

# CARNEGIE COUNCIL *for Ethics in International Affairs*

## All the Missing Souls: A Personal History of the War Crimes Tribunals

Public Affairs

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### Introduction

**JOANNE MYERS:** Good morning, and welcome to the Carnegie Council. I'm Joanne Myers, director of Public Affairs Programs, and on behalf of the Carnegie Council, I would like to thank you all for joining us as we welcome David Scheffer to our Public Affairs Programs.

Professor Scheffer, the first-ever U.S. ambassador for war crimes issues, will be discussing his recently published book, *All the Missing Souls*. Ambassador Scheffer has also recently been appointed by the [secretary-general](#) as an expert on the [Khmer Rouge trials](#). It's a recent appointment, and we're very pleased to have him in that spot.

This book, *All the Missing Souls*, is not only a personal history of his involvement with American initiatives leading up to the establishment of the war crimes tribunal in the 1990s, but it is a valuable record of America's efforts to establish the concept of accountability for mass atrocities as a central principle in international affairs.

Punishing those who have committed crimes against humanity may not seem all that unusual today. Yet this wasn't always the case. It was only in the aftermath of [World War II](#) that the first-ever war crimes tribunals, both of [Nuremburg](#) and [Tokyo](#), were established to bring to trial individuals who were responsible for atrocious crimes against mankind. At the time, subjecting war criminals to a system of organized justice before a court of law was considered quite extraordinary.

Surprisingly, for nearly five decades thereafter, nothing much happened to make the idea of international criminal courts a reality. Then, against the bloodshed and international inaction committed against the citizens of [Yugoslavia](#) and [Rwanda](#), something finally changed. War crimes tribunals were once again established to prosecute those who were responsible for the murder and mutilation of millions.

But the journey in getting the world's great powers to unite against impunity was anything but smooth, reveals Professor Scheffer. In *All the Missing Souls*, our speaker, who was the [Clinton administration's](#) point person on international justice, provides an invaluable legacy to history as he shares with us his work on behalf of the United States in pursuing this historic mission to create the

war crimes tribunal for the former [Yugoslavia](#) and the international criminal tribunal for [Rwanda](#). Professor Scheffer was also involved in the establishment of a special court to prosecute mass killings in [Sierra Leone](#) and [Cambodia](#), as well as heading the U.S. team negotiating the [Statute of the International Criminal Court](#).

He writes about the challenges, the political and diplomatic maneuverings he encountered in establishing the ICC [International Criminal Court], knowing he would be met with defeat. As you may recall, President [Clinton](#) signed the Rome Statute, but never submitted it to the Senate, and when President [Bush](#) came in, he refused to join the International Criminal Court.

While international courts are now an established part of the emerging fragile world order, still, acquiring the necessary evidence to prosecute those responsible for genocide, war crimes, and crimes against humanity is a daunting task. Frustrating as it may have been, nevertheless, to have transformed abstract ideas into effective institutions and to have been instrumental in building a genuine system of international criminal justice during the most fertile time in the development of international criminal law since the Nuremburg trials, had to be extremely rewarding.

Ambassador Scheffer, we applaud your efforts for believing in what could be possible and for your patience and persistence in pursuing this goal, one that has resulted in creating hope, closure, and justice for so many.

Please join me in giving him a warm welcome and asking Ambassador Scheffer to join us at the podium. Thank you.

## Remarks

**DAVID SCHEFFER:** Thank you, Joanne. I'm deeply appreciative of that very kind introduction. It's a great pleasure to be back at the Carnegie Council for Ethics in International Affairs.

I spent four years of my life, from 1989 through 1992, at the Carnegie Endowment for International Peace, a sister organization funded by the same individual a long time ago, down in Washington. I still stand in amazement at the impact that [Andrew Carnegie](#) has had with his philanthropy at that time in setting up these types of organizations. I'm extremely grateful that all of you have come out for a breakfast early on a beautiful day to hear the likes of me.

Because of my recent appointment by the secretary-general to deal with the Cambodia tribunal, I just want to make it clear that I speak in my private capacity only today and not officially whatsoever.

This is a book that took about three years to write, from 2007 through mid-2010. Then it went through five months of clearance in the U.S. government, which one has to do when you're a diplomat and then you write a book. You have to make sure that all that classified information does not get spilled out. It was a rather long journey, and then it takes a year to actually produce the book. I am so happy now to be able to relate the story of what happened in the 1990s with respect to the building of five major war crimes tribunals.

I had an extraordinary opportunity. I was at the Carnegie Endowment for International Peace and I was asked to assist [Madeleine Albright](#) in the preparation of her confirmation hearing as our ambassador to the United Nations, which I did. Then I became her first hire when she attained that position.

She asked me to actually work in her Washington, D.C. office in the State Department, because she

was a cabinet member and she would be on the Principals Committee of the National Security Council, and then there would be a Deputies Committee, where most of the meetings took place, actually, in the formulation of the foreign policy of the Clinton administration. I was asked to fill that position in the Deputies Committee. It just meant that for four years, 1993 through 1996, I was really on the frontline of the foreign policy making of the Clinton administration as a member of the Deputies Committee.

This book only gives you a small snapshot of the war crimes-related issues that came before us in the Deputies Committee. There is a lot more that happened there, of course. Some of it is on my study floor, 60,000 words' worth, because the publisher, which is a fantastic publisher, Princeton University Press—when I handed in 250,000 words, they got back pretty quickly and they said, "And you shall omit 60,000 words." So 60,000 are gone, perhaps to be resurrected someday in a second book, because it really is the making of foreign policy in that first term that I think is a very, very interesting story.

Nonetheless, here we are with the issue of the war crimes tribunals. My book is about the right formula, how to discover the right formula, in ever-changing international circumstances, to confront monstrous evil, and to do so in the courtroom.

Consider the challenge we had in the early 1990s—mass atrocities, leadership perpetrators, usually an ongoing and vicious armed conflict, or at least a potentially resurgent one, a destroyed or failed court system, unwilling political leaders, and a skeptical international community much more focused on the peace or war equation of the conflict itself. That was the scenario facing us in so many atrocity zones, including the Balkans, Rwanda, Sierra Leone, and elsewhere, in the 1990s. Cambodia was different only in that the atrocities had long ended, but the infrastructure was lacking, and political landmines were all over the place.

We were not starting from scratch because of the Nuremburg and Tokyo military tribunals decades earlier, but ours was a very different challenge under far more complex circumstances. This would not be victor's justice, although some have viewed it as the powerful imposing justice upon the weak. Modern international justice is no simple code of criminal procedure either. The quest for justice meanders back and forth between international and domestic courts. Yet the search for evil aimed for the civility of the courtroom and in the growing resolve that removing war criminals from politics and military leadership would make a difference.

We have witnessed a transformational era in confronting what I call atrocity crimes—genocide, crimes against humanity, and war crimes. I have a postscript chapter in the book that I think is useful, not only for the lay reader, but particularly useful for students and professors and diplomats in the arena, where I try to define what atrocity crimes are and what the law is that governs the enforcement against them.

Throughout my ambassadorship and the four years while I was senior advisor and counsel to Ambassador Albright—and then, in the second term of the Clinton administration, I was appointed ambassador-at-large for war crimes issues, a position that had never existed, but President Clinton and then-Secretary Albright felt we needed to have a full-time envoy functionally representing that issue to all governments around the world. So my office remained in the State Department, although I got a new one called the Office of War Crimes Issues, with my own staff, which was nice.

That enabled me then to basically be on a plane for four years and travel around the world, dealing directly with governments and visiting atrocity sites and the courts themselves, in sort of a never-

ending quest to ensure that these courts not only are functional, but also that the new courts that need to be built, whether it be for Cambodia or Sierra Leone or the permanent International Criminal Court—that the United States was well represented in those endeavors with other governments and with the United Nations itself.

But I found in that exercise that it became very, very tiresome to constantly say, what is this all about? This is about genocide, crimes against humanity, and war crimes. Journalists also found this very, very tedious. How do you write an article and repeat that ten times in an article?

It wasn't until I left office in 2001 that I sat down and wrote a law review article that tried to bring this together in a more coherent, understandable way, both for practitioners and academics and for the general public. That's why I think it's so important to think about the term "atrocities crimes."

When I would go into policy meetings in Washington, it was much more important for me to be able to say, literally, "Something very awful is happening out there, and by the way, it's atrocities crimes. We have to do something about it," rather than to sit there and say, "Well, I think genocide is happening." Then the policymaker responds, "How do you know it's genocide? What do you mean, genocide? Is this like the [Holocaust](#)? What is going on?"

It becomes a very confusing dialogue, and policymakers don't have time for that, nor do they want to get into that kind of discussion.

So anyway, the term "atrocities crimes."

Then I developed the term "atrocities law" to try to describe what kind of law is actually being developed in the jurisprudence of the war crimes tribunals, the Yugoslav and Rwanda Tribunals, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and, of course, the permanent International Criminal Court. It is a unique field of law. It's not just international humanitarian law. That's an inaccurate description of what actually is the totality of what is going on in these courts.

It's not the law of war either. That's not a complete description. It's not international human rights law. That's a very poor description of what's going on. And it's really not useful to say that it's international criminal law per se, because that field of law stretches over an enormous range of categories of activity—money laundering, trafficking, terrorism—that has no relevance to the war crimes tribunals.

So what I have tried to do in my writings—and it's in this little postscript chapter of the book (it's like the end chapter; if you really want to get into this, read this)—is to try to explain what I mean by atrocities law. What I mean is, that is the jurisprudence that is literally uniquely being developed by the war crimes tribunals, and we need to understand it as a unique field of law.

All right, enough of that.

I want to try to explain this book by describing both the old world and the new world. Of course, in my lifetime, the old world has to be pre-1993 and the new world is after 1993. In the old world, prior to the 1990s—I think we need to just go back and remember how different it was.

There were no international criminal courts whatsoever. We only had the memory of Nuremberg and Tokyo, and those memories were basically vested in a few academics, a couple of movies, and some dusty shelves where the full record of Nuremberg sits up at Harvard Law School library. That was basically it. We didn't really see the Nuremberg and Tokyo experiences as guides to future

performance judicially on our watch. As we came into office, that was still pretty much the situation.

Official leadership impunity reigned supreme. There's a whole list of individuals I can list here between World War II and 1993 who led countries, led militaries, and did so with absolute impunity and never faced the bar of justice for the atrocity crimes that they were responsible for. That was basically accepted. No one assumed that they would actually reach the bar of justice. The legal concept "head-of-state immunity" reigned absolutely supreme.

We also had a very poor understanding of atrocity crimes themselves. Sure, we had the [Genocide Convention](#), but we didn't really have any experience interpreting it or prosecuting it. We had crimes against humanity as an uncodified and dangerously vague concept out there. We had war crimes, but they were tied to the [Geneva Conventions](#), were not widely being prosecuted by courts-martial around the world.

Therefore, we didn't even really understand the full scope of what war crimes are. Certainly our understanding of what they were under customary international law was very deficient and very controversial. So we had all of these sort of nascent fields of law, where everyone assumes, "Oh, yes, genocide, we've done that." No, we actually haven't yet. We don't really understand it. We don't know how to prosecute it.

So we entered 1993 with a scratchy concept of what crimes we were actually pursuing.

We also had very weak national enforcement. There weren't that many domestic courts actually out there prosecuting these crimes whatsoever.

Finally, we really had no experienced international jurists, no body of judges or prosecutors out there in the national court systems who really knew the full combination of criminal law, international criminal law, and international law and criminal procedure. How do you find all of that in one judge, who has sat there and read the texts and understands international law frontwards and backwards?

Believe me, they weren't there. In fact, one of Madeleine Albright's real aims when we were building the Yugoslav Tribunal—and this is in the book—she said, "We're going to nominate a woman. We're going to get a woman on the bench of this court." There had been no woman on the bench of the International Court of Justice in The Hague ever at that point. Now we have had many. But at that point there were none. She was determined to get a woman on the bench.

We found [Gabrielle McDonald](#) in the federal courts of Texas, in Houston, an African American, with a sonorous voice, very impressive, a fantastic criminal law judge, federal criminal law. I'll never forget her coming into my office, and we had a long discussion. It was clear that she needed to do some fast learning on international criminal law. I say that with all fairness. Here was this great judge sitting in front of me, but she had never dealt with international criminal law in the courtroom. I gave her textbooks and pointed out chapters and all this stuff. She was a real fast learner, and she picked it up and ran with it.

But that was sort of the world at that time, the sort of ad hoc, let's-get-up-to-speed kind of approach to international justice. So we lived with that.

Then we come to the new world, 1993 onwards, and we have the five major international courts—one of them, of course, in Cambodia, is actually literally a domestic court, but internationalized—being negotiated throughout that decade. We had a transformational event institutionally, actually creating the bodies that had the capacity to investigate and prosecute atrocity

crimes. We also had some UN courts ultimately established in Kosovo, in East Timor. We have domestically in the last decade war crimes chambers that have been very active in Sarajevo, in the domestic courts, and even in Zagreb and in Belgrade. So very impressive developments over the last 17 years.

What I couldn't write about in this book, because it just was part of those 60,000 words, is another kind of interesting story that you won't read about in my book, but I thought I would just mention it very briefly to you. During the 1990s, there were several courts that were not built that, quite frankly, probably should have been built. I spent an enormous amount of my time trying to get these launched, but unsuccessfully. I really need to tell that story someday, just for historical purposes.

I spent a lot of time on the issue of South Sudan and the [civil war](#) that had raged in Sudan for over 17 years, with more than a million deaths involved. I actually secretly went in to South Sudan without the permission of Khartoum. I went in with a UNICEF plane and spent a week-and-a-half actually witnessing the results of those atrocity crimes in South Sudan. I was determined that we had to do something about this. The story of how that did not happen I think is an interesting one.

The Democratic Republic of the Congo—the [killing](#) in the Congo during the 1990s was unbelievable. I spent a lot of time there, in some very dangerous circumstances. I went beyond the brief of where the State Department knew I was going. But when you get way out into the field, you find yourself in circumstances where the opportunity arises—"hop in the car, let's go down this road, and you will meet so-and-so, who is the rebel leader you've been wanting to see, because he is accused of"—and that happened several times in the Congo.

It was an experience that—we have never really achieved the justice equation for the Congo. We now have the Congo as a situation before the International Criminal Court, but that's only for crimes since 2002, not the 1990s.

[Genocide in Burundi](#) in 1993: We made many efforts to try to gin something up on Burundi, but it didn't succeed.

Finally, [Iraq](#) under [Saddam Hussein](#) in the 1980s and 1990s—forget about the [last decade](#) or the 2001, 2002, 2003, 2004 experience—don't forget about it, but I'm just saying that the level of criminal conduct during the 1980s and 1990s was obviously significant. You saw some of that play out in the [Saddam Hussein trial](#), actually, in Baghdad a number of years ago.

Finally, [Chechnya](#) consumed an enormous amount of my time as war crimes ambassador, mostly trying to gather the evidence on Chechnya. There was a lot of it. Of course, so much of it pointed to the responsibility of the leadership in that country, in Russia. You can just imagine how difficult it was for me to walk around the State Department and try to convince my colleagues in the State Department, "Let's take on Russia today." Well, that wasn't going to happen. But it was an interesting exercise in trying to strive for some level of judicial inquiry on Chechnya, but, of course, failing in the process.

I'll tell you just one anecdote on Indonesia. There was a lot of time as well in building the UN courts in East Timor after the [1999 massacre](#). I wanted to get to East Timor as quickly as possible after September of 1999. I still needed permission from the Indonesian government to get in-country, to get to East Timor. My other State Department colleagues were getting in, but I was not being granted permission by Indonesia.

The word came back that they found my title, "ambassador-at-large for war crimes issues,"

presumptive and did not wish to have such an ambassador on the ground in East Timor because it presumed that something criminal had occurred, and they were not going to accept that premise. So I never got permission from Indonesia to enter. I felt sometimes that maybe I should just change my title to "ambassador-at-large for peace and humankind" and just grab the visa and run for it.

In any event, let me just talk very, very briefly about this new era. I think we have seen the beginning of the end of impunity, leadership impunity. There's still a lot of it out there. We see it play out every day. But we also see justice play out every day with respect to a whole range of top leaders who have now been either brought to justice or are under indictment. I think that is extremely significant.

We have a much more sophisticated understanding of atrocity crimes now through the jurisprudence of the tribunals. Believe me, there's a whole legal academy now that survives on this, literally. We know rape as genocide. We know what it means to aid and abet genocide now. We know what the gravity requirements are for these crimes, the magnitude that they need to reach in order to attract the attention of international prosecution.

We know much more about command responsibility, about what it is to have specific intent and inferred intent. We know about these crimes against humanity that we call forced marriage and forced pregnancy. We know about the crime against humanity of persecution, which is actually ethnic cleansing, with much greater sophistication and practicality now than we did before.

We actually know a lot more about the crime of torture through the jurisprudence of the tribunals. It's the kind of knowledge which one only hopes would have sifted through to Washington in the very early years of this century. I think it would have provided policymakers in Washington with a much greater understanding of what this is all about. It was actually litigated before the tribunals—a much more comprehensive understanding of the crime of torture. But somehow it didn't sift through.

We also have much stronger national enforcement of these laws, with those countries that have joined the International Criminal Court. There are 120 of them now. They have been implementing the Statute of Rome and the crimes that are within that statute—genocide, crimes against humanity, war crimes—into their domestic criminal codes. That's an enormous leap in criminal law throughout the world. That means national courts are much more capable now of actually prosecuting these crimes.

That's encouraged by the Rome Statute, through a principle called complementarity. If you can run with it domestically, run with it, and we, the ICC, will back off. Now that they are implementing this in their national criminal codes, that is a much more realistic prospect, and we actually see it playing out in various cases.

Finally, we have much more experienced jurists now. We have a whole pool of international jurists whom we can draw upon, who understand this field of law and who can walk straight into the courtroom and start practicing it immediately, as well as prosecutors, as well as a very, very talented and expert international defense bar now.

Don't assume that you have any easy case of it as a judge or a prosecutor in these courts. You will be challenged every single moment by expert defense lawyers. And that's exactly the way it should be, because due process is absolutely central to the functioning of these courts.

I would like to, if I may—Joanne, I'm in your hands in terms of whether I have a moment or two to read a passage from the book? Is that possible?

**JOANNE MYERS:** Yes.

**DAVID SCHEFFER:** I have to be judicious as to what I'm going to read here. I know I have a very sophisticated audience, and I want to give you the best I can. If I may read just two short passages from the book—and, Joanne, tell me if I have to stop. These are just a paragraph or two each. They are no more than that.

This book has chapters on all of the tribunals, sometimes in multiple number because it takes that to understand how one negotiated and created these tribunals. The ICC, for example, has three chapters, before, during, and after Rome; the Yugoslav Tribunal, a couple of chapters; Rwanda, a few chapters, et cetera.

Then there are chapters—one on the Rwanda genocide itself and what we were doing back in Washington or not doing, the insider's view of Washington decision-making during the Rwandan genocide, which I hope is very useful for you; the [Srebrenica genocide](#) of 1995, what was going on back in Washington during that period. There's a whole chapter on the inside-Washington view of Srebrenica.

There's a chapter called "Unbearable Timidity," which is the five-year hunt for [Karadzic](#) and [Mladic](#) in Bosnia from 1996 through 2001, on my watch, and the failure to actually capture those two individuals. I tell you the story of that.

I tell you the story of the hunt for [Pol Pot](#) in Cambodia, where we made a very concerted effort to try to capture Pol Pot on the border of Cambodia and Thailand. We were within hours of doing so, literally, and then he died, very mysteriously. I tell that story. It has really never been told before, because this was a very behind-the-scenes story, trying to get Pol Pot captured.

Then I have, of course, a chapter about the [Kosovo operation](#) in 1999, which, for me, became the pinnacle of my work as war crimes ambassador, because the U.S. bureaucracy came together and enabled me to really operate effectively as a war crimes ambassador in an ongoing atrocity. For that, I was very, very thankful.

Let me just read you a very short passage about the United States and the Rwandan genocide in 1994:

"The United States failed in 1994 to respond effectively to the genocide that engulfed Rwanda. The reasons did not originate only with the brutal [killings](#) of 18 American soldiers on the streets of Mogadishu, Somalia, six months earlier. To be sure, that firefight had an enormously negative impact for years thereafter on Washington's attitude about military engagements in Africa or with anything labeled 'UN,' and it shaped the context for failing to intervene to end Rwanda's genocide.

"But Mogadishu was a distant scream that penetrated the subconscious thinking of policymakers. The real struggle took place over more contemporary issues that required immediate decisions for effective action but instead triggered a multitude of excuses and devastating delays. For those of us in the policy rooms at the time, the memory of our vacillation over the horror is sickening and will never be extinguished. I owe the victims and their families my soul every day.

"During the Rwandan genocide, policymakers, including American, European, and UN officials, equivocated and made decisions with tragic consequences. The National Security Council failed to convene the Deputies and Principals Committees soon enough. They could have focused urgent attention on the genocide and sparked bold decision making and interagency coordination. While the

Pentagon tied itself in knots reviewing performance criteria for peacekeeping operations, the State Department remained faithful to a failed peace process that was buried beneath the bodies stacking up throughout the countryside of Rwanda.

"What happened? The United States responded conventionally to an extraordinarily unconventional crisis and thus lost opportunities to reverse the tide of killings at the earliest stages."

Now, if I have time, I'm just going to read one other short passage, which is from the ICC negotiations. This is June 1998. I was about to fly off, as head of the U.S. delegation, to the Rome negotiations in the summer of 1998, where we would conclude the treaty for the International Criminal Court.

Madeleine Albright and I had been trying to get a change in my instructions so that I could go to Rome with a more ambitious agenda that would prevail and have the United States really back in the leadership of the negotiations. But it required a change in instructions. The principals were deadlocked.

We had to go to the president, and so I called for a meeting with the president—I asked for a meeting. He was occupied. The chief of staff told me he was preparing for his China trip. Furthermore, it was the [Monica Lewinsky](#) summer. I was told that I could meet with the first lady, [Hillary Clinton](#), in the alternative, and then she would communicate with the president.

That may surprise some of you, but actually I had spent time with Hillary Clinton before because Madeleine is very close to Hillary, and when you're a close aide to Madeleine, you end up in Hillary's circle occasionally. I certainly had had long experiences of talking with her. I found her brilliant, extremely impressive, and, frankly, meeting with her was somewhat satisfactory for me, if she were then to communicate with the president.

"On that day in [June] 1998, Hillary entered the map room of the White House with [Melanne Verveer](#), her chief of staff. [[Eric](#)] [Schwartz](#) and [[Jamie](#)] [Baker](#) of the National Security Council, one of their deputy lawyers, and I took our assigned seats on the couch and assorted chairs. Hillary appeared tired and drawn, as if she had been through some kind of hell and back. I worried what that might mean for the fate of our discussion, but I plunged ahead explaining precisely what Albright had set forth in the late May teleconference as the shift we needed in the U.S. negotiating position.

"Baker," the NSC lawyer, "then weighed in with the Pentagon's view to hold firm on the longstanding American requirements. Hillary asked how the negotiations had gotten so convoluted, with such complexities over jurisdiction. Why not, she asked, just have a global war crimes tribunal modeled on the Yugoslav Tribunal, which was created by the Security Council? When this all got started, she thought we would simply reproduce the Yugoslav Tribunal on a world stage. I explained why the International Criminal Court would be a treaty-based court independent of the United Nations and that after years of negotiations the situation had changed as governments expressed their largely negative views about the Security Council controlling a judicial process.

"Hillary expressed her amazement that the French did not find the International Criminal Court abhorrent given that country's involvement in Africa and the exposure of their forces there. I explained that France was one of the most engaged governments in the negotiations and saw this as a means to lead in Europe and in the realm of international justice. (I also knew they were likely to sign the Rome Statute, perhaps even at the conclusion of the diplomatic conference.)"

And they did. "She absorbed without flinching Baker's condescending warning that since the

president finally understood the role of the military, if he were to support the Pentagon position President Clinton would earn the military's permanent respect and allegiance."

Off-brief, of course, I will tell you that I thought that was owed on January 20, 1993, when he was sworn in as president.

"And that meant he needed to back the current U.S. insistence on full immunity from prosecution by the court as both a nonparty state and as a possible future state party to the court. In rebuttal, I reminded her of the futility of trying to attain full immunity that would extend even to our status as a state party and that it was undercutting our credibility to achieve major objectives in the treaty. Hillary paused to reflect, thanked us, and told me she sympathized with how difficult my job would be in Rome. I saw that as a signal that she would advise the president to back the Pentagon's futile position, and that is exactly what he did."

So a couple of small passages.

I would love to take questions now. Thank you very much for coming here this morning.

### Questions and Answers

**JOANNE MYERS:** I have to say that normally we don't have readings, but with those readings, you titillated us to want to buy the book and read more, I'm sure.

**QUESTION:** Allen Young.

What do you think would be necessary to get the United States to ratify the ICC treaty?

**DAVID SCHEFFER:** Several things. I don't think we should be too optimistic that it will happen soon, certainly not with the current political composition in Washington, and also the simple fact that I believe the [Obama administration](#) has some other treaties lined up for priority ratification long before the Rome Statute, including the [Comprehensive Test Ban Treaty](#), the [Law of the Sea Convention](#), which should have been ratified ages ago, et cetera.

One of the things that I think we have to do is in order to give us confidence to join the International Criminal Court is to know that our own criminal code and our own military code of justice are modernized so that our courts are fully capable of investigating and prosecuting these precise crimes in the Rome Statute. Right now a lot of those crimes cannot be effectively investigated or prosecuted in our domestic courts.

The reason that's so important is that, just like with our European friends and New Zealand and Australia, Japan, Canada, all members of the court—in fact, all of our allies are members of the court, with the exception of Turkey and Israel—they are modernizing their codes so that they can actually say to the ICC, frankly, "You back off because we can do this."

In fact, in a technical sense, we're more exposed than they are to the ICC, in many respects, because they have this inherent capability now of taking this on themselves, and the ICC will have to back off. We can't say that we can effectively prosecute the crime against humanity of persecution. It's not in our federal code, so how can we say we can do it?

I worked with Senator [Dick Durbin](#) of Illinois back in 2006 onwards on some legislation that he spearheaded in the Senate Judiciary Committee's Human Rights Subcommittee to try to ensure that

U.S. law starts to get modernized in this respect. Over a series of years, he worked very hard to get bipartisan support, and he achieved it, for the [Genocide Accountability Act](#), the [Child Soldiers Accountability Act](#), and the Human Trafficking Accountability Act.

Those are just slices of what's in the Rome Statute. That's not a total picture at all yet. But what that means is that the United States cannot be a sanctuary for anyone of any nationality who commits those crimes anywhere in the world. It's almost a near-universal jurisdiction concept. The only nexus that's required with the United States in order to prosecute someone is for that perpetrator to land in the United States, to set foot on our territory. He sets foot on our territory; we take him down.

That used to not be the case. You could commit genocide in Zambia and live happily ever after in that nice home near Disney World. You're a foreigner, the crime committed overseas; our law doesn't reach you. That is no longer the case.

But it does mean we need to keep those kinds of initiatives alive. Senator Durbin introduced something called the [Crimes Against Humanity Accountability Act](#), which really was the large incorporation of those crimes against humanity into the federal criminal code—a very ambitious piece of legislation. It has not moved because the composition of the House changed and it just has not been a realistic initiative in the last couple of years.

But I hope someday—if we can get that kind of legislation in place, then, if a president finds the moment to actually go the Senate, it's a much easier project because we can say it's already in our domestic law. We're safeguarded in our domestic criminal—and by the way, the [Uniform Code of Military Justice](#) is extremely archaic on this issue.

Do you know that most of what we regard as identifiable war crimes, which we identify in the Rome Statute very specifically, you can't find in the Uniform Code of Military Justice? When you saw that Haditha [conviction](#) come down last week, three months suspended for the [massacre](#) of 24 civilians in Iraq—a very troubling decision, in my mind—it was for dereliction of duty.

What are we talking about here? If we had a war criminal before one of these war crimes tribunals, that would be the least of our concerns. We would have real criminal charges against this individual before a war crimes tribunal. We don't seem to be able to do that in our Code of Military Justice. All of that needs to be modernized.

**QUESTION:** James Starkman.

Professor, as a former head of the Atrocities Prevention Interagency Working Group, how would the current status of Mr. [Assad](#) in Syria be viewed? What acts would be within the province of that group to prevent further massacres and so forth?

**DAVID SCHEFFER:** You're referring, of course, to my service in 1999 and 2000 as head of the Atrocities Prevention Interagency Group, the first kind of group that we had ever had in the government—obviously an outgrowth of all of our experiences in the 1990s. The president appointed me to try to get ahead of atrocities. We developed quite an interesting track record over two years, which both failed and worked. I won't go into the details of that. I actually write a little bit about that in the book. But it actually set up a template that you will see now rolled out very shortly.

You saw the announcement last August. I think any day now you will see the formal announcement—maybe I'm behind the times on the news—of the Atrocities Prevention Board, which is being created by the Obama administration for this precise objective—namely, to organize our government

and also our relationships with other governments so that we can coordinate with other governments, coordinate internally to get ahead of atrocities before they overwhelm us. I had the privilege last October of participating in some useful meetings for the creation of that atrocities board.

[Syria](#) is case number one. It is unfolding before our eyes. I think you can make a very credible claim—the UN high commissioner for human rights, [Navi Pillay](#), has certainly made this claim now—that the conduct of the Syrian government constitutes the beginnings of a crime against humanity—systematic widespread assault on a civilian population in many different populated centers of Syria, with death tolls—get this, we're looking at 50 to 60 deaths a day on the streets of Syria now, literally. And that is organized. Someone is organizing that coherently in terms of police crackdowns on the civilian population. So it's ripe for investigation.

I know that before the Security Council—one of the first steps one would take in atrocities prevention is to see if there is anything the Security Council could do in a preemptive fashion to try to dissuade that kind of conduct. Of course, one would be the Security Council actually referring Syria to the International Criminal Court for investigation. That is so unlikely, as we know, because of the Russian and the Chinese attitudes on the situation at the Security Council.

Nonetheless, that could be a step. Of course, there are so many other steps that we see unfolding now—economic sanctions, diplomatic sanctions, isolation, getting the Arab League to come in and apply as much pressure as possible. All of those are the types of options that you would have on a policymaking table for atrocities prevention. You would have your checklist.

Military intervention is always the last option. But also you want to make sure that it's not too late on military intervention. It's a very, very fine calculation. But I think we're all sensitized now to the need to understand that atrocities are under way, that the leadership has some role in the commission of those atrocities, and we need to get on top of that.

I do think that President Assad, unless he's been away from the news or is being very poorly advised, has to understand that he is exposing himself ultimately to judicial risk. That's the new world. If he thinks he can somehow walk away from this without being exposed to the risk of judicial prosecution, whether it be before a future Syrian court—and don't underestimate that possibility; think [Egypt](#)—or the International Criminal Court or even a regional court of some sort, he's delusional.

He has to understand that that risk is out there. Other leaders have mitigated that risk in their performance after understanding that there is a judicial risk out there.

**QUESTION:** What is the significant difference in procedure between the International Criminal Court and domestic courts?

Secondly, don't you think those accused persons being tried by the International Criminal Court can as well be tried by domestic courts?

**DAVID SCHEFFER:** Yes. That's a very good question. I'll repeat it. What's the significance in terms of criminal procedure between the International Criminal Court and domestic courts? And shouldn't people be subject to prosecution before domestic courts?

I'll take the second one first. It is, of course, preferable that domestic courts take on these prosecutions. That is built into the Rome Statute for the International Criminal Court. In fact, it's sort of built into the statute that someday the ICC be rendered useless because national courts will have

actually modernized their codes and there's the political will and capability to actually prosecute these types of crimes, and there is a realistic development of extraterritorial jurisdiction in national courts—not pure universal jurisdiction in all national courts, because if you went in that direction, there would be relative chaos,

I think, in the international legal system, but rather surely the capability of national courts to ensure that they can take on effective prosecution certainly of their own nationals and of other foreigners who fall within their territorial or other jurisdiction, whether it be what we call protective jurisdiction or passive jurisdiction, where your nationals are victims of somebody who has attacked them.

So all of those prospects are out there. National courts are taking on that challenge, developing it. It will take decades, but I think the prospect is out there.

There is an advantage, however, at this stage to International Criminal Court procedure. One of the reasons we created that court in the 1990s was to get beyond the very laborious and expensive exercise of building new ad hoc tribunals for every atrocity.

After the Rwanda Tribunal was built, within a year or so I labeled what I saw unfolding in the Security Council as "tribunal fatigue." I would come before the Security Council and ask for the building of other courts, such as one for Sierra Leone or one for Cambodia, in the same model as Rwanda and Yugoslavia, and I would be told, "You know, we're not going to keep going down this pattern of building one court after another."

The ICC does provide a form of efficiency, with one body of judges, one body of prosecutors, an experienced defense bar, one location in The Hague. That's a management of resources. It also means that when they get seized with a situation, they can actually efficiently investigate, with experience, expertise, perhaps far faster than a domestic court would be able to gear up to investigate these very complex crimes.

I think when you look at atrocity crimes, you have to remind yourself that investigating them is similar to if you are involved in complex commercial litigation in your domestic courts—antitrust cases, massive discovery. Guess what? That can be translated into criminal law, too. Welcome to atrocities. It takes years to compile this evidence. It's a very, very complex exercise. And that experience is within the international tribunals.

**QUESTION:** John Richardson.

It's my understanding that, putting aside the Nuremburg criminal trial, which was an international one for the leading figures, there were hundreds of people who were prosecuted, many of them executed, in the American sector of Germany or in the British sector and probably in the French. It was for stuff that was happening in Poland maybe, in a concentration camp or something. So I'm sort of puzzled that we now have a—why is the United States so saddled with an archaic code? It worked quite well in 1945, and quite quickly. We've got these people in [Guantanamo](#) that we don't seem to know what to do with.

**DAVID SCHEFFER:** Yes, exactly. A very good question. Those occupation courts in Germany, which were subsequent to the major Nuremburg trials that we're so familiar with, operated under something called Council Law No. 10, as I recall. That Council Law No. 10 invoked and brought the original statute of the London Charter of the Nuremburg trials into the Occupation court scenario. They have these international crimes then embedded in the Council Law No. 10.

That's distinct from the Uniform Code of Military Justice. It's just not the same thing at all.

Yes, those occupation law courts had the capacity to prosecute war crimes and crimes against humanity, as sort of sister courts to the major Nuremburg trials.

Your question is so penetrating. Why is there this sort of lag in the modernization of our own criminal code and Uniform Code of Military Justice?

I actually don't have an honest for you on that, other than that I think there just needs to be a greater awareness, particularly in the JAG [Judge Advocate General's] Corps. We have some fantastic JAG officers who—every time I negotiated, for years, on the ICC—I was head of the U.S. delegation. Remember, the talks on the ICC were not just Rome 1998. They were 1995, 1996, 1997, 1998, 1999, 2000, after Rome, too. I always had a retinue of JAG officers with me, as well as Justice Department lawyers, in my delegation. There is good expertise in the JAG Corps about all of this.

But maybe it's somewhat intimidating to think about getting that specific in terms of war crimes charges within our own code for our own soldiers. I hope not. But I think it's something we need to do now. We need to face up to the reality of how the world is changing and bring that into our own legal system.

**QUESTION:** Richard Valcourt, *International Journal of Intelligence*.

Nuremburg and Japan were basically victors' justice. In more contemporary times, it probably makes sense that the European Union, the United States, and so on prosecuted individuals who disrupted events on the continent, in the Balkans and so on. But then there's a problem when Western nations start getting themselves involved in a continent like Africa, where the African Union perhaps should take responsibility for prosecuting those who are disrupting things on that continent. Don't we run the risk of a certain kind of meddling or neocolonialism here?

**DAVID SCHEFFER:** First, you're talking about the fact that all of the situations before the International Criminal Court are in Africa. Of course, the creation of the Rwanda Tribunal by the Security Council was also Africa. The creation of the Special Court for Sierra Leone was Africa. Yes, a lot of these atrocities have found their locus in Africa. The question is, shouldn't Africans be judging their own?

It has been an evolutionary process. Please recognize that in the 1990s there was no initiative to do so. There was no real capacity to do so. It was natural for the Rwanda Tribunal, frankly, to be a Security Council project, particularly in the immediate aftermath of the worst genocide in that country.

The interesting thing about the International Criminal Court is that a large portion of its membership is Africa. Africa was a leading wedge in the drafting and in the support for the Rome Statute. I don't know the number off the top of my head, but a majority of African countries—a supermajority, I believe—are members of the International Criminal Court. So we have had enormous buy-in to the International Criminal Court by Africa. That's very important.

There have been objections by particularly the African Union as to the indictment and pursuit of President [al-Bashir](#) of Sudan by the ICC. That's an issue that has required very deft management. I think it has sensitized a lot of people to this concern about Africa.

The selection of the new prosecutor for the ICC is [Fatou Bensouda](#) from the country of Gambia. She has been deputy prosecutor for the last nine years. She will now become chief prosecutor. The

African Union supported her candidacy for the lead position. So my feeling is that perhaps, with Fatou in the prosecutor's seat as of June of this year, we might start to see a slight change in this equation.

I think the real challenge for the ICC—and, of course, we want the ICC to only take those situations on board that merit true investigation, not some political mandate being achieved—I think it is going to have to arrive at some point soon where the ICC takes a non-African situation and runs with it.

Right now they have under preliminary examination—we call it preliminary examination prior to formal investigation—Colombia has been so for many years. I have just been hearing some interesting news about Colombia, that the domestic judicial effort there, which is the whole test of whether the domestic courts can take on the [situation](#) in Colombia with the [FARC](#) [Revolutionary Armed Forces of Colombia], et cetera, has actually been lagging. Once again we have the prospect: Should the ICC actually take Colombia on board? It's a state party.

Other situations are Afghanistan, which I think is a very, very relevant situation—that's the [Taliban](#) and, of course, [coalition military forces conduct](#) in Afghanistan. Afghanistan is a state party to the ICC.

Then, of course, there's the Palestinian [situation](#). They have a submission before the court. It hangs on whether or not Palestine is a state. The prosecutor has not determined yet whether it is. I think he is probably now deferring to the special committee, I think, set up by the Security Council. One of the Security Council's committees is examining that issue, as you know, from last summer.

So there are many situations out there that could start to turn this tide a little bit for Africa.

**QUESTION:** Arlette Laurent.

I wonder, is there a timeframe for the ICC to be able to prosecute? In other words, how far back can they go?

**DAVID SCHEFFER:** Interesting question. I'm going to actually answer this with a slight degree of detail, for only a couple of minutes.

The jurisdiction of the court reaches back to July 1, 2002. That was the opening date of the operation of the ICC. Anything that occurred prior to July 1, 2002, cannot be dealt with by the ICC. Its temporal jurisdiction is only July 1, 2002, onwards. That's by virtue of the Rome Statute.

However—and I have argued this in some of my law review writings, and I argue this in the book as well, in one of the ICC chapters—there is also an additional feature to the Rome Statute that I think we should at least try to understand. I'm not convinced that the Rome Statute for every single situation reaches back to July 1, 2002. When we were negotiating the statute, we wanted to encourage countries to join the court, and one of the ways that you encourage them to join the court is to let them know that from the moment of their ratification and joining the court, from that moment forward, they are covered by the court.

It's not that you join the court, and by the way, guess what; Did you know that you've been covered ever since July 1, 2002, for everything you have ever done? That doesn't really incentivize you to join the court. What's the point of joining if you have already been covered since July 1, 2002?

I explain in the book how this became sort of a complicated equation in the negotiations. I would

argue that we should encourage membership in the court, particularly by the United States. One way to get there—this goes back to your question about how do we get to ratification of the Rome Statute—is to assure countries that the court is not there to examine their conduct prior to the date of ratification, unless, under the terms of the statute, the Security Council has referred your situation since July 1, 2002, to the court under a Chapter 7 referral resolution. That would trigger it, yes.

But the deal we have struck is, we want you to join the court, and give you the confidence to do so by not subjecting you to automatic scrutiny for pre-ratification conduct.

A lot of people will dispute me on that. I understand it's a minority point of view. But I was the negotiator, and certainly as we were negotiating the treaty, that was the presumption. It was only in that final round of the negotiations that the jurisdictional issues began to make that a more complicated proposition.

Let me give you just one example. If we could have in the peace negotiations between Palestinian authorities and Israel—and I have said this many times to my Israeli colleagues and publicly—I would think in those peace negotiations you would want to sit down with the Palestinians and agree that the peace agreement will have a bilateral agreement between both countries that any actions prior to the date of the peace agreement being signed are off-deck in terms of ICC investigation—the Palestinians agree not to bring [Operation Lead](#) to the court; there is an agreement that pre-peace agreement actions are not going to be brought the International Criminal Court.

That will incentivize, I would hope, Israel in particular to understand that achieving a peace deal with the Palestinians at least neutralizes that whole issue. From that point forward, of course, I think a new state of Palestine would almost immediately become a state party to the Rome Statute. I think we have to assume that. And, of course, at that point, then, anything beyond that stage, if it happens on Palestinian territory, would presumably be open to scrutiny by the ICC under territorial jurisdiction.

But at least we will have agreed in the peace deal to start with a clean slate between these two states and move forward into the future. That's just the pragmatic deal that I think has to be made in that peace agreement.

**JOANNE MYERS:** I thank you for being our guide on what it takes to build an international criminal justice system. Thank you very much. It was a terrific talk.

### Audio

David Scheffer was at the forefront of the efforts leading to criminal tribunals for the Balkans, Rwanda, Sierra Leone, and Cambodia. His quest has been to "to discover the right formula, in ever-changing international circumstances, to confront monstrous evil and to do so in the courtroom."

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### Video Clip

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