

JOAN B. KROC

Distinguished Lecture Series

Stephen J. Rapp

*Achieving Justice for Victims of Genocide,
War Crimes and Crimes Against Humanity*



JOAN B. KROC
INSTITUTE FOR
PEACE & JUSTICE
UNIVERSITY OF SAN DIEGO



Joan B. Kroc Institute for Peace & Justice
Distinguished Lecture Series

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JOAN B. KROC INSTITUTE FOR PEACE & JUSTICE

Joan B. Kroc School of Peace Studies
University of San Diego
San Diego, California

Stephen J. Rapp
*Achieving Justice for Victims of Genocide,
War Crimes and Crimes Against Humanity*

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Fostering Peace, Cultivating Justice,

Creating a Safer World



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JOAN B. KROC INSTITUTE FOR PEACE & JUSTICE



The mission of the Joan B. Kroc Institute for Peace & Justice (IPJ) is to foster peace, cultivate justice and create a safer world. Through education, research and peace-making activities, the IPJ offers programs that advance scholarship and practice in conflict resolution and human rights.

The IPJ, a unit of the University of San Diego's Joan B. Kroc School of Peace Studies, draws on Catholic social teaching that sees peace as inseparable from justice and acts to prevent and resolve conflicts that

threaten local, national and international peace. The IPJ was established in 2000 through a generous gift from the late Joan B. Kroc to the University of San Diego to create an institute for the study and practice of peace and justice. Programming began in early 2001 and the building was dedicated in December 2001 with a conference, "Peacemaking with Justice: Policy for the 21st Century."

The Institute strives, in Joan B. Kroc's words, to "not only talk about peace, but to make peace." In its peacebuilding initiatives, the IPJ works with local partners to help strengthen their efforts to consolidate peace with justice in the communities in which they live. In Nepal, for example, the IPJ continues to work with Nepali groups to support inclusiveness and dialogue in the transition from armed conflict and monarchy to peace and multiparty democracy. In West Africa, the IPJ works with local human rights groups to strengthen their ability to pressure government for much needed reform and accountability.

The Women PeaceMakers Program documents the stories and best practices of international women leaders who are involved in human rights and peacemaking efforts in their home countries.

WorldLink, a year-round educational program for high school students from San Diego and Baja California, connects youth to global affairs.

Community outreach includes speakers, films, art and opportunities for discussion between community members, academics and practitioners on issues of peace and social justice, as well as dialogue with national and international leaders in government, nongovernmental organizations and the military.

In addition to the Joan B. Kroc Institute for Peace & Justice, the Joan B. Kroc School of Peace Studies includes the Trans-Border Institute, which promotes border-related scholarship and an active role for the university in the cross-border community, and a master's program in Peace and Justice Studies to train future leaders in the field.

JOAN B. KROC DISTINGUISHED LECTURE SERIES

Endowed in 2003 by a generous gift to the Joan B. Kroc Institute for Peace & Justice from the late Joan Kroc, the Distinguished Lecture Series is a forum for high-level national and international leaders and policymakers to share their knowledge and perspectives on issues related to peace and justice. The goal of the series is to deepen understanding of how to prevent and resolve conflict and promote peace with justice.

The Distinguished Lecture Series offers the community at large an opportunity to engage with leaders who are working to forge new dialogues with parties in conflict and who seek to answer the question of how to create an enduring peace for tomorrow. The series, which is held at the Joan B. Kroc Institute for Peace & Justice at the University of San Diego's Joan B. Kroc School of Peace Studies, examines new developments in the search for effective tools to prevent and resolve conflict while protecting human rights and ensuring social justice.

DISTINGUISHED LECTURERS

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| April 15, 2003 | Robert Edgar
General Secretary, National Council of Churches
<i>The Role of the Church in U.S. Foreign Policy</i> |
| May 8, 2003 | Helen Caldicott
President, Nuclear Policy Research Institute
<i>The New Nuclear Danger</i> |
| October 15, 2003 | Richard J. Goldstone
Justice of the Constitutional Court of South Africa
<i>The Role of International Law in Preventing Deadly Conflict</i> |
| January 14, 2004 | Ambassador Donald K. Steinberg
U.S. Department of State
<i>Conflict, Gender and Human Rights: Lessons Learned from the Field</i> |
| April 14, 2004 | General Anthony C. Zinni
United States Marine Corps (retired)
<i>From the Battlefield to the Negotiating Table: Preventing Deadly Conflict</i> |
| November 4, 2004 | Hanan Ashrawi
Secretary General – Palestinian Initiative for the Promotion of Global Dialogue and Democracy
<i>Concept, Context and Process in Peacemaking: The Palestinian-Israeli Experience</i> |
| November 17, 2004 | Noeleen Heyzer
Executive Director – U.N. Development Fund for Women
<i>Women, War and Peace: Mobilizing for Security and Justice in the 21st Century</i> |
| February 10, 2005 | The Honorable Lloyd Axworthy
President, University of Winnipeg
<i>The Responsibility to Protect: Prescription for a Global Public Domain</i> |
| March 31, 2005 | Mary Robinson
Former President of Ireland and U.N. High Commissioner for Human Rights
<i>Human Rights and Ethical Globalization</i> |



- October 27, 2005 His Excellency Ketumile Masire
Former President of the Republic of Botswana
Perspectives into the Conflict in the Democratic Republic of the Congo and Contemporary Peacebuilding Efforts
- January 27, 2006 Ambassador Christopher R. Hill
U.S. Department of State
U.S. Policy in East Asia and the Pacific
- March 9, 2006 William F. Schulz
Executive Director – Amnesty International USA
Tainted Legacy: 9/11 and the Ruin of Human Rights
- September 7, 2006 Shirin Ebadi
2003 Nobel Peace Laureate
Iran Awakening: Human Rights, Women and Islam
- October 18, 2006 Miria Matembe, Alma Viviana Pérez, Irene Santiago
Women, War and Peace: The Politics of Peacebuilding
- April 12, 2007 The Honorable Gareth Evans
President – International Crisis Group
Preventing Mass Atrocities: Making “Never Again” a Reality
- September 20, 2007 Kenneth Roth
Executive Director – Human Rights Watch
The Dynamics of Human Rights and the Environment
- March 4, 2008 Jan Egeland
Former Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator for the U.N.
War, Peace and Climate Change: A Billion Lives in the Balance
- April 17, 2008 Jane Goodall
Founder – Jane Goodall Institute and U.N. Messenger of Peace
Reason for Hope
- September 24, 2008 The Honorable Louise Arbour
Former U.N. High Commissioner for Human Rights
Integrating Security, Development and Human Rights
- March 25, 2009 Ambassador Jan Eliasson
Former U.N. Special Envoy of the Secretary-General for Darfur and Under-Secretary-General for Humanitarian Affairs
Armed Conflict: The Cost to Civilians
- October 8, 2009 Paul Farmer
Co-founder of Partners In Health and United Nations Deputy Special Envoy to Haiti
Development: Creating Sustainable Justice
- November 18, 2009 William Ury
Co-founder and Senior Fellow of the Harvard Negotiation Project
From the Boardroom to the Border: Negotiating for Sustainable Agreements
- February 25, 2010 Raymond Offenheiser
President – Oxfam America
Aid That Works: A 21st Century Vision for U.S. Foreign Assistance
- September 29, 2010 Monica McWilliams
Chief Commissioner – Northern Ireland Human Rights Commission
From Peace Talks to Gender Justice
- December 9, 2010 Johan Galtung
Founder – International Peace Research Institute
Breaking the Cycle of Violent Conflict
- February 17, 2011 Stephen J. Rapp
U.S. Ambassador-at-Large for War Crime Issues
Achieving Justice for Victims of Genocide, War Crimes and Crimes Against Humanity

BIOGRAPHY OF STEPHEN J. RAPP

Stephen J. Rapp of Iowa is ambassador-at-large for war crimes issues. Appointed by President Barack Obama, he was confirmed by the Senate and assumed his duties on Sept. 8, 2009. Prior to his appointment, he served as prosecutor of the Special Court for Sierra Leone beginning in January 2007, leading the prosecutions of former Liberian President Charles Taylor and other persons alleged to bear the greatest responsibility for the atrocities committed during the civil war in Sierra Leone. During his tenure, his office achieved the first convictions in history for sexual slavery and forced marriage as crimes against humanity, and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law.

From 2001 to 2007, Rapp served as senior trial attorney and chief of prosecutions at the International Criminal Tribunal for Rwanda, personally heading the trial team that achieved convictions of the principals of RTLM radio and *Kangura* newspaper – the first in history for leaders of the mass media for the crime of direct and public incitement to commit genocide.

Rapp was U.S. attorney in the Northern District of Iowa from 1993 to 2001, where his office won historic convictions under the firearms provision of the Violence Against Women Act and the serious violent offender provision of the 1994 Crime Act. Prior to his tenure as U.S. attorney, he worked as an attorney in private practice and served as staff director of the U.S. Senate Judiciary Subcommittee on Juvenile Delinquency and as an elected member of the Iowa Legislature.

He received his B.A. from Harvard College in 1971. He attended Columbia and Drake Law Schools and received his J.D. from Drake in 1974.

Rapp is married to Donna J. Maier, a professor of history at the University of Northern Iowa. They have two children.



INTERVIEW WITH STEPHEN J. RAPP

The following is an edited transcript of an interview with Stephen Rapp, conducted on Feb. 17, 2011, by Milburn Line, executive director of the Joan B. Kroc Institute for Peace & Justice, Jennifer Mills, M.A. student in peace and justice studies at the University of San Diego (USD), and Dustin Sharp, assistant professor at the Joan B. Kroc School of Peace Studies at USD.

ML: Why the international transition, from Iowa out into the world?

SR: From very early on I have seen the law as a tool to be used for the benefit of society and communities. I had an earlier career in politics, and when I was in the Iowa Legislature I pushed for the rights of victims in criminal proceedings. I had myself been a victim of a very violent crime when I was young and had met other victims among my constituents and those who sought help at my law office. I knew what crime had done to victims and to communities and saw the need to respond to it. I believed then as now that people who murder and rape and selfishly destroy the lives of others deserve to face consequences, and that by doing so we can prevent others from experiencing the same kind of victimhood.

After my political career I was in full-time private law practice, though still often involved in public service. My private practice included criminal defense, and I represented people charged with sometimes horrible crimes, and did my best to hold the state to its burden, even when it meant that guilty people were sometimes acquitted. But I saw that it was from the prosecution side that the law might best be used to benefit communities. In 1993 I was appointed as a federal prosecutor, to be the U.S. attorney for the Northern District of Iowa.

My district was not in 1993, or now, an area of the country famous for its high crime by any means. But federal prosecution is quite important there because many local county attorneys' offices are under-resourced and face challenges from crime that cross jurisdictional lines. By working with local prosecutors

we can sometimes make better and stronger cases than would be the situation if they were alone. Because I often had such good relationships with local prosecutors and local law enforcement agencies, I could sometimes find and quickly develop cases that would fit new federal laws, like the Violence Against Women Act.

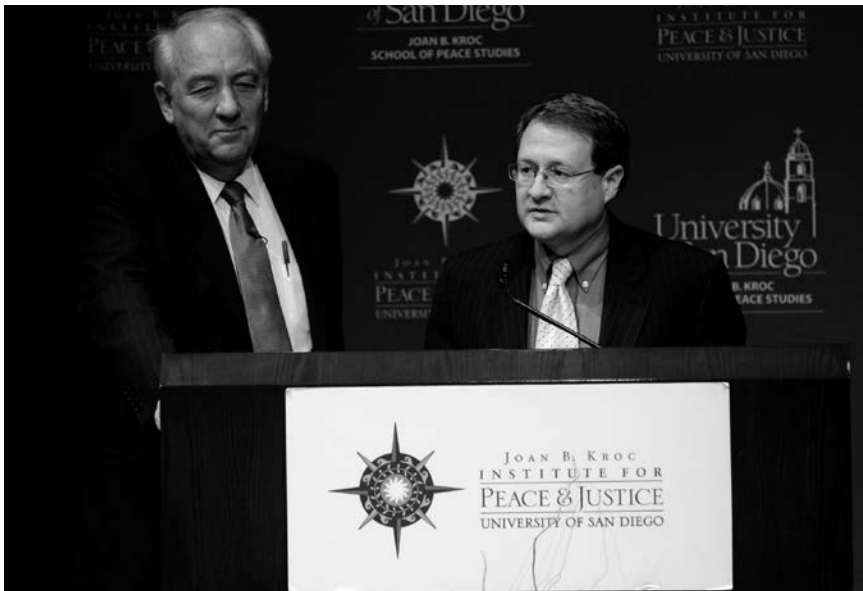
I remember when a woman in my hometown was shot by her husband, with the bullet passing about a half inch from her aorta. I called the county attorney and asked, "What are you doing with this case?" He said, "Well, she's scared to death of him. She won't say it's intentional. She's saying he accidentally discharged the gun. There are bullet holes all through the walls and it looks like he's been firing at her before, but she won't cooperate." I said, "Does he have any record of domestic abuse?" "Oh, he's been convicted a year ago for that."

I said, "We have a new federal law that passed two months ago that says anybody who has committed domestic abuse can't have a gun. It's punishable by up to 10 years in prison. Let's prosecute him not for intentionally shooting her, but for having a gun as a prohibited person. And then we can have the punishment based upon his actual conduct and probably achieve a strong sentence." In the state system he might have been ordered to pay only a small fine, and maybe could have shot her again. By prosecuting the case federally, he received a sentence that I recall was 51 months, and she was safe. Just as importantly, it sent a signal to everyone in the state that if you commit these crimes, you can't have a gun anymore. If you want to keep your firearm, don't abuse your loved ones.

I sought out cases where I thought by taking action I could achieve a benefit for the community. But at the same time that I was interested in the law and what could be done beyond my home community, I had always been interested in what was happening in the broader world. My wife, who I married in 1981, is a professor of African history. We traveled in Africa and throughout many other continents. Even after our children were born in 1987 and 1989, we still took a foreign trip almost every year. Any money we saved quickly went into travel.

My wife and I closely followed the events in Yugoslavia – the crimes and bombardment of Sarajevo – and then the Rwanda genocide, nightly listening to the radio broadcasts on BBC World Service. We were quite unhappy with the inaction of the world in preventing these crimes. When the idea of an international court was first proposed for Yugoslavia and then for Rwanda, I thought, *That would be a great thing to do.*

I remember sitting in my office as U.S. attorney in Cedar Rapids, Iowa, in the mid-1990s and regularly receiving emails from Washington with messages that would say, “We need somebody in your office, one of your assistants, to go to Mexico or Colombia on a six-month basis. Do you have any volunteers?” And I’d circulate those but I never got anyone in the office who was very interested in going. Then I started receiving calls from Washington asking: “Does anyone want to go to The Hague for six months?” And I wrote back, “None of my assistants want to go, but I do. I want to go.” To which the response was, “No, you can’t go. You’re the boss. We’re looking for your assistants.”



Eventually in my second term as U.S. attorney, when the ethnic cleansing of Kosovo began in 1999, I remember calling Washington and saying, “We, U.S. attorneys, need to get together as a group. We can document the violations. Let’s figure out what we can do to assist.” I even called the War Crimes Office in the State Department, the office that I now lead, and said, “What can we do?”

But by 1999, the tribunals were no longer taking seconded personnel, not even the six-month details on which assistant U.S. attorneys had gone earlier. The practice had been discontinued because it was viewed as being discriminatory in favor of rich countries. They had become solely U.N. institutions where everybody was hired and paid by the United Nations, and where there were people working from 70 or 80 countries at each tribunal. I heard that with this push to bring people from everywhere, it was not easy to be hired as an American.

I started seeking out people whenever I was in Washington, people who had worked at the tribunals, even on short-term details. Finally in 2000 I decided to apply, but wondered whether to go to the Yugoslavia tribunal in The Hague or the Rwanda tribunal in Arusha, Tanzania. I went to Washington and visited what is now my office in the State Department. I did not see Ambassador David Scheffer, but met with his young aide, Pierre Prosper, a Haitian-American prosecutor from Los Angeles, who had worked as an assistant trial attorney at the Rwanda tribunal, actually leading its first prosecution, the Akayesu case.¹ And he said, “Do not go to Yugoslavia. Go to Rwanda, go to the Arusha tribunal. This is where you are really needed.”

I followed his recommendation and applied for a vacancy as a senior trial attorney at the Rwanda tribunal in September 2000. I did ask the War Crimes Office to put in a good word for me with Carla del Ponte, who was then prosecutor of both the Yugoslavia and Rwanda tribunals. As a result, I was called for an interview in January of 2001. I should note that when I applied for this position in September of 2000, I did not yet know whether Al Gore or George Bush would be elected. But I had been a U.S. attorney then for

¹ The verdict of the Prosecutor v. Jean-Paul Akayesu defined rape as a war crime and as a crime against humanity.

almost eight years and wanted to do something else. I would have sought the international job even if Gore had been elected and I had been invited to stay on as a U.S. attorney for another four years in my district. But I remember flying to Europe for the interview the weekend that Bush became president and being so very hopeful that I would be hired for the job in Arusha and not go back to the ordinary practice of law.

I was thrilled when I received the offer in April 2001. I was then still a U.S. attorney because Iowa's senators had recommended that I stay in office until a Republican appointee was confirmed, which was not expected until September. But I wanted to move on, so as soon I received medical clearance, I was on my way to Arusha in May 2001. When I arrived I was immediately ordered to take the lead in the famous media trial that had by then been going on for seven months.² Certainly that was the best decision I ever made – it was certainly some of the toughest work I have ever been involved in, but extremely satisfying.

JM: What do you envision is the role of the U.S. in international justice in the future?

SR: I think our role will continue to be one of trying to assist national justice systems, but with an increased focus on making sure those national justice systems in conflict areas are strengthened so as to have the capacity to deal with atrocity crimes. We have a tradition of doing rule of law programming around the world in developing countries, but not much of it is focused on preparing national authorities for the more challenging cases that involve prosecuting local leaders, government ministers, militia chiefs, police and military officials.

These kinds of cases require protecting witnesses who will face threats from powerful people and developing evidence as to how these powerful people made the crimes happen. It is sometimes possible to develop evidence about an individual directly committing an act, but if you need to prove who was responsible for sending a child soldier to carry out the act, it can be a tough challenge. Indeed, when you prosecute organized criminal activity it is always

hard to prove who the person behind the scenes was who pulled the strings, and to show how and when he pulled the strings. With atrocity crimes it can be even more difficult.

From a purely legal point of view, I think we all recognize that the law of genocide, war crimes and crimes against humanity is universal and applies everywhere. But the ability to actually enforce it in different countries varies: Legislation may need to be passed and the tools provided for doing it. I think that you will see that our strongest emphasis needs to be on providing the tools to pursue these crimes at the local level.

That said, quite often – as was the case in the former Yugoslavia, as in Sierra Leone, as in other places in the future – it is going to be impossible to bring very senior people to justice in a national system. How to deal with this problem is the next challenge. Our approach will be to develop a way to reinforce the national system by including international personnel or international judges within it, even to the point of creating a hybrid court like we had in Sierra Leone.

Now, the International Criminal Court (ICC) cannot deal with any crimes that happened before 2002, and that is largely why we have seen hybrid courts like those for Sierra Leone or Cambodia for crimes that happened before 2002. But even in the post-2002 period, we still see value in localized, but partially internationalized, courts. They can send a more direct and stronger message, and do it close to the victims and affected communities. They can also leave the national systems strengthened when the trials of major atrocity crimes are finished. That is something that an international court sitting far away cannot do.

On the other hand, we still have to recognize that sometimes you just cannot try the responsible senior leaders in the country where the crimes were committed, and that there is no possibility of justice at the national level, even with international participation. Then you need international courts like we had for Yugoslavia and Rwanda. For crimes since 2002, 114 countries

² The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze

now say that this court should be the ICC. The United States, since President Bush's decision to let the Darfur case go to the ICC in 2005, has recognized that the ICC is here to stay, and that it is a place where justice can be delivered when it cannot be achieved at the national level. Our approach then is to try to ensure that the ICC is effective in being able to investigate and prosecute serious atrocities.

Of course, we also want to make sure the ICC is pursuing appropriate cases – that its prosecutor is not politically motivated, that it is not taking cases when there is only a handful of victims or when deaths or injuries result from accidents – that it is focusing on mass atrocities. We have laws like the American Service Members Protection Act that restrict to a point our ability to help the court. Fortunately there is an exception, an exclusion in the law passed by Senator Christopher Dodd, that says that this law shall not prevent the United States from assisting in a case of a non-citizen, such as Saddam Hussein, Slobodan Milosevic, Osama bin Laden or others allegedly responsible for genocide, war crimes or crimes against humanity. That language essentially allows us to provide at least in-kind assistance to the ICC on a case-by-case basis.

So we are looking for ways to help make the ICC more effective, particularly in making arrests. We want Joseph Kony arrested, we want Bosco Ntaganda arrested, we want the other arrest warrants to be executed. We will want the individuals who may be summoned by the court in the Kenya case to appear, and if they do not appear, we want them to be arrested.³ We will also do everything we can to ensure the court is effective in trying the cases that come before it.

DS: There is an increasing backlash in African countries against the ICC; some are calling it the African Criminal Court. I teach a class on transitional justice, and students look at the map where international war crimes prosecutions have taken place. One of the things they often seem to notice is that among those where we have seen prosecutions in recent decades, there seems to be a preponderance of very small, weak countries: Sierra Leone, Rwanda, Cambodia,

the former Yugoslavia. When you look at some of the big players – the United States, China, Russia, Israel – whose militaries have also committed questionable acts, to put it diplomatically, we do not see the same response. For the students, this leads to a cynicism that really what is at work here is just a crude politics, that international law is just a tool for the strong over the weak, that it is applied where the strong want it to be but they never allow it to be applied to themselves. If you were teaching that class, how would you respond to students who are raising this question to me every semester?

SR: It is accurate to say that the Rwanda and Yugoslavia tribunals came into being because there was no objection to them being established in the Security Council, which meant that not China, not Russia, not the United States or Britain or France were opposed to them – at least at the time of their creation. Though in the case of the Yugoslavia tribunal, the Russians have taken a much more negative view of it in the period since it was established. These courts were created because there was a consensus among great powers that there were cases in these countries that cried out for justice and that it was appropriate for it to be delivered at the international level.

Of course, between Nuremberg, with the last of its trials ending in 1949, and the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, there were really no international prosecutions, and that was a reflection of the Cold War. When the Cambodian crimes and other crimes were committed in Africa or Latin America, people knew about them, but those crimes often involved countries allied with one side or another in the Cold War. There was no will to press for accountability in those cases. It was only after the Cold War ended, and to some extent as a result of the breakup of structures that had restrained some conflicts, that the world saw horrible atrocities in the 1990s but was able to achieve again a consensus in favor of international justice. Yet that consensus favored it in certain places, but not everywhere.

On the other hand, the places that were the focus in the 1990s were the right ones. It was in Yugoslavia where the worst crimes since World War II were being

³ The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, and The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

committed. It was in Rwanda where genocide was committed that killed 800,000 people. Most people do not object to the choice of the former Yugoslavia, and of Rwanda, but some now point to the situations taken on by the ICC, and say that its choices are not fair. My response is for people to look at a map and point to where intentional killings of tens of thousands of people have happened in the 1990s and in the first decade of the 21st century. Except for the former Yugoslavia, they have been in Africa. I know that some mention the wars in Iraq and Afghanistan, but there the civilian deaths have resulted from terrorist acts, like suicide bombings, or unintentionally from operations undertaken to defeat terrorist groups or other insurgents. In situations where soldiers in western militaries have intentionally targeted civilians, they have been prosecuted in the military or civilian justice systems of their home countries.

That said, it is obvious that international justice does not reach everywhere. But because of what has been done at the international courts, there is now the demand for justice whenever atrocities are committed. The prosecutions of a Milosevic or a Taylor or a Kambanda⁴ led to an expectation that a way will be found to achieve justice. These expectations have been partly responsible for the formation of investigation and prosecution units in countries where alleged war criminals have sought refuge, where units have pursued cases like those against the leaders of the *Force Démocratique de Libération du Rwanda* (FDLR) in Germany and the cases against Rwandans in Canada and in Belgium. This expectation of greater accountability has begun even to push at the walls of great powers. It would not be happening if national leaders had not been brought to trial before international courts.

Those of us who are prosecutors are only confronted by complaints from defendants and their attorneys: *Why did they drag me in? There's another guy out on the street who's twice as bad as I am.* The answer is that this is no defense. It is because of the crime you committed and the people you victimized that you are before the court. But as a prosecutor succeeds against one criminal group, the demand is there to pursue others who have committed

⁴ Slobodan Milosevic was the Serb leader during the wars in Yugoslavia in the 1990s; he was arrested in 2001 and died in detention during his trial in 2006. Charles Taylor was the former president of Liberia and was indicted for his role in the war in neighboring Sierra Leone by the Special Court for Sierra Leone in 2003; he is currently on trial. Jean Kambanda was the former president of Rwanda and pled guilty to several crimes including genocide; he is serving life in prison.

crimes of equal gravity. The expectation becomes, *Well, if you have convicted the leaders of La Cosa Nostra, what about other organized crime families?* You need to use the tools that you have to remove those who are committing serious crimes and to deter others from committing similar conduct.

The international system is not like a national system because it depends upon state cooperation, but the fact that there are successful international prosecutions is creating a demand for accountability, no matter where the crimes are committed. Does that always mean it will happen? Is it happening in Sri Lanka? Is it happening in Burma? Is it happening in the Middle East? Perhaps not yet to the same level but the pressure is there for it to happen. Because of what has occurred at international courts, accountability is now more likely to be demanded everywhere.

ML: A historic challenge here is the question about the United States participating in these regimes, and the historical tendency of exceptionalism, or exemptionalism. How can we move forward in improving our ability to understand the benefits of cooperation?

SR: We have been successful to a point in the approach we have taken to the ICC. There was an effort in Congress before we went to the ICC Review Conference in Kampala, Uganda in May-June 2010.⁵ Several members sponsored a bill called the Protect America Act that would have prohibited us from sending an observer delegation. The bill did not go anywhere. It did not even have substantial support on the Republican side because there is a strong interest in accountability in both political parties. You had bipartisan support for the Uganda LRA Act, which encourages action to arrest Joseph Kony and send him to the ICC.⁶ When my predecessor as Sierra Leone prosecutor went to Congress seeking help in the pursuit of Charles Taylor, the resolution calling for Taylor's arrest was passed in the House by 434 to 1, with only Ron Paul voting no. People in both parties care about these atrocities and they want to see a response to them.

⁵ The Review Conference on the Rome Statute of the International Criminal Court

⁶ The LRA Disarmament and Northern Uganda Recovery Act, signed into law in May 2010

There is the question about whether the United States could become a member of the ICC. When I answer this question, and when I talk with members of Congress, I always say, “What we need to do is have a strong, effective domestic system of accountability. We need to be able to make the statement that there would never be a need for an American to be brought before an international court for prosecution because we will do it ourselves.”

That does lead to questions about whether there are any gaps between our law and international law. There have been efforts in this area by Senator Dick Durbin of Illinois, who has sponsored successful legislation together with one or two Republican senators, to provide that we would have prosecutions in U.S. courts for genocide or the use of child soldiers committed elsewhere in the world, if the alleged perpetrator is present in the United States. The focus of these laws has been on foreign nationals who have sought a safe haven in the United States, but they have also strengthened our commitment to complementarity by giving us the ability to prosecute those responsible for atrocities in our national system when they come within our jurisdiction.

I also emphasize the U.S. tradition of tough prosecution of powerful individuals without fear or favor. I mention the prosecution of the Republican chairman of the Senate Appropriations Committee, Ted Stevens, during a Republican administration, and the Democratic chairman of the House Ways and Means Committee, Dan Rostenkowski, during a Democratic one. I cite the case of Spiro Agnew, prosecuted and resigned as vice president of the United States, and of President Nixon who fought giving up tapes and went to the Supreme Court and lost 9 to 0, leading to his resignation.

On the other hand, we also know that it is very hard to prosecute your own who are fighting your country’s enemies. It is a little easier in the case of corruption or private vice, much harder when it is someone who was carrying the flag, particularly someone who was conscripted or because of economic or social circumstances volunteered to face foreign shot or shell. There were the cases of Captain Ernest Medina and Lt. William Calley and the My Lai Massacre of over 500 Vietnamese civilians in March 1968. They were

prosecuted in military courts-martial. Medina was acquitted when the judges declined to apply command responsibility. Calley was convicted, but served less than his full sentence. Tough as these cases may be, the message must be clear that we are ready, willing and able to prosecute ourselves.

One of the interesting things about our relationship with the ICC is the role that a career U.S. military officer, Bill Leitzau, has had in the development of the ICC law on war crimes. Bill was a Marine JAG officer when he was part of the U.S. delegation in Rome in 1998, and a deputy assistant secretary of defense when he was part of our observer delegation in Kampala in 2010. From my observation he was worth the weight of the rest of us in the delegations put together. He was one of the authors of Article VIII of the Rome Statute – the listing of all of the crimes, including the grave breaches and violations of the customs of war both for international armed conflict and non-international armed conflict. Then after Rome, he authored the official Elements of Crimes.

The people who were strong ICC supporters, and were unhappy that we were not joining the ICC, asked: “What business is it of an American to do this?” In the end they adopted his work unanimously. It is a reflection of the fact that war crimes are clearly defined and effectively punished in the American military justice system. People look to us to prosecute these kinds of cases, and that is what we are doing today, up the road in Camp Pendleton⁷ or over in Afghanistan. There are always families of service members who may think it unfair. It is a statement that the United States will enforce the rules itself. We can say that it does not make any difference whether we are in the ICC or not, we will prosecute our own who violate the law. I think that this is the most effective response.

People then come back with questions about torture and waterboarding and enhanced interrogation and those kinds of things. And my response still is that I have faith in Eric Holder and his tough decision to appoint a special counsel to investigate. Complementarity doesn’t require that you prosecute. It requires that you investigate and see if you have a prosecutable case, and pursue it if you do.

⁷ In 2006, several U.S. Marines were charged with murder and other violations for their role in the death of an Iraqi civilian in Hamdania earlier that year. The proceedings were held at Camp Pendleton in San Diego County.

International commentators like Philippe Sands and others will say, “Ah-ha, what we had was a high-level conspiracy with Deputy Legal Counsel John Yoo’s opinion giving people a license to commit torture.” If you really were to pursue a case like that, you would have horrendous problems. John Yoo has had these views about presidential power long before 2002. I disagree with them and so do almost all legal scholars, but it would be difficult to prove that his giving an opinion about the law that was consistent with his prior writing was an act taken with criminal intent.

To prosecute individuals who then followed that advice when they would have the defense of advice of counsel would be equally difficult. For those who went beyond the advice, and where their actions are suspected of resulting in death or injury, there could be stronger cases, but you would have to prove that causation when contemporary evidence may be lacking. I am not involved in the Department of Justice investigation in any way, but I trust the people who are involved to work through these issues thoroughly and in good faith. That is what is required in complementarity – not that you prosecute and convict, but that you undertake a genuine process.

JM: I am interested in the Special Court in Sierra Leone, especially the case on forced marriages. I know that was a controversial ruling even within the court, whether to prosecute it as a separate crime against humanity rather than as sexual slavery. Why do you believe it has not been adapted into any of the cases of the ICC, when in the cases in Uganda and the Democratic Republic of the Congo there is forced marriage?

SR: We will have to wait and see. Do keep in mind the ICTY and ICTR [International Criminal Tribunal of Rwanda] broke legal ground with gender violence, with convictions for rape as crimes against humanity or as war crimes. At the ICTR the act of mass rape was found to be one of the means by which genocide was committed; even if it didn’t result in the death of the victims, it was part of the genocide. Those were historic decisions.

At the Special Court for Sierra Leone (SCSL), we had a slightly newer list of crimes against humanity that was drawn from the text of the Rome Statute.

So we explicitly had sexual slavery in the list, which they did not have at the U.N. courts and of course did not have at Nuremberg. So we pursued the sexual slavery charge, and many people thought, *Well, that’s enough, because you certainly have the facts showing sexual slavery* – and can achieve convictions if you can prove that any of the defendants were responsible. *Isn’t that enough?*

“... the ICTY and ICTR ... broke legal ground with gender violence, with convictions for rape as crimes against humanity or as war crimes.”

This effort to prosecute forced marriage began well before my arrival in Freetown, led by my friend Boi-Tia Stevens, a lawyer from Sierra Leone with whom I had worked at the ICTR and who had gone home to work in the Office of the Prosecutor of the SCSL. She and others said that there had been a crime of a different dimension that was not solely sexual slavery, which the world had seen before with victims forced to be “comfort women” to the commanders of occupying military forces. In Sierra Leone, many women had been forcibly conscripted into conjugal relations. A woman who was made a consort of a rebel leader was forced to not only provide sexual favors but also to care for him in any way that he wished, and in the process she appeared to be complicit in what he was doing. She essentially was forced to become the female head of his bush household. Then at the end of the day, despite having been forcibly conscripted, and in a way similar to that of child soldiers, she found herself blamed and treated as one of the perpetrators. She cannot go home without being viewed as someone responsible for the atrocities against her own people. Even though she was herself a victim, people still find it hard to take that step and say that she was not responsible with her “husband” for his crimes.

Many of these “wives” found themselves bound, even after the end of the civil war, to stay with the rebel leaders who continued to brutalize them. There was a study done by Zainab Bangura, a local human rights activist who served as

an expert witness in our trials, and who has since become minister of foreign affairs of the Republic of Sierra Leone. That study documented more than 100 cases and reported on the horrible consequences to the victims of this crime.

“I think that a key part of what we do for victims at the end of the day is to say, ‘You were victimized. You are not at fault. These people are at fault. They’re the ones that did these criminal acts.’”

There was no provision anywhere in the statute that said that forced marriage was a crime, but there was this provision for prosecuting “other inhumane acts” as crimes against humanity. This general category had existed in the list of crimes against humanity from the beginning. It has been defined to include acts of similar gravity to those on the specific list of crimes against humanity, like murder and rape, when carried out as part of a widespread or systematic attack against a civilian population or part of that plan or knowledge of the plan. That listing of specific acts as crimes against humanity is not inclusive of every brutal thing that someone might come up with tomorrow. You do not have to wait until someone begins committing a horrible, inhumane act and then change the statute before you can prosecute, because the category of other inhumane acts basically recognizes there are other horrendous ways in which you can victimize people that are not on the specific list. If they are equally grave and are committed as part of an overall strategy to victimize the civilian population, they can be prosecuted.

So that is the approach that we took. We lost the issue the first time in the trial chamber in the AFRC case, but we decided to take it to the appeals chamber where we won a decision that we were right on the law, but which declined to enter convictions. This opened the way to us to achieve convictions at a trial in the Revolutionary United Front case, and convictions were then affirmed on appeal.⁸ I thought it very important to achieve those convictions for the benefit of the victims. I think that a key part of what we do for victims

⁸ Prosecutor vs. Sesay, Kallon and Gbao

at the end of the day is to say, “You were victimized. You are not at fault. These people are at fault. They’re the ones that did these criminal acts.” And to say that about this crime was I think helpful to the victims. It did not add any more time to the sentences, but it was a significant victory.

Why has it not been taken up elsewhere? The ICC has so far charged only a limited number of crimes. You will recall in Lubanga,⁹ there was criticism that there were no specific gender violence crimes charged. It was an effort by Prosecutor Luis Moreno-Ocampo to try to keep the first ICC case simple. But thereafter, some of the ICC prosecutions have included crimes of gender violence. With the precedent of what we accomplished in Sierra Leone, I suspect that when another case like this comes up, people will look at the SCSL decision because the ICC has the same statutory provision as the SCSL. The decision at the Special Court is not binding on the ICC, but I think it will be viewed as persuasive and will be useful in similar cases.

DS: You have mentioned the importance of prosecutions in benefiting communities. As we start to think about the legacy of the ICTR and the legacy of the Special Court, one of the criticisms is precisely that there was this separation between the courts and the victim communities and constituencies that they were thought to serve. In many ways I think the Special Court was an improvement on the ICTY and ICTR – we did have an outreach division. What is the legacy of Sierra Leone and what can be improved upon in the future?

SR: Outreach is about providing information to the victimized communities. I suppose it is not the same as going out and building clinics and making public improvements in these communities – the kind of thing that we would like to have done. That may be possible as a result elsewhere under the statutes at the ICC and the Cambodia tribunal that do allow for victim reparation. These kinds of community projects and benefits are the most likely possibility for courts with the power to order reparations because of the impracticality of providing individual reparation. I think that is one area where the approach of the ICC may do more for communities than was possible at the ICTY, ICTR or SCSL.

⁹ Prosecutor vs. Thomas Lubanga is the first case to be tried at the ICC.

However, its outreach was the great success of the Special Court. It was extraordinary that the SCSL, which took only 10 defendants through trial, had the impact it did. This impact was reflected in a survey taken in early 2007 of about 10,000 people across the country, which found that close to 90 percent knew that there was a Special Court, and about 80 percent of them believed that it was a force for at least stability and peace in the country. That was a tribute to a robust outreach program, deployed in a country that did not have wide circulation of newspapers. Indeed, I do not think there is a newspaper in the country that circulates a thousand issues. Because of the inadequacy of an electrical power grid, there is no real penetration for television; I think 2 percent of people in the country have access to a television. Radio with transistors and batteries is the way most people get their information, and even that is intermittent.

But there were district outreach officers in every one of the 13 districts of the country, whose sole job was holding meetings to inform people about the court. They did so by screening videos, which involved providing generator fuel for electricity to screen a video at night in a community hall. They did it by distributing printed materials and inviting out principals of the court, and other employees, to answer the public's questions and to hear its criticisms and suggestions. I think this allowed the public to become much more knowledgeable about what was being done at the SCSL, and at the end of the day for the court to have a much larger impact.

That of course was easier because the court was in Sierra Leone. The Special Court had to obtain all its funding voluntarily. It went to states for funding of its operations, and then to foundations, to the European Union and other soft money donors to get funding for outreach. Since it had to be up and running to fundraise for all its needs, it became successful at raising funds for outreach. At the ICTY and ICTR the main budgets were covered from assessed contributions of U.N. member states, but outreach could only be financed from donations. Because these courts were not forced to look at every sort of place and possibility for their survival, they may not have ended up with adequate resources for outreach.

At the ICTR and ICTY, the citizens of Rwanda and the countries of the former Yugoslavia were not a large part of the staff. In their outreach programs, it was usually internationals coming out to make presentations. They had to coordinate everything with the respective government and local authorities. There were certainly times in the history of those tribunals when their work was unpopular with some governments or officials in these countries. They may not even have had access to the main community hall to show their films or to answer questions. So there were challenges in terms of doing outreach at the ICTR and ICTY, and there may be as well for the ICC in some of the situations in which it is involved.

“Effective criminal justice is about more than pursuing individual cases. It is about communicating that certain acts are criminal and that those who commit them face consequences.”

Outreach is critical to the success of a court. It cannot be viewed as an afterthought. I come from a tradition in the U.S. where prosecutors – and they are often faulted for this – announce the filing of charges in major cases in press conferences. They want the public to know that the law is on the job. When Rudy Giuliani was U.S. attorney in New York, he even had people arrested for alleged financial crimes on the floor of the New York Stock Exchange. Effective criminal justice is about more than pursuing individual cases. It is about communicating that certain acts are criminal and that those who commit them face consequences.

When I was a U.S. attorney I wanted people to know that a federal Violence Against Women Act exists, and that you are prohibited from possessing a gun if you have a prior conviction for misdemeanor domestic abuse. We want people to know what is in the law. People do not read statute books; they do not read news about what Congress is doing. The way they find out about the law is through information communicated to the public about criminal

prosecutions. This is particularly important because you cannot prosecute everyone, but by prosecuting good selective cases, you send a signal about existing laws, and by doing that, hopefully maximize general deterrence.

People from other national systems are not always comfortable with this approach. In continental systems, most of the work is done in secret judicially-led investigations. They may go on for years and nobody says a word, and then finally there may be a relatively brief trial, after which people may wonder what happened. Maybe the press publicizes it at that point, but maybe they do not.

I know that some fear that public information about court proceedings can slander reputations of accused persons. In the Bosnian War Crimes Chamber, a court that has done great work with limited resources, it was decided last year that under a local privacy law they had to excise from their website all the names of the people they have convicted. And as a result, during the long time that it took to redact the public versions, they had to take down all their judgments from their website, so you could not find out what the court had done at all.

There is a discomfort about publicizing what these institutions are doing. But there are ways to convey it that are fair to the defense. We did so in Sierra Leone. I would go out, side by side with the head of the defense office. I would talk about the issues involved in our cases, but not saying that “so-and-so is guilty.” The defender would be saying, “You have got to listen to both sides, because these accused persons are to be presumed innocent and could be found innocent once all the evidence is heard. If you have information that could benefit them, you have as much of an obligation to come forward to the defense as you do to the prosecution. And we will protect you too.”

So I think the lesson of Sierra Leone is to find a way to get the news out there. Do not die with the secret. And by maximizing public information about even a relatively few cases, you can increase the impact. With this magnified effect one can also achieve a greater benefit from the investment in these sometimes long and challenging trials.

ML: Could we be more effective in deterrence? Could we be preventive? Can international justice help us be preventive? The Albright Commission on preventing genocide came up with this figure: For \$250 million we could vest an infrastructure within government that gives us capabilities to detect mass atrocity and potentially respond effectively.

SR: We are very supportive of the recommendations. This administration, with few exceptions, is in the process of implementing the recommendations of the Albright-Cohen report published in 2008. My office is part of this whole-government response. I work closely with David Pressman, whose position as the National Security Council’s director for atrocity prevention and accountability was established now almost a year ago.

“So I think the lesson of Sierra Leone is to find a way to get the news out there. Do not die with the secret.”

The process begins by looking for the warning signs that precede the commission of mass atrocities, and in this work the intelligence community can play an important role. We know historically that these mass crimes are often accompanied by efforts at public mobilization. We remember from Rwanda the training and arming of militias, and the beginning of propaganda against Tutsis and the Hutus who would protect them. This is the kind of “us vs. them” rhetoric that we see in other places, at the moment in Cote d’Ivoire. There certain people are denounced as foreigners, even though they are voting citizens of the republic. *He’s not even one of us, he’s a Burkinabe.* In an effort to preserve power, one side mobilizes support by dividing the population between those who view themselves as native against those whose families migrated to the country during past periods of its prosperity. We saw an example of this in the speech in December by Minister of Youth Blé Goudé, which seemed to encourage the *Jeunes Patriotes* in Cote d’Ivoire to drive out the foreigners – even to attack the Golf

Hotel and peacekeepers who were there protecting the election winner, the alleged Burkinabe Alassane Ouattara. These kinds of things we are looking at very closely.

We are looking to the steps that could be taken to calm the situation, to counter the messages of hate. Among the steps we encouraged was a statement by the ICC prosecutor that warned those engaging in incitement and in threats to attack the peacekeepers, that these acts could constitute crimes under the ICC statute. This is the case because, even though Cote d'Ivoire is not an ICC member, its government by voluntary declaration in 2004 submitted itself to the jurisdiction of the court. I think even while the political crisis continues, this warning has served to reduce the violence from the level that we feared. We are not out of the woods yet. But this is all part of an approach by our government to reduce the threat of atrocities, by gathering information, by acting to counter divisive rhetoric and mobilization, and warning those responsible of future accountability.

I bring to this effort the lesson I have learned from prosecuting these cases. These mass atrocities are not like storms or natural disasters. They are acts of men, acts of human beings, and almost always involve a leadership decision to play the race card, play the card of religious bigotry, to victimize women to intimidate and destroy enemy communities. They make these decisions for reasons that are horribly wrong but rational. These decisions involve a calculation that these tactics can work in the protection of power and wealth or the gaining of power and wealth. We need to act effectively to change that calculation and by doing so deter these crimes, even in the midst of armed conflicts.

STUDENT MEETING

The following is an edited transcript of a private meeting with graduate students from the University of San Diego, held on Feb. 17, 2011.

Stephen J. Rapp: I have been dealing with issues regarding the International Criminal Court and its warrants against Joseph Kony for crimes in Uganda, against Sudanese leaders for crimes in Darfur and now in its efforts to begin cases in Kenya – against the backdrop of continued efforts in Africa to push for deferral of the prosecutions in Sudan and against those responsible for the post-election violence in Kenya in 2007.

But at the same time my post involves working with all the tribunals that are currently in the process of delivering justice, and trying to do what we can to facilitate their work. So I was in The Hague last week to see the Yugoslavia tribunal prosecutor to discuss with him the continued efforts to bring Ratko Mladic and Goran Hadzic to justice, which are very high priorities for our government. I was also in diplomatic visits in European countries to determine what could be done to strengthen that effort.

I was present last week at the Special Court for Sierra Leone where I was prosecutor for almost three years to watch my successor, Brenda Hollis, begin closing arguments in the Charles Taylor trial, the trial that I had opened on the 4th of June, 2007. Like in June 2007, the defense walked out on the closing. The case will now go to judgment. There may be an opportunity for the defense to file its brief or some argument to be considered on a belated basis – that issue is before the appeals chamber. But that trial is now very close to verdict, expected late this summer. Making sure that the Special Court has the resources to finish the job has been one of the tough tasks that I had when I was prosecutor, and still is one of my tasks since assuming my current position about 18 months ago.

There is also the Special Tribunal for Lebanon, which we support. As you probably know, an application for indictment has been filed by the prosecutor

that is now confidential but before a pre-trial judge. The question of whether that court will continue to have support from the Lebanese government, and how it will survive if it loses that support, are very challenging issues that we will have to confront.

Beyond that, I have spent time dealing with tribunals that have been established to deal or begin to deal with crimes committed quite some time ago. I was in Cambodia three weeks ago, working to determine what we need to do to ensure that the trial begins for the leaders of the Pol Pot government, the four surviving members: the former chief of state, the former foreign minister, the former minister of social welfare and “Brother Number 2,” the unofficial second in command in the Khmer Rouge government. That trial is scheduled to begin in June for the alleged murder of 2 million Cambodians between 1975 and 1979. That tribunal does not yet have the resources to complete this trial. I have been trying to make sure that it has those resources. It is also facing challenges in terms of the investigation of other persons while the government and the Cambodian side of the court do not support further investigations. But efforts to interfere with those investigations can have the effect of reducing the support that the court needs.

I was in Bangladesh, where an international crimes tribunal has been established to deal with the alleged murder of 3 million people during the 1971 war of independence. They are establishing a tribunal within their national court system, but enforcing international law. They have already arrested six individuals. The process that they are following has been criticized by the International Bar Association and other commentators as not following the precedents of other courts and not ensuring adequate protection of the rights of the accused. The government invited me to come and suggest what needs to be done to improve the quality of the procedures. So I am working hard on my recommendations to the government.

But then there are other situations where we do not have a court at all, so the U.S. government has helped organize the establishment of commissions of inquiry. In Kyrgyzstan last June, there were the murders of at least 400

people, targeted on an ethnic basis, which had the effect of dislocating 300,000 people. We have, through an intense effort, been able to have an international commission of inquiry established. And next Monday it will deliver its report to the government of Kyrgyzstan. Having been in communication with the commissioners, it is going to be a tough and fully accurate report. It will become public in mid-March. We have had the cooperation of the government on that one.

But there is another case that we have been dealing with probably to the greatest extent in my current diplomatic visits, and that is the question of Burma, or Myanmar as other countries call it, where we have supported an international commission of inquiry to establish the truth about the serious violations of human rights that have taken place in that country certainly in the years since 1988. But obtaining the international support that is needed for a commission of inquiry is a challenging task. Some are saying that there has been progress in Burma with Aung San Suu Kyi now free, with elections – unfair and restricted as they were – and that it is not now the time to press for a commission of inquiry.

I spent three days on the Thai-Burma border talking with refugees, speaking with people who have been victims, even in the last months, of atrocities committed by the Burmese military. What is happening in the border areas in the war between the military and the ethnic groups is not an improvement – frankly it is worse. Everyone I talked to along the border – refugees who crossed 20 years ago and refugees who crossed two days ago, people who work in humanitarian assistance, people who work exclusively in medical care – said we need a commission of inquiry in order to deter these atrocities from occurring. The creation of a commission will send a signal that the world cares and is watching, even if it accomplishes nothing more.

So through our diplomacy and visits to various capitals we are trying to build the support, or at least gauge where other countries stand, and if the support is there, to be able to move forward in the Human Rights Council or even in the General Assembly to establish a commission of inquiry.

So that is the range, though not everything, of what the job involves. It is all part of fulfilling the expectations that I think have been raised by the success, not overwhelming success but still remarkable success, of international justice to date, and to answer the questions that I hear around the world: After justice was achieved for those who were victimized in Rwanda or Bosnia why is there not justice here? Why can the truth not be known about what happened to us? We are trying to help make it possible to answer those questions.

With that opening, let me yield to your questions.

Q: I come from southern Sudan, now of course South Sudan. There are people in the Khartoum government who are now running around calling Bashir a peace hero. They are going about thinking that because Bashir allowed southern Sudan to go, that he should be forgiven for what he did. Is there anything that a killer can do so that he can be free?

A: There is no way explicitly to do that. Sudan is not part of the ICC, but under the ICC statute, the U.N. Security Council can send any case to the ICC, and decided to do that in 2005. The Bush administration went along with that referral at the time. Eventually that led to arrest warrants being issued against a fellow by the name of [Ahmed Muhammad] Harun, now governor of Kordofan state, and a militia leader by the name of Ali Kushayb, and then in 2008, the prosecutor sought the arrest warrant against Bashir that was later amended to be an arrest warrant for the crime of genocide.

What has been proposed by the African Union and by the Arab League for some time is that the Security Council should exercise its power under the ICC statute to defer the prosecution of Bashir. Under Article 16, the Security Council in the interests of peace can defer a prosecution for a year, and it could be renewed a year at a time. There were arguments that providing that benefit to Bashir would have facilitated efforts to negotiate with him about southern Sudan and the implementation of the Comprehensive Peace Agreement (CPA).

Our position was that there needs to be accountability and that it was not necessary to give him even a one-year get-out-of-jail pass to continue to

press for the implementation of the CPA. I think it has been shown that it was not necessary. We have had this referendum on the 9th of January and the decision by 99 percent of the people in the new nation of South Sudan to become independent.

“... I don’t think peace can come to Darfur unless there is accountability. Who would go home to where they lived before they went to a camp if they thought it would happen again next week or next year ...”

The situation in Darfur remains. The atrocities committed in 2003 are essentially unanswered. There have been no prosecutions, no effective actions by the national system. None of the Janjaweed or others who went out and murdered and raped people by the thousands have faced any consequences at all. None of those who supplied them with the weapons, or who planned these crimes, have faced any consequences. And the only accountability there is at the moment is the accountability that comes from these arrest warrants in the ICC.

However, I don’t think peace can come to Darfur unless there is accountability. Who would go home to where they lived before they went to a camp if they thought it would happen again next week or next year, and that the same people who did it – who killed your family members – are still there? So I think there has to be accountability.

I would like to see accountability ground-up. If the Sudanese were developing something like that, many would have more interest in talking with them about what should or should not be prosecuted at the ICC. But since it has not happened yet, and because I do not think there is any showing that the ICC arrest warrant has made Bashir worse than he was beforehand, I do not think there is any showing that failure to give him an Article 16 has obstructed the peace process in southern Sudan. I do not see that there is a reason for an Article 16 deferral.

But the issue remains out there. The African Union at the summit in Addis Ababa in January again called on the Security Council to consider this. Our position as a Security Council member has been not to defer, and that has been the position of a number of other countries. Obviously we have the veto at the Security Council, so we can stop it.

Would it help Bashir to support peace and accountability? If he were eventually in the dock and he were to say, “I am a peaceful man. I was not responsible for what these guys did and I created a system to punish them,” he might be able to beat the case on grounds that he was thus not guilty under the doctrine of command responsibility. This is because he was charged not for committing the crimes directly but as a commander who failed to prevent or punish those who acted directly. But I do not think he wants to go to The Hague to give that defense a try.

The final point to make is that Article 16 of the ICC statute does exist for a reason. Human rights groups do not like it. I am someone who believes in justice and accountability, but I can imagine – not this time, not in this situation – that there might be a time it is justified to use this tool, that sometimes the interests of getting the peace negotiations concluded might trump the interests of getting somebody taken right off to jail. So there is a reason for it, but as a general rule it has been my perception that if somebody is committing horrible atrocities, if you do not hold them accountable, they will commit more atrocities in the future. I think some of Bashir’s better behavior is reflective of the fact that he has had this indictment hanging over his head.

Q: I am from Liberia, West Africa. My interest is in the Charles Taylor trial. The Truth and Reconciliation Commission (TRC) report was submitted to the national legislature in 2009. The verdict of the [Special] Court for [Sierra Leone], to be handed down in September probably, will have an impact on the peace process in Liberia, either positively or negatively. But more than that, Taylor also committed some heinous crimes in Liberia and that was reflected in the Truth and Reconciliation Commission report. We have been wondering whether the principle of double jeopardy would hold for him, whether he would

be found guilty or not, at the trial he is in now. Is there any plan to also indict Taylor, as has been reported in the Truth and Reconciliation report, for the crimes he committed also in Liberia?

Also there are other people or other personalities that are mentioned in that report who are serving in government. They are in parliament, they are in congress. They are mentioned in that report for prosecution also. My question is, with U.N. peacekeepers withdrawing, if these people that are named in this report are now brought to justice, what is the likelihood that Liberia will relapse into war?

A: It is a very good question. Just to begin with the Taylor matter, and as you clearly understand, Charles Taylor is on trial in The Hague for the Special Court of Sierra Leone (SCSL), not for any crimes he committed in Liberia, but exclusively for responsibility that he had for his alleged agents, the Revolutionary United Front, committing crimes in Sierra Leone. Nothing about that verdict will constitute a decision as to crimes in Liberia.

It would remain possible for Liberia – if it was to have a court and it was to deal with it in a way that would eliminate presidential immunity – to try him for those crimes. I’ve not heard of any effort to actually do that. There was some speculation in a publicized cable, from before I was in government, about whether Taylor could be prosecuted in another national system for those crimes. And I tend to think the answer to that is no. As to whether he will be convicted at the SCSL, I was the prosecutor and I believe strongly in the evidence that we presented, and in my role asserted that this evidence was sufficient for Taylor to be convicted in the Sierra Leone court, but that decision will be up to the judges.

The issue however that you raise about accountability for all the crimes in Liberia, for the suffering of Liberia from 1979 onward that was documented by the TRC, is a very good one. I thought the TRC did quite a good job of bringing in a lot of people to testify and shedding a light on the events from 1979 onward – crimes committed by Taylor and members of his group, crimes committed by leaders of other groups.

I was disappointed that the actual report that was written was not as strong as the hearings. The recommendation for instance to bar President Ellen Johnson-Sirleaf for 25 or 30 years by the reason that she supported Taylor at the very beginning in 1989 but broke from him in 1990 – when she admitted exactly to what she had done, and then others who had been responsible for killings were not recommended for any punishment – I think called into question the recommendations of the TRC itself. But that leaves aside the fact that there was all this evidence developed by the TRC, and it calls for further action.

The position we have taken in the U.S. government is similar to the case of Sierra Leone. Sierra Leone went to the international community and said, “We want to establish a special court. We want to have a TRC, but also a special court to prosecute those who bear the greatest responsibility. Will the international community help us do that?” Liberia hasn’t asked that yet. And we’re waiting for that process to go forward, for Liberia to come to us.

Whenever I go to Liberia, people ask, “What do you think we should do?” I say, “Well, I have some views. I will share them with you maybe. But we think the first step is for the Liberians to decide what they think a good process would be and then come to us. We are such a strong friend of Liberia that we will probably be there to help make this happen if it is a good process.”

Now, it may be because of the way the recommendations came out of the TRC, and resulting political controversy, that we have not received a request from the Liberian government for assistance in establishing a system of accountability, but I intend to follow up on this issue. Obviously with elections now proceeding, it may be the post-election period before decisions are made. But the United States remains ready to do what it can to help achieve accountability, and I share your concern that if people have committed mass atrocities, they can do it again if they are not held to account for those crimes.

Q: You talk about the successes of the Rwanda tribunal. Can you shed more light on the crimes committed by the RPF [Revolutionary Patriotic Front]? There is a big challenge for the tribunal to prosecute those who are in government as opposed to those not in government. Secondly, I was thinking about the principle of complementarity under the ICC, when the ICC can work together with the national governments in the implementation of the justice process. In Uganda there is a debate that the commanders of the Lord’s Resistance Army (LRA) be tried under the national justice system. And then looking at what happened in Kenya, the post-election violence, there is a similar move which appears to be a copycat from the Uganda case. Can you throw more light on that? What do you see happening with that kind of trend, of states saying we want to do it ourselves?

A: Those are very big questions. Let me deal with the RPF one for a moment because it is a tough one. The policy of the prosecutors under whom I worked in regard to this has continued to be questioned, and the failure of the Rwanda tribunal to prosecute at least in Arusha any cases against any persons from the RPF is a big issue that affects the legacy of that court.

I’m sure people know the circumstances: The ICTR was established because of the genocide in Rwanda, the genocide of the Tutsi ethnic group and Hutu moderates who were trying to protect Tutsis. It was one of the great genocides of the 20th century: 800,000 people murdered in the brief period of 100 days, a rate of killing that exceeded that of the Nazi death machine at its most efficient. That was the crime that called the court into existence.

The mandate was to bring those responsible for that crime to justice. Of course those people were no longer in power. They had won the genocide but lost the war. They had been essentially defeated by the RPF and ran off into exile. The tribunal where I served for six years was successful in tracking them down in 26 different countries and bringing them to justice in Arusha, including a dozen government ministers, 13 military leaders, governors,

mayors, media leaders and clergy – Catholic, Seventh-day Adventist, Anglican, Pentecostal pastors – who were involved in the genocide.

That was the main mission, but the court also had jurisdiction to deal with not only genocide, but crimes against humanity and war crimes committed by any party, any person in Rwanda in 1994. My good friend, my late friend Alison des Forges, wrote the definitive account of the genocide, a book for Human Rights Watch published in 1999 – tough reading, but a book that should be read, called *Leave None to Tell the Story*. In the last chapter of that book, she recounts her information that alleges that the RPF, in the course of winning the war, killed at least 30,000 Hutu civilians.

The question was: Do you prosecute both sides? If it was 800,000 on this side and 800 on the other side? Maybe not. But if it was 30,000 on the other side, is there not an obligation to look at that crime too? Prosecutors did investigate it and had difficulty developing the evidence. My last boss in the job, Hassan Jallow, the Gambian jurist, eventually made the decision to send at least one of the files over to Rwanda to be prosecuted by the Rwandan authorities against some of their own, which resulted in at least a couple convictions. But that decision was criticized.

Obviously the challenge of that case – and the challenge of so many others – is how to get the cooperation you need from the state to investigate and to make arrests. But by contrast, as I noted in the former Yugoslavia, the same prosecutor Carla del Ponte, who was prosecutor at both tribunals until September 2003, prosecuted all sides. And in the Sierra Leone court, we successfully prosecuted people on both sides of the conflict.

There, it was very controversial prosecuting the leaders of the Civil Defense Forces (CDF), including probably the most popular person in the country, Sam Hinga Norman, who was credited with helping defeat the RUF. But we believed he and his groups had committed atrocities when he ordered his men to kill all the people in villages viewed as being sympathetic to the rebels. It was an important case, and we were able in Sierra Leone to get cooperation to do it. In Rwanda, it was much more difficult.

To go to the question of complementarity, what does that mean? In the Rwanda and Yugoslavia courts, which had primacy, the tribunals could say, “We want this guy, we’re going to prosecute him,” and the national governments might respond, “No, we will do it.” The tribunals would answer, “No, we have primacy, give him up. Send him to us.” That was the rule under which they were established. The ICC is a court of secondary jurisdiction. National courts have the first bite of the apple, if they are to proceed with the case. It is only if they do not do it, because of a lack of capacity or will, that the ICC has jurisdiction.

I remember when Luis Moreno-Ocampo became prosecutor. I talked to him about a month after he was elected but before he took office. He said, “I would be the most successful prosecutor in the world if I had no cases at all, if I can convince countries to go and do it themselves.” Now I am not sure that the donors to the ICC would have been happy spending money for a court with no cases, including the pay and benefits of 18 judges all dressed up in blue robes but with no trials to conduct. But theoretically the prosecutor’s idea was an appropriate approach.

In Uganda, the government itself sought the referral of the Lord’s Resistance Army case to the ICC. It basically said, “We don’t have the power to get Kony. We think by referring this case to the ICC, this will help get him. We don’t have the capacity to do it.” So that is how it started. The prosecutor went out and indicted Kony and four others. He still does not have them. There was a time during the negotiations in Juba when there were discussions over whether Kony might agree to come in and sign a peace agreement and then face a genuine national process. There was some interest in the international community in giving that a try, and even granting an Article 16 deferral, if Kony were to sign. But he never turned up. Now no one thinks Kony wants to face justice anywhere; at the end he wants to be forgiven. So it didn’t work.

Meanwhile, however, while the prosecutor and the Ugandan forces, with our assistance, continue to chase after Kony and those of the other accused that he did not kill, we are interested in helping develop the Ugandans’ own system for prosecuting those who did not get indicted at the ICC. The U.S.

government, through a grant from our Office of Transitional Initiatives, has been funding training and resources for a special division of the High Court of Uganda to try other LRA leaders. Thomas Kwoyelo was captured during one of these operations by the Uganda Peoples Defense Force, and his case is now pending trial in Uganda. Interestingly enough, the only LRA case that is proceeding anywhere in the world is the one in Kampala.

Everyone wants to see, even if the ICC has the top cases, the national system being able to prosecute responsibly other individuals. And that is part of complementarity. The challenge of course is that the ICC is not an aid agency. Countries say, “Can the ICC come and help us build courts? Can it provide us with judges? Can it provide the computers or the buildings or the witness protection, etc.?” And the ICC members who are paying dues to this think, “It costs too much already. We don’t have enough money to provide assistance.”

We are really trying to help the ICC with complementarity because we want to see prosecutions at the national level. And that is why we are in Uganda assisting the special division, why I am spending all this time in the Democratic Republic of Congo working with national authorities to establish specialized courts for war crimes at the national level. They are making progress on the necessary legislation. We want to see cases in national courts even if the ICC is taking a few cases to The Hague. If we can establish justice for all the cases at the national level, that is best. It is what we hope can happen in Guinea – that a new government will be able to prosecute those most responsible for the crimes against humanity committed in September 2009. That is what we want to see done, and what the ICC in principle wants to see done.

Kenya is a little different at the moment. It was three years ago next week that they signed this power-sharing agreement, and part of that was that there was going to be accountability in Kenya for those responsible for the post-election violence: the murder of 1,200 people, dislocation of a half million – horrible acts committed sadly on an ethnic basis because that was the way that the political contest had been aligned. We believed very strongly that there needed to be accountability or we would come up against another election and the same kind of thing would happen.

We urged the Kenyan government to establish a special national tribunal. The U.S. was ready to come and help. It could have been a mixed court with internationals included among the prosecutors and judges. If that is what they wanted, we could have sent them personnel or, and I am sure that, Commonwealth countries would have been happy to do so as well. We were ready to help make it a success. But civil society groups were not enthusiastic, saying, “We do not trust a national court, or even a mixed court in Kenya because we are afraid it will be rigged in favor of the establishment.” So intriguingly, there was no great interest even among human rights groups to do it at the national level – as there certainly was not among the members of the political class.

The government actually turned to the ICC and said, “Ocampo, you do it. We will cooperate with you.” And eventually, though they would not give him the formal referral, they essentially said, “Go ahead, do your work. That is how we will handle accountability. We are not going to have a domestic tribunal.” Of course he eventually did exactly what he said he would do, which is to charge two or three leaders from each side who were allegedly responsible for the mass violence. But now they’re saying, “Wait, we are going to have a domestic tribunal.” And they have asked the U.N. Security Council to grant a one-year deferral to give them time to establish one and to pursue cases.

Our response to that is that we must have accountability now. We need cases pursued before the 2012 election. It should not be deferred. The ICC has jurisdiction. They should proceed with the case. However, there still is a need for accountability in Kenya. We will still be supportive of a court like we have been in Uganda, like we are in the DRC, to deal with the others. And if the Kenyans proceed in good faith with that, and then proceed and actually go after the same people the ICC is going after, they can go to the ICC and say, “ICC, stop. We are doing it.” But they cannot do it based upon: “Oh, we might put this into effect. We might pass it. We might fund it. We might investigate it. We might prosecute it. Give us time.” No, the time is up, and the ICC is on it.

Q: We have been talking a lot about accountability and preventing people from doing these kinds of atrocities again. It seems to be that is one side of the justice coin; that is the retributive justice approach. It's clear that there are many more victims than there are perpetrators, and they are damaged socially, economically, psychologically, etc. Is restorative justice in the purview of your position? How important, in your motivation in prosecuting these criminals, is a result that actually ends up benefiting the victims instead of just throwing the perpetrator in jail?

A: It is very important, and what brings me to this field is the chance to do something for the victims. I admit to disappointments about what can be accomplished, but I keep looking for ways that we can help with that part of it. The first thing that we can do for the victims (and I have had people tell me how important it is to them) is to ensure that this process goes forward and that they know about it, and there's a finding that someone did something bad, and that they or their loved ones were victimized.

In terms of what that does for the memory of loved ones, and to some extent to reintegrate society, I think should not be underestimated. Of course I tend to look at this from the point of view of a traditional prosecutor – that is, by looking backward at cases and prosecuting them, we send a message forward that will deter those crimes and prevent others from being victimized. People can speculate on the effect of general deterrence. It is never perfect, but I believe that the prospect of people being held to account by good and effective criminal justice systems is one of the things that keeps our lives from being nasty, brutish and short. I think that prevents others from becoming victims.

But we need to act for the victims of crimes that have already been committed. Understand that the Rwanda tribunal and the Yugoslavia tribunal had no provisions for the victims, either for reparations sought for them by the prosecutor or by their own participation in the process. That is different in the Cambodian court, which did provide for victim participation and for reparations, though these have been limited by the court to symbolic awards only. Of course civil law systems do allow for victims to participate in trials

and sometimes to achieve monetary judgments against the criminally accused – not that they can necessarily collect those sums, but there is that process. And the ICC incorporates this civil law process in its procedures.

The challenge to all of that is the people you prosecute, with rare exception, will, by the time you have them in court, be indigent. So any judgment entered against them will not be collectible. For the tyrants in the dock, the kleptocratic rulers who may have committed human rights violations as they were also pillaging their country of resources and filling foreign bank accounts with stolen money, the challenge of tracing the money, locating and seizing the funds, as we have discovered, is even harder than convicting these individuals. The funds may be hidden, they can be transferred to other names, they can be in banking havens. As we have seen with Ferdinand Marcos and Baby Doc Duvalier, it took more than 20 years to locate a fraction of the funds and to return them to deserving parties. But even these modest successes are exceptional.

You may have seen a press report recently about my speaking to the SCSL management committee when I was prosecutor about my search for Taylor's assets. Our capacity at the Sierra Leone court was very meager when it came to conducting international financial investigations. So I was constantly trying to motivate the United Nations and other actors to press ahead with tracing Taylor's assets. We had a provision that said that if we had a conviction for a crime that involved some taking of property – and we were alleging that pillaging the diamonds in Sierra Leone was taking the property through a campaign of terror, a war crime, then we could recover the proceeds of that pillage and restore it to the victims.

Of course it's very difficult to find the individual victims of Taylor's pillage of raw diamonds. But if they could not be found, we had an agreement that the money would go into the Sierra Leone victims' reparation fund. This fund was established by the government of Sierra Leone and it has spent about \$4 million to date of donated funds, providing reparations to the individual victims of sexual violence and amputation, and to the survivors of the dead.

Of course with the large number of victims, this has meant only very small amounts have been received by the victims.

I was always hoping we could somehow make this work to recover money and fill this fund. But the ability of the court to find those assets and to seize them was really beyond our capacity. There's still the possibility that after a conviction something could be done. A conviction does stand as a personal judgment that the perpetrator is responsible to the victims of the specific crimes. If a verdict was rendered saying Charles Taylor was responsible for all the crimes committed by the RUF between such and such a date in certain districts of Sierra Leone, those individual victims would have a right to use that judgment as essentially a determination of liability binding in a personal injury lawsuit that they could file seeking to recover from his assets. But this requires them to have attorneys with the capacity to succeed in such cases. So there may be something that may still be out there that could be opened up if funds were to be found.

More common is the situation where the perpetrator has no seizable assets, like the situation for victims of armed groups in the DRC or of Joseph Kony and his LRA in Uganda. For these victims, the ICC Trust Fund for Victims is trying to raise voluntary contributions, but the donations so far have not been great. If they were not trying to compensate individual victims, you would have a situation like we had with funding in Sierra Leone where they were proposing to pay \$100 compensation to someone who had his right hand chopped off. The person would almost feel insulted taking \$100 for such a horrible thing. But given the numbers of victims, how could they pay more? I think the focus at the moment regarding victim reparation is trying to find a collective way to aid people, to use this to bring in a clinic for fitting people with prosthetics, or a clinic to provide maternal and female healthcare. Of course, the individual victim may say, "Well, everyone can go there. What has been done to compensate for my personal loss?" But even in finding money for collective reparations, there is reluctance among donors who wonder why they should pay for crimes for which they were not responsible, while the individual perpetrators are not paying.

But it is still a real unanswered need. Certainly in Sierra Leone whenever I met with the victims' groups, like those in the amputee football club that I supported, I find them cheering our verdicts: "It is great you won, but at the end of the day we can't eat judgments. We have got to have jobs. We have got to have a future. It is good what you have done, but more needs to be done." And there is not often anyone to do it.

Q: You were involved with the first convictions for sexual enslavement as a crime against humanity. I know that in both Bosnia and Rwanda the masterminds were convicted. But there are still many "smaller fish" who escaped the national prosecutions. Did your office have any involvement with that process? Were you able to work with the national Bosnian government to establish future courts for the victims of sexual enslavement?

A: We are indeed quite involved in the efforts to carry out justice at the local level in the former Yugoslavia. Understand that in each of the countries of the former Yugoslavia, prosecutors are pursuing cases of crimes against humanity and war crimes. In Bosnia there is a war crimes chamber in the state court that we have funded, which has actually been the most efficient court to date for trying cases. It has tried scores of individuals for violations. These tend to be mid-level leaders, responsible for killings in Srebrenica and elsewhere.

But there are in Bosnia hundreds, if not thousands, of unprosecuted cases of persons allegedly responsible. There is the War Crimes Chamber of the State Court that has had a mix of international prosecutors and judges, though these are being phased out by 2012. The court will continue with its work but it probably will not reach even a fraction of the cases that are potentially there. They have it in their national war crimes strategy to transfer those cases to the lower level courts, to the district courts in the Bosnia-Serb entity and in the cantonal courts in the federation of Bosniaks and Croats. Those courts are not really up to speed on these issues, though I have been out in the Balkans several times trying to help strengthen their efforts at the local level. There needs to be a continuation of this support.

Another problem in the Balkans is that crimes may have been committed in Bosnia by a Serb now living in Serbia, and the victims are in Bosnia. Between the countries of the former Yugoslavia there is no extradition in war crimes cases. So for some of the worst crimes committed, the perpetrators are not within the arm of the court where the crimes were committed.

The answer is for there to be sharing of information between the national prosecutors. Some of the victims' groups are not really thrilled with this because they do not trust the prosecutor in Belgrade, who is a Serb, to prosecute a case in which Bosnian Muslims were the victims and Serbs are the accused. But the Serbian prosecutor has pursued some of these cases and won convictions. The practical approach is for the case with Bosnian victims to be put together by the Bosnian prosecutor in Sarajevo and sent to his Serbian counterpart in Belgrade. Then the Belgrade prosecutor should reach out and find the accused, investigate the case further and prosecute it in his own court in Belgrade, perhaps having Bosnian witnesses come there or testify by video link.

I am hoping to have the prosecutors of each of the three countries of former Yugoslavia come to Washington or another neutral site in the next two or three months, to sign agreements for this kind of sharing of information between them. It is imperfect because it is not mandatory that they pursue every good case, but it is what we can do now. If it works, it also has other benefits. In our view nothing is quite as effective in terms of reconciliation as for a country to prosecute its own who have committed horrible crimes against others, and for that to be seen in the community of the perpetrators. That is powerful. That is why complementarity is such an important concept. A trial at home has more impact than one in The Hague thousands of miles away.

You did not ask specifically about Sierra Leone. That is a tough situation for complementarity. In 1999 when the government was truly on the ropes and the rebels were in control of two-thirds of the country and Charles Taylor was involved in mediating the peace, they signed a peace agreement in Lome, Togo, to end the civil war in Sierra Leone, in which all the rebels, everybody, received amnesty. The United Nations appended a statement saying that this didn't apply for international crimes. But the peace plan broke down when

the rebels started raping and killing and even attacking peacekeepers. Then the government wrote to the United Nations and said, "Well, we are going to proceed with a truth commission, but for those that bear the greatest responsibility, we want an internationalized court."

So the Special Court for Sierra Leone was created with a mandate only to prosecute the top people, with everybody else still benefiting from the Lome amnesty. Effectively, the 13 people who we indicted for what happened in Sierra Leone – 10 of whom went through trials, 3 of whom died beforehand – were the persons that were proceeded against for war crimes. There are persons alive today who murdered hundreds, who raped hundreds, who were not prosecuted and are effectively immunized.

There were some who said that this particular amnesty did not apply even at the national level and that the national government could proceed with cases, but there has not been any political will to do that by either of the two political parties that have had power during the years since the civil war ended. So whenever I appeared at outreach meetings in Sierra Leone, I was always asked this question: "What about the guy down the lane who did these horrible things? What is going to happen to him?" And I said, "Our mandate was only to pursue the most serious leaders."

To some extent, justice is never complete. Nuremberg only prosecuted certain people. If you have ever seen the Kenneth Branagh film about the Wannsee conference that made the decision on the Holocaust,¹⁰ there are words on the screen at the end to tell what happened to those who participated in the meeting. Of course the SS leader portrayed by Branagh was blown up by partisans in Bohemia, and maybe one or two were prosecuted, but most of those who survived the war were never punished. They went onto careers in banks or business. It is the nature of justice that many people get away with it.

On the other hand, justice is about those cases that you can make. In doing them, the story is told. The state, the prosecutor, is held to a very high standard of proof. And the individuals have a chance to defend themselves. In those representative cases, a measure of justice is achieved – and it is worth it.

INTRODUCTION

Dee Aker

Deputy Director

Joan B. Kroc Institute for Peace & Justice



As we celebrate the 10th anniversary of the institute, we're also particularly pleased with our continuing outreach to women and young people seeking to play a positive role in peacebuilding and social justice in their communities. So it's especially an honor to have you here this evening, Ambassador Rapp, because we are keenly aware of the attention you have paid specifically to advancing the cause of women victims of crimes against humanity.

As we come upon the 100th anniversary of International Women's Day, we thank you for your clarion call for accountability and justice that includes addressing specific atrocities against women in Sierra Leone, the former Yugoslavia, Cambodia – and so many other distraught homelands of our Women PeaceMakers who have been recognized here at the Institute for Peace & Justice.¹¹ During our Global Court of Accountability in 2005 with Justice Richard Goldstone and Fatou Bensouda of the International Criminal Court, believe me, you were here in spirit and essence – and you continue the work. We are greatly appreciative.

¹¹ The Women PeaceMakers Program is entering its ninth year. It has documented the stories of Christiana Thorpe of Sierra Leone, Svetlana Kijevčanin and Shukrije Gashi of the former Yugoslavia, and Thavory Huot of Cambodia.

Your commitment to exposing and addressing the often ignored gender-based crimes in these settings allows such women and survivors to feel supported and to be better heard in their political and legal advocacy in building their own societies again. This includes their possible access to justice, and most assuredly in the essential inclusion of gender issues within negotiations and initiatives for women in armed conflicts and recovery in post-conflict situations, as called for in United Nations Security Council Resolution 1325.

Your voice and pioneering legal strategies deployed to put war criminals on notice – whether for prosecuting a former head of state, Charles Taylor, for crimes and actions in a neighboring country, or taking on the media magnates in Rwanda for calling neighbors to kill neighbors – have reignited the belief that justice, though complex and elusive, is worth seeking and may help deter similar future sufferings.

I want to invite you to our podium to help us with the gnawing question: How do we achieve justice for those most dehumanized, demoralized or completely lost in the crimes of genocide and war? How do we support the precarious progress you and a few others have created? Now that there is some capacity to address gender-based crimes, how do we get the follow-up ordered for victims in terms of reparations after convictions by the International Criminal Court?

I invite students, colleagues and friends to join me in welcoming Ambassador-at-Large for War Crimes Issues Stephen J. Rapp.



*Achieving Justice for Victims
of Genocide, War Crimes and
Crimes Against Humanity*

Stephen J. Rapp

Thank you very much, Dee, for that wonderful introduction that, like the news I receive almost every day, reminds me of the challenge of achieving justice in particular for women in zones of armed conflict, in places like North and South Kivu where women are attacked and raped and enslaved, where there is sadly too little accountability, where the message that all of us have tried to deliver of “never again” and “there are consequences” has not yet been delivered with sufficient effectiveness. It is part of the challenge in my current job to make what we have been able to achieve in some small measure in these international institutions matter at the level of each community and each individual.

But before I go to where I think international justice needs to progress in the future, I want to stop for a moment and reflect on where it has been and the developments we have seen in a relatively brief few years – in years that span just a little longer than my own lifetime. I had an opportunity to do that about three months ago, and it was something that at one time in my life I could have only dreamed of: It was an opportunity to represent the United States of America on the 65th anniversary of the Nuremberg trials, in Nuremberg, Germany.

The courtroom at Nuremberg has remained a courtroom of regular trials and has not been open to the public. There has not been a site open for commemoration of the historic events that happened there in that courthouse until this year when it was established by the city of Nuremberg and the government of Germany. They invited representatives of each of the four powers that prosecuted the leaders of Nazi Germany to come there on the 65th anniversary of the opening to address the people of Nuremberg. There were also representatives of the German government. I was honored to join the Russian foreign minister, Sergei Lavrov, and representatives of the United Kingdom and France to deliver an address.

It was for me a moving experience. When I was a prosecutor in the Rwanda tribunal, my friends from Australia and New Zealand would always laugh at me: “Whenever you go to court, Rapp, you want to deliver a speech from Justice Robert H. Jackson. Americans think he was so great.” And I say, “He was.”



Justice Jackson was a sitting justice of the United States Supreme Court, a former attorney general under Franklin Roosevelt, who was asked by Harry Truman – without leaving the Supreme Court – to take a year off and go to Nuremberg to lead the American side of the prosecution. It fell onto him to open the trial on November 21 and appear before the judges of the four allied powers. At his side was a dock with 21 Nazi leaders led by Herman Goering and the surviving leaders of each part of what had been a powerful German Reich, a Nazi machine that had killed 6 million Jews and plunged Europe into a war with tens of millions of casualties.

One part that most of us who followed will always remember was the second sentence of his opening, that “... the wrongs that we seek to condemn and punish have been so calculated, so malignant, so devastating, that civilization cannot bear their being ignored, because it cannot survive their being repeated.” But he went beyond that and talked about what justice required in the wake of those tremendous atrocities. That was something new in the world – that men of great power, not just low-level individuals but those who had exercised the power of a state, could be held to justice. As he said, “The law shall not stop with the punishment of petty crimes by little people. It

must also reach men who possess themselves of great power and who make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.”

But he also said something about the rather unpredictable possibilities of these enterprises, of seeking justice – and is a warning that resonates still – when he said that “we must never forget that the record on which we judge these defendants today is the record upon which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.”

In my speech to the group that day, I said and I believe that what happened at Nuremberg, the idea that the great could be held to account for atrocities against ordinary men and women, was a day of immense historic importance. For the German audience I remembered a quote from Goethe, who had been a witness at Valmy in 1792, where a citizen army had vanquished the forces of imperial and regal Europe. What he said about Valmy could be said of what happened at Nuremberg: “From this place and from this day begins a new era in the history of the world.”

Nuremberg was significant and it shows what trials can achieve. The trial largely turned on documentary evidence. Tens of thousands of pages of German-owned documents were presented, and as Jackson said, “The documents alone were sufficient to convict.” But the film record was presented of the concentration camps, gathered by Budd and Stuart Schulberg in a three-hour documentary that was shown in the first month of the trial. There was some live testimony. But some of the live testimony appeared almost by accident. But the fact that it came in and that it was part of that historical record is of immense importance to us today, when some crazy people would deny the reality of what happened.

There was the testimony of Rudolf Franz Ferdinand Hoess, who had been commandant at Auschwitz, who had been captured in Poland after the trial began and who had been made available to the defense. One of the defendants decided to call him as a witness. This defendant wanted Hoess to say that the

defendant had not been at Auschwitz. So Hoess came and so testified. But in the course of the testimony he described what had happened at Auschwitz, with matter-of-fact pride. It’s estimated that under his command, 2,500,000 victims had been executed and exterminated by gassing and burnings, and another half million had succumbed to starvation and disease – making a total dead of 3 million. As he almost boasted, in the summer of 1944 “we executed 400,000 Jews from Hungary alone.” That was the record that was established in that trial.

But after that trial and the subsequent proceedings – there were a dozen other trials of other Nazi leaders that concluded by 1949 and a similar proceeding in Tokyo – there were no further examples of accountability on the international stage. Jackson had said in his address that this was a “novel and experimental” idea. And some thought it would be the one and only because of the horror of what the Nazis had wrought during World War II.

During the Cold War, when international institutions like the United Nations were frozen in terms of action at least by the Security Council – by the fact that one side or the other could veto action against even bad and atrocity-committing allies on their side – there was no expectation that anyone would face justice for atrocities at the international level.

That changed after the end of the Cold War and with the atrocities that began to develop in a world with some of its moorings unstuck in the 1990s, first in the former Yugoslavia where tens of thousands were victimized, murdered, raped, driven from their homes in efforts to separate and create Greater Serbias or Greater Croatias – ethnically pure countries built on the blood of others, with groups believing that what they were doing was justified by historic victimhoods that they had suffered.

The world responded finally in the United Nations Security Council with the creation of an international tribunal. Many at the time said, “Is this not a poor substitute for doing something really effective?” Indeed, as we remember, in World War II what brought the Nazis to the dock was the fact that they were

defeated in a war, that their country was occupied. The trial was conducted by the four-party occupation government that had the power to arrest and enforce sentences – a super-state in essence, created by the victorious allies.

But in 1991, 1992 and 1993, the world was unwilling to put troops in harm's way in the former Yugoslavia, to provide peacekeepers with adequate weapons and material, with mandates under Chapter VII that would have given them the power to protect individuals.¹² Atrocities became ongoing. We saw the bombardment of Sarajevo, a city where we had watched Torville and Dean in the Olympics just nine years before, where people were shot down in the streets as they went shopping, in an effort by the Bosnian Serb forces to essentially intimidate and destroy the Bosnian Muslim population in that capital city.

The response by the United Nations was to look at Nuremberg, at least a part of it, and say, "Let's have a court. Let us not send in soldiers. Let us send in lawyers and see what happens." I think people did not have very high expectations about what would be accomplished. But I think all of us see that because of the work, because of the evidence, because of the process, because of the cooperation that was eventually possible, justice could be done. No one thought when it began that President Slobodan Milosevic, then the powerful president of the Yugoslav federation, would some day be brought to justice. But that day arrived.

A year later in Rwanda, even worse crimes occurred: the murder of 800,000 men, women and children in the period of 100 days – a rate of killing that exceeded that of the Nazi death machine at its most efficient. The Security Council responded to the demands that said, "Do African victims not count? What about justice in Africa?" There hadn't been a willingness to provide [General Romeo] Dallaire with reinforcements; there had even been calls to remove the small U.N. force that was in Rwanda. But after it was over, the idea of a tribunal was the solution chosen, and one was established.

¹² Chapter VII of the U.N. Charter regulates the use of force in response to "threats to the peace, breaches of the peace and acts of aggression."

Not much was expected of it either. To date it has brought people to trial from 26 countries across Africa, Europe and North America, including 12 members of the genocidal government including the prime minister who was convicted of genocide, 13 military leaders including the strongman Colonel [Theoneste] Bagosora who set the genocide in motion, and other leaders – of the media, the territorial administration, governors and mayors, and business leaders and leaders of the clergy: Catholic, Seventh-day Adventist, Pentecostal, Anglican and others who had participated and helped lead the killing.

"During the Cold War ... there was no expectation that anyone would face justice for atrocities at the international level."

A few years after the establishment of these tribunals, violence continued in Sierra Leone and the world then established a court without the same powers as the ICTR [International Criminal Tribunal for Rwanda] or ICTY [International Criminal Tribunal for the former Yugoslavia] had had – a new institution, a mixture of both international and national elements. There was no expectation when it was created that it would succeed beyond holding some rebel leaders to account, certainly not that it would be able to achieve the arrest of a leader in another country who was alleged to have been pulling the strings in the atrocities in Sierra Leone. But the day arrived that Charles Taylor was flown in to Freetown and then on to The Hague.

And so these institutions each in a way exceeded expectations. Of course the question today in this lecture is justice for the victims: Is this business of holding a Taylor or a Milosevic or a Bagosora or a Kambanda or a Goering, is this justice for victims? I can only speak from my own experience, actually putting cases on trial, meeting with victims in Rwanda and Sierra Leone, bringing them to court, talking to their families, returning to their

communities – particularly in Sierra Leone where we made probably the greatest success in our outreach program and in our efforts to discuss in communities across the country what we were doing. I can say that what we did, did not solve all the challenges that the victims face. And meeting those challenges remains a major part of what I am working on today and what I think all of us need to work on.

“To say that they are victims and that others are responsible – that they are not responsible – is an important contribution to them as human beings, and to the story of what happened.”

But holding those responsible who set in motion these great evils – that as Jackson discussed, touched so many if not every home – does have and did have great meaning to the victims. To say that what happened to them, what happened to those who died, to say to the women who were raped, to say to those whose children had been taken away, to say to the child soldiers who were conscripted, to say to the bush wives who were enslaved, that they were victims and that others are responsible for their crimes is of immense significance.

I was asked today by a group of students about our efforts to achieve, which we were successful in doing, the definition of a new crime: of forced marriage beyond even sexual slavery, as another inhumane act. You can prosecute them for rape, you can prosecute them for forced slavery, but why add to that a prosecution for forced marriage as a crime against humanity, as essentially another inhumane act?

What was happening here is that women were taken – not only sexually abused, not only torn from their communities and their families, but they were also conscripted into a conjugal relation, made to be wives, made to be servants but also made to be consorts, essentially stigmatized. Everyone

who looked at them said, “That person’s complicit in this crime.” So they could not go home. Others could. As we know, in crimes of sexual violence it is hard to go home, people are stigmatized. In this case, however, it was even worse because they were viewed as traitors. So their lives afterwards involved them choosing to go to a community that rejects them or staying with one that brutalizes them. To say that they are victims and that others are responsible – that they are not responsible – is an important contribution to them as human beings, and to the story of what happened.

I do believe, and in this I sound like the prosecutor that I was before I took this job, in the value of a lesson well taught, of a prosecution which sends a message that if you do the crime there is at least the possibility that you will have to do the time. Of course we know that the law even in the most well-ordered societies, even in those that have the best and most effective justice systems and the fairest trials, does not result in every criminal being charged and every guilty person convicted, and it does not prevent all crimes. That said, sending out the message that there can be consequences can make a difference.

“As I got to know the perpetrators of these crimes, I came to understand that mass murder, mass rape, mass mutilation, are not acts of atavistic and spontaneous violence.”

As I got to know the perpetrators of these crimes, sitting across the courtroom from them or sitting in the jailhouse sometimes with their lawyers trying to convince them to plead guilty and cooperate, or speaking to the informants who told us where we could find the witnesses and the information and the resources that had been hidden, I came to understand that mass murder, mass rape, mass mutilation, are not acts of atavistic and spontaneous violence. Sometimes one picks up reports and reads, “Inter-ethnic violence broke out and continued for days,” saying that these are crazy people fighting out ancient hatreds in some spontaneous way.

No, these atrocities are organized. These forces are unleashed for a purpose: to gain power, to hold power. It is effective. To demonize a particular group, to say to a society that may have a history of conflict, perhaps almost forgotten with a particular minority, that it is the other party's fault, it is a strategy that works. We see some elements of it in the way politics is sometimes played out in more developed societies.

But in these conflict zones, it is the leaders who make the decisions. They enlist the militia, they mobilize the forces, they train the people to kill and to maim. They deploy them, supply them, incite them and use them to gain or maintain power. The decisions are made by people who are intelligent, who have gained power in very trying and difficult situations, who constantly are calculating advantages and disadvantages. Sending a message to them that there are consequences can in certain circumstances change their conduct effectively, cause them to do it differently, cause them to act in ways that do not result in the destruction of human life and limb.

As I noted earlier, in Jackson's speech he spoke of the poisoned chalice, suggesting that once one began to seek justice people would come to expect it, and they would expect those who pursue justice to be held to the very same standards. As we watch what is happening in the world today, we see the dynamics of what has been unleashed by the success of these international tribunals. There is no question that there are cases that arose only in a relatively few countries. There is no question that there are some places where horrible things have happened where there has been no international justice and no realistic possibility of it.

I constantly deal with these issues as I sit in the State Department with those following the traditions of diplomacy. I often suggest to them that what has happened in international justice in the last 15 years since these tribunals have come on the scene has created probably one of the most dynamic and almost unpredictable factors in the international system. It is a question in almost every situation that we deal with these days – the question of whether there is a possibility that some leader might be held for trial and whether that

might prevent him from seeking refuge in this country or that country. There are new consequences out there, arising from the call for justice for crimes, not just committed recently, but also those committed in the past, that must enter into the equation of our thinking.

But I believe the question for us now is to look at what is happening as tribunals like the Rwanda tribunal and the Yugoslavia tribunal are closing their doors. They are finishing their work and have been directed by the Security Council to tie it up. Trials have been long and complex; too many individuals at perhaps too low a level have been prosecuted. The U.N. Security Council at the end of last year established basically a residual mechanism to begin the closing of those tribunals. I mentioned the Taylor trial – in that tribunal it is indeed the last case, with a judgment expected to be rendered in his case this summer and an appeal by next winter. That will conclude the work of that institution.

At the same time a new court, the International Criminal Court, has come into being (without U.S. membership) with 114 countries now as parties. It includes all 27 countries in the European Union and every country in South America, but it does not include the United States, Russia, China, India, Pakistan, Israel or any Middle Eastern countries except Jordan. Thus far it has issued 14 warrants and only five of them have resulted in an arrest. There is a perception that perhaps this particular experiment in international justice is running out of gas, that the expectation – bringing leaders to justice – may be too inconvenient, too challenging, too difficult or too disruptive to the powers that be for it to continue to be effective.

At the same time, because of what has been established, because of the expectations, because of the work of victims' groups, grassroots organizations and civil society across the globe, there is increasing demand for justice, particularly at the level closest to the affected communities.

What then does the future hold? What can it hold in a world which is still a world of states where there is no power that can make one country do

something that it does not want to do? There are ways perhaps that it can be persuaded, but no way to compel it. I spent the last 18 months, much of it on the road, dealing with the challenges, and I think that the seeds that have been planted by international justice are showing their greatest vitality at the grassroots – that in each country there is an expectation that there needs to be justice there, that where the victims are, where the perpetrators have committed these crimes, there needs to be at the very minimum a process to tell and reveal the truth.

“...I think that the seeds that have been planted by international justice are showing their greatest vitality at the grassroots ...”

As I deal with this process going forward, I find myself on the road in places where the prospect of prosecution of leaders may seem like a very far off thing. But where the process of just revealing the facts, of finding where the bodies are buried, how many died and where they died and what happened, is something that everyone demands and which you can build support around – and perhaps with that support build something more in the future.

In this past year I have been in Kyrgyzstan, where there was this horrible situation of Kyrgyz and Uzbeks – substantially and dramatically larger numbers of Uzbeks – murdered in cold blood, in Osh and Jalalabad in May and June of 2010. Even though it is a country that was formerly part of the Soviet Union and on the border with China, we managed to get an international commission of inquiry established. A report will be issued on Monday to the government and be published in three weeks that will describe exactly what happened. The government is cooperating thus far. I salute President [Roza] Otunbayeva for her cooperation. That will be a tough report. It will be difficult for that society to go forward and to respond to the truth because everyone has been spreading information that is not true, but it is a start.

In Burma, there is an even tougher situation. There is no prospect of cooperation by the government, even with an election that finally happened. The military government controlled it with an iron fist and delivered 81 percent of the seats to its people, and a military leader from the government took the presidency. It has established a supreme state council with the former President Than Shwe in control of everything. Hard to imagine that there could be much hope of government cooperation there.

I was on the border of Burma and Thailand for three days last month meeting with refugees, some who had crossed the border 20 years ago, some who had crossed the border 20 days ago. Two million have crossed that border. They describe continuing and ongoing atrocities against civilians in the various peripheral provinces of Burma.

We are pressing there for an international commission of inquiry, and we are trying to build support around the world to have a commission that will at least record what happened and send a signal. Indeed, I asked everybody who I saw, “What should we do?” And they said, “We have to have a commission of inquiry.”

I asked, “What good will that do?” “Well, at least they will know the world is watching. At least they will know that when they murder and they rape and they do these things, that it matters and that there is some prospect of justice in the future. And that may save lives.”

That is in some of the most challenging places. In others we are working very hard to build courts at the local level. I have been five times to the Democratic Republic of Congo in the last 18 months. That is a country that has four people in the International Criminal Court. Three are now in trial, a fourth awaits trial. But still we have these ongoing atrocities and a national system that is simply not effective in holding any senior to mid-level person to account. The government has now supported the idea of establishing specialized courts with international participation in them, international judges and prosecutors – not as a majority but as participants, not a fancy U.N. court with a lot of 4-wheel-drive vehicles sitting behind barbed wire

fences, but a national court with international participation. Legislation to put this into effect will, as they tell me, be ratified next month. And then we will be looking for international support to make it happen.

“We owe it to all of humankind to make the institutions of national and international justice so effective that there is at least the possibility that it will deter the worst crimes known to humankind.”

In other places there is the demand for justice not just for crimes that were committed last month or last year, but – as in Bangladesh or Cambodia – for crimes committed in the 1970s. The international community is providing resources to try those cases at the national level. Those proceedings, if they are done right, can be more meaningful than those tried in The Hague at the distance of thousands of miles from the communities.

Finally it is important to note that sometimes justice is not possible at the national level. Sometimes the system is so broken, sometimes the capacity is not there, sometimes the will is totally lacking to go after those who are responsible. The lesson we learned in the former Yugoslavia, the lesson we learned in Nuremberg, is that you need an international court to establish that justice. At the moment that international court is the ICC.

The United States has not chosen to move forward to join the ICC. In this administration we have decided to engage with it, to support the cases it has taken so far because all of them are those that cry out for justice. When there is no ability or capacity or will at the national level to prosecute people, the ICC can prosecute them. We are going to try to make it effective, and try to make sure that it can achieve the promise of justice that has been made at Nuremberg and Arusha and The Hague.

We owe this effort and this continuous struggle to those who have suffered these horrendous crimes and have the right to demand justice. We owe it to all of humankind to make the institutions of national and international justice so effective that there is at least the possibility that it will deter the worst crimes known to humankind. Thank you very much.

QUESTIONS AND ANSWERS

Questions from the audience were read by Executive Director Milburn Line.

ML: Thank you, Ambassador Rapp. I'm usually quite kind to our speakers, but I'm not going to be tonight. I'm going to start off with the elephant in the room: What is it about us that makes us think we're different – this American exceptionalism that also leads us to this American exemptionalism – that we don't think we need to participate in international regimes like the International Criminal Court?

SR: Well, I expected that question. It is always a challenging one. Of course, the easy answer – I will try the easy answer first, but then I will also take a shot at the much harder one – is that the United States, in its long tradition in dealing with international treaties and conventions, is very slow to enter into any such system. It is beyond living memory probably now, but in 1919 Woodrow Wilson went to Paris and persuaded the rest of the world to agree to a League of Nations. He came back and could not get it approved in the United States Senate.

We see that it is difficult even to approve treaties that are in our national interest. There is the treaty on the Law of the Sea that we are now complying with fully, but without formal ratification. If we actually ratified it, it would give us the ability to drill for oil in the Arctic – it would actually be to our benefit. But it is still difficult to get 67 senators to agree to something that to some extent limits our sovereignty.

Even conventions which have been approved by almost every country in the world are very hard to get accepted in the Senate. A few years ago the Supreme Court made a decision on the juvenile death penalty. They struck it down under the 8th Amendment by a 5 to 4 vote, but there was a discussion about the Convention on the Rights of the Child. One of the provisions of the Convention on the Rights of the Child is that you cannot execute someone for a crime they committed as a juvenile. But the United

States has not ratified it. There are only two countries in the world that have not ratified, and those are the United States and Somalia. I recently received word that Somalia, whose legislature cannot safely meet in Mogadishu but meets in Nairobi, has it on the agenda now to ratify the Convention on the Rights of the Child. It may come up in the Senate one of these days, but it will be difficult getting 67 votes for it.

I was discussing this with a good friend of mine, Judge Navanethem – or Navi – Pillay, who was the presiding judge in the media trial, the 34-month trial against the leaders of the Rwandan media that I prosecuted in Arusha. She is from South Africa, had suffered under apartheid, had been on the South African Supreme Court appointed by Nelson Mandela for a couple of years before she went to the Rwanda tribunal. After our trial she was on the ICC for six years. She is now in Geneva as the U.N. High Commissioner for Human Rights. She is a very nice person – very tough, but a very nice person. When I mentioned this to her she said, “But you in America protect the rights of the child a whole lot better than many countries that have ratified the Convention on the Rights of the Child.”



I thanked her for that, and it is true. Through our own institutions, our own Bill of Rights, our own Constitution and our own system of justice, we have a tough and effective system that we are proud of. That leads Americans to say, “Why should we be part of something where somebody else could tell us what to do?” And that will remain a challenge in terms of going forth with the ICC for a long time.

That said, and that is the easy answer, the answer from the point of view of this administration, led by a person who was a professor of constitutional law at the University of Chicago, Professor Obama, is that there are potential dangers to the U.S. being part of the ICC given the role that we play in the world. Former Secretary of State Madeleine Albright referred to us as “the indispensable nation.” We have 3 million men and women under arms around the world protecting people from terror and atrocity. No other country is as spread out around the world as we are, and that makes us vulnerable.

So when we go to countries like Afghanistan with our own service members, we ask those countries to sign Status of Forces Agreements. We are not going to make our service members face justice in those nations’ courts; they will face it in our own. When a U.S. service member does something bad, we will prosecute.

We are concerned that because, as President Obama in his Nobel lecture in 2009 noted, there are people in the world who resent the power of the United States, people in the world who think the use of force is inherently illegitimate, we could find ourselves unfairly targeted when we are doing the right thing. There is certainly the possibility that if there was a warlord out there who was killing 20,000 people, we could be persuaded to intervene to stop it. If 20 people were killed by accident as we were protecting individuals – and if you exercise military force there will be innocents who are killed unintentionally – a prosecutor could say, “We will prosecute the warlord, and then we will prosecute the American major responsible for killing the 20 people,” even though the American was responsible for an accident, not a war crime.

So that is the concern we have about joining the court at this time. On the other hand, the cases it has taken so far have not been cases of collateral damage or unintentional loss of life during the use of lethal force. They have been cases that involve the intentional targeting of innocent men, women and children by Joseph Kony, by warlords in the Congo, by rapists in Darfur. The situation we see in so many places is that it is so much more dangerous to be an innocent woman or child than it is to be a soldier. Those are where crimes are being committed these days, and those are the ones that the ICC is focusing on. They cry out for justice. We support justice in those cases.

The ICC statute says it will only take cases that involve a high level of gravity, and generally even in war crimes it says that they need to be part of widespread actions. So it is possible that as this court develops and we see how it selects cases and which ones the judges approve and which ones they reject, we could gain confidence that this court would not be used as some sort of political vehicle to target us. But that will take time, as it always takes for the United States as it evaluates whether to join international institutions.

ML: How effective do you think truth and reconciliation commissions (TRCs) are in achieving justice and promoting peace among those who have been victims of war crimes and crimes against humanity?

SR: That is a great question. Wherever I go I find a lot of people saying, “Is it not better to have a truth and reconciliation commission than to have trials?” Potentially TRCs can do a fantastic job of revealing what really happened in a conflict, who was responsible broadly for what occurred – and sometimes can do it a whole lot more efficiently than trials, which can take a very long time. Proving that somebody committed a relatively small part of what they fully did, through a contested proceeding, can be challenging, whereas if that person would just come in and confess to everything they have done, we would learn a lot more.

In South Africa, the one truth and reconciliation commission that most of us are familiar with, there was an expectation that those who did not come in and tell the whole truth might face prosecution. And to some extent that motivated a lot of folks to come in and tell the whole truth. In the end there wasn't any prosecution for those who didn't tell the whole truth. But at the time it worked. I think it was an appropriate decision by the post-apartheid government of South Africa, that it was more valuable to get the truth, and that the dangers of this particular group – the people responsible for the crimes of the apartheid regime – ever gaining power again and committing those crimes again were probably not great. So forgoing the possibility of punishment in return for truth I think made sense. But there was the potential sting of punishment that helped make it work.

“I think as a general rule, as we try to define how best to do justice, most of us would look at a TRC as part of the way to tell the story.”

In Sierra Leone we had a truth and reconciliation commission and also prosecution for the most senior leaders, in this mixed court. Practically none of the perpetrators came into the TRC to say what they had done, even though the court announced that any information given there could not be used against anyone. But what has happened in a lot of TRCs recently is that the bad guys have not come in, they have not told the truth. Victims have found the commissions of value to tell their stories. Experts have been hired to investigate and fill in the blanks. But we have not had the kind of catharsis that we hoped to have.

I think as a general rule, as we try to define how best to do justice, most of us would look at a TRC as part of the way to tell the story. They are useful in situations where not all of the low-level offenders or even the mid-level offenders would be subject to prosecution. A commission for these offenders

could be combined with an approach where more senior level individuals would face criminal consequences, because it was they who had unleashed the forces. But figuring out how to make both of these ideas work together remains a challenge. Since South Africa, TRCs have not been as effective as we hoped in finding the truth.

ML: A related question, in dealing with such international crimes against humanity, who decides and on what basis do they decide whether to engage in punitive justice – prosecutions – or restorative justice, like truth commissions or gacaca courts in Rwanda?

SR: I suppose this goes to the question of how courts have been established in the last several years. First of all in regard to gacaca and knowing Rwanda and having spent so much time there, I want to note that the gacaca courts are punitive courts. They are at the community level. They have processed hundreds of thousands of individuals, and have sentenced people up to 30 years in prison.

There is some controversy about them because individuals are not represented by counsel and victims are not protected. But most of us looking at Rwanda realize in dealing with crimes like those in the genocide – which had tens of thousands of perpetrators and hundreds of thousands who were complicit in one way or another – that the idea of traditional trials does not make sense and that these have been the next best thing. There has been a provision that those who fully confess their crimes could receive a reduction in their sentence of around a third, but they are not institutions where people are forgiven for committing their crimes.

In terms of who decides, it is almost always the state in which the crimes have been committed. The state may now be in the hands of those who were victimized, in which case they may finally seek trials and other justice mechanisms. It may still be in the hands of those who were associated with the perpetrators, and it may have to be pressured to do anything about these offenses. But it is first and foremost there that we look.

When a state does not do it, then the question becomes, when does the international community intervene? For countries that have joined the ICC, it is within the ability of the ICC and the prosecutor – if the crimes are sufficiently grave and if the state is not doing anything and does not have the will or capacity to do it – to come in even over the state’s objection, though if the state then starts a proceeding and begins to do something genuine, it can petition to take the case back. So the preference is always for it to be done at the national level.

For the rest of the world that is not in the ICC, the U.N. Security Council by a resolution with a nine-vote majority and with no veto from any of the five permanent members can act as it did to establish the Yugoslavia and Rwanda tribunals. Post-2002,¹³ because it is so expensive to establish a free-standing tribunal, the answer (as in the case of Darfur) is to send the case to the ICC to be prosecuted. Though we have seen with Sudan not being in the ICC, it has been very hard to achieve cooperation. But it is only in those kinds of situations where it is possible to overrule the decision of the state.

“Trying to establish justice in places where there is some lack of will and some lack of capacity is where I spend 90 percent of my time.”

That said, every case involves demands for justice by civil society, by victims’ groups in the country and in countries next door, as well as by an active international human rights movement, that can persuade countries to do things that they might not do otherwise. They can push for the establishment of mixed chambers or other approaches that countries may be willing to accept that do not go all the way to surrendering sovereignty, but that mix an international and a national presence. Trying to establish justice in places where there is some lack of will and some lack of capacity is where I spend 90 percent of my time.

¹³ The ICC can only prosecute crimes committed after 2002.

ML: What would you say to those who say trials of accountability following genocides are simply not enough? How does a trial seeking justice answer the moral question of our government’s inaction during active genocides, like that of Darfur?

SR: I think that this expresses the concern that all of us have, arising from crimes like the Rwanda genocide happening when there was a peace force that did not have a mandate to protect anybody. I remember those days as they unfolded in April of 1994, even as I was living in Iowa and serving as a U.S. prosecutor. I have come to know those events intimately from victims and others who were present on the scene. Certainly one of the saddest things about Rwanda was the failure of the international community to prevent the crime, when it was evident to anyone who had their eyes open what was happening.

One of the sorriest things was our own government’s decision to try to remove the small U.N. force that was there as the genocide was beginning. General Dallaire was asking for 5,000 soldiers to stop the killing. With the Belgians leaving he still had about 1,200. They were all willing to remain. The United States and Britain and others said “No, come home. There is no reason to be there anymore.” And it was only the members of the Security Council who were from non-permanent states – from New Zealand and the Czech Republic – who badgered the permanent members and pushed for action.

The result was a compromise that allowed Dallaire to remain on the ground with 270 soldiers – sufficient to witness the genocide but not prevent it. Though through his actions, he probably saved 30,000 lives with these 270. Obviously the world needs to take effective action while these crimes happen.

That said, the experience that we had in Iraq – getting caught between sides in a civil war – does not make anyone like the idea of stepping into a conflict and protecting one ethnic or religious group from another, particularly when it is difficult to understand a situation in which our intelligence and sensitivities

are limited. One could well find oneself in the situation described by Colin Powell, “if you break it you own it” or more precisely “if you try to fix it, you own it.” The idea of direct military intervention to protect people is an imperfect solution and certain to result in loss of life and second-guessing, even though the effect of the operation may be to save tens of thousands. Even with success, one should not expect to be thanked.

How do we deal with this problem of protecting people? It is easy for me to say, “The bad guys will be prosecuted and that will deter them, that will have some effect.” It can, but not enough. I think that leads all of us to be looking for other methods and techniques to try to strengthen civil society, to try to respond to hate propaganda with the truth, to try to use sanctions and targeted efforts to deal with the leadership where it hurts – in the pocketbook. There is a variety of other things in the toolbox that we need to try.

You have had other speakers on the Responsibility to Protect.¹⁴ There is a list of things that can be used. We are trying to use some of them as we speak in Cote d’Ivoire, and there at least we may have reduced the level of violence but still have not gotten to the political solution to which the people are entitled. The answer there in the end may be a regional intervention of some kind.

But before we get to that point I think all of us want to use whatever tools are there. I think it is important to note that the Responsibility to Protect [Act] states that it is the responsibility of every government to protect its people from these atrocities. If they fail to do it, it is the responsibility of the international community.

ML: A question from an IRC Peacemaker¹⁵: How about the situation in northern Uganda? The genocide there has been going on for more than half a century.

SR: My focus is on crimes of atrocity, and of course that leads to the case of Joseph Kony and the Lord’s Resistance Army and the need to bring him and

those who are responsible for the horrendous atrocities to justice, and that still needs to be done. I think the question implies that when it comes to the situation in northern Uganda there are grievances that go back before Joseph Kony, and that there have been atrocities committed by persons other than him. Of course, I think there needs to be a process of justice or at least of truth seeking for all of these crimes.

The ones on which I have the greatest focus are those that are happening now. With Joseph Kony now having left the land of the Acholi and having gone into the Democratic Republic of Congo, 500 miles to the west and even further north into the Central African Republic, South Sudan and south Darfur, and continuing to commit acts of unspeakable cruelty and mutilation and kidnapping, it is important that he be brought to justice. As Uganda goes through the process of accountability at the national level, we want to support their efforts to know the truth and tell the truth about all the crimes that have been committed.

ML: The Obama administration refuses to investigate officials of the previous administration for torture, a war crime, in Iraq or Afghanistan. Do you favor other countries bringing them to justice under universal jurisdiction?

SR: It is a good question. First of all, before I talk about universal jurisdiction, to question the premise here, I know the administration has talked about turning the page and not wanting to make it a high priority to prosecute officials of the past government for crimes, believing that people would view that as politically inspired. But I will note that my former colleague when I was a U.S. attorney, Eric Holder, now the attorney general of the United States, has appointed a special counsel that has investigated and continues to investigate crimes committed by United States personnel: torture or waterboarding or so-called enhanced interrogation. My office is not involved at all in that investigation.

¹⁴ Lloyd Axworthy on “The Responsibility to Protect: The Prescription for a Global Public Domain” in 2005; Gareth Evans on “Preventing Mass Atrocities: Making ‘Never Again’ a Reality” in 2007; and Louise Arbour on “Integrating Security, Development and Human Rights” in 2008

¹⁵ A group of youth from the local branch of the International Rescue Committee

As a prosecutor, however, and as someone who has read the books by people like Philippe Sands, the British barrister who set forth his theory of how a prosecution could be made, I think one has to recognize that any case to prosecute people who provided legal advice or who accepted legal advice in the Bush administration would be very, very challenging indeed. The obligation of Eric Holder and the people he has appointed to deal with this is to see whether there are prosecutable cases. That has been limited to some extent because of the difficulties of dealing with cases involving legal advice. That effort is continuing. Those cases are difficult, because it is then difficult to show what caused injury, what caused death, four or five years after the fact. People often think that it is easier to prosecute than it is in reality. One is not obliged to pursue cases that cannot be won.

It should be noted also that President Obama has withdrawn those memos that authorized waterboarding to be committed, memos with which I personally disagree and which I think all reasonable legal opinion disagrees. The United States is not doing those things and will not do them and will uphold the law. As I noted earlier, we do have a system of military and civilian justice that has shown an ability to hold even high-level people to account.

The question about universal jurisdiction: We support efforts by countries that act to avoid becoming safe havens for war criminals. If a war criminal from Rwanda has gone to Belgium, claiming he was a victim, when in fact he was a perpetrator, and under Belgian law he cannot easily be sent back to Rwanda for trial, we then support the Belgians in prosecuting that case.

In the U.S. we prosecuted Charles Taylor, Jr. He happened to be a citizen of the U.S., but he had not been living in the U.S. when he tried under a false passport to pass through Miami. We prosecuted him, under our law, for torture by an American citizen in Liberia, of Liberians. So we are ready to see individuals who have ties to a particular country or citizens of those countries be prosecuted for crimes they committed elsewhere.

But we do not favor prosecutions by countries that have no ties to either the victims or to the perpetrators, such as a Spanish prosecutor deciding to prosecute an American for an act committed in Iraq when there aren't Spanish victims or anyone in Spain who was a perpetrator. Cases need to be made based upon a country's own substantial interest in the affair. The ones that have been talked about, like prosecuting former Defense Secretary Rumsfeld in Madrid, no, we do not support that.

ML: Is there any possibility that the leaders of Sri Lanka will be brought to account for the horrific crimes committed in the final months of the war?

SR: Those who have followed the work of our office know that one of the tasks given my office after I took my job was to report on what had happened in Sri Lanka during the closing days of the war. We published a report under the signature of the secretary of state in October of 2009. Understand, we did not have the ability to investigate through primary sources, but gathered credible reports that were corroborated indicating violations – certainly mass violations by the Tamil Tigers, the LTTE, but also alleged violations by government forces: bombardment of civilians in no-fire zones, bombardment of hospitals, deprivation of food and medical supplies for populations caught in the war zone, killings of individuals who were surrendering.

We urged then the government of Sri Lanka to investigate these cases through their system of justice. Again, as I said earlier, our approach is always to go first to the country where the crimes are committed or alleged to have taken place and say, "You have the responsibility to investigate," and use our pressure, our assistance, to try to make it happen there.

In the case of Sri Lanka, it is not in the ICC. Sri Lanka has strong supporters in the Security Council and in the Human Rights Council. The prospect of any case being taken to an international court I think is almost impossible. If there is to be justice there it really needs to be done at the national

level. We have also supported the establishment of a panel of experts by U.N. Secretary-General Ban Ki-moon to advise him and the international community regarding whether what is being done in Sri Lanka is effective and whether it is a genuine inquiry. We are expecting now reports both by the panel of the United Nations and by the national commission that has been appointed in Sri Lanka.

As we said in a second report that we filed in August 2010 under a congressional mandate, we were concerned given the past history in Sri Lanka of not investigating these kinds of allegations. But nonetheless we are taking them at their word and urging them to do the right thing, and thus far have been pleased that victims and survivors, including people looking for information on missing persons, have been testifying before the commission. We are hoping that the report it will issue in the next few months will be one that leads to justice. This is a continuing process, so stay tuned.

ML: With regard to the atrocities that occurred during colonization, what is the best strategy to achieve justice for remaining indigenous populations? In particular, what can be done for Palestine?

SR: Obviously there are grievances. Crimes that had been committed in the past during periods of colonial rule are subject in many countries to truth and reconciliation processes or historic memory processes where at least the truth is revealed, and where leaders of governments that were responsible, as they were in Australia, have made statements of public apology. The expectation of justice for current crimes leads to an expectation to do something similar for those crimes that are historic, even where there are no witnesses or victims alive.

On Palestine, this brings to mind one of my good friends, who several years ago delivered a lecture here in this series and who is also on the board of this institute, Richard Goldstone. He was asked by my friend Navi Pillay to head a commission to investigate what happened in Gaza between December of 2008 and January of 2009. Our government was critical to some extent of the report because it did not give any credit for the possibility that processes

at the national level were ongoing and could be done that would achieve justice for these crimes. We have continued to press the Israeli government to investigate each allegation of civilian loss of life that occurred in Gaza during that operation, and each loss of life that occurred on the Israeli side we have asked the Palestinian Authority to investigate. As has recently been reported by the Tomuschat commission, also appointed by the Human Rights Council, there has been progress on domestic accountability.

Dealing with the issues of Palestine and Israel is difficult. The challenge that all of us feel so strongly is the need for there to be a peaceful solution that ends conflict and respects the right of Palestinians and Israelis to live side by side in peace. We, in our government, spend enormous energy in that direction. Recognize, though, that when civilians are intentionally targeted, there needs to be justice. The place for that to be achieved is first and foremost in the state and by the authorities where it happened.

ML: What difference does it make to your efforts that the leader of the Department of State, Secretary Clinton, is so articulately committed to justice for women?

SR: It is wonderful that Secretary Clinton is committed to justice for women. I am someone who has been committed for certainly all of my public life to the importance of the rights of women in the political sphere and everywhere else. But what so many of us who have gotten involved in this area of justice have seen, tragically at a time when in many parts of the world women are emerging into positions of leadership in societies at such great benefit to all of humankind, that in some places women are still oppressed and victimized, and that the business of attacking women viciously through acts of sexual violence seems to be getting worse.

I think the world woke up to violence against women in conflict during the justice that was achieved in the Balkans. Many said, "Well, there has always been rape in war, rape and pillage of victimized communities, and it has never really been talked about." In the Balkans it finally was. In Nuremberg,

the crime of rape was not on the list. In the Geneva Conventions of 1949, rape was not explicitly prohibited, but could perhaps be punished as “an outrage against personal dignity,” an approach that focused elsewhere, perhaps at the dignity of the victim’s husband, and not at the protection of the woman from physical violence. It was through what we did in these international institutions that vehicles in the law were found to prosecute these horrendous crimes.

At the same time, in conflict zones like the Democratic Republic of Congo (DRC) and actions by the Janjaweed and their suppliers in the government of Sudan and in other conflict zones, attacking women, raping and enslaving women, is another technique for humiliating and destroying communities that proves to be effective. In August of 2010 in Walikali in North Kivu, not far from Goma where I was just two days earlier, armed men raped 303 individuals – about 260 of them women and girls, but also young men and older men were raped – in a situation where there were not killings or other injuries. It was rape. I have spoken to people who refer to these acts of rape as destruction, as ways in which communities are torn apart, and in which one group or militia basically humiliates and destroys the community of another.

We had these horrible acts in Fizi, in South Kivu, just four weeks ago where a community, righteously acting to protect a woman from being raped by a soldier, killed the soldier. Then the soldiers from his unit came in under their colonel and raped 52 women in that community. Fortunately, those responsible are now being held for trial in the DRC.

Something has to be done that is more effective. Cases in the ICC, and there have been some, alone will not do it. That is why Secretary Clinton and I are really committed to making justice work in the DRC. We have been pressing for five high-level officials – a general, three colonels and a major, the so-called FARDC-5¹⁶ – who are directly involved in acts of rape to be brought to justice. We finally have cases going against four of them.

¹⁶ *Forces Armees de la Republique Democratique du Congo*, or Armed Forces of the Democratic Republic of Congo

But the perception still is out there that you can get away with this crime, and until you really have robust justice on the ground – which we think we will get with these specialized chambers – the perception will be that you get away with it. Until then it will be used as an effective means in destroying and humiliating an enemy population, with the resulting tremendous destruction of human beings and families and community ties.

So the challenge is there. The secretary is serious. She went to Goma herself, the month before I took this job, and listened to the victims and spoke of her commitment. Her commitment and her messaging on the issue will remain strong, and I am confident that we will use that leadership to make a difference on the ground. It is what I work for.

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