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Charity Registration Number: 208223

Transcript

A Personal History of the War Crimes Tribunals

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13 March 2012

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Elizabeth Wilmshurst:

I am Elizabeth Wilmshurst, associate fellow in international law here at Chatham House, and we are very glad indeed to welcome here Professor David Scheffer. Particularly glad, he seems to have been on BBC for most of the day; I don't know if you heard him on the Today Programme? So, we are very glad to have one slot.

I would just like to say a very brief word about David. He is now professor of law and director of the Center for International Human Rights at Northwestern University School of Law in the US; and, he is also the UN secretary general's special expert on United Nations assistance to the Khmer Rouge trials in Cambodia. But when I first met him he was the first US ambassador-at-large for war crimes, that was between 1997 and 2001. And, when I was in the British delegation, I had the great pleasure of working with him and his team at the Rome Conference for the establishment of the International Criminal Court, and thereafter at the [incoherent] in New York when we were drafting the elements of crimes and the rules of procedure for that court. But David was also leading the US initiatives on the war crimes tribunals, the Yugoslav Tribunal and the Rwanda Tribunal during the 1990s.

David has written a book about his personal reminiscences about the work he has done, *All the Missing Souls*.

David, over to you.

Professor David Scheffer:

Thank you, Elizabeth, very much, and it is a great pleasure to be here today. And frankly, I don't need to speak for, you know, thirty minutes, I would much rather get to your questions because this is a very sophisticated audience and I think your questions are going to be much smarter than anything that I can deliver here tonight. I would rather just go straight to them, but...

First of all, I would like to say it is great to be back in Chatham House. I have had many extraordinarily informative sessions here over the last, really, two decades. And it is just always a great honour to be here, and thank all of you for taking the time to come and listen to me today.

I thought it was extremely important to write this book. While I was ambassador-at-large for war crimes issues, there were moments when I would be in airports in Africa etc. where I would just sit here and think about, 'My goodness, there is so much history unfolding on my watch, at some point I am going to have to reflect on this and write about this once I am out of

government.' I have the habit of keeping extremely detailed notes in my notebooks, and this book really reflects that personal record day-by-day.

I... also... when I left government in 2001 with the arrival of the George W. Bush administration, and I was not going to have the opportunity to be employed in that administration. [Laughter] I was off to the US Institute of Peace, actually, as my stop afterwards. I actually started writing this book because I thought it was so important to write my narrative of those eight years. And, what I writing was just awful, it was just terrible, and the reason... after about five or six weeks, I looked at my manuscripts and they were very defensive, I was trying to justify everything I ever did, everything was right that I did, you know, that I was writing. I was angry; I wanted my job back. I didn't like the fact that George W. Bush had won the election. And, so, it was sort of this anger-management writing, and I just put it all aside. And I went to the security of writing law review articles and preparing for a teaching career.

In 2007, I got a call from Brigitta van Rheinberg, the editor-in-chief of Princeton University Press, and she basically said, you know, 'It is 2007, isn't it about time for you to write your story about the last decade?' And I finally thought that maybe now it is time. And, actually, when I started writing it flowed so differently. I found I could be very self-critical, I didn't hesitate about trying to tell the truth about all of our mistakes as policymakers, and I thought, sort of a more balanced view even of our success. And that is what you see in this book, I hope you appreciate the balance within it. In fact, even within the final chapter before I go to a postscript chapter, I think I have three pages where I summarize all of my mistakes just so you get it.

And, so, that, I hope, is sort of a valuable component of what this book is all about eight years. This was a transformational period in international justice, and Elizabeth lived every moment of it in the FCO, and it was my incredible privilege to collaborate with Elizabeth as a representative of the British government. I can't say enough about you, Elizabeth, in terms of how decent and forthcoming you were as a negotiating partner as well as...you instructed me very often on the right way to go, and I always appreciated that.

I worked for eight years in the [Bill] Clinton administration for literally the most powerful women in the world; that was Madeleine Albright; I think her predecessor with that title was Margaret Thatcher. And, for eight years that was an extraordinarily experience for me...in the first four years she was ambassador to the United Nations and I was her senior advisor and council. I worked in the Washington [DC] office, in the State Department office of Madeleine. And, I was her deputy on the Deputies committee of the National

Security Council; she was the principal, so she was on the Principals committee. That meant that for four years every aspect of America's foreign policy, every major aspect of it, as well as intelligence policy...confronted us on the Deputies committee, where I would be four or five times a week in the Situation Room in the White House. So, I saw the...really the entire expanse of President Clinton's foreign policy unfold, and I was a participant in it, and I bear responsibility for so many of the decisions that were made during those four years, because we made decisions in the Deputies committee. And I write about that in my chapter about the Rwandan genocide in 1994; I was on the Deputies committee, and that was our responsibility to deal with that atrocity, and we got it wrong, and I write about that. I write about Srebrenica in 1995; we got that wrong on the Deputies committee. And then, I write about in a title...a chapter entitled 'Unbearable Timidity' galvanize my own government to get very serious about tracking and apprehending Radovan Karadzic and Ratko Mladic, and we failed. By 2001 they were not in custody; what is that all about? You know, after five year, you try to capture these people? What is that all about? So, I tried to tell that story; and, of course, I am quite critical of my own government in terms of addressing that particular issue.

There is another chapter about Kosovo in 1999, and for me, this was sort of the apex of my authority as ambassador-at-large for war crimes issues. I finally had a situation where the Washington bureaucracy was behind me at all times, projecting me forward on the issue of atrocities in Kosovo, putting me very far out in front of policymaking during the Kosovo crisis, And, that, to me, was exactly where I should be as war crimes ambassador in that type of situation, and I write about that in a chapter about Kosovo, as well as the frustrations during that period as well [sic]. As we came up to the indictment of Slobodan Milošević, and the frustration that Prosecutor [Louise] Arbour had with the US government during those months, but I write all about that in this book.

The major corpus of this book, however, is about how to create major international war crimes tribunals. And, I had the privilege of being on the ground floor, from the US government perspective, of five major tribunals: the International Criminal Tribunal for the former Yugoslavia, and for Rwanda – two different tribunals – the Special Court for Sierra Leone – in which Elizabeth was a major negotiator with me, on the British government side in the year 2000 – and the Extraordinary Chambers in the Courts of Cambodia from 1997 onwards, and, of course, the permanent International Criminal Court from 1995 onwards, once it emerged with the draft statute of the

international law commission in 1994. So, this became such a consuming issue during the first term of the Clinton administration, ambassador Albright sort of delegated to me the war crimes work at that time, that we often sat and talked, she and I, about...this is becoming an issue that really requires a fulltime person just hands on every single day, and also representing the US government diplomatically with over governments on this issue. So, a functional ambassadorship as opposed to a territorial one.

When she became secretary of state...of course, it is nice for your boss to become secretary of state because you kind of get a nice job as a consequence of that. And, at first, she offered me the ambassadorship in the Netherlands, because, she thought that is logical, the Hague, war crimes tribunals, go for it, you know, work the issue in Europe from that vantage point. That didn't work out because Ambassador [K. Terry] Dornbush asked for an additional year on the job, he liked being there, and we couldn't say 'no' to Ambassador Dornbush. So, she said, 'Well, do you want to just be a senior advisor to me as Secretary of State, and then we'll put might forward?' The only problem being that at that point another large donor would step forward and say, 'I like the Hague,' and I would lose my...I don't have any money, so I would lose that argument. [He laughs] So, I said to her, 'Look, we've been talking for years about the need for a fulltime ambassador on war crimes, let's just do it.' She went to the president, he quickly agreed, the US Senate quickly agreed, it was a very bipartisan proposal. I had no opposition at all in the Senate, and by July 30 1997 I had the ambassadorship. And from that point forward, as I write in the book...one NGO representative introduced me in late 1997 at a meeting, he said, 'I hereby introduce you to the "Ambassador to Hell"', and there was more truth to that than fiction. But I also thought I was the "Ambassador to Hell and Back". In other words, how do you go into these flames of hell with these atrocities, and how do you pull back from it and achieve a decent sense of accountability for the perpetration of them? And that became my mission, and it was an arduous one. I had colleagues around the world, Elizabeth was one of them, who I was in touch with constantly, and we were all collaborators on this venture.

I guess what I would like to emphasize is the transformational character of what, indeed, happened. I mean some of you here know exactly what I am talking about because you lived through it. Others of you are young enough to perhaps not fully grasp that during the 1990s there was, indeed, a transformation in the world of international criminal justice. We started in 1993 with no international criminal tribunals whatsoever. There were distant memories of Nuremburg and Tokyo collecting dust on law school book

shelves. But, interestingly enough, in early February 1993, I was reading a book that had just been published by Telford Taylor, who was a professor at Columbia Law School, *The Anatomy of the Nuremberg Trials*. And I was incredibly impressed with that book at that particular moment. It had just come out in late 1992. And that was when Madeleine came to me, we were just at the UN, and she said, 'You know we have got to respond to the issue in the Balkans of not only what is happening on the ground, but there is a lot of talk about some degree of accountability for it, we have got to figure out how to achieve that.' And, in really what was remarkably warp speed by late February consensus within the [UN] Security Council to use the Security Council authority to build a criminal tribunal.

Now, no one in San Francisco and no one in Dumbarton Oaks in 1944...in 1944 and 1945 had said anything about the Security Council building criminal courts. But, we took that idea, it was Article 41 of the UN Charter, and we ran with it. And I think for Madeleine, for her, not only was it important from a substantive point of view, but also, you have to imagine, she had just arrive at the UN, I think she wanted to make her mark in a constructive way, and this was the vehicle by which to do it. And she ran with it very aggressively in February 1993, and we got the initial resolution authorizing setting up the Yugoslav tribunal, followed by a May resolution on the details of operationalizing it.

But that was a pattern that then...you know, we were on *terra nova*, and we started to get a grip and we started to occupy some territory on *terra nova*, and we extended that theory into the Rwanda tribunal the next year in the aftermath of the genocide. But then tribunal fatigue set in, and by the time we came to Cambodia and Sierra Leone we really did have to find different alternative methodologies for creating those criminal tribunals. You know what this book does not tell you about...I submitted a manuscript of 250,000 words, and the editor-in-chief, Brigitta van Rheinberg, sent back a nice, a very nice email to me saying, you know, 'Thank you, this is great, we now look forward to, over the next couple of months, to your cutting 60,000 words from this manuscript.' And it did take 60 months to figure out how to cut the 60,000 words.

But, part of that story is what we did *not* build, because I spent an enormous amount of my time in the 1990s on atrocities for which we never achieved any accountability for: Chechnya, the Congo, Burundi, Iraq, Sudan. All of those were massive crime scenes during the 1990s, and we simply were not able to achieve any institutional vehicle by which to bring anyone to justice for those particular atrocities that occurred during the 1990s. But, we did make

progress, and ultimately achieved courts not only for the former Yugoslavia and Rwanda, but also for the civil war in Sierra Leone, and for the Pol Pot atrocities during the 1970s in Cambodia...and then, of course, the permanent International Criminal Court. All the latter three as treaty-based courts: Sierra Leone, a treaty that created an international court with the government of Sierra Leone; Cambodia, a treaty that created a domestic internationalized court in Cambodia; and, of course, the International Criminal Court, which had a massive international treaty which now has 120...120 nations as state partners to it.

But we did transform the landscape in the 1990s. When we began in the 1990s leadership immunity was more or less assumed, and we...throughout the Cold War the names of the leaders who avoided any accountability is a long one, and we started to chip away at that in the 1990s. We also developed during the 1990s and, of course, in the last decade, a very experienced and talented group in the legal academy of what I would call international jurists, both judges, defence council, you know, prosecutors, administrators...and, of course, none of those people existed with those talents in 1993, none.

Madeleine came to me after we got the resolution through on the Yugoslav Tribunal in the late February 1993 and said, 'David, you know, frankly, we are going to get an American judge on this Yugoslav Tribunal, after all, we are paying for a big part of it. And, we're going to have a judge on this, I want to nominate a good judge for the Yugoslav Tribunal. But,' she said, 'in the entire history of the permanent court of international justice prior to World War II, and the international court of justice after World War II, there has not been a single woman sitting on the bench in the Hague, not a single one. It has been men making law for men. We will break that mould.' She said, 'So, here is what we are going to do, Dave. You are going to create a list for me to look at. You can put a few men on that list, that is fine, I know they are out there. But, I want to see a lot of women's names on that list because I know they are out there too, and I do not want you to overlook them.' So, I said, 'Absolutely, Madam Ambassador.'

So, I went out and I created a list of fantastic, talented names of women federal judges, one of them was Gabrielle McDonald in Houston, Texas. And we brought Judge McDonald to Washington, we were interviewing her, and during the course of the interview Judge McDonald leaned over to me and she said, 'You know, David, I actually don't know anything about international law. I just know criminal law, like federal criminal law.' And she had run a lot of criminal trials. And, I said, 'That is okay, that is okay. I've got a couple of

textbooks, I am going to give them to you.' [Laughter] And I literally did, I handed her textbooks on international law, and international criminal law, and something about [Mahmoud] Cherif Bassiouni, I think, at the time. [He laughs] And she was a very fast learner, of course, and ran with it, and she ultimately became president of the Yugoslav Tribunal many years later, or several years later. But that just shows you we didn't have this wealth of individuals to draw upon. Now, if you asked that question, my goodness we have all sorts of lists that we can draw upon of extremely talented people that can be tapped for this kind of work.

I also just want to finish with just one other comment. In 1993, did we really know how to prosecute for the crime of genocide? Did we really have much experience doing that? The answer: no. Did we really know how to prosecute for crimes against humanity? Did we have much experience? Do we even know what some of these vague terms in crimes against humanity meant? No. And even war crimes, although we had a history of court marshals and national jurisdictions over the years—and, of course, we had Nuremberg and Tokyo as examples on all these things—but did we really know how to prosecute large-scale war crimes effectively in an international setting? Answer: no. So, all of that had to be learned, and digested by...and a learning curve had to emerge from these tribunals, which is one of the reasons you saw this frustrating lag in the work of the tribunals. Even the judges had to get a hold of this and grope their way through it during the 1990s. Well, now the jurisprudence of these tribunals is rich. It employs hundreds of international law professors now, just trying to keep up with the jurisprudence of these tribunals.

And, so, that depth of knowledge, of course, is being brought to bear increasingly in the work of the courts. Now, I know that there is a lot that one can criticize about how the tribunals have actually operated having been set up, and that is fair game for any discussion. This book is really about the creation of them, the negotiating theatre that emerged politically, legally, and even socially around the emergence of these tribunals, and how they emerged from certain types of atrocities, and how those atrocities influenced the character of the tribunals. So, it is really a narrative that includes the people involved, and, of course, it is a personal perspective, my perspective as I watched all of this unfold, and, of course, participated in it representing the US government.

There are three chapters on the International Criminal Court and they are very heavily laden with my perspective as the US negotiator pre-Rome [meaning the Rome Conference, 1998], Rome, and post-Rome, and...I think

you will find that story rather interesting. And there is a postscript chapter where I describe my own terminology of atrocity crimes and atrocity law just to try to bring a greater sense of cohesion and simplicity to how we actually address this emerging field of law, which has its own complexities to it. I thought, if I might, Elizabeth, I would perhaps entertain the audience with a couple of short passages from the book that I thought might interest you. May I do that?

Elizabeth Wilmshurst:

Sure.

Professor David Scheffer:

Okay. One of them is...my...my early years with Madeleine Albright, who I deeply admire, she actually opened up all these opportunities for me. I do write a sort of balanced story, I speak of our good moments and some less positive moments in my relationship with Madeleine, but that is fair game, you know, for eight years of work together. She was a pathfinder...in fact, I think that was her, yeah, that was her diplomatic security service code name, 'pathfinder', and it was a very accurate description of her. But I want to give you just one little vignette from our time together. This is in the early years:

'Albright displayed great cunning in her public service, and she brilliantly mastered both the Washington bureaucracy and the UN behemoth in New York. I marvelled at how she could coax the most obstinate opponent into conceding vital points, while pitching over the cliff those who dared to presume that she, a woman in a man's world of diplomacy, had a weak spine. Some of my most enjoyable moments were when I played a bit part in her theatre of misperceptions. During my early years with Albright, I would witness a group of men (and typically only men) enter her office at the State Department in Washington and plop down on comfortable couches for a policy meeting with her, while I sat on one of the hard-back chairs to take notes and occasionally contribute a few words. Ambassador Albright would rise from her desk, greet the gentlemen, and ask if they wanted coffee. Invariably, some of the men would say, 'Yes, please,' and expect Albright to sit down with them and have either her secretary or me—the aid—serve the coffee. But Albright strode over to a side table, slowly poured the coffee, and brought each cup, one at a time, to the anointed men. Our first test was to see whether anyone objected to the US permanent representative to the United Nations personally serving him coffee. Sometimes the men simply thanked her. The second test was to wait for one of the kind men to object

and offer to help carry the coffee cups. But she would stop the poor soul and say cheerfully to the entire group, "Oh, please don't bother. You know, I used to do this for a living when I was a housewife." From that moment forward, Madeleine Albright controlled the meeting as the men sunk a bit lower in those soft couches.' [Laughter]

Now I want to just read a short passage about the ICC [International Criminal Court] negotiations. This is a meeting I had with the First Lady, Hillary Clinton, and this is in June 1998. In May 1998, I had...Madeleine and I had sought to achieve approval in the Principals committee for a change in instructions before I went to Rome, so that we had a more plausible negotiating position when we arrived in Rome. We had held firm to essentially the same position for many years, and we knew...I knew it would go down in flames, we had to have a change, and so did Madeleine, she knew that. We got gridlock in the Principals committee so we had to go to the president directly. And I called up the chief of staff [Erskine Bowles] who said, you know, 'Dave, you've got to go to Rome, but before you go to Rome he has got no time in his schedule to see you, he is preparing for his trip to China.' And I also knew, as background noise, that this was the summer of Monica Lewinsky, so all hell was breaking loose in the White House. So, the chief of staff said to me, 'But, you know, would you like to meet with Hillary?' Now, she is not in the chain of command, but she has the president's ear and I had gotten to know her because anyone who works closely with Madeleine will get to know Hillary because they are very good friends, so she was no stranger to me. So, I said, 'Of course, I will meet with Hillary.' So:

'On that day in June 1998, Hillary entered the Map Room of the White House with Melanne Verveer, her chief of staff, Eric Schwartz of the National Security Council, Jamie [James] Baker, the NSC lawyer, and one of his 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 US negotiating position. Baker then weighed in with the Pentagon's view to hold firm on the long-standing American requirements. Hillary then asked how the negotiations had gotten so convoluted, with such complexities over jurisdiction. "Why not," she asked, "just had a global war crimes tribunal modelled 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.'

Now, sidebar, I thought that was due on January 20th 1993 when he was sworn in as president. [Laughter]

'And that meant he had to back the current US insistence on full immunity from prosecution by the court as both a non-party state and as a possible future state-party to the court. In rebuttal, I reminded her of the futility of trying to obtain 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.'

And then the story of Rome unfolds.

Elizabeth Wilmshurst:

Thank you, David.

Now, we have a very wide scene of the whole of the international criminal tribunals and the International Criminal Court, so let us have some questions.