War Crimes and the International Criminal Court
Judith Armatta, J.D.
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I am pleased to have the opportunity of speaking with you today about an issue I consider critically important for our war-weary world. As war has been with us throughout recorded history, so have efforts to tame it – perhaps mirroring the split within the human psyche. It continually amazes me how stalwart is the desire for a humane and just world, given the ruthlessness of our warrior selves.

At the end of WWII, face to face with the unimaginable horrors of the Holocaust, a few courageous souls steered the human community away from revenge, toward justice. As Justice Robert Jackson, chief prosecutor at the Nuremberg trial so eloquently stated, "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

Pierre Hazan, author of Justice in a Time of War, writes that "[The Nuremberg trials] were actually the crucible of the culture of law in human rights and played a major role in the formation of a universal conscience of humanity. . . ." p. 20. The Nuremberg legacy is not just a legacy on the limits of mistreatment of combatants, POWs and civilians in time of war. I suggest its primary legacy is the codification of crimes against humanity in the Nuremberg Charter. These are crimes so egregious that they offend our conception of what it means to be human. The eminent British jurist Lord Geoffrey Robertson describes them thus: "[T]hese were crimes that the world could not suffer to take place anywhere, at any time, because they shamed everyone. . . . They were crimes against humanity, because the very fact that a fellow human could conceive and commit them diminishes every member of the human race. For this precedent alone. . . the Nuremberg judgment was one large legal step forward for humankind." P. 220.

The Nuremberg legacy lay dormant for more than 50 years while cold warriors protected their respective tyrants. But in 1993, it was called to life by a colleague I respect very much, Mirko Klarin, a Serbian journalist who has made his life's work the exposure of truth and the punishment of those guilty for massive crimes committed in the process of Yugoslavia's destruction. That was 1991. Two years later, the United Nations Security Council established the first international tribunal since Nuremberg, the ICTY. The next year, the UN birthed a second ad hoc tribunal to respond to the horror in Rwanda. Though both were created with a high degree of cynicism and little intent to actually hold individuals accountable, those who carried the torch of justice since Nuremberg stepped up to make their promise a reality. These two ad hoc tribunals were

the stepping stones that led to the permanent International Criminal Court, which came into being in July 2002 and is now supported by 104 member states. Sadly, the United States is not one of them.

The ICC has a very narrow remit. It is only to investigate and try war crimes, crimes against humanity, genocide and – if the members can ever agree on a definition – the crime of aggressive war. The ICC is a court of last resort. It will only step in when state legal action is not possible. The accused will be individuals, the most responsible, those who exercised the most power over events.

Presently, the ICC is investigating conflicts in four countries, all in Africa. The Central African Republic, Uganda, the Democratic Republic of the Congo, and Darfur, Sudan. The Chief Prosecutor has issued indictments for five members of the Lord's Resistance Army in Uganda for widespread sexual slavery, murder and brutalization of children over two decades. None of the five are yet in custody. The ICC indicted Thomas Lubanga, leader of a militia group in the Democratic Republic of Congo, for using children as soldiers and sex slaves. He will be the first person tried at the ICC, possibly beginning this summer. Just this week, Chief Prosecutor Luis Moreno O'Campo indicted two men from the Sudan, one a militia leader, the other a former Minister of the Interior for war crimes and crimes against humanity.

These initial charges demonstrate some of the challenges facing the ICC. The five LRA indictees from Uganda fled the country before they could be arrested. In Sudan, the government opposes extradition and trial before the ICC maintaining local courts are capable of rendering justice. Government officials and their surrogate militias are responsible for the massive displacement of people, rapes and murders in the Darfur region. Enforcement of its warrants will continue to plague the ICC.

Another challenge confronting the ICC is *real politick*, preferred by diplomats through the ages. *Real politick* is states, including the US, making a deal with Charles Taylor, former president of Liberia, if he would step down, he would get asylum in Nigeria, allowing the state to move into a more peaceful, democratic period. The same was done with Idi Amin when he took up residence in a palace in Saudi Arabia after looting Uganda's treasury and torturing and murdering thousands of people. But the US and other states changed their minds and pressed Nigeria to extradite Taylor to Sierra Leone to face trial in the ad hoc tribunal established there. He is now in The Hague awaiting trial before the Special Court for Sierra Leone.

That impunity doesn't work to establish peace is well demonstrated by the results of granting amnesty to the Revolutionary United Front in the Sierra Leone civil war in 1999. It allowed the RUF to regroup and resume their atrocities for two more years.

As with the ICTY, the ICC is challenged to develop a body of law that is an amalgam of two legal systems – the common law and civil law systems – and to train judges, schooled in the different systems, to apply this new creature. The ICTY experienced problems when the prosecution introduced plea agreements. Civil law judges were suspicious and wary. They didn't like the prospect that an accused could secure a lesser sentence if he or she pled guilty, cooperated with the prosecution by providing a full accounting and information for use in other trials, testifying in other trials, and offering an apology. In one case, the Trial Chamber accepted the plea agreement, then handed down a stiff sentence well beyond what the prosecution requested, thereby making it very difficult for the prosecution to make plea agreements with other indictees. Eventually, the Appeals Chamber reduced the sentence.

The ICC is challenged to demonstrate fairness and universality. If all its cases come from Africa, it will not be seen as fair. If the big powers like the U.S., China and Russia keep themselves beyond the reach of the permanent criminal court, resentment will grow. If there's time, I will talk about universal jurisdiction and how that principle may bring the US and China within the rule of law.

Residing in The Hague far away from where crimes under investigation have been committed, the ICC must reach out to the people in those states if the verdict is to be useful to them at all. Video and even radio transmission of proceedings into Congo, Darfur and other places may not be possible due to lack of widespread availability of modern technology or because of ongoing conflict conditions. Efforts must be made to bring journalists from the home country to The Hague, to support them in this expensive Western city and to assure they receive timely visas that will cover the period of proceedings. This was quite a problem for Balkan journalists trying to attend trials at the ICTY. Visas were limited to three months, not renewable until the journalist returned home and maybe not then. Local media could not afford to pay for journalists to reside in The Hague for long periods of time. NGO assistance had to be secured. The same problems will face the ICC.

As the Darfur investigation has shown, interviewing witnesses in the conflict zone can be impossible. All witnesses the ICC interviewed as the basis for its recent indictments were interviewed outside Sudan. Many of those who testify will require protection if they return home. If that is too dangerous, the ICC will need to relocate them and their families, giving them new identities.

For atrocities committed in Uganda and the Congo, the ICC prosecutor has chosen to issue very narrow indictments, limited to use of child soldiers in combat and as sex slaves. Victims' rights groups have strongly criticized such narrow charging as it virtually ignores the atrocities committed against other civilians – systematic rape,

murder and torture, and the looting and destruction of homes. Because these crimes have not been charged, those who have been victimized by them will not be able to participate in ICC proceedings as the statute allows or receive compensation from its Victims Trust Fund. As important, a large number of victims will be omitted from the healing process that a trial offers – the acknowledgment of their suffering by a world community standing with them to restore their sense of belonging in the human community from which their bond has been broken by the violence perpetrated against them.

The ICC is erring on the side of caution, to assure the evidence unquestionably supports the charges to assure success in their first trials. Perhaps the prosecution also seeks to make the trials more manageable by focusing on relatively few charges. Whatever the reason, for victims to see the ICC as a way to secure justice, the tribunal will have to take more risks.

A looming obstacle is the non-participation by the US and other big powers. The US has not just not participated. It has actively worked to undermine the ICC. Congress passed the American Service Members Protection Act, familiarly known in The Netherlands as The Hague Invasion Act because it gives the US military authority to invade any country where its nationals are being held to answer before an international court.

The US also negotiated bilateral immunity agreements with 101 states. Under a BIA, a state promises to not turn over any US citizen to the ICC in exchange for receiving economic and military aid from the U.S. Over 50 members of the ICC have refused to sign a BIA. Those who have signed are the states who can least afford to relinquish US aid.

Recently the winds of change have blown through the White House – at least in some spheres. After four years' experience with the ICC where complaints against the US have been rejected for lack of evidence or lack of jurisdiction, the US not being a member, the USG seems less afraid it will be hauled before the ICC on politically motivated charges. Regrettably. At any rate, the U.S. is now vocally supporting ICC investigations in Uganda, the DR Congo and Darfur, where the US earlier pronounced genocide was occurring. In addition, the US no longer withholds funds for military training to states that refuse to sign BIAs. We found it advantageous to have our allies well trained to respond to global terrorism. Economic aid still has not been restored, however.

As well as harming the ICC, the US is also harmed by its nonparticipation. Even before the Iraq war, Abu Ghraib and Guantanamo Bay, our refusal to join the ICC hurt

the image we once cultivated as a world leader in human rights and rule of law. After the Iraqi invasion, torture of prisoners and holding "unlawful combatants" incommunicado, denying them fundamental rights guaranteed by the Covenant on Civil and Political Rights, we are pretty much seen as a rogue state.

There is a benefit to the ICC for US nonparticipation. We can't do anything more to weaken it from the inside, as we did when its statute was being drafted, for example, allowing the Security Council to veto prosecutions.

I want to turn now to David Morrison's fine article in Great Decisions 2007. I congratulate him on making understandable something as complex as a labyrinth, where one path leads to another leads to another, never seeming to end.

I do have to take issue with his statement that history and victims consider tribunals dismal failures at least as far as punishment and deterrence. The verdict of history is still out. As you might imagine, victims offer a wide variety of opinions. Both the ICTY and ICTR have handed down life sentences, the former for the commander who led the 3 ½ year siege of Sarajevo, the latter for the prime minister convicted of genocide. I admit sentences are inconsistent, though there are efforts to change that. The inconsistencies largely derive from different philosophies of sentencing in the judges' home jurisdictions. Sentencing law at the ad hoc tribunals is in process. We must work to refine it in a way that assures more uniformity.

As for deterrence, we do know that impunity leads to more crimes. While the Srebrenica genocide occurred after the ICTY was up and running, those responsible had no reason to believe they risked being brought before it. International players continued to negotiate with those they knew were most responsible for the atrocities.

We also know that identified war criminals are cognizant of what goes on in the international tribunals. Milosevic disclosed in his trial that the leader of the Bosnian Serb army, General Ratko Mladic, sought and received a guarantee from Jacques Chirac that he would not be sent to The Hague in exchange for turning over two French pilots he had kidnapped. The political leader of the Bosnian Serbs, Radovan Karadzic, tried to hinge his fate to Mladic's guarantee, but didn't succeed. It is rumored that he later secured a similar guarantee in exchange for removing himself from politics.

Another measure of the tribunals' success can be found in their statistics. Despite lacking financial support and cooperation from UN members to secure information and make arrests, the ICTY became a fully functioning court – built up from nothing. Since 1994, it has concluded proceedings against 100 accused. Five were acquitted. Forty-eight have been sentenced. Twenty-three are currently at trial with another 17 in the pretrial stage and 18 pending appeal. That two of the most wanted remain at large is not

the fault of the Tribunal, but of its international supporters and, most recently, elements of the Serbian ruling class, including its bodyguards and political henchmen. The ICTR has a similarly noteworthy record of convictions. It also convicted the first head of government, Jean Kambanda, for genocide.

Mr. Morrison criticizes the tribunals for trying only a few of the perpetrators and only the higher ups. Precisely. That is what the tribunals were designed to do. They were never meant to try all of the guilty. The intent was that they try the most responsible and at least some of those accused of the most heinous crimes. The foot soldiers, so to speak, were to be the responsibility of domestic courts, traditional courts like the Gacaca Courts in Rwanda or special domestic war crimes courts established for the purpose, such as the one in Bosnia.

My experience tells me that not all victims found the tribunals dismal failures. Even though Milosevic avoided a verdict in his trial, I believe some witnesses who gave testimony against him felt satisfaction. One of them was Ismet Haxiavidija, a frail elderly man with a presence in court that was anything but. His son came to him one morning and told him "Father, my life is over." His wife and child had been killed. They were found among 20 bodies in the family compound, 19 of whom were women and children.

When Milosevic insisted the people had been killed by NATO bombs, Mr. Haxiavdija thundered, "No!" and described how the children were taken from the basement and massacred, how the house was burned. He said people told him not to go there because they feared he would have a heart attack. "My son said it is a sin to see children like that." "With what kind of human feelings can someone commit a crime of this kind against children, young people, old people?" Though he was crying, his voice remained strong and clear.

Judge May asked Milosevic if, in light of the witness's condition, he had any further questions. "I do. I do," he answered, then said, "War is a crime in itself and it is the innocent who suffer. Is it clear who created the war? You are furious because of the death of your family. Everyone would feel that way. How it came to be a war. . ."

Mr. Haxiavdija interrupted, "YOU! You as president. By sending criminals, the most evil criminals to commit crimes against children in the eyes of their mothers." At the end of his testimony, he asked the judges if he could say something. It wasn't done, but the judges allowed it anyway. Mr. Haxiavdija turned to Milosevic, looked him squarely in the eye, and said, "I just want to ask you, how could you kill women and children? Have you no human feelings?" There was utter silence in the courtroom. Milosevic made no response.

Other witnesses also had the chance to confront Milosevic, the man they blamed most for the loss of loved ones and the destruction of their way of life. I truly don't think they believe the tribunal was a dismal failure. As Eric Stover concluded after conducting a study of victim witnesses who had testified at the ICTY: "For many study respondents, merely being in the courtroom with the accused while he was under guard helped to restore their confidence in the order of things. Power, one witness said, 'flowed back from the accused to me.' If only for a brief while, this witness finally held sway over his personal tormentor, and his community's wrongdoer. It was at moments like these that the tribunal justice was at its most intimate."

The ICTY and ICTR have also contributed to the development of international criminal law. They held clearly for the first time that rape can be a war crime. They more clearly defined genocide in all its permutations, as they did for command responsibility, the responsibility of commanders for the acts of their subordinates.

Mr. Morrison also claims that tribunals are all "victors' justice." But is it victors' justice when the United Nations creates a tribunal? The ICTY indicted and is trying people from all sides of the bloody decade of wars in the former Yugoslavia, Serbs, Croats, Bosniaks, and Albanians. Who won that war anyway? I can't tell.

There was a bit of victors' justice in the ICTR. When Chief Prosecutor Carla Del Ponte began investigating crimes allegedly committed by certain Tutsi leaders, some of the UN member states negotiated her removal as prosecutor for the ICTR. They feared it would destabilize the region. Real politick again trumped justice.

The ICC, a permanent international court, was created to eliminate victors' justice (or at least lessen it). It remains to be seen how successful it will be. The fate of the Darfur indictments will be an early indication, though obviously not definitive.

Mr. Morrison notes that state leaders, like Milosevic and Saddam Hussein, deny the legitimacy of tribunals. They do and will continue to do so. The issue is how the court responds. In the Milosevic case, the accused loudly and repeatedly proclaimed the tribunal was illegitimate and he would only participate because it gave him a forum from which to make his political case. Then he insisted on representing himself, when he clearly had no intention of doing so. Yet the Court allowed it. That made for a fundamental contradiction in the proceedings – and for a lengthy, contentious trial. It was lengthy because Milosevic frequently used his time for speech-making, instead of cross-examination, then manipulated the court into extending his time. The other contributing factor to the trial's length was Milosevic's ill health which occasioned substantial adjournments as well as a much-reduced trial schedule of 3 half days per week. While it is not without controversy, my position is that the Court should have appointed counsel to represent Milosevic from the moment he said he had no intention of

mounting a proper defense and did not recognize the court. Had that been done, it is more likely the trial would have ended with a verdict instead of with the death of the accused.

Despite the lack of a verdict, the Milosevic trial collected thousands of pages of documentation – which will be used in other trials and will help establish a common truth as it operates to prevent revisionism. Through the subpoena power of the court as well as its prestige, the prosecution was able to obtain records that may never have come to light otherwise. They included intercepted telephone calls between Milosevic and Bosnian Serb leaders, transcripts of secret Assembly sessions in the Republika Srpska where members declared, "We have done this so the Muslims will cease to exist," military orders and Milosevic's admission that he diverted money from federal customs funds to support the Serbian forces in Bosnia and Croatia.

There is no doubt mistakes were made in the Milosevic trial and in other trials before the ad hoc tribunals. But as one commentator has said, "The enemy of justice is perfection." Geoffrey Robertson expands on this: "Many mistakes have been made, particularly with the inefficiency and expense in some new courts. I do think, however, that justice will have its own momentum and in time we will look back on these problems as teething troubles, and future generations will be amazed that we let people like Pol Pot, Augusto Pinochet and Idi Amin live happily ever after their tyranny."

In his article, Mr. Morrison also addressed terrorism and how the US has sought to deal with those suspected of involvement. Until 9/11, the US dealt with terrorists through its criminal justice system. Two well-known convictions are that of Ramzi Yousef, the mastermind of the two world trade center bombings, and Sheikh Omar Abdul Rahman, sentenced to life in prison for involvement in a plot to blow up tunnels, a bridge, the UN, the federal building and the FBI headquarters in New York. After 9/11, however, the US turned to the language and machinery of war.

As criminal defendants, Yousef and Rahman received full due process rights guaranteed by the US Constitution. Both were fairly convicted and will remain behind bars for the rest of their lives. For a nation at war, its enemies should have been afforded rights guaranteed by the Geneva Conventions to prisoners of war. But war on terror was an exception. The rule of law was inconvenient. It restricted US agents from doing what they thought necessary to get information and protect the country. So we now have the category "unlawful combatant," a person with few if any rights. A person who can be detained without charge for as long as his captors want.

In 2004, the President of the US signed by executive order the Military Commissions Act of 2004, which gave him authority to decide when and if to send a captive before a military commission. The prisoner had no right to an attorney, to see

evidence against him if it was considered a state secret, and no right to challenge his imprisonment through the ancient writ of habeas corpus. In 2006, the US Supreme Court struck down the Act as an illegal usurpation of legislative power. In October 2006, Congress quickly passed nearly the same law by an overwhelming margin – and presented it to the President for his signature as if it were a birthday gift instead of the seeds of destruction of our constitutional system. Recently, a federal appeals court upheld the Military Commissions Act of 2006 as a legitimate exercise of legislative power. If the Supreme Court decides to hear the case, the constitutionality of the Act will be examined. There is hope yet that constitutional freedoms will not be sacrificed on the altar of expediency.

The question that needs answering is not, as Mr. Morrison writes, whether it is necessary to trade off longstanding liberties to forestall the worst the terrorists might do. The question is will relinquishing longstanding liberties forestall the worst the terrorists might do. Will it make us safer? I have to ask how many people were won over to Al Qaeda by Abu Ghraib, by Guantanamo Bay, by the Military Commissions Act?

A word on universal jurisdiction, if there is time. The concept of universal jurisdiction is not new. It derives from customary international law that permitted trials of non-nationals for especially reprehensible crimes, such as piracy and slavery. It allowed Israel to try Adolf Eichmann, the French to try Klaus Barbie, the U.S. to try Manuel Noriega. Under universal jurisdiction, Spain requested Britain to extradite its guest, Augusto Pinochet, and the British House of Lords to decide to do so. Belgium has tried at least four Rwandans under this theory.

The ICC encourages states to adopt domestic legislation enabling the state to assume jurisdiction of those who can be charged with war crimes, crimes against humanity and genocide. It doesn't matter if the accused or any of his or her victims lives in the state assuming jurisdiction.

Germany is one of the first states to adopt domestic legislation to implement universal jurisdiction. As a result, the Center for Constitutional Rights, together with three other NGO's from other countries, has filed suit in a German court on behalf of prisoners in Guantanamo Bay and Abu Ghraib, requesting an investigation of named US officials for ordering, aiding and abetting or failing in responsibility to prevent or punish foreseeable war crimes consisting of torture, severe beatings, stripping prisoners naked and hooding them, deprivation of sleep and food, sexual abuse and exposure to extreme temperatures. The plaintiffs allege the crimes violate the Geneva Conventions, the 1984 Convention Against Torture, and the 1977 Covenant on Civil and Political Rights.

Defendants include political officials such as Donald Rumsfeld and George Tenet; military officials such as and, uniquely, the lawyers who provided false and clearly

erroneous legal opinions when it was known and foreseeable that torture would result. Among the lawyers are the attorney general, two deputy attorneys general, counsel to the Department of Defense and counsel to the Vice President.

Plaintiffs claim Germany is the court of last resort because the US gave immunity to all US personnel in Iraq from Iraqi prosecution, the US has not gone beyond prosecuting seven lower level soldiers for the crimes in Abu Ghraib, the US is not a signatory to the ICC, therefore relief cannot be obtained there, no other international tribunal is mandated to investigate or prosecute crimes in Iraq and recently a US federal court affirmed the Military Commissions Act of 2006.

What are the chances of the lawsuit succeeding? Probably slim. A German court rejected an earlier version of the lawsuit, because there were available remedies in the U.S. Yet there is clearly a movement among states in support of universal jurisdiction to assure that rule of law applies equally to everyone, that no one is above the law, in particular the most powerful. In fact, that is the belief and the hope that led to the creation of international tribunals and the permanent International Criminal Court.

Perhaps in the time we have for questions and discussion, I can address Truth Commissions and some of the other topics for which there wasn't time in my presentation.