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A stylized world map in shades of blue and white, serving as a background for the top section of the cover.

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THE REACH AND THE GRASP OF  
INTERNATIONAL CRIMINAL JUSTICE—HOW DO  
WE LENGTHEN THE ARM OF THE LAW?

*Ambassador Stephen J. Rapp*

# THE REACH AND THE GRASP OF INTERNATIONAL CRIMINAL JUSTICE— HOW DO WE LENGTHEN THE ARM OF THE LAW?

*Ambassador Stephen J. Rapp\**

Thank you very much, Dean Lawrence Mitchell and Professor Michael Scharf, and thank you to Case Western and the Cox Center for International Justice and Law. It is a great honor for me to be here and to be receiving this award from the Cox Center because of all that it does to advance international criminal justice in the world today and to train the leaders who will advance it and bring it to greater success in the future. This is brought home to me, every couple of weeks, when I open my e-mail and I see the War Crimes Prosecution Watch<sup>1</sup> which is published by the Cox Center and the Public Interest Law and Policy Group. Just in the last issue, there were reports on prosecutions in thirty countries around the world in which there have been violations past and present.

As Dean Mitchell said, we only have to look at the newspaper at the developments in Syria today where we have seen thousands of innocent civilians killed by bombardment. I was on the borders of

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\* Stephen J. Rapp is Ambassador-at-Large, heading the Office of Global Criminal Justice in the U.S. Department of State. He was appointed by President Obama, confirmed by the Senate, and assumed his duties on September 8, 2009. Prior to his appointment, Ambassador Rapp served as Prosecutor of the Special Court for Sierra Leone beginning in January 2007, responsible for 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. From 2001 to 2007, Mr. 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. Prior to his career in international law, Mr. Rapp was a U.S. Attorney in the Northern District of Iowa from 1993 to 2001, Staff Director of the U.S. Senate Judiciary Subcommittee on Juvenile Delinquency, an elected member of the Iowa Legislature, and worked in private practice. He received his B.A. from Harvard College in 1971. He attended Columbia and Drake Law Schools and received his J.D. degree from Drake in 1974.

1. *War Crimes Prosecution Watch*, PUB. INT'L LAW & POL. GROUP, <http://publicinternationalallawandpolicygroup.org/library/watches/war-crimes-prosecution-watch/>.

Syria last week, and we are now receiving reports of even worse crimes—men, women, and children being slaughtered, hacked to death with knives in villages around Homs and Daraya. The level of atrocities, if anything, is increasing.<sup>2</sup> We see developments in South Kordofan and Blue Nile that frankly do not receive enough press attention, other than when George Clooney was arrested last week in a demonstration at the Sudan embassy, but horrendous atrocities are being committed against the people in the Nubian Mountains.<sup>3</sup>

Those who follow the news of international diplomacy see how these issues are playing out at the highest levels. Many of you saw the news on Saturday of the arrest in Mauritania of Abdullah al-Senussi, the former head of Libyan Security.<sup>4</sup> Now the question has arisen, will he go to the International Criminal Court (ICC) pursuant to the arrest warrant issued by the ICC last June? Will he go to France, which has tried him in absentia,<sup>5</sup> but under the European Convention would have to try him again for the murder of 170 people in that UTA Air flight that exploded over Niger in 1989?<sup>6</sup> Does he go to Libya where he committed atrocities against his own people over the course of thirty years? Will American law enforcement have an opportunity to talk to him about the bombing of Pan Am 103 and other acts?

Everywhere we see the reach of international justice. But at the same time, there are doubts as to whether it has the grasp to accomplish the goals that it has set for itself: of having an effective system of accountability for the worst crimes known to humankind; a system that offers the prospect that the victims of past crimes can receive justice in courts now; a system that is strong enough to deter

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2. See Janine di Giovanni, *Syria Crisis: Daraya Massacre Leaves a Ghost Town Still Counting Its Dead*, THE GUARDIAN (UK) (Sept. 7, 2012), <http://www.guardian.co.uk/world/2012/sep/07/syria-daraya-massacre-ghost-town/>.
  3. See Mukesh Kapila, *Is Sudan Committing Another Genocide—Against the Nuba People?*, THE GUARDIAN (UK) (Mar. 21, 2012), <http://www.guardian.co.uk/commentisfree/2012/mar/21/sudan-genocide-nuba-war-nings-ignored>.
  4. See *Mauritania Deports Libya Spy Chief Abdullah al-Senussi*, BBC NEWS (Sept. 5, 2012), <http://www.bbc.co.uk/news/world-africa-19487228>.
  5. See Geoffrey Robertson, *Extradition of Abdullah al-Senussi is a Blow to International Justice*, THE GUARDIAN (UK) (Sept. 5, 2012), <http://www.guardian.co.uk/commentisfree/2012/sep/05/extradition-abdullah-al-senussi-justice>.
  6. See Afua Hirsch, *Libya, France and ICC Compete for Custody of Gaddafi Intelligence Chief*, THE GUARDIAN (UK) (Mar. 18, 2012), <http://www.guardian.co.uk/world/2012/mar/18/libya-france-icc-abdullah-al-senussi>.

those crimes from occurring in the future and to prevent others from becoming victims. Certainly in these last twelve months, we have seen examples of where there has been that grasp, where there have been successful results. Most notably with the International Criminal Tribunal for the Former Yugoslavia (ICTY), established now eighteen years ago,<sup>7</sup> at a time when the world had relatively low expectations, having watched as nothing effective had been done to prevent atrocities in the Balkans. There was not the will to send in effective peacekeepers or civilian protection forces, but instead the decision was made to send in lawyers and judges and establish a tribunal. Initially, there was little hope that it would ever charge and arrest people at a high level. Now after having seen President Slobodan Milošević brought to justice in 2001, we have seen in the last year the arrest of the last two fugitives, General Ratko Mladić, who was the military leader at Srebrenica, where the genocide of eight thousand men and boys was committed in 1995,<sup>8</sup> and Goran Hadžić, alleged to bear responsibility for atrocities against Croats including the hundreds taken from Vukovar Hospital and killed in 1991.<sup>9</sup>

A hundred and sixty-one people were charged by the ICTY.<sup>10</sup> Every one of those one 161 was brought to the bar of justice. Even when I was U.S. Attorney in Northern Iowa, I do not think I ever charged 161 people over a period of time and saw them all arrested and brought to court. At the Rwanda Tribunal (ICTR) where I worked for six years, eighty-three of the ninety-two indictees have been brought to justice—many of them of very high rank.<sup>11</sup> During this last year, many of the complex, multiple-accused trials of the military and political leaders alleged to be responsible for the genocide of 800,000 men, women, and children in Rwanda in only 100 days in 1994, have come to their conclusions with historic judgments rendered.

In Cambodia, I was present on February 2-3 at the Extraordinary Chambers of the Courts of Cambodia (ECCC) for the appeals judgment in the case of Kang Kek Iev, known as Duch, the leader of the S-21 torture center—where at least 12,000 people were brought to

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7. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

8. See Dan Bilefsky & Doreen Carvajal, *Serb Ex-General Accused of Massacre is Captured*, N.Y. TIMES, May 27, 2011, at A1.

9. See *Vukovar Suspect Goran Hadzic Pleads Not Guilty*, BBC (Aug. 24, 2011), <http://www.bbc.co.uk/news/world-europe-14652784>.

10. Nick Squires, *Ratko Mladic Trial: How the ICTY Works*, TELEGRAPH (UK), May 16, 2012, <http://www.telegraph.co.uk/news/worldnews/eur/ope/serbia/9270323/Ratko-Mladic-trial-how-the-ICTY-works.html>.

11. Emmanuel R. Karake, *Rwanda: Destiny of Genocide Trial Archives Under Discussion*, THE NEW TIMES (RWANDA), Sept. 17, 2012, <http://allafrica.com/stories/201209180146.html>.

be tortured until they confessed, and were then executed with fewer than a dozen surviving. The Duch case, having gone through trial and now appeal, resulted in a conviction for crimes against humanity and a life sentence. Another trial is now underway for the three surviving leaders of the Pol Pot regime, allegedly responsible for the deaths of almost two million men, women, and children in 1975-1979.<sup>12</sup> Dean Mitchell mentioned that the trial judgment will be pronounced by the Special Court for Sierra Leone (SCSL) in the Charles Taylor case on the 26th of April.<sup>13</sup> In the Kenya cases before the ICC, six political leaders, including two who are leading candidates for the presidency of Kenya in the coming elections, have been voluntarily coming to court under orders to appear. There have been hearings that resulted in four of them having the charges against them confirmed. The impact of these cases continues to resonate in Kenya and across the region.<sup>14</sup> Finally, of course, just in the last five days, we have seen the first trial judgment by the International Criminal Court in the case of Thomas Lubanga.<sup>15</sup>

So there have been an amazing number of recent developments in the world that are positive and that indicate that this project can achieve success. On the other hand, the situation with Syria, that both the Dean and I mentioned, is the one that continues to challenge us. There is no prospect of achieving justice at the national level unless that regime were to change, and the prospect of its leaders being brought to justice at the international level in the ICC is blocked by an expected Russian veto in the UN Security Council.

As to the performance of the ICC itself, we have to recognize that even after this court has been in active existence for eight or nine

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12. See Kevin Doyle, *In Cambodia, Pol Pot's Regime on Trial at Last*, TIME (Feb. 17, 2009), <http://www.time.com/time/world/article/0,8599,1879869,00.html#ixzz2CcuIb7lw>.
  13. See Faith Karimi and Moni Basu, *Court Finds Charles Taylor Guilty of Aiding War Crimes*, CNN (Apr. 26, 2012), <http://www.cnn.com/2012/04/26/world/africa/netherlands-taylor-sentencing/index.html> (“In a landmark ruling, an international tribunal found former Liberian President Charles Taylor guilty Thursday of aiding and abetting war crimes in neighboring Sierra Leone’s notoriously brutal civil war.”).
  14. See *Situation in the Republic of Kenya*, INT’L CRIM. CT., <http://www.icc-cpi.int/NetApp/App/MCMSTemplates/SituationsAndCases/Index.aspx?NRMODE=Published&NRNODEGUID={6047C73F-8F78-47CB-BD5C-7D8B694428D1}&NRORIGINALURL=/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/&NRCACHEHINT=Guest#> (last visited Feb. 6, 2013) (illustrating the charges brought against six men for crimes against humanity and explaining that the Pre-Trial Chamber declined to confirm charges against two of them).
  15. See *DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, BBC (July 10, 2012), <http://www.bbc.co.uk/news/world-africa-18779726>.

years, only five individuals are in fact under arrest and in detention,<sup>16</sup> while some nine other living individuals subject to public arrest warrants remain on the lam. We also have to acknowledge that we are at the end of the era of *ad hoc* international tribunals, the ICTY and ICTR, and of an internationalized special court, the SCSL. At the height of their work there were forty-three judges serving the ICTY and ICTR and twelve at the SCSL. They will not be actively serving in the future and the quantity of decisions and actions in the area of international criminal law will diminish. We will left with such other courts as might be created by agreement at the regional level, with hybrids or mixed courts integrated into national systems, with national systems themselves, and with the ICC, of which the United States is not a member. Later I will be glad to answer questions about the U.S.-ICC relationship.

Today, some 120 countries are members of the ICC; seventy-two are not.<sup>17</sup> Many of the major conflict zones of the world are outside its territorial jurisdiction and even in the cases where there is territorial jurisdiction, the crimes have often occurred in places in which the states themselves do not have effective control. This makes it hard for an institution that acts through state cooperation to be effective.

And of course, when it comes to the UN Security Council referring cases arising outside of ICC territory, we have 1) the difficulty of getting past a veto, in situations such as Syria; and 2) the difficulty of achieving cooperation with states that have not accepted the ICC treaty. And at the national level, where both ICC and US policy recognize the primary responsibility to prosecute these cases lies—there are questions about capacity, particularly where the inadequacy of justice systems may have precipitated the conflict, and where the conflict itself may have devastated judicial institutions. If the national systems do have the capacity, the authorities may not have the will to pursue these cases except against those that have lost the conflict. Much remains to be done to strengthen capacity and will at the national level.

But today I want to pose the question of whether international criminal justice, even in its present incomplete form, is beginning to have an effect on the commission of these crimes. I think all of us know that in any system in criminal justice, the prospect that people

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16. *See Situations and Cases*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Feb. 6, 2013) (discussing the sixteen cases in seven situations that have been brought before the ICC and listing Thomas Lubanga Dyilo, Laurent Gbagbo, Germain Katanga, Mathieu Ngudjolo Chui, and Jean-Pierre Bemba Gombo as the five individuals who are in detention).

17. *See The States Parties to the Rome Statute*, INT'L CRIM. CT., <http://www2.icc-cpi.int/Menus/ASP/states+parties/> (last visited Feb. 6, 2013).

will be arrested and convicted is uncertain, but nonetheless, the risk to one's future of such consequences deter many people from committing crimes. Today we have a situation in the world where the risks have risen. Certainly if one is within the territory of an ICC member state, the potential consequences are quite apparent. There could be an arrest warrant with your name on it. Indeed, the possibility of such a warrant may be the subject of media and public discussion within days of the first reports of atrocities. Even outside ICC territory, there is the risk that the Security Council might find the will to refer the case, and even if it does not, other mechanisms could be established to bring individuals to justice. We have also seen states taking the initiative to pursue cases in their national courts for crimes committed elsewhere, particularly where alleged perpetrators have found haven in those states. We have seen effective prosecutions in Belgium,<sup>18</sup> the Netherlands,<sup>19</sup> Denmark,<sup>20</sup> Germany,<sup>21</sup> Canada,<sup>22</sup> and even in the United States<sup>23</sup> for conduct committed outside their borders.

The Dean and I have both mentioned the Charles Taylor case, but there is also the case of Charles Taylor's son, Charles Taylor, Jr., who in 1997 at the age of nineteen joined his father in Liberia, taking command of his anti-terrorism unit and becoming, according to the evidence, someone who tortured people to death. After his father's overthrow, the son made the mistake of flying through Miami, Florida, on a false passport in 2006, and he was then arrested and convicted for passport fraud. But before he was released, a case was developed based on his being a U.S. citizen, having been born when his father was a student in Massachusetts, and he became the first person ever charged under a 1994 U.S. law for torture, specifically of

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18. See, e.g., Daphne Eviatar, *Debating Belgium's War-Crime Jurisdiction*, N.Y. TIMES, Jan. 25, 2003, at B7.
  19. See, e.g., *About the Court*, INT'L CRIM. COURT, [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx) (last visited Feb. 6, 2013).
  20. See, e.g., Anna Bonini, *Rwandan Genocide Suspects in Denmark and Canada Proceed*, ILAWYER: A BLOG ON INTERNATIONAL JUSTICE (May 3, 2012), <http://ilawyerblog.com/rwandan-genocide-suspects-prosecutions-in-canada-and-denmark-proceed/>.
  21. See, e.g., Matthew Lippman, *Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals*, 8 U. MIAMI INT'L & COMP. L. REV. 1, 3 (2000).
  22. See, e.g., Bonini, *supra* note 20.
  23. See, e.g., *Ex-Liberian Dictator's Son Sentenced to 97 Years in U.S. Jail*, TELEGRAPH (UK), Jan. 9, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/4210623/Ex-Liberian-dictator-Charles-Taylors-son-sentenced-to-97-years-in-US-jail.html>.



Liberians in Liberia.<sup>24</sup> After a Miami jury found him guilty on all counts, he was sentenced to ninety-seven years in prison,<sup>25</sup> a judgment upheld by the Eleventh Circuit Court of Appeals.<sup>26</sup> So the risk of prosecution for these crimes has become more real.

So is this having an effect on conduct? I was recently at a conference where President Sang-Hyun Song of the ICC attempted to answer this question. Song is a great jurist, having been a professor of law before he was elected to the ICC in 2003 and (because as he was first elected to a short term of three years and was eligible for re-election for full term of nine years in 2006), is now in his tenth year as an ICC judge, and fourth year as president of the ICC.<sup>27</sup> He pointed to some apparent deterrent effects of ICC prosecutions in Kenya and the Congo, but he also spoke about the ability of law and practice to establish norms that filter deep within communities and essentially make certain types of acts unacceptable. We have seen that with practices such as chattel slavery and other sorts of conduct that at one time were allowed but have since gone beyond the pale of human understanding and acceptance. He suggested that the ICC Statute was helping set such norms, particularly as it encouraged national systems to develop their own legal response to these crimes in ways that fit their particular circumstances.

I served as a United States Attorney for eight years in the 1990s when we began to see an enormous fall in the rate of violent crime in major American cities, a decline that has continued in most parts of the country to this day. I tend to credit a change of the relationship between law enforcement and the citizens of high crime areas. In the past, law enforcement officers had been alienated from communities and viewed as enemies by members of minority groups. In the 1990s, law enforcement began to work much more cooperatively at the neighborhood level by implementing community policing practices. There was a new approach to enforcing the law that recognized that it was often the citizens of these high crime areas, particularly minorities and poor individuals, who were suffering the most. It enlisted these citizens in their own interest against the scourge of crime and encouraged an attitude of non-acceptance of criminal or destructive behavior even when committed by members of these very groups. These attitudes have spread and have had wide effect. It may

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24. *Id.*

25. *Id.*

26. *See generally* United States v. Belfast, 611 F.3d 783 (11th Cir. 2010).

27. *Judge Sang-Hyun Song (Republic of Korea): President of the International Criminal Court*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/presidency/the%20president/Pages/judge%20sang\\_hyun%20song%20\\_republic%20of%20korea\\_\\_\\_%20president.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/presidency/the%20president/Pages/judge%20sang_hyun%20song%20_republic%20of%20korea___%20president.aspx) (last visited Feb. 6, 2013).

be aspirational, but I believe that international justice, properly practiced, can begin to have this effect even before enforcement is universal.

Of course, today enforcement of international criminal law is far from universal. What can be done to lengthen its arm, and increase the certainty that major offenders will be brought to justice?

One thing that has excited me in the last few weeks, and excited me even about what is often described as the dysfunctional American political system, is the recently introduced legislation in Congress to expand the U.S. Rewards for Justice program. After discussing universal norms, it may seem mundane to be talking about rewards for wanted persons. But rewards are very important for the United States in responding to serious crime. We have programs focused on terrorists and narcotics traffickers.<sup>28</sup> We have also have a program for persons accused of war crimes and other atrocities, which is administered by my office. At the moment it applies to fugitives from the ICTY, ICTR, and SCSL. Of course, there are not very many of these fugitives any more. But it has been very effective in reducing their number. In the last two and a half years since I have been in this job, and because I went back and looked at several cases that had come up over the course of the three years before I was there, I have recommended and paid out some fourteen rewards for information that led to the arrest of certain key fugitives at the Yugoslavia and Rwanda tribunals. We are continuing to spend great effort in publicizing the availability of those rewards in the countries in which we think the last nine fugitives from the Rwanda Tribunal are hiding. As it stands now, we have offered rewards up to five million dollars, with the amount varying according to the value of the information, the risk to the informant, and the level of the wanted individual.<sup>29</sup> We make an evaluation in each case. The largest reward I have paid to date is some two million dollars.<sup>30</sup>

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28. See *The State Department's Rewards Programs: Performance and Potential: Hearing Before the Subcommittee on Terrorism, Nonproliferation, and Trade of the Committee on Foreign Affairs*, 110th Cong. Opening Statement (2012) (statement of Hon. Edward R. Royce, Chairman S. Comm. on Terrorism, Nonproliferation, and Trade Committee on Foreign Affairs) [hereinafter *The State Department's Rewards Programs*].

29. Assistant Secretary of State Jendayi Frazer and Ambassador-at-Large for War Crimes Clint Williamson, Briefing on Rewards for Justice Search for Rwandan War Criminal (May 12, 2008), *available at* <http://2001-2009.state.gov/p/af/rls/rm/2008/104667.htm>.

30. See *The State Department's Rewards Programs*, *supra* note 28, at 2 (statement of Ambassador-at-Large, Office of Global Criminal Justice, Stephen J. Rapp).

At present it does not apply to fugitives from the ICC or to other internationalized courts. But we have sent to Congress proposed legislation that would essentially eliminate this restriction and allow us to pay a reward if the arrested individual was charged with genocide, war crimes, or crimes against humanity at any international, hybrid, or mixed court, provided that the Secretary of State determines it is appropriate. This specifically would allow a reward to be paid for Joseph Kony of the Lord's Resistance Army and his two commanders, who are wanted by the ICC and still alive.<sup>31</sup> If the procedures were followed it could be offered for the arrest of any person currently sought by the ICC. It could also benefit from the recent increase of the maximum U.S. reward, in the most serious cases, to twenty-five million dollars.<sup>32</sup>

The legislation has been introduced by Rep. Edward Royce (R-CA) and Sen. John Kerry (D-MA), and has had bipartisan support from the beginning. Now, with the video that went viral in the last ten days—the passion in Congress for bringing Joseph Kony to justice has led to even greater support from right to left, with co-sponsors ranging from Rep. Dan Burton (R-IN) of Helms-Burton fame and Rep. Ileana Ros-Lehtinen (R-FL), the Cuban-American congresswoman who chairs the House of Foreign Affairs Committee, and then across the aisle to Howard Berman (D-CA) who leads the Democrats on the same panel.<sup>33</sup> I think that we are looking at the prospect that before the end of the year, this will become law, and we will be able to put out posters for Joseph Kony and other wanted individuals in the Central African Republic, South Sudan, and the Democratic Republic of Congo, and get the information that can be used to affect their arrest and transfer to The Hague. As shown by the strong support of the bill by the Department of Defense, this program can be of benefit to our military advisory mission that has been deployed to assist local forces in those countries in bringing Joseph Kony and other LRA leaders to justice.

We can also deploy political and diplomatic means to encourage the arrest of wanted individuals. In the Charles Taylor case, we did not have—for the Special Court of Sierra Leone—Chapter 7 powers.<sup>34</sup>

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31. *See Wanted by the ICC: The LRA's Leaders: Who They Are and What They've Done*, THE ENOUGH PROJECT, [http://www.enoughproject.org/files/pdf/lra\\_leaders.pdf](http://www.enoughproject.org/files/pdf/lra_leaders.pdf) (last visited Feb. 6, 2013).

32. *See Rewards for Justice*, NAT'L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/other/rfj.html> (last visited Feb. 6, 2013).

33. *See H.R. 4077: Department of State Rewards Program Update and Technical Corrections Act of 2012: Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr4077> (last visited Feb. 6, 2013).

34. *See* U.N. Charter, art. 48, para. 1.

We did not have the right to call up any state, like the ICTY and ICTR could as Security Council created tribunals, and say, “It is mandatory as a matter of international law; you have to comply, you have to arrest Mr. Taylor.” But we did have political support around the world, and we were able to work with civil society and human rights groups on a campaign that led to unanimous resolutions in the European Parliament and to a 421 to 1 vote in the U.S. House of Representatives, demanding that Nigeria arrest Charles Taylor so that he could be transferred to the Special Court to face justice.<sup>35</sup> And through those efforts, and through isolating individuals who are alleged to have committed these crimes, and making contact with them inappropriate, except for the most essential reasons, we can bring individuals to justice wherever they are in the world.

Of course, there will be situations, as I have noted earlier, where we do not have an international court, and we do not have the will at the national level to hold perpetrators to account. What can we do then? How can we begin this process? How can we at least get a head start on the business of accountability? My position in the State Department originally involved only work with existing courts, but my travel now includes countries where crimes have been committed and there is not yet a place for justice. Last year I was on the road for 222 days—to a lot of places where the crimes were committed before 2002, and therefore could never go to the ICC, or to places of newer crimes where there is no prospect for an international trial anytime in the near future.

For recent crimes, one of the approaches we have taken is to press for commissions of inquiry at the UN Human Rights Council, which has established them for Côte d’Ivoire and for Syria. These commissions have been able at least to find the facts and begin the process of investigation.<sup>36</sup> In other situations, we have encouraged the countries themselves, even when there was not necessarily a majority in the Human Rights Council, to accept international participation in inquiry commissions which we did in Guinea after more than 100 people were murdered in the national stadium, and women were raped on its stands in September of 2009,<sup>37</sup> or in Kyrgyzstan where there

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35. *See* Resolution on the Special Court for Sierra Leone: The Case of Charles Taylor, EUR. PARL. DOC. P6\_TA(2005)0059 (2005); H.R. Con. Res. 127, 109th Cong. (2005) (enacted).

36. *See* Report of the Independent, International Commission of Inquiry Côte d’Ivoire, UN Human Rights Council, U.N. Doc. A/HRC/17/48 (June 1, 2011); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Human Rights Council, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

37. *See* Rep. of the Int’l Comm’n of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, Dec. 18, 2009, U.N. Doc. S/2009/693 (2009).

were 500 killed, largely members of the Uzbek ethnic group in June of 2010,<sup>38</sup> and where almost a half a million people were displaced, or in Bahrain—a situation much less serious in terms of loss of life, but which still involved dozens killed and increased sectarian division.<sup>39</sup> The resulting commissions of inquiry showed great independence and went ahead and found facts, made preliminary determinations of responsibility, and recommended that the justice systems proceed with formal investigations and prosecutions. As a result, such national proceedings are underway in Guinea and Bahrain, where many thought they would never happen.

But beyond commissions of inquiry, another approach is taking hold. It involves the creation of independent projects to collect the evidence according to criminal law standards, and to visibly build cases for the day when prosecution will be possible. This sends a message to potential offenders that justice will be coming. Communications about preparations for justice can be directed to commanders, as well as their subordinates. Commanders will know that if they do not prevent or punish crimes of their subordinates, they themselves in the future could be held criminally responsible. Subordinates under orders to commit atrocities will know that obeying these illegal orders will not be a defense. To all, the message will be, “Leave the field. Do not participate in these kinds of crimes. If you leave now, the world can be forgiving, but if you continue we will pursue you to the end of your life. You will be like Nuon Chea, being tried in Cambodia at age 85,<sup>40</sup> or John Demjanjuk, convicted in Germany at age 91.<sup>41</sup> Until the day you draw your last breath, the world will not forget.”

The British Foreign Secretary, William Hague, recently proposed that we take the initiative to ensure that the atrocities in Syria are documented according to an international evidentiary standard suitable for use in local and international courts and has called for the establishment of a Syria-wide human rights abuse documentation hub

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38. See Kyrgyzstan Inquiry Commission [KIC], *Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010* (2010), available at [http://www.humansecuritygateway.com/documents/KIC\\_ReportoftheIndependentIntlCommissionofInquiryintotheEventsinSouthernKyrgyzstan.pdf](http://www.humansecuritygateway.com/documents/KIC_ReportoftheIndependentIntlCommissionofInquiryintotheEventsinSouthernKyrgyzstan.pdf).

39. See Bahrain Independent Commission of Inquiry, *Report of the Bahrain Commission of Inquiry* (Dec. 10, 2011).

40. See Nuon Chea, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/indicted-person/nuon-chea> (last visited, Feb. 6, 2013).

41. See Robert D. McFadden, *John Demjanjuk, Accused of Atrocities as a Nazi Camp Guard, is Dead at 91*, N.Y. TIMES, Mar. 18, 2012, at A22.

to collect and collate the mounting evidence of atrocities in the interests of justice and that of the Syrian people.<sup>42</sup>

Yes, the international criminal justice is not yet a complete system but it is becoming more so every day. A system of criminal justice is always a work in progress. We know that in our own country the criminal justice system is not always effective, it has not always been fair, and all of us have to work each day to improve it. The challenge is much greater at the international level. International justice is a young project. As we all know, it began at Nuremberg but was interrupted during the years of the Cold War. I am always inspired by the words of our American Chief Prosecutor at Nuremberg, Robert Jackson, who said that common sense requires criminal justice to “reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which left home in the world untouched.”<sup>43</sup>

We began again in the 1990s to build a system that will hold the perpetrators of mass atrocities accountable—a system that will ensure justice for victims after horrible crimes have been committed and protect others from falling victim to these crimes in the future. A great deal remains to be done to reach the day when it is truly effective.

It is a job for all of us to bring forward that day. Thank you very much.

AUDIENCE MEMBER 1: I am a first-year student at Case Western. My name is Kennan Castel-Fodor. My question to you is, through the lens of international criminal justice, what remedies exist now or can be improved upon in the future for bringing to justice egregious crimes committed by Security Council members who hold a veto such as Russia in Chechnya or China in Tibet or with the Uighurs or with the United States in Guantanamo?

AMB. RAPP: Well, that is obviously at the core of the issue that I discussed here. Let me first of all make it plain that consistent with the principles of the ICC, it is the obligation of every state to prosecute its own, and when these crimes are committed to take them on, as we see now in the newspapers regarding the beginning of the case against Sgt. Robert Bales for the alleged killing of sixteen people in Afghanistan, as we saw with the prosecution of members of the

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42. See UK Foreign Secretary William Hague, Statement on Syria (Aug. 10, 2012), *available at* <http://www.fco.gov.uk/en/news/latest-news/?id=798971582&view=News#>.

43. See Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), *available at* <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal>.

Stryker Brigade who were engaged in killing civilians in Afghanistan in the past.<sup>44</sup> The United States does have a system, when war crimes are committed, of holding people to account, and it is one of the more effective in the world. Indeed, Bill Lietzau who has had a career in the Marine JAG Corps and is now the Deputy Assistant Secretary of Defense, was active at the Rome Conference where he was a major author of Article 8 of the ICC Statute and thereafter of the elements of crime that were adopted by the ICC.<sup>45</sup> I think, to a large extent, these are reflections of the fact that it is the Americans who have had the greatest experience and who have developed the most complete system in this area.

But, of course, you point to crimes committed in other countries in which there have not been many examples of people being brought to justice. I indicated earlier, there are other routes. There is the Human Rights Council for commissions of inquiry. That is challenging, but no country has a veto in the HRC. We are moving this week on Sri Lanka, a country with a close relationship with China. In 2009, Sri Lanka relied on China and several non-aligned states to successfully block action by the Human Rights Council.<sup>46</sup> I think there is an excellent chance on Thursday that we will be able to pass a resolution by a majority in the Human Rights Council that calls for accountability for actions that killed an estimated forty thousand civilians during the last days of the conflict in 2009 with the Liberation Tigers of Tamil Eelam (LTTE)—accountability certainly for surviving leaders of the LTTE but also independent investigations of government forces that committed crimes. Of course, China, Russia, and other members of the Human Rights Council will oppose it, but because of the support of countries in Africa, the Americas, and elsewhere, I think that the resolution can pass. Will it lead to prosecution? Well, it will lead to there being greater international pressure on Sri Lanka to do the right thing on the national level. It may affect bilateral engagement with Sri Lanka on trade, aid, or

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44. See Adam Ashton, *Trial Opens for Sgt. Robert Bales in Afghanistan Killings*, MCCLATCHY (Nov. 4, 2012), <http://www.mcclatchydc.com/2012/11/04/173325/trial-opens-for-bales-in-afghan.html>; Craig Whitlock, *Members of Stryker Combat Brigade in Afghanistan Accused of Killing Civilians for Sport*, WASH. POST (Sept. 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803935.html?sid=ST2010091803942>.
45. See William K. Lietzau, *A General Introduction to the General Introduction: Animating Principles Behind the Elements of Crimes*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT II* 285, 289 (Flavia Lattanzi & William A. Schabas eds., 2003).
46. See *Sri Lanka: UN Rights Council Fails Victims*, HUMAN RTS. WATCH (May 27, 2009), <http://www.hrw.org/news/2009/05/27/sri-lanka-un-rights-council-fails-victims>.

military cooperation. It will not be easy to persuade the government to do the right thing—obviously, a more formidable task when a country can rely on support from a major power. But even then, it may eventually be possible if you have documented the crimes and put the information out there.

People often talk of double standards, but I think this talk of double standards actually indicates that standards are being established. There is this expectation when people ask, “If it’s being done there, why not here?” That question is being put time and time again. It creates dangers to leaders who were involved in these violations. It affects their hope for a future when they might be able to visit Europe on business or vacation. It may foreclose their dream of a comfortable exile. So I think that developing this evidence, listening to witnesses, and being able to put forward cases at a high standard, is the approach that can eventually impact even those with the greatest power. The actions of the global community can achieve results that go beyond the expectations of the real politicians (the practitioners of *realpolitik*).

AUDIENCE MEMBER 2: Somebody’s got to ask the Henry King questions. Late last year, there was an article in the *Economist* on the ICC entitled, “Cozy Club or Sword of Righteousness?”<sup>47</sup> When I first read the article, I thought, gosh, they’re being a bit critical, but as I read it again, I realized that the article did a number of probably correct things. It pointed out the extent of the challenge, which is enormous. It also pointed out some of the shortcomings in the development of the ICC which, when you think about it, are entirely predictable and understandable. It also pointed out a lot of the successes that have been had. But overall, I was sort of reminded that this is perhaps a little analogous to the Wild West and the search for justice and the rule of law in the Wild West in the nineteenth century and the fact that if you don’t press forward and keep pressing forward, you won’t succeed. But there, the rule of law prevailed and the justice system prevailed eventually. It took decades, but it eventually succeeded.

Do you think that’s the lesson of the International Criminal Court and where it’s going at this point in time, in a similar fashion, you know, keep pressing, keep moving forward, keep improving, and at the end of the day we’re going to be a much better world than we are now?

And secondly, as a corollary to this question which is sort of the inevitable thing to add in, if the United States, first all, do you think there’s ever a chance that the United States will join the ICC at some

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47. *Cosy Club or Sword of Righteousness?*, *ECONOMIST*, Nov. 26, 2011, <http://www.economist.com/node/21540230>.



point in the reasonably near future? And secondly, if it did, what would be the impact?

AMB. RAPP: Well, thank you very much for the questions. I like the analogy of the Wild West: one sheriff investigating and honest judges and juries that were not intimidated, making a difference. And it is “catching” because as one place becomes stable and people can live freely and build and not have the risk that it is going to be taken away from them or destroyed; other people demand the same thing. So I do think that there is something to that analogy, albeit, that was a matter of the exercise of power within a sovereign country that could, in the end, make decisions, could tax itself, could appoint good sheriffs and marshals, etc.

In a world of states, you have many places where that is a much more challenging task. It is difficult to have an international court provide for justice in The Hague when it is very hard for it to be achieved even at the lower level, when you do not have adequate police, and when you do not have adequate courts and other things within the countries themselves. Having it just at The Hague level and not also at the other is one of the reasons that it is difficult for the ICC to have an impact. Of course, the ICC is based on complementarity, the preference for proceedings at the national level. But the ICC itself cannot do a lot for “positive complementarity,”<sup>48</sup> which is the business of helping countries develop their own systems, because it is not an aid agency, and indeed they do not have a budget for it. They need to rely on states to provide this aid, and the United States really wants to work with the ICC on strengthening national justice systems. This is not just in a situation where the country itself is proceeding on its own with all of the cases, but also in situations like the Democratic Republic of Congo (DRC), when there are cases in the ICC, though only four or five people at a very high level, while there are scores of others who were involved in mass killings and mass rapes who need to be prosecuted at the national level.

So, if we are going to make the system effective, it cannot just be in The Hague—it has to be also at the national level. One of the reasons why I want to see a more effective ICC is so that it can be a 900-pound gorilla that is standing offstage and saying, “If you don’t do the right thing—if you don’t prosecute the people in your country for committing these crimes we’ll step in. Would you rather have justice in your own courts or justice 4,000 or 5,000 miles away?” This is what you could call “negative complimentary,” causing countries, in

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48. See, e.g., OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009-2012 ¶¶ 16, 17 (Feb. 1, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

order not to have a case go to the ICC, to go ahead and do it themselves.

But I think that effective complementarity, of either kind, is still missing in the international system. Even to the extent that a lot of us have donor programs that promote the rule of law, many of these programs are not focused directly on strengthening the ability of countries to take on atrocity crime.

I am glad to have a question at some point on whether the ICC is too comfortable or any of these courts are too expensive or their trials are too long, but I will save that for another answer, though I have the impression that is part of what was said in that *Economist* article. Let me respond now to your question about the ICC and the United States.

I get this question about the United States joining the ICC all over the world, and my answer is always that the United States is very slow to ratify international treaties and conventions, certainly in the area of public law. My friend Harold Koh has said that there are about thirty-two votes in the Senate that are automatically against any such treaty, and so getting to sixty seven means you do not have much room to maneuver. Of course, it does take sixty seven. Harold Koh, who was formerly Dean of Yale Law and now the Legal Advisor at the State Department, also tells of his confirmation to become Legal Advisor, where he had to face a filibuster which it takes sixty votes to end. Thanks to Senator Richard Lugar and a few other Republicans, he was able to overcome this barrier. I think he ended up with sixty-two votes for his confirmation, to which he observed, "If I had been a treaty, I'd have been defeated."<sup>49</sup>

So, you see the difficulty of the United States ratifying treaties, which caused us to take forty years to ratify the Genocide Convention.<sup>50</sup> We remember that President Wilson sold the world on a League of Nations and could not get it through the Senate.<sup>51</sup> We know, having read it in the Supreme Court decision on the juvenile death penalty, that there were only two countries in the world that had not ratified the Convention on the Rights of the Child—Somalia and the United States.<sup>52</sup> You should now know that the Transitional

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49. See Laura Rozen, *Harold Koh Confirmed*, FOREIGN POLICY: THE CABLE (June 25, 2009, 8:41 PM), [http://thecable.foreignpolicy.com/posts/2009/06/25/harold\\_koh\\_confirmed](http://thecable.foreignpolicy.com/posts/2009/06/25/harold_koh_confirmed).

50. See Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. TIMES, Nov. 5, 1988, <http://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html>.

51. See Jason A. Edwards, *The Fight Over the League of Nations: Rhetorical Tension Within America's Exceptionalist Narratives*, 47 OHIO COMM. J. 265, 265–66 (2009).

52. See *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010).

Federal Assembly of Somalia recently ratified the Convention on the Rights of the Child.<sup>53</sup> So, we are alone.

On the other hand, when I mentioned this to one of your previous award winners, Navi Pillay, a couple years ago, she said to me, “But you Americans protect the rights of the child a lot better than many countries that have ratified the convention.” That was very nice of her to say, but what she said goes to the heart of the American attitude. We have our own Constitution. We have our own law. We have our system. We built it up. We know how it works. We can protect these rights our way. We do not need somebody from The Hague, or Geneva, or someplace else telling us what to do. A lot of us in this world have seen the benefits of multilateral action, of working with other countries. With an enormous effort and a political campaign, sometimes you can convince people of those benefits and get a treaty ratified. But it takes a real effort, and it takes—like we had when Reagan finally pushed the Genocide Convention—a confluence of political factors making almost everyone see it as the right thing to do. We are not there on the ICC.

But I think your question on the ICC is why President Obama is not starting this campaign to ratify. At this stage, we still want to see how the ICC works and how it chooses its cases. There is this fear that an international prosecutor would want to show how tough he or she was by prosecuting an American, even if we came in to save 20,000 people but killed twenty people by mistake. There is the concern that the ICC would prosecute the leader who killed the 20,000, but also prosecute an American, just to show evenhandedness. On the other hand, you can read the Rome Statute and see how it is based on complementarity and how it requires a prosecutor before moving on her own motion to have a grave case. You can see the preference in Article 8 for prosecution of systematic war crimes, not just “one-off” occurrences. So, we will see how that whole thing develops over time as cases are picked and as judges decide admissibility standards.

It may be that at some point in the future, Americans will feel a whole lot more confident that there is really zero risk of ICC prosecution if we are doing the right thing, or ourselves prosecuting those who have done the wrong one. But it will take some time. Until that day, we are taking an approach that began to develop in the second term of the Bush Administration when they allowed the Darfur referral<sup>54</sup> to go forward. The policy then changed from one of

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53. See Press Release, UNICEF, UNICEF Welcomes Decision by the Somali Transitional Federal Government to Ratify the Convention on the Rights of the Child (Nov. 20, 2009), *available at* [http://www.unicef.org/infobycountry/media\\_51841.html](http://www.unicef.org/infobycountry/media_51841.html).

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

“let’s kill this court” to “this court can be helpful in the world.” In the present administration, we have basically taken advantage of the fact that the American Service Members Protection Act includes the famous Dodd Amendment<sup>55</sup> that says that we are not prohibited from assisting the ICC in a case involving a non-citizen alleged to be responsible for war crimes, crimes against humanity or genocide. Of course, that includes everybody that is before the ICC. So, we can assist on a case-by-case basis once we have made a determination within our government to be supportive on a case, which we have, in every case where there are arrest warrants. We have said that we support these cases, and we are working to find ways to assist—witness protection, diplomatic and political engagement, rewards for justice, etc. We are going to find ways to help the court succeed when it is doing the right thing, which it is. I think this will build up a level of confidence over time that will make becoming even closer to the court possible when and if the stars align. But joining would take a very long time given our American political tradition. Yes?

AUDIENCE MEMBER 3: Are there constitutional issues with respect to the United States assisting in the enforcement of criminal laws in other jurisdictions, that’s why we have extradition treaties? Are there issues that arise out of assisting courts like that from a constitutional standpoint in enforcing their criminal mandate when we are not a member state, for example? Does that raise any constitutional issues?

AMB. RAPP: Well, we have laws that say we can pay a reward for bringing people to justice in Arusha or The Hague or in Freetown, to these international courts. Now, of course, we were directly involved in establishing these courts, a couple through the United Nations, one by agreement between the United Nations and the relevant country. But I do not think there is a problem with us supporting justice elsewhere.

We are trying to bring pirates to trial, including those recently picked up by the USS *Carl Vinson*, which acted to stop piracy against an Iranian ship, and then delivered the alleged pirates to the Seychelles to be prosecuted.<sup>56</sup> We have had a few pirates prosecuted

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55. See American Service-Members’ Protection Act of 2002, Pub. L. 107-206, 116 Stat. 820.

56. See Press Release, U.S. Navy, U.S. Navy, International Forces Respond to Piracy Attack (May 6, 2011), available at [http://www.navy.mil/submit/display.asp?story\\_id=60211](http://www.navy.mil/submit/display.asp?story_id=60211); Press Release, U.S. Dep’t of State, Republic of Seychelles Conviction of Pirates (Nov. 7, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/11/200232.htm>.

in New York, but it is rather expensive.<sup>57</sup> We would like to have the Kenyans, the Seychellois, and others do these cases. We are assisting other systems of justice because we share a common interest. We share an interest in the having the sea lanes free from pirates. We also share a common interest in men, women, and children across this planet not being subject to mass murder, rape, amputation, slavery, and everything else.

So, I do not see that there is a constitutional issue. This is also a matter of how our government deploys resources, an exercise of the spending power. If Congress decides to spend—and it is willing in the situation of the ICC to say we will spend for rewards—that is an area in which congressional power is pretty clear and almost unrestricted. Once you have the decision of the people's representatives, you can do it. As I said earlier, from the left to the right to the center, at least when it comes to the case of Joseph Kony, everybody in the United States wants to see the end of that man's scourge. It is alleged that he has killed and enslaved thousands, displaced at last count 465,000 people from their homes,<sup>58</sup> and Americans want him brought to justice.

I should note that rewards are popular in America. We like reward posters. This is probably something that fits our culture, but this is a reward for information leading to the arrest and transfer of these individuals. This is not a reward that pays for a dead Kony. It pays for Joseph Kony in the dock before International Criminal Court in The Hague.

But I should also respond to other the question of whether money is well spent on international justice. In the interests of not looking like a Pollyanna, I recognize that this whole process is a very expensive one. I am hopeful that we will begin to see more efficiencies at the ICC, but so far we have a court that took until its ninth year to finally have a judgment that involves only one individual on essentially the one crime of recruiting child soldiers. I think that the ICC needs to learn more from the other international tribunals—and this may sound a little self-centered from one whose own experience was in these *ad hoc* courts. These courts took a while to get going and to learn how to manage cases. If you go to the Yugoslavia Tribunal now, they are trying complex cases like that of Ratko Mladić very efficiently.<sup>59</sup> The prosecutor originally charged Mladić with acts in

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57. Robert Siegel & Michelle Norris, *Prosecution of Pirates Raises Many Questions*, NPR (Apr. 21, 2009), <http://www.npr.org/templates/story/story.php?storyId=103334952>.

58. Nima Elbagir, *U.S. Lends Support in Hunt for Notorious African Warlord*, CNN (Apr. 30, 2012), <http://www.cnn.com/2012/04/29/world/africa/central-african-republic-kony/index.html>.

59. *See generally Ratko Mladic Trial: The Former Yugoslavia Tribunal at a Glance*, TELEGRAPH (UK), May 16, 2012, <http://www.telegraph.co>.

forty municipalities of Bosnia, but because he needs to compress the trial, he has taken it down to eleven, filing a pared-down amended indictment. Presiding Judge Orić has set time limits in the Mladić trial, as he and other judges have done in other recent ICTY cases to restrict time that the parties have to present their evidence. In Karadžić, the prosecutor had 300 hours. In Mladić, there is an even a more restrained clock, an egg timer that will cut off the prosecutor's direct examination of witnesses after an aggregate of 200 hours. If he gets down to the last hours, and he has a lot yet to prove, he is in trouble. So this shows that it is possible to manage even these complex international trials.

These trials cannot be quick. Having also been a prosecutor in a national system, these are not cases like that of a bank robbery, where the crime may have been over and done within five minutes. You have events that unfolded over the course of years, and in order to understand what a leader was saying and meaning and what people understood him to mean, you have to present evidence of the political context. You have to know the language and the proverbs. You have to understand the culture. But of course, as to every bit of evidence you put on that suggests that words and actions served a criminal purpose you will have defense attorneys prepared to present those who will say, "No that was not the case." You will have to present evidence of mass crimes, from scores of events and killing sites. You will be trying individuals who are very powerful and who may try to restrain witnesses from testifying. You will have to confront loyalties to a clan, to a religion, to an ethnicity, to a nation, which will make it difficult to receive cooperation of those close to defendants. It is like what Dr. Johnson said of a dog walking on his hind legs. It is not that he does it well, but that can do it at all that is the miracle. At the ICTY and other ad hoc courts, it has been shown that it can be done.

For the ICC, one bit of good news is that of the last six judges who were just elected—four or five of them had experience in the other tribunals. Even though the procedures are different, in large part in order to keep the prosecutor from going overboard, there are lot of similarities. The ICC can gain from the experience of the ad hoc tribunals. In the future, I look for it to be able to produce judgments in large cases involving high level defendants by following the best practices that have been developed at the other courts.

Thank you very much.



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