

COUNCIL *on* FOREIGN RELATIONS

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Summary: Symposium on International Law and Justice

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Sixty years after the adoption of the Genocide Convention, civilians in Darfur and other conflict zones are still being killed. What can the world community do to stop mass atrocities? How can we end impunity for perpetrators? And when does the pursuit of peace collide with the need for justice? These difficult questions—and the possible answers from the next U.S. administration—were the focus of a symposium on international law and justice sponsored by the Jolie-Pitt Foundation, held at the Council's New York headquarters on October 17, 2008.

As Council President **Richard N. Haass** observed in his opening remarks, “The international legal order is a critical part of global governance,” and it is evolving rapidly. For example, the United Nations has embraced a new doctrine known as the “responsibility to protect,” asserting that sovereignty is not a license for states to commit mass atrocities, and that when they do so, the world has a responsibility to intervene. To hold killers accountable, the world has developed an expanding range of legal instruments, from national tribunals to the International Criminal Court (ICC); yet the international community often lacks the political will or capacity to put these norms into practice, and the tools themselves remain controversial.

The human stakes are immense. The 21st century is not a decade old, noted **David Scheffer**, former U.S. ambassador at large for war crimes issues, yet atrocity crimes have already claimed hundreds of thousands of lives and consigned countless more to trauma and misery. “At stake are two principles,” Scheffer said, “The responsibility to protect...and the end of impunity for perpetrators of atrocities.” But there are no easy solutions. More than four years ago, President George W. Bush declared Sudan guilty of genocide. Today, the UN Security Council is still struggling to deploy peacekeepers to Darfur, and may defer the prosecution of Sudanese President Omar al-Bashir.

In extreme cases, said retired General **Wesley Clark**, military force may be the only recourse. As Supreme Allied Commander in Europe, Clark in 1999 led a successful NATO bombing campaign to reverse Serbian ethnic cleansing in Kosovo. One of the key lessons, he said, is the need to take sides to

do what is right. “You should try to get the highest level of authorization you can,” beginning with the UN Security Council, but a blockage in that body should not prevent appropriate action.

Edward Luck, special adviser to the UN Secretary-General, stressed that the emphasis should be on prevention rather than military intervention. The Responsibility to Protect (R2P) doctrine covers a narrow range of crimes (genocide, war crimes, crimes against humanity and ethnic cleansing), and the primary obligation for preventing these rests with the state itself. The principal role of the international community should be to nurture the capacities and will of vulnerable countries to fulfill these duties. But if these efforts fail, the UN must take “timely and decisive response.” Intervention might involve mediation, economic incentives, preventive deployments, peacekeeping, and regional initiatives; the choice is not only between doing nothing and using military force.

However, as **Victoria Holt** of the Stimson Center explained, the international community lacks the tools to fulfill its goals. For instance, the Security Council has authorized the deployment of more than 100,000 peacekeepers to some of the most violent and chaotic corners of the earth, but saddles them with an “impossible mandate,” she said, by failing to provide the training, doctrine, military and logistical support they need to prevent violent attacks on civilians.

Ending Impunity

Putting an end to mass atrocities requires ending the presumption that perpetrators can get away with murder. Too often, the international community has treated peace and justice as mutually exclusive goals, when in fact history shows that impunity is an obstacle to enduring peace. “When a killer is allowed to walk away from his crimes, I believe that... tells him something,” said **Angelina Jolie**, in her introduction to the final session. “It sends a message to the next (check quote) that they need not worry, that they will most likely not be held accountable for their actions.” In contrast, she predicted, “When crimes against humanity are punished consistently and severely, the killer’s calculus will change.”

Since the end of the Cold War, the international community has experimented with various forms of “transitional justice” to address the legacy of mass atrocities. The broadest, if controversial, is the International Criminal Court (ICC), which now boasts 108 member states (the United States is a non-party). In a conversation with *New York Times* columnist **Nicholas Kristof**, ICC Prosecutor **Luis Moreno-Ocampo** described the Sudanese government’s complicity in genocide, war crimes, and crimes against humanity, which provides the basis for his July 14, 2008, indictment of President Bashir. “The evidence shows that the Sudanese armed forces, acting in concert with militia Janjaweed, attacked hundreds of villages...killed, tortured, and raped thousands of civilians,” and “destroyed all means of survival, sources of water and stripped the villages, destroying schools, mosques, and hospitals.” Although large-scale killing has slowed today, “fear, rape and hunger” continue in Darfur—and “are the main weapons of the current phase of the genocide.”

However, a number of actors (including the African Union) have recommended that the Security Council suspend Bashir’s prosecution to advance the cause of peace in Sudan. Ocampo demurred on whether the Council should do so, noting that his mandate is to bring criminals to justice, not to do “deals.” One thing he said he is sure of from history, however, is that “providing impunity will not solve the problem.”

Approaches by the Next Administration

The U.S. attitude toward the ICC is one issue at stake when the United States chooses its next president in November. For a sense of how Senators John McCain or Barack Obama view the U.S. role in helping prevent and prosecute mass atrocities, ABC News Correspondent **Cynthia McFadden** interviewed **Nicholas Rostow** and **Greg Craig**, foreign policy advisors to McCain and Obama, respectively. The lively exchange revealed broad agreement on the importance of preventing and responding to mass atrocities, and support the R2P. But there was also significant daylight between the two camps, particularly on the risks and benefits of joining the ICC.

During his 2000 campaign, George W. Bush memorably said that the United States was right not to intervene to halt the Rwandan genocide in 1994. In contrast, both McCain and Obama believe that this was a terrible mistake, and that the United States cannot afford to remain indifferent to mass atrocities. Craig avoided outlining rigid criteria for when the United States should intervene, saying this would be decided on a pragmatic, “case by case” basis. Rostow agreed, noting the unavoidable political calculus in any decision to use military force: “How many lives of U.S. service men and women is this worth? 100? 1,000?”

Both spokesmen agreed that the United States has acquired a damaging international reputation as a country prone to unilateral action and dismissive of the international rule of law. Rostow emphasized that Senator McCain is “no unilateralist,” and said that the Bush administration’s reputation is unfair, since it had often acted through multilateral institutions and, in the case of Darfur, the president himself has led the demand for a forceful international response.

Craig countered that the Bush administration had earned its “cowboy” reputation, having made plain from day one its disdain for multilateral cooperation and the rule of law. If elected, he said, Senator Obama would abandon the “go it alone, my way or the highway” pattern of recent years and engage in the sort of multilateral cooperation needed to address today’s transnational threats. Regardless of who becomes president, Craig predicted that some Bush administration officials will face indictment in European (or other national) courts for criminal offenses related to the global war on terrorism.

Craig and Rostow likewise disagreed on the risks of U.S. membership in the ICC. Obama has indicated he is more open to the possibility, believing that the court’s “cautious, conservative, and serious” track record suggests it will present minimal dangers to U.S. sovereignty and freedom of action. Any policy review would include extensive consultation with the U.S. military, to alleviate concerns about the exposure of U.S. troops to unwarranted prosecution. Rostow described McCain as more skeptical of the ICC, which poses serious implications for the supremacy of the U.S. Constitution and the independence of U.S. judicial proceedings. Are we really prepared, he asked, “to arrogate to an international body the ability to sit in judgment of U.S. legal processes”? Before agreeing to join the court, McCain believes some “serious tweaking” to the Rome Statute, which established the ICC, is in order.

Issues raised in the symposium included:

The threshold and authority required for armed humanitarian intervention: The symposium failed to reach agreement on the difficult question of what threshold would justify armed military intervention by the United States and other members of the international community. Nor was there any consensus on the requirements for interventions to be regarded as legal and legitimate. For instance the intervention in Kosovo remains controversial despite collective agreement by NATO, since it sidestepped the UN Security Council.

Preventing atrocities before they start. Debates about the wisdom of armed intervention should not distract us from developing and sharpening an entire range of policy tools that fall well short of military force. The UN, the United States and other governments need a full array of instruments—analytical, diplomatic, financial, economic, political, and military—to anticipate, detect, and respond quickly to mass atrocities. The Genocide Prevention Task Force, scheduled to release its final report in November, will provide some initial suggestions as to how to fill this toolbox.

Trade-offs between peace and justice. Participants expressed varying views about whether the tension between these two goals is real or illusory. Both Craig and Rostow, for example, argued against taking a “fundamentalist” position in favor of justice. Indicting a sitting senior official during a conflict—however warranted—could jeopardize prospects for peace, while in some cases deferring a prosecution, or even providing amnesty, could save countless lives. Others, suggested that such trade-offs were more apparent than real, since impunity prevents a reckoning with the past and merely abets future atrocities.

The future of American exceptionalism. The U.S. attitude toward the ICC underlines a longstanding feature of U.S. global engagement. The United States is dedicated to the rule of law and prefers other countries to be bound by a predictable framework of international rules. But it remains sensitive to incursions on its own national sovereignty and external freedom of action. How to balance American exceptionalism with global governance will be a major foreign policy debate in the 21st century.