

NOTES FOR THE UN LECTURE

The Future of International Justice

1. Until the Nuremberg Trials there was effective impunity for war criminals. At home, more usually than not, they were hailed as war heroes and there was no international court in existence.
2. Nuremberg ignited a flame of hope for a new system of international criminal justice. Hence, the reference in the 1948 Genocide Convention to an international court having jurisdiction to prosecute genocide. The flame that was ignited was to splutter for almost half a century as the Cold War put paid to any endeavors in that direction.
3. Then, in 1993, there was the surprising move by the Security Council in establishing two ad hoc international criminal tribunals using its Chapter VII powers.
4. It is important to recognize the politics behind that decision. If the Rwanda Genocide had been committed prior to the commission of war crimes in the Balkans there would have been no Rwanda tribunal – there was not one for Cambodia or Iraq or any of the other egregious war crimes committed since Nuremberg.
5. The former Yugoslavia was in Europe and the Cold War had come to an end. At that point the Clinton Administration and the Secretary-General of the United Nations were strongly in favor of the tribunal. The efforts of Madeleine Albright were crucial to that endeavor.
6. There are many lessons to be learnt from the work of the ICTY and ICTR. Let me refer briefly to a few:

- (a) The politics of the situation is crucial to the establishment and sustaining of an international court;
- (b) The development of humanitarian law – it has been interpreted, refined and expanded. I need only to refer in this regard to the law relating to gender crimes.
- (c) Fair trials are possible before an international criminal court;
- (d) Possible deterrence – Operation Storm and the Kosovo action.

7. This ushered in an exciting 15 years of rapid development of international criminal justice with the establishment of hybrid international tribunals for East Timor, Sierra Leone, Cambodia and now for Lebanon.
8. There has been a successful ending of impunity for heads of state and former heads of state in the Balkans and in Rwanda. That has spread to other regions and countries – oppressive leaders who have committed war crimes in their own countries cannot travel with the same freedom and security. I would refer to Suharto, Hassen Habre and Haile Mariam Mengistu. The fate of Slobodan Milosevic and Charles Taylor should be a warning to all leaders who perpetrate serious war crimes.
9. The successes of the ad hoc tribunals unquestionably led to the Rome Diplomatic Conference in the middle of 1998 and the establishing of the ICC. Again, the role of the United States in that endeavor was crucial. And, as we know, 105 nations have now ratified the Rome Treaty and that includes all but one member of the EU and 27 of the 53 members of the African Union.

10. However, the road forward remains a fraught one. First of all there is State sovereignty. This is particularly important with regard to a treaty-based court. It is manifesting itself in a number of ways:

- (a) The peace versus justice debate (so far the international criminal courts have not in any way impeded peace);
- (b) Museveni now wanting to turn off the tap having used the ICC to reign in Koni.
- (c) Sudan adamantly refusing to comply with its obligations under the UN Charter and assist the ICC investigations— even in the face of a Chapter VII resolution. Here, political will appears to be foundering;
- (d) This raises the many problems surrounding the enforceability of orders of the ICC (in the case of the ICTY and ICTR the positive role of the US was crucial).

11. Perhaps most negative of all is the present policies of the United States and in particular its hostility of the United States to the ICC.

12. What of the future? We are at a critical juncture with regard to the ICC – enforcement and politics.

13. Will we return to the pre-Nuremberg days of impunity for war criminals? I believe not. Cautious optimism is justified.

14. In the first place there is the moral imperative. Citizens of most democracies are no longer prepared to allow their governments to sit back and allow war criminals to do what they wish. Political interests certainly dictate the extent and nature of interventions but the responsibility to protect has gained tremendous traction in the opening years of this century. The decision by the Bush Administration to allow the Security Council reference of Darfur to the ICC is an important

illustration of this development. What action will be taken against Sudan remains to be seen – but this is undoubtedly a crucial test of the will of the leading nations to reign in a government that is openly flouting the will of the global community represented in a Chapter VII resolution.

15. Most importantly, the major democracies would hardly enjoy a world absent the rule of law. Commercial reasons, apart from political, dictate where the interests of democracies lie.