Case Western Reserve Journal of International Law

Volume 35 | Issue 2

2003

Arresting War Criminals: Mission Creep or Mission Impossible

David Scheffer Amb.

ARRESTING WAR CRIMINALS: MISSION CREEP OR MISSION IMPOSSIBLE?

Ambassador David Scheffer[†]

Before I begin, I want to make two comments about what both Professor Madeline Morris[1] and Jerry Fowler[2] pointed out. When Jerry Fowler mentioned my work on "atrocity crimes" and "atrocity law," he raised an important issue. I found, in practical government experience, that one can get tripped up repeatedly in policymaking sessions if one has to spend time worrying about how to reach the benchmark of the particular crime that is at issue. For example, with the crime of genocide, has it actually occurred yet? One can spend weeks, and even that is optimistic, trying to determine if that crime is actually occurring or has occurred with the requisite criminal intent. Meanwhile, killing continues; action is stalled; there are excuses for inaction. I believe it is extremely important that there be terminology adaptable enough so that at the policy level we know how to react quickly to deal with the killing in an efficient and timely way and not let the law stymie the policy implementation on the ground. When, however, it comes to actual prosecution of the crimes, I believe it is extremely useful to maintain these important distinctions among crimes in the law, because the prosecution and defense need these distinctions.

During the Kosovo intervention of 1999, we moved fairly quickly into terminology of "indicators of genocide."[3] The point was to tell particularly the media that the crime was indeed emerging. We see the intelligence; we see the news reports; we see certain factors here that can lead towards that conclusion.

The question of the moment is whether we are reacting appropriately to the threat – because we must react. At the beginning of the Kosovo intervention we reported that there appears to be genocide, but we decided to refer to it as "indicators of genocide." The important challenge was to

---

[†] Ambassador David Scheffer is a member of the New York and District of Columbia Bars. He served as the U.S. Ambassador-at-Large for War Crimes Issues from 1997 to 2001. From 1993 to 1996, he was Senior Adviser and Counsel to the U.S. Permanent Representative to the United Nations.

[1] Madeline Morris, *Genocide Politics and Policy*, 35 CASE W. RES. J. INT'L L. 205 (2003).

[2] Jerry Fowler, *Diplomacy and "the G-Word"*, 35 CASE W. RES. J. INT'L L. 213 (2003).

[3] U.S. DEP'T OF STATE, REPORT ON THE VISIT OF AMBASSADOR SCHEFFER TO THE BORDER BETWEEN THE FORMER REPUBLIC OF MACEDONIA AND KOSOVO APRIL 1-2 AND REFUGEE ACCOUNTS OF ATROCITIES, (Apr. 7, 1999), *available at* http://www.state.gov/www/regions/eur/990407_scheffer_kosovo.html (last visited Apr. 4, 2004).

act and not have some long debate, particularly in public, about the issue. It can be far more useful to understand and articulate that "atrocity crimes" (namely, genocide or crimes against humanity or serious war crimes) are occurring and that the highest priority is to react quickly and effectively to stop further commission of such crimes.

The other thing that I just wanted to point out is that the symbolic value of identifying "genocide" is extremely powerful, particularly in the historical context as well as in the future. It is obviously important when ultimately proceeding with investigations and prosecutions. This discussion should not somehow leave people with the impression that the extreme value of a genocide analysis is in anyway undervalued in using such terminology as "atrocity crimes."

Now that I have responded to Ms. Morris and Mr. Fowler, I want to address a few major points. The first is that this year, 2003, is the decade mark of an extraordinary ten years of activity on this front. It is not just the issue of seeking to achieve justice in the courtroom, but the issue of arresting indicted fugitives and others who are suspected of heinous crimes against humankind. It started almost exactly ten years ago, in June 1993, with respect to Somalia when the U.N. Security Council adopted a resolution that authorized the forceful apprehension of those responsible for the attacks on Pakistani peacekeepers in Mogadishu.[4] The primary target for the resolution was Mr. Aidid. It was this moment in the Council's history when the concept of the Security Council becoming directly engaged in the issue of apprehending a suspected war criminal really began.

It did not take the Council very long to reach the decision that it could use its Chapter VII enforcement authority to authorize military forces on the ground in Somalia to pro-actively track down these individuals, arrest them, and bring them to justice. We had no idea, at the time and throughout the summer, what justice meant. In other words, we asked, what court, where, how, to whom? In fact, it was during the summer of 1993 that we considered all sorts of scenarios. By August we began to focus on whether, if Aidid was arrested in Somalia, U.S. and U.N. officials would take him to an offshore vessel on the high seas and process him there. They either would or would not actually prosecute him on that vessel. We still had not quite worked out exactly what would happen once we got Aidid on a vessel in the high seas. Then, of course, the tragedy of early October 1993 occurred, when 18 U.S. soldiers died during an arrest operation in Mogadishu, and the whole effort collapsed in a matter of hours. The whole momentum that had been building during the summer, that we were going to arrest individuals responsible for crimes against U.N. peacekeepers using international authority through the Security Council, lost its basis for policy

[4] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., pmbl., U.N. Doc. S/RES/794 (1992).

projection. This occurred not only in our government, but in other governments as well.[5]

We had a vigorous start, but I think we have now had a ten-year experience where we are coming full circle again. In the campaign against terrorism, we seem to have had a very clear presumption since 9/11 that the Security Council is backing up the use of military force to pursue terrorists.[6] Certainly, the Security Council was supportive of the operation in Afghanistan and has been very supportive in the campaign against terrorism, in terms of its specific resolutions and the activity within Security Council on the many fronts of terrorism.[7] One of those key activities is the acquiescence of the Security Council to permit a rather robust military effort to track down terrorists and using military force to do so.[8]

Now, if the United States pushes the envelope too far on that, then you will start to see the Security Council balk and seek to constrain that authority. But 9/11 has changed the dynamics, and frankly, brought us back full circle to those heady days in the summer of 1993 when we thought there was truly a new modality unfolding in front of us with respect to the Council. Yet, ironically, during the ten years between Mogadishu and today, we have gone through an extraordinary exercise in so many jurisdictions in the world – "atrocity zones" as I call them – where we have placed, first and foremost, the issue of due process and the integrity of the court structure at the very forefront of our planning and implementation, and we have utterly diminished the priority and the operational implementation of the arrest process.

In Mogadishu we initiated arrests and started to plan due process and how we actually were going to achieve justice. Then, during those ten years an enormous retrenchment occurred where we sought to establish procedures to ensure that due process rights are protected. We wanted to ensure the legal integrity of every case that we were pursuing. Recognizing all the controversy and debate about the exact form these courts would take,

---

[5] David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World,* 18 B.Y.U. J. PUB. L. 1, 25 (2003)

[6] *See* S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., at 1, U.N. Doc. S/RES/1368 (2001); *see also* S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

[7] *Id.*

[8] See Leila Nadya Sadat, Terrorism and the Rule of Law, 3 Wash. U. Global Stud. L. Rev. 135, 144-45 (2004) ("To the extent the international community supported the U.S. military response to the September 11th attacks, . . . it did so on the understanding that a fairly classical interpretation of the doctrine of self-defense applied because the Taliban could be considered legally responsible for al Qaeda's crimes. Alternatively, it could take comfort in the adoption of Security Council Resolutions 1368 and 1373 which, although notably silent on the use of force, recognize 'the inherent right of self defense.'").

we were trying to establish a judicial process that protected the due process of defendants. Nonetheless, the arrest function became a very diminished calculation and there was insufficient coordinated planning.

The Security Council never explicitly authorized the use of military force to track down the indictees of the International Criminal Tribunals of the Former Yugoslavia or Rwanda or the Special Court for Sierra Leone or the U.N. courts in Kosovo or in East Timor.[9] None of their statutes have explicit enabling authority for arrest functions.[10] Instead, the focus has been on due process.[11] My concern, however, is that, ironically, while we have come full circle in the campaign against terrorism with respect to the political and operational will to arrest suspects, we are starting to slip on the due process side. Thus we are starting to move in the other direction: full court press on arrest, incarceration with no access to legal counsel, endless interrogations, indefinite detention, and of course, the legal vacuum of Guantanamo Bay, Cuba, where no one seems to know precisely what law, if any, applies there.[12]

Before I address about some of the operational issues I want to note that the arrest toolbox is not comprised only of military force. Indeed it may not be even police power in a particular jurisdiction that will achieve the objective. There are a lot of other tools in that toolbox, which we actually had to employ in the last decade, in part because the on-the-ground law enforcement effort or military force capability either was not being activated or was being activated poorly or anemically and simply not getting the job done. So what did we do in governments such as the United States? First, we tried to use the tools of diplomacy in every possible way in terms of insisting to other governments that they cooperate with the war crimes tribunals, that they track indicted fugitives under their domestic criminal law enforcement systems and detain them, and that they work out arrangements with the relevant tribunal for extradition or transfer of the indictee. All of that was an enormous part of the last decade's effort; namely that we were relying on diplomatic pressure and not, in most cases, on an international military component to get the job done.

There was a whole process of trying to structure the pressure within the Dayton Peace Accords to ensure that the parties fulfilled obligations to the International Criminal Tribunal for the Former Yugoslavia.[13] It was a

---

[9] S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994); S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc. S/RES/1315 (2000); S.C. Res. 1272, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1272 (1999).

[10] *Id*

[11] *Id.*

[12] *See generally* Jonathon Wachs, *The Need to Define the International Legal Status of Cubans Detained at Guantanamo,* 11 AM. J. OF INT'L L. & POL'Y 79 (1996).

seesaw effort throughout the Dayton talks, which Michael Scharf and Paul Williams, of course, have written about in their book.[14] I would just emphasize that I do not have any personal recollection of any particular moment where full-bore amnesty for war crimes was the preferred option of the United States Government or even one that we were seriously pressing for in Dayton. Maybe the record will prove me wrong and some officials were in fact behind the scenes doing something of that character, but I certainly did not see it in all of the channels I covered.

Yet, out of Dayton we had a certain construct that relied enormously on the local parties to actually bring indicted fugitives to The Hague for trial.[15] Obviously, that did not work very well. We also had in the United States Government something called the "outer wall" in which we worked with many other governments, particularly with respect to Belgrade, to try to ensure that they would not be welcomed into the international community until the indictees were transferred to The Hague. The "outer wall" had various components to it. It took a lot of diplomatic activity, for many years, to sustain the outer wall, and of course, ultimately it crumbled.

The Lautenberg legislation in the U.S. Congress became law and put a lot of pressure (particularly on Belgrade, but also Bosnia-Herzgovina and Croatia) to withhold United States assistance unless each of the municipalities were cooperating to track indictees and transfer them to The Hague.[16] We launched a rewards program for Bosnia in 1999 and for Rwanda in January 2001 to provide up to $5 million for information leading to the arrest or conviction of any particular indictee.[17] I have always been surprised at how unproductive that program actually was, particularly since we put a fair amount of effort into it.[18] But at some point, I think it merits

---

[13] *See* Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal,* 94 DEPAUL L. REV. 925, 963-64 (2000)

[14] PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA (2002).

[15] *See generally* Anne L. Quintal, Note, *Rule 61: The "Voice of Victims" Screams Out for Justice,* 36 COLUM. J. OF TRANSNAT'L L. 723, 737 (1998).

[16] War Crimes Prosecution Facilitation Act, S. 804, 105th Cong. (1997); Foreign Operations Act for Fiscal Year 1998, S. 955, 105th Cong. (1998).

[17] Press Briefing, Amb. David Scheffer, $5 Million Reward Offered for Capture of War Crime Figures (Mar. 3, 2000), *available at* http://www.usembassy.it/file2000_03/alia/a0030308.htm (last visited Apr. 8, 2004); *see also* 144 CONG. REC. H10166-01 (daily ed. Oct. 8, 1998) (statement of Rep. Gilman).

[18] *See e.g.*, Andrea Gerlin, *For NATO, ex-Serb Leader is Elusive,* PHILADELPHIA INQUIRER, Mar. 18, 2002, *available at* http://www.philly.com/mld/inquirer/news/nation/2883584.htm?1c (last visited Apr. 8, 2004) (describing how even though rewards were offered for Radovan Karadzic, people remained unwilling to turn him in).

some academic study. Why does a rewards program, in fact, only work to a certain extent, but rarely as intended?

Finally the prosecutor for the ad hoc tribunals visited Washington frequently to apply a lot of pressure in one-on-one meetings with the highest officials of our government. That, of course, also was an effort to achieve results on the arrests of indicted fugitives. As for the arrests themselves, the whole experience in the Balkans was a painful experience for individuals like myself and for a lot of people in the military, and it became part of the "angst factor" in our war crimes work. General Nash saw it unfold in 1996 and the frustration that can emerge when you have rules of engagement[19] that are not proactive in terms of arrests. Then, we have to try to figure out, given the non-proactive element, whether there some methodology, some parallel track, that could be used to effect arrest. It took years to get there. It took years of bureaucratic battles in Washington. It took years of diplomatic battles with our closest allies on the ground in Bosnia. It was a clash of the thinking of the military establishment versus the diplomatic establishment versus the intelligence community.

All of these elements of our government, at times, were at war with each other over this issue of how do you affect arrests of these individuals on the ground. What are your presumptions if they are arrested? What would be the consequences if they are not arrested? An enormous amount of gaming occurred. Also, however, some day the historical record will show that there was a very highly skilled and potent effort that was brought together by the U.S. military, our intelligence community, by certain other countries, for that parallel track and it had some successes. My bottom line is that unless the Commander-in-Chief and the very top officials, every single day, are placing apprehension of top war criminals as the highest priority to accomplish, then the rest of the military and intelligence, and even diplomatic sectors, can start to lose sight of that priority. They will start to lose their focus, and the tracking effort will be quickly diverted to other issues on the ground. If this results, then we will not achieve our primary objective, which is apprehension of the top indictees.

---

[19] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Apr. 4, 1949, art. 70, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).