The state of international justice: an interview with David Scheffer
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Over the past week, I've been emailing with David Scheffer, the U.S. ambassador for war crimes issues during the Clinton administration. Now a professor at Northwestern University's law school, Scheffer played a key role in the development of the international tribunals for the former Yugoslavia and Rwanda. He also led the U.S. delegation at the 1998 Rome Conference that created the International Criminal Court (ICC). Scheffer has a new book out, *All the Missing Souls*, published by Princeton University Press. It's an engaging first-person account of some the most important recent developments in international criminal law. It's indispensable for anyone interested in the international justice movement. Below is a lightly edited compilation of our exchange:

DB: One question often raised about international justice efforts is how they affect the calculations of those in power. Do they lead people in the command of governments and armed groups to change their behavior? That question has a particular importance when, as in Libya, an international court gets involved in the midst of an ongoing conflict. What's your view on what the record to this point shows?

This is one of those questions that seeks to unravel the thinking of powerful perpetrators. International war crimes tribunals should not bear the burden of both punishing atrocity crimes and deterring them. The latter may indeed be a fortunate result of the process, but these courts are designed first and foremost to investigate past atrocity crimes and bring the perpetrators to justice. Of course we hope they will deter future commission of such crimes as well, and sometimes that surely occurs. Following the indictments of Radovan Karadzic and Ratko Mladic after the Srebrenica genocide, no further massive crimes were masterminded by either individual. A few weeks after Slobodan Milosevic was indicted in May 1999, the Kosovo conflict reached a negotiated end and NATO forces streamed into Kosovo. After Liberian president Charles Taylor was indicted, he left office swiftly, bound for temporary refuge in Nigeria before arriving in The Hague. The ICC indictment of Sudan President Omar Al-Bashir may have guided his conduct, both in terms of the narrow range now for his foreign travel and his approach to the independence of South Sudan. The indictments of Moammar Gadaffi, his son, and intelligence chief certainly demonstrated to all of them a "no way out" reality that, combined with rebel advances and NATO air power, forced them to abandon power and seek escape from capture.

It would be folly to think that indictments alone can radically alter a tyrant's behavior, but they surely influence that behavior in ways that constrain their options and ultimately

diminish their exercise of power. Indictments are primary vehicles to delegitimize leaders, both at home and abroad. Kathryn Sikkink's new book, *The Justice Cascade*, which I reviewed recently for *The New Republic*, makes the deterrence argument eloquently and with 30 years of empirical evidence to support it. So this is no longer a matter of anecdotal conjecture. Deterrence is becoming a reality of human rights prosecutions.

DB: A frequent criticism of the international justice project--and the ICC in particular--is that these are mechanisms that affect the weak, not the powerful. Can you imagine a major power—say the United States, United Kingdom, France, China, or Russia--ever facing ICC arrest warrants?

Scheffer: Bear in mind that some major powers, like Britain and France, are members of the ICC and have therefore already agreed to be subject to its jurisdiction and potentially its arrest warrants. It is entirely possible that a major power's leaders could face ICC arrest warrants in the future, but I would hope that policymakers and military commanders are smart enough to avoid the planning and execution of atrocity crimes in the first place. The worst platform upon which to examine this issue is the one that upholds some odd theory that major powers are entitled to impunity for the commission of atrocity crimes. At the end of the day the rule of law must prevail, but the Rome Statute invites nations to get the job done themselves and thus avoid the prospect of ICC arrest warrants.

That being said, if the military forces of a major power commit atrocity crimes on the territory of an ICC member state, or if the major power itself is an ICC member and acts on the territory even of a nonparty State, the common view is that jurisdiction indeed can be triggered over that major power's leaders allegedly responsible for the commission of such atrocity crimes.

British conduct in the Iraq war was scrutinized by the ICC prosecutor and, although he did not find a basis for initiating a formal investigation, he could have done so. He also acknowledged the value of Britain's domestic investigations. American military performance in Afghanistan is presumably part of the ICC prosecutor's current review of alleged atrocity crimes in Afghanistan because Afghanistan is a court member. The Prosecutor has not determined to initiate a formal investigation in Afghanistan, but he has the power to seek the judges' approval for one.

In practice, such arrest warrants remain unlikely because the ICC prosecutor will be looking for criminal intent as well as criminal conduct. I would argue that establishing the requisite criminal intent in commanders and political leaders will be less likely for the highly professional armed forces of many of the major powers. There may be terrible mistakes in targeting, for example, but the ICC prosecutor typically would have to find that US commanders intentionally set out to kill civilians. The prosecutor will pause before seeking an indictment to that effect.

Further, the principle of complementarity under the Rome Statute is extremely important,

as it requires deferral to national investigations and prosecutions where the nation is willing and able to undertake such tasks, before the ICC seizes jurisdiction, if at all. If the United States, for example, wants to insulate its political and military leaders from ICC arrest warrants, Congress needs to ensure that the federal criminal code and the Uniform Code of Military Justice are fully modernized to incorporate atrocity crimes of genocide, crimes against humanity, and war crimes. That has already begun, under the leadership of Senator Dick Durbin, with such laws as the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Human Trafficking Accountability Act, but there is still more to do to prove that federal prosecutors and federal courts, as well as JAG officers and courts martial, are fully capable of investigating and prosecuting American officials for any alleged atrocity crimes. The War Crimes Act of 1996, as amended in 1997, was a good start for war crimes accountability under U.S. Law, but the Military Commissions Act of 2006 severely undermined it and thus proved to be a regressive influence. In contrast, Britain and France have modernized their domestic laws to expand accountability, not contract it. It would be folly to maintain the considerable gaps that still exist in US federal and military law regardless of whether the United States joins the ICC.

DB: Is it possible the US will be an ICC party in the next decade?

Scheffer: Yes. But the political calculations are complex and there is rarely a good time to take such an initiative. The challenge at home is to ensure that federal and military law fully cover the atrocity crimes of the Rome Statute so that there is no doubt in the capability of our courts (rather than the ICC) to investigate and prosecute such crimes, particularly when any Americans are alleged to be involved. The opportunity for the United States lies in truly leading, or at least sharing the lead, with other nations in the pursuit of international criminal justice. Even if one tries to argue today that America remains at the forefront of the pursuit of war criminals, that argument will never resonate unless and until we join the ICC. The world has changed and the ICC, with 119 states parties including practically every ally of the U.S., is the primary engine of international criminal justice. This country has so much more to gain by joining with others to bring war criminals to justice than it has to lose from the manageable risk of falling under the scrutiny of the ICC prosecutor some day. Ratifying the Rome Statute gives the United States the opportunity to demonstrate that we are not intimidated by the rule of law, but rather embrace it.

DB: In your book you describe a Clinton administration that was unable to develop a coherent and realistic negotiating strategy for the Rome conference. Your account suggests that there may be serious systemic problems as the US tries to engage in complex multilateral negotiations. Do you see any signs that the US has become better at this?

Scheffer: I'm handicapped in answering this question because one really needs to be in government to gauge how forward-looking and organized the federal agencies are to engage effectively in complex multilateral negotiations. I've been on the outside since 2001. Nonetheless, I think the following can be fairly stated:

During the George W. Bush Administration, leading officials such as Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and State Department undersecretary (later US ambassador to the UN) John Bolton engaged vigorously to derail multilateral negotiations and undermine international treaties, favoring instead an exceptionalist American approach--disdainful of international law--in such matters as war crimes, nuclear arms control, and global warming. The State Department legal adviser's internal resistance to the torture memoranda and all that flowed from those documents demonstrates, however, that there remained deep divisions within the federal bureaucracy about the so-called war on terror and that reality only further complicated how the United States projected itself in multilateral negotiating bodies.

During the Obama Administration there appears to be a stronger coordinating effort by the National Security Council to bring agencies together faster for more effective decision-making in multilateral negotiations and to engage the president sooner as a major player in the multilateral dynamic. That does not mean the US position has prevailed at all times, by any means, but it appears better organized. The one glaring exception seems to be American diplomacy relating to the Palestinian bid for statehood status at the United Nations. We appeared to engage on this issue far too late to use the issue as leverage in re-invigorated peace talks and to persuade other key nations of the significant equities at stake for the long-term resolution of the Israeli-Palestinian stand-off. When assertive diplomacy is being used only in the final week or two prior to a key initiative at the United Nations, it's almost always too late. Perhaps I have misread what is in the public domain about our efforts on this issue, but it certainly seemed to me to be a repeat of some of what I encountered in the ICC talks, namely, the lack of a realistic but also innovative game plan being decided and then pushed very hard months before D-Day at the UN.

An interesting process to watch unfold now is the imminent arrival of the new Atrocities Prevention Board, mandated by President Obama. This body is designed to coordinate relevant federal agencies to identify and respond early to the threat or eruption of such atrocity crimes as genocide, crimes against humanity, and war crimes globally. The Board, which traces its origins to the atrocities prevention interagency group I led in the final two years of the Clinton administration, may prove a useful model for how other complex issues of multilateral character can be better organized within the federal bureaucracy so that the United States can lead effectively, either up-front or from behind, to meet the toughest global challenges of the 21st century.

DB: You write in the book about being treated rather coldly by Secretary of State Madeleine Albright after the Rome Conference. Do you think she blamed you for the result?

Scheffer: I do not believe Secretary Albright blamed me for the result in Rome. She was very aware of the forces arrayed against me in Washington and the intransigence of key foreign delegations to further compromise. She was hit in August 1998 with the embassy

bombings in Kenya and Tanzania and that really swamped her time and compelled her to focus on anti-terrorism objectives. There may have been a calculation among her other top advisers that the ICC was a doomed endeavor and that there were other priorities, particularly on Capitol Hill, that she should be spending her political capital upon. That could have led to a decision to shift me into the shadows, at least for a while, as I must have symbolized a setback in the administration's foreign policy. But by the time the Kosovo campaign began in March 1999, my shadow days were over. I nonetheless plunged forward with the ICC, and ultimately with a great assist from Albright in late December 2000 before President Clinton decided that the United States would sign the Rome Statute.

DB: What has surprised you about the trajectory of the international justice movement since you left office?

Scheffer: I was surprised at how oblivious the George W. Bush Administration was to the positive and indeed revolutionary advancement of atrocity law--the law of the war crimes tribunals--during the 1990s. Just a basic knowledge of the jurisprudence of the Yugoslav and Rwanda Tribunals, and of how the Rome Statute of the International Criminal Court embodies crimes firmly embedded in customary international law with the approval of U.S. negotiators, would have guided the Bush Administration towards a far wiser policy of detention, interrogation, and prosecution of alleged international terrorists. It was as if the prior decade had not occurred and all of the work we had accomplished from 1993 through 2000 abandoned when confronted with our own challenges in the realm of atrocities. It was very frustrating for me to witness from outside the government, particularly when the ill-conceived torture memoranda were revealed and the incredibly foolish and illegal detention and interrogation practices came to light.

But I was also surprised when the Security Council, with strong American and French support, quickly established the Special Tribunal for Lebanon to investigate and prosecute the assassination of Lebanese Prime Minister Rafik Hariri. I had assumed that the days of Security Council criminal tribunals had ended with the creation of the International Criminal Court and with the hybrid frameworks I had to negotiate for the Special Court for Sierra Leone and for the Extraordinary Chambers in the Courts of Cambodia towards the end of the 1990s. Yet the Security Council rose to the challenge in Lebanon relatively swiftly and that was indeed impressive and unexpected.