

Conflict Prevention and Resolution Forum: May 14, 2002
Challenges for International Justice & Reconciliation

**Notes from the comments of Ambassador David Scheffer (Senior Vice-President,
UNA-USA and Former US Ambassador-at-Large for War Crimes Issues)**

Ambassador Scheffer opened his remarks with the topic of “justice” – an issue that he has focused on more strongly than that of “reconciliation” during his government service because the atrocities that he was addressing were so dynamic and horrendous. He explained that many critics describe the war crimes tribunals in Bosnia and Rwanda as “token efforts” by the international community that were created to relieve feelings of guilt because of the lack of a military response by the US. Ambassador Scheffer does not believe that the war crimes tribunals were implemented as an excuse for failing to use force. He explained that the use of force is extremely controversial and that while the US should be more willing to use force, there are many factors that are involved in government decision-making.

What is our responsibility in terms of justice? Ambassador Scheffer believes that the discussion of war crimes must be modernized and that we need to communicate more clearly the atrocities that have taken place. There is a great deal of terminology used to describe these instances of mass destruction - war crimes, crimes against humanity, genocide - as well as the law that pertains to them – international law, humanitarian law, etc. Ambassador Scheffer describes these crimes as “atrocities crimes” – not simply “violations of international law” - to be addressed through “atrocity law” where the jurisdiction of the tribunals is accurately defined.

Changing the terminology will also help increase the awareness of the public and the press and it will allow us to move away from our reliance on the word “genocide”. Often, the international community gets so caught up trying to answer the question of whether or not an act can be defined as genocide, that meanwhile thousands more people die. If the answer points to yes, the international community then feels a responsibility to respond. Ambassador Scheffer described this as a “false dilemma” and that we must respond to all atrocity crimes. International law states that steps must be taken to address genocide and while the treaty does not require the use of military force, there is an obligation to react. Ambassador Scheffer described the false fear that if we “jump into the genocide pit”, we will be faced with the pressure to respond militarily. Thus, politicians don’t want to rush to the conclusion of genocide. Ambassador Scheffer argued that we need to stop worrying about terminology and adjust our thinking so that we react more quickly to criminal acts and to the horrors taking place on the ground.

Ambassador Scheffer then pointed to the historical record of the US, revealing that the US was at the forefront of efforts to create ad hoc tribunals in the 1990’s in Sierra Leone, Cambodia, and Iraq. Unfortunately, “we came up against brick walls on the latter two”. It was in Cambodia that his work was most relevant to the question of weighing justice and reconciliation. He described the leaders from the Pol Pot regime as “ripe for

prosecution” while the Cambodian leadership argued for justice one day while the next day it argued that the people should just put the events behind them and reach reconciliation. The Clinton administration felt that if no action were taken the events would scar the people. Negotiations continued over several years and were largely successful but then collapsed over the last year. Scheffer described as one of his greatest disappointments having to sit back and watch the Cambodian agenda crumble in 2001 and 2002.

In the case of Yugoslavia, the US tried to address both issues of truth and reconciliation. Ambassador Scheffer explained that the US has attempted to help create a truth commission in Bosnia – a process that is still underway. The original idea for a tribunal in Bosnia was not supported by the International Criminal Tribunal for the former Yugoslavia. They felt that it would make their efforts to achieve justice much more difficult. The Clinton administration “decided not to decide” in that they agreed to allow the Bosnians to decide for themselves whether or not they wanted a truth commission. Ambassador Scheffer speculated that perhaps the US should have intervened to support, at an earlier stage, a truth and reconciliation commission, and that only history will tell whether or not this was the right decision.

Ambassador Scheffer described his work in Rwanda to achieve justice as both an invigorating and frustrating experience. The US tried every year to improve the work of the International Criminal Tribunal for Rwanda in order to assist in producing a better work product. Ambassador Scheffer believes that the process of the war crimes tribunals has improved and he doesn’t support the arguments that the tribunals should be dismantled. He described the apprehension rate for the tribunals in Rwanda as “stellar” – unlike what we have witnessed and continue to focus on in the former Yugoslavia. Yet one problem that remains is the fact that the good work of the tribunal has not been communicated effectively to the people. Ambassador Scheffer spoke directly with the people in Rwanda who had been affected by the crimes and they did not know who had been convicted of genocide through the International Criminal Tribunal for Rwanda. Word is not getting out to the public.

Ambassador Scheffer also addressed the judicial dilemma involved in Rwanda's domestic judicial system and the question of what to do with Rwanda's some 130,000 incarcerated genocide suspects. He argued that the 1994 experience needs more explanation and that we “made a huge mistake in Rwanda”. We wasted years after the genocide searching for a western, judicial solution to deal with the 130,000 suspects. Critics argued that there needed to be a “process” and the US wasted time setting up a process that “was a failure”. A quasi-judicial reconciliation process called “gacaca” did emerge through the Rwandan government, with funding from the US, where elected elders passed judgment on the suspects from their own communities. The case of Rwanda illustrates that in certain instances, the US may need to be prepared to modify its notion of western-style response.

Ambassador Scheffer concluded his remarks on the topic of universal jurisdiction. He articulated certain ironies present in the debate surrounding the International Criminal

Court (ICC) in that critics criticize universal jurisdiction and the Court - for example the US fears that the Court could expose US soldiers to prosecution for atrocity crimes - but the reality and the real danger is the chaos that might result if numerous national governments practiced universal jurisdiction. While countries may not want to address certain cases because they are too hot, some like the idea of being able to prosecute any crime, perpetrated anywhere in the world, and dating from any historical period.

How do we rationalize universal jurisdiction and acquire the necessary sense of order? Ambassador Scheffer stated that the ICC may be the answer and that by providing a rational process the Court can serve as a “very constructive traffic cop”. He believes that we need to find a way to better control universal jurisdiction. For example, if the US were involved with the Court, it would be able to prosecute atrocity crimes but it also might serve as an example to other countries in defining nexus requirements – requirements that establish the jurisdictional requirements for prosecuting crimes. This would at least further define the rules and the US could pass laws allowing courts to take action. Thus the US would serve as a model to other nations and they would recognize reasonable limits to the exercise of universal jurisdiction.

Ambassador Scheffer expressed his desire that the US be part of this process. He argued, “the US shouldn’t be intimidated by the ICC, although we are acting as though we are. We are becoming the intimidated nation”. On the contrary, Ambassador Scheffer believes that the more we dive in, the better we will protect American interests. He concluded with his fear that US rejection of the ICC may result in more damage to US interests and US soldiers than being a member of the Court could have done, in that the US will have no credible influence among the members of the Court and ultimately, the US will not be able to participate in the process to protect American interests, including its soldiers.