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History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Louise arbour

Aryeh Neier

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HISTORY AND FUTURE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

THE HONORABLE LOUISE ARBOUR
ARYEH NEIER

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INTRODUCTION

ARYEH NEIER
PRESIDENT, OPEN AIR SOCIETY

I am Aryeh Neier, President of the Open Society Institute, and it is my privilege this afternoon to introduce Justice Louise Arbour. Justice Arbour has served as the Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda for the past year and a half.

I just asked her to reconfirm how long she has been in office. She thought for a moment, and agreed that it was a year and a half—though it felt like twenty years. I can sympathize with her sentiments.

It is an extraordinarily demanding assignment. The responsibility for bringing prosecutions in two international tribunals on two continents—with the extraordinary range of crimes that were committed—is incredibly daunting.

I can recall some five years ago, when the Tribunal for the former Yugoslavia was being established. There were many persons skeptical about the effort. Mainly, they felt it would be impossible to apprehend those indicted by the Tribunals and that the entire cause—international justice for great crimes—would be set back by the establishment of the tribunals. I think the events of those years have proved the nay-sayers wrong, even though it was not always clear.

It took some fourteen months after the United Nations Security Council approved the establishment of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) until the appointment of a chief prosecutor. Inevitably, that set back the effort to bring indictments. The first Chief Prosecutor, Justice Goldstone, had to focus a large part of his efforts on the attempt to win international public backing for the Tribunals. Accordingly, much of his time was devoted externally. I think it is fair to say that in contrast, Justice Arbour primarily focuses internally on the operations of the Tribunals and on making sure that they bring only credible and effective prosecutions.

It seems to me that we have quite a lot of evidence about the credibility won by the Tribunals. It is clear that momentum is now behind the effort to establish a permanent International Criminal Court. Although it seems most likely that such a court will be established, there is still a great deal to be said about the way it should operate. The fact that it will be established, however, is largely due to the credibility that the ad hoc tribunals for the former Yugoslavia and Rwanda have achieved.

Another sign of the credibility achieved by the Tribunals has been provided by developments involving the recent killings that occurred in Kosovo. When the Contact Group met in London a few days after these killings, one of its actions was to call on the prosecutor to ex-

pand her investigations to include the Kosovo events. The United Nations Security Council has also called for such a step.

It is important to note that the United Nations resolution establishing the ICTY refers to the territory of the former Yugoslavia and to events since 1991. Unlike the Rwanda Tribunal, the resolution does not establish an end point for the covered period, thereby making it possible to expand the investigations to deal with Kosovo.

I had a conversation yesterday with a visiting colleague from Kosovo, somebody who I regard as a particularly knowledgeable and astute observer of events there. We were talking about the possibility that additional violence would take place in Kosovo. He asserted that although the prospect of additional violence is overwhelming, one factor entering into the equation is that the security forces of the Serbian government are mindful of the Tribunal. He believes that this will have some effect on their performance. I do not know whether this is a correct assumption. But the very fact that it is possible for somebody from Kosovo, knowledgeable about the current situation, to believe that the security forces are even thinking about the Tribunal, is an extraordinary testament to the Tribunal's emerging credibility.

Overall, I believe that the Chief Prosecutor for the Tribunals is the person who, above all others, has to be given credit for the Tribunals' credibility. The Chief Prosecutor, more than anyone else, is the public face of the Tribunals. The Chief Prosecutor has to be relied upon to act effectively and fairly on behalf of the Tribunals. Obviously, the judges, the defense attorneys, and the Registrar, all have crucial roles to play, but the nature of this process puts a disproportionate share of the burden on the Chief Prosecutor. Justice Arbour has done us proud in shouldering that burden.

HISTORY AND FUTURE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

PRESENTATION BY THE HONORABLE LOUISE ARBOUR
CHIEF PROSECUTOR, THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS FOR THE
FORMER YUGOSLAVIA AND RWANDA

INTRODUCTION

Thank you very much, and thank you for having me here. I am extremely honored to be speaking at this conference.

I have the impression, hearing what was discussed earlier, including my name with my very distinguished colleagues and friends from the Tribunals, that not much of what I will say is going to add a lot of substance. Nonetheless, I hope that I can contribute some of my own reflections. It will be, essentially, on themes that have been better developed by others this morning. I will try to speak briefly, and then I will be happy, if there is time, to take some of your questions.

I would like to begin by stating that I have been distracted in the course of today's proceedings and yesterday's events. I hoped to begin my presentation by making a joyful announcement. Regretfully, this is not possible.

But, in any event, in fairness to the pressure of being forthcoming to the media, I think I should share with you something that is now in the public domain, which has not been widely covered. On March 6th, we, the Prosecutor's Office, filed in the Rwanda Tribunal for confirmation of an indictment against Bagasoro and twenty-eight others. I attended an *in camera* confirmation hearing last week in Arusha. I regret to say that this indictment was not confirmed, and it was dismissed yesterday. I will be at The Hague on Friday to work on a notice of appeal. I hope I am not ruining lunch with this announcement. From my point of view, it is a set-back; but Bernard Muna, Deputy Prosecutor for the Rwanda Tribunal, and I are extremely committed to pursuing this matter further.

The judgment is the subject of a non-disclosure order. So what I have told you is in the public domain. Unfortunately, I cannot say anything more except that I am not unduly alarmed. I have not seen the actual text of the non-disclosure order, but I believe a copy has

been sent to my hotel. The reason why it is attached with a non-disclosure order will become apparent when that order is subsequently lifted. Now, having shared this disconcerting piece of news with you, let me shift to what I really want to discuss.

Briefly, I will say a few general things, and then I will address some observations on the issues that I think are most relevant, not only to my experience in the two Tribunals, but to the proposed direction for the creation of a permanent court. Then, in my usual frank and direct way, I'll provide some advice to those lawmakers who have our future in their hands.

I. REFLECTIONS ON THE RECORD OF THE TRIBUNALS

Let me start by reading a short extract from the transcript of the Rwanda Tribunal of February 25, 1998, representing a portion of the evidence submitted by General Romeo Dallaire, who is the United Nations Commander in Rwanda. Towards the end of his testimony, he stated the following, which echoes something that you have heard this morning from the Rwanda ambassador.

General Dallaire said, "It seems to me unimaginable that every day in the media, we see people being massacred, and yet we fold our arms, we remain unperturbed, we remain isolated, without wanting to come to aid, without wanting to come to their assistance."

He went on to say the following: "In my opinion, it has always been very easy to accuse the United Nations of not having intervened. But the United Nations are not the sovereign country." I think that is going to be good news for Senator Helms.

General Dallaire continued and said, "The United Nations are we, all of us. If the United Nations did not intervene, this means that, by extension, all of us had failed. All of us had a responsibility for the genocide that continued in Rwanda for almost four months."

The failure that General Dallaire spoke of can be modestly addressed and redeemed from a total failure if we can now bring it amongst ourselves to hold these murderers, rapists, and torturers accountable for their actions. I believe that is what criminal law does domestically. And, I believe that this is the ambition of international criminal law.

Domestic criminal law serves as a realistic gauge in our assessment of the performance of international criminal law so early in its life span. Criminal law, generally, has one method of conflict resolution. When it is triggered, it is the testimony to the failure of virtually all other social institutions. By the time criminal law is brought to its full force—that is, to a criminal trial—it means that other social institutions like the family, the education system, the mental health infrastructure, the welfare distribution mechanisms in our society, the children's aid society, and women's shelters, have either partially or totally collapsed. Some things have dramatically gone wrong. That is where criminal law intervenes.

So, I think we should not be overwhelmed by the sense of failure expressed by General Dallaire even though he spoke forcefully on this issue. This is, in fact, the last redemption and our last chance to contribute effectively and address that situation.

Now, as promised earlier, I will provide some observations on the issues that I believe are significant for the creation of a permanent court. Overall, I have six points. Please note that these points are unconnected and in no particular order.

II. PROSPECTS OF A PERMANENT COURT OF INTERNATIONAL JUSTICE

First, I would like to discuss the complementarity and primacy of international tribunals and possibly a permanent court over domestic institutions. I have been told in many circles that this is not a negotiable issue before the Rome conference. If that is correct, then I am very disappointed. But, since I am not in the business of taking no for an answer quickly, I think it is important that we forcefully examine the question of whether we should concede that the lack of primacy of a permanent international court is acceptable.

I am very concerned that under the proposed system we are simply re-arranging the chairs on the deck of the Titanic. Generally speaking, it is difficult to be so blunt; but, the Tribunals share a common experience. States who were the most affected by the crimes within our jurisdiction—states that you would assume have the greatest interest in the work of the Tribunals—are the ones who would be happy to see the Tribunals discharged and settle their business in private regardless of whether these settlements were either by expedi-

tious, fair or unfair disposition; or, in many cases, by a very convenient form of amnesty.

On the other hand, I believe other states who are the least affected—who, in fact, are possibly not affected at all by the conflict, but who endorse the concept of universal jurisdiction—would be willing to discharge their obligations to prosecute by sending us all the case work. I think this is very telling for the future of complementarity generally, and for the idea that a permanent International Criminal Court would be in partnership with governments for the prosecution of war crimes.

Second, I want to discuss state cooperation and compliance. It took me a long time to understand why the governments with which I interacted at the investigative stage were concerned about their military, government officials, and diplomats actually being charged and held personally and criminally responsible when there is no criminal responsibility for governments under the statute. Therefore, I spent a lot of time persuading them that this would not, at that stage, be the purpose of the exercise. I specified that we were, in fact, collecting evidence and treating them as witnesses.

Yet the resistance continued to be extremely strong. It took me a long time to come to understand their reluctance. Then I finally realized that even though there is no criminal responsibility for governments under the statute, there is only one court that counts—the court of public opinion.

Third, it must be recognized that the thought of being a witness in The Hague and having to disclose something that may tarnish a military record or speak unfavorably of an unwise policy of the past, was enough to keep people away from willing participation in our effort. This is an extremely discouraging concept. It takes considerable effort to encourage a government to discharge their obligation to international criminal justice, even when the cost to them, in my view, is so minimal. Minimal as it is, it is always too high a cost for them to willingly want to pay.

My fourth point, which many have spoken about this morning, pertains to a chronic situation facing international criminal justice in our lifetime; the fact that an international court sits in a vacuum. As a result of this phenomenon, even a permanent International Criminal Court cannot rest on the other pillars of democracy that we take for

granted in our domestic criminal justice system. I speak, for instance, of the absence in areas of the world in which our work matters so much, of a free and independent media. I can refer to what we take for granted domestically as the following: the existence of an independent, but regulated profession; and the unconditional endorsement of accountable governments who are required to enforce the law. We cannot count on those two items.

More importantly, universal acceptance of the duty to give evidence in criminal cases can be understood by all in our own society, but not in the international arena. That duty supersedes all other legitimate concerns, except in the narrow end of the lost privilege. It covers the very few concerns that can trump the search for truth in a criminal trial, like national security interests and the penitent priest privilege. There is only a handful of these privileges that we uphold above and beyond the duty to come to court and provide evidence. We cannot make that assumption in the international forum. In fact, I think it is extremely wise to proceed on exactly the opposite assumption.

Most states and, I regret to say, most international organizations, and probably many non-governmental organizations—in my opinion—are not prepared to accept the fundamental premise that it is their duty to come and give evidence in an international criminal forum. More significantly, this duty supersedes all other legitimate interests. In fact, our assumptions are opposite to theirs. They believe that testifying would jeopardize their field operation and would in some way impede their capacity to do work that we all value and cherish; but domestically, that would always have to yield to the criminal process. We are nowhere near universal acceptance of the duty to provide evidence on the international scene.

Now, I would like to turn to my fifth point, which is actually a question. In particular, I question whether there is a future for international criminal justice without the existence of crimes falling squarely within the ambit of its jurisdiction—like crimes against humanity, war crimes, and genocide. Specifically, I am concerned about having an equally potent and more widely applicable crime of offenses against the administration of justice. The future of an international court is bleak unless we start thinking seriously of developing substantive offenses, chargeable not only against individuals, but

also against groups, corporations, moral entities, and governments. These entities should be charged as accessories after the fact in situations where they shelter fugitives for violating court orders, intimidate witnesses, and interfere with the administration of justice.

Much has been said this morning, but I will add my voice to those who advocate that we not let ourselves get pressured into a more expeditious discharge of our mandate than is required to observe other fundamental rules—such as the right of an accused to a fair and expeditious trial. I am concerned that the pressure to get it done may interfere with the pressure to get it right. This is particularly true for the most difficult and elusive area of our investigative work, which is command responsibility of accomplices other than the actual perpetrator. That part of the work is elusive in the extreme mainly because the evidence is in the hands of those who will not willingly yield information to us.

I believe our work will be profoundly counter-productive as a long term investment in peace and national reconciliation if we do it fast and get it wrong. I do not want to shortchange history by shortchanging ourselves for the capacity to show the true magnitude of the criminal organizations or the criminal drive that is really behind these atrocities.

And, finally, the last observation I want to make is that I believe future peacekeeping will never be the same. I believe that information recorded during peacekeeping operations belongs to all and it is objectionable for those who participate in these exercises to take it home with them and refuse to share such information. If there can be no peace without justice, then I believe there can be no real peacekeeping without law enforcement for war crimes.

In my year and a half as prosecutor, and as an Appellate Court Judge, on many occasions I faced *in terrorem* arguments. If you are familiar with this old tactic of advancing arguments, you know that immense catastrophe can result. In virtually everything I do, I confront *in terrorem* arguments. As such, I would urge lawmakers, who are presently examining the creation of a permanent court, to resist, at all costs, this form of discourse and debate. I was told, I believe, every one of these arguments has been proven or will be proven grossly inaccurate. But these arguments are advanced by very serious people—I presume in good faith—but in a very misguided fashion.

It is said, and continues to be said, that if peacekeepers are called to account before a Tribunal—and by account, I mean not be exposed to personal criminal liability but merely to explain how they discharged their function—then no country will ever again contribute troops to a peacekeeping operation. I believe that this is an *in terrorem* argument that is likely to be proven false in the future.

In the same manner, I was told that if we collectively pressed for arrests by SFOR, then hostility would immediately resume in Bosnia. I was told that if I pressed, as I did, seeking a decision by the court, that we had the power to issue binding orders to states, which we did successfully, I was told, once again, in one of these *in terrorem* arguments, that this initiative could be the single one that could bring the talks toward the permanent court to a halt. So I say we must resist these arguments that are based on rather pessimistic views of the future.

CONCLUSION

On the eve of the conference in Rome, I urge lawmakers to remember the common law history of the offense of treason. You may recall that the crime of treason was the crime that, throughout the ages, carried the highest level of procedural safeguard because it was clear to lawmakers that they were more likely to be charged with this crime in the course of their lifetime. We, therefore, attached a tremendous procedural safeguard to our model for the prosecution of treason.

I urge those who will be in Rome to design a system good enough for themselves. Only if they design a model of criminal justice that they believe is good enough for themselves, can they then have the right to insist that it apply to others.

Thank you very much.

AUDIENCE QUESTIONS

MR. NEIER: Thank you very much, indeed. Justice Arbour has agreed to answer questions. Please, go ahead.

AUDIENCE MEMBER: I would like to pick up on an observation made about Kosovo. Justice Arbour, it seems to me that there is an enormous opportunity for the Tribunal to play a role in deterring and preventing genocide in Kosovo.

One of the most effective ways to do that, following up on the contact that we have already made on this issue, could be for you, or whoever happens to be on the staff, to go to Kosovo and put down a marker to make sure that ethnic cleansing does not reoccur there—essentially, to make a message of accountability.

Is that anything that you would have or would consider doing?

JUSTICE ARBOUR: I have made a public announcement that my office will be investigating and is investigating the events in Kosovo. I am not sure that personally going there is likely to advance my investigations a great deal. I think it is critically important for our Tribunal that we discharge our function in a professional manner. Our actions should not contain a suggestion that we are merely responsive to political pressures or an advancement of political interests. We are very clear as to what the legal landscape is within which we can operate. Areas that we can work in, that we have already referred to, include the territorial jurisdiction of the Court.

It does not take an advanced legal education to identify possible offenses to include in these very preliminary investigations based on information available in the public domain. We know what types of offenses to reasonably target. We have identified the areas we need to investigate. I have to say that the best investigative work is not always the one that is field work. Seeing investigators in the field does not infer that you have made the most progress.

Sometimes the most difficult part of the work is establishing all of the elements of the offenses. It is not a mystery in these circles whether or not there was, is, or will continue to be an armed conflict in Kosovo. This is a matter to which we have to pay considerable attention. You understand that within our Tribunal, of course, this has to be established beyond a reasonable doubt. It is not just an intuitive assessment. So we have an investigation strategy. But I have to say, at this point, I have not contemplated my presence there.

I expect that I may be in Bosnia in the near future. I just returned from Belgrade and Montenegro before the current events in Kosovo. I am not sure that I could go there by myself and investigate with any level of sophistication.

AUDIENCE MEMBER: You mentioned, Justice Arbour, how states are propelled, not by their legal obligations, but by their fear of pub-

lic censure. It could be possible that if the Tribunals employed a media-friendly approach, it could generate public rage over officials sheltering planners of genocide. Strategically, to rephrase the question, since public censure and fear are such effective forms of motivation, could the Tribunal indirectly arouse a media frenzy strategy?

JUSTICE ARBOUR: Yes, but I think it is always wise to proceed on the rather trite assumption that states, like people, always behave in what they perceive to be their best self interests. So, they will have to balance the measure of shame that they can face. In other words, they will weigh the shame for not willingly testifying in a criminal trial against the shame that they will suffer if they do testify. At the end of the day, I think it is a pretty crude decision on their part as to whether they are prepared.

Frankly, I think at this stage of our work—at this stage of our jurisprudence—and at this stage of the political support we have in the international community, that evidence will be forthcoming. But, at the end of the day, I am not concerned about that.

I believe the evidence will be forthcoming, and that most governments will take the stand and come forward. A lot of evidence has been made available as a result of public opinion. That is the posturing. Now, we have to get them to deliver, to actually open up to the scrutiny of the Prosecutor, originally, and I will endorse Mr. Wladimiroff's concern that we should also be open to the scrutiny of the defense. The governments should be open to the scrutiny of the Tribunal, to the most limited extent that they think they can get away with.

AUDIENCE MEMBER: Justice Arbour, following up on that point, could you bring us up to date on your relations with the French Government and also the Croatian Government?

JUSTICE ARBOUR: Well, I am very pleased that you asked that question. I am pleased to report that my relations with the French Government are excellent.

You may be aware of the statement made by the Foreign Minister, Mr. Levine, who came to The Hague approximately three weeks or a month ago. We had extensive discussions after the visit I made to Paris, which I think were less productive. In the course of his latest

visit, however, he publicly announced that French military officers and French officials may freely testify.

I was asked, when I was in Arusha last week, why he only referred to The Hague Tribunal. The assumption in the French media has always been that all the difficulties that we had encountered in the past with France were really related to the former Yugoslavia and the real agenda was one of alleged obstruction with respect to the Hague Tribunal.

No such distinctions were made to me. I understood the French position to be extremely clear and forthcoming—which is that if they are called, they will testify. I am very pleased. This is without any particular reservation, except what is available to all who cooperate with the Tribunal, which is: some evidence we could choose to take under Rule 70, our confidentiality rule. Of course, in appropriate cases, I have indicated that I will cooperate in advocating any kind of protective measure that is appropriate with respect to any kind of interest that France, or any other country, would want to advocate for some of its witnesses.

With respect to Croatia, who I have picked a fight with recently, I am very unwilling, frankly, to rate government cooperation among those with whom we have a most intensive on-going relationship. Cooperation has many facets. There is no question that we tend to get, although it is not always true of all, the very best cooperation when what we ask is in the self-interest of that government. This is not a big surprise.

But, even that was certainly not the case with respect to the Republic of Serbia and the Federal Republic of Yugoslavia. Even when we were seeking information related to Serb victims of perpetrators from any other group, this information was not forthcoming. I think we have overcome that particular difficulty. There has been a considerable effort on the part of Croatia, in the instance of the surrenders. In particular, we saw this diplomatic effort in the Fall.

I am still very dissatisfied with the speed and completeness, or let me put it this way, the lack of responses to requests for assistance in on-going investigations. Although the matter is before the court, I am appalled that the litigation initiated more than a year ago, which gave rise to a judgment in principle legally binding the Government of Croatia for the production of documents, is still being vigorously

contested. We still have not seen a lot of what we asked for and what we are entitled to.

It is very difficult to give you a rating, a comparative quality of cooperation. For the most part, at the current level of investigations, it is extremely discouraging to try to obtain what we are perfectly entitled to under the statute.

AUDIENCE MEMBER: Have you found that Rule 70 has proved useful in helping you obtain information from governments?

JUSTICE ARBOUR: Yes, it has proved very useful. It was particularly useful before we litigated our entitlement to the evidence in the first place. Rule 70 was particularly useful. For those of you who are not familiar with the details of our rule, this is a provision by which the Prosecutor can receive information in full confidence, essentially undertaking never to use that information without the prior approval of the source.

It is a procedure used to develop and essentially to lead to actual evidence that you can use in court, without having to reveal the original source. It is, frankly, and we have to live in a realistic world, the only mechanism by which we can have access to military intelligence from any source.

I believe we must now use it very cautiously. It was a very useful device, until we tested our entitlement to compel the production of some evidence. I think that now that we have that behind us, we must be circumspect in not using Rule 70 as generously as we have in the past. Now we are in court, more and more. If somebody holding a candy says I will give it to you under Rule 70 and you want it badly enough and take it; then after you have it, you want to use it in court but you are not allowed. You realize that this was not such a good strategy, especially if you thought you had a real chance of getting the candy some other way.

So, it is a very useful device, but I think that we have to be very circumspect in the manner in which we use it. Not to mention the fact that when it is triggered, we bind ourselves not to use it, and afterwards, we curtail the rights of the defense, and indeed the scope of investigation by the court itself. So I think it is ethically and professionally a device that the Prosecutor ought to use with considerable discretion and not take lightly.