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Frank M. Coffin Lecture on Law and Public Service: The Future of International Criminal Justice

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THIRTEENTH ANNUAL FRANK M. COFFIN LECTURE ON LAW AND PUBLIC SERVICE

EDITORS' NOTE

The Thirteenth Annual Frank M. Coffin Lecture on Law and Public Service was held in the fall of 2004. Justice Richard J. Goldstone, former Justice of the Constitutional Court of South Africa and pioneer for international justice and human rights, delivered the lecture. Established in 1992, the lecture honors Judge Frank M. Coffin, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, an inspiration, mentor, and friend to the University of Maine School of Law.¹

1. Past lectures from this series include: Joseph J. Rauh, Jr., *Nomination and Confirmation of Supreme Court Justices: Some Personal Observations*, 45 ME. L. REV. 1 (1993) (delivered posthumously by Mr. Rauh's widow, Olie Rauh, and their son, Michael Rauh, who were joined by Justice William Brennan); Arthur Schlesinger, Jr., *Multiculturalism and the Bill of Rights*, 46 ME. L. REV. 189 (1994); Patricia M. Wald, *Whose Public Interest is it Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3 (1995); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996); Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 ME. L. REV. 1 (1997); Robert R. Reich, *What Happened to the American Social Compact?*, 50 ME. L. REV. 1 (1998); Warren B. Rudman, *The Law of Unintended Results: The Independent Counsel Law*, 51 ME. L. REV. 1 (1999); Justice Ruth Bader Ginsberg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 ME. L. REV. 301 (2000); Alan B. Morrison, *Must the Interests of the Client Always Come First?*, 53 ME. L. REV. 471 (2001); Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159 (2002); Cruz Reynoso, *The Lawyer as a Public Citizen*, 55 ME. L. REV. 335 (2003); Scott Harshbarger, *Strengthening Democracy: The Challenge of Public Interest Law*, 56 ME. L. REV. 214 (2004).

THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

THIRTEENTH ANNUAL FRANK M. COFFIN LECTURE ON LAW AND PUBLIC SERVICE

Honorable Richard J. Goldstone

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THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

*Honorable Richard J. Goldstone**

I. INTRODUCTION

Dean Khoury, Judge Coffin, Mrs. Coffin, your Honors, Ladies and Gentlemen: It's a wonderful privilege and great pleasure to be with you this evening, and to be back for the second time this year in Maine. One of the unexpected pleasures of having been invited to deliver this lecture was telling people in New York, Washington, D.C., or Boston that I was delivering the Coffin lecture. The reaction of people was quite remarkable. A warm glow would suddenly surround everybody in the room, and they would say, "Oh, Judge Coffin!" and would follow with wonderful remarks about Frank Coffin. I look forward, in the next years, to telling people that I delivered the Coffin lecture and hope to enjoy the same warmth and reaction. We have been with Judge and Mrs. Coffin since lunch today, and I speak for Noleen as well: we feel we've been here longer than half a day, and one of the great benefits of this invitation is the possibility of spending most of the weekend with them. It has also been a delight for me to meet their family: two of their daughters, their son, some of their grandchildren, and other members of their family. So, thank you very much, indeed, for whoever is responsible for inviting me to deliver the 2004 Coffin lecture.

II. THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

In his very generous and well-researched introduction, Judge Coffin mentioned that I ended my book, *For Humanity*,¹ on a note of optimism. Let me immediately say that I remain optimistic about the future of international justice—there is a certain amount of caution in the optimism, but nevertheless, optimism. I am optimistic because one must bear in mind that sixty years ago, there was no such thing as international criminal justice. Nobody would have understood the concept. We must remember that prior to the end of World War II, save for domestic prosecution of war crimes, there was no international criminal law at all.² The only criminal law dispensed was by domestic courts, and for this reason international criminals went free. They benefited from complete immunity, especially war criminals.³ Because, if you think about it, war criminals, almost by definition, come

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1. RICHARD GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* (2000).

2. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 16 (2003).

3. There are various barriers to prosecuting international crimes nationally. These include laws granting amnesty for broad categories of crimes, national statutes of limitations, the prohibition on double jeopardy, and national immunity from prosecution for heads of state. For a detailed discussion of these impediments, see *id.* at 312-22.

from oppressive societies, from dictatorships; war criminals don't, as a rule, come from democracies. More often than not, they are regarded as war heroes and not war criminals by their own societies.⁴

The change began as a consequence of the Holocaust and the terrible war crimes that were committed by the Nazi regime in World War II. The law has always reacted—it is not pro-active and it cannot be—the law always reacts to facts on the ground, not only in the field of criminal law, but throughout the whole plethora of legal mechanisms, laws, and legal tools. When technology changes, the law has to change to keep up with it, whether it is the Internet or new types of weapons. Thus, after the First World War, the Geneva Conventions had to be changed to include air warfare, which didn't exist before the First World War. It's no different with respect to war crimes.

It was a consequence of the Second World War that governments, that nations, began to realize that they had to take notice and become involved when other governments ill-treated and violated fundamental human rights of their citizens. This was a huge change. It is reflected in the Charter of the United Nations, which, for the first time ever in an international legal instrument, recognizes and seeks to protect individual human rights.⁵ Before the United Nations Charter, individual human beings had no standing at all in international law. International law dealt with governments, and there were no courts, no mechanisms at all for individuals to seek justice outside their own domestic courts.⁶ And, by definition again, in oppressive societies, individuals had no standing, even in front of their own domestic courts.⁷ So, the law followed the Universal Declaration of Human Rights,⁸ which was an aspirational document; it wasn't intended to have any legally binding effect, but it gave birth in the 1960s to a whole series of international covenants dealing with human rights, particularly the International Covenant of Civil and Political Rights⁹ and the International Covenant dealing with Economic, Social and Cultural Rights.¹⁰

The second effect of World War II was that people started questioning the absolute theory of the sovereignty of nations.¹¹ The belief grew that people and their governments were entitled to take notice and to comment when human rights violations were perpetrated.

My own country provides a good illustration: South Africa had practiced racial discrimination and racial oppression for well over 300 years, since 1652, when the Dutch first colonized the Cape of Good Hope.¹² In 1948, the National

4. Examples of this phenomenon are Slobodan Milosovic, Radovan Karadzic, and Ratko Mladic.

5. See, e.g., U.N. CHARTER art. 1, para. 3, art. 13, para. (1)(b), art. 55, para. (c).

6. CASSESE, *supra* note 2, at 37.

7. Augusto Pinochet, for example, enjoyed immunity for almost twenty years before this was finally brought to an end. GOLDSTONE, *supra* note 1, at 121.

8. G.A. Res. 217, U.N. GAOR, 4th Sess., U.N. Doc. A/810, at 71 (1948).

9. G.A. Res. 2200A (XXI) U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966).

10. *Id.*

11. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 21 (1997).

12. François du Bois, *The Past and Present of South African Law*, 32 INT'L J. LEGAL INFO. 217, 217 (2004).

Party introduced the apartheid system, which legalized racist policies that had been enforced for three centuries before.¹³ This legalization of injustice was raised in the General Assembly in 1949 by the Indian representative to the United Nations.¹⁴ India proposed a resolution condemning the manner in which the South African government was ill-treating people of Indian origin in South Africa.¹⁵ The resolution was passed by the General Assembly over the negative votes, clearly of South Africa, but also of the United States, the United Kingdom and Australia.¹⁶ Their governments didn't want the United Nations looking into their racial policies at that time. South Africa's response, which was widely accepted, was that: "this is not your business; the way we treat our citizens or ill-treat our citizens is our internal affair."

Although South Africa's response was widely accepted at the time, the sentiment changed. Over the following decades, it was the international community that was instrumental in bringing an end to apartheid. South Africa had pariah status. Boycotts, economic sanctions, divestment, and disinvestment led by the United States forced South African white minority leaders to realize that the apartheid system was not only a dead-end, but a bloody end at that. In 1973, the General Assembly passed the International Treaty,¹⁷ which declared apartheid in South Africa to be a crime against humanity. The treaty almost completed a circle that began with the Nuremberg trials, which first recognized crimes against humanity.¹⁸

World War II, and particularly Nuremberg, also opened a Pandora's Box with respect to universal jurisdiction. Until then, national courts only had jurisdiction, generally speaking, for crimes committed within their geographic areas of jurisdiction.¹⁹ American courts, for example, could only hear criminal cases in respect to crimes committed in the United States.²⁰ And that was the position literally in every country of the world. The one exception, of course, was for piracy.²¹ Pirates could be brought to trial in any court in any land. Otherwise, pirates would get away with their deeds with complete impunity because pirates, by definition, don't commit their crimes on land; they commit them on the high seas.²² If there wasn't universal jurisdiction, there wouldn't be any court of jurisdiction.

But World War II so horrified decent people in many, many countries that they decided that, for some international crimes, there should be universal jurisdic-

13. See *id.* at 224-25.

14. G.A. Res. 265, U.N. GAOR, 3d Sess., Supp. No. 20, at 6, U.N. Doc. A/RES/265 (1949).

15. *Id.*

16. 1948-49 U.N.Y.B. [310], U.N. Doc. A/RES/395 (1949).

17. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068, U.N. GAOR, 28th Sess., Agenda Item 53, art. 1, U.N. Doc. A/RES/3068 (1973).

18. See *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Adopted by The International Law Commission of the United Nations, G.A. Res. 95, U.N. GAOR, at 188 (1946), U.N. Doc. A/CN.4/SER.A/1950/Add.1.

19. CASSESE, *supra* note 2, at 277-85.

20. See *id.*

21. *Id.* at 284.

22. See *id.*

tion.²³ In other words, jurisdiction would not depend on where the crime was committed, but on the nature of the crime itself.²⁴ If the crimes were sufficiently serious, people suspected of having committed those crimes could be brought to justice in the courts of any country, no matter how far removed, how remote, or how ever disconnected with the actual commission of the crime.²⁵

Universal jurisdiction was first recognized internationally in the 1949 Geneva Conventions,²⁶ which defined the worst of all crimes and called them grave breaches.²⁷ Today there is not a country that hasn't ratified the Geneva Conventions.²⁸ The Geneva Conventions oblige all these nations to bring to justice people who commit grave breaches of the Conventions, no matter where or when committed.²⁹ The Convention goes on to provide that if a country is unwilling or unable to prosecute such a person itself, it is obliged to turn that person over to a government of a country that is prepared to do so.³⁰

The Apartheid Convention followed in 1973, creating universal jurisdiction for the crime of apartheid.³¹ It was honored in the breach. Regrettably, the Western democracies ignored the Apartheid Convention.³² South African government officials, ambassadors, and other South Africans guilty of the crime of apartheid could go and do their business in New York, Washington, London, Paris, or Bonn, and not fear being arrested for having been complicit in the crime of apartheid. Apartheid might well have ended ten years earlier had that Convention been taken seriously by the trading partner countries of South Africa.

The 1984 Torture Convention³³ included provisions for universal jurisdiction, and that did have an effect. It was under that convention that General Pinochet,

23. The reason for extending universal jurisdiction is perhaps best explained in the case of *Eichmann* by the District Court of Jerusalem, judgment of 12 December 1961; English translation in 36 I.L.R. 5-276: "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations." *Id.*

24. CASSESE, *supra* note 2, at 284-85.

25. *See id.*

26. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted on* Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted on* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

27. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

28. For a list of parties to the Geneva Conventions and its Protocols, see International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols* (Jan. 6, 2004), at http://www.icrc.org/eng/party_gc.

29. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 27, art. 146.

30. *Id.*

31. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, *supra* note 17, art. 4.

32. There have been no documented cases of prosecution on the basis of the Apartheid Convention.

33. *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

the former dictator of Chile, was arrested in a London clinic in 1998, at the request of a Spanish judge, for crimes allegedly committed in Chile almost twenty years before.³⁴ That development surprised international lawyers and the international community. The Spanish court accepted universal jurisdiction; the House of Lords in London agreed that this instance was a recognized basis for exercising universal jurisdiction and ordered the extradition of General Pinochet.³⁵ In the following year, the British government, on the grounds of the ill health of General Pinochet, decided not to fulfill the order.³⁶ But that arrest in the London clinic, and the recognition of its legality by the highest courts of England and Wales had important consequences, in Chile in particular. There were many victims in Chile who were suddenly given a voice by the English decision. The decision also had another effect: it stopped some other former dictators from traveling. Not long after the Pinochet decision, the Frankfurt *Algemeine*³⁷ reported that the former dictator of Indonesia, President Soeharto, had cancelled an appointment in a German clinic where he was used to going for treatment. The former dictator of Ethiopia, who was in Zimbabwe, came to Johannesburg for medical treatment.³⁸ Human Rights Watch in New York raised a hue and cry, and Mengistu Haile Mariam beat a hasty retreat back to Zimbabwe.³⁹ It's remarkable that the dictators, the oppressive leaders who don't think twice about violating the rights of their people, seek for themselves the best medical treatment the world can offer. They also seek holidays at the most expensive pleasant holiday resorts. Some were being denied that.

Universal jurisdiction had begun to bite. It may be bad news for travel agents of human rights violators, but it's good news for us. The twelve international conventions dealing with terrorism (beginning in the 1970s, not after September 11th of 2001), airplane hijacking, diplomats being taken hostage, and ships on the high seas all provide for universal jurisdiction.⁴⁰ Courts around the world are

34. *R. v. Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet*, 1 A.C. 147 (H.L. 2000).

35. *Id.*

36. *Pinochet Set Free*, BBC News, Mar. 2, 2000, at <http://news.bbc.co.uk/1/hi/uk/663170.stm> (last visited Feb. 10, 2005). Pinochet was released on March 2, 2000. *Id.*

37. *ALGEMEINE*, at <http://www.faz.net> (with paid subscription).

38. Press Release, Human Rights Watch, South Africa Urged to Bring Ethiopian Dictator to Justice (Nov. 24, 1999), at <http://www.hrw.org/press/1999/nov/eth1124.htm>.

39. *Id.*

40. The twelve conventions are as follows: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* on Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1315 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 18 I.L.M. 1419; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention on the Marking of Plastic Explosives for the Purpose of Identification, Mar. 1, 1991, 30 I.L.M. 721; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304.

being armed by their governments with the power to exercise universal jurisdiction over the most serious crimes from which the international community suffers.

The 1948 Genocide Convention,⁴¹ interestingly, didn't recognize or confer universal jurisdiction. It provided that jurisdiction for this most horrible of all crimes, genocide, would be conferred either on domestic courts where the crime was committed or in an international court having jurisdiction.⁴² It was assumed that there would be an international criminal court having jurisdiction with respect to war crimes committed anywhere.⁴³ The establishment of such a court was prevented by the Cold War. The Soviet Union and China had no wish for such a court. So, it was put on the back burner.⁴⁴ Draft rules and procedures for an international criminal court gathered much dust in back rooms at the United Nations' offices in New York. It was only in 1993, again to the surprise of the most seasoned international lawyers, that the United Nations Security Council set up the first ever International Criminal Tribunal for the former Yugoslavia,⁴⁵ and that was followed in the following year by the International Criminal Tribunal for Rwanda.⁴⁶

As a footnote, it is interesting that the United States is unique in allowing what is in effect universal jurisdiction for civil claims arising from serious violations of human rights of foreigners. The Alien Tort Claims Act of 1789⁴⁷ provides jurisdiction in the federal courts where foreigners can sue foreigners for serious human rights violations recognized by the United States. These are unusual provisions, and some people refer to them as an example of the United States' arrogance in allowing its federal courts to exercise that sort of jurisdiction. It's not. It was an unusual development in the 18th century to deal with ambassadors' rights being violated; it was intended to deal with piracy, and so forth.⁴⁸ I applaud its use in our time to condemn serious human rights violations, wherever they may occur.

A few words about the United States' approach to international law and to international justice. There has always been an ambivalence. I'm over-simplifying and hope I'm not being unfair when I suggest that the attitude over more than a century has been: International law is a good idea for the rest of the world but not for us. And we encourage the rest of the world to use it, to get on with it, but don't use it against our citizens. We want our citizens to be subject only to our courts and not to international courts.

There is a fear that international courts and international organizations will have an anti-American bias that would make it unfair and inappropriate to subject United States' citizens to their jurisdiction.

41. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

42. *Id.* art. 6.

43. This is evidenced by Article VI of the Genocide Convention, which refers to an "international penal tribunal" with jurisdiction over the crime of genocide. *Id.*

44. Hakan Friman, *The International Criminal Court: Negotiations and Key Issues*, 8 AFR. SEC. REV. NO. 6 (1999), available at <http://www.iss.co.za/Pubs/ASR/8No6/InterCourt.html>.

45. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 6, U.N. Doc. S/RES/827 (1993).

46. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

47. Alien Tort Claims Act, 28 U.S.C. § 1350 (1789).

48. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2759 (2004).

The United States was, above all countries, responsible for the establishment of the Yugoslavia tribunal by the Security Council.⁴⁹ It was the Clinton administration, but in particular the commitment of its ambassador, Madeleine Albright, that convinced the United Nations Security Council to set up an international criminal tribunal.⁵⁰ As its first prosecutor, I had the difficult task of setting up an international prosecutor's office. From my own personal experience I can assure you that, without the United States' approval or political and financial resources, that tribunal would never have got off its feet; it would never have got to work. It was also the United States that pushed for the Rwanda tribunal to be set up. And again, it was the United States that made it a reality.

The American Bar Association played a crucial role in assuring fair trials in the Yugoslavia tribunal. As I mentioned in my book,⁵¹ it was the then-director of the American Bar Association, Mark Ellis (the founding director) who came to the Hague soon after I arrived. He said: "The American Bar would like to help you, the prosecutor of the Yugoslavia tribunal; how can it do so?" I told him that the best way the American Bar could assist was to ensure that defendants who came before this tribunal would have adequate defense counsel. That appealed immediately to Mark Ellis, and to the American Bar Association. So, in the first trial of Dusko Tadic,⁵² the American Bar employed two British barristers, experienced criminal barristers, to join the Dutch leader of the defense team.⁵³ The reason was that the judges had decided that the tribunal should have more or less an adversarial system of trial, the kind you and I are used to, where counsel fight each other in front of a neutral judge who is a referee, and not an active participant, as judges are in a civil system.

Tadic received a list of counsel who offered their services to the registrar of the court. They were not pro bono counsel but were paid by the United Nations. Tadic's eyes fell on the name Vladimeroff. Tadic is a Serb, and he knew that Russians had an affinity for Serbians and that Vladimeroff was a Russian. And he said, "I'll have him." Vladimeroff didn't speak a word of Russian; his grandfather had immigrated to Holland as a youngster. Fortunately, however, he was a leading criminal lawyer at the Hague, but he had never cross-examined, he had never watched a cross-examination, and he found himself in a position where he would be required to cross-examine the prosecution witnesses. He was not equipped to do so. The American Bar employed the two English barristers for two weeks to come and teach Vladimeroff how to cross-examine. It didn't take too many hours for the three of them to realize one can't learn to cross-examine in two weeks. The American Bar then decided to employ the two barristers to join Vladimeroff's team. At that point, the U.N. only had financing for one counsel, not three. Soon after that, I'm happy to say, the registrar of the Court agreed that the United Nations would pay for all three of them. This was crucial. If the Yugoslavia tribunal had relied on unfit trial counsel, it would have been the death knell of international tribunals, of international courts.

49. Barbara Crossette, *Time is Short for U.S. to Join the International Criminal Court*, N.Y. TIMES, Nov. 24, 2000, at A9.

50. *Id.*

51. GOLDSTONE, *supra* note 1, at 119.

52. Prosecutor v. Tadic, Case No. IT-94-I-T Int. Crim. Trib. for the Former Yugoslavia (7 May 1997) available at <http://www.worldlii.org/int/cases/ICTY/1997/1.html>.

53. They were William Clegg Q.C. and John Livingston.

When our office was opened, twenty-three leading United States lawyers, prosecutors, investigators, and computer technicians were sent from Washington at no cost to the United Nations; that was a gift from the United States government. They played a very important role, a crucial role, in assuring the efficiency and fairness of the procedures in the Yugoslavia tribunal.

The United Nations tribunals were successful in two important respects. First, they advanced the use of the Geneva Conventions, which had seldom been used. They were excellent laws on paper, but laws that are not implemented are not worth much more than the paper that they're written on. Now, for the first time, the law was not only being used, it was advanced. Just as one example, the recognition of systematic mass rape and other gender crimes as war crimes was new.⁵⁴ The Rwanda Tribunal held that systematic rape could constitute genocide.⁵⁵ There were huge advances in that area and in other areas. A further success was the demonstration that fair trials could be held in an international tribunal—that wasn't a given, it wasn't accepted. I haven't read or heard any serious criticism of the fairness of the trials before the international tribunals sitting in the Hague or Arusha.

Those successes led to the push for a permanent international criminal court, and again, it was Madeleine Albright who encouraged Kofi Annan, the then newly appointed Secretary General of the United Nations, to call a diplomatic conference in Rome in the middle of 1998.⁵⁶ One hundred and sixty nations turned up, and 120 voted in favor of the Rome Treaty to set up the International Criminal Court.⁵⁷ Regrettably, at that point, the United States' policy took almost a 180-degree turn. It was the Pentagon—the military—who feared American citizens appearing before any international criminal court.⁵⁸ They were suspicious of runaway prosecutors, dishonest judges, and bias against the United States. So, the Clinton administration tried to curtail the power of this new international criminal court. The Clinton administration wished only the Security Council to have authority to trigger an investigation by the International Criminal Court.⁵⁹ That way they could, by the use of its veto, stop any investigations that it didn't like or that could have been embarrassing either to Washington or to a friendly state. It was rejected, and rightly so.⁶⁰ To have an international criminal court dependent on a political gatekeeper, which the Security Council is, would rob the court of effectiveness and credibility. There may as well be no international court of law at all. The United States then suggested the system that is called "complementarity," allowing the international criminal court jurisdiction only if the court of the nationality

54. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T Int. Crim. Trib. for Rwanda (2 Sept. 1998), available at <http://www.ictcr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

55. *Id.* § 7.7.

56. Alessandra Stanley, *Annan Urges Formation of War Crimes Court*, N.Y. TIMES, June 16, 1998, at A6.

57. *Rome Statute of the International Criminal Court*, 9th Sess., U.N. Doc. A/CONF. 183 (1998), available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Mar. 26, 2005).

58. Interview by BBC Radio with Madeleine Albright, former Secretary of State, (Sept. 9, 2003), available at http://www.bbc.co.uk/radio4/news/un/transcripts/madeleine_albright2.shtml.

59. David J. Scheffer, *Developments at the Rome Treaty Conference*, Statement Before the Senate Foreign Relations Committee (July 23, 1998), in 9 U.S. DEP'T OF ST. DISPATCH, Aug. 1998, at 19.

60. *Rome Statute of the International Criminal Court*, *supra* note 57, art. 15 (authorizing cases being initiated by the Prosecutor subject to oversight by the Pretrial Chamber).

of the alleged war criminal is unable or unwilling itself to investigate the alleged crime.⁶¹ Under this system, the international criminal court would have no jurisdiction if, for example, an American were accused of a war crime and the United States itself wished to investigate the alleged crime. The nations assembled in Rome found that reasonable and this is the system that was accepted.⁶² The position under the Rome Statute is that the court has no jurisdiction where the national authorities decide to hold a good faith investigation.⁶³ In order to attract jurisdiction, a prosecutor would have to prove to a three-judge pretrial panel, subject to appeal to a five-judge panel, that the domestic investigation was in fact a charade or a fraud designed to rob the international court of jurisdiction.⁶⁴ I would suggest this is almost an impossible burden to meet in relation to any country having a democratic form of government and open courts. I can't believe that a prosecutor would be able to establish that a serious investigation, whether in the United Kingdom, the United States, or any other democracy, was intended to be a sham investigation. The treaty still didn't satisfy the Pentagon. The Clinton administration joined only six other nations, including Syria, Qatar, and China, in opposing the Rome Treaty.⁶⁵ President Clinton, of course, at the end of his term of office, signed the treaty, not happily, but he signed it.⁶⁶ He refused to send it to the Senate, but the United States, by his signature, indicated it would co-operate with the International Criminal Court, and certainly would not do anything to undermine it.

For the court's life to begin, sixty countries had to ratify the Rome convention.⁶⁷ The fact that 120 countries signed wasn't sufficient. Many thought that getting the requisite numbers of ratifications would take a decade or more. It took less than four years. By April 2002, the sixtieth country had ratified.⁶⁸ To date, ninety-eight countries have ratified the treaty.⁶⁹ I am optimistic for it; I believe there is a critical mass of nations around the world behind the ICC. Almost half of the members of the United Nations have now ratified, and that includes every member of the European Union.⁷⁰ There is hardly a traditional ally of the United States that has not ratified the statute of the international criminal court.

Unfortunately, the current Bush administration has taken an active role to undermine the court, pressuring governments to enter into ridiculous agreements at-

61. See John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 92-93 (2000).

62. The principle of complementarity is included as Article 17 of the Rome Statute. *Rome Statute of the International Criminal Court*, *supra* note 57, art. 17.

63. *Id.*

64. *Id.*

65. Seguin, *supra* note 61, at 88.

66. Clinton's Words: 'The Right Action', N.Y. TIMES, Jan. 1, 2001, at A6.

67. *Rome Statute of the International Criminal Court*, *supra* note 57, art. 126.

68. On April 11, 2002, ten countries deposited their ratifications of the Rome Statute simultaneously. The Statute therefore entered into force on July 1, 2002. See *id.*

69. See *Ratification Status*, at <http://www.un.org/law/icc/statute/romeofra.htm> (last visited Mar. 26, 2005).

70. See Coalition for the ICC, *Europe and CIS*, at <http://www.iccnw.org/countryinfo/europecis.html> (last visited Feb. 10, 2005).

tempting to preclude the handing over of American citizens to the International Criminal Court, through Bilateral Immunity Agreements allegedly entered into under Article Ninety-Eight of the Rome Statute.⁷¹ These are the agreements that have been demanded, and to date, some sixty countries have entered into those agreements.⁷²

Nonetheless, I remain optimistic because of the critical mass of nations that have joined the court. Let me give you just one example of how that court, I believe, should be used today. We have all read about the terrible crimes being committed in the Sudan, in Darfur, crimes committed against non-Arab citizens of the Sudan. Millions of people have been forced from their homes and hundreds of thousands forced into situations of starvation and death.⁷³ Former Secretary of State Colin Powell, appropriately in my view, has expressed the view of the United States that this is genocide.⁷⁴ Being genocide, there is an obligation on the United States to stop that criminal conduct. There have been weak resolutions in the Security Council through no fault of the United States; China has weakened those resolutions under threat of veto.⁷⁵ This situation, I would have thought, cried out for the Security Council to instruct the International Criminal Court, which it can do under the Rome Treaty, to immediately investigate war crimes in the Sudan. The Security Council could put together sufficient military forces—it can get them from Africa, if it so wishes—and they should be authorized to apprehend those suspected and hand them to the International Criminal Court. It would be an exemplary use of the powers of the International Criminal Court and it would send a message. It would send a message that the international community is no longer prepared to allow a situation like that in Rwanda to happen again. President Clinton apologized on behalf of the United States for not doing more to stop the Rwanda genocide.⁷⁶ The Security Council could do something right now at very little cost; it wouldn't even be contrary to the approach of the United States, that the Security Council shall hold the key to trigger the jurisdiction of the International Criminal Court.

I turn now to the effects of 9/11: Terrorism, I would suggest, harms democracy by making its citizens believe that their liberties are a source of weakness. The opposite is the truth. Your liberties, and I am happy to say as a South African,

71. See, e.g., Treaty Affairs Staff, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2004*, at <http://www.state.gov/documents/organization/38401.pdf> (last visited Feb. 10, 2005).

72. See *id.*; *Countries with Bilateral Immunity Agreements*, Sept. 29, 2003, at <http://www.endgenocide.org/ceg-icc/article98/tableofbias.htm> (last visited Feb. 10, 2005).

73. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, at 3 (Jan. 25, 2005), at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

74. Colin Powell, Speech to the Senate Foreign Relations Committee (Sept. 9, 2004); see *Powell calls Sudan Killings Genocide*, Sept. 9, 2004, at <http://www.cnn.com/2004/WORLD/africa/09/09/sudan.powell>.

75. See generally S.C. Res. 1556, U.N. SCOR, 59th Sess., U.N. Doc. S/2004/703 (2004); S.C. Res. 1564, U.N. SCOR, 59th Sess., U.N. Doc. S/RES/1564 (2004); S.C. Res. 1574, U.N. SCOR, 59th Sess., U.N. Doc. S/2004/947 (2004); see also Human Rights Watch, *The United Nations and Darfur* (Jan. 2005), at <http://hrw.org/wr2k5/darfur/3.htm>.

76. On March 25, 1998, President Clinton acknowledged that "[w]e did not act quickly enough . . ." to stop the genocide. *A News Hour with Jim Lehrer Transcript: Promoting Peace* (Mar. 25, 1998), at http://www.pbs.org/newshour/bb/africa/jan-june98/rwanda_3-25a.html.

my liberties, are a source of strength, not a source of weakness. Disproportionate responses to terrorism harm democracy and imperil liberty. The challenge facing democracy is to find a proportionate response to terrorism. The two leading democracies, the United States and the United Kingdom, I would suggest, have overreacted. They have endangered civil liberties in very material respects. In the United Kingdom, the legality of detention without trial is being tested this week in the House of Lords; a decision is expected within the next six weeks, according to this morning's *New York Times*.⁷⁷ In the United States, secret deportation hearings, detention of American citizens without trial, and denial of access to lawyers or family members are all now permissible measures.⁷⁸ One reads, for example, in a report from the Human Rights Watch (HRW)—and let me say, as a Board member of HRW, their reports have been exhaustively investigated—that people have been detained and “disappeared” by the United States government.⁷⁹ This horrible concept of disappearances has been roundly condemned by the United States over many years. The HRW report goes through the definitions of disappearances, and they accurately say that disappearances involve four elements: (1) deprivation of liberty against the will of the detainee; (2) direct or indirect involvement of government officials; (3) refusal to acknowledge the detention or to disclose the fate or whereabouts of the person concerned; and (4) the removal of the detainee from the protection of the law.⁸⁰ It details, exhaustively, eleven cases where the facts are known of people who have been disappeared by the United States government.

On a more optimistic note, I've had the privilege in the last few months of giving talks at the National Defense University in Washington, D.C., and, more recently, at the United States Air Force Academy in Colorado Springs. I have been impressed by the openness with which these issues are discussed. I was impressed with the strong views openly expressed by students at those military colleges in favor of the International Criminal Court and the shame they feel as military people at this sort of thing happening.

In the majority opinion of the United States Supreme Court—and again a reason for optimism—the United States Supreme Court has said, contrary to the view of the current administration, that the federal courts do have jurisdiction over people being detained in Guantánamo Bay.⁸¹ The United States Supreme Court has said that United States citizens cannot be kept in detention without a trial, without access to lawyers, without access to family.⁸² Justice O'Connor has stated clearly that indefinite detention for the purposes of interrogation is not authorized.⁸³ From

77. See Douglas, Jehl, *The Reach of War*, N.Y. TIMES, July 8, 2004, at A1. This decision has now been handed down in *A (FC) and others (FC) v. Secretary of State for the Home Department* 2 W.L.R. 87 (H.L. 2004), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

78. See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)* Pub. L. No. 107-56, 115 Stat. 272 (2001).

79. Human Rights Watch, *The Road to Abu Ghraib* (June 2004) at 17, at <http://www.hrw.org/reports/2004/usa0604/>.

80. *Id.* at 12 n.26.

81. *Rasul v. Bush*, __ U.S. __, 124 S. Ct. 2686, 2698 (2004).

82. *Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633, 2652 (2004).

83. *Id.* at 2641.

this opinion, it appears that the United States will consider both the abduction and prolonged detention of United States' citizens without charges or trial to constitute a violation of fundamental due process, an internationally recognized human right.⁸⁴ The hope is that judges will continue to act as a check on this sort of unjustified and unlawful overreaction.

India's Prevention of Terrorism Act,⁸⁵ draconian as it is, was completely repealed by the Indian Parliament in the aftermath of a recent election that put a new government in power. In my own country, the South African cabinet initially approved new legislation allowing for detention without trial.⁸⁶ Unbelievable! A government consisting of people who suffered from detention without trial, now in government, is prepared to use this sort of method. The African National Congress (ANC), however, controls the parliamentary committee on justice. Based on prior experience with this detention method in South Africa, the ANC said that it was not prepared for people to be detained without trial. This is the strength of democracies. Individual members of civil society and non-governmental organizations are able to speak out, and if there is sufficient public pressure, political leaders are oftentimes prepared to amend their policies rather than risk increasing public hostility.

There is a good illustration in your own society. In November 2001, the Department of Defense established new Military Commissions to try some of those persons detained at Guantánamo Bay.⁸⁷ The rules provided for secret trials, death sentences by majority vote, no appeal to a higher court or authority and no right to counsel other than appointed by the Military.⁸⁸ There were protests from the American Bar Association, from some state and city bars, and from human rights organizations.⁸⁹ The media also weighed in. In March 2002, the rules were significantly changed and the more deplorable provisions were removed.⁹⁰

Similar pressure can apply at the global level. Security Council Resolution 1373 peremptorily required all Member States of the United Nations to promulgate new legislation to combat terrorism and to respond to the Counter-Terrorism Committee (CTC) within ninety days.⁹¹ Within the specified time there were 174 responses.⁹² Many came from oppressive governments who needed no urging to

84. *See id.* at 2650-51.

85. The Prevention of Terrorism Act No. 15 of 2002, at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm> (last visited Mar. 20, 2005).

86. Republic of South Africa Anti-Terrorism Bill, 2002, Ch.2, part 1, §§ 27-29, at http://www.opbw.org/nat_imp/leg_reg/south%20africa/anti-terror.pdf (last visited Mar. 20, 2005).

87. The Military Commissions were established under military order of the President on November 13, 2001. *See President Issues Military Order*, (Nov. 13, 2001), at <http://www.globalsecurity.org/security/library/policy/dod/011113-bush-military-order.htm>.

88. *Id.*

89. *See, e.g.*, American Bar Association Task Force on Treatment of Enemy Combatants, *Preliminary Report*, at http://www.abanet.org/leadership/enemy_combatants.pdf (Aug. 8, 2002).

90. The new rules were announced by Secretary of Defense Donald Rumsfeld on March 21, 2002. The appointment, procedures, and charge sheets before these military tribunals have been made available by the Department of Defense. *See United States Department of Defense, Military Commissions*, at <http://www.defenselink.mil/news/commissions.html> (last updates Feb. 17, 2005).

91. S.C. Res. 1373, art. 6, U.N. SCOR, 56th Sess., U.N. Doc. SC/7158 (2001).

92. The Counter-Terrorism Committee lists the lodging of reports on its official website. *See Counter-Terrorism Committee, Reports From Member States*, at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html (last visited Mar. 27, 2005).

pass draconian legislation, further violating the fundamental civil liberties of their citizens.⁹³ Many came from democratic legislatures. The initial vetting of the legislation by the CTC did not relate at all to violations of human rights or civil liberties. There were complaints registered, in particular, by the United Nations High Commissioner for Human Rights, Sergio Vieira de Mello.⁹⁴ Within a short period the policy was changed.

This is a very open society. It has struck me many times when visiting the United States that when I, as a foreign visitor, criticize the policies of your government, it is not resented. The same would not necessarily be true of other democracies. I have not experienced the same acceptance of criticism in other democracies I have visited. Yet, in times of fear, there is an unfortunate tendency in all democracies to defer to the executive and to tolerate serious, and sometimes unnecessary and unjustified, inroads into civil liberties.⁹⁵ It is precisely in times of threat that civil liberties require greater protection.⁹⁶ And that protection must be demanded from members of civil society.

When powerful democracies make these inroads into the rights of their citizens, there is a most unfortunate knock-on effect in other, less democratic nations. One reads of President Mugabe of Zimbabwe deporting Western journalists because they are "terrorist sympathizers."⁹⁷ One reads of Indonesia planning to set up prisons similar to that at Guantánamo Bay.⁹⁸ And, of course, the despicable conduct at Abu Ghraib Prison in Iraq will be cited for years to come in rebuttal to criticism by the United States of torture in other lands.

Powerful nations should lead by example and accept being bound by an international rule of law. That was the hope of the drafters of the Charter of the United Nations—that such a rule of law would bind the rich and powerful as well as the poor and weak nations.⁹⁹ The movement has been in that direction for the past sixty years, and it is nothing short of tragic that the United States no longer leads that movement and, in some respects, hinders it.

III. CONCLUSION

What of the future? I am cautiously optimistic. The birth and growth of international criminal justice has been impressive and has wide global acceptance. An impetus has developed, and there is good reason to believe that overreaction to 9/11 will be seen by future generations to have been a detour and not a new road.

The reason for caution lies in the present domestic and foreign policy of the United States—the only superpower, and traditionally regarded as the leader of the

93. For example, Pakistan, Egypt and Kenya. See Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post September 11 United States*, 75-76, at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf> (Sept. 2003).

94. *Report of the Seminar on the Commission on Human Rights* 21, World Federation of United Nations Associations, at <http://www.wfuna.org/docUploads/Final%20Report%202004%20Seminar%20%2Epdf> (July 19-23, 2004).

95. See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR*, (2004).

96. *Id.*

97. Lawyers Committee for Human Rights, *supra* note 93, at 77.

98. *Id.* at 80.

99. The Preamble to the Charter of the United Nations speaks of binding "nations large and small." U.N. CHARTER pmb1.

free world. The reason for optimism is the openness of your society and its commitment, for more than two centuries, to democracy, not only for your own people, but also for all people around the world. I would urge that we, who are fortunate to live in democracies, should, at all costs, guard against becoming the appeasers of power at the unnecessary expense of freedom.