

**CHALLENGES CONFRONTING INTERNATIONAL JUSTICE ISSUES\***  
**Address by David J. Scheffer**  
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I am very pleased to address such a distinguished audience this evening at the New England School of Law and, in particular, to have the pleasure of Professor Michael Scharf's company. Professor Scharf is a leading scholar on international humanitarian law and the institutions being forged to prosecute war criminals. His new book, *Balkan Justice*, is a testament to that scholarship. New England School of Law can be very proud of his contributions to both theory and practice in a field that is, unfortunately, growing.

The challenges confronting international justice today are daunting. The absence of justice is too often the norm rather than the exception in lands where armed conflicts and atrocities proliferate. Combatants are as likely to know as much about the laws of war as they do about quantum mechanics. The typical victims are women and children -- in the thousands -- raped and macheted for their mere existence. The severity of mass killings in our time, on the eve of the millennium, reflects how little we know of ourselves, of our neighbors, and of our future. Neither our faith in the impressive march of technology nor our other aspirations for the next century can overshadow the grotesque reality of the massacres that characterize civilization, or the lack thereof, in today's troubled world.

National systems of justice are the front-line defense but they have proven problematic. In the ideal world, every war crime, every crime against humanity, and every act of genocide would be prosecuted either in the territory where it was committed or by the state of nationality of the defendant. Yet there are significant cases in which no one is prosecuted by responsible domestic authorities.

In recent years much effort has been expended to establish international criminal prosecutions in two regions where domestic efforts have been lacking. The Security Council responded to the challenges of accountability in the former Yugoslavia and Rwanda by establishing ad hoc international criminal tribunals. Other nations of the world could easily be candidates for similar ad hoc tribunals. "Tribunal fatigue" in the Security Council explains, at least in part, why ad hoc tribunals have not become the universal mechanism for accountability.

But we should pause for a moment and note just how far the tribunals for the former Yugoslavia and for Rwanda have come. We are in the fifth year of the Yugoslav War Crimes Tribunal. From the beginning of the Clinton administration in 1993, we have viewed the pursuit of justice in that region as reinforcing the pursuit of peace, for without sufficient accountability of individual criminals, there remains the collective guilt of ethnic groups fueling continued inter-ethnic conflict for generations.

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You do not hear many people talking about the Yugoslav Tribunal as a purely symbolic exercise any more. While the Tribunal has experienced great difficulties in fulfilling the mandate entrusted to it by the Security Council, those difficulties have neither defeated it nor dissuaded those governments that are its pillars of support. Let me share some facts with you:

As of mid-January 1998, seventy-nine individuals have been publicly indicted by the Tribunal. Fifty-seven are ethnic Serb, nineteen are ethnic Croat, and three are ethnic Bosniac. Three indictees have died, meaning that we know of seventy-six living indictees. Fifty-four remain at large and nineteen are in custody in The Hague. The indictments against three ethnic Croats were withdrawn last month and they were released from custody. Of those indictees at large, fifty-two are ethnic Serbs and two are ethnic Croats. Of those indictees in custody now, only three are ethnic Serbs, thirteen are ethnic Croats, and three are ethnic Bosniacs.

The United States Government worked hard to facilitate the surrender on October 6th [of 1997], of ten Bosnian Croat indictees. The surrender, including indictee Dario Kordic, was a welcomed step that would not have happened without the cooperation of the Government of Croatia. We continue to press Zagreb for further cooperative actions with the Tribunal, particularly regarding the apprehension or surrender of Ivica Rajic and Zoran Marinic and the production of documents in the Blaskic trial.

As a consequence of the Bosnian Croat surrender, the United States entered into intensive consultations with the Tribunal and with the Dutch Government in October [1997] to determine what is most critically needed to strengthen the Tribunal's capabilities and ensure timely trials of those who are in custody. The answer was two-fold. First, the Tribunal's full budget request for 1998 needed to be approved in New York by the [United Nations'] General Assembly. This was a tough task for us, because it was hard to argue for an increase for the Tribunals when the United States was so far behind in our dues to the [United Nations]. When the repayment of dues was held hostage in Washington over an unrelated family planning issue, our ability to support the Tribunals in New York was made that much more difficult. One lesson from the last few months is that we need to show progress on our [United Nations] dues if we are to advance the cause of the Tribunals at the [United Nations].

In the end, we were pleased with the outcome on the Tribunal's budgets. The General Assembly approved 97% of the Tribunal's request, resulting in a budget of \$69 million for calendar year 1998, which reflects more than a 30% increase over the 1997 budget. That is an extraordinary development given the budgetary crisis at the United Nations. The projected U.S. assessment for the 1998 budget will be over \$17.5 million.

We were advised that the second priority was the immediate construction of a second major courtroom that would be fully functional and capable of conducting joint trials with multiple defendants. Last week I visited The Hague and delivered to the Dutch Government \$1 million as the U.S. share of a joint Dutch-U.S. undertaking to build such a courtroom by April of this year. The new courtroom will greatly enhance the Tribunal's capacity to hold trials and thus lessen the pre-trial detention periods of indictees in custody. A third smaller courtroom will be built with a generous donation

by the British Government. The Canadian Government has offered funds to assist with courtroom capacity as well.

Our experience with Croatia highlighted a fundamental issue that has bedeviled the Tribunal since its creation - State cooperation. States and entities are required to cooperate with the Tribunal, but often non-cooperation is the norm. The worst offenders are Republika Srpska and Serbia/Montenegro. Neither has apprehended or orchestrated the voluntary surrender of a single indictee. So our outer wall of sanctions on the [Federal Republic of Yugoslavia] will stand. That wall blocks access to the international community until there is real progress on resolving the problems in Kosovo, improved cooperation with the Yugoslav Tribunal, including transfer of the "Vukovar 3" to The Hague, progress on resolving the successor state questions, and support for democratization in Serbia. Aid to Republika Srpska is conditioned on the cooperation of individual local authorities with the Dayton Peace Process. We are working closely with Congress under recently enacted law to ensure that U.S. and multilateral funds are expended to promote Dayton objectives, including the isolation of those who fail to cooperate with the Tribunal in the apprehension of indictees.

Although the number of indictees in custody has, in recent months, more than doubled, clearly much more needs to be achieved. The United States is totally committed to strengthening the capabilities of the Yugoslav Tribunal and to pressuring the regional authorities in order to accomplish the arrest or voluntary surrender and subsequent prosecution of the indictees. Those indictees who remain at large, including Radovan Karadzic and Ratko Mladic, must realize that their day before the Yugoslav Tribunal will come; that there are no deals to cut; that there is no way out of avoiding a fair trial. Karadzic's pathetic efforts to seek exoneration through publication of hand-picked documents and to avoid a trial in The Hague elicit no sympathy from this quarter. The smartest move by Karadzic and Mladic would be to voluntarily surrender to Tribunal officials. They would live their natural lives, since there is no death penalty at the Tribunal, and they can argue their innocence before the world rather than pursue the cowardly isolation of men who appear to fear their past as much as they do their future.

There is no statute of limitations on these crimes, and the work of the Yugoslav Tribunal will continue for many years. Of course we are impatient for justice to be rendered, and we hear the criticism of those, particularly the victims, who understandably are frustrated with the pace of apprehensions. But the fact that certain major indictees are not yet in custody should lead no one to assume that we are complacent. Nor should anyone underestimate how seriously we view Karadzic's corrosive influence on the Dayton peace process. The President's commitment to maintain a military presence in Bosnia should signal to all alleged war criminals that they cannot beat the clock by waiting for July and the end of the deployment of the Stabilization Force (SFOR). Acting within the mandate approved by the North Atlantic Council, SFOR has demonstrated on two occasions since last July that it has the will to apprehend indictees.

The International Criminal Tribunal for Rwanda poses comparable, though not identical, challenges to the international community. Following the UN Inspector General's report on the maladministration of the Rwanda Tribunal one year ago, much

change has occurred that leads us to conclude that the Tribunal is back on track, albeit with a long way to go before achieving the efficiency and competence expected of a criminal court. Nonetheless, of the thirty-two publicly indicted individuals of the Rwanda Tribunal, twenty-three are in custody. Some of the major figures in the Rwandan genocide of 1994, including Bagasora, are in custody awaiting trial in Arusha. There are currently three trials underway. We hope that these trials will be conducted more efficiently and judgments handed down as soon as possible.

Like the Yugoslav Tribunal, the Rwanda Tribunal received a major boost in its 1998 budget. Recently the General Assembly approved 96% of the Tribunal's request for a total budget of \$59 million for 1998. That represents a near 40% increase over its 1997 budget of \$45 million. The projected U.S. assessment will total almost \$16 million.

We believe that Chief Prosecutor Louise Arbour and the new Deputy Prosecutor Bernard Muna are rebuilding the Rwanda Tribunal into a powerful institution for justice in the Great Lakes region of Africa. Arbour and Muna plan multiple indictments and joint trials that will demonstrate the conspiracy that led to and implemented the genocide in Rwanda.

However, in Rwanda, the genocide continues. The Rwanda Tribunal's temporal jurisdiction only encompasses the calendar year 1994 and therefore there is no international accountability available for current atrocities as there remains in the former Yugoslavia. My own investigation of the Mudende refugee camp massacre in northwest Rwanda in early December [1997] persuaded me that resurgent genocide is being waged there. Yet the perpetrators cannot be brought to trial before the Rwanda Tribunal for these more recent crimes.

This dilemma is emblematic of the yawning gap between the jurisprudence of the two ad hoc tribunals and the creation of a permanent international criminal court, which at best is years distant. Either the international community relies entirely on national justice systems to prosecute perpetrators of war crimes, crimes against humanity, or genocide in our own time or new ad hoc tribunals or other mechanisms of accountability take up the slack until a permanent court can function. Given the frequency of atrocities in various parts of the world, the rule of law will suffer a major defeat unless the gap is closed with the means to bring individuals to justice.

The United Nations talks on the establishment of a permanent international court (ICC) have entered perhaps their most critical stage. Only one Preparatory Committee meeting remains, in March and April, before the diplomatic conference begins in Rome this summer for a fixed, five week period. The number of issues to be resolved between now and June is daunting, the ICC would be an institution that melds the common law and civil law systems and takes into account other major legal systems. The stakes are very high, for the perpetual absence of an appropriate permanent international criminal court would embolden war criminals to conduct their business with impunity; but an ill-conceived permanent court might create bad law, discourage effective national prosecutions, and create new divisions among States.

President Clinton has repeatedly expressed his Administration's commitment to the establishment of an ICC. [United States] leadership in establishing the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and [United

States] support for their full operation reflects a strong [United States] commitment to international criminal justice that underpins our participation in the [United Nations] talks on an ICC. We know that the success of the ad hoc tribunals is a necessary predicate to gaining universal support for the establishment and operation of a permanent court.

I want to emphasize why an appropriately constituted permanent international criminal court is in the best interest of the United States. We live in a world following the Cold War where mass killings, mass rapes, and other atrocities are occurring with shocking frequency. The rule of law, that the United States has always championed, is at risk again of being trampled by war criminals whose only allegiance is to their own pursuit of power. We believe that a core purpose of an international criminal court must be to impose a discipline of law enforcement upon national governments themselves to investigate and prosecute genocide, crimes against humanity, and war crimes, failing that the permanent court will stand prepared to undertake that responsibility. Just as the rule of extradition treaties is “prosecute or extradite,” the rule governing the international criminal court must be “prosecute nationally or risk international prosecution.” That discipline on national systems to fulfill their obligations under international humanitarian law has been and will continue to be central to the [United States] position. Our long-term vision is the prevention of these crimes through effective national law enforcement joined with the deterrence of an international criminal court.

A number of important issues in the UN talks require further rigorous consideration by governments before the Rome diplomatic conference this summer. For example:

1. Will the jurisdiction of the court be limited to the core crimes of genocide, crimes against humanity, and war crimes, or will it extend to cover crimes such as drugs or terrorism?
2. Will all State Parties be obligated to accept all of the crimes within the jurisdiction of the court, or will they have a right to “opt-in” or “opt-out”?
3. Will State Parties file complaints against named individuals with the court or will they refer entire situations for investigation to the Prosecutor?
4. Will the Security Council have any authority under the statute of the court to involve itself in the referral of situations to the court?
5. Will the Prosecutor be able to investigate and seek indictments against any individual under any circumstances anywhere in the world?
6. Will the prosecution of an individual case be subject to any requirement of prior consent by any particular State or States?
7. What will be the limits of an obligatory State with the investigations and prosecutions by the court?
8. What will be the precise character of penalties?
9. How will the court be organized and will there be an oversight mechanism of States Parties to the treaty to ensure administrative and fiscal discipline in the operation of the court?
10. What will be the source of funding for the court?

11. How will the rules of evidence and procedure, and the elements of offenses be prepared?
12. Should a State have the right to attach reservations to its ratification of the treaty?
13. What [United States] constitutional issues need to be considered for the United States to be a party to the treaty?

This is only a short list of the multitude of tough questions that must be answered in the coming months. The ICC will be an institution of considerable complexity because it will truly be unique in its fusion of international and criminal law, procedure and its enforcement against individuals located within sovereign borders.

Notwithstanding such complexities, the United States will continue to play a leading role in the [United Nations] talks and seek to resolve differences among delegations. Last September, before the [United Nations] General Assembly, President Clinton challenged governments to establish a permanent international court to prosecute the most serious violations of humanitarian law before the century ends.

Some commentators would have you believe that because the [American] Government has taken some tough positions on how the court should be structured and its jurisdiction triggered, [United States] resolve to establish an international criminal court is somehow less convincing than that of other governments. One non-governmental organization has gone so far as to suggest that the United States should be abandoned in this whole process. That is rubbish. It dangerously reflects a tendency to misrepresent [United States] positions in the [United Nations] talks and assumes that an ICC will be viable without [United States] participation or support.

The establishment of a permanent international criminal court can bridge the millenniums with two prospects. Sadly, the need to establish such a court reflects the darker vision of our future. It assumes that atrocities will continue to be the norm and require judicial responses. Nonetheless, an effective and efficient permanent criminal court should help deter the commission of these heinous crimes and thus save lives.

When I visited Gisenyi Hospital last month, I saw the living horror of genocide in the anguished faces of 267 victims of a genocidal assault on the Mudende refugee camp in Rwanda. The wounded were overwhelmingly women and children. Many had multiple wounds: gunshot, machete, and burns. The lone surgeon in the hospital told me how he literally stuffed the brains of children back into their skulls and stitched up the consequences of malicious machete attacks. Women and babies with compound fractures moaned in agony. One young beautiful girl lay paralyzed by a gunshot wound to her lower spine. We all have a duty to respond to this barbarity.

Thank you.