acts of terrorism that occurred within the same temporal period are sufficiently linked to the Hariri assassination to fall within the jurisdiction of the Tribunal. So far, the Tribunal has ruled that three other attacks being prosecuted by the Lebanese authorities are, in fact, sufficiently linked to the Hariri assassination such that

they should be brought within the jurisdiction of the Special Tribunal for Lebanon.

The applicable law is the law of terrorism, and the Appeals Chamber, following the lead of Judge Cassese, ruled that even though the Statute says it is incorporating domestic law, the judges can rely on international law in order to interpret the domestic law. Judge Cassese wrote a very important article in 2006 in which he made the argument that there was a customary international law prohibition against terrorism. This crime has never been the subject of an omnibus treaty; rather, the international community has promulgated a series of piecemeal treaties that address particular manifestations of terrorism, such as terrorist bombings or hijacking airplanes. To date, states have never been able to reach a consensus definition of the crime of terrorism. Judge Cassese in his article—and now his opinion—has argued that there is such a definition.

The Tribunal has essentially been operating in a vacuum, without defendants in custody. The STL is the one tribunal that can proceed against defendants *in absentia*. None of the other tribunals would allow such proceedings. The ICTY Statute only allowed for a sort of mini-trial in which the indictment was confirmed. The Prosecutor was entitled to put on some evidence and preserve witness testimony, but the Court could not reach a substantive verdict without the defendant present. The Lebanese Tribunal was designed differently and reflects the practice of a number of civil law national systems that allow for *in absentia* trials. This practice is foreign to our thinking because in the United States,

there are only very narrow circumstances in which a trial can go forward in the absence of the defendant. We are at the stage at which we will see whether the Lebanese authorities can locate these fugitives and bring them into custody or whether the Tribunal will invoke Article 22 and move forward without the defendants.

International Court of Justice

I would be remiss if I did not talk a little bit about the International Court of Justice (ICJ). The ICJ does not have penal jurisdiction over individuals; it only has jurisdiction over states. There are, however, three matters pending before the Court that have implications for international criminal law. One is a case between Germany and Italy. Italian courts have been entertaining civil cases seeking money damages arising out of World War II. Germany has argued that those cases are foreclosed by postwar peace treaties promulgated in the immediate aftermath of World War II. This argument has prevailed in suits brought in the United States, such as cases against banks. In the United States, an omnibus settlement was reached in which a series of funds were created that paid out reparations to victims. Italy is allowing cases to go forward in its courts, and Germany has asked that this be stopped. Greece, interestingly, has tried to intervene in that matter.

Another pending case is between Belgium and Senegal, and concerns Hissène Habré, the former leader of Chad who is alleged to be responsible for tens of thousands of assassinations, killings, summary

executions, and torture during his reign. He was found in Senegal, and many activists argued that Senegal should prosecute him. Senegal had to amend its domestic law, including its statute of limitations, to enable Habré's prosecution. In the meantime, Belgium indicted Habré under a theory of universal jurisdiction. Following some negotiations, the African Union was brought into the conversation. The African Union recommended that Senegal move forward. Senegal said it would but claimed it needed outside funding, so a pot of money was collected. After all these machinations, Senegal decided not to move forward.

In response, Belgium filed suit against Senegal in the International Court of Justice saying in effect: "You are not going to prosecute him, therefore, you should extradite him to us. You are under a treaty-based obligation and maybe even a customary international law based obligation to extradite him to us. We are willing and able. We have the indictment ready. We have victims here. We want to prosecute this case." This case is now pending before the ICJ.

The final case before the ICJ that I want to mention also involves Belgium, which has been very active in invoking its universal jurisdiction statute. The Democratic Republic of Congo brought suit against Belgium trying to enjoin the prosecution of individuals from the DRC. That case was eventually withdrawn before the ICJ, no doubt as a result of some sort of political solution worked out between the two parties.

What the Future Holds

As for what to expect in the next year, there are a number of other situations that are still under consideration by the ICC outside of Africa, including Colombia and Georgia. We will have to see whether or not domestic proceedings in these situations are deemed sufficient to keep the Court from moving forward. In addition, the ruling in the Palestinian situation is going to be very interesting, if and when the Prosecutor decides whether or not he wants to move forward with that. Such a ruling will be, obviously, highly politically contentious on a number of different grounds.

We are going to see the creation and implementation of the residual mechanism for the various tribunals and the transfer of jurisdiction in some of these cases to that residual mechanism.

The Lebanese Tribunal may institute *in absentia* proceedings. That would bring some measure of closure, but such proceedings often feel insufficient to many of us. We really need to have the defendants there to mount a credible defense. It remains to be seen whether the Tribunal will get custody over these individuals who are Hezbollah members and who enjoy the support of Syria and other states. Many think that whether the warrants will be executed hinges on Saudi Arabia's position. If Saudi Arabia is willing to exercise its influence, we may see some progress at the Lebanese Tribunal.

We are on pins and needles with respect to the political crisis at the ECCC. Will the Tribunal move forward, or will it back down in the face of presumed political interference? Interestingly, some documents that Wikileaks got hold of revealed that the United Nations had actually contemplated the possibility of transferring *Cases 003* and *004* to the domestic system. That would be the death knell of those cases. So whether Andrew Cayley can hold the line and push those cases forward or whether the political machinery will step in and prevent that from happening remains to be seen.

Lastly, we have to look out for the *Lubanga* judgment—the first substantive judgment to be issued by the ICC. It will be incredibly interesting to see where the Court comes out. So, lots of developments on the horizon. I look forward to next year's gathering to see how many of these open issues come out.

Commentary

A Moral Responsibility

Kerry McPhee*

As a society, it is essential to analyze the world around us and to have the courage as individuals to defend what we believe is right, even in the face of adversity. “Upstanders” have shown these qualities throughout history, creating a positive influence in their social structure and changing society, including actions during the Holocaust, the Women’s Rights Movement in America, and the African-American Civil Rights Movement. After reviewing these specific cases, we will see the significance of raising future generations as upstanders.

By the end of the widely known genocide called the Holocaust, approximately six million Jews were murdered, along with five million other people, including gypsies, homosexuals, and other religious and political opponents of the Nazi regime. During this time, German citizens were living under an extreme state of paranoia. Therefore, an upstander had to put his or her life at high risk.

* 2011 Hamburg High School Graduate; Freshman at the University of Buffalo. This is the winning essay in a high school essay contest sponsored by the Summer Institute for Genocide Studies, the Robert H. Jackson Center, and *Impunity Watch*. The winning essay was formally recognized at the Fifth International Humanitarian Law Dialogs.

Before the outbreak of World War II, a woman named Jane Haining volunteered as a matron for over fifty orphan girls who were predominantly Jewish. The orphanage was located in Budapest, Hungary, where Haining lived until her arrest by the Gestapo (Nazi Police). Later, Haining died in one of the gas chambers at Auschwitz. She is quoted as saying, "If these children need me in the days of sunshine, how much more do they need me in the days of darkness?"

It is important for our society to learn from Haining's courageous acts. Haining sacrificed her own safety and life to help other human beings because she knew that the Nazis were wrong. By learning from Haining's example, individuals can become upstanders rather than bystanders and have an impact on the world around them. Haining's experience shows us that, even when facing the greatest of adversity, we need confidence in our convictions to end prejudices in the world. It is people with these powerful qualities that will progress our world.

Another example where the characteristics of an upstander were crucial in positively changing society is the passing of the Nineteenth Amendment, which granted women the right to vote. Women were treated as property and had no representation within their government. A woman's responsibility was to take care of children and maintain a stable home. Women were not treated as equals in society. It was not until 1920 that women saw real progress within America.

Alice Paul and Lucy Burns are two perfect examples of upstanders. Paul started the National Woman's Party in 1916, which would later have great influence on the women's suffrage movement. Paul and Burns followed a non-violent civil disobedience movement while picketing the White House with banners demanding the right to vote. Without these National Women's Party efforts, women may have never been able to get the right to vote. Paul and Burns are great examples of upstanders, showing the importance of perseverance in striving for progress within a cause. Upstanders can also give bystanders the drive to speak out against the injustices of the world.

In much of America, it was not long ago when the bench that you sat on or the place where you were employed was based largely on your racial identity. Only fifty years ago, blacks and whites in the South were completely segregated, whether at school or on the public bus system. African-Americans were treated as inferior due solely to their skin color. An upstander during that time period named Dr. Martin Luther King Jr. once said, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." This quote is from Dr. King's speech at the March on Washington, one of the biggest successes of Dr. King's activist career to gain equal rights for African-Americans.

Dr. King, an African-American, had felt the injustices in America because of his skin color and had decided to act upon his feelings towards the issue. He

wanted equality for all and was determined to achieve his goal. Dr. King led many successful, peaceful protests. Like the March on Washington, he also led the Montgomery Bus Boycott where he was able to gain more supporters in order to achieve equality. Upstanders like Dr. King were confident that what they were accomplishing was for the betterment of society.

Upstanders play a huge role in every society because they are the people who prevent the injustices of the world from happening or continuing. Upstanders not only change the world they live in, but, more specifically, they change societal factors for future generations to come. They are recognized for their determination and willingness to act for a better world. Therefore, upstanders have been significant throughout history. They deserve a spot in our memories and for their messages to be passed on from generation to generation.

Transcripts and Panels

Update from the Current Prosecutors

This roundtable was convened at 10:30 a.m., Monday, August 29, 2011, by its moderator, Professor Mark Drumbl of Washington and Lee University School of Law, who introduced the panelists: Fatou Bensouda of the International Criminal Court (ICC); James Arguin of the International Criminal Tribunal for Rwanda (ICTR); James Johnson of the Special Court for Sierra Leone (SCSL); Andrew T. Cayley of the Extraordinary Chambers in the Courts of Cambodia (ECCC); and Daryl Mundis of the Special Tribunal for Lebanon (STL). An edited transcript of their remarks follows. Serge Brammertz of the International Criminal Tribunal for the former Yugoslavia (ICTY), who was unable to attend the panel, submitted instead an excerpt of his annual report to the United Nations.

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MARK DRUMBL: It is a great honor and a delight to be back here at this incredible get-together. I would like to thank all of the organizers, students, and others who have been able to put together such an exciting couple of days.

I will introduce our speakers today very briefly—their accomplishments are so long, we could go on forever—and I will pose a couple of questions to them, and then provide you with a description of how we will proceed.

We are privileged to have with us today five prosecutors who will speak in the following order: the first speaker will be Fatou Bensouda from the International Criminal Court; second will be James Arguin from the International Criminal Tribunal for Rwanda; the third speaker will be Jim Johnson from the Special Court for Sierra Leone; fourth will be Andrew Cayley from the Extraordinary Chambers in the Courts of Cambodia; and fifth will be Daryl Mundis from the Special Tribunal for Lebanon. Each of these esteemed lawyers and distinguished prosecutors brings to the table considerable experience, expertise, and background.

We are going to ask our prosecutors to provide us with an update on current developments at their particular institution. Within that framework, I would love to hear from them, as I am sure you would as well, about key challenges as well as key accomplishments. What are you nervous about and what are you proud of? It would be great to hear from all of you not just about conceptual challenges but also about the nuts and bolts: arrest warrants, getting suspects in custody, running the trials, putting this together, making it stick, and pinpointing in microscopic detail how you actually secure a conviction for crimes whose gravity and magnitude may know no bounds.

And there is a final thing I think I would really love to hear about from our speakers today, and that is something that transcends legal work and involves personnel. We have a lot of law students with us here today, and I would love it if the prosecutors could give some advice to new graduates or current students about

how to get into the practice of international criminal law: how did you folks get there, and where do you see the field going—again, not just conceptually but as a living, breathing, organic entity? We heard from David Scheffer this morning that corporations are people. Well, courts and tribunals are people too, right? And in this particular sense, it would be great to get a perspective on that aspect of your work.

Each of our distinguished speakers will have approximately 15 to 20 minutes and we will leave time for audience questions. So without any further ado, it is my great honor to welcome Fatou Bensouda from the International Criminal Court.

FATOU BENSOU DA: Good morning, and thank you very much for your introductory remarks. I am always happy to attend the International Humanitarian Law Dialogs. Not only do we talk about international humanitarian law, but I always find the interaction with the community fascinating. Even the storms could not hold me back! I had to come.

As some of you who have been following the International Criminal Court will know, it has been pretty busy over the last two years with trials ongoing and new cases beginning at the same time.

Our very first trial, *Prosecutor v. Thomas Lubanga Dyilo*, is nearing its end. The trial started in 2009. Lubanga, you will recall, is a militia leader in the Democratic Republic of Congo (DRC). He has been

charged with enlisting and conscripting children under the age of 15 and using them to participate in hostilities. During the trial, we faced various challenges. We have endured two stays of the proceedings for technical reasons, from which we took valuable lessons. We finally heard closing arguments last week, and we are expecting the judgment soon.

One of the highlights of the closing hearing in *Lubanga* was that Ben Ferencz was present and an active participant. I did the opening of the closing remarks, and he was there to provide the final remarks on behalf of the Prosecution. Ben, in his typical fashion, spoke from the heart; it was amazing to listen to him.

Another trial that is currently ongoing is *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. This is the case of two top militia leaders who are allegedly responsible for a massacre in Bogoro, a village in the Ituri district of the DRC. The trial started last year, and the Prosecution has already closed its case. The Defence witnesses are currently testifying, and we are hopefully expecting a final decision toward the end of 2012.

The trial of *Prosecutor v. Jean-Pierre Bemba Gombo* is also ongoing. Jean-Pierre Bemba is a former Vice-President of the DRC, but he was charged with crimes that occurred in the Central African Republic (CAR). The Prosecution alleges that in 2002, the then-president of the CAR invited Bemba to assist him in putting down an attempted coup d'état in the CAR. Bemba brought in his militia, the Movement for the Liberation of Congo, to thwart that coup attempt, and we

are alleging that many crimes were committed in the process of putting it down.

As I think I mentioned last year, this is also one of those cases where the allegations of rape and sexual abuse outnumber the allegations of killing. An important aspect of this case is the issue of command responsibility—the responsibility of military commanders for the actions of their people on the ground. The Prosecution will complete its presentation of evidence, hopefully, in a month or two.

The other case that I would like to mention is that of *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*. These are two rebel commanders who have been charged with crimes in the context of the situation in Darfur. You will likely recall that the situation in Darfur was referred to the ICC by the United Nations Security Council. Our investigations have resulted in three cases. The first, *Darfur 1*, is against Ahmad Harun and Ali Kushayb—the first a former Minister of State for the Interior and the other a militia leader. In our *Darfur 2* case, President al-Bashir, the President of Sudan, is charged with committing crimes, including genocide, in Darfur.

Darfur 3 is a case against the rebel commanders Banda and Jerbo, a case not concerning the government of Sudan. Banda and Jerbo are alleged to have attacked an African Union peacekeeping base in Haskanita, resulting, amongst other things, in loss of lives. Whereas the number of killings may have been limited during the incident, the importance of the case lies, in particular, in

the fact that peacekeepers were killed. Peacekeepers are there to keep the peace, to try to bring stability and security. When you kill them, you are exposing those who they protect. So the Prosecution wants to send this message in this case.

There is also the case of *Prosecutor v. Callixte Mbarushimana*. Callixte Mbarushimana is a top militia leader, heading a group of former Rwandan génocidaires, who is accused of being responsible for a campaign of massive crimes, including killings and rapes, which occurred in the Kivu provinces of the DRC. Mbarushimana has been arrested. He was living in Europe, actually, but the crimes with which he has been charged took place in Africa. The Prosecution has submitted evidence to the Court showing that he actually knew that the crimes were taking place. The Prosecution has information that he was in direct contact with the commanders on the ground who were committing these crimes. The confirmation of charges in this case will take place on September 17, 2011, and we are hoping that the trial will begin in 2012.

Then we have the situation in Kenya where the Office of the Prosecutor (OTP) is pursuing two cases against individuals who were allegedly involved in the post-election violence that took place in Kenya in 2007. They include former ministers, the Secretary of the Cabinet of the Republic of Kenya, the former head of the police, and a radio broadcaster.

An admissibility challenge was issued in these cases, not by the suspects but by the government of

Kenya. It was rejected by the Trial Chamber, but the government appealed; a decision from the Appeal's Chamber is expected next week.

The confirmation of charges hearings in both cases will take place in September. Hopefully, the trial will start in 2012 or early 2013.

Another situation before the Court is that of Libya. There was a unanimous decision by the U.N. Security Council referring the situation in Libya to the ICC. I think we are all aware of what is currently happening in Libya and the atrocities that are being committed. The Office of the Prosecutor has requested arrest warrants for: Colonel Muammar Gaddafi; Saif Al-Islam, the son of Muammar Gaddafi, who has also been very vocal and public in the media during this conflict; and Abdullah Al-Senussi, the Head of Intelligence in Libya. They were all charged with crimes against humanity allegedly committed between February 15 and the end of February. The investigations into those crimes are still ongoing. We are including investigations into the allegations of war crimes committed in February by the different parties, as well as allegations that have been made that rape was committed as part of policy. We can continue to discuss what is currently happening in Libya later because the situation is changing very rapidly.

Let me finally mention the situation in the Republic of Côte d'Ivoire. On the basis of our preliminary examination, focusing in particular on the context of the post-election violence, the Office of the Prosecutor has

asked for authorization from the Pre-Trial Chamber to open an investigation into the situation in Côte d'Ivoire.

I recently traveled to Côte d'Ivoire to meet with the authorities and also to determine how we might proceed with an investigation once we have the required authorization. The issue that kept coming up, of course, was whether we were going to investigate both sides and not just one side. I am glad that the President came out and said, "I have invited the Prosecutor not because I want to shield people from my side, but I want an independent institution to investigate what has taken place." I think this was quite interesting—in the end, the Prosecutor will always operate in an impartial manner.

In addition to the investigations and cases already referred to briefly, the Office is also engaged in various preliminary examinations to examine situations before deciding whether or not to proceed with a full investigation. We have different situations in various phases of preliminary examination. The Office is still assessing the jurisdiction of the ICC over the situation in Palestine. We are checking if crimes have been committed that fall under the jurisdiction of the Court in Korea, Nigeria, Honduras, and Afghanistan. In Colombia, we are monitoring national proceedings before deciding whether the ICC should step in or whether to allow Colombia to continue their national investigations and their prosecutions. We are doing the same thing in Guinea and in Georgia.

As a final note, I would like to highlight that various arrest warrants were issued by the Court, and that they

are currently still pending execution. I mentioned the cases in Darfur. It is important that the international community keeps insisting and following-up on the legal obligation of Sudan to cooperate with the ICC on the basis of Resolution 1593.

Arrest warrants are also outstanding, since 2005, in the situation of Uganda. Joseph Kony, the top leader of the Lord's Resistance Army, has still not been arrested. Action against the LRA leadership is politically uncontroversial: we all agree that action is needed. The international community needs to support Uganda's efforts.

In the DRC, an arrest warrant is outstanding for Bosco Ntaganda. I think that the DRC just needs to make the decision to arrest him. I don't think there should be any excuses anymore. His presence in the region presents a great risk. Action is needed.

Finally, with regard to Libya, we have said that the primary responsibility to implement the arrest warrants is with the Libyan people. As you know, Libya is not a State Party to the Rome Statute, but it is a member of the United Nations, and has been since 1955. So we believe that Libya should comply with Security Council Resolution 1970, which specifically calls on Libya to cooperate fully with the Court and Prosecutor and to provide any necessary assistance.

MARK DRUMBL: Thank you very much, Prosecutor, for covering the breadth of the ICC's

activities in less time than you were actually allotted. So let's continue with James Arguin of the International Criminal Tribunal for Rwanda.

JAMES ARGUIN: Thank you. I am James Arguin, Chief of the Appeals and Legal Advisory Division at the International Criminal Tribunal for Rwanda. Prosecutor Hassan Jallow wishes he could have attended, but he decided not to travel during Ramadan, so I had the fortune of being selected to come in his place. I want to first convey his greetings to everyone. I know he likes to come to this event, but I am certainly happy to be able to take his place.

Let me first address the update on where things stand at the ICTR, including current developments, challenges, and key accomplishments. I will then address the personnel issue, especially for our aspiring lawyers, about career paths.

With regard to the current status of the ICTR, it is moving toward completion. We are the oldest *ad hoc* tribunal, and our mandate is ending. In July 2012, the ICTR will be done. We will start handing over its functions to the residual mechanism that has been established by the U.N. Security Council. There is, however, a great deal of work that remains to be done, and the ICTR will see all of the pending cases to completion, including appeals.

To date, 32 cases have been completed through final judgment from the Appeals Chamber. This summer, we

arrested one of our outstanding fugitives, Bernard Munyagishari. Preliminary proceedings are starting at the ICTR in terms of arraignments, and he will face trial either at the ICTR or, if the decision is made, he may be referred to another jurisdiction.

We have ten additional cases currently in trial or pending before the Trial Chamber. Some have been submitted for decisions. Judgments in all ten of those cases are anticipated by the end of this year, according to the judicial calendar. Some of them, however, already look like they may spill over into 2012.

We also currently have 19 cases on appeal before the Appeals Chamber. Two judgments—in the *Setako* and *Muvunyi* cases—are due to be rendered when I return to Arusha toward the middle of September. In September, we will present oral arguments before the Appeals Chamber in two additional cases—the *Ntabakuze* and *Dominique Ntawukulilyayo* cases.

Briefing is ongoing in all of the remaining 15 cases. Those include some of our bigger cases, involving multiple accused. The *Butare* case has six accused. Another has four accused. Those cases will require substantial time for completion, particularly since there are translation issues and other issues relating to anticipated Defence motions. So the briefing in those cases will span well into 2012.

Wrapping up the ten pending cases before the Trial Chamber will also generate additional appellate work.

There are 22 possible additional appeals as a result of the ongoing trials. All of that work, of course, will need to be completed before the ICTR closes or can close, and it will take a substantial amount of time. We anticipate that all of our cases will be submitted to the Appeals Chamber by the end of 2013. By submitted, I mean argued. So basically, the majority of our work as prosecutors will be done in terms of briefing and argument, and it will be up to the Appeals Chamber to decide the cases on the law and the facts and to render their decisions. Some of those decisions, particularly in the multi-accused cases, will only be issued in 2014.

Some of the other things we are working on at the ICTR include the Rule 11*bis* procedure, which is a referral procedure for sending cases to national jurisdictions. The Prosecutor had previously filed five applications to refer cases to Rwanda for trial. Those applications were denied because the Trial Chambers and Appeals Chamber were not persuaded that Rwanda would be able to preserve the fair trial rights of the accused in those cases. In November 2010, in light of substantial changes to Rwandan domestic law and the international community's extensive efforts to help Rwanda rebuild its judicial infrastructure—including its judiciary, prosecution services, and victim witness services—the Prosecutor decided to submit new applications in three cases. I am happy to say that in June of this year the Referral Chamber allowed the Prosecutor's application for referral in the first of those cases, which has been the flagship case. So we will be sending one of our first cases to Rwanda, assuming that the Appeals Chamber agrees with the Referral

Chamber's decision. That is another appeal that we are going to deal with in September. Briefing in that case will proceed very quickly, and we should have a judgment in October. If we are successful, referrals will be a key piece of our completion strategy, enabling us to refer any of the smaller remaining cases to Rwanda for trial.

The referral decision also has ramifications for other jurisdictions that want to extradite offenders to Rwanda for trial. So it could have a dramatic impact on proceedings at both the tribunal-level and internationally.

At the same time, we have nine remaining fugitives. We are actively working on those cases in a variety of ways to make sure that they are handed over to the Residual Mechanism in an orderly fashion, so that they can be prosecuted if and when those accused are captured and arrested.

Two of the Rule 11*bis* proceedings actually involve fugitive cases. There are other proceedings underway in three of those fugitive cases for the preservation of evidence. We filed an application before our Trial Chamber in September 2010, in those cases where we seek to put on any testimony that we are in danger of losing because of victim illness, or potential threats to witness safety. It is really a deposition practice, subject to cross examination, that takes place. The goal is simply to preserve the evidence so that if and when we succeed in capturing these fugitives, they can then face trial.

All of those proceedings are ongoing, but since this is our first time using this procedure, some of the kinks are being worked out through the process. What we are trying to avoid, of course, is a trial *in abstentia*. It is not a trial at all. It is simply a deposition practice to preserve evidence for future use at trial. We anticipate that it will raise a host of issues, but so far the proceedings are going very well, and we are looking forward to trying to do this in other cases, targeting the evidence that is most in danger of being lost.

The remaining fugitive cases are also undergoing review with an eye toward handing functions over to the Residual Mechanism. The indictments in many of these cases were issued eight or ten years ago. Since that time, the law from the Appeals Chamber has developed substantially in terms of the substantive elements of some of the offenses, concepts of modes of liability, and the Prosecution's pleading requirements regarding the specificity of the notice given to the accused.

To make sure that the indictments that are turned over to the Residual Mechanism are as up to date as possible, we are undertaking file reviews of all those cases and updating the pleadings to make sure that they comply with the most recent standards imposed by the Appeals Chamber. Some additional investigation may be required to determine which witnesses are still available and whether there is any additional evidence that could be added. But the goal is to just make sure that everything will be in order when the ICTR's mandate ends in July of next year and we have to turn functions over to the Residual Mechanism so that the new

Prosecutor can pick up those files and start pursuing those cases without any delay. It will also enable us, if the decision is made and if our pending referral requests are sustained on appeal, to refer those cases, fully investigated and fully pleaded, to whatever national jurisdiction may receive them, so that they can be prosecuted without any delay or deficiencies in the pleadings.

The key challenges, I think, are really a function of the completion strategy. It is very difficult to keep key staff when the Tribunal's days are numbered. July 2012 is our official turnover date. As I said, though, the ICTR will continue to handle the cases it already has pending and will see them to completion. We have a lot of very talented staff, and they are obviously anxious about their futures. One way or another, the Tribunal is going to close, so the days of working for the Tribunal are limited. I anticipate seeing a great deal of attrition over the next year or two. We have also included plans for downsizing at the end of 2012, as well as at the end of 2013, in our budget projections.

This raises significant challenges, both in terms of staffing and also in terms of scheduling and timing, because all of our case management projections are based on the trial calendars and the Appeals Chamber calendars in terms of when they believe decisions will be rendered and judgments entered. We already, as I mentioned, are seeing some of the cases that were projected to end in November or December being pushed back to perhaps January, February, March, or later. That has serious implications for us, because we are under a

mandate to start shutting things down. Courtrooms are shutting down. The number of Associate Legal Officers, who work in Chambers, is decreasing, and the number of prosecutors is decreasing. So it is going to be a very stressful time, and there is really no way for us, as prosecutors, to control the rendering of decisions or judgments. The Chambers make those determinations, and they are dictated by the fairness of the trial. Witnesses get sick, witnesses are unavailable, Defence counsel require more time to investigate allegations, we often ask for more time to investigate late-noticed alibi defenses—all of that results in delays in the anticipated scheduling of a case for judgment, and that has a spillover effect on when our work will be done. So that, I would say, is a major challenge at this time.

In terms of key accomplishments, I would point to some of the early decisions and some of the most recent decisions. Overall, the Tribunal has made 86 arrests since its inception—actually 87 now with Munyagishari. That is a significant accomplishment given that we do not have independent arrest powers. It requires cooperation and mutual assistance from all of the countries where these accused have been found. It has been a challenge, but we can learn many lessons. As we implement the completion strategy, Prosecutor Jallow would like to tell the story of the OTP's successes in this area, so we will begin to compile some of the stories behind those arrests. Some of them are just remarkable.

With regard to the more recent success, I would point to the referral of cases to Rwanda, because that represents the fulfillment of an idea to rebuild the

capacity that was just devastated by genocide. All of Rwanda's legal infrastructures were wiped out. In the span of a relatively brief period of time, Rwanda has made great strides in rebuilding its judicial, legislative, and executive functions. Rwanda has also shown great willingness and openness to considering legislative changes in order to bring itself in line with the international community. By partnering with many other countries, Rwanda really has done a remarkable job in developing a new infrastructure for victim-witness protection, prosecution, defense, as well as prisons and other facilities, video link capabilities, and everything else necessary to ensure a fair trial for defendants accused of crimes in Rwanda.

On the recruitment front, I would not recommend following my path to the ICTR or international justice. I really have a national background as a prosecutor on the state and federal level here, in the United States and really am just fortunate to have the opportunity to work with the ICTR. I think it is more of a testament to my background in appellate litigation and management at a major law firm. But, I would suggest that if anyone is applying to the ICTR—and I should note that we will have vacancies posted on Inspira, our online recruitment cite, within the next several months for several positions which we are actively trying to fill so we can keep up with the anticipated attrition—but I would suggest that you need to be persistent. Think about internship opportunities, maybe volunteer opportunities. We welcome all the assistance we can get. We have had some fabulous interns in our Division and throughout

OTP. They contribute greatly, and they get very good experience. That is one way in.

But if you apply, just be persistent and patient, because our recruitment process takes a very long time. I would also say to pay very particular attention to the vacancy announcements. Consistent with U.N. hiring practices, recruitment is focused on competencies and educational requirements. The competencies are things like professionalism, teamwork, planning and organization, and other skills that are defined in the U.N. guidelines. If you focus your experience and relate it to those competencies and values, then you will probably do a very good job answering questions if you are selected for an interview. The key is gearing your prior experience toward meeting the expectations and the needs of the position, and if you can relate your past experience to the competencies and values required for the current position, then I think you have as good a shot as anyone to get a job at the ICTR. I think my own path into the ICTR shows that, since I did not have any prior international experience or experience with the Tribunal. It was just a matter of relating my national and domestic practice to the Tribunal's needs, so I would encourage you to do the same.

MARK DRUMBL: Thank you for the perspective from the ICTR. Our next speaker is Jim Johnson, who will give us the perspective of the Special Court for Sierra Leone.

JAMES JOHNSON: Thank you very much. This is the second time that I have been honored to be here and

represent the Prosecutor from the Special Court for Sierra Leone at this event. Prosecutor Brenda J. Hollis regrets not being able to be with you here today and she extends her warm regards to all of you.

Last year, my update concentrated on two principal areas of activity within the OTP: developments around the *Charles Taylor* trial and the progress being made by the OTP toward the Court's transition to the Residual Special Court for Sierra Leone.

This year, the same two activities have been the primary focus of the OTP, and I will briefly discuss each. First and foremost, we soon expect the trial judgment in the *Charles Taylor* case, which, you will appreciate, is an important milestone not just for the Special Court but also for the field of international criminal justice. We are expecting that the Trial Chamber will soon give notice of the date on which the trial judgment will be handed down.

You will recall that Mr. Taylor was charged under an 11-count indictment for crimes against humanity, war crimes, and other serious violations of international humanitarian law. The Prosecution introduced the evidence of 100 witnesses; 94 of those witnesses testified live at the trial. We considered 29 of those witnesses to be "insider witnesses," meaning persons close to the accused. The Prosecution also introduced over 600 exhibits. The Prosecution's evidence continued for some 13 months, which included three recesses in the Court's calendar.

The Defence concluded its case on November 12, 2010, after calling 21 witnesses. Mr. Taylor himself testified from mid-July 2009 until early February 2010. In addition, the Defence introduced nearly 500 exhibits. The Defence case lasted nearly 16 months. Written and oral submissions were presented in February and March, and the presiding judge declared the hearing closed on March 11, 2011. Since that time, the Trial Chamber has been in private deliberations on judgment. If Mr. Taylor is found guilty of any of the charges brought against him, we hope, based on Court estimates, that a sentence would be announced in November of this year, and that we would have an appeals judgment, if necessary, by May of next year.

I am sure you do not need to be reminded that Mr. Taylor was indicted with these crimes while he was sitting head of state. He is the first former head of state against whom a judgment will be rendered by an international court. We hope that this trial will demonstrate that heads of state will be held accountable and that accountability will be determined in a trial that is fair, efficient, and conducted in accordance with the highest standards of law and procedure. Regardless of the outcome, we hope that leaders and heads of states will look to the trial of Mr. Taylor as an affirmation that with leadership comes not just power and authority but also responsibility and accountability.

As I said, the second area with which we have been most concerned is the transition to the Residual Mechanism. The Special Court will be the first international criminal court to complete its mandate and

transition to a residual court—or we hope to be the first, if we see the *Taylor* judgment this month or next.

Over the last year, we have been busy with preparations towards that transition. You may recall that in August of last year, shortly before we gathered here at Chautauqua, the agreement between the United Nations and the government of Sierra Leone on the establishment of the Residual Special Court was signed. It currently awaits ratification by the government of Sierra Leone.

This agreement flows from the Special Court's distinctive character as an *ad hoc* tribunal which was established by agreement between the government of Sierra Leone and the United Nations, rather than being unilaterally established by the Security Council. According to current timelines, we expect the transition to take place around May 2012, coinciding with an appeals judgment. The Residual Special Court, including its archives, will be located in The Hague with a very small staff, and an even smaller staff will be located in Freetown.

The Prosecution's priority with respect to the Residual Special Court will be to participate in the effective and efficient delivery of the Court's residual obligations. These include the ongoing protection and support of witnesses and confidential sources that have assisted the Court, the enforcement of sentences, and the maintenance and management of OTP records and archives. While this list is by no means exhaustive, it does indicate some of OTP's primary areas of concern as we transition to the Residual Court.

I think it is appropriate to talk about witnesses and our related concerns. Without the strength and courage of the witnesses who have come forward to testify truthfully before the courts, international criminal trials would not be possible. We owe a great debt of gratitude to those witnesses. The Prosecution considers it an absolute obligation to ensure that the Residual Special Court provides effective and timely protection and support to witnesses and confidential sources, not least because we continue to receive reports of witnesses being harassed, intimidated, or otherwise interfered with.

The Freetown Office of the Residual Special Court will respond to reports of such misconduct. It will also provide for the follow-up needs of witnesses and others who are at risk on account of the testimony given by such witnesses, regardless of whether those witnesses testified for the Prosecution or the Defence.

The need for a continuing, viable, and proactive witness protection and support mechanism is clearly demonstrated by the ongoing contempt proceedings currently before the Court. Following Prosecution concerns and reports of witness tampering and possible acts of contempt against Prosecution witnesses, the Trial Chamber granted the Prosecution's Motion for Investigation in February 2011. Five individuals were subsequently charged with contempt, on the grounds that they attempted to bribe, and otherwise interfere with, witnesses in an attempt to influence them to recant their testimony before the Special Court. The charges also included violation of protective measures. It should be noted that two of the five charged with contempt are

Armed Forces Revolutionary Council convicts currently serving their sentences in Rwanda.

On July 15, 2011, at their initial appearance, one of the accused pled guilty to the charges of contempt, while the remaining four accused pled not guilty. Trials for the remaining four accused will take place in the coming months.

As I said, the Prosecution is also engaged in the preparation of its records for transition to the Residual Special Court's archives. In the last year, our archival work has focused on review and cataloging records and their transfer from Freetown to The Hague. I can report that the transfer took place last December. And, of course, we are working on the creation of access protocols. These protocols will ensure that a robust and appropriate information security system is in place for all OTP archives. The protocols will focus on the retention of information ownership by the OTP, grades of security classification that will be applied by the OTP prior to the transfer of any records to the archives, and explicit procedures for gaining permission from the OTP when responding to access requests. The archives of the Special Court need to be physically and climatically secure in an environment that safeguards their long-term physical condition and confidentiality. Consequently, the archives will be housed at The Hague for the foreseeable future. There is a provision in the protocols for the relocation of the archives to Sierra Leone if conditions there improve. Of course, copies of the Court's public records will be maintained in Sierra Leone and accessible to the public.

It is currently intended that the Residual Court will be funded through voluntary contributions. This, of course, raises many of the same concerns regarding the availability of sustained and adequate funding that have haunted the Special Court through its existence. We certainly hope a solution will be found to ensure that the Residual Court's ability to fulfill its ongoing mandate will not be compromised.

Just a few additional things before I finish up. Those of you who were here last year may recall I mentioned that we expected the departure of our Deputy Prosecutor, Mr. Joseph Kamara, from the Special Court. He did leave in September 2010 to take up the position of Sierra Leone Anticorruption Commissioner. Mr. Kamara is one example of the many talented Sierra Leonean staff from whose skills and knowledge the Special Court has been able to benefit. The Special Court, in turn, has provided an environment in which the Sierra Leoneans could further develop their skills and experience before returning to duties within the national system. Since Joseph Kamara has left the Special Court, I think he has made quite an impact through his work on the Anticorruption Commission within Sierra Leone.

The OTP has continued to be actively engaged in the Special Court's outreach and legacy programs in order to broaden the impact of its work on the people of Sierra Leone and the international community. The major legacy of the Court and other *ad hoc* tribunals is, of course, the determination of responsibility for the horrific crimes committed against civilians in the

affected countries and the development of related jurisprudence.

In addition and in particular, we are pleased to report two legacy projects in which the OTP has been a key player. First, we have helped to establish the Sierra Leone Legal Information Institute, Sierra LII, which will provide free online access to the primary legal materials of Sierra Leone. We hope this platform will eventually be used to make electronic copies of the Special Court's documents available to the public, including all of our decisions and public materials. We also hope that other related organizations within Sierra Leone will take advantage of Sierra LII to make their records and decisions public, such as the Truth and Reconciliation Commission, the Sierra Leone Anticorruption Commission, and the Human Rights Commission.

Secondly, I would like to briefly mention that, along with the other international court prosecutors, we are delivering the International Prosecutors' Best Practices Project, which seeks to harvest the experience and knowledge of those who have served and continue to serve in the various participating OTPs for the benefit of future national and international prosecuting authorities.

Lastly, I will just mention one Special Court project that we are excited about—the development of the Sierra Leone Peace Museum, which will be located on the grounds of the Special Court in Freetown and has been supported by a sizeable grant from the U.N. Peacebuilding Fund. The Peace Museum is intended to document the Sierra Leone conflict and the subsequent

progress toward peace and justice. The Peace Museum will also serve as one of the locations within Sierra Leone where all of the Court's public records will be accessible. Work is ongoing to establish the infrastructure and contents of the Sierra Leone Peace Museum.

Thank you.

MARK DRUMBL: Thank you. It is so much easier to moderate a panel of prosecutors than professors, because everyone speaks within or under their allotted time. I feel completely superfluous here. Thank you very much for the perspective from Sierra Leone. We now turn to Andrew Cayley, who will deliver remarks with a view from the Extraordinary Chambers in the Courts of Cambodia.

ANDREW T. CAYLEY QC: Thank you very much, indeed.

If my professional colleagues would forgive me for a moment, because I see there are a number of high-school students in the auditorium. The Court of which I am the International Co-Prosecutor addresses events that took place in Southeast Asia, specifically Cambodia, between 1975 and 1979. At that time, there was a very extreme Maoist/Leninist government in place in that country, which sought to bring about drastic social, agricultural, and economic reform of its nation and people. In the process of implementing what were insane government policies, they killed 1.8 million of their own

people by starving or working to death about a million people and murdering about 800,000.

I live in the country. I live in Phnom Penh where the Court is located. There isn't anybody in that country that is unaffected by what happened during those years. Everybody that you speak to lost relatives. Even people who had not yet been born during that period will tell you that one or both sides of their family has many missing members. So I just want to emphasize the trauma that the Cambodian society has been going through for 30 years and, thus, the importance of these trials.

When I was told these facts, before I went to Cambodia—and, having worked in this field of law for a number of years, I was not skeptical—but I needed to see it for myself. And now having lived in the country and travelled within it, I can say it genuinely is a society with much pain and grief and a lot of psychiatric and psychological conditions amongst the people as a result of these terrible times.

The Court for which I am the International Co-Prosecutor was first discussed in 1997 when the Cambodian government went to the United Nations and asked for assistance in establishing a court. The actual establishment of the Court was a very long and painful process, and indeed, we have Ambassador Scheffer here who was one of the principal individuals involved in negotiating the agreement that established the Court. By June 2003, an agreement had been reached between the United Nations and the Cambodian government for the

establishment of a court structure. The agreed-upon structure is unique amongst all of these international and internationalized courts. This particular Court is described as an “internationalized court.” Why? Well, because it is a domestic Cambodian court. Like a federal court, or a crown court in my country, it is situated within the Cambodian legal system. It is not an international court like the Rwanda Tribunal or the ICC.

Also, uniquely, it is based on the French civil law system, not the common law system that we have in the United States or the United Kingdom. One of the principal differences between those two systems is that within the civil law system, the investigation is not carried out by the police or under the supervision of the Prosecutor. It is carried out by investigating judges. It is a judicially-supervised investigation. Cambodia was a French colony. It was part of French Indochina and won independence from France in 1953. But when the Court was established, as I have said, it was based in the Cambodian legal system, which had maintained the French civil law tradition.

In essence, we have a Cambodian court with a U.N. mission bolted onto its side. So the Court is staffed by both Cambodians and by U.N. international staff. The Agreement between the United Nations and the Cambodian government required that each particular role within the Court be filled by both a Cambodian and an international. So I have a Cambodian counterpart, a Co-Prosecutor. All of the international judges have Cambodian counterparts, and in fact, in all of the Chambers, Cambodian judges are in the majority. So we

have quite a complex structure in which to address these kinds of crimes but nevertheless one which the Cambodians wanted and one to which the United Nations agreed.

One of the particular problems that we face is that we, unlike the other international courts, are dealing with crimes that are 30 years old. So we have to deal with all of the problems that come from that, especially witnesses whose recollection is not as good after 30 years as it was in the week or in the months after these events happened. We are fortunate that we have quite a rich document collection. The Khmer Rouge regime was very thorough in keeping records, but a number of those documents have been destroyed over the years. We do not have all of them, but we certainly have a significant number of documents.

Also, many of the victims who have provided evidence, or who could have done so, have died. I was actually sent an SMS text last night that a principal victim witness just had a massive heart attack and is in a hospital in Phnom Penh. These are issues which challenge all of these courts, but for this Court, securing witness testimony is a particularly challenging issue.

There are only four cases before the Court. The first case concerns an individual known as Comrade Duch, who was the effective commander of a camp known as S-21, or Tuol Sleng, in Phnom Penh, which was the principal security camp of the Khmer Rouge. There were hundreds of these camps across the country during the time of the Khmer Rouge regime, but this was the main

security center of the regime based in Phnom Penh. The regime used it to torture and murder individuals who they believed were traitors. And because it was, frankly, a completely insane regime, they brought people in, tortured them, and made them give confessions implicating other individuals which were often false. Then the regime would go and arrest those individuals too. When I was watching the movie, *The Response*, yesterday, the chilling part for me was the reference to people being tortured and forced to make confessions. That is exactly what the Khmer Rouge did, and in the process, they ended up murdering 800,000 of their own people.

If you go to Tuol Sleng, you will see that entire families were rounded up and taken to this camp and murdered. Often, if one individual within the family was implicated, then the rest of the family was taken to the camp as well. Because the Khmer Rouge was very thorough in recording the entry of people into the camp, there is a photographic headshot of every person who entered the camp. All of these can be seen when you go into the camp now. It is a museum which is extremely chilling and distressing. You see the photographs of many, many young people, entire families with babies, and parents who, by the looks on their faces, knew exactly what the fate of their entire family would be in this place.

Duch was the commander of that camp. He was tried in 2009, convicted in July 2010 of crimes against humanity and grave breaches of the Geneva Conventions, and sentenced to 35 years of

imprisonment, which was reduced to 30 years because he was illegally imprisoned for a period of time prior to his trial.

After the trial judgment, we decided that we would appeal that sentence, as well as a number of the technical legal findings in that case. We have asked for the imposition of a life term, reduced to a fixed period of 40 years, to make allowance for the period of illegal detention. I think it is important symbolically for the victims and the country that he gets a life term. This was a man living a happy family life outside the camp, and then went into the camp and ordered the murder and torture of innocent people.

The second case in the ECCC concerns the four most senior living members of the regime: Deputy Secretary Nuon Chea—he was the deputy to Pol Pot, the leader of the Khmer Rouge regime; Khieu Samphan, the former President of the regime; Ieng Sary, the Foreign Minister, and Ieng Sary's wife, Ieng Thirith, the Minister of Social Affairs. Now, these are the four most senior living members of the regime. They have been charged with crimes against humanity, genocide, and also crimes under the national criminal code. The ECCC is a domestic court that is internationalized, so the Court has jurisdiction over both of these very serious international crimes and over national crimes as well.

The closing order, which is essentially the indictment or the charge sheet, was issued in September of last year. Interestingly—and certainly unlike in the legal system that I come from—that closing order can be

appealed. Unlike a simple charge sheet in a common law system, the closing order is a voluminous document because it sets out all the work of the investigating judges. It sets out a narrative of all of the events. That was appealed by the four accused on a variety of different grounds, challenging the investigation that had been carried out by the investigating judges. That appeal was denied in January of this year, and the case was sent to trial.

We had the initial hearing at the end of June, which dealt with jurisdictional issues, such as Defence challenges to the jurisdiction of the Court on a whole variety of grounds that I do not have time to deal with here. But, for example, one particular ground argued is that a court was set up by the Vietnamese after they invaded Cambodia in 1979 and brought down the Khmer Rouge regime. They set up a revolutionary tribunal and tried one of the individuals that is standing trial now, Ieng Sary, *in absentia*. Ieng Sary was trying to argue that we could not try him again, under the double jeopardy rule, because he had already been tried and convicted. Actually he was tried *in absentia*, never served any kind of sentence, and frankly, it was a kangaroo court. In that trial, Defence counsel was giving evidence against their own clients. Our argument was that the trial was a false trial, and that the Defence cannot put forward a completely false trial to justify why their client should not stand trial now. So that was one issue. There were a number of other jurisdictional issues.

We hope that this second trial will begin toward the end of this year. The accused are elderly. The eldest is

85, and the stress of these trials at that age is of serious concern to us. In fact, today, in Phnom Penh, there was a hearing regarding Ieng Thirith. I was surprised it was made public, but it was, so I can tell you about it. She is suffering from a degenerative disease and is consequently not likely to be deemed fit to stand trial. That determination, however, is subject to two further psychiatric reports by a geriatric psychiatrist from the United Kingdom and a psychiatrist from Singapore.

The last two cases, *Cases 003* and *004*, are quite complex for me to talk about in a public forum. Nevertheless, I will say to you that I have learned to cherish my own legal system and appreciate it in a way that I never did before. You do not appreciate the things you learn in law school—the theory of law, the independence of judges and prosecutors—until you work in a place where perhaps these things do not exist in the same way. Certainly, I would say to you, treasure it. In the United Kingdom and the United States we all enjoy due process and that element of fairness, whereby the great and small alike can be brought before the criminal justice system. Without that fairness, you really do despair.

Somebody sent me a quote by an American author, Liza Wilcox, which really says it all. I hope it will mean something to you because, as I said, I cannot say too much about these cases. But here is her quote: “To sin by silence, when we should protest, makes cowards out of men.” I have now got that on the pinboard in my office.

As for the Court's challenges, we are concerned about money. The Court is voluntarily funded. We rely on donors, such as the United States, which is a very generous donor. Japan is as well. But the donors are getting tired because the Court has gone over the number of years that were estimated at the outset. That is going to be a problem. I suspect the Court will need at least another three years to complete its work. The trial in the second case will take two years and the appeal one year. With the advanced age of the accused being another concern, we need to move very quickly.

One of the Court's unique aspects is the participation of victims in the legal process. Victims are called "Civil Parties," and they can participate. They have lawyers. They can give evidence as civil parties, not just as witnesses for the Prosecution. They have an interest in this trial. We are going to need to cut the number of crimes that we address simply to get through the trial, and this is going to create tensions with the Civil Parties, because they want their crimes—those crimes which changed their lives—put before the Court. So that is certainly a challenge.

In terms of lessons to be learned, I think there are a lot of lessons that the international community needs to learn from the ECCC. I think the international community needs to examine the establishment of this type of court based on national jurisdiction with international participation. It needs to determine whether the independence and integrity of the staff who work in those courts can be absolutely guaranteed, and if that cannot be done, then the international community needs

to consider very carefully whether this type of court should ever be set up again.

Accomplishments: I genuinely believe that when the Court completes its work, we will have brought a degree of restorative justice to the country. The people are very enthusiastic about the Court because it is based in their country. They want justice. Wherever I go—and I make an effort to travel around the country and speak to people—people want these crimes to be addressed.

I think we have also been reasonably successful in capacity-building. We are working alongside Cambodian colleagues. I am constantly talking about issues of integrity, professionalism, independence, and doing your job properly, and I think that message is getting through to a degree. There are one or two very, very bright spots in all of this—although you can gather from what I have said that there are many, many difficulties—but I think we have accomplished something there. I think that when some of the Cambodian staff return to the Cambodian legal system, they will bring many lessons with them. I am not saying this in a patronizing way. I do this by working with them as colleagues, and I think that is the most effective way of doing it, but I do believe that we will leave something worthwhile behind us.

Lastly, I want to mention another organization in Phnom Penh called the Documentation Center of Cambodia, DC-Cam, which was set up by Yale Law School in the early 1990s, and is run by an absolutely inspiring American-Cambodian named Youk Chang. Youk Chang has spent the last seven or eight years

traveling around Cambodia teaching high-school students, secondary-level teachers, and government employees about the Khmer Rouge and what happened during its regime. He was a victim of the regime himself. He lost members of his family but he managed to get to the United States. He does not want these events happening again in his country, and he makes an effort to go around the country ensuring that people know the truth. So there are many, many positive things going on in Cambodia in addition to the many challenges. Youk Chang is certainly one of the very positive elements that I deal with. I have got to finish here, so thank you very much, indeed.

MARK DRUMBL: Thank you very much, Andrew. We now turn to the Special Tribunal for Lebanon and to Daryl Mundis.

DARYL MUNDIS: Thanks, Mark. Good afternoon, everyone. As was the case with my colleague, Jim Johnson, I need to apologize for the absence of my Chief Prosecutor, Daniel Bellemare, who is unable to be here today. It is also to my great benefit. It has been a true privilege and honor to attend this event in Chautauqua. I would also like to thank Greg Peterson and the Jackson Center, as well as Professor David Crane, for starting these Dialogs five years ago, which has really turned into a particularly important event.

This is the first time that the Special Tribunal for Lebanon has been invited to participate in the International Humanitarian Law Dialogs, and we are very grateful for the opportunity to be here.

Unlike the other international courts and tribunals that you have heard from this morning, we do not deal with crimes against humanity, war crimes, or genocide. We deal specifically with terrorist offenses that occurred in Lebanon. The Special Tribunal for Lebanon was established by the U.N. Security Council in 2007, and we commenced operations on March 1, 2009. We have been described as the first international anti-terrorist court or tribunal.

The Special Tribunal for Lebanon is, in many ways, the successor to the United Nations International Independent Investigation Commission (UNIIC). The UNIIC was created by the Security Council in 2005 to investigate the assassination of former Lebanese Prime Minister Rafic Hariri, who was killed in a massive car bomb explosion on February 14, 2005. That attack also killed 21 other individuals and injured more than 230 people. It has been noted to be one of the largest peacetime explosions ever recorded seismographically. So we are talking about an extremely large car bombing; a Vehicle Borne Improvised Explosive Device.

On June 28 of this year, the Pre-Trial Judge in our case confirmed the indictment we had originally submitted on January 17, 2011. Amended versions of that indictment were subsequently filed on March 11, May 6, and on June 10, 2011, which ultimately led to the Pre-Trial Judge's ruling that we had established a *prima facie* case.

At the same time, the Pre-Trial Judge granted the Prosecution's motion for arrest warrants directed

specifically at the Lebanese authorities, as well as international arrest warrants which were transmitted via Interpol and which resulted in so-called “red notices” being issued against our four accused.

We have a nine-count indictment. Four individuals are named in that indictment: Mustafa Amine Badreddine, Salim Jamil Ayyash, Hussein Hassan Oneissi, and Assad Hassan Sabra. These four individuals were named along with other unidentified individuals who allegedly participated in, and committed as accomplices, the assassination of Rafic Hariri and the murder of the others. The indictment charges each of the four individuals, as co-perpetrators, with conspiracy aimed at committing a terrorist act. That is Count 1 of our indictment.

One of the other things that makes this type of panel so interesting is that, as I'm sure many of you know, there are a number of similarities among the various international courts and tribunals, but there are also a number of important differences that make each of these courts unique. I think the ICTY and the ICTR are about as close to siblings as you will find among the different international courts and tribunals.

One of the things that makes the Special Tribunal for Lebanon unique is that we do not apply international law. We apply Lebanese substantive law. So we have to look to the Lebanese Criminal Code for our subject-matter jurisdiction, as stated in Article 2 of the Statute.

Similarly, our Statute is drafted in such a way that we can borrow from both the international system and the Lebanese system with respect to modes of liability, depending on how we need to formulate the charges in our indictments to reflect the best categorization of the criminal activity. I think it is important that I stop and mention that at this point because, as I said, all four of our named individuals are charged with conspiracy. They are not charged as part of a joint criminal enterprise, which a number of the lawyers and academics in the room will appreciate.

Let me talk very briefly about the other counts in our indictment. Badreddine and Ayyash also face charges of committing a terrorist act by means of an explosive device, intentional homicide with premeditation by using explosive materials, both for the death of Rafic Hariri and for the 21 other victims, and attempted intentional homicide with premeditation by using explosive materials. These charges constitute Counts 2 to 5.

The indictment alleges that Badreddine served as the overall commander or controller of the operation, while Ayyash coordinated the preparation and physical perpetration of the Vehicle Born Improvised Explosive Device attack with the other members of the assassination team. So, in effect, Badreddine was the controller, if you will—the overall person responsible—and Salim Jamil Ayyash acted as the actual assassination team leader.

The other two individuals, Oneissi and Sabra, are charged in Counts 6 through 9 in our indictment with being accomplices to the commission of these offenses. With respect to these two individuals, the indictment focuses on their role in preparing a false claim of responsibility, which is an important component of our case.

Shortly after the explosion that killed Rafic Hariri, calls were made to the media to pick up a videotape. On this videotape was an individual by the name of Abu Ahmed Adass, claiming responsibility for the attack in the name of a terrorist organization that had never been heard of before and has never been heard from since. He claimed the attack on behalf of a number of Sunni causes, including the Palestinians and al-Qaeda in Iraq. As the investigation unfolded, the OTP came to the conclusion that this was a completely false claim of responsibility for the attack. That is significant because the four individuals that we have indicted are all either members, affiliates or otherwise associated with Hezbollah, a Shia group in Lebanon, which, as I think many of you are probably aware, has been designated by the U.S. government as a leading terrorist organization.

So they set up a false claim of responsibility to shift blame toward Sunni groups, whereas we allege that the crimes were perpetrated by the Shia group, Hezbollah.

The investigation conducted following the attack—initially by UNIIC, the independent commission, and subsequently by the OTP once the Tribunal came into existence on March 1, 2009—reaped a large amount of

evidentiary material, including witness statements, documentary evidence, and electronic evidence, including closed circuit television material and, most significantly, call data records.

As some of you may have read in the media, a large part of our case is based on communications data, which makes this case different in virtually every way, shape, and form from any of the other cases that have been before any of the other international courts and tribunals. We had a system that enabled us to go through billions—and I mean billions—of telephone records, to narrow things down, and identify closed networks of telephones that were used to perpetrate the attack. We then used other processes, which are explained in a detailed communications report that we submitted to the Pre-Trial Judge along with the indictment, through which we were able to identify the actual perpetrators of this attack. So it took an enormous amount of call data records and communications analysis to lead us to the identification of these four perpetrators.

Following the issuance of the arrest warrants, the Prosecutor General of Lebanon, in accordance with our Rules, reported on August 9, 2011 that the Lebanese authorities had been unable to locate the four accused. Consequently, just two weeks ago, the President of the Special Tribunal for Lebanon invoked what we call, “the public advertisement provision,” where the indictment is made public, with the exception of certain information that we feel is necessary to be kept from the public at that point in time.

Together, these two rules lay the groundwork for what is probably the most significant legal difference between the STL and the other tribunals. Our Statute and Rules of Procedure allow us to conduct trials *in absentia*, which has not been the case in any of the other modern international courts and tribunals. But prior to doing so, we must complete two steps. We must provide the Lebanese authorities with a period of at least 30 days in which to fulfill their responsibility to make arrests. Following the end of that 30-day period, we have an additional 30-day period of public advertisement, during which the Lebanese authorities can continue searching for the accused and attempt to effect arrests. We are now in the second of these two 30-day periods, at the end of which—toward the end of September—there will likely be a hearing on whether or not we should move to a trial *in absentia*. If that is so ordered, then the four accused will be assigned Defence teams. We will then move into the pre-trial disclosure phase and preliminary motions will be filed. That is really where we are with respect to the *Hariri* case.

The jurisdiction of the Special Tribunal extends to three distinct categories of cases, one of which is the *Hariri* case. The second category involves the other attacks that occurred in Lebanon between October 1, 2004 and December 12, 2005. A pre-trial judge must determine whether those attacks are connected and similar in nature and gravity to the attack against former Prime Minister Hariri to extend the Tribunal's jurisdiction. Category Three comprises other attacks that occurred in Lebanon after December 12, 2005, if they are found to be connected to the Hariri attack, but these

cases are also subject to a further agreement between Lebanon and the United Nations, with the approval of the Security Council.

OTP has recently made submissions on three Category Two cases: the case involving Marwan Hamade, the case involving George Hawi, and the case involving Elias El Murr, all three of whom were fairly prominent Lebanese politicians. Mr. Hawi was killed in the attack against him. Mr. El Murr and Mr. Hamade both survived the attacks, although other people were killed in the attacks targeting the three of them, including bodyguards, people in their vehicles, and bystanders.

Just earlier this month, we had a ruling from the pre-trial judge ordering the Lebanese authorities to defer those three cases to the jurisdiction of the Tribunal. We have made a demonstration to the pre-trial judge, which I cannot talk about in any detail, but the pre-trial judge has made a finding that those cases are connected and are similar in nature and gravity to the Hariri attack. So we are currently focusing some of our attention toward trying to develop those cases, submit indictments, and hopefully get them joined with the *Hariri* case. We would like to pursue a single trial that involves as many of these cases as we possibly can, both because they are connected and because it would maximize judicial resources.

I would like to very quickly answer some of the questions Mark Drumbl posed earlier. I think our biggest challenge is indicting people who are part of Hezbollah. I think that is probably challenging enough. We also

grapple, as do all of these courts and tribunals, with the issue of arrest. The likelihood of any of these individuals being arrested is very, very small. The likelihood of any of them voluntarily surrendering themselves to the Tribunal is even smaller. So those are some of our biggest challenges.

In terms of the biggest achievements and accomplishments—we are obviously still in the very early stages of our Court. We are just still learning how to walk here, compared to the ICTY, ICTR, and the ICC. But I think that getting an indictment through the confirmation process was a relatively significant achievement. When I left the ICTY, more than one of my colleagues thought I was absolutely insane to be jumping to the Special Tribunal for Lebanon. But I think the fact that we have been able to get both that initial indictment and to get at least three of the related cases connected and deferred is significant.

With respect to the students that are out there, I echo a number of the comments made by some of my colleagues. I particularly like the comment that James Arguin made at the beginning. One of the most important things that I am looking for when I hire—and I have sat on a number of hiring panels, both at the ICTY and at the STL—is criminal litigation experience. We do have a small number of lawyers who do mainly legal research, drafting memos, but we are essentially a criminal prosecution office. That is what we do.

You would be surprised. When I advertise a post requiring five years of experience, I get applications

from people with ten or 12 or 15 years of experience. So when I have a P2 entry-level post with maybe two to three years of experience, I am getting people with seven or eight years of criminal litigation experience. This is not necessarily the message students like to hear. But go out. Go to work at the U.S. Attorney's office, the District Attorney's office, the Public Defender's office. I don't really care whether you defend or prosecute. I want to see that you understand how a criminal courtroom works. If you are one of many law students who are saddled with a huge amount of debt, go to a firm, but go to the complex litigation department. If it is civil litigation, I want to see that you know how to handle a case that is going to take three and a half years if it ever goes to trial and has 52,000 documents in it, because that is a lot more like the cases we deal with than any other kinds of cases on the civil law docket.

So get that experience, get in a courtroom, keep coming to meetings like this. Those are the best ways, I think, to get hired here by one of the tribunals.

MARK DRUMBL: Great. Thank you very much.

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SERGE BRAMMERTZ, ICTY

During the reporting period, significant advances were made in establishing accountability for the crimes

committed during the wars in the former Yugoslavia. Foremost among these were the arrests of Ratko Mladić on May 26, 2011, and Goran Hadzić on July 20, 2011. Ratko Mladić had evaded capture and transfer to The Hague for 16 years. Goran Hadzić was a fugitive of justice for seven years. Both were the last fugitives remaining at-large out of the 161 persons indicted by the Tribunal. The Prosecution expressed its commitment to moving ahead expeditiously with the trials.

During the reporting period, the Prosecution finalized a large component of its trial work. By the end of the period, the presentation of the Prosecution's case-in-chief had been completed in all but four cases. Three cases were in the defense phase of the proceedings and two cases had concluded and were awaiting judgment. This progress was achieved notwithstanding problematic rates of staff attrition in the Office of the Prosecutor, which has left remaining staff to shoulder unsustainably heavy burdens. The Prosecutor expressed concern that staffing difficulties would likely escalate in the next reporting period given the absence of incentives for staff to remain.

The OTP began shifting the focus of its attention and resources to the appeals phase of proceedings to ensure that it is effectively positioned to deal with the upcoming appellate caseload. By the end of the reporting period, there were five cases on appeal. The Appeals Division also absorbed work arising out of the *Haradinaj et al.* retrial and the *Rašić* contempt trial.

The multiple contempt proceedings on-going before the Tribunal, particularly those concerning the *Šešelj* case, continued to generate a significant amount of additional work for the OTP. Šešelj's lack of compliance with court orders required continuous monitoring to ensure the protection of witnesses, constituted a drain on the Tribunal's resources, and presented a challenge for the Tribunal's effective functioning.

The OTP worked at full capacity to finalize the remaining trials and appeals. The Prosecution continuously reevaluated its working methods to identify ways of further expediting the proceedings. A consistent methodology was applied across all cases for streamlining the presentation of evidence in court. This methodology focused on narrowing the issues in dispute with Defence teams as much as possible and presenting evidence in written form. Efficient use was made of key evidence located in the war-time notebooks and associated tapes of Ratko Mladić, which were located by the Serb authorities in February 2010. The OTP established a task force to uniformly and expeditiously handle all issues related to the *Mladić* materials.

With the completion of trial activities, the OTP abolished corresponding posts and proceeded with downsizing the office. At the same time, preparations began for the transition of functions to the International Residual Mechanism for Criminal Tribunals in accordance with Security Council Resolution 1966 of December 2010.

The OTP continued to depend on the full cooperation of states to fulfill its mandate. The cooperation of the states of the former Yugoslavia remained especially vital in the areas of (a) access to archives, documents, and witnesses; (b) the protection of witnesses; and (c) efforts to locate, arrest, and transfer the remaining fugitives as well as taking measures against those who have supported ICTY fugitives.

With the arrest of Ratko Mladić on May 26, 2011, and his transfer to the Tribunal on May 31, 2011, and the arrest of Goran Hadžić on July 20, 2011, and his transfer on July 22, 2011, Serbia met a key obligation towards the Tribunal. The OTP acknowledged the important work done by the Serbian authorities who brought about the arrests, particularly the National Security Council, the Action Team established to track the fugitives, and the operatives from the security services. With these arrests, the Prosecutor recognized Serbia's genuine commitment to cooperating with the Tribunal. He also encouraged Serbia to provide information on how the fugitives were able to evade justice for so long and help the public understand why they must stand trial.

Prior to Mladić's arrest, the Prosecutor had strongly encouraged Serbia to critically reassess its failing strategy for apprehending the fugitives. He urged Serbia to address all operational shortcomings and to widen the scope of the investigation. Certain recommendations were implemented, which contributed to the arrests of Mladić and Hadžić.

The Serbian Government was further asked to intensify action against individuals in the networks that have supported ICTY fugitives, including Mladić and Hadžić. The Prosecutor welcomed Serbia's statement that it will investigate and prosecute the networks that supported Ratko Mladić during his time in hiding. On May 10, 2011, the War Crimes Department of Belgrade's High Court accepted guilty pleas from six people who helped Stojan Župljanin while he was a fugitive from the Tribunal. Aside from this, action taken against individuals accused of helping the fugitives yielded few results.

Concerning the Tribunal's ongoing cases, Serbia's responses to the OTP's requests for access to documents, archives, and witnesses were generally timely and adequate. Serbia's National Council for Cooperation (NCC) continued to improve cooperation among different government bodies handling requests from the OTP. The NCC facilitated Prosecution requests to reclassify Supreme Defence Council documents in the *Perišić* case as public documents. As a result, in March 2011, the Prosecutor informed the *Perišić* Trial Chamber that the Supreme Defence Council documents could be made public. The OTP will continue to seek the assistance of Serbia in providing access to government documents and archives and facilitating the access of witnesses during trials and appeals.

During the reporting period, Croatia was generally responsive to requests made by the OTP. However, the OTP's long-standing request for important military documents relating to Operation Storm—requested for

the *Gotovina et al.* case—remained outstanding. The inter-agency task force established in October 2009 to locate or account for the missing documents continued its administrative investigation. During the reporting period, the Prosecutor asked Croatia to address a number of inconsistencies and questions in connection with the Task Force’s findings, which remained unresolved.

On April 15, 2011, the Trial Chamber rendered its judgment in *Gotovina et al.* and found Gotovina and Markač guilty of crimes based on the evidence submitted at trial. The Prosecutor expressed disappointment that, in the aftermath of the judgment, the highest state officials failed to comment objectively on the outcome of the case.

During this reporting period, the authorities of Bosnia and Herzegovina responded promptly and adequately to requests for documents as well as access to archives and witnesses.

The authorities of Bosnia and Herzegovina were asked to step-up efforts against fugitive networks.

Throughout the reporting period, the OTP continued to support the work of the State Prosecutor and the Special Department for War Crimes in processing cases and investigative files transferred by the Tribunal. However, structural difficulties impeded the implementation of the National War Crimes Strategy. Political initiatives in Bosnia and Herzegovina that sought to undermine the work of the State Prosecutor’s

Office and the State War Crimes Court were of deep concern.

Cooperation in judicial matters between the states of the former Yugoslavia remained critical to completing the Tribunal's mandate. Judicial institutions in the former Yugoslavia continued to face challenges in coordinating their activities, which in turn imperiled the rule of law and reconciliation in the region. There were some improvements in war crimes information and evidence-sharing between prosecutors in Bosnia and Herzegovina, Croatia, and Serbia. However, legal barriers to the extradition of suspects and the transfer of evidence across State borders, as well as parallel investigations, continued to obstruct effective proceedings. While regional prosecutors expressed a commitment to addressing the problem of parallel investigations, the Prosecutor called for urgent action at the political and operational level as well.

The OTP continued to rely on states and international organizations to provide documents, information, and witnesses for trials and appeals.

The OTP expressed appreciation for the support of states as well as international and regional organizations, such as the Organization for Security and Cooperation in Europe, the Council of Europe, and the European Union. The arrest of Ratko Mladić underscored the potential of conditionality policies to promote positive outcomes for international justice. The support of nongovernmental organizations, including those active in the former Yugoslavia, continued to facilitate the work of the OTP.

All cases transferred from the Tribunal to Bosnia and Herzegovina and Croatia pursuant to Rule 11*bis* have been finalized. The judgment in the last of these cases—against Milorad Trbić, who was convicted of genocide and sentenced to 30 years of imprisonment—was confirmed on appeal on January 14, 2011.

The Kovačević case, which was transferred from the Tribunal to Serbia, remained suspended due to the ill health of the accused. There was no indication of when, or if, the accused will be fit to stand trial. The OTP continued to monitor the situation.

The fact that convicted war criminal Radovan Stanković (transferred from the Tribunal to Bosnia and Herzegovina pursuant to Rule 11*bis*) remains at-large almost four years after he escaped from prison in Foča was identified as a serious concern. The Prosecutor encouraged the authorities of Bosnia and Herzegovina, as well as neighboring States, particularly Serbia, to take all necessary steps to capture Stanković and to sanction those who facilitated his escape.

The OTP continued to actively work on strengthening the capacity of national authorities to effectively handle the remaining war crimes cases. To this end, the Office engaged in ongoing dialogue with its counterparts throughout the former Yugoslavia. It also supported training, the development of best practices, and information exchanges.

During the reporting period, the OTP continued to support national prosecutions by facilitating access to investigative material and evidence from Tribunal case files as well as its database in The Hague. In addition, the European Union-funded “liaison prosecutors” project was a key mechanism for strengthening working relationships between the State Prosecutor’s Offices in Bosnia and Herzegovina and Croatia and the War Crimes Prosecutor’s Office in Serbia.

Forging a Convention for Crimes Against Humanity

Leila Nadya Sadat*

The following essay expands upon Professor Sadat's remarks on a panel about the Crimes Against Humanity Initiative, held on August 29, 2011, at the Fifth International Humanitarian Law Dialogs in Chautauqua, New York. It is based on her Preface and Acknowledgments, in Forging a Convention for Crimes Against Humanity (Leila Sadat, ed. Cambridge University Press, 2011).

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During the trials of the German and Japanese leaders by the Allies following World War II, crimes against humanity emerged as an independent basis of individual criminal liability in international law. Although the “Martens Clause” of the 1907 *Hague Convention Respecting the Laws and Customs of War on Land* referenced the “laws of humanity, and the dictates of the public conscience” as protection for human beings

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caught in the ravages of war, this language was too uncertain to provide a clear basis for either state responsibility or individual criminal responsibility.¹ Subsequently, crimes against humanity were specifically included in the Charters of the International Military Tribunal (IMT) at Nuremberg² and at Tokyo³ to address depredations directed against civilian populations by the state—including the state of the victims' nationality. Indeed, it was in many ways the most revolutionary of the charges upon which the accused were convicted, for its foundations in international law were so fragile.⁴

Following the trials, the Nuremberg principles embodied in the IMT Charter and judgment were adopted by the General Assembly in 1946,⁵ and codified

¹ See, e.g., Leila Sadat, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 296-300 (1994).

² Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

³ Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589.

⁴ The other was the crime of waging an aggressive war.

⁵ Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144. U.N. Doc. A/236 (Dec. 11, 1946).

by the International Law Commission in 1950.⁶ Thus, “crimes against humanity,” whatever their uncertain legal origin, found a place in international law as a category of offenses condemned by international law for which individuals could be tried and punished.

The codification of the crime of genocide, itself a crime against humanity, lent some truth to this assumption; however, the important achievement of the Genocide Convention’s adoption and entry into force in 1951⁷ was overshadowed by Cold War politics. Indeed, no trials for genocide took place until 1998, when Jean-Paul Akayesu, *bourgmestre* (mayor) of the town of Taba, was convicted by the International Criminal Tribunal for Rwanda (ICTR) for his role in the slaughter that had engulfed Rwanda in 1994.⁸

Crimes against humanity percolated in the legal systems of a handful of countries that had domesticated the crime, including France, Canada, and Israel, and certain elements of their prohibition could be found in new international instruments prohibiting torture and

⁶ Documents of the Second Session Including the Report of the Commission to the General Assembly, [1950] 2 Y.B. INT’L L. COMM’N 374, U.N. Doc. A/CN.4.SER.A/1950/Add.I.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (entered into force Jan. 12, 1951).

⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998).

apartheid.⁹ Scholarly articles periodically appeared as well. But the promise of “never again,” as many have observed before me, was repeatedly dishonored while the mass atrocities committed in the second half of the twentieth century unfolded before the eyes of the world, bloody in their carnage and the human toll they exacted, and shocking in their cruelty and barbarism.¹⁰ There was little accountability of any kind exacted from those responsible for these crimes against humanity—*ces crimes contre l’esprit*—whether committed by government officials or military leaders, rebels,

⁹ See International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S.243 (entered into force July 18, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Organization of American States, Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, O.A.S.T.S. No. 67 (entered into force Feb. 28, 1987); Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *opened for signature* Nov. 26, 1987, E.T.S. 126 (entered into force Feb. 1, 1989).

¹⁰ One recent study has suggested that between 1945 and 2008, between 92 and 101 million persons have been killed in 313 different conflicts, the majority of whom have been civilians. In addition to those killed directly in these events, others have died as a consequence, or had their lives shattered in other ways—through the loss of property, through victimization by sexual violence, through disappearances, slavery and slavery-related practices, deportations and forced displacements, and torture. M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 3, 6 (M. Cherif Bassiouni ed., 2010).

insurgents, or low-level perpetrators. The Nuremberg promise remained unfulfilled.¹¹

One of the most horrific examples of post-World War II crimes against humanity was the Cambodian “genocide” discussed by Gareth Evans in the lecture he gave on the occasion of the Experts’ Meeting of the Crimes Against Humanity Initiative in June 2009.¹² From 1975 to 1979, the Khmer Rouge regime killed an estimated 1.7-2.5 million Cambodians, out of a total population of 7 million.¹³ Although now popularly referred to as a “genocide,” that is a difficult legal case to make. Indeed, there has been a great deal of criticism and worry generated by the decision of the Co-Prosecutors of the Extraordinary Chambers in the Courts

¹¹ In 1989, the Cold War ended with the fall of the Berlin Wall and this began to change. The International Criminal Court project, which had lain fallow, was restarted with the introduction of a resolution into the General Assembly by Trinidad and Tobago, leading a coalition of 16 Caribbean nations, and work on the Draft Code of Crimes continued at the International Law Commission. *See Report of the International Law Commission to the General Assembly on the Work of its Forty-Eighth Session*, [1996] 2 Y.B. Int’l L. Comm’n 15-42, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2); *see also* LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002).

¹² Gareth Evans, *Crimes Against Humanity and the Responsibility to Protect*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 1* (Leila Nadya Sadat ed., 2011).

¹³ *See generally* CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* 118-120 (2005).

of Cambodia (ECCC) to bring charges of genocide against several former high-ranking leaders of the Khmer Rouge regime, for fear that the charges will not be legally possible to prove.¹⁴ For the most part, individuals were killed, tortured, starved, or worked to death by the Khmer Rouge not because of their appurtenance to a particular racial, ethnic, religious, or national group—the four categories to which the Genocide Convention applies—but because of their political or social classes, or the fact that they could be identified as intellectuals.¹⁵ While theories have been advanced suggesting ways that the Genocide Convention applied to these atrocities,¹⁶ and an argument can certainly be made that some groups were exterminated *qua* groups (such as Buddhist monks, whose numbers were

¹⁴ Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, Case No. 002/19-09-2007-ECCC-OCIJ (Office of the Co-Investigating Judges Dec. 28, 2009); see Peter Maguire, Op-Ed., *Cambodia's Troubled Tribunal*, N.Y. TIMES (July 28, 2010), <http://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html>; see also William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287 (2001).

¹⁵ See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 87-154 (2002).

¹⁶ Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989) (describing the mass atrocities in Cambodia as an “auto genocide”).

reportedly reduced from 60,000 to 1,000),¹⁷ most experts agree with Evans' chilling assessment that:

[F]or all its compelling general moral authority the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race and religion as those they were victimizing—and their motives were political, ideological and class-based . . . the necessary elements of specific intent required for its application were simply not there.¹⁸

Once again, the international community had failed both to prevent the commission of mass atrocities and to provide the legal tools necessary to react to their occurrence.¹⁹ As war broke out in the former

¹⁷ POWER, *supra* note 15, at 143.

¹⁸ Evans, *supra* note 12, at 3.

¹⁹ The international community eventually negotiated an agreement with the Cambodian government to establish a court known as the Extraordinary Chambers in the Courts of Cambodia for the trial of a handful of former Khmer Rouge leaders in 2003. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 117.

Yugoslavia, and the Rwandan genocide took place with the world watching in horror, the international community reached for the Nuremberg precedent only to find that it had failed to ensure its completion. This made the task of using law as an antidote to barbarism a difficult and complex endeavor. The uncertainty in the law was evidenced by the texts of the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR), which contained different—and arguably contradictory—definitions of crimes against humanity, a notion difficult to square with the idea of universal international crimes.²⁰ Cherif Bassiouni underscored this problem in an important, but little-noticed, article appearing in 1994 entitled, “‘Crimes Against Humanity’: The Need for a Specialized Convention,” in which he lamented the “existence of a significant gap in the international normative proscriptive scheme, one which is regrettably met by political decision makers with shocking complacency.”²¹

With the adoption of the International Criminal Court (ICC) Statute in 1998, crimes against humanity were finally defined and enshrined in an international convention. The ICC definition is similar to earlier versions, but differs in important respects, such as the

²⁰ The IMT Statutes for Tokyo and Control Council Law No. 10, *supra* notes 2-3, also differed slightly from the Nuremberg definition.

²¹ M. Cherif Bassiouni, “*Crimes Against Humanity*”: *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L. L. 457, 457 (1994).

requirement that crimes against humanity be committed “pursuant to or in furtherance of a State or organizational policy.”²² However, it was a convention that *by its own terms* did not purport to represent customary law, but only law defined for the purposes of the Statute itself.²³ (Whether it either initially or has *subsequently* come to represent customary international law was debated during the course of this Initiative).²⁴ Moreover, even if the ICC definition ultimately represents customary international law, it applies only to cases to be tried before the ICC. While presumably ICC States Parties can and will adopt the ICC definition as domestic law (and are encouraged to do so pursuant to the principle of complementarity), the ICC Statute provides no vehicle for inter-State cooperation. Putting it more simply, the adoption of the Rome Statute advanced the normative work of defining crimes against humanity considerably, but did not obviate the need to fill the lacunae in the legal framework as regards the commission of atrocity crimes, most of which are crimes against humanity and not genocide, and many of which are crimes against

²² Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

²³ See, e.g., *id.* art. 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means . . .”).

²⁴ See Guénaël Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142 (Leila Nadya Sadat ed., 2011); Kai Ambos, *Crimes Against Humanity and the International Criminal Court*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 279 (Leila Nadya Sadat ed., 2011).

humanity and not war crimes. As the *ad hoc* tribunals begin to close down, shoring up the capacity for national legal systems to pick up cases involving crimes against humanity appears imperative if the small gains achieved during the past two decades of international criminal justice are not to be reversed. This is particularly true as regards crimes against humanity, for recent experience demonstrates that crimes against humanity have been committed and charged in all situations currently under examination before the international criminal tribunals (and the ICC) to date.²⁵

The case of *Bosnia v. Serbia* before the International Court of Justice²⁶ again evidenced the difficulty engendered by this normative. For the debate in that case, which centered upon whether the mass atrocities in Bosnia committed during the 1990s constituted genocide, missed the point.

Although the Court recognized that many serious violations of the laws of armed conflict and crimes against humanity had been committed by Bosnian Serb troops, because the Court's jurisdiction was limited to

²⁵ See Leila Nadya Sadat, *Emerging From the Shadow of Nuremberg: Crimes Against Humanity in the Modern Age* (forthcoming 2012).

²⁶ See Richard J. Goldstone, *Foreword*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* xvi-xvii (Leila Nadya Sadat ed., 2011).

genocide,²⁷ these other crimes were not before them and they “slipped off the table.”²⁸ Of the nearly 200,000 deaths, 50,000 rapes estimated to have occurred, and the 2.2 million people forcibly displaced as a result of the Serb ethnic cleansing campaign,²⁹ genocide was held to have been proven only in the massacre of some 8,000 Muslim men and boys in Srebrenica in July 1995.³⁰ What was missing was a convention on crimes against humanity that would have given the International Court of Justice jurisdiction not only in respect of the crime of genocide but for crimes against humanity as well.³¹

²⁷ Genocide Convention, *supra* note 7, art IX.

²⁸ Goldstone, *supra* note 26.

²⁹ These numbers are estimates of the number of deaths, rapes, and people forcibly displaced as a result of the armed conflict in Bosnia. AMNESTY INTERNATIONAL, BOSNIA & HERZEGOVINA: ‘WHOSE JUSTICE?’: THE WOMEN OF BOSNIA AND HERZEGOVINA ARE STILL WAITING 5, nn. 9, 14, 15 (2009), <http://www.amnesty.org/en/library/asset/EUR63/006/2009/en/8af5ed43-5094-48c9-bfab-1277b5132faf/eur630062009eng.pdf>. Some critics claim that these numbers are overestimates and have been politicized. *See, e.g., id.*

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶¶ 296-297 (Feb. 26). In its June 2010 judgment, the ICTY found that there is enough DNA evidence to identify at least 5,336 individuals but evidence continues to be discovered so the numbers could be as high as 7,826. Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 664 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010).

³¹ Article 26 of the Proposed Convention does this. *See Proposed International Convention on the Prevention of Crimes Against*

Thus, in 2008, the Whitney R. Harris World Law Institute, under my direction, launched the Crimes Against Humanity Initiative. As the Commentary to the Proposed Convention explains,³² the Initiative had three primary objectives: (1) to study the current state of the law and sociological reality as regards the commission of crimes against humanity; (2) to combat the indifference generated by an assessment that a particular crime is “only” a crime against humanity (rather than a “genocide”); and (3) to address the gap in the current law by elaborating the first-ever comprehensive specialized convention on crimes against humanity.

The Initiative progressed in phases, each building upon the work of the last. The publication of *Forging a Convention for Crimes Against Humanity* by Cambridge University Press, including the expert papers commissioned by the project and the Proposed Convention in English and in French, represented the culmination of the first three phases of the Initiative: *preparation* of the project and methodological development (I); *private study* of the project through the commissioning of the papers in that volume, the

Humanity, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 359, app. I (Leila Nadya Sadat ed., 2011). Of course, the same can be said for the actions brought to the Court by Croatia and Serbia, as well. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment on Preliminary Objections, 2008 I.C.J. 118 (Nov. 18).

³² Leila Nadya Sadat, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 449, app. III (Leila Nadya Sadat ed., 2011).

convening of expert meetings, and collaborative discussion of draft treaty language (II); and *public discussion* of the project with relevant constituencies and the *publication* of the Proposed Convention (III). Ambitious in scope and conceptual design, the project is directed by a Steering Committee of renowned experts, and has drawn upon the Harris Institute's connections, particularly overseas, to assemble a truly extraordinary international effort to collaborate on the elaboration of a proposed convention on crimes against humanity.

During Phase II of the Initiative, fifteen papers written by leading experts, were presented and discussed at a conference held at the Washington University School of Law on April 13-14, 2009. They were then revised for publication.³³ The papers addressed the legal regulation of crimes against humanity and examined the broader social and historical context within which they occur. Each chapter was commissioned not only to examine the topic's relationship to the elaboration of a future treaty, but to serve as an important contribution to the literature on crimes against humanity in and of itself.

The papers ranged from technical discussions of specific legal issues, such as modes of responsibility

³³ One paper, on *Re-enforcing Enforcement*, was commissioned subsequent to the April meeting based upon the emphasis in that meeting on inter-State cooperation as a principal need to adopt the Convention. Laura M. Olson, *Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the Aut Dedere Aut Judicare Obligation*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 323 (Leila Nadya Sadat ed., 2011).

(van Sliedregt), immunities and amnesties (Orentlicher), enforcement (Olson), and gender crimes (Oostervelt), to broader conceptual treatments of earlier codification efforts (Clark), the definition of the crime in the Rome Statute and customary international law (Ambos and Mettraux), and the phenomenon of ethnic cleansing (Hagan & Haugh).

Several chapters contrasted the ICC and *ad hoc* tribunal definitions of crimes against humanity and were very helpful to the discussions as the drafting effort progressed (*see, e.g.,* Sluiter); the same can be said for the many other contributions to the book which addressed specific topics such as crimes against humanity and terrorism (Scharf & Newton), universal jurisdiction (Akhavan), and the Responsibility to Protect (Scheffer).

David Crane's contribution outlining "Operation Justice" in Sierra Leone represents an outstanding case study of "peace and justice" in action; likewise, Cherif Bassiouni's exposé on "revisiting the architecture of crimes against humanity" is a magisterial account of the crime's development during the past century.

In discussing the scholarly work more questions were raised than answered. What was the social harm any convention would protect—atrocities committed by the state or a broader concept that would include non-state actors? Would a new legal instrument prove useful in combating atrocity crimes? How would any new instrument interact with the Rome Statute for the International Criminal Court? The lengthy discussions

that transpired are memorialized in the *Comprehensive History* included in the book and have continued since the book appeared in print; indeed, it should be emphasized that the discussion and elaboration of the Convention's provisions are deeply intertwined with the academic work accomplished at the same time.

As the initial scholarly work was undertaken, a preliminary draft text of the Convention, prepared by Cherif Bassiouni, who had chaired the Drafting Committee at the Rome Diplomatic Conference for the ICC, was circulated to participants of the April meeting to begin the drafting process. As the Initiative progressed, nearly 250 experts were consulted, many of whom submitted detailed comments (orally or in writing) on the various drafts of the Proposed Convention circulated, or attended meetings convened by the Initiative either in the United States or abroad.

Between formal meetings, technical advisory sessions were held during which every comment received—whether in writing or communicated verbally—was discussed as the Convention was refined. The Proposed Convention went through seven major revisions (and innumerable minor ones) and was approved by the members of the Steering Committee in August 2010 in English. It has since been translated into French, Spanish, and Arabic, and a Chinese version is being contemplated.

It is to be hoped that the elaboration of the Proposed Convention will begin, not end, debate. Written by experts without the constraints of government

instructions (although deeply cognizant of political realities), it is, in the view of the Initiative's Steering Committee, an excellent platform for discussion by States with a view towards the eventual adoption of a United Nations Convention on the Prevention and Punishment of Crimes Against Humanity.

The Proposed Convention builds upon and complements the ICC Statute by retaining the Rome Statute definition of crimes against humanity but has added robust interstate cooperation, extradition, and mutual legal assistance provisions in Annexes 2-6. Universal jurisdiction was retained (but is not mandatory), and the Rome Statute served as a model for several additional provisions, including Articles 4-7 (Responsibility, Official Capacity, and Non-Applicability of Statute of Limitations) and with respect to final clauses. Other provisions draw upon international criminal law and human rights instruments more broadly, such as the recently negotiated Enforced Disappearance Convention, the Terrorist Bombing Convention, the Convention Against Torture, the United Nations Conventions on Corruption and Organized Crime, The European Transfer of Proceedings Convention, and the Inter-American Criminal Sentences Convention, to name a few.³⁴

Yet, although the drafting process benefited from the existence of current international criminal law

³⁴ A complete list is found in the table at the back of the *Proposed Convention* found in Appendices I and II of *Forging a Convention for Crimes Against Humanity*.

instruments, the creative work of the Initiative was to meld these and our own ideas into a single, coherent international convention that establishes the principle of state responsibility as well as individual criminal responsibility (including the possibility of responsibility for the criminal acts of legal persons) for the commission of crimes against humanity. The Proposed Convention innovates in many respects by attempting to bring prevention into the instrument in a much more explicit way than predecessor instruments, by including the possibility of responsibility for the criminal acts of legal persons, by excluding defenses of immunities and statutory limitations, by prohibiting reservations, and by establishing a unique institutional mechanism for supervision of the Convention. Echoing its 1907 forbearer, it also contains its own “Martens Clause” in paragraph 13 of the Preamble.

Elaborating the 27 articles and 6 annexes of the treaty was a daunting challenge, and one that could not have been accomplished without the dedication and enthusiasm of many individuals. I cannot mention all of them in this short essay, but I am particularly grateful to Cherif Bassiouni for his extraordinary efforts in leading the drafting process and his service as a member of the Initiative’s Steering Committee. I am equally grateful to Hans Corell, Richard Goldstone, Juan Mendez, William Schabas, and Christine Van den Wyngaert—the other members of the Steering Committee—for their leadership. Each member of the Initiative’s Steering Committee brought tremendous energy and expertise to the project, guiding its methodological development and conceptual design, and carefully reading, commenting

upon, and debating each interim draft of the Proposed Convention extensively. The collegial spirit with which our discussions were carried out and our work engaged helped enormously in keeping us on track, and the collective wisdom and experience of my colleagues made working on this project both delightful and inspiring.

As with all such projects, many supported the effort without being on its front pages, so to speak. Of special note are the experts that gave generously of their time and talent, particularly Morten Bergsmo, Robert Cryer, Larry Johnson, Guénaél Mettraux, Laura Olson, Göran Sluiter, and Elies van Sliedgreedt, who attended one or more technical advisory sessions and contributed extensively to the elaboration of the Convention's text. The Harris Institute's staff did, and continues to do, a fabulous job keeping the project on track. Of course, we could not have undertaken this effort at all without the extraordinary support provided by Steven Cash Nickerson, Washington University Alumnus, who gave generously to support the first three phases of the Initiative, as well as the United States Institute of Peace, Humanity United, and the Brookings-Washington University Academic Venture Fund for additional, critical financial support.

At the end of the day, however, it is perhaps to Whitney R. Harris, former Nuremberg prosecutor, to whom we are most indebted. For it was Whitney who, along with his fellow trial counsel, first prosecuted crimes against humanity at Nuremberg; it was Whitney who endowed the Institute bearing his name, providing it

with the means to carry on his life's work; and it was Whitney who served as our counselor, advisor, and friend on this project, as with so many before it. I am sorry that he did not live to see it bear fruit.

One cannot embark upon an endeavor such as this without being keenly aware of the currents of history. Here in the heartland of America, calling for the elaboration of an international convention, embodying international legal principles for the settlement of international problems, is not unprecedented. The resolution responsible for the convening of the Second Hague Peace Conference—from which emanated the 1907 Hague Convention—issued from the Inter-Parliamentary Union meeting in St. Louis, Missouri, upon the occasion of the 1904 World's Fair.³⁵ Indeed, the participants of the first meeting of the Initiative in April 2009, gathered in historic Ridgeley Hall on the Washington University campus for a photograph, which was taken in the same room in which, 105 years earlier, the Inter-Parliamentary Union had issued its call for peace. Nor is it unheard of for a group of experts³⁶ or an academic institution to spearhead an effort such as this.

³⁵ Editorial Comment, *The Second Peace Conference of the Hague*, 1 AM. J. INT'L L. 431 (1907). The hopes of that second Peace Conference, however, and the 1907 Convention it produced, were soon dashed as European leaders led their countries into the terrible war that followed.

³⁶ The International Law Association, for example, elaborated a draft statute for an international criminal court in 1926. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-FOURTH CONFERENCE (1927).

Witness, for example, the Harvard Research project in international law, which produced three draft conventions, published in 1935.³⁷ The authors of that project cautioned that the “draft[s] . . . [were] completed within the limits of a rigorous time-schedule, by men already burdened with exacting duties; and these facts should be borne in mind in any appraisal of the work done.”³⁸ We hope that our work fares somewhat better, although the men (*and women*) who have contributed to it, of course, were under the same constraints of busy schedules and deadlines.

What will become of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity? In Phase IV of the Initiative we have undertaken a global awareness campaign to help make the Convention a reality. But will states embrace this “academic offering” and take up the challenge to negotiate a convention for the suppression of crimes against humanity? Or will indifference and inaction continue to be the hallmark of international policy?

As Whitney R. Harris admonished us, shortly before his death:

The challenge to humanity is to establish and maintain the foundations of peace and justice upon the Earth for the centuries to come. We

³⁷ *Codification of International Law*, 29 AM. J. INT’L L. (Supp. 1935).

³⁸ *Id.* at 8.

must learn to end war and protect life, to seek justice and find mercy, to help others and embrace compassion. Each person must respect every other person and honor the God who made this incredible mystery of human life a reality.³⁹

I hope that this Initiative, undertaken by the Institute that bears his name, will contribute to the realization of these objectives.

³⁹ Whitney R. Harris, *Human Existence is in Peril*, National Public Radio, June 12, 2006, available at <http://www.npr.org/series/4538138/this-i-believe>.

Why Is There a Need for a Crimes Against Humanity Convention?

William Schabas*

The following text is an edited transcript of Professor Schabas's remarks on a panel about the Crimes Against Humanity Initiative, held on August 29, 2011, at the Fifth International Humanitarian Law Dialogs in Chautauqua, New York.

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WILLIAM SCHABAS: Thank you. As Leila mentioned, I have just moved from the tranquil west of Ireland to the big city in London. Being a specialist in violent conflict, I felt I needed to get some field experience. So I am in north London now.

As Leila explained, our project—and the theme of our panel this afternoon—is the Crimes Against Humanity Convention, which does not yet actually exist, at least not in terms of a treaty that has been formally adopted and that is in force. It is a project that is making its way toward adoption. We launched it about three years ago, and we have been working on preparing a draft convention. Leila will tell you more about that in her remarks. The goal now is to get states to go through the process of adopting the text, followed by a lengthy and complex period of ratification, so that it enters into

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force and actually becomes a legally-binding, operative document. This is an exercise that takes a considerable amount of time, and we are just about a third of the way along the road, but like all ideas, it has to start somewhere.

The question that I want to try to answer a little bit at this point is why we need this. We already have a convention dealing with the crime of genocide. It is an old convention—more than 60 years old. It was adopted in 1948 at the tail end of a very fertile period in the development of international criminal law, of which the Nuremberg trial was the centerpiece. In fact, Article 6 of the Genocide Convention, which was formally adopted by the United Nations General Assembly in December 1948, calls for the creation of an international criminal court. So there's a thread, you might say, that starts at Nuremberg or slightly before that, runs through the Nuremberg trials to the adoption of the Genocide Convention, and then brings us to this new period. But there is a significant hiatus, which is an important subject and difficult to explain. Starting at about 1950-1952, the whole business of international criminal prosecution goes into a kind of hibernation, and it is not revived until the 1990s with the establishment of the International Criminal Tribunals for Yugoslavia and Rwanda, and then the International Criminal Court.

So I have to take you back—it is a bit of a history lesson really—to the 1940s to talk about why we have a Genocide Convention in 1948 but no Crimes Against Humanity Convention. Why did the international community and the United Nations agree to have a

Convention on the Prevention and Punishment of the Crime of Genocide but do nothing for crimes against humanity? That is the gap that we are trying to repair—to create a convention for crimes against humanity that does the same thing as the Convention on the Prevention and Punishment of the Crime of Genocide.

The Genocide Convention, I should add, does not create the International Criminal Court. That is another business altogether, which happens, as I mentioned, at the end of the 1990s. The Genocide Convention imposes a number of obligations on states that sign and ratify it; it mainly imposes an obligation that States Parties prosecute genocide within their own legal system, and that means that they have to enact the crime of genocide in their criminal codes. States are also required to cooperate in matters of extradition and other rules, and they have to participate in the prevention of genocide. Finally, they acknowledge that a dispute between states dealing with the crime of genocide can be adjudicated before the International Court of Justice. So there are a number of important obligations that we have for genocide because of the Convention, and we do not have any equivalent treaty imposing such obligations for crimes against humanity. Perhaps some of them exist under customary international law.

At the International Criminal Court, there is no such distinction between the two categories of international crime, because the Rome Statute allows for the prosecution of both genocide and crimes against humanity. It is up to the Prosecutor to decide what to prosecute and to the judges who then have to confirm the

charges, but beyond that, the International Criminal Court does not make a meaningful distinction between the two categories of crimes.

But at the level of state obligations in terms of cooperating with other states and with the international community in the repression, prevention, and punishment of crimes against humanity, we do not have the same instrument that we have for genocide, and that is what we are trying to address. So I want to try to shed some light on why that situation has existed in the past and why it should now be resolved.

If we go back to very early on in the Second World War, by about 1941 or 1942, the idea emerged that when the war was over, those who had committed atrocities during the war would be brought to justice. A very important declaration was made in October 1943 by the three leaders, Churchill, Roosevelt, and Stalin, basically serving notice to the Nazis that they would be held individually accountable for the crimes that they were committing and would be brought to justice.

This was a novel development in international law. It had not been done before. There had been hints of it at the time of the First World War, but it did not really come to pass. It shows humanity's progressive development. We had reached the stage where war crimes were no longer going to be forgiven, amnestied, or forgotten, nor would perpetrators be put into exile like Napoleon. Instead, they were actually going to be brought to justice.

Shortly afterwards, the Allies agreed that they would set up a body called the United Nations War Crimes Commission, and it began work in London in early 1944. The United Nations had not yet been established, but they were already using the term “United Nations.” I think it came from Roosevelt. If we had left it to Churchill, he would have called it the “Great Powers Commission on War Crimes” or the “Allies’ Commission on War Crimes.” But Roosevelt was able to speak a little more articulately to the people of the world—to speak more democratically—and he said, “Well, let’s call it the United Nations War Crimes Commission.”

They brought together experts from many of the Allied countries in London, and very soon after, they started to meet. They had to figure out the substance of the crimes they were to prosecute. The idea of war crimes had ancient origins. You could go back to the time of the Greeks—to the Trojan wars—and you would find a notion of the laws and customs of war that have to be respected in an armed conflict. That is, I think, what they thought they were going to prosecute.

The term “war crimes” itself is a bit odd, because it is used in many different senses. I think that if someone was to explain to someone on a telephone today about this meeting here in Chautauqua, they would say, “Well, who was there?” Someone might say, “The war crimes prosecutors—the prosecutors from the war crimes tribunals.” While that is a good enough description in the generic sense, it is not technically true, because these prosecutors not only prosecute war crimes but also

genocide, crimes against humanity and, as we heard this morning, terrorism as well.

So it is actually a broader concept. The term “war crimes” has a technical meaning—it refers to battlefield offenses. The historic notion is essentially one of soldiers fighting dirty. In a more modern understanding, it refers to crimes committed against civilians in the enemy’s territory—territory you occupy—but that is it.

In early 1944, people started coming to the United Nations War Crimes Commission saying, “What are you going to do about the Nazi atrocities committed in Germany, about the persecution of Jews and of other minorities in Germany?” And the answer from the Foreign Ministries of Britain and the United States—who were leading the debate—was, “We’re not going to do anything about that, because we are going to prosecute crimes under international law, and international law does not have anything to say about what states do to their own populations. That is their business. That is not a concern of ours.”

But over the course of 1944, in these meetings, that idea was gradually rejected. The unimaginable atrocities that had been perpetrated by the Nazis were increasingly being revealed over the course of 1944 as the tide of battle shifted. As this happened, the idea emerged that these atrocities could not go unpunished, even if they had not been previously adequately addressed by international law and certainly had not been adequately defined. By the end of 1944, I think that a corner had been turned, and it was well accepted that in some way,

the post-war prosecutions were also going to deal with atrocities committed against “any civilian population.” They used the term “any civilian population” very intentionally, because it appears in the definition of crimes against humanity that is adopted at Nuremberg, and it is in the definition that we use today. Any civilian population, including your own—that is the idea of crimes against humanity.

But they did not use the term “crimes against humanity” in 1944. I think there were a couple of suggestions that it be used, but the expression that they wrote down was “atrocities, persecutions, and deportations.” So the United Nations War Crimes Commission prepared many draft lists of the crimes. They included war crimes, and they added another category called “crimes against peace,” which was the subject of the International Humanitarian Law Dialogs last year and is what we today call the “crime of aggression.” The third category of crimes was “atrocities, persecutions, and deportations.” Clearly, the Commission was struggling with how to define this phenomenon of the atrocities committed by the Nazis, and in particular, those committed within the borders of Germany itself and directed against minorities.

At about the same time, other people not involved with the Commission were laboring on much the same problem. The most important of them is an individual who fled from Nazi-occupied Poland, a Jewish Polish lawyer named Raphael Lemkin. Lemkin made his way first to Sweden and then to the United States. He received a short appointment at Duke University, then

another adjunct appointment at Yale University, and eventually he began working for the U.S. government on the problem of war crimes prosecution.

Over the course of 1944, Lemkin prepared a book, which was published by the Carnegie Foundation in November of that year. The book was titled, *Axis Rule in Occupied Europe*, and it contained a chapter of about 30 pages called, “Genocide.” That was the first time the word “genocide” was ever used. It was invented by Raphael Lemkin. He had invented it to describe, in his own way, the phenomenon of atrocities, persecutions, and deportations—to use the Commission’s expression—atrocities perpetrated by the Nazis against minorities, including those within Germany itself. In other words, Lemkin was trying to address the same problem as the United Nations War Crimes Committee, but he came up with a slightly different paradigm, a slightly different definition, and a slightly different name. He called it “genocide.”

In the chapter, he wrote about a range of acts of genocide that included various forms of persecution of minorities—not just their extermination, but various other forms aimed at attacking the minorities with a view to their eventual disappearance.

The next stage in this process was an important conference that took place in London in June, July, and early August 1945, called the “London Conference.” The London Conference is where the great Nuremberg trial was prepared. One of the leading individuals of that Conference—everybody knows his name—originally

practiced law just down the road from here in Jamestown. Robert Jackson was sent by President Truman to negotiate the terms of the Nuremberg trial and the way in which it would take place.

Jackson went to the London Conference with this material. He had the definition of “atrocities, persecutions, and deportations” that had emerged from the U.N. War Crimes Commission, and he also had Lemkin’s work. In fact, he had Lemkin with him, because Lemkin came to advise and assist Jackson in London. Lemkin was there, sort of lobbying for his word. He wanted “genocide” to be used in the document that they were going to use for the prosecutions at Nuremberg.

The Conference lasted several weeks, and on the final weekend, I think, before the end of the Conference, Jackson went to visit a very distinguished law professor—the Chair of International Law at Cambridge University, whom Jackson had gotten to know when he was Attorney General of the United States. This famous professor had come to lecture in the U.S. and had gone to meet with Jackson. His name was Hersch Lauterpacht.

Ironically, Hersch Lauterpacht is rather like Lemkin. He's a Jew who also fled from Eastern Europe. He emigrated from there, really, but by that time, there was no question that he would never be able to return. And like Lemkin, many members of his family perished in the Holocaust. Lauterpacht had become the most distinguished professor of international law in Britain by that time in 1945.

Jackson went to visit Lauterpacht over the weekend in Cambridge. They had dinner at Trinity College where Lauterpacht was a fellow, and as Jackson later reported to the Conference, Lauterpacht had this great suggestion that instead of talking about atrocities, persecutions, and deportations, they call the concept “crimes against humanity.” And his term was adopted. It was agreed to by the other members of the Conference. This is where we first see the term.

Now, Lauterpacht did not invent the term. Lemkin invented the term “genocide,” but Lauterpacht did not invent the term “crimes against humanity.” If Cherif Bassiouni was here today—he was originally scheduled to be on our podium—he would remind us that it was initially used, at least in an international, political, or legal sense, in a famous declaration made in 1915 by the Russians, the British, and the French. The declaration was a message to the Turkish government, and I quote from the Declaration, “these new crimes of Turkey against humanity and civilization.”

I think that it is fair to say that this was really the first time that the term was cited. I found a couple of anecdotal uses of “crimes against humanity” even prior to that point. We know of one use by an American journalist who went to the Belgian Congo in the late 1890s, and that is about where the trail goes cold.

This is not just of historical interest, but I think it is of legal interest as well. In responding to the argument that the term was used retroactively, we would like to be reassured that when the term “crimes against humanity”

was used in 1945, people knew what it meant. They were familiar with, if not the legal definition of it, what the concept was meant to convey.

Last year, I found an extremely unique and original new research tool that enables you to trace the origin of an expression. You know that if you want to learn the origin of a word like “crimes,” you can go to the Oxford English Dictionary, the 20-volume dictionary, and you can see all the uses of the word “crimes” in the English language, and then you can do the same thing for the word “humanity.” But you cannot trace the expression, “crimes against humanity.” But I have now discovered this new research tool, which is called—many of you actually know it—“Google Books.”

I had my assistants enter the search terms “crimes against humanity,” and “crime against humanity,” in quotation marks, and we did it with different languages as well. We found the term was used frequently through the 19th century and well into the 18th century in different languages and slightly different forms, but it was a familiar term. It was often used to describe slavery and the slave trade. The very earliest citing of the term “crimes against humanity,” which I think is almost poetic, comes from Voltaire. So it seems that Voltaire invented the term “crimes against humanity.” At least that's my story, and I'm sticking to it until someone finds an earlier reference.

But to get back to our story, Lauterpacht in 1945 actually used a term that was familiar to people. He said, “That is what you should call it.”

There was one other little difficulty, and it really explains why we have a Genocide Convention and not a Crimes Against Humanity Convention. There was a debate at the London Conference, which Jackson wrote about in his report on the Nuremberg trial to the President of the United States. He wrote, “We had a difference in opinion about the law-making process at the London Conference. The Russians thought that we were making law that was only going to apply to the Nazis,” but Jackson wrote, “I was always of the view that we were making law that was going to apply to us as well, and that what we were doing when we were defining these crimes was defining a body of law—crimes for which we could also be held accountable.” You see the debate then, and that colored Jackson's speeches at the London Conference. It also influenced the definition.

There was a point where Jackson said, “We have to be very careful when we recognize the responsibility of a government for the persecution of its own citizens as an international crime because we have, in our own country, manifestations of the persecution of minorities, and we do not want to be held accountable at international law for that fact.” Of course, Jackson was speaking about the treatment of African Americans in the United States at a time when there was an Apartheid-like system, at least in certain states, and the practice of lynching was still taking place in the southern states of the United States. Obviously, as a Roosevelt Democrat, this was not something that Jackson was proud of, but he had to defend his own government from being exposed to prosecution for crimes against humanity.

So Jackson said, “I think what we ought to do is restrict crimes against humanity to these acts of persecution of minorities committed in association with the aggressive war.” That way, he knew that the Nazis could be found guilty, but that his own government, his President, and others could not be held accountable or prosecuted in the same way. So the legal concept of crimes against humanity was born and defined at Nuremberg, but limited by this restriction of association with war.

I would have loved to have been a fly on the wall at that conference. In the report, Jackson wrote quite honestly and candidly about his concern, but I can just imagine the British guy at the conference thinking, “That’s a good point, and what about India and Nigeria and Cyprus and Aden and Palestine and Jamaica?” And then the French guy sitting there, scratching his head, saying, “Yes, and what about Indochina and Algeria and the Congo and all of our colonies?” And then the Russian guy—he was actually Ukrainian—but he was probably sitting there worrying about atrocities committed by them. All four of them—the Soviets, the British, the French, and the Americans—had big things to worry about, so they wanted a legal text that they could use against the Nazis but that would not come back and bite them in the tail. And that was how they did it—they limited crimes against humanity to acts associated with aggressive war.

Their analysis of crimes against humanity was upheld by the judges at the end of September and the beginning of October 1946 in the great Nuremberg

judgment, and then a very interesting development took place. Remember our friend, Raphael Lemkin? He was still there. He was hanging around, and he had been lobbying to get the word “genocide” put into the judgment. He did not succeed. He got the prosecutors to use it a little bit. But he was furious when the judgment came out, not, I think, because they did not use his word, but because of the consequence of limiting crimes against humanity, which he found to be profoundly hypocritical and disturbing.

I learned about Lemkin's personal reaction from a person who has also been mentioned here today, Henry King. Henry King was one of the younger prosecutors at Nuremberg at the time. He passed away a little more than two years ago.

Henry King described how he met Lemkin in the lobby of the Grand Hotel in Nuremberg. It is still there, by the way. It is a grand old hotel, and King met Lemkin there. King said Lemkin was disheveled, distraught, and he was furious, because the Nuremberg judgment had agreed to prosecute wartime genocide but not peacetime genocide. Lemkin said that the crimes committed by the Nazis before 1939 went unpunished. They were mentioned in the judgment, but nobody was convicted for them. Lemkin was furious, and he said, “I'm going to fix this.”

He rushed back to New York and went to the General Assembly of the United Nations, which was meeting for the very first time in an old factory at Lake Success on Long Island, and Lemkin started lobbying.

He had never really done this before from what we can tell. He had been an academic, and he was a practicing lawyer in Poland. But at the United Nations, he transformed himself into a campaigner, and he managed to convince three delegations—Panama, Cuba, and India. These were not the Great Powers; they were not countries that were afraid of prosecution for the atrocities that they were committing against their subject populations. They were countries of what we would later call the “third world,” who were essentially afraid of being persecuted. Lemkin said, “Let's see if we can fix this problem. Let's pass a resolution that we will call the ‘Resolution on the Crime of Genocide,’ and let's recognize genocide as an international crime that can be committed in times of peace.”

When the Cuban Ambassador to the United Nations stood up in the fall of 1946 to present the resolution, he said, “We are here to fix the problem with Nuremberg. We are here to fix the shortcoming of the Nuremberg judgment. We want to recognize that these atrocities can be committed in times of peace.” The resolution, which was adopted in December 1946, called for the adoption of a convention on genocide, and the states proceeded to negotiate that convention. It was adopted, as I said, in 1948.

But they did have some difficulty during the negotiations. The four Great Powers who agreed in 1945 to a legal concept of crimes against humanity by which the Nazis could be charged but they could not—that is, atrocities, persecutions, and deportations of their civilian population committed in wartime—were not going to

turn around two and a half years later and broaden the concept. They were not ready for that. The same concerns they had in 1945 still existed in 1948. So they said to the United Nations, “We'll agree to a concept of international crimes committed against vulnerable citizen populations, against minorities, that can be committed in peacetime, but you are going to have to narrow it down.” So they narrowed it and they called it “genocide.” They did not mention crimes against humanity. So this is how crimes against humanity became separated from genocide. They were differentiated, but actually, they are part of the same thing. Genocide and crimes against humanity were forged in the same crucible, intended to address the same reality—the same Nazi atrocities—but they are defined differently. Genocide is defined as “acts intended to destroy national, ethnic, racial, or religious groups.”

Genocide is narrower than crimes against humanity in two respects. Genocide is confined to national, ethnic, racial, and religious groups. It does not protect political groups. It does not protect social groups. It does not protect a range of groups or individuals who might need protection. It does not deal with just any civilian population; it only applies to these four groups.

Furthermore, it has to involve the destruction of the group and not just persecution or deportation. It is narrower than atrocities, persecutions, and deportation. It has to involve the group's destruction.

So the four Great Powers and other countries said, “We can agree to that, so let's have a convention,” and

that's where the Genocide Convention comes from in 1948. It is a result of the same phenomenon that gave rise to the concept of crimes against humanity. It is narrower in some respects than crimes against humanity but it is broader in one important respect—the very beginning of the Genocide Convention says that this is a crime that can be committed in times of peace as well as in wartime. So that problem was solved, but at the price of a much narrower definition of crime.

For about 45 years, we lived with this tension between crimes against humanity and genocide. Every time there was an atrocity—in the 1970s, for example, with the Khmer Rouge regime—people went to the international lawyers and said, “What can we get them for?” “What are they doing?” “Well, they are attacking people. They are persecuting them. They are killing people.” “On what grounds?” “Well, on political grounds. It is mainly because they disagree with their political objectives.” “And is there a war on?” “Not really, it’s peacetime. It’s kind of settled down.” The lawyers would say, “Well, that’s too bad, because if it was wartime, we could get them for crimes against humanity. But maybe we can stretch the definition of ‘genocide.’ We will say that, actually, genocide does not just cover national, ethnic, racial, or religious groups.” There was a big hole in the framework of international crimes. We had a big impunity gap in the law between crimes against humanity and genocide.

In the 1990s, when international criminal prosecution was revived, that hole was repaired, that impunity gap was filled, at least in some respects, by the

International Criminal Tribunal for the former Yugoslavia. In its first judgment, the Appeals Chamber ruled that crimes against humanity can be committed in times of peace as well as in times of war. That idea, which was revolutionary in the 1940s, is well accepted by the 1990s. It was accepted as part of the Rome Statute when it was adopted in 1998. So the hole in the definitions of the crimes is repaired.

Over the years, some people have argued that what we really should do is expand the definition of “genocide” to fill the hole. We could have done that. I do not quite know why we did not do that. Instead, we expanded the definition of crimes against humanity, but one way or the other, that hole was filled. So when the International Criminal Court was established, we had these two concepts: crimes against humanity and genocide. The concept of crimes against humanity is much broader than genocide. It is like the relationship between manslaughter and premeditated murder.

Some people argue that the two crimes have different objectives. I think that is maybe exaggerated, because when I look back at the history and the reasons why they were created, I think they were both created to address the same phenomenon, albeit in different ways.

So, by 1988, the problem of the definition was solved, and we also have the International Criminal Court, which can prosecute people for either genocide, or crimes against humanity, or both. It does not really matter very much which category is selected. The

sentence could be the same. It is a choice that the Prosecutor and the judges make.

But we still do not have our convention for crimes against humanity, and that represents a gap in the law. It may not be a huge gap, but it is a significant one. There is a lot of symbolism in this initiative that Leila launched three years ago, which I had the privilege of being brought into at an early stage, along with a number of others, including Hans Corell, Cherif Bassiouni, Richard Goldstone, Christine Van den Wyngaert, and Juan Mendez. The Draft Convention consolidates and confirms the achievement of having fixed the problem with crimes against humanity about which Lemkin ranted in 1946 and which launched him on his process of promoting the crime of genocide.

**Proposed International Convention on the
Prevention and Punishment of Crimes Against
Humanity**

**Washington University School of Law Whitney R.
Harris World Law Institute Crimes Against
Humanity Initiative**

August 2010. * Original: English

The following text is the Proposed Convention put forth by the Crimes Against Humanity Initiative and referred to in the preceding texts by Leila Sadat and William Schabas.

* * * * *

Preamble

The States Parties to the present Convention,

Conscious that all people are united by common bonds and share certain common values,

* This version of the text was issued in February 2012 and contains minor corrections of the original text. The corrections are listed in a corrigendum published on February 17, 2012.

Affirming their belief in the need to effectively protect human life and human dignity,

Reaffirming their commitment to the purposes and principles of the United Nations, outlined in its Charter, and to the universal human rights norms reflected in the Universal Declaration of Human Rights and other relevant international instruments,

Mindful of the millions of people, particularly women and children, who over the course of human history have been subjected to extermination, persecution, crimes of sexual violence, and other atrocities that have shocked the conscience of humanity,

Emphasizing their commitment to spare the world community and their respective societies the recurrence of atrocities, by preventing the commission of crimes against humanity, and prosecuting and punishing the perpetrators of such crimes,

Determined to put an end to impunity for the perpetrators of crimes against humanity by ensuring their fair and effective prosecution and punishment at the national and international levels,

Recognizing that fair and effective prosecution and punishment of the perpetrators of crimes against humanity necessitates good faith and effective international cooperation,

Recognizing that effective international cooperation is dependent upon the capacity of individual States Parties to fulfill their international obligations, and that ensuring the capacity of each State Party to fulfill its obligations to prevent and punish crimes against humanity is in the interest of all States Parties,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, including crimes against humanity,

Recalling the contributions made by the statutes and jurisprudence of international, national, and other tribunals established pursuant to an international legal instrument, to the affirmation and development of the prevention and punishment of crimes against humanity,

Recalling that crimes against humanity constitute crimes under international law, which may give rise to the responsibility of States for internationally wrongful acts,

Recalling Article 7 and other relevant provisions of the Rome Statute of the International Criminal Court,

Declaring that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of the principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues

to enjoy the fundamental rights that are recognized by international law,

Have agreed as follows:

Explanatory Note

What follows are cross-references to other international instruments. For full commentary on the Convention and description of the choices made therein, see the Comprehensive History of the Proposed CAH Convention.

- 1. The word "Punishment" tracks the Genocide Convention.*
- 2. Preambular paragraphs 1, 4, 6 and 9 draw heavily from the Preamble to the Rome Statute of the International Criminal Court.*
- 3. Preambular paragraph 3 draws upon the Preamble to the Enforced Disappearance Convention.*
- 4. Preambular paragraphs 5, 6 and 7 include language specifically directed at both prevention and punishment.*
- 5. Preambular paragraph 8 is intended to forcefully emphasize the importance of capacity building to ensuring the effective operation of the present Convention.*

6. *The reference in preambular paragraph 10 to “other tribunals established pursuant to an international legal instrument” includes mixed-model tribunals such as the Special Court for Sierra Leone.*
7. *Preambular paragraph 11 acknowledges that crimes against humanity may give rise to the responsibility of States for internationally wrongful acts. This does not mean that State responsibility necessarily attaches. See Article 1 and accompanying Explanatory Note.*
8. *Preambular paragraph 13 is inspired by the Martens Clause appearing in the Preamble to the Hague Convention of 1907 and by Article 10 of the Rome Statute.*

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Article 1

Nature of the Crime

Crimes against humanity, whether committed in time of armed conflict or in time of peace, constitute crimes under international law for which there is individual criminal responsibility. In addition, States may be held responsible for crimes against humanity pursuant to principles of State responsibility for internationally wrongful acts.

Explanatory Note

1. *States Parties to the present Convention who are also Parties to the Rome Statute are bound by their obligations under that Statute. The obligations arising under the present Convention are therefore compatible with the Rome Statute. In addition, the provisions of the present Convention regulate the bilateral relations between the States Parties to the Rome Statute. The present Convention also offers an opportunity for States that are not parties to the Rome Statute to regulate their bilateral relations with other States, whether Parties to the Rome Statute or not.*
2. *The prohibition against crimes against humanity exists under customary international law and this provision incorporates the customary international law development, which recognizes that crimes against humanity may be committed in time of armed conflict and in time of peace.*
3. *Article 1, like preambular paragraph 11, acknowledges that crimes against humanity may give rise to the responsibility of States for internationally wrongful acts should breaches of the present Convention be attributable to a State Party in accordance with the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001.*

4. *Specific reference to State responsibility underscores the applicability of State responsibility principles to the present Convention.*

Article 2

Object and Purposes of the Present Convention

1. The States Parties to the present Convention undertake to prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes.
2. To these ends, each State Party agrees:
 - (a) To cooperate, pursuant to the provisions of the present Convention, with other States Parties to prevent crimes against humanity;
 - (b) To investigate, prosecute and punish persons responsible for crimes against humanity fairly and effectively;
 - (c) To cooperate, pursuant to the provisions of the present Convention, with other States Parties, with the International Criminal Court if the State is a Party to the Rome Statute, and with other tribunals established pursuant to an international legal instrument having jurisdiction over crimes against humanity, in the fair and effective investigation, prosecution and punishment of

persons responsible for crimes against humanity;
and

- (d) To assist other States Parties in fulfilling their obligations in accordance with Article 8 of the present Convention.

Explanatory Note

1. *This provision highlights the three core “pillars” of the present Convention: prevention, punishment, and effective capacity building to facilitate such prevention and punishment.*
2. *The reference in paragraph 2(c) to other international tribunals includes the ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as mixed-model tribunals established pursuant to an international legal instrument, such as the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. With regard to this provision’s reference to a State Party cooperating with the International Criminal Court, it should be noted that States Parties to the Rome Statute may have such an obligation. States which are not Party to the Rome Statute have no such obligation absent a referral by the Security Council or voluntary acceptance of the Court’s jurisdiction, but may cooperate with the International Criminal Court. This provision recognizes that such States may cooperate with the*

International Criminal Court, but does not impose an independent obligation to do so.

3. *The reference in Article 2(d) to assisting “States Parties in fulfilling their obligations” includes the obligations in Article 8 to facilitate State capacity building.*

Article 3

Definition of Crimes Against Humanity

1. For the purpose of the present Convention, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;

- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

- (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of

international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purposes of the present Convention, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society.

The term “gender” does not indicate any meaning different from the above.

Explanatory Note

- 1. The text of paragraphs 1 and 2 incorporates the definition contained in Article 7 of the Rome Statute, with two necessary modifications of language specific to the International Criminal Court in subparagraph 1(h), whereby the following language was used: “gender as defined in paragraph 3,” and “or in connection with acts of genocide or war crimes.”*
- 2. No substantive changes to Article 7 of the Rome Statute have been made.*
- 3. As used in paragraph 1(k) of the present Convention, “[o]ther inhumane acts of a similar character” could be interpreted, in keeping with Articles II(b) and II(c) of the Genocide Convention, as including acts which cause the same harmful results as the acts listed in subparagraphs (a) through (j).*

Article 4

Individual Criminal Responsibility

- 1. A person who commits a crime against humanity shall be individually responsible and liable for*

punishment in accordance with the present Convention.

2. In accordance with the present Convention, a person shall be criminally responsible and liable for punishment for a crime against humanity if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose

involves the commission of a crime against humanity; or

- (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) Directly and publicly incites others to commit crimes against humanity;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present Convention for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
3. No provision in the present Convention relating to individual criminal responsibility shall affect the responsibility of States under international law for internationally wrongful acts.

Explanatory Note

This provision draws upon Article 25 of the Rome Statute.

Article 5

Responsibility of Commanders and other Superiors

In addition to other grounds of criminal responsibility under the present Convention for crimes within the jurisdiction of a court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of a court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, whereas,
 - (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress

their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of a court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; and
 - (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Explanatory Note

This provision is from Article 28 of the Rome Statute.

Article 6

Irrelevance of Official Capacity

1. The present Convention shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present Convention, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar a court from exercising its jurisdiction over such a person.

Explanatory Note

1. *This language draws heavily upon Article 27 of the Rome Statute. However, in paragraph 2 of this Article, “the Court” has been changed to “a court,” meaning any duly constituted judicial institutions having jurisdiction.*
2. *Paragraph 2 draws upon the dissenting opinion of Judge Van den Wyngaert from the ICJ’s judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, and*

supports a different and more expansive principle than Article 27(2) of the Rome Statute.

Article 7

Non-applicability of Statute of Limitations

Crimes against humanity as defined by the present Convention shall not be subject to any statute of limitations.

Explanatory Note

- 1. This language draws upon Article 29 of the Rome Statute.*
- 2. States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of crimes against humanity as defined in the present Convention and that, where they exist, such limitations shall be abolished.*

Article 8

Obligations of States Parties

1. Each State Party shall enact necessary legislation and other measures as required by its Constitution or legal system to give effect to the provisions of the present Convention and, in particular, to take effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

A. Legislation and Penalties

2. Each State Party shall adopt such legislative and other measures as may be necessary to establish crimes against humanity as serious offenses under its criminal law, as well as its military law, and make such offenses punishable by appropriate penalties which take into account the grave nature of those offenses, the harm committed, and the individual circumstances of the offender. In addition, such a person may be barred from holding public rank or office, be it military or civilian, including elected office.
3. Each State Party shall adopt such legislative and other measures as may be necessary to ensure that a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity as set forth in Article 5, paragraph 1.

4. Each State Party shall adopt such legislative and other measures as may be necessary to ensure that, with respect to superior and subordinate relationships not described in paragraph 3, a superior shall be criminally responsible for crimes against humanity as set forth in Article 5, paragraph 2.

5. Each State Party shall adopt such legislative and other measures as may be necessary to ensure in its legal system that the victims of crimes against humanity have the right to equal and effective access to justice, and the right to adequate, effective and prompt reparation for harm suffered, including, where appropriate:
 - (a) Restitution;
 - (b) Compensation;
 - (c) Rehabilitation;
 - (d) Satisfaction, including restoration of reputation and dignity; and
 - (e) Measures to ensure non-repetition.

Each State Party shall ensure that, in the event of the death of a victim of crimes against humanity, his or her heirs shall be entitled to the same rights to equal and effective access to justice, and to adequate, effective and prompt reparation.

6. Each State Party shall adopt such legislative and other measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in crimes against humanity. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offense. Each State Party shall, in particular, develop administrative measures designed to provide reparation to victims, and to ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

B. Investigation and Prosecution

7. Upon receiving information that a person who has committed or who is alleged to have committed crimes against humanity may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.
8. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the person who has committed or who is alleged to have committed crimes against humanity is present shall take the necessary and appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

9. States Parties shall prosecute or extradite those charged with or suspected of committing crimes against humanity.
10. Each State Party shall ensure that any individual who alleges that he or she has been subjected to crimes against humanity in any part of the territory under its jurisdiction has the right to complain to the competent legal authorities and to have his or her case promptly and impartially examined by the competent judicial authorities.
11. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning crimes against humanity and, as appropriate, for their relatives and other persons close to them. Such measures may include, inter alia, without prejudice to the rights of the accused, including the right to due process:
 - (a) Establishing procedures for the physical protection of such persons such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
 - (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a

manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

C. Prevention

12. Each State Party shall endeavor to take measures in accordance with its domestic legal system to prevent crimes against humanity. Such measures include, but are not limited to, ensuring that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.
13. States Parties may call upon the competent organs of the United Nations to take such action in accordance with the Charter of the United Nations as they consider appropriate for the prevention and punishment of crimes against humanity.
14. States Parties may also call upon the competent organs of a regional organization to take such action in accordance with the Charter of the United Nations as they consider appropriate for the prevention and punishment of crimes against humanity.
15. States Parties shall develop educational and informational programs regarding the prohibition of crimes against humanity including the training of law enforcement officers, military personnel, or other relevant public officials in order to:

- (a) Prevent the involvement of such officials in crimes against humanity;
 - (b) Emphasize the importance of prevention and investigations in relation to crimes against humanity;
16. Each State Party shall ensure that orders or instructions prescribing, authorizing, or encouraging crimes against humanity are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. Moreover, each State Party shall take the necessary measures to ensure that persons who have reason to believe that crimes against humanity have occurred or are planned to occur, and who report the matter to their superiors or to appropriate authorities or bodies vested with powers of review or remedy are not punished for such conduct.

D. Cooperation

17. States Parties shall cooperate with States or tribunals established pursuant to an international legal instrument having jurisdiction in the investigation, prosecution, and punishment of crimes against humanity.
18. States Parties shall afford one another the greatest measure of assistance and cooperation in the course of any investigation or prosecution of persons alleged to be responsible for crimes against humanity irrespective of whether there exist between said

States Parties any treaties on extradition or mutual legal assistance.

E. Capacity Building

19. States Parties shall to the extent possible provide one another capacity building assistance on an individual basis or through the mechanisms outlined in Article 19.

Explanatory Note

1. *This provision draws upon similar language from other international criminal law conventions. Paragraph 1 of this provision provides that measures taken by States Parties to prevent and repress crimes against humanity must be in accordance with the Charter of the United Nations. It should also be understood, however, that the obligation to prevent crimes against humanity includes the obligation not to provide aid or assistance to facilitate the commission of crimes against humanity by another State. See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 16, commentary paragraph (9). See also the ICJ's judgment in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, paragraphs 425-38. This is consistent with Article 1 of the present Convention.*

2. *With regard to paragraph 2, it is understood that the obligations of States Parties apply to all institutions and organs of the State without exception including, inter alia, military courts and any other special proceedings. The language regarding penalties is drawn from Article 4(1) of the Torture Convention. The current provision acknowledges, however, that States Parties may have different obligations arising under regional human rights conventions, and earlier language requiring penalties to be no less severe than those applicable for the most serious crimes of a similar nature has been removed. With regard to barring individuals found responsible for crimes against humanity from holding public rank or office, the permissive “may” was included to avoid possible contradiction with the jurisprudence of the European Court of Human Rights. There is, however, language in *Velásquez Rodríguez v. Honduras (Merits)*, Inter-Am. Ct. H.R., 29 July 1988, Ser. C, No. 4, to support the proposition that persons who abused power to commit crimes against humanity could be barred from holding public office.*

3. *Paragraphs 3 and 4 require States Parties to enact legislation to ensure that military commanders and other superiors are criminally responsible for crimes against humanity committed by subordinates under their effective command and control, or effective authority and control as the case may be, as a result of the commander or superior’s failure to exercise control over such subordinates.*

4. *Paragraph 5 draws upon the General Assembly's Resolution adopting Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (March 21, 2006).*
5. *In order to avoid impunity or de facto immunity for those persons who act collectively or within a legal structure, States Parties should enact legislation capable of reaching such entities. Paragraph 6 draws heavily upon Article 26 of the UN Convention Against Corruption to oblige States Parties to adopt appropriate legislation and develop administrative measures designed to provide reparation to victims.*
6. *Paragraph 7 is from Article 7(1) of the Terrorist Bombing Convention. It also covers persons who have committed crimes against humanity or alleged to have done so.*
7. *Paragraph 8 is from Article 7(2) of the Terrorist Bombing Convention.*
8. *Paragraph 9 recognizes the obligation of aut dedere aut judicare.*
9. *Paragraph 10 draws upon Article 13 of the Torture Convention but includes language clarifying that the State Party's obligation extends to "any part of the" territory under its jurisdiction.*

10. *Paragraph 11 draws upon Article 32 of the UN Convention Against Corruption.*
11. *The language of paragraph 12 is from Article 20 of the ICCPR.*
12. *Paragraph 13 is from Article VIII of the Genocide Convention. This is consistent with paragraph 1 of the present provision, which provides that any measures taken by States Parties to prevent and punish crimes against humanity must be in accordance with the Charter of the United Nations.*
13. *The term competent used here means the appropriate body within the regional instrument and also those bodies acting within its constituent instrument.*
14. *Paragraphs 15 and 16 oblige States Parties to develop education and training sessions in order to give effect to the obligation to prevent crimes against humanity. These paragraphs draw heavily upon Article 23 of the Enforced Disappearance Convention.*
15. *The Summary of Recommendations of the Genocide Prevention Task Force Report sets forth specific policy measures for education and prevention, which cannot be incorporated into normative provisions of the present Convention. However, if the present Convention has a treaty body that recommends specific measures to States Parties, such a body may use these recommendations.*

16. *Recognizing that capacity building is one of the core functions of the present Convention, paragraph 19 provides that States Parties, to the extent possible, shall provide one another capacity building assistance. Providing capacity building technical assistance to States Parties is one of the mandated functions of the permanent Secretariat to be established pursuant to Article 19, paragraphs 10 and 11.*

17. *Although it defines the obligations of States Parties, this article makes no explicit reference to State responsibility. Both preambular paragraph 11 and Article 1 explicitly recognize that crimes against humanity are crimes under international law which may give rise to the responsibility of States for internationally wrongful acts.*

Article 9

Aut Dedere Aut Judicare (Prosecute or Extradite)

1. Each State Party shall take necessary measures to establish its competence to exercise jurisdiction over crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites him or her to another State in accordance with its international obligations or surrenders him or her to the International Criminal Court, if it is a State Party to the Rome Statute, or to another international criminal tribunal whose jurisdiction it has recognized.

2. In the event that a State Party does not, for any reason not specified in the present Convention, prosecute a person suspected of committing crimes against humanity, it shall, pursuant to an appropriate request, either surrender such a person to another State willing to prosecute fairly and effectively, to the International Criminal Court, if it is a State Party to the Rome Statute, or to a competent international tribunal having jurisdiction over crimes against humanity.

Explanatory Note

1. *Paragraph 1 draws upon Article 9(2) of the Enforced Disappearance Convention.*
2. *Paragraph 2 reflects the principle aut dedere aut judicare.*
3. *With regard to this provision's reference to a State Party surrendering an accused individual to the International Criminal Court, it should be noted that States Parties to the Rome Statute may have such an obligation. States which are not Party to the Rome Statute may have no such obligation, but may cooperate with the International Criminal Court. This provision recognizes that such States may cooperate with the International Criminal Court, but does not impose an independent obligation to do so.*

Article 10

Jurisdiction

1. Persons alleged to be responsible for crimes against humanity shall be tried by a criminal court of the State Party, or by the International Criminal Court, or by an international tribunal having jurisdiction over crimes against humanity.
2. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over persons alleged to be responsible for crimes against humanity:
 - (a) When the offense is committed in any territory under its jurisdiction or onboard a ship or aircraft registered in that State or whenever a person is under the physical control of that State; or
 - (b) When the person alleged to be responsible is one of its nationals; or
 - (c) When the victim is one of its nationals and the State Party considers it appropriate.
3. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offense of crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or

surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

4. The present Convention does not preclude the exercise of any other competent criminal jurisdiction compatible with international law and which is exercised in accordance with national law.
5. For purposes of cooperation, jurisdiction shall be deemed to exist whenever the person responsible for, or alleged to be responsible for, crimes against humanity is present in the State's territory or the State Party is in a position to exercise physical control over him or her.

Explanatory Note

1. *It is understood that the reference in paragraph 1 to "an international tribunal having jurisdiction," is with respect to any State Party that shall have accepted the jurisdiction of such tribunal. This provision also recognizes the principle of complementarity embodied in the Rome Statute.*
2. *Paragraph 2 draws upon the language of Article 9(1) of the Enforced Disappearance Convention. This provision is intended to avoid litigation over the scope of territorial application.*
3. *Paragraph 3 draws upon Article 9(2) of the Enforced Disappearance Convention and Article 5(2) of the Torture Convention.*

4. *Paragraph 4 draws upon Article 9(3) of the Enforced Disappearance Convention.*
5. *Paragraph 5 is intended to ensure that there exists no jurisdictional gap in a State Party's capacity to exercise jurisdiction over a person who is responsible for, or is alleged to be responsible for, crimes against humanity, and would apply to persons transiting a State Party's territory even where the State Party is not in a position to exercise physical control over the person.*

Article 11

Evidence

1. The rules of evidence required for prosecution shall be those in existence under the national laws of the State Party conducting the investigation, prosecution, or post-trial proceedings but shall in no way be less stringent than those that apply in cases of similar gravity under the law of said State Party.
2. States Parties may, for purposes of the present Convention, recognize the validity of evidence obtained by another State Party even when the legal standards and procedure for obtaining such evidence do not conform to the same standards of a given State Party. Such non-conformity shall not be grounds for exclusion of evidence, provided that the evidence is deemed credible and that it is obtained in conformity with international standards of due

process. This paragraph shall apply to all aspects of the present Convention including, but not limited to: extradition, mutual legal assistance, transfer of criminal proceedings, enforcement of judicial orders, transfer and execution of foreign penal sentences, and recognition of foreign penal judgments.

3. In relation to the collection of evidence, States Parties shall endeavor to conform with international standards of due process.

Explanatory Note

1. *Paragraph 1 recognizes that in multilateral and bilateral treaties the law of evidence that applies is the law of the forum State.*
2. *In connection with mutual legal assistance and as currently reflected in Article 13 and Annex 2, it is also possible for requesting States to ask that specific conditions be employed or procedures followed in the taking of evidence by the requested State. Paragraph 2 permits States to recognize the validity of evidence obtained by another State Party, even where the requested conditions or procedures are not followed, provided that the evidence is deemed credible and that it is obtained in conformity with international standards of due process, including the obligation under Article 15 of the Torture Convention, which would exclude any statement made as a result of torture.*

3. *Paragraph 3 obliges States to endeavor to conform to international standards of due process in the collection of evidence.*

Article 12

Extradition

States Parties shall afford one another the greatest measure of assistance in connection with extradition requests made with respect to crimes against humanity in accordance with the provisions of Annex 2.

Explanatory Note

The obligation to extradite or prosecute persons responsible for, or alleged to be responsible for, crimes against humanity is found in Article 8, paragraph 9 and Article 9 of the present Convention. Applicable modalities are provided in Annex 2.

Article 13

Mutual Legal Assistance

States Parties shall afford one another the greatest measure of assistance in connection with investigations, prosecutions and judicial proceedings brought with

respect to crimes against humanity in accordance with the provisions of Annex 3.

Explanatory Note

The modalities by which States Parties are obliged to afford one another mutual legal assistance are outlined in Annex 3, which is drawn from the mutual legal assistance provisions of Article 46 of the UN Convention Against Corruption.

Article 14

Transfer of Criminal Proceedings

States Parties having jurisdiction in a case involving crimes against humanity may engage in a transfer of criminal proceedings in accordance with Annex 4.

Explanatory Note

The modalities by which States Parties may engage in a transfer of criminal proceedings under the present Convention are contained in Annex 4, which is based on the European Transfer of Proceedings Convention and its Protocol.

Article 15

*Transfer of Convicted Persons for the Execution of
Their Sentences*

States Parties may transfer to one another a person convicted of crimes against humanity in their respective legal systems for purposes of the execution of such convicted person's sentence in accordance with the provisions of Annex 5.

Explanatory Note

The modalities by which States Parties may transfer persons convicted of crimes against humanity for the execution of their sentences are outlined in Annex 5, which is based on the European Convention on the Transfer of Sentenced Persons as well as the Inter-American Criminal Sentences Convention.

Article 16

*Enforcement of the Effects of States Parties' Penal
Judgments*

A State Party may recognize and enforce the effects of another State Party's penal judgments in accordance with the provisions of Annex 6.

Explanatory Note

This provision acknowledges that States may recognize and enforce the effects of another State Party's penal judgments. The modalities for such recognition and enforcement are found in Annex 6, which is based on the European Convention on the International Validity of Criminal Judgments.

Article 17

Ne Bis in Idem

A person effectively prosecuted for crimes against humanity and convicted or acquitted cannot be prosecuted by another State Party for the same crime based on the same or substantially same facts underlying the earlier prosecution.

Explanatory Note

- 1. This provision recognizes the ne bis in idem principle, which is found in many international instruments, including Article 14(7) of the ICCPR, Article 20 of the Rome Statute, Article 10 of the ICTY Statute, and Article 9 of the ICTR Statute.*
- 2. This provision recognizes that for the ne bis in idem principle to apply as a bar to a subsequent prosecution, the first prosecution must have been conducted "effectively." Pursuant to Annex 1(b),*

“effectively” means diligently, independently and impartially in a manner not designed to shield the person concerned from criminal responsibility for crimes against humanity and consistent with an intent to bring the person concerned to justice, bearing in mind respect for the principle of the presumption of innocence.

Article 18

Non-refoulement

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that such a person would be in danger of being subjected to crimes against humanity.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Explanatory Note

1. *This provision draws upon Article 16 of the Enforced Disappearance Convention, which is in turn drawn from Article 8 of the Enforced Disappearance*

Declaration. A similar obligation, specific to torture, is found in the Torture Convention.

2. *Paragraph 1 also draws upon Article 3(1) of the Torture Convention.*
3. *The non-refoulement provision of the present Convention is limited to situations involving crimes against humanity because such crimes form the core subject matter of the present Convention. In this regard, the present Convention follows the approach of the Enforced Disappearance Convention and the Torture Convention.*

Article 19

Institutional Mechanisms

A. Conference of States Parties

1. A Conference of States Parties to the present Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in the present Convention and to promote and review its implementation.
2. The Secretary-General of the United Nations shall convene the Conference of States Parties not later than one year following the entry into force of the present Convention. Thereafter, regular meetings of the Conference of States Parties shall be held every

three years. With regard to the first convening of the Conference of States Parties by the Secretary-General of the United Nations, the Secretary-General shall provide the necessary secretariat services to the Conference of States Parties to the Convention. The secretariat provided by the Secretary-General of the United Nations shall:

- (a) Assist the Conference of States Parties in carrying out the activities set forth in this article and make arrangements and provide the necessary services for the sessions of the Conference of States Parties;
 - (b) Upon request, assist States Parties in providing information to the Conference of States Parties as envisaged in paragraphs 5 and 6; and
 - (c) Ensure the necessary coordination with the secretariats of relevant international and regional organizations.
3. Each State Party shall have one representative in the Conference who may be accompanied by alternates and advisers. The Conference of States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers and the payment of expenses incurred in carrying out those activities.

B. Committee

4. For the purpose of achieving the objectives set forth in paragraph 1 of this article, the Conference of States Parties shall establish the “Committee Established Pursuant to the International Convention on the Prevention and Punishment of Crimes Against Humanity” (the Committee).
5. The Committee shall have ten members. The members of the Committee shall be experts in matters relevant to the present Convention who are designated by the States Parties and elected by the Conference of States Parties. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years. Immediately after the first election, the names of these five members shall be chosen by lot in a manner designated by the Conference of States Parties.
6. The Committee shall establish its own rules of procedure and shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1, including:
 - (a) Facilitating activities by and between States Parties under the present Convention;
 - (b) Facilitating the exchange of information among States Parties on successful practices

- for preventing and punishing crimes against humanity;
- (c) Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations;
 - (d) Making appropriate use of relevant information produced by other international and regional mechanisms for preventing and punishing crimes against humanity in order to avoid unnecessary duplication of work;
 - (e) Making recommendations to improve the present Convention and its implementation;
 - (f) Taking note of the technical assistance requirements of States Parties with regard to the implementation of the present Convention and recommending any action it may deem necessary in that respect;
 - (g) Establishing financial rules and regulations for the functioning of the Committee and the Secretariat; and
 - (h) Managing the Voluntary Trust Fund established by the States Parties pursuant to paragraph 14.
7. For the purpose of paragraph 6, the Committee shall acquire the necessary knowledge of the measures taken by States Parties in implementing the present

Convention and the difficulties encountered by them in doing so through information provided by States Parties and through such supplemental review mechanisms as may be established by the Committee.

8. The Committee shall examine the most effective way of receiving and acting upon information, including, *inter alia*, information received from States Parties and from competent international organizations. Input received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the Committee may also be considered. Each State Party shall provide the Committee with information on its programs, plans and practices to implement the present Convention, including:
 - (a) The adoption of national implementing legislation;
 - (b) The establishment of administrative mechanisms fulfilling the prevention requirements contained in the present Convention;
 - (c) Reports on data gathering regarding its obligations under the present Convention including, but not limited to, the number of allegations, investigations, prosecutions, convictions, extraditions and mutual legal assistance requests.

9. The information provided by the States Parties shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them on its own initiative or at the request of the Committee. The Committee may also request States Parties to provide additional information on the implementation of the present Convention.

10. The Committee shall establish a permanent Secretariat to facilitate its activities, procedures and methods of work to achieve the objectives set forth in paragraphs 1, 5, 6 and 7. The Committee may establish such other subsidiary bodies as may be necessary.

C. Secretariat

11. The Secretariat's functions shall be:
 - (a) Providing technical assistance to States in the process of acceding to the present Convention;
 - (b) Providing technical assistance, including appropriate capacity building assistance, to States Parties in fulfilling their obligations under the present Convention;
 - (c) Disseminating information between States Parties;

- (d) Facilitating mutual legal assistance and other aspects of cooperation between States Parties, including facilitating cooperation in matters involving the appearance of witnesses and experts in judicial proceedings, and in effectively protecting such persons;
- (e) Receiving and compiling information from States Parties as required by the Committee; and
- (f) Ensuring the necessary coordination with the secretariats of relevant international and regional organizations.

12. The Secretariat shall be headquartered at _____.

D. Expenses

13. The expenses of the Conference of States Parties, the Committee, the Secretariat, and any other subsidiary bodies shall be provided from the following sources:
- (a) Contributions of States Parties assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based;
 - (b) Funds contributed on a voluntary basis by governments, inter-governmental organi-

zations, non-governmental organizations, private organizations, foundations, and individuals.

E. Voluntary Trust Fund

14. The States Parties shall establish a Voluntary Trust Fund managed by the Committee to provide States Parties with technical assistance and capacity building needed in support of efforts to carry out the obligations arising under the present Convention.

Explanatory Note

1. *This article draws heavily upon Articles 112, 116 and 117 of the Rome Statute, Articles 63 and 64 of the UN Convention Against Corruption, and Articles 26 and 29 of the Enforced Disappearance Convention.*
2. *Paragraph 2 of this provision will be subject to approval by the competent organs of the United Nations, including reimbursement by the States Parties to the United Nations for expenses incurred by the organization.*
3. *The experience of States Parties with this body and its functions will determine how it will evolve in the future and what role it will assume over and above the mandate mentioned in the Convention such as fact-finding for purposes of developing an early warning system.*

4. *With regard to paragraph 12, an appropriate Headquarters Agreement will need to be negotiated with the host country, subject to approval by the Conference of States Parties.*

Article 20

Federal States

The provisions of the present Convention shall apply to all parts of federal States without any limitations or exceptions.

Explanatory Note

This language is from Article 41 of the Enforced Disappearance Convention.

Article 21

Signature, Ratification, Acceptance, Approval, or Accession

1. The present Convention shall be open for signature by all States at _____ until _____.
2. The present Convention shall be subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or

approval shall be deposited with the Secretary-General of the United Nations.

3. The present Convention shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Explanatory Note

This article draws upon Article 125 of the Rome Statute.

Article 22

Entry into Force

1. The present Convention shall enter into force on the thirtieth (30th) day following the date of deposit of the twentieth (20th) instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving, or acceding to the present Convention after the deposit of the twentieth (20th) instrument of ratification, acceptance, approval, or accession, the Convention shall enter into force on the thirtieth (30th) day after the deposit by such State of its instrument of ratification, acceptance, approval, or accession.

Explanatory Note

Paragraphs 1 and 2 draw upon Article 126 of the Rome Statute.

Article 23

Reservations

No reservations may be made to the present Convention.

Explanatory Note

- 1. This language is from Article 120 of the Rome Statute.*
- 2. It is understood that national legislative systems vary and that these variances will apply to modalities of *aut dedere aut judicare* and that States may make declarations about their respective national legal systems and procedures. This applies particularly to Articles 9, 10, 11, 12, 13, 14, 15, and 16 of the present Convention.*

Article 24

Amendment

1. Any State Party to the present Convention may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Conference of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Conference may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Conference of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Amendments to the present Convention shall enter into force one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by two-thirds of the States Parties and shall be binding on those States Parties that have accepted them; other States Parties who have not accepted the amendments shall continue to be bound by the provisions of the present Convention and any earlier amendments that they have accepted.

5. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Conference of States Parties or at a Review Conference.

Explanatory Note

This article draws heavily upon Article 121 of the Rome Statute.

Article 25

Interpretation

The terms of the present Convention shall also be interpreted in the light of internationally recognized human rights standards and norms.

Explanatory Note

It is self-evident that the customary international law of treaty interpretation applies (codified in the Vienna Convention on the Law of Treaties). This article is also intended to ensure that the terms of the present Convention are interpreted in accordance with the regional human rights obligations of States Parties under the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights, as well as in accordance with specific obligations established by

treaty bodies with respect to different human rights conventions.

Article 26

Dispute Settlement Between States Parties

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention, including those relating to the responsibility of a State for alleged breaches thereof, that cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice for a final and binding decision by a request in conformity with the Statute of the Court.

Explanatory Note

This provision draws upon Article 30(1) of the Torture Convention, Article 42(1) of the Enforced Disappearance Convention, and Article IX of the Genocide Convention.

Article 27

Authentic Texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

Explanatory Note

This language is from Article 128 of the Rome Statute.

Annex 1
Use of Terms

For the purposes of the present Convention:

- (a) “Fair,” “fairly” or “fairness” means in accordance with norms of due process recognized by international law, consistent with the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights;
- (b) “Effective,” “effectively” or “effectiveness” means diligently, independently and impartially in a manner not designed to shield the person concerned from criminal responsibility for crimes against humanity and consistent with an intent to bring the person concerned to justice, bearing in mind respect for the principle of the presumption of innocence.
- (c) “Person” means a natural person or legal entity.

Explanatory Note

The definitions of “fair” and “effective” in paragraphs (a) and (b) are designed to ensure that States may not use sham investigations or legal proceedings to thwart their obligations to investigate, prosecute or extradite. The definition in paragraph (b) draws heavily upon the ne bis in idem principle articulated in Article 10 of the ICTY Statute and Article 20 of the Rome Statute.

Annex 2

Extradition

A. Crimes Against Humanity as Extraditable Offenses

1. Crimes against humanity shall be deemed to be included as an extraditable offense in any extradition treaty existing between States Parties before the entry into force of the present Convention.
2. States Parties undertake to include crimes against humanity as an extraditable offense in any extradition treaty subsequently to be concluded between them.

B. Legal Basis for Extradition

3. In the absence of relevant national legislation or other extradition relationship, States Parties shall consider the present Convention as the legal basis for extradition in order to fulfill their obligation to prosecute or extradite persons alleged to be responsible for crimes against humanity pursuant to Article 8, paragraph 9 and Article 9.

C. Modalities of Extradition

4. In the absence of relevant national legislation or other extradition relationship, States Parties may use all or some of the following modalities provided in this Annex.

D. Grounds for Refusal of Extradition

5. For the purposes of extradition between States Parties, crimes against humanity shall not be regarded as a political offense or as an offense connected with a political offense. Accordingly, a request for extradition for crimes against humanity may not be refused on this ground alone, nor shall extradition be barred by claims of official capacity subject to Article 6, paragraph 1.
6. It shall be grounds for denial of extradition that the person sought is being tried for crimes against humanity or for another crime under the laws of the requested State based on facts which constitute one or more of the constituent acts listed in Article 3, paragraph 1, or that the person sought has already been tried for such crime or crimes and acquitted or convicted, and has fulfilled the penalty for said conviction. It shall also be grounds for denial of extradition if the requested State Party ascertains that the person sought for extradition may be subjected to crimes against humanity in the requesting State as provided for in Article 18.
7. It shall be grounds for denial of extradition that the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's right to a fair and impartial trial may be prejudiced for any of those reasons.

8. It shall be grounds for denial of extradition that the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defense, and the person has not or will not have the opportunity to have the case retried in his or her presence.
9. It shall be grounds for denial of extradition that the person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 14 of the International Covenant on Civil and Political Rights.
10. Extradition may be refused if the offense of crimes against humanity carries a penalty not provided for in the requested State, unless the requesting State gives such assurance as the requested State considers sufficient that the penalty not provided for in the requested State will not be imposed or, if imposed, will not be carried out.

E. Rule of Specialty

11. No person extradited for crimes against humanity shall be tried in the requesting State for any other crime than that for which extradition was granted unless the requested State or person extradited so consents.

F. Multiple Requests for Extradition

12. In cases of multiple requests for extradition, the State Party in whose territory the person alleged to be responsible for crimes against humanity has been found may take into consideration the following factors in determining priority:
- (a) The territory where one or more of the constitutive acts considered part of the crime has taken place;
 - (b) The nationality of the offender(s);
 - (c) The nationality of the victim(s); and
 - (d) The forum most likely to have the greater ability and effectiveness in carrying out the prosecution, and which provides greater fairness and impartiality.

Explanatory Note

1. *Paragraph 1 draws upon Article 13(2) of the Enforced Disappearance Convention.*
2. *Paragraph 2 draws upon Article 13(3) of the Enforced Disappearance Convention.*
3. *Paragraph 3 ensures that, in the absence of relevant national legislation or an existing bilateral or multilateral extradition relationship, the present Convention shall provide the legal basis upon which*

a State Party may fulfill its obligation to extradite or prosecute in accordance with Article 8, paragraph 9 and Article 9.

4. *Paragraph 4 ensures that, in the absence of relevant national legislation or an existing bilateral or multilateral extradition relationship, the present Convention may define the modalities by which a State Party may fulfill its obligation to extradite or prosecute in accordance with Article 8, paragraph 9 and Article 9.*
5. *Paragraph 5 draws upon Article 13(1) of the Enforced Disappearance Convention with regard to political offenses. With regard to claims of official capacity, this paragraph is consistent with Article 6, paragraph 1 of the present Convention, which precludes any official capacity as an applicable defense.*
6. *With regard to paragraph 6, in order to uphold the substance of the principle ne bis in idem, it should not matter whether a State or a State Party has tried a person. In any event, the requested State will have to determine whether the prosecution was fair and effective.*
7. *Paragraph 7 draws upon Article 3(b) of the UN Model Treaty on Extradition.*
8. *Paragraph 8 draws upon Article 3(g) of the UN Model Treaty on Extradition.*

9. *Paragraph 9 is drawn upon Article 3(f) of the UN Model Treaty on Extradition.*
10. *Paragraph 10 is similar to, but broader than, Article 4(d) of the UN Model Treaty on Extradition, and recognizes that States may have differing obligations with respect to regional human rights treaties.*
11. *Paragraphs 6 through 9 provide mandatory grounds for refusal of extradition, while paragraph 10 provides an optional ground for refusal. Potential additional optional grounds for refusal are provided in the UN Model Treaty on Extradition, Article 4.*

Annex 3

Mutual Legal Assistance

1. Legal assistance between States Parties shall be afforded to the fullest extent possible under relevant laws, treaties, agreements, and arrangements of the requested State Party and may be afforded on the basis of the present Convention and without the need for reliance on a bilateral treaty or national legislation.

A. Types of Mutual Legal Assistance

2. Legal assistance to be afforded in accordance with this Annex may be requested for any of the following purposes:
 - (a) Taking evidence or statements from persons;
 - (b) Effecting service of judicial documents;
 - (c) Executing searches and seizures, and freezing of assets;
 - (d) Examining objects and sites;
 - (e) Providing information, evidentiary items and expert evaluations;
 - (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

- (g) Identifying or tracing proceeds of crime, property instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

B. Transmission of Information

3. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to the present Convention.
4. The transmission of information pursuant to paragraph 3 of this Annex shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in

its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

C. Obligations Under Other Applicable Treaties

5. The provisions of this Annex shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

D. Transfer of Detained Persons

6. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to crimes against humanity may be transferred if the following conditions are met:
 - (a) The person freely gives his or her informed consent;
 - (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties deem appropriate.

E. Form of Requests for Mutual Legal Assistance

7. Requests for legal assistance shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

8. A request for legal assistance shall contain:
 - (a) The identity of the authority making the request;

 - (b) The subject matter and nature of the investigation, prosecution or judicial proceedings to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceedings;

 - (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
 - (e) Where possible, the identity, location and nationality of any person concerned; and
 - (f) The purpose for which the evidence, information or action is sought.
9. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

F. Execution of Requests for Mutual Legal Assistance

10. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary with the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

G. Witnesses

11. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the

request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

H. Limited Use of Information

12. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

I. Refusal of Requests for Mutual Legal Assistance

13. States Parties shall not decline to render mutual legal assistance pursuant to this Annex on the ground of bank secrecy.

14. Legal assistance may be refused if the request is not made in conformity with the provisions of this Annex.
15. Legal assistance may not be refused based upon claims of official capacity subject to Article 6, paragraph 1, or that the crime was of a political nature.
16. Legal assistance shall be refused if the person who is the subject of the request is being tried for crimes against humanity or for another crime under the laws of the requested State based on facts which constitute one or more of the constituent acts listed in Article 3, paragraph 1, or if the person has already been tried for such crime or crimes and acquitted or convicted, and has fulfilled the penalty for said conviction. It shall also be grounds for refusal of mutual legal assistance if the requested State Party ascertains that the person who is the subject of the request may be subjected to crimes against humanity in the requesting State.

Explanatory Note

1. *Much of the text of this Annex draws upon the mutual legal assistance provisions of Article 46 of the UN Convention Against Corruption.*
2. *For additional modalities of effectuating mutual legal assistance, States Parties may look to model legislation such as the UN Model Treaty on Mutual*

Assistance in Criminal Matters or to the relevant conventions of regional bodies.

Annex 4

Transfer of Criminal Proceedings

1. Whenever a State Party, having jurisdiction over a person charged with crimes against humanity, agrees with another State Party, also having jurisdiction pursuant to Article 10, to cede jurisdiction and to transfer the record of the proceedings undertaken to the requesting State Party, the transfer procedure shall be established by agreement between their respective competent authorities. Such a procedure shall be based on the present Convention and shall not require the existence of a bilateral treaty between the respective States Parties or national legislation.
2. A transfer may occur when it is in the best interest of justice, and when it enhances fair and effective prosecution.
3. A State Party may request another State Party to take over proceedings in any one or more of the following cases:
 - (a) If the suspected person is ordinarily resident in the requested State;
 - (b) If the suspected person is a national of the requested State or if that State is his or her State of origin;
 - (c) If the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

- (d) If proceedings for the same or other offenses are being taken against the suspected person in the requested State;
- (e) If it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;
- (f) If it considers that the enforcement in the requested State of a sentence, if one were passed, is likely to improve the prospects for the social rehabilitation of the person sentenced;
- (g) If it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his or her presence in person at the hearing of proceedings in the requested State can be ensured;
- (h) If it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so.

Explanatory Note

1. *This provision draws upon the European Transfer of Proceedings Convention and includes in paragraph 3 the situations listed in Article 8 of that convention*

defining when States may make such transfer requests.

- 2. Grounds for refusal have not been included in light of the diversity of national legal systems.*

Annex 5

*Transfer of Convicted Persons for the Execution of
Their Sentences*

1. States Parties may transfer to one another a person convicted of crimes against humanity in their respective legal systems for purposes of the execution of such convicted person's sentence on the basis of the present Convention and without the need for a bilateral treaty between the States Parties or national legislation.
2. The transfer shall require the consent of the transferring State Party, the transferred-to State Party, and the person to be transferred, who shall waive any rights to challenge his or her conviction in the transferring State, along with the agreement of the transferred-to State Party to execute the sentence as decided in the transferring State in accordance with its penal laws and applicable regulations.
3. Conditional release and other measures provided for in the transferred-to State shall be in accordance with its laws and applicable regulations. No pardon or other similar measure of clemency, however, shall be extended to the transferred person without the consent of the transferring State.

Explanatory Note

This provision draws upon the Convention on the Transfer of Sentenced Persons as well as the Inter-

American Criminal Sentences Convention. States Parties may also wish to look to model legislation of relevant organizations, to regional directives, and to sub-regional agreements.

Annex 6

Enforcement of the Effects of States Parties' Penal Judgments

1. Recognition and enforcement of a State Party's penal judgment shall be based on the present Convention and shall not require a bilateral treaty between the respective States Parties, or national legislation, other than that which may be required under the Constitution or national law of each State Party to implement the present Convention.
2. Cooperation and assistance between States Parties, particularly with regards to giving effect to Annexes 3 through 6, and which, in accordance with the laws of a given State Party, are barred if predicated on a foreign penal judgment or which require a treaty or national legislation having for effect the recognition of a foreign penal judgment, shall instead rely on the present Convention with respect to the enforcement or reliance upon a foreign penal judgment.
3. A State Party may, however, refuse to execute, enforce, give effect to, or rely on another State Party's penal judgments if the judgment in question was obtained by fraud or duress, or was issued on the basis of procedures that violate international standards of due process, or are in conflict with domestic public policy.

Explanatory Note

This provision draws upon the European Convention on the International Validity of Criminal Judgments.

**International Convention on the Prevention and
Punishment of Crimes Against Humanity**

*Table of Abbreviations and Instruments Cited in the
Convention and Explanatory Notes*

African Charter	African [Banjul] Charter on Human and People's Rights , 1982, 1520 U.N.T.S. 217 (entry into force Oct. 21, 1986).
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> , 1973, G.A. Res. 3068 (XXVIII) of Nov. 30, 1973, UN Doc. A/9030, 1015 U.N.T.S. 243 (entry into force July 18, 1976).
American Convention on Human Rights	American Convention on Human Rights , 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entry into force July 18, 1978).
CAH	Crime(s) Against Humanity.
Comprehensive History of the Proposed CAH Convention	<p>Leila Nadya Sadat, <i>A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity</i>, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Cambridge Univ. Press, 2011).</p> <p>For the website of the Washington University School of Law Whitney R. Harris World Law Institute Crimes Against Humanity Initiative, see http://law.wustl.edu/crimesagainsthumanity.</p>

<p>European Convention on the Transfer of Sentenced Persons</p>	<p>Convention on the Transfer of Sentenced Persons, 1983, Europ. T.S. No. 112, Strasbourg (Mar. 21, 1983) (entry into force July 1, 1985).</p>
<p>ECHR</p>	<p>European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222, Rome (Sep. 4, 1950) (entry into force Sep. 3, 1953).</p>
<p>Enforced Disappearance Convention</p>	<p>International Convention on the Protection of All Persons from Enforced Disappearance, 2006, G.A. Res. 61/177, UN GAOR 61st Sess., Supp. No. 49, at 207, UN Doc. A/RES/61/177 (Dec. 20, 2006) (not yet in force).</p>
<p>Enforced Disappearance Declaration</p>	<p>Declaration on the Protection of All Persons from Enforced Disappearance, 1992, G.A. Res. 47/133, UN GAOR 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992).</p>
<p>European Convention On the International Validity of Criminal Judgments</p>	<p>European Convention on the International Validity of Criminal Judgments, 1970, Europ. T.S. No. 70, Criminal Judgments, The Hague, (May 28, 1970) (entry into force July 26, 1974).</p>
<p>European Evidence Warrant</p>	<p>Council Framework Decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 2008, O.J. (L 350) 72, Council Framework Decision 2008/978/JHA (entry into force Feb. 8, 2009).</p>

European Mutual Assistance Convention	European Convention on Mutual Assistance in Criminal Matters , 1959, Europ. T.S. No. 30, Mutual Assistance in Criminal Matters, Strasbourg, (April 20, 1959) (entry into force 12 June 1962).
European Statutory Limitations Convention	European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes , 1974, Europ. T.S. No. 82, Crimes against humanity and War Crimes, Strasbourg (Jan. 25, 1974) (entry into force June 26, 2003).
European Transfer of Proceedings Convention	European Convention on the Transfer of Proceedings in Criminal Matters , 1972, Europ. T.S. No. 73, Criminal Proceedings, Strasbourg, (May 15, 1972) (entry into force Mar. 30, 1978).
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide , 1951, G.A. Res. 260 (III), UN Doc. No. A/180, 78 U.N.T.S. 277 (Dec. 9, 1948) (entry into force Jan. 12, 1951).
Genocide Prevention Task Force Report	Madeleine Albright & William Cohen, Preventing Genocide: A Blueprint for U.S. Policymakers (2008) , <i>available at</i> : http://www.usip.org/genocide_taskforce/report.html .
Hijacking Convention	Convention for the Suppression of Unlawful Seizure of Aircraft , 1970, (The Hague, Dec. 18, 1970), T.I.A.S. No. 7192, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entry into force Oct. 14, 1971).
ICCPR	International Covenant on Civil and Political Rights , 1976, G.A. Res. 2200 (XXI), Supp. No. 16, UN Doc. A/6316 (Dec. 16, 1966) (entry into force Mar. 23, 1976).
ICJ	International Court of Justice

<p>ICTR Statute</p>	<p>Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, 1994, S.C.Res. 955, UN Doc. S/RES/955 (Nov. 8, 1994), as amended by S.C.Res. 1431, UN Doc. S/RES/1431 (Aug. 14, 2002).</p>
<p>ICTY Statute</p>	<p>Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 at 36, annex (1993) & S/25704/Add. 1 (1993), adopted by Security Council on May 25, 1993, UN Doc. S/RES/827 (1993).</p>
<p>ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts</p>	<p>Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, 2001, UN GAOR, 56th Sess., UN Doc. A/56/10 (2001).</p>
<p>Inter-American Criminal Sentences Convention</p>	<p>Inter-American Convention on Serving Criminal Sentences Abroad, 1993, O.A.S.T.S. No. 76 (June 9, 1993) (entry into force April 13, 1996).</p>
<p>Inter-American Extradition Convention</p>	<p>Inter-American Convention on Extradition, 1981, O.A.S.T.S. No. 60 (Feb. 25, 1981) (entry into force Mar. 28, 1992).</p>

Inter-American Mutual Assistance Convention	Inter-American Convention on Mutual Assistance in Criminal Matters , 1992, O.A.S.T.S. No. 75 (May 23, 1992) (entry into force April 14, 1996).
Nuclear Terrorism Convention	International Convention for the Suppression of Acts of Nuclear Terrorism , 2005, G.A. Res. 59/290 (LIX), Annex, UN Doc. A/59/766 (April 13, 2005) (entry into force July 7, 2007).
Nürnberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal , 1950, Int'l Law Comm'n, delivered to the General Assembly, UN Doc. A/1316 (1950).
Rabat Declaration	Convention on Extradition and Mutual Legal Assistance in Counter-Terrorism , 2008, annex to the letter dated 14 August 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Morocco to the United Nations addressed to the Secretary-General. A/62/939 – S/2008/567 (08-47023) (not in force).
Rome Statute	Rome Statute of the International Criminal Court , 1998, 2187 U.N.T.S. 90 (entry into force July 1, 2002).
Statutory Limitations Convention	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity , 1970, G.A. Res. 2391 (XXIII) UN Doc. A/7218, 754 U.N.T.S. 73 (Nov. 26, 1968) (entry into force Nov. 11, 1970).
Terrorist Bombings Convention	International Convention for the Suppression of Terrorist Bombings , 1997, G.A. Res. 52/164, UN Doc. A/RES/52/164 (Jan. 12, 1998) (entry into force May 23, 2001).

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Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment , 1987, G.A. Res. 39/46, annex, UN GAOR, 39 th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1984) (entry into force June 26, 1987).
UN Charter	Charter of the United Nations , 1945, 1 U.N.T.S. 16 (Oct. 24, 1945).
UN Model Assistance Treaty	United Nations Model Treaty on Mutual Assistance in Criminal Matters , 1990, G.A. Res. 45/117, UN Doc. A/RES/45/117 (Dec. 14, 1990).
UN Convention Against Corruption	United Nations Convention Against Corruption , 2003, G.A. Res. 58/4, UN Doc. A/58/422 (Oct. 31, 2003) (entry into force Dec. 14, 2005).
UN Convention Against Transnational Organized Crime	United Nations Convention Against Transnational Organized Crime , 2001, G.A. Res. 25/55, annex I, UN GAOR, 55 th Sess., Supp. No. 49, at 44, UN Doc. A/45/49 (Vol. I) (2001) (entry into force Sept. 29, 2003).
UN Model Extradition Treaty	United Nations Model Treaty on Extradition , 1990, G.A. Res. 45/116, Annex, UN Doc. A/RES/45/49 (Dec. 14, 1990).
World Summit Outcome Document	General Assembly Resolution 60/1: 2005 World Summit Outcome , 2005, G.A. Res. A/RES/60/1, UN Doc. A/RES/60/1 (Oct. 24, 2005).

Conclusion

Conclusion

Elizabeth Andersen*

For five years, the international prosecutors who have led international accountability efforts since World War II have made their way, at the end of August, to a quiet retreat along the shores of Lake Chautauqua. This annual gathering has become an important opportunity for this community to reflect on persistent challenges; record achievements, new developments, and lessons learned; and inspire a next generation committed to justice, accountability, and peace. The Proceedings of these International Humanitarian Law Dialogs—year to year, an interesting mix of same and different—serve as a valuable historical marker in the evolving international justice field, as this volume amply illustrates.

Consistent with past Dialogs, the prosecutors highlighted the very significant challenges that plague efforts at accountability for the very worst atrocities. Evidentiary challenges are a constant in these difficult cases. In his impromptu keynote, Andrew Cayley graphically illustrated the challenges of early prosecutions of the Srebrenica massacres, the painstaking process of piecing together evidence of thousands of killings from satellite photos, radio intercepts, exhumations of “commingled” remains in mass graves, and testimony of the tragically few survivors. Daryl Mundis described the daunting task of evaluating “billions” of communication records at the

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Special Tribunal for Lebanon. And Andrew Cayley again, this time putting on his Cambodia Tribunal hat, explained the challenge of prosecuting 30-year-old crimes with aging witnesses and defendants.

Another persistent theme, heard again in 2011, is the lack of adequate resources that dogs these accountability efforts. Dependent on voluntary contributions by states, in an era of economic distress and in the face of increasing donor fatigue, many of the prosecutors described funding shortages that make meeting ambitious timelines for prosecutions nearly impossible. It is striking that as I write this conclusion—nearly one year later—none of the dates projected by the prosecutors in August 2011 for completion of their prosecutions or issuance of decisions has been met.

The most serious challenge reported by the prosecutors year after year is the difficulty of obtaining arrests and other forms of state cooperation. Fatou Bensouda reported an impressive array of new investigations and cases at the International Criminal Court; but the number of accused who remain at large and even flaunt their impunity is troubling. In the inaugural Catherine B. Fite lecture, Diane Amann underscored the difficult politics of accountability that too often impede state cooperation and arrest.

The very sameness of these difficulties, relayed by the prosecutors year after year, might cause one to despair that justice can ever be found. But this is where the Dialogs play an important part, providing an opportunity annually to take stock and see that, despite

the seemingly insurmountable challenges, enormous gains are being made.

First among the positive developments noted at this meeting, with its focus on crimes against humanity, was the development of jurisprudence around such crimes. The Annual Heintz award honored H. W. William Caming and Benjamin Ferencz, two giants of the Nuremberg Tribunal, where crimes against humanity were first prosecuted. The achievement of those first prosecutions cannot be overstated, and the development of crimes against humanity law through the work of the various modern-day tribunals described at Chautauqua is impressive. David Scheffer outlined the further development and application of that law—in civil actions under the United States’ Alien Tort Statute, challenging corporations for their alleged complicity in expulsions, torture, and other crimes against humanity. But most exciting and promising at the 2011 Dialogs was the presentation by William Schabas and Leila Sadat of the Crimes Against Humanity Initiative, their efforts to develop a crimes against humanity convention, to codify this body of law and, importantly, establish effective prevention and enforcement mechanisms.

A second new and important note sounded at the 2011 Dialogs and in these Proceedings is “transition.” As a number of the accountability efforts begin to come to a successful end, the prosecutors are increasingly focused on transferring cases and records to residual mechanisms and domestic courts. They reported important gains in capacity-building and other efforts to leave a lasting legacy that will help rebuild the rule of

law in their countries of operation. The most important development reported in 2011 in this respect was that Rwanda's judicial system had finally been deemed adequate to receive cases transferred from the International Criminal Tribunal for Rwanda. Also encouraging was Jim Johnson's report of plans for a Peace Museum at the site of the Special Court for Sierra Leone, and of the impact that former Special Court staff members were having in new leadership roles in Sierra Leone. Meanwhile, looking forward to how best divide prosecutorial responsibility between the International Criminal Court and domestic jurisdictions, Mark Ellis's thoughtful paper provides an interesting new idea for mediating competing interests under the complementarity principle codified in the Rome Statute.

Finally, the 2011 Dialogs marked an important achievement in just the area often most challenging—arrest. For four years, the prosecutors had gathered at Chautauqua and penned a Declaration that included a list of fugitives from justice before the international tribunals, and always among those names was Ratko Mladić, mastermind of the genocide and crimes against humanity committed at Srebrenica. In early 2011, Mladić was finally arrested and transferred to the tribunal in The Hague. At long last, with all indictees of the Yugoslavia Tribunal apprehended, a powerful signal had been sent to perpetrators of atrocities the world over.

In celebrating such progress, the Dialogs also serves the important purpose of inspiring the next generation to carry the accountability project forward. This is done formally with the annual Impunity Watch essay contest

prize, this year presented to Kerry McPhee, for her thoughtful essay on “A Moral Responsibility,” but it happens informally at Chautauqua as well. A special feature of the conference is the easy mix of many of the most senior experts and practitioners in the field with an eager cadre of student acolytes. In this remote setting, hierarchies of the “real world” fall away, and many an international prosecutor can be seen on the porch or in the dining room, casually sharing coffee and personal insights with an aspiring young lawyer. Motivating and informing this next generation of “upstanders,” as McPhee calls them—those who stand up to the injustices of the world—is perhaps the most important contribution of the Dialogs and these Proceedings.

It is in this hope that the American Society of International Law, whose mission is to promote greater understanding and use of international law, is so pleased to co-sponsor the Dialogs and publish these Proceedings. We could not do so without the assistance of ASIL Fellow Shannon Powers, who served as managing editor of the volume. We are also much indebted to all those who make the Dialogs possible. We are especially grateful to David Crane, for the vision and leadership he had to launch the Dialogs and with which each year he organizes this special gathering. Thanks are due too to the other co-sponsoring organizations and institutions, especially Chautauqua Institution and the Jackson Center, with the inestimable Carol Drake, whose organizational skills not even a hurricane can confound!

The collective effort to convene the Dialogs is important. Annually, it provides a unique opportunity to recognize and celebrate our successes while renewing our commitment to meeting the persistent challenges and bringing new thinking to the task. We hope that readers of these Proceedings will feel the Chautauqua spirit and eagerly join the conversation.

Appendices

Appendix I

Agenda of the Fifth International Humanitarian Law Dialogs

Sunday, August 28 through Tuesday, August 30, 2011

“Widespread and Systematic!” Crimes Against Humanity in the Shadow of Modern International Criminal Law

The fifth annual International Humanitarian Law Dialogs, co-sponsored by the Robert H. Jackson Center at the Chautauqua Institution, is an historic gathering of renowned international prosecutors from Nuremberg through present day and leading professionals in the international criminal law field. This unique three-day event, held August 28-30, will allow participants and the public to engage in meaningful dialog concerning past and contemporary crimes against humanity, and the role of modern international criminal law.

Sunday, August 28

Arrival of the Prosecutors & Participants

2:00 p.m. **Screening of The Response**, followed by a panel discussion with members of the cast.

Monday, August 29

7:00 a.m. **Breakfast.** 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.** Drew Beiter and Warren Popp, Editor-in- Chief of “Impunity Watch.” Fletcher Hall.
- 9:20 a.m. **Keynote Address.** Amb. Hans Corell, Former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations. Introduced by Professor Leila Nadya Sadat. Fletcher Hall.
- 10:00 a.m. **Break.**
- 10:30 a.m. **Update from the Current Prosecutors.** Moderated by Professor Mark Drumbl. Fletcher Hall.
- 12:30 p.m. **Lunch.** Athenaeum Hotel.
- 1:30 p.m. **Keynote Address.** Amb. David Scheffer, Mayer Brown/Robert A. Helman Professor of Law, Director, Center for International Human Rights. Introduced by Professor Michael Scharf. Athenaeum Hotel.

- 2:30 p.m. **Panel on Crimes Against Humanity Initiative.** Moderated by Professor Leila Nadya Sadat. (Panelists: Amb. Hans Corell, Professor William Schabas.) Fletcher Hall.
- 5:30 p.m. **Reception.** Athenaeum Hotel.
- 7:00 p.m. **Dinner.** Athenaeum Hotel.
- 8:00 p.m. **First Annual Katherine B. Fite Lecture.** Professor Diane Marie Amann. Athenaeum Hotel.

Tuesday, August 30

- 7:00 a.m. **Breakfast with the Prosecutors.** Athenaeum Hotel.
- 9:00 a.m. **Drafting of the Fifth Chautauqua Declaration.** (Private – Prosecutors only.)
- 9:00 a.m. **Update on International Criminal Law.** Professor Beth Van Schaack. 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.** Mark Ellis, Executive Director, International Bar Association. Introduced by Professor Mike Newton. Athenaeum Hotel.
- 2:30 p.m. **Issuance of the Fifth Chautauqua Declaration.** Moderated by Professor Diane Marie Amann. Athenaeum Hotel.

Appendix II

The Fifth Chautauqua Declaration August 30, 2011

In the spirit of humanity and peace the assembled international prosecutors and their representatives here at the Chautauqua Institution...

Recognizing the continuing need for justice and the rule of law as a cornerstone to international peace and security;

Underscore that only through the rule of law will peoples of the world be truly free from want and fear and have an ability to freely worship and speak, principles that are the cornerstone of the United Nations Charter;

Note with pride the awarding to H.W. William Caming and Benjamin Ferencz the second annual Joshua Heintz Humanitarian Award for distinguished service to mankind;

Note with satisfaction the handing over to the International Criminal Tribunal for the Former Yugoslavia Ratko Mladic and Goran Hadzic for a fair and open trial; thus signaling to all fugitives from international justice the international community's commitment to bringing them to account;

Note with satisfaction the International Criminal Tribunal for Rwanda's arrest and commencement of

proceedings against fugitive Bernard Munyagishari, the successful application for the referral of Jean Uwinkindi's case to Rwanda for trial, and ongoing efforts to preserve evidence against three additional fugitives for use in future trials;

Note the conclusion of the first trial against a former sitting head of state, Charles Taylor, by the Special Court for Sierra Leone, and the completion of the trial against Thomas Lubanga, the first trial of the International Criminal Court;

Note the issuing of an arrest warrant by the International Criminal Court against Muammar Gadhafi, Saif al Islam, and Abdullah el Sennussi, and call for their arrest and prompt handover to the Court;

Note with satisfaction the issuing of an indictment by the Special Tribunal for Lebanon against four individuals alleged to be involved in the 2005 assassination of former Lebanese Prime Minister Rafik Hariri and others;

Note the commencement of the proceedings against the four most senior living members of the Khmer Rouge regime but also the widespread concern for the independence and integrity of the Extraordinary Chambers of the Courts of Cambodia;

Are aware of the movement by peoples all across the Middle East and elsewhere to establish representative governments, and call on all parties to respect the

humanity involved in these events and to follow the precepts of international humanitarian law;

Further note with continued concern the outstanding arrest warrants issued by international courts and tribunals, requiring the cooperation of state parties and the international community as a whole for their enforcement;

Now do solemnly declare and call upon the international community to keep the spirit of the Nuremberg Principles alive by:

Continuing international support to all nations seeking to adhere to the rule of law and promote accountability in their societies;

Urging all parties to the ongoing armed conflicts in the Middle East to respect international humanitarian law, in particular, by refraining from targeting protected persons and places;

Cooperating with efforts to locate, arrest, and hand over to the various international courts and tribunals those individuals who have been indicted for international crimes wherever found;

Urging States and the international community to end impunity for the gravest of crimes by refusing to include or accept amnesty or immunity clauses in peace agreements;

Urging States and the international community to continue to support international justice by ensuring adequate resourcing of all courts and tribunals and for the residual mechanism of those courts and tribunals whose mandates are coming to an end;

Recognizing the importance of complementarity between the efforts of national prosecuting authorities to enforce their own laws and those of the international courts and tribunals;

Emphasizing that independence of Prosecutors of international criminal courts is essential to the exercise of their mandates and the furtherance of international criminal justice, and urging all States and organizations to recognize and support that independence.

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

Daniel A. Bellemare
Special Tribunal for Lebanon

Hassan Bubacar Jallow
International Criminal Tribunal
for Rwanda

Andrew Cayley
Extraordinary Chambers for the
Courts of Cambodia

Robert Petit
Extraordinary Chambers in the
Courts of Cambodia

Brenda Hollis
Special Court for Sierra Leone

Appendix III

Biographies of the Prosecutors and Participants

Diane Marie Amann

Diane Amann is the Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law and is an expert in the interaction of national, regional, and international regimes in efforts to combat atrocity and cross-border crime. She earned her B.S. from the University of Illinois, her M.A. in Political Science from the University of California, Los Angeles, a J.D. from Northwestern University School of Law, and a Dr.h.c from Utrecht Universiteit in the Netherlands. Professor Amann was a law clerk for Judge Prentice H. Marshall in Chicago and for U.S. Supreme Court Justice John Paul Stevens. She has also served on the Board of Advisors of the National Institute of Military Justice, the Executive Council of the American Council of International Law, and as co- chair of ASIL West. She now teaches Public International Law, International Criminal Law, Constitutional Law, Federal Jurisdiction, Evidence, Criminal Law, Civil Procedure, International Human Rights Law, and Constitutional Criminal Procedure. Professor Amann is also a founding contributor to IntLawGrrls, a blog that focuses on international law, policy, and practice.

Elizabeth Andersen

Elizabeth Andersen is Executive Director and Executive Vice President of the American Society of International Law (ASIL), a position she has held since 2006. Before joining ASIL, Ms. Andersen served as the Executive Director of the American Bar Association's Central European and Eurasian Law Initiative and as Executive Director of Human Rights Watch's Europe and Central Asia Division. Earlier in her career, 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.

James J. Arguin

James Arguin is Chief of the Appeals and Legal Advisory Division within the Office of the Prosecutor at the United Nations International Criminal Tribunal for Rwanda (ICTR). Prior to joining the ICTR in November 2010, Mr. Arguin served as a prosecutor with the United States Department of Justice and Massachusetts Attorney General's Office, where he was appointed Chief of the Appeals Division. Following graduation from George Washington University Law School, Mr. Arguin clerked for a United States District Court judge. He then joined the Boston office of the international law firm now

known as K&L Gates LLP, where he worked as an associate, income partner, equity partner, and, eventually, Chair of the Litigation Department. As a member of the adjunct faculty at New England Law | Boston, Mr. Arguin also taught courses on legal research and writing, and appellate advocacy.

Fatou Bensouda

Fatou Bensouda was elected Deputy Prosecutor of the International Criminal Court by the Assembly of States Parties in September 2004 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 (ICTR) in Arusha, Tanzania. She was also the Senior Legal Advisor and the Head of the Legal Advisory Unit for the ICTR. Prior to joining the ICTR, 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

Serge Brammertz is the Chief 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. Mr. Brammertz has also been published extensively in the areas of global terrorism and organized crime and corruption.

Andrew T. Cayley

Andrew Cayley has served as the International Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia since 2009. He earned his L.L.B and L.L.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.

David M. Crane

David Crane is a Professor of Practice at Syracuse University College of Law, where he also earned the degree of Juris Doctor. He teaches International Criminal Law, International Law, and National Security, as well as the Laws of Armed Conflict. In 2002, he was appointed Chief Prosecutor of the Special Court for Sierra Leone by then Secretary-General of the United Nations, Kofi Annan. Through 2005 Professor Crane prosecuted those who bore the greatest responsibility for crimes against humanity, war crimes, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990's as Chief Prosecutor. He was the first American Chief Prosecutor at an international war crimes tribunal since Justice Robert H. Jackson at Nuremberg in 1945. During his decades of service for the United States government, Professor Crane has held the positions of 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. Professor Crane also advises the Syracuse University College of Law online publication, *Impunity Watch*, which seeks to inform the world of human rights violations in real-time, as well as publish like a traditional law review.

Mark Drumbl

Mark Drumbl, author of *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007)—an important publication presenting a new perspective on how perpetrators of genocide and crimes against humanity should be punished—is the Class of 1975 Alumni Professor at Washington & Lee University, School of Law. Professor Drumbl also serves as Director of the University's Transnational Law Institute. Professor Drumbl received his J.D. in 1994 from the University of Toronto, graduating *summa cum laude*, and holds an LL.M. and J.S.D. from Columbia University. Prior to entering law teaching, Professor Drumbl was judicial clerk to Justice Frank Iacobucci of the Supreme Court of Canada. His practice experience includes international arbitration, commercial litigation, and he was appointed co-counsel for the Canadian Chief-of-Defense-Staff before the Royal Commission investigating military wrongdoing in the U.N. Somalia Mission. Professor Drumbl has published numerous critically-acclaimed legal articles regarding human rights abuses and international humanitarian law. His current book, entitled, *Reimagining Child Soldiers in International*

Law and Policy, will be published by Oxford University Press early in 2012.

Mark Ellis

Mark Ellis is the Executive Director of the International Bar Association (IBA), comprised of 198 national bar associations and 40,000 members from around the world. Prior to joining the IBA, Dr. Ellis served as the first Executive Director of the Central European and Eurasian Law Initiative, which provides legal assistance to twenty-eight countries and the International Criminal Tribunal for the former Yugoslavia (ICTY). Dr. Ellis has also served as Legal Advisor to the Independent International Commission on Kosovo. Dr. Ellis is currently a member of the Advisory Panel to the Defense Counsel for the ICTY. Dr. Ellis earned his J.D. from Florida State University and his Ph.D. in international criminal law from King's College, London. He is the co-recipient of the American Bar Association's World Order Under Law Award, and the recipient of Florida State University's Distinguished Graduate Award. His latest publication—*Sovereignty and Justice: Creating Domestic War Crimes Courts within the Principle of Complementarity*—will be published by Oxford University Press in 2011.

James Johnson

James 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-Partinkirchen, 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 advisor 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.

Daryl Mundis

Daryl Mundis is the Chief of Prosecutions at the Special Tribunal for Lebanon. Prior to joining the STL, he was a senior prosecuting trial attorney with the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia in The Hague. Prior to joining the Office of the Prosecutor in November 1999, he was an Associate Legal Officer in the Chambers of the ICTY President Gabrielle Kirk McDonald, where he worked extensively on matters involving the Security Council and State compliance issues, in addition to providing legal advice on matters of international humanitarian law. Mr. Mundis holds a Ph.D. in international law from the London School of Economics (LSE), University of London; LL.M. with merit (LSE); J.D. with honors in foreign and comparative law (Columbia Law School); Masters in International Affairs (Columbia University School of International and Public Affairs); and B.A. *magna cum laude* in International Studies and Russian Area Studies (Manhattanville College).

Robert Petit

Robert 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 advisor 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 the Special Court for Sierra Leone.

Ambassador Stephen Rapp

Stephen Rapp started as U.S. Ambassador-at-Large for War Crimes Issues in September of 2009. Before this appointment Mr. Rapp was 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

Leila Sadat is the Henry H. Oberschelp Professor of Law at Washington University School of Law. She also is the Director of the Whitney R. Harris World Law Institute at the School of Law. She is 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. 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 L.L.M. from Columbia University School of Law, and a degree from the University of Paris I – Sorbonne (diplôme d'études approfondies).

Beth Van Schaack

Beth Van Schaack joined the Santa Clara Law faculty after working in private practice with Morrison & Forester LLP, where she practiced in the area of commercial law, international law, and human rights. She also served on the United States delegation to the International Criminal Court Review Conference in Kampala, Uganda. Prior to entering private practice, Professor Van Schaack was involved in human rights litigation as the Executive Director and Staff Attorney of

The Center for Justice & Accountability, a non-profit law firm in San Francisco dedicated to the representation of victims of torture and other grave human rights abuses. Professor Van Schaack also clerked with the Office of the Prosecutor of the International Criminal Tribunals for the former Yugoslavia from 1997-98. During the 2009-2010 academic year Professor Van Schaack was a visiting Scholar with the Center on Democracy, Development, and the Rule of Law at Stanford University. In addition to teaching a number of courses on international and humanitarian law at Santa Clara Law, Professor Van Schaack remains a legal advisor for The Documentation Center of Cambodia, a position she has held since 1995.

William Schabas

William 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. degrees in History from the University of Toronto, and his L.L.B., L.L.M., and L.L.D. degrees from the University of Montreal, Canada. He has received honorary degrees from Dalhousie University, and Case Western Reserve University. He has taught at the University of Quebec, McGill University, Queen's University Belfast, the National University of Rwanda and others. Professor Schabas has authored twenty-one books and more than 250 articles in academic journals, primarily in the fields of international human rights and

criminal law. He is also 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

Michael 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 Nongovernmental Organization Public International Law and Policy Group. 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 Professor Scharf served as a Special

Assistant to the Prosecutor of the Cambodia Genocide Tribunal.

Ambassador David J. Scheffer

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 Advisor 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.