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# "The Crisis in the Implementation of International Law"

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## “THE CRISIS IN THE IMPLEMENTATION OF INTERNATIONAL LAW”

*Hon. Richard Goldstone\**

PROFESSOR MICHAEL SCHARF: Good afternoon, everybody. Wow! We have quite a crowd in here. Hopefully, we are not violating the fire marshal’s law. I know the overflow room is also full. Welcome back to our conference, “International Law in Crisis.”

It is my extreme pleasure to introduce to you today’s luncheon speaker. Many of you came to this conference because you were interested in what he has to say. We have a record crowd at this conference.

We had 190 preregistered people, which is way more than we usually get, and we also have probably about a thousand people watching us live and another 10,000 will watch it in archive.

Let me start by telling you about Richard Goldstone’s career and then about his special relationship with this institution as part of my introduction.

Richard Goldstone was a pioneer in fighting Apartheid and the Goldstone Commission<sup>1</sup> the first commission that bears his name was one of the most important institutions that helped dismantle Apartheid in South Africa.

When the Yugoslavia tribunal was formed and I was working at the State Department as Attorney Adviser for U.N. Affairs they were struggling to find somebody that could be acceptable to the whole international community, to be the first prosecutor of an international tribunal since Nuremberg.

It took them fourteen months and dozens of candidates before they all settled on a consensus on Justice Richard Goldstone.

At the time, Richard had just been appointed to the Constitutional Court.<sup>2</sup> It was like our Supreme Court, and so he had to ask for a leave of

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\* Richard Goldstone is a former Justice of the Constitutional Court of South Africa. He also served as chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

<sup>1</sup> See generally *Commission of Inquiry Regarding the Prevention of Public Violence and Intimidating (Goldstone Commission)*, HUMAN RTS. INST. S. AFR., <http://www.hurisa.org.za/gold.htm> (last visited Jan. 19, 2012) (providing information on how the Goldstone Commission was formed and its investigations during Apartheid).

<sup>2</sup> *Judges: Judge Richard Goldstone*, CONST. COURT S. AFR., <http://www.constitutional.court.org.za/site/judges/justicerichardgoldstone/index1.html> (last visited Jan. 19, 2012) (noting that Goldstone served as a judge of the Constitutional Court of South Africa from July 1994 through October 2003).

absence, which Nelson Mandela gladly gave him. I am sure there were some tough negotiations, but it was similar to when Robert Jackson took a leave of absence from our Supreme Court to be the first prosecutor of the Nuremberg Tribunal.<sup>3</sup>

When Richard created the Yugoslavia tribunal, and I used that word intentionally because he was the founding father, he was the one who took a tribunal that most people thought was just put together as a Band-Aid or just some kind of propaganda tool to show the West was doing something when it refused to put ground forces or air forces to stop the atrocities in Bosnia.

Nobody really thought it was going to succeed. Nobody thought that the top ten people that Eagleberger had identified as the worst culprits would ever see justice.<sup>4</sup> And yet, over the years, especially because of the dint of Richard Goldstone's personality and his politics and his fundraising and everything he did to create this little institution and turn it into a huge tribunal that dwarfed Nuremberg, they got Milošević, the leader of Serbia.<sup>5</sup> They got Mladić, the main general.<sup>6</sup> They got Karadžić.<sup>7</sup>

In fact, of all the indictees, every single one has now been arrested and brought to justice in The Hague.<sup>8</sup> Nobody would have thought that would happen, and that's because of Richard Goldstone.

Now, when Richard left the tribunal back on the Constitutional Court, he took on a series of other important work. He worked on the issue of Kosovo's status, and he worked, of course, as the dean mentioned this morning, on the very controversial Goldstone Commission report.<sup>9</sup>

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<sup>3</sup> See generally John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH U. GLOB. STUD. L. REV. 511 (2007) (discussing how Justice Jackson was uniquely suited to be a prosecutor in the Nuremberg Tribunal).

<sup>4</sup> See LEILA NADYA SADAT & MICHAEL P. SCHARF, *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 275 (2008) ("The list of persons named by Eagleburger included Slobodan Milosevic, President of the Federal Republic of Yugoslavia (Serbia and Montenegro); Radovan Karadzic, leader of the self-proclaimed Serbian Republic of Bosnia and Herzegovina; and General Ratko Mladic, commander of the Bosnian Serbs military forces.").

<sup>5</sup> *Milosevic Charged with Bosnia Genocide*, BBC NEWS (Nov. 23, 2011), <http://news.bbc.co.uk/2/hi/europe/1672414.stm>.

<sup>6</sup> Dan Bilefsky & Doreen Carvajal, *Serb Ex-General Accused of Massacre is Captured*, N.Y. TIMES, May 27, 2011, at A1.

<sup>7</sup> Editorial, *Trying Karadzic*, N.Y. TIMES, Oct. 27, 2011, at A30 (noting that it took thirteen years and "enormous" international pressure for Serbian officials to arrest Karadzic).

<sup>8</sup> *Milosevic Charged with Bosnia Genocide*, *supra* note 5; *Serbia Extradites Ratko Mladic to the Hague*, BBC NEWS (May 31, 2011) <http://www.bbc.co.uk/news/world-europe13607980>; *Trying Karadzic*, *supra* note 7.

<sup>9</sup> See generally *United Nations Fact Finding Mission on the Gaza Conflict*, U.N. HUMAN RTS. COUNCIL, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm> (providing the text of the Goldstone Report, methodology information, and webcasts of the public hearings).

For the law school, however, he had played also a very special role. I met Richard 19 years ago at a conference in Syracuse, Sicily, and we established what became a very active academic consortium—that is based and headquartered here at Case Western Reserve—where we do work for all of the international tribunals.<sup>10</sup>

We started working for the Yugoslavia tribunal when it expanded to the Rwanda Tribunal.<sup>11</sup> We also expanded when David Crane<sup>12</sup> became the chief prosecutor for the special court of Sierra Leone.<sup>13</sup> Richard suggested you might want to have Professor Scharf and his students help you out as well. So we took on that; same thing with Cambodian Tribunal and the Special Tribunal for Lebanon.

In addition, one of our favorite alumni—who is profiled in the upcoming “In Brief,” which is our alumni magazine—Chris Rassi, started his career as Justice Goldstone’s law clerk at the Constitutional Court in South Africa<sup>14</sup> as did an alumni or as did both an alumni and a colleague who is now down at Cleveland State, who also has invited Richard to speak there this afternoon. And he will be, after he leaves here, Cleveland gets a double dose of Richard.

Now, from the tribunal work we did, we ultimately, together with the Public International Law and Policy Group, our program doing this work for tribunals, were nominated for a Nobel Peace Prize,<sup>15</sup> and it has brought a lot of good attention to the work we do. It also has really helped build up this program.

Now, over the years, Richard has come, no matter how busy he was, and spoken at our conferences. He has been a Klatsky endowed lectur-

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<sup>10</sup> See generally *Frederick K. Cox International Law Center: Special Student Opportunities*, CASE W. RES. UNIV. SCH. OF LAW, [http://law.case.edu/centers/cox/content.asp?content\\_id=29](http://law.case.edu/centers/cox/content.asp?content_id=29) (last visited Jan. 19, 2012) (describing international tribunal externships available to students).

<sup>11</sup> See generally *General Information*, INT’L CRIM. TRIB. FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Jan. 19, 2012) (describing what the Rwanda Tribunal is and why it was created).

<sup>12</sup> See generally *Profile: David M. Crane*, SYRACUSE UNIV. COLLEGE OF LAW, <http://www.law.syr.edu/deans-faculty-staff/profile.asp?fac=152> (last visited Jan. 19, 2012) (providing a summary of David Crane’s professional accomplishments).

<sup>13</sup> See *id.* (noting that Crane served as the founding chief prosecutor of the Special Court for Sierra Leone).

<sup>14</sup> See *Christopher Rassi Joins the Washington Office*, THOMPSON HINE LLP, <http://www.thompsonhine.com/publications/publication1204.html#3181> (last modified Sept. 14, 2007) (“Mr. Rassi served as law clerk to the Honorable Yvonne Makgoro, Constitutional Court of South Africa.”)

<sup>15</sup> *Michael Scharf ’88 Nominated for Nobel Peace Prize*, DUKE L. NEWS & EVENTS, <http://www.law.duke.edu/features/2005/scharf.html> (last visited Jan. 19, 2012).

er, which is a human rights lecture.<sup>16</sup> He has spoken at major conferences we have had. Three years ago, maybe it is four now, he was selected to get the honorary degree from this university. So he is an alumnus of this university, and we are proud of him, no matter how controversial some people think his report is.

I will say this: as the dean suggested, we love controversy here because that's what an academic institution does, so last year we had a program that, unfortunately, Richard was not able to come to, where we debated for hours the Goldstone Commission report, and several of the panelists here have written articles, and these are available still, available out in the hall.

If you want to see the dissection of every dotted 'I' and crossed 'T' and everything in the Goldstone Commission report, we did that. So we don't shy away from critique here. But we didn't invite him today to talk about the Goldstone report.

Lots of stuff is going on in the world about international law and crisis. We have Gadhafi on the run.<sup>17</sup> We have got al-Bashir, who has been indicted by the ICC.<sup>18</sup> We have lots of major international criminals that need to be brought to justice.

And there is nobody in the world who knows that topic better than Richard Goldstone. We asked him to come here and talk about that. So his speech today will be about that. He would like his questions and answers to be on that subject.

After this, there is going to be another panel about the Middle Eastern crisis, and if we want to go back to talking about the Goldstone report, we can do that on that panel, but for this panel, we are focusing on this expertise that Richard Goldstone brings that nobody else really has in the world, and we are so happy to have him here.

Please join me in welcoming him.

[Applause.]

HON. RICHARD GOLDSTONE: Well, Michael, thank you very much for your very warm introduction. It is a great pleasure and privilege to be back at Case Western. I have made a number of visits here and spoken at similar seminars and other functions to which Michael has referred I would add that I have had a very warm relationship with Michael for almost two

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<sup>16</sup> See *Frederick K. Cox International Law Center: About the Center*, CASE W. RES. UNIV. SCH. OF LAW, [http://law.case.edu/centers/cox/content.asp?content\\_id=26](http://law.case.edu/centers/cox/content.asp?content_id=26) (last visited Jan. 19, 2012) (listing Goldstone as a Klatsky Endowed Seminar in Human Rights lecturer).

<sup>17</sup> Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, October 21, 2011, at A1.

<sup>18</sup> See *ICC Indictment of Sudanese Leader*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/7924195.stm> (Mar. 4, 2009) (quoting excerpts from the arrest warrant of Sudanese President Omar al-Bashir).

decades in which we have worked together in many areas of international humanitarian law.

I hope too many of you won't be disappointed that I am not going to talk about fact finding missions. I don't believe that they are directly relevant to the issue of whether international law is in crisis.

Let me say only this: the view I have just expressed is based on the fact that fact finding missions are not judicial; they are not quasi-judicial; they don't make the law.<sup>19</sup> They provide or may not provide, as the case may be, factual background and possibly even legal views, which are not binding on anybody, but may or may not be useful to political bodies or to legal bodies out there.<sup>20</sup>

We heard an excellent introduction to this conference yesterday evening, of all places at the Rock and Roll Hall of Fame. I must say I didn't envy David Crane talking in that atmosphere, but he overcame problems that I would have thought were impossible to overcome, and it was a very sober, somewhat pessimistic introduction to the topic.

He was wise to set that tone for a conference that is on "The Crisis of International Law." I am more optimistic. I don't believe I am a starry-eyed optimist, but I am an optimist, and that optimism has led me to decide to talk not about the crisis of international law, but rather the crisis in the *implementation* of international law.

I imagine that all of you, like me, were frustrated at not being able to attend all of today's panels because they have all been excellent and warrant congratulations to Michael and his colleagues on the organization of yet another outstanding conference with a gathering of outstanding people who are so well qualified to talk to the various topics that we have been feasting on today.

International law—far from being in crisis, is being relied upon and called in aid more frequently by international leaders than ever before.<sup>21</sup> The current relevance of international law could never have been anticipated but a few years ago.

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<sup>19</sup> See generally *The United Nations Human Rights System*, HUMAN RTS. EDUC. ASSOC, [http://www.hrea.org/index.php?doc\\_id=437](http://www.hrea.org/index.php?doc_id=437) (last visited Jan. 19, 2012) (explaining the procedures and practices of fact-finding missions).

<sup>20</sup> *Id.*

<sup>21</sup> See Harold Hongju Koh, *The Obama Administration and International Law*, U.S. DEPT. STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> ("[O]beying our international commitments is both right and smart, and that is a message that this Administration, and I as a Legal Adviser, are committed to spreading."); see also *Merkel Demands Respect for International Law*, SPIEGEL ONLINE (Sept. 11, 2006), <http://www.spiegel.de/international/0,1518,436359,00.html> (quoting Chancellor Angela Merkel: "Apart from determination and international unity, respect for international law, tolerance and respect for other cultures should be the maxims of our actions.").

The question, as I have already indicated, that we have to ask ourselves, is whether international law can fulfill the expectations of those relying upon it. Let me say, too, by way of warning, that too many people place too much of a load on the law. The law is but one tool, and in many respects an insignificant tool in the development of peace and security and economic sustainability. The law is a tool in that regard, but without the political will, without the necessary economic resources, it cannot be a magic wand that is going to cure the most serious problems that the world community is facing.

Allow me do two things: First, to point out the huge developments in various areas of international law; and second, when I have done that, to talk about its implementation.

And let me start with the area that I know best and to which Michael has referred, and that is international criminal law and, in particular, the International Criminal Court (ICC). When the International Criminal Court was agreed to in Rome in the middle of 1998, there was this huge threshold of sixty ratifications before the Court could begin to operate.<sup>22</sup> This was seen by the majority of optimistic people as a huge threshold that would take at least a decade to reach.

But, as we know, it took less than four years, and amazingly, today 117 of the 193 members of the United Nations have ratified the Rome Treaty.<sup>23</sup>

It is interesting looking at the 117 nations by year and region:<sup>24</sup> Africa thirty-two;<sup>25</sup> Latin America and the Caribbean twenty-six;<sup>26</sup> Asia and the Pacific Guard, sixteen,<sup>27</sup> and Europe and the CIS countries forty-three.<sup>28</sup> It is a huge, huge development, and it includes the 43 from Europe, including every member of the European Union.<sup>29</sup>

It is possible that the so-called Arab Spring might bring more Arab countries into the ICC fold, and there has been an unfortunate shortage of

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<sup>22</sup> *Ratification of the Rome Statute*, COAL. INT'L CRIM. COURT, <http://www.iccnw.org/?mod=romeratification> (last visited Jan. 19, 2012).

<sup>23</sup> *The States Parties to the Rome Statute*, INT'L CRIM. COURT, <http://www.icccpi.int/Menu/ASP/states+parties/> (last visited Jan. 19, 2012).

<sup>24</sup> *Ratification of the Rome Statute*, *supra* note 22 (now 120 since Cap Verde joined on Oct. 11, 2011).

<sup>25</sup> *The States Parties to the Rome Statute*, *supra* note 23 (now thirty-three since Cap Verde joined on Oct. 11, 2011).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *About the EU: Countries*, EUROPA, [http://europa.eu/abouteu/countries/index\\_en.htm](http://europa.eu/abouteu/countries/index_en.htm) (last visited Jan. 19, 2012).

Arab countries who ratified the Rome treaty, for reasons that speak for themselves.

So far, Tunisia has come out of this Arab Spring and has now ratified the Rome Treaty. Others may follow and depending on developments in those countries they might become democracies. It is democratic nations more than others that accede to the Rome Treaty and are prepared to make themselves parties to international humanitarian law efforts.

Then there is the use of the ICC by governments. It is a strange irony that African countries, three of them, have approached the ICC and said “please come and investigate what’s happening with regard to war crimes in our country.”<sup>30</sup>

The first three cases before the ICC—from Uganda, from the Central African Republic, and the Democratic Republic of the Congo—came from governments.<sup>31</sup> Again, nobody anticipated at all in 1998 or 2002 when the Court began, that cases would come before the Court from governments.<sup>32</sup>

It was assumed that all the cases would be initiated by the prosecutor using his own what are called *proprio motu* power, his power of referring cases for confirmation to a pretrial chamber of the International Criminal Court.<sup>33</sup>

Three came from African Governments.<sup>34</sup> Of the remaining three before the Court, two came, again to the amazement of the most optimistic supporters, from the Security Council.<sup>35</sup> It had been assumed that the Security Council for the then foreseeable decades would not refer cases to the

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<sup>30</sup> *All Situations*, INT’L CRIMINAL COURT <http://www.iccpi.int/Menus/ICC/Situations+and+Cases/Situations/> (last visited Jan. 19, 2012) (noting the first three ICC situation referrals of Uganda and the Democratic Republic of the Congo in 2004 and the Central African Republic in January 2005).

<sup>31</sup> *Id.*

<sup>32</sup> See Paola Gaeta, *Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?*, 2 J. INT’L CRIM. JUST. 949, 950–51 (2004) (describing the widespread backlash expected from countries pressed to self-refer cases to the ICC).

<sup>33</sup> *Id.* at 951 (noting the significant difficulties expected with using the other jurisdictional triggers of Security Council referrals and complaints brought by an unconnected State Party to the Court).

<sup>34</sup> *All Situations*, *supra* note 30.

<sup>35</sup> Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT’L CRIM. JUST. 590, 590–91 (2005) (noting the 2005 referral of Sudan regarding the Darfur crisis); *Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression*, U.N. NEWS SERVICE (Feb. 26, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37633> [hereinafter *Security Council Imposes Sanctions*].

International Criminal Court because of the United States veto and the Russian veto and Chinese veto.<sup>36</sup>

Powerful countries don't like international courts. Powerful countries don't like international adjudication at all. Powerful countries don't like people from other nations looking over their shoulders and giving judgment on what they are doing.

Two cases were referred by the Security Council and one during the second term of President George W. Bush. In his first term he went to extreme lengths to try and kill this court in its infancy. At his urging, a compliant Congress passed what then seemed and seems even more today to be ridiculous legislation, including what has been called the Hague Invasion Act, which authorizes American troops to rescue Americans who might be brought before the court in The Hague.<sup>37</sup> It really stretches the imagination that the Congress of the United States could even consider, let alone pass, legislation of that nature.

John Bolton famously stated that the happiest day of his career, was that during which he informed the Secretary General of the United Nations that the United States was withdrawing its signature from the Rome Treaty.<sup>38</sup> It was the same Administration in its second term that decided not to veto the reference of the Sudan of the Darfur situation to the International Criminal Court.<sup>39</sup> One never knows and certainly the odds on that happening were thought to be just about zero.

Two weeks before the United States announced it would not veto the referral, the then-Ambassador for War Crimes in the Bush Administra-

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<sup>36</sup> See Johan D. van der Vyver, *Jurisdiction of the International Criminal Court*, CASE W. RES. UNIV. SCH. OF LAW – FREDERICK K. COX INT'L LAW CTR. WAR CRIMES RESEARCH PORTAL (Sept. 23, 2003), [http://law.case.edu/war-crimes-researchportal/instant\\_analysis.asp?id=5](http://law.case.edu/war-crimes-researchportal/instant_analysis.asp?id=5) (describing the obstacle a Permanent five veto poses to any Security Council referral).

<sup>37</sup> American Service-Members' Protection Act of 2002, Pub. L. No. 107–206, 116 Stat. 820 (2002) (codified as amended at 22 U.S.C. § 7401, § 2008) (granting the President "all means necessary and appropriate" to free any American serviceperson being tried before the Court); see also Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L. J. 415, 423 (2004) (noting the pejorative European reference to the act as the "Hague Invasion Act").

<sup>38</sup> Orentlicher, *supra* note 37, at 421 (noting that the Bush Administration rejected the Court due to its unbridled power); Robert C. Johansen, *The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity*, 28 HUM. RTS. Q. 301, 301–02 (2006) (indicating that the un-signing was unsurprising to observers); van der Vyver, *supra* note 36 (presenting then-Undersecretary of State for Arms Control and International Security's opposition to the ICC).

<sup>39</sup> Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Function and Status*, 24 BERKELEY J. INT'L L. 650, 650 (2006) (noting the U.S. decision to abstain from the vote rather than exercising its veto as expected).

tion, Pierre Richard Prosper said that the United States “will veto the reference because a reference by the Security Council will give the International Criminal Court credibility.”<sup>40</sup>

He was right. It did give it credibility, but he was wrong that the U.S. would exercise its veto. And who would have believed that, as recently as this year, the United States would vote affirmatively for such a resolution. The Obama Administration voted affirmatively to refer the Libyan situation to the ICC, which is resulting, as we know, in the indictment of three Libyan leaders, including Gadhafi as well as one of his sons and his security chief.<sup>41</sup>

So there is reason for optimism in a situation where pessimism had really overtaken the events and the prophecies that people were making with good rational reason.

I might say in parentheses that I initially questioned the timing of the reference of the Libyan situation to the ICC. The Security Council for the first time used the so-called principle of the responsibility to protect because that is what it was doing by authorizing NATO powers to assist the rebels fighting against the regime of Muammar Gadhafi.<sup>42</sup> The Security Council exercised its powers in order to protect civilian lives in Libya. The reference to the ICC seemed to me to be premature and might well have been postponed until the end of hostilities.

I am happy that my concerns have proven to be ill founded. The fighting is coming to an end and so too is the Gadhafi regime.<sup>43</sup> What will come in its place, we have to wait and see. If there is some form of democratic government, if decent operating courts of law can be set up, even one with international assistance, I certainly would strongly support a trial of Gadhafi in Libya, subject to his being able to be given a fair trial but by acceptable international standards, a big “if”.

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<sup>40</sup> See Johansen, *supra* note 38, at 321 (noting Ambassador Prosper’s explanation that “[w]e don’t want to be party to legitimizing the ICC”).

<sup>41</sup> Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

<sup>42</sup> Libya: Implementation of UN Resolution 1973 for the Protection of Civilians; Urgent Action Required in Cote d’Ivoire; Deteriorating Situation in Abyei, INT’L COAL. RESPONSIBILITY TO PROTECT (Mar. 25, 2011), <http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/3335-crisis-alert-libya-implementation-of-un-resolution-1973-for-the-protection-of-civilians-urgent-action-required-in-cote-divoire-deteriorating-situation-in-abyei> (noting Resolution 1973 as the first implementation of military action under the responsibility to protect doctrine).

<sup>43</sup> Louis Charbonneau, *U.N. Ends Mandate for NATO Operations in Libya*, REUTERS (Oct. 27, 2011), [www.reuters.com/article/2011/10/27/us-libya-un-idUSTRE79P6EC20111027](http://www.reuters.com/article/2011/10/27/us-libya-un-idUSTRE79P6EC20111027) (indicating British Foreign Secretary William Hague’s optimistic sentiments for Libya’s future following the cessation of NATO operations).

I think that the Libyans have a long way to go in forming a government at all, let alone a democratic government, but if they can do that, then the complementarity on which the international court is based would favor a trial in Tripoli or somewhere in Libya rather than in The Hague.<sup>44</sup> I am not optimistic that that will happen, and if it doesn't, then, of course, the International Criminal Court must insist on the arrest warrant being carried out, and Gadhafi, if he is arrested, being tried in The Hague.

There is also the possible resort to a mixed domestic and international tribunal along the lines of the Special Court for Sierra Leone. That Court is regarded as having been a success and much credit for that must go to David Crane. On the other hand there is also the Special Tribunal for Lebanon.<sup>45</sup> The jury is still out but the prospects of accused persons appearing before that tribunal appear to me to be highly unlikely.

The intention, as I understand it, and it is possible under the statute under which that court operates, is that there will be a trial in absentia. I certainly don't like trials in absentia. I believe they bring cold comfort to the victims, and from a prosecutor's point of view, they are poison because if the accused person is ever brought to court, the trial in absentia is rendered void, and defense counsel have a wonderful opportunity of cross examining major witnesses who already have given evidence in the trial in absentia. Another problem, incidentally, with trials in absentia is, it makes important witnesses marked people for assassination, and that's another huge danger of trials in absentia.<sup>46</sup>

Let me move away from criminal justice and look at a couple of other areas of international law and decide whether they are in crisis. There is the International Court of Justice, the so-called World Court.<sup>47</sup> When I was in The Hague in the middle 1990s, that court was almost ignored. I remember they had about two cases, one or two cases a year, and I remember my bemusement when I met with some of those judges of the International Court of Justice, who complained that they were overworked. It was really Parkinson's law: they worked harder on two cases than they would have on two hundred cases because they had nothing else to do. That has

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<sup>44</sup> Alison Cole, *A Hybrid Court Could Secure Justice in Libya*, THE GUARDIAN (Oct. 27, 2011), <http://www.guardian.co.uk/law/2011/oct/27/hybrid-court-justice-libya?newsfeed=true> (indicating that while the principle of complementarity favors a trial in Libya, hybrid courts such as the Special Tribunal for Lebanon are another alternative).

<sup>45</sup> *Id.*

<sup>46</sup> *Cf.* Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 220 (2002) (noting the common usage of threats and other intimidation methods to dissuade witnesses from testifying in the Yugoslav war crimes trials).

<sup>47</sup> *See generally* TERRY D. GILL & SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 23 (6th ed. 2003) (providing an excellent background resource on the function, structure, and work of the World Court).

changed considerably. The International Court of Justice presently has eighteen cases actively going on in front of its judges.<sup>48</sup> Only governments can litigate in front of the International Court of Justice.<sup>49</sup> No individuals, no organizations, only governments, and they can't be forced to do so.<sup>50</sup> They go there willingly because they want to have their dispute settled by the International Court of Justice. So there has been a proliferation, relatively speaking, of cases before the International Court of Justice, and these are brought by governments.

The World Trade Organization's Appellate Body is a good example of the huge increase in the use by governments of international law.<sup>51</sup> Until sixteen years ago, trade disputes between members of the World Trade Organization were settled by quasi-diplomatic proceedings between governments.<sup>52</sup> The system was directed not at litigating differences; the system was directed at finding solutions and frequently by way of compromise. It was usually diplomats who argued the cases in that court, not lawyers.

Today the WTO dispute settlement system is really based on the rule of law.<sup>53</sup> There are now binding outcomes and the final court of appeal is the Appellate Body of the WTO sitting in Geneva.<sup>54</sup> By way of a footnote, the reason it is called the Appellate Body, I understand on good authority, was to satisfy the United States and make it comfortable for the United States to join an appellate court that wasn't called a court.<sup>55</sup> So they called it the Appellate Body to make it palatable in Washington, D.C.

That does not matter; it works. The present chairman of that court is an American, Jennifer Hillman.<sup>56</sup> She has said, and I quote, from a yet unpublished piece: "the parlance of disputes has shifted from one of compro-

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<sup>48</sup> *Cases*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1> (last visited Jan. 19, 2012) (listing 17 cases pending or under deliberation as of Nov. 3, 2011).

<sup>49</sup> GILL & ROSENNE, *supra* note 47, at 266 (referencing Article 34.1 of the Statute of the International Court of Justice declaring that only states may be parties before the Court).

<sup>50</sup> *Id.* (referencing Article 36 of the Statute).

<sup>51</sup> Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, TEX. INT'L L.J. 469, 476 (2003) (noting that the Appellate Body of the WTO "has grown in size over the last years, in order to match the increasing caseload of the Appellate Body").

<sup>52</sup> John H. Jackson, *Dispute Settlement and the WTO - Emerging Problems*, 1 J. INT'L ECON. L. 329, 331-32, 338 (1998).

<sup>53</sup> *Understanding the WTO: Settling Disputes - A Unique Contribution*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Jan. 19, 2012) ("The WTO's Procedure underscore the rule of law, and it makes the trading system more secure and predictable.").

<sup>54</sup> *Id.*

<sup>55</sup> *Dispute Settlement - Appellate Body*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited Jan. 19, 2012).

<sup>56</sup> *Id.*

mise and settlement to one of winners and losers, victories and defeat. Many precedents have grown up in that court. They are persuasive rather than binding authority.”<sup>57</sup>

It is interesting to see the countries that use that Appellate Body of the WTO, and we are talking about many billions of dollars involved in the cases that come before it. The major user has been the United States. It has initiated ninety-eight cases before the appellate body and has defended over a hundred.<sup>58</sup> The European Union initiated eighty-five; defended seventy.<sup>59</sup> Canada initiated thirty-three; defended seventeen.<sup>60</sup> They are followed by Brazil and India, Mexico, Argentina, Korea, Japan and Thailand, all those countries significant users of the appellate body of the WTO.<sup>61</sup>

What appears to me as the most significant development is the use being made in recent years of the WTO Appellate Body by China: first, in defending cases, and now, more frequently, as an initiator of complaints before that body.<sup>62</sup>

Finally, with regard to that body, what is also significant is that in the overwhelming number of cases it has heard, according to Jennifer Hillman, the WTO requirements have been found to have been substantially violated, and orders of compliance were issued by the appellate body.<sup>63</sup> In

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<sup>57</sup> See Fabien Gelin, *Dispute Resolution as Institutionalization in International Trade and Information Technology*, 74 *FORDHAM L. REV.* 489, 492 (2005) (discussing the Appellate Body’s creators’ intent to preclude a case ruling from having binding precedential effect).

<sup>58</sup> *United States of America – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/usa_e.htm) (last visited Jan. 19, 2012) (listing 98 cases that the U.S. has initiated as complainant and 113 cases it has defended as respondent).

<sup>59</sup> *European Union – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm) (last visited Jan. 19, 2012) (listing 85 cases that the E.U. has initiated as complainant and 70 cases it has defended as respondent).

<sup>60</sup> *Canada – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/canada\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/canada_e.htm) (last visited Jan. 19, 2012) (listing 33 cases that Canada has initiated as complainant and 17 cases it has defended as respondent).

<sup>61</sup> *Understanding the WTO: The Organization – Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 19, 2012) (follow hyperlink of the desired country for information on the number of complaints initiated and defended by the country).

<sup>62</sup> *WTO Disputes Overtake 300 Mark*, WORLD TRADE ORG. (Sept. 11, 2003), [http://www.wto.org/english/news\\_e/pres03\\_e/pr353\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr353_e.htm) (listing one case China had initiated as complainant and no cases it had defended as of Sept. 11, 2003); *China – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited Jan. 19, 2012) (listing eight cases China has initiated as complainant and 23 cases it has defended as respondent).

<sup>63</sup> See Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 *J. INT’L ECON. L.* 397, 398 (2007) (“Of the 109 adopted panel or panel/Appellate Body reports, in nearly 90% of these cases the panel and/or the Appellate Body have found WTO violations.”).

almost every case, the United States, China, India, you name them; the countries have carried out the orders and the decisions of the appellate body of the WTO.

Turning to the European Court of Human Rights; it has a backlog, apparently, of well over one hundred thousand cases and the number continues to grow, many of them coming from Russia who submitted to the jurisdiction of that court.<sup>64</sup>

So one sees in these areas—and there are others—that there is an increasing reliance on international law. So, far from being in crisis, it is being used more and more and being called in aid more and more. I now turn to the area where I would suggest there is crisis, and that is in the ability of most of those courts to satisfy the calls that are being made on them.

Let me go through the ones I have referred to. I needn't refer to the WTO because one sees there that it is being used, and it is coping well.

What about the criminal courts? The ad hoc tribunals are winding down.<sup>65</sup> The Sierra Leone tribunal is winding down.<sup>66</sup> The Cambodia tribunal hasn't got too much life left in it.<sup>67</sup> The steam has already gone,<sup>68</sup> and as David Crane indicated last night, in a very few years from now the only international criminal court will be the permanent ICC.<sup>69</sup>

And David with every good reason was bemoaning the fact that that court is the one court in respect of which the United States influence has diminished. I suggest though not to the point of extinction. I think the United States will always play a crucial role in that court, even if it doesn't ratify

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<sup>64</sup> See *Mammoth Backlog Prompts European Rights Court Reforms*, BBC NEWS (Feb. 19, 2010), <http://news.bbc.co.uk/2/hi/europe/8525524.stm> (citing a backlog of 120,000 cases at the European Court of Human Rights, 27,000 of which originated in Russia).

<sup>65</sup> See Guido Acquaviva, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, 9 J. INT'L CRIM. JUST. 789, 795 (2011) (describing the U.N.'s creation of an International Residual Mechanism for Criminal Tribunals, which will result in the ICTR beginning to wind down in July 2012 and the ICTY beginning to wind down in July 2013).

<sup>66</sup> See Juliette Rousselot, *13 Years of International Justice*, HUMAN RTS. NOW BLOG (July 17, 2011, 9:00 AM), <http://blog.amnestyusa.org/justice/13-years-of-the-international-criminal-court/#more-22476> (“[T]rials are winding down at the Special Court for Sierra Leone, which is expected to render a verdict in the Charles Taylor case in the next few months . . .”).

<sup>67</sup> See Mike Eckel, *Cambodia Genocide Tribunal May End Prosecutions Prematurely*, WASH. TIMES (May 4, 2011), <http://www.washingtontimes.com/news/2011/may/4/cambodia-genocide-tribunal-may-end-prosecutions-pr/> (“Human Rights Watch expressed concern Wednesday that the tribunal will shut down its operations after the current case and abandon plans for trials of other former Khmer Rouge officials.”).

<sup>68</sup> See *supra* notes 65–67 (discussing the winding down of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia).

<sup>69</sup> See David Crane, *An Age of Extremes: International Law in Crisis: Eight Challenges*, 44 CASE W. RES. J. INT'L L. 47, 52–53 (2012).

the Rome Treaty. The United States will continue to play a role because of the activities of civil society in this country. Many of the people responsible for those activities are sitting in this room, and you know who you are. Without you and without your efforts, international criminal justice wouldn't have notched up the successes that it has over the last seventeen, eighteen years.

But the ICC is facing crises. It is facing crises, mainly of perception, but again, as I think David Crane indicated, perceptions are a fact. It is not just a theory. What people perceive is a fact. Their perceptions may be right. Their perceptions may be wrong. But they have to be taken into account.

The perception in Africa is that the International Criminal Court is anti-African, and was set up by Western countries to investigate Africans.<sup>70</sup> Of course, that perception exists and is being nurtured by politicians, and sometimes I will suggest by dishonest politicians because it is completely unfair for the reasons I have mentioned. One of the six cases before the International Criminal Court has been referred by the prosecutor; the other five, as I indicated, three by governments, two by the Security Council.<sup>71</sup> The court didn't choose those situations. The court was chosen to look into those situations.

That perception is going to remain until, I hope, in the coming few years the International Criminal Court is going to become seized of situations that don't only relate to sub-Saharan Africa. So that's the one problem of perception.

The second problem, of course, is the number of governments that have failed to honor their international legal obligations. No international laws can be of any utility, can be of any force, unless there is the political will of governments that are parties to them, to carry them out and adhere to them.

This is the greatest problem and weakness of international law. No international court, no international body has or in any of our lifetimes, will ever have its own police force or own army to execute its judgments.<sup>72</sup> It is

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<sup>70</sup> See ALEXIS ARIEFF ET AL., CONG. RES. SERVICE, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 26 (2011), available at [http://assets.opencrs.com/rpts/RL34665\\_20110307.pdf](http://assets.opencrs.com/rpts/RL34665_20110307.pdf) ("The ICC's investigations in Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent.").

<sup>71</sup> *Situations and Cases*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (last visited Jan. 19, 2012).

<sup>72</sup> See, e.g., Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 24 (2003) ("[T]he ICC's success will largely depend on international cooperation, especially insofar as the Court commands no police force of its own.").

now and will remain completely dependent on the support and cooperation from national governments.

That's a fact of life, and I read some years ago, somebody, and I have forgotten who it was, said: "if there is a problem with no solution, it is not a problem. It is a fact, and you have to deal with it."<sup>73</sup>

[Laughter.]

And the fact of international law is that it depends and will always depend on the cooperation of national governments, and that's not a problem; it is a fact, and it has to be dealt with. And, of course, that's the importance of the United States certainly until now.

David knows, I know, all chief prosecutors know—past and present—that the United States played *the* crucial role in making these courts work. The ad hoc tribunals wouldn't have been set up without the United States' support, and it was mainly Madeline Albright who was responsible for it.<sup>74</sup>

Having been set up, they wouldn't have succeeded. We wouldn't have gotten intelligence information. We wouldn't have had sufficient staffing. We wouldn't have had sufficient money, but most important of all the courts wouldn't have gotten their major culprits before them without the political and economic power of the United States and its willingness to force governments to cooperate with the Court.

Milošević wouldn't have been there. Karadžić wouldn't have been there now. Mladić wouldn't be there now. The leading generals, Gotovina<sup>75</sup> and the others who came to the international court, the Rwanda tribunal succeeding, none of those things would have happened. I know from my own experience none of those things would have happened without active support from Washington, D.C.

So it is a problem that the international court has. It hasn't been as fortunate as these other courts were, but that seems to be changing, and that

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<sup>73</sup> James Joyner, *NATO: Problems with No Solutions?*, ATLANTIC COUNCIL (Apr. 28, 2010), [http://www.acus.org/new\\_atlanticist/nato-problems-no-solutions](http://www.acus.org/new_atlanticist/nato-problems-no-solutions) ("But, as Shimon Peres noted and Donald Rumsfeld popularized, 'If a problem has no solution, it may not be a problem, but a fact, not to be solved, but to be coped with over time.'").

<sup>74</sup> See MADELEINE ALBRIGHT & BILL WOODWARD, *MADAM SECRETARY* 183 (2003) ("[T]he Clinton administration, the leading financial contributor [to the ICTY], didn't waver . . . We made cooperation with the tribunal a top issue in all our bilateral relationships with governments both in and outside the region."); VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* 159 (2008) ("Moreover, some Western diplomats, particularly in the U.S. State Department, viewed the [ICTR] as key to ensuring peace and stability in Rwanda and elsewhere in Central Africa.").

<sup>75</sup> See Marlise Simons, *U.N. Court Convicts Two Croatian Generals of War Crimes and Frees a Third*, N.Y. TIMES, Apr. 16, 2011, at A9 (describing the crimes and trial of General Gotovina).

support can be forthcoming from Washington even if the United States does not join as an active party.

Of course, those of us who support the International Criminal Court would rejoice if the United States would ratify the Rome Treaty, and that's the big question out there, and that is whether the court will succeed in the coming decade and more. I have no doubt that eventually the United States will ratify the Rome Statute.

And I say that because the people of this country don't approve of war criminals. The people of this country don't want war criminals to have impunity, and if the United States government and the United States President and the Senate come to the conclusion that it is in the interests of the United States to join, they will do it.

They are not going to do that unless they are convinced that it is indeed in the interests of the United States and understandably so. No legislature, no president, no head of state, no parliament is going to take a step that they believe is not in the interests of the country that they lead and represent.

Let me draw this to a conclusion by referring to a recent book some of us, I am sure some of you have read, Joseph Nye's book called "The Future of Power."<sup>76</sup> He convincingly distinguishes on the one hand between the transition of power between states, and on the other of the transition of power between Asian and Western states and particularly the rise of China and India.<sup>77</sup>

That's the transition of power and the fear by many in this country, and other Western countries, that the United States' preeminence is on a downward curve, and China and India are on an upward curve, a topic we are not going to discuss today. He contrasts this transition of power with the diffusion of power from governments to non-state actors and in particular, non-governmental organizations.<sup>78</sup>

This diffusion has been facilitated by the side of the world in which we are living, and we see many examples of it right now: the tent cities in Israeli cities; the Arab Spring; none of these things would have been conceivable without cyber power; the riots in London and so forth.<sup>79</sup>

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<sup>76</sup> See generally JOSEPH S. NYE, JR., *THE FUTURE OF POWER* (2011) (examining the changes and development of governmental power since the Cold War to project how power will evolve in the future).

<sup>77</sup> *Id.* at 177–86 (describing China's rise in power); *id.* at 173–75 (describing India's rise in power).

<sup>78</sup> *Id.* at 119 ("The real issue related to the diffusion of power is not the continued existence of the state, but how it functions . . . . In a world of global interdependence, the agenda of international politics is broader, and everyone seems to get into the act.")

<sup>79</sup> See Brett Van Niekirk et al., *Analyzing the Role of ICTs in the Tunisian and Egyptian Unrest from an Information Warfare Perspective*, 5 INT'L J. COMM. 1406, 1407–08 (2011), available at <http://ijoc.org/ojs/index.php/ijoc/article/viewFile/1168/614> (discussing various

As Nye put it: “in a world where borders are becoming more porous than ever before, to everything from drugs to infectious diseases to terrorism nations must mobilize international coalitions and build institutions to address shared threats and challenges.”<sup>80</sup>

A current illustration of the relevance of NGOs relates to the CICC, the Coalition for the International Criminal Court. It is an amazing organization, the largest non-governmental organization I guess in the world.<sup>81</sup> It is a coalition of over two and a half thousand NGOs from over 120 countries and it is brilliantly led by an American, William Pace, out of his office in New York.<sup>82</sup>

There has been concern about the qualifications of some of the judges who have been appointed to the International Criminal Court over the last decade. With the full consent of the leaders of the Assembly of States Parties, the CICC set up a panel of five individuals, with no international powers at all.<sup>83</sup> It is an NGO.<sup>84</sup> It is the Independent Panel on the Election of Candidates to the ICC.<sup>85</sup> It has already begun its work. There is presently the process to elect six new judges to the Court. The election will be held during December of this year. I was appointed to chair the Committee. Judge Pat Wald of Washington D.C. is vice chairing it.<sup>86</sup> Hans Corell, the former Undersecretary General for Legal Affairs from Sweden, is on it.<sup>87</sup> Judge O-Gon Kwon from the Yugoslavia tribunal is on it,<sup>88</sup> and Cecilia Medina from Argentina, a leading Latin American judge and lawyer, is the

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social activist movements that have employed information and communications technology (ICT) to pursue their goals).

<sup>80</sup> Joseph Nye, *Joe Nye Answers Your Questions on the Future of American Power*, CNN WORLD (Mar. 15, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/03/15/joseph-nye-answers-your-questions-on-the-future-of-american-power/>.

<sup>81</sup> *About the Coalition*, COAL. INT’L CRIM. COURT, <http://www.iccnw.org/?mod=coalition> (last visited Jan. 19, 2012) (“The Coalition for the International Criminal Court (CICC) includes 2,500 civil society organizations in 150 different countries working in partnership . . .”).

<sup>82</sup> *Id.* (describing CICC membership statistics); *CICC Convenor and Staff*, COAL. INT’L CRIM. COURT, <http://www.iccnw.org/?mod=convenorstaff> (last visited Jan. 19, 2012) (“Mr. William R. Pace has served as the Convenor of the Coalition for an International Criminal Court since its founding in 1995.”).

<sup>83</sup> *About*, INDEP. PANEL ON ICC JUD. ELECTIONS, <http://www.iccindependentpanel.org/about> (last visited Jan. 19, 2012) (summarizing the creation of the Panel, its mandate and its membership).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *About*, *supra* note 83.

fifth member.<sup>89</sup> What is our brief? We are to have regard to all the documentation that comes to the Assembly of States parties and relevant governments. Relying solely on the relevant provisions of the Rome Treaty, which sets out the qualifications of judges,<sup>90</sup> we will issue a public report prior to the election stating whether the candidates are qualified or not qualified. If we hold any candidate to be “unqualified” we will furnish reasons for that opinion.

The hope is that this should act as a deterrent against governments putting forward candidates who are likely to be held to be unqualified. However, the point I want to make is: who would have thought five years ago that governments represented in the Assembly of States parties, now 119 countries,<sup>91</sup> would welcome an NGO doing this work?

It is really a good example, I think, of what Joseph Nye calls the diffusion of power to NGO's.<sup>92</sup> Of course, this diffusion carries its danger. Al Qaeda is also the result of this sort of diffusion. So diffusion from governments to non-governmental organizations can be for good, and it can be for evil. So again, it is a phenomenon that one must watch.

Finally, I was impressed with the last panel before the luncheon adjournment on global warming.<sup>93</sup> I went to that panel because I know so little about it. I thought it was a good opportunity to learn something, and it seemed to me that *there* is an area of international law that is in crisis because insufficient has been done about it. More law is needed, and more political will is needed in order to comply with the tremendous needs that were so articulately and very clearly pointed out by that panel.

So I hope I have said sufficient to demonstrate that far from being in crisis international law continues to be an essential tool; international courts using international law are being called upon more frequently to help resolve some of the most difficult and important problems facing our global community.

Thank you very much.  
[Applause.]

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also Rome Statute of the International Criminal Court, art. 36, U.N. Doc. A/CONF.183/9 (July 17, 1998) (outlining the qualification, nominations and election of judges).

<sup>91</sup> *The States Parties to the Rome Statute*, *supra* note 23 (now 120 countries since Cap Verde joined in Oct. 2011).

<sup>92</sup> See Robert O. Keohane & Joseph D. Nye, Jr., *Introduction*, in *GOVERNANCE IN A GLOBALIZING WORLD* 22 (Joseph S. Nye & John D. Donahue eds., 2000).

<sup>93</sup> See *International Law in Crisis*, CASE W. RES. UNIV. SCH. OF LAW – FREDERICK K. COX INT'L LAW CTR., [http://law.case.edu/centers/cox/content.asp?content\\_id=191](http://law.case.edu/centers/cox/content.asp?content_id=191) (last visited Jan. 19, 2012); see also *International Law in Crisis – Panel 2B*, YOUTUBE (Sept. 23, 2011), <http://www.youtube.com/watch?v=XYdpmysEFQ>

PROFESSOR SCHARF: Thank you very much for those insightful remarks. We will now have fifteen minutes of questions. Just come up to the microphones and line up behind each other. Please identify where you are from and your name and then ask the question.

AUDIENCE MEMBER: My name is Kevin Hartman. I am a student here at Case.

I was just going to ask you, the Security Council has referred al-Bashir to the ICC, and consistently, he has traveled to other African states without being taken to the ICC. And I was wondering, is there any law around holding the leaders for harboring him to the ICC from justice and what can be done about this in the future?

HON. RICHARD GOLDSTONE: Well, of course, this is perhaps one of the most vivid examples of some of the problems that are being faced by International Criminal Court and its reliance on government. It is disgraceful that at least one government, which is a party to the Rome Treaty, allowing President al-Bashir under an arrest warrant to come into the country and not to arrest him.<sup>94</sup> But that's the exception.

As a South African, I am proud that our government indicated to President al-Bashir that he was the only African leader not being invited to the inauguration of our President Jacob Zuma.<sup>95</sup> The ambassador from the Sudan was called in and was told that his president is not being invited because we would be obliged to arrest him and hand him over for trial in The Hague.<sup>96</sup> In another situation, the government of Botswana made a similar declaration,<sup>97</sup> and at least one other government, Kenya, canceled a visit from al-Bashir after they were pressured to do so.<sup>98</sup>

But this is the problem, and it is not the first time it arose. The arrest warrant against al-Bashir has rendered it very difficult for him to be a head of state. Heads of state have a problem if they can't travel freely, and he can't travel freely.

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<sup>94</sup> See *Chad Refuses to Arrest Sudan's Al-Bashir*, CBC NEWS, <http://www.cbc.ca/news/world/story/2010/07/21/chad-sudan-bashir.html> (last updated July 21, 2010) (reporting on Chad being the first ICC member state to not arrest Al-Bashir); *Kenya's ICJ Moves to Court to Seek Bashir's Arrest*, E. AFRICAN (Nov. 18, 2010), <http://www.theeastafican.co.ke/news/-/2558/1056094/-/om9rrez/-/index.html> (noting that the Kenyan Government failed to arrest Al' Bashir when he visited in August 2010); *Omar Al-Bashir Arrest Requested Rejected by Malawi*, BBC NEWS AFRICA (Oct. 14, 2011), <http://www.bbc.co.uk/news/world-africa-15308198> (quoting the Prime Minister to the effect that it was not Malawi's "business" to arrest Al-Bashir).

<sup>95</sup> *Bashir Will Not Be Invited to Zuma's Inauguration*, ICC OBSERVERS (Apr. 26, 2009), <http://icc-observers.org/2009/04/26/bashir-will-not-be-invited-to-zumas-inauguration/>.

<sup>96</sup> *Id.*

<sup>97</sup> *Botswana Stands by the International Criminal Court*, REPUBLIC BOTSWANA (July 28, 2010), <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/>.

<sup>98</sup> *Kenya's ICJ Moves to Court to Seek Bashir's Arrest*, supra note 94.

That is obviously a way in which he is being largely marginalized. There is no European nation that he can visit. He can't attend a meeting in the United States or Canada. The former was a party to the Security Council resolution and the latter has ratified the Rome Treaty.<sup>99</sup> No doubt the United States would wish to see al-Bashir brought to trial.

So this is a mixed report, but more and more countries that ignore their international obligations are going to be castigated. They are going to be isolated because if countries refuse to carry out their international obligations in that area, they are going to be distrusted. Governments who don't carry out their obligation are going to be suspect.

And people will start worrying about doing trade with them because if they break their word in that respect, they will break their word in the other respect. More frequently governments have to comply with international law if they want to have credibility.

AUDIENCE MEMBER: Thank you.

HON. RICHARD GOLDSTONE: But to answer your question directly, there is nothing that can be done against the leaders of those countries because it is not criminal not to carry out your obligation.<sup>100</sup> It is a breach of the international treaty, but it is not a criminal offense.<sup>101</sup>

AUDIENCE MEMBER: My name is Nick Weiss. I am a second year law student here at Case, and you talked about this briefly, but the ICC has indicted Gadhafi, and the transitional government has also said that it would like to prosecute. Which of these two courts do you think should prosecute Gadhafi?

HON. RICHARD GOLDSTONE: Well, I think I did refer to that briefly in my opening remarks. The International Criminal Court in The Hague, the permanent court, is referred to as a court of second choice.<sup>102</sup> The court that has the first right to investigate and prosecute and punish war criminals is the court of the country from where that person comes, not the International Criminal Court.<sup>103</sup> It is really a reverse of the situation that existed with the United Nations tribunals who had first choice.<sup>104</sup>

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<sup>99</sup> See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 3, 2005) (although the Resolution was adopted, the U.S. abstained from voting).

<sup>100</sup> See Frederic L. Kirgis, *Treaties as Binding International Obligations*, AM. SOC. INT'L L. (May 1997), <http://www.asil.org/insight9.cfm> (noting treaties do not legally bind parties).

<sup>101</sup> *Id.*

<sup>102</sup> *ICC at a Glance*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> (last visited Jan. 19, 2012); see also Rome Statute of the International Criminal Court, *supra* note 90, art. 17 (outlining issues of admissibility).

<sup>103</sup> *ICC at a Glance*, *supra* note 102.

<sup>104</sup> See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 385 (1998) (describing International Tribunals as having primacy over national courts).

The International Criminal Court may not get involved in any criminal case if a country whose courts have jurisdiction wish to do so themselves.<sup>105</sup>

Take an example: If a soldier from the United Kingdom was to be charged with war crimes committed in Afghanistan or Iraq, the United Kingdom could say to the International Criminal Court “we will investigate.” If the United Kingdom does that and investigates in good faith, then regardless of the outcome, the International Criminal Court would have no jurisdiction.<sup>106</sup>

And there is no reason in my view why that shouldn’t—in theory—apply in Libya. The question is: it can only happen if the local court, if the domestic court is willing and able to hold a fair trial under international standards.

If and when Libya will have a court that can hold an open and fair trial by international standards, your guess is as good as mine. If that does not happen within a short time, it seems to me that the international court is the only court with effective jurisdiction.

If I was in the position of the chief prosecutor or the judges of that court, I would insist on the international court proceeding against Gadhafi unless and until a Libyan court, if necessary, with assistance from other countries in the international community is able to put on the trial.

And let me say, I favor the principle of complementarity not only because that’s what the Rome Statute provides but it is also first prize in any justice system that trials should take place at or as close to the scene of the crimes as possible. That’s where the victims are.

If a criminal justice system is to have credibility, it should function at home. One of the problems for the Yugoslavian tribunal and the Rwanda tribunal has been that the trials took place many thousands of miles away from where the crimes were committed.

There is often no alternative. If there is an alternative, it should be preferred.

AUDIENCE MEMBER: Thank you.

AUDIENCE MEMBER: Thank you. My name is Jessica Feil. I am a student here at Case. You mentioned it briefly in your speech, but I was wondering if you thought the criticisms of the international court being too focused on Africa? Could you expand a bit on whether or not you think it is a legitimate criticism?

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<sup>105</sup> *ICC at a Glance*, *supra* note 102; *see also* Rome Statute of the International Criminal Court, *supra* note 90, art. 17.

<sup>106</sup> *See Frequently Asked Questions*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/> (last visited Jan. 19, 2012) (explaining that “complementarity” prevents ICC jurisdiction unless the country is unwilling or genuinely unable to investigate the alleged crime).

HON. RICHARD GOLDSTONE: Well, as I have said, I think it is a very unfair criticism for the reasons I mentioned, and that is the African governments can hardly complain if they themselves are responsible. I understand the perception, the perception of the African Union, of a number of states.

It is peculiar that you have an International Criminal Court mainly supported by Northern and Western countries and the only cases before the court happen to be African. This looks like, to many people, a sort of neo-colonial Western imperialistic decision to go against African countries.

And let me say what exacerbates it: It is the failure to go against powerful countries. War crimes we know have been committed ad nauseam by Russia, by China, by other Asian countries.<sup>107</sup> They are not before the International Criminal Court. They are not there because they are not prepared to join in. They are not prepared to ratify their own treaty.<sup>108</sup> And they have got vetoes in the Security Council.<sup>109</sup>

So one has to be a little bit sympathetic to the African perception. I think it is unfair, and as I say, it is going to continue to exist until non-African countries come before International Criminal Court.

AUDIENCE MEMBER: Thank you.

AUDIENCE MEMBER: I am Claude Welch from the University of Buffalo. I wondered if you could speak to the possibility that appointing an African prosecutor might help to reduce the concerns that are expressed, the critiques you just spoke of both in your remarks and in response to the last question.

HON. RICHARD GOLDSTONE: Well, you know, the present prosecutor's term of office ends in the middle of next year, and there is already a search committee being set up by the Assembly of States parties to look for a new prosecutor.<sup>110</sup> And there is a lot of talk out there, newspaper

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<sup>107</sup> See generally Wenqi Zhu & Binxin Zhang, *Expectation of Prosecuting the Crimes of Genocide in China*, in CONFRONTING GENOCIDE 173, 174 (René Provost & Payam Akhavan eds., 2011) (explaining that China lags behind the international effort to prosecute for international crimes); Christopher W. Mullins, *War Crimes in the 2008 Georgia – Russia Conflict*, 51 BRIT. J. CRIMINOLOGY 918 (2011) (addressing the war crimes committed by both Georgia and Russia).

<sup>108</sup> See Valeriane Toon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 CONTEMP. SE. ASIA 218, 219 (2004) (noting the uneasiness of Russia, China, and the United States over the ICC).

<sup>109</sup> *Id.*; see also U.N. Security Council: Membership in 2012, <http://www.un.org/sc/members.asp> (last visited Jan. 19, 2012) (noting the voting process, and veto power of current members in the Security Council).

<sup>110</sup> See CICC Elections Team *Questions and Answers on the ICC Prosecutor Election*, COAL. INT'L CRIM. COURT (Sept. 15, 2011), [http://www.iccnw.org/documents/CICC\\_Elections\\_Team\\_QandA\\_ICC\\_Prosecutor\\_Election\\_150911-1.pdf](http://www.iccnw.org/documents/CICC_Elections_Team_QandA_ICC_Prosecutor_Election_150911-1.pdf) (describing the process of electing the Prosecutor for the ICC in 2011).

articles, rumor, that for the reason you mentioned there should be an African prosecutor.

And one of the front runners is the present Deputy Chief Prosecutor, Fatou Bensouda, who is a black African.<sup>111</sup> I have a problem with the theory that the prosecutor should come from a particular continent, but having said that, as an African, if an African is, all things being equal, the best person to be the chief prosecutor, great.

That's a matter for celebration, but I certainly would be against the appointment of somebody simply because of the country they come from or the color of their skin. I think the most appropriate, the best qualified person, should be appointed. And if that person happens to come from an Asian country, so be it.

I certainly would be strongly against appointing somebody simply because they come from a particular continent where there are other candidates with better qualifications.

AUDIENCE MEMBER: Thank you very much.

AUDIENCE MEMBER: Hi. My name is Danielle Fritz, and I am a law student here at Case. A few months ago the U.K. foreign minister suggested that it might be a good idea to negotiate in exile for a peace deal with Gadhafi.<sup>112</sup>

Are these agreements ever in the interest of international peace?

HON. RICHARD GOLDSTONE: You know, one must distinguish—it is a great question—one must distinguish between political decisions being made with regard to international justice and courts on the one hand and legal decisions on the other.

In my view and it is something that David Crane and I have often debated and not always agreed on. In my view, the prosecutor and judges should take legal decisions. They have been appointed not to be politicians, and if they were, they would make the lousiest politicians in the world. I have no doubt about that.

[Laughter.]

HON. RICHARD GOLDSTONE: They may even not be the greatest lawyers, but they would be the worst politicians. It is not their calling.

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<sup>111</sup> Mark Kersten, *The ICC's Next Top Prosecutor: The Candidates*, JUSTICE IN CONFLICT (June 3, 2011), <http://justiceinconflict.org/2011/06/03/the-iccs-next-top-prosecutor-the-candidates/> (giving a brief bio of each of the candidates for ICC Prosecutor).

<sup>112</sup> Bridget Kendal, *Could Gaddafi Go into 'Internal Exile' in Libya*, BBC NEWS (July 26, 2011), <http://www.bbc.co.uk/news/uk-14298472> (reporting on the possibility of peace deal with Qaddafi). *But see* Mary Beth Sheridan, *Moammar Gaddafi Killed in Rebel Custody as Last Loyalist Holdout in Libya Falls*, WASH. POST (Oct. 20, 2011), [http://www.washingtonpost.com/world/gaddafis-home-town-overrun-conflicting-reports-on-his-fate/2011/10/20/gIQAMwTB0L\\_story.html](http://www.washingtonpost.com/world/gaddafis-home-town-overrun-conflicting-reports-on-his-fate/2011/10/20/gIQAMwTB0L_story.html) (announcing Gadhafi was shot to death by rebel fighters who seized him from a drainage pipe).

Secondly, they are not parties to any peace negotiations. They don't know what's going on. I agree with David that prosecutors should not have their heads in the cloud and should be aware of the effect of what they do. In the case of Gadhafi, I have no doubt the court's job is to get him on trial for terrible crimes he has committed in the very recent past.

If it can be established—and it is a very big “if”—that peace would come to Libya if Gadhafi was given asylum in some lovely haven like Zimbabwe, that would be a question to be determined by politicians, not by lawyers, and the politicians who would have to decide that would be those on the Security Council.

The Rome Treaty setting up the International Criminal Court provides that the Security Council can order proceedings in that court to be suspended for successive periods of one year.<sup>113</sup> If there was rational evidence that could persuade the necessary majority of the Security Council with no veto cast by one of the Permanent Members that it is in the interest of the people of Libya that Gadhafi should not be prosecuted, that would be a political decision.

And frankly, I wouldn't lose any sleep if they took that decision, but it is not a decision I believe should be taken in The Hague. The prosecutor has no power to make it anyway, I am happy to say, and the judges may or may not have the authority to take such a decision but they certainly wouldn't do it if the prosecutor didn't request them to do so.

So I think there are very few cases where giving effective amnesty or asylum to the worst war criminal, is going to bring any enduring peace, and certainly, it has been the experience in the last seventeen years, since there have been international criminal courts, that justice and prosecution have assisted the peace rather than the converse.

PROFESSOR SCHARF: Last question. Ruth.

PROFESSOR RUTH WEDGWOOD: Well, I certainly agree with you that Ocampo, I think, has done a very prudent job in steering the court and giving it sea legs.<sup>114</sup> Three quick, each hard questions, though, none probably admitting yes or no answers.

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<sup>113</sup> Rome Statute of the International Criminal Court, *supra* note 90, art. 16 (outlining the deferral of investigation or prosecution).

<sup>114</sup> See *Office of the Prosecutor*, INT'L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/structure+of+the+court/office+of+the+prosecutor/biographies/the+prosecutor.htm> (last visited Jan. 19, 2012) (becoming the first ICC Prosecutor when he was unanimously elected on April 21, 2003); see also *Situations and Cases*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Mar. 8, 2012) (listing fifteen cases arising out of seven situations that have been brought before the ICC by the Prosecutor); *The Office of the Prosecutor of the International Criminal Court Opens its First Investigation*, INT'L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB> (last visited Jan.

Just forgive me for raising this, but I take the performance of the ad hoc tribunal as a very important precedent for the performance of the ICC because they really were the test runs, if you will, and I mentioned this morning the fact that ICTR, the Rwanda tribunal, never did try any Tutsi cases gives pause to people who suppose the courts can take purely a political stance.

Second, this is a lawyer's question: On complementarity, you are supposed to be unwilling or unable to handle that case yourself; not that you would rather not.<sup>115</sup> So I am wondering what you think. I am wondering is some defense lawyer going to have an argument that "rather not" is not a satisfaction of complementarity, would be objectively unwilling or unable but not to be preferred and push it off for political reasons perhaps because it is easier to have The Hague decide it than...

HON. RICHARD GOLDSTONE: Well, Uganda is a good example.

PROFESSOR RUTH WEDGWOOD: And final one, answer as you see fit. I am straying a little bit here, but shouldn't perhaps the principle of complementarity also apply to political bodies? For example, the Human Rights Council is now deciding whether to take up Sri Lanka,<sup>116</sup> and they may or may not have done an adequate job, but shouldn't national states first be given the prerogative of investigating their own war crimes before or in the future political bodies take the sort of quasi-investigative role?

HON. RICHARD GOLDSTONE: Well, thanks. But those two questions would really require more than a few minutes for response. So let me give a telegraphic response to both.

On the Rwanda situation, just by way of explanation, the issue is that there is critical evidence that emerged over the years that the army of Kagame, the present president of Rwanda<sup>117</sup> and the military genius who put an end to the genocide committed very serious war crimes involving many thousands of victims.<sup>118</sup>

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19, 2012) (announcing Ocampo's first investigation will be the alleged crimes committed on the territory of the Democratic Republic of Congo).

<sup>115</sup> See Rome Statute of the International Criminal Court, *supra* note 90, art. 17 (structuring the court as a court of last resort).

<sup>116</sup> See Iqbal Athas, *Sri Lanka State of Emergency to end September 14*, CNN (Aug. 25, 2011), [http://articles.cnn.com/2011-08-25/world/sri.lanka.end.emergency\\_1\\_tamil-tiger-rebels-president-rajapaksa-foreign-minister-lakshman-kadirgamar?s=PM:WORLD](http://articles.cnn.com/2011-08-25/world/sri.lanka.end.emergency_1_tamil-tiger-rebels-president-rajapaksa-foreign-minister-lakshman-kadirgamar?s=PM:WORLD) (reporting on President Rajapaksa's decision not to sign a proclamation renewing the state of emergency).

<sup>117</sup> *Personal Profile*, OFFICE OF THE PRESIDENT, <http://www.presidency.gov.rw/presidents-profile> (last visited Jan. 19, 2012) (noting that the Rwandan, Paul Kagame, took office Apr. 22, 2000).

<sup>118</sup> See Lars Waldorf, "A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal, 33 *FORDHAM INT'L L.J.* 1221, 1225 (describing the

And I can speak about it openly because this is an issue that didn't emerge during my watch, I am happy to say, that but arose during the watch of people who succeeded me as chief prosecutor of that tribunal.

By any standards, the violations committed by the RPF Army of Kagame should have been investigated. They fell within the jurisdiction of the court.<sup>119</sup> The prosecutors didn't do it—there can be no question—because they were aware, and it was said publicly by the government of Rwanda, “Prosecutor: If you investigate crimes committed by our Army, that's the end of our cooperation with you. We will break off all cooperation,”<sup>120</sup> and that would have been the end of the tribunal.

The witnesses had to come from Rwanda. So a prosecutor is faced with a terrible choice. Do I do the honorable thing and prosecute across the board, or do I ignore these revenge attacks?

Let me make that clear that the attacks made by the RPF Army were of a very different caliber to the genocide committed by the previous government of Rwanda; eight hundred thousand people killed in a genocide over less than a hundred days.<sup>121</sup> These were revenge attacks by the Army of the victims.<sup>122</sup>

And the prosecutors, I believe, unfortunately, simply swept this under the rug. They didn't deal with it. They just didn't investigate, and the tribunal was able to continue to its conclusion.<sup>123</sup> I think what I would have done—and I am speaking with hindsight—and I don't say it in any criticism of them at all, I think they were in a very difficult position. What I think should have been said is: our job, we were set up to investigate the genocide, eight hundred thousand people. We weren't set up to investigate revenge attacks. We could investigate them, but I am not going to jeopardize the major purpose of this tribunal, which is the genocide and the future of the people of Rwanda. I am not going to jeopardize this by being holier than thou and going against people who didn't commit genocide.

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ICTR prosecutor's decision to allow Rwandan investigation of Kagame's army's alleged war crimes).

<sup>119</sup> *CTR: Rwanda Tribunal Creates Rich Legal Precedent*, HUM. RTS. WATCH (Jan. 15, 2010), <http://www.commondreams.org/newswire/2010/01/15-3> (“The Rwanda tribunal's prosecutor failed to bring charges against members of the Rwandan Patriotic Front.”).

<sup>120</sup> See Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 665–71 (2001) (describing the shortcomings of the ICTR, including reasons the Rwandan government refused to cooperate with the tribunal).

<sup>121</sup> Ingvar Carlsson, *The UN Inadequacies*, 3 J. INT'L CRIM. JUST. 837, 841 (2005).

<sup>122</sup> See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 306 (1994).

<sup>123</sup> See generally JENNIFER TRAHAN, HUMAN RIGHTS WATCH, *GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (2010) (full summary of the jurisprudence of the ICTR).

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## CRISIS IN THE IMPLEMENTATION

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I think, incidentally, the Yugoslavia tribunal was faced with a similar decision when Russia complained about NATO crimes in the bombing of Kosovo.<sup>124</sup> I think on a scale of 1 to 10 with 10 as the most serious, the Yugoslavia tribunal and the Rwanda tribunal were investigating genocide of 9's and 10's. I think the revenge attacks maybe were at 4, 5, and 6's. The NATO crimes were at 1's and 2's. They were not committed with intent. That there might have been negligence is another matter.

So I think I would have advised a pragmatic solution, and I would have had to live with it.

PROFESSOR SCHARF: And you will have to answer parts 2 and 3 afterwards, but everybody, please, again, join me in applause.

[Applause.]

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<sup>124</sup> *Russian Duma Condemns NATO*, BBC NEWS (Mar. 27, 1999), <http://news.bbc.co.uk/2/hi/europe/305762.stm>.