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Stefan A. Riesenfeld Award Lecture - Crimes against Women under International Law

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STEFAN A. RIESENFELD
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Stefan A. Riesenfeld Award Lecture—
Crimes against Women under
International Law¹

By
The Honourable Madam Justice Louise Arbour,
Supreme Court of Canada

Professor Guzman's Introduction:

Thank you, Dean Dwyer. Let me add a welcome, on behalf of the International Legal Studies Program, to all of you, and especially to our guest speaker. It is great to see so many people here, especially in light of the significance of the topic that will be discussed. I also want to add my congratulations to the Berkeley Journal of International Law for yet again carrying off an event seemingly without a flaw.

My role here is to introduce our speaker, which is an honor and a pleasure. There are really two ways in which it can be difficult to introduce someone. One is if their accomplishments are so few in number and so small in magnitude that it is difficult to know really what to say. The other one is if their accomplishments are so large in number and so impressive in magnitude that, without occupying the entire time left to the speech, you have to decide what you are going to say. I face the second of these problems. I am going to just do my best to deal with it, recognizing that I'm omitting a whole bunch of important information, and hoping that Justice Arbour will not take offense.

She is referred to as Justice Arbour because she is a member of the Canadian Supreme Court, and has been since 1999. Before that, she was a judge on the Court of Appeals for Ontario and, before that, was on the Supreme Court of Ontario. I do not need to tell anybody here that having Supreme Court Justice on your resume is a pretty good thing, and not a bad justification for us to have

1. This piece was transcribed from the 2002 Stefan A. Riesenfeld Award Lecture.

someone come to speak. In fact, we would be honored and thrilled to have her speak in her capacity as a Supreme Court Justice. But that is not why she is here.

Before becoming a judge and a justice, Justice Arbour was a professor at the Osgood Hall School of Law in Toronto, one of Canada's premier law schools. As such, she wrote on criminal law, human rights, constitutional law, and more. We would again be lucky to have her here, speaking as an authority on any of those subjects in her capacity as an academic, but again, that is not why she is here.

In 1995, Justice Arbour took on a task to investigate the alleged abuses of inmates at the Republic Prison for Women in Hasting, Ontario. This was at the request of the Canadian government, and she reported to the Solicitor General of Canada. You and I can only imagine what that task involved—a whole range of delicate issues on the table—inmates' rights, women's rights, a broader set of human rights, as well as notions of law and order and corrective justice. With that experience behind her, again, it would be helpful and informative for us to have Justice Arbour speak on just that one project, trying to deal with problems at a penitentiary for women, but again, that is not why she is here.

Why she is here is that, from 1996 until her appointment to the Canadian Supreme Court in 1999, Justice Arbour was the chief prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. There, she worked as a tireless advocate on behalf of the victims of violence as well as an unrelenting prosecutor of criminals who perpetrated staggering acts of violence, cruelty and genocide. I cannot even begin to list the accomplishments of Justice Arbour as chief prosecutor, but let me cite just one. As chief prosecutor, she issued the first ever international warrant for the arrest of a sitting head of state, Slobodan Milošević. Facing political pressure from many sides, and skepticism from a lot of places, Justice Arbour predicted that this was merely the first step toward the trial of Mr. Milošević.

There is no longer much skepticism about whether that is true, since, today, Mr. Milošević sits in the Hague in the midst of a trial for his acts. So, here, and in all of her other work on the criminal tribunal, Justice Arbour has distinguished herself, and that is what has brought her here to speak for us today. With that introduction, I want to introduce our speaker, who will talk about crimes against women under international law. I turn it over to Justice Louise Arbour.

Justice Louise Arbour:

Thank you very much to the Dean and to Professor Guzman, for that kind introduction.

I am absolutely delighted to be here. I feel, however, that I am here under absolutely false representation. If you knew how little I know about international law, you would find it scary. I am a criminal lawyer, a criminal law academic. I'm a judge. I'm a generalist. I do everything except international law. When I was working on the international scene, I was so busy getting it

done, that I was just hoping that the law would fall into place. So, I have to start with this enormous disclaimer before I embark on talking to you about international criminal prosecutions, and in particular about prosecutions on the international scene related to violence against women.

The other disclaimer that I should make at the beginning is that I was a law teacher for many years, and every time we brought in a non-academic, a practitioner, a judge—they're all the same—we, the academics, would roll our eyes, sitting in the back of the room, waiting for the war stories, expecting no intellectual content whatsoever, just a string of anecdotes. As a matter of fact, I have war stories, and they're real war stories. I find them, not only irresistible, but extremely good at explaining in very concrete terms the actual content of legal issues. While these stories may not have the appearance of intellectual rigor that a more theoretical presentation would have, now that I'm on the other side of the fence, I realize that they serve a purpose.

To introduce my talk, I'll take you back, which will show again that I'm not an international lawyer, to the work I did that Professor Guzman referred to: the work in corrections, in a criminal correctional environment. In the late fall of 1995, I received a phone call from the then-secretary general of the United Nations. Not being an international lawyer, I found it quite impressive when someone called and asked if I would take a call from Mr. Boutros Boutros-Ghali. I could not for the life of me imagine why he would be calling me. When he called, and when I took his call, I was actually in the basement of a building that belonged to the correctional service of Canada. This building is across the street from the only federal penitentiary for women in Canada, which houses the total number of women in the whole country who serve a sentence of more than two years, which is about 300 women. I was conducting an inquiry into an event that had taken place at the prison for women.

Now, if you bear with me, there will be a point. I was in the basement of that correctional building, conducting an inquiry, in the spring of 1994 because there had been a spree of very violent incidents in the prison for women. Six inmates had assaulted correctional officers while they were waiting to get their medication. It was quite a violent event, which allegedly involved the use of a syringe and an alleged stabbing. It was not too clear exactly what had happened, but it was very traumatic for the correctional staff.

The six inmates who had been involved were put in segregation units with two other women who were already in isolation cells. During the next four days, intense unrest took place in that little segregation unit—fires were set, urine was thrown at correctional officers who walked by, and there was an enormous amount of verbal abuse. There was a general feeling that things were very much out of hand.

On the fourth day, the correctional staff held a protest outside the prison and a demonstration calling for an end to this destruction in the segregation unit. That night, the warden of the prison for women called in what's called an IERT, an institutional emergency response team. The IERT did not exist in the women's correctional service. When you only have 200 prisoners from the whole

country to manage, you don't have all the refined programs or services that are necessary. So, this IERT had to be called in from a neighboring male institution. The IERT is a team that is composed of correctional officers and volunteers. They work anonymously. They are extremely well-trained. Their main task is to do cell extractions and strip searches of men. In this instance, they opened these eight cells, removed each of the women, stripped the cell, leaving nothing inside, then stripped the women, and returned them inside this bare cell, wearing only a paper gown. This procedure was felt necessary to ensure that there were no weapons left inside, and to put an end to what had taken place in the segregation unit.

The IERT uses the technique of intimidation in order to ensure compliance. The team is composed of eight men who are in full combat gear. They wear black uniforms, shin pads, eye visors, helmets and gas masks. They carry mace, batons and shields, and they never speak. They do not answer questions, and they do not communicate verbally at all. They communicate with each other by using hand signals. All of this creates an atmosphere of terror. There's no other way to describe it. It's extremely scary. And, as I said, it's done this way to ensure the least amount of resistance.

This was the first time that this institutional emergency response team from the male penitentiary had been requested not just to intervene in the prison for women—they had done that before—but to actually conduct cell extractions and strip searches. One of the features of their procedures is that all of their cell extraction procedures are videotaped. One of the members of the team carries the video equipment. This is done for self-critiques of their performance. The IERT marches into the cell block, making a huge amount of noise. They bang their shields against the bars of the cell, and they give an order to the inmate to comply. They enter the cell whether there is resistance or not. Essentially, they wrestle the inmate to the floor, apply leg-irons, handcuffs, and body restraints, and they cut off the inmate's clothing. All of this, including the videotaping, was done at the prison for women.

The procedure took virtually all night. It began at midnight and lasted until four or five o'clock in the morning. Six of the eight women were kept in segregation from April until December of that year. A claim for *habeas corpus* was made. At the court proceedings, the inmates claimed that there had been a videotape of the event that they complained of. Eight months later, that videotape made its way into the hands of the Canadian Broadcasting Corporation, and segments of it were aired on national television. That led to the government calling the commission of this inquiry over which I presided.

You're probably wondering if I'll ever get to the international scene, but I will get there. What is very important for me to convey to you is what I learned in investigating this particular incident. The procedure that I described to you was recorded on videotape, and the public saw segments of it, including this IERT coming in, opening the cell, and performing a cell extraction. They actually saw the women's clothing being cut, and even saw the women being marched out of their cells naked, dressed only in their paper gowns. The reac-

tion of the Canadian public was one of shock, disbelief and horror. Viewers all took what they saw on the videotape quite literally: "This is what happened."

The contents of the videotape were extremely disconcerting because of the enormous display of force, coercion and intimidation. There was also a very disconcerting response from the inmates. There was a lot of swearing and cursing. There was also a lot of laughing, and extremely crude comments, which led the members of the IERT who testified before me to say that in their opinion, the inmates were not intimidated by their intervention. They testified that the inmates were joking and laughing, making rude comments, and that in at least one instance, one of them was openly flirting with them. If you view the videotapes, there is some corroboration for that kind of clinical description of what happened. However, of the inmates who testified, several expressed emotions that I accepted as very real and genuine. They spoke of their fear, humiliation and, in some cases, of the painful reliving of early memories of abuse.

The only sense I eventually was able to make of that event, to try to capture what had really happened, I found in the testimony of the prison doctor for the women, Dr. Pierson, who was present that night. It was in her evidence that I found a coherent explanation for what otherwise felt like a surreal quality in that videotape. I accepted her interpretation of the events that were depicted on that videotape. I'll just read a little bit from the report that I wrote: "In her opinion, the numerous requests which were shouted by the inmates for medications, for Tampax, which seemed so inappropriate in the circumstances, were in fact a desperate cry for help and comfort. As for the incidents that the team members had perceived as an attempt at flirting by one of the inmates, Dr. Pierson, who has known this woman for some time, testified that, in her view, the inmate was in fact in a disassociative state, speaking in a girlish voice, possibly re-living a childhood episode of sexual abuse. Dr. Pierson said that this very emotionally fragile inmate was exhibiting signs of having lost contact with reality." This explanation, as I said in my report, was very plausible to me. "The bravado that the words displayed betrayed the humiliation, the defeat, and the terror that these women were experiencing when confronted and subjected to this unimaginable display of force in the middle of the night, behind prison bars. The many references to their menstrual periods, Tampax, and rape is consistent with the fact that they were experiencing the event as having a significant sexual aspect."

You may wonder what this has to do with the prosecution of sexual violence internationally. When I wrote my report on the incident in the prison for women, I had already accepted the post as chief prosecutor for the Hague. I wrote in the first line of the preface of the report as follows: "The incidents that gave rise to this inquiry could have gone largely unnoticed. Until the public viewing of the videotape which shed light on parts of these events, and until the release of the report by the congressional investigator, the correctional service of Canada had essentially closed the book on these events." Then I packed my bags and I went to the Hague.

Two years later, in the Hague, in September of 1998, Jean-Paul Akayesu, the *quarter-meister* of the Taba community of Rwanda was convicted of several

counts of genocide and crimes against humanity, and violations of common Article 3 to the Geneva Convention, and Article 4 to the Condition of Protocol 2, amongst other things, for crimes that are called outrages upon personal dignity, including rape, degrading and humiliating treatment and indecent assault.

In December of 1998, Anto Furundzija was convicted of torture, inhuman treatment, and rape. His conviction has subsequently been upheld on appeal. And then, in December of 2001, three men from Foca, in an indictment that is usually referred to as the Foca indictment—Foca is a town in Bosnia and Herzegovina—were convicted of rape and torture as crimes against humanity, and as violations of the laws and customs of war. They were also convicted, again, in relation to the sexual exploitation of girls and women, and of enslavement as a crime against humanity. There are many, many similar charges pending before the International Tribunal.

If I were ever to write a book about all of this, I would start my preface as follows: “The incidents that gave rise to these convictions could have gone largely unnoticed. Without the creation of the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, the world would have long ago closed the book on these events.” It is clear that, in my opinion, neither Akayesu, nor Furundzija, nor Kunarac nor Kovac and the third man from Foca would have ever, ever been brought to account in their own national jurisdictions for what they had done. Yet, I am not sure that when the Security Council created these two ad-hoc international criminal tribunals, the Tribunal for the former Yugoslavia in 1993, and Rwanda in 1994, that the Security Council ever contemplated that there would be investigations, prosecutions and convictions reflecting the level of sexual violence that had been associated with these conflicts.

I’m not persuaded that members of the Security Council thought very seriously that there would ever be a trial and convictions for anyone who would fall in the jurisdiction of the tribunals. Even on the assumption that they thought there would be some accounting, I can’t imagine that there was much of a sense in that institution that launching these tribunals under Chapter 7 of the U.N. Charter as a tool to restore international peace and security, would mean that sexual violence had to be denounced and prosecuted. Basically, there are three broad issues that I would like to discuss with you: How did we get there? What have we learned? And where do we go from here?

First, how did we get there? I’m not sure to what extent you know the history of the creation of these tribunals. I won’t spend much time on that because much of that information is readily available in the literature that has been produced since the tribunals were created. I think history will show that these tribunals had, in a sense, an accidental birth—completely unexpected. After the Nuremberg and Tokyo trials, the general consensus was that if there was to be that kind of personal criminal liability or enforcement of international humanitarian law, and if that was to take place before an international institution, it would have to be done by a consensus in the international community.

The Security Council Chapter 7 powers are very broad. They are the most coercive forms of power that can be exercised on the international scene. When the Security Council imposes duties, they bind all states. It is sometimes in the form of sanctions—economic sanctions, political denunciation, any ultimately military intervention—but the creation of the criminal judicial organ, a subsidiary organ emanating from the Security Council, had never really been contemplated. I think that it had been born, it's fair to say, out of the utter despair of the international community as to how to manage these unmanageable conflicts in the Balkans. Hundreds of Security Council resolutions have been issued in the conflict in the Balkans, and the creation of the tribunal was one of them.

Second, how did we get there, and what are these resolutions? When I was involved with these two tribunals, I spent a lot of time defending against the accusation that, like Nuremberg and Tokyo, these tribunals were just another form of victor's justice. I claimed that, technically, this was not the case. The tribunals at Nuremberg and Tokyo were not simply international, they were multi-national; they were created by the victorious Allies, essentially to try their defeated enemies. I would make the argument that these two ad-hoc tribunals were created by the United Nations, by the Security Council, whose budget is governed by the General Assembly. But, in a sense, I've withdrawn from this technical defense of these institutions after reading a wonderful book by Gary Bass, called *Seta and the Vengeance: The Politics of War Crimes Tribunals*, which was published at the end of the year 2000. Gary Bass says if in fact these tribunals are victor's justice, they can't be otherwise. It makes a difference who the victors are. They can't be otherwise, because only advanced liberal democracies could have created these kinds of institutions. So, in a sense, they are a product of the developed, advanced democracies that are fully engaged in a culture of rights, and the impetus for creating this kind of institution could have only come from there.

Let me come back to the prosecution of sexual violence, and I'll say three things. The first relates to what happened at the prison for women before I went to the Hague. I believe that the prosecution of sexual violence on the international scene could not have happened without the immense progress that had been made throughout the Western World. Certainly in North America and in Europe, in the preceding twenty or thirty years, we have enhanced our understanding of sexual violence. In developing and modernizing our rules of substantive law and evidence, we have developed a new method for denouncing sexual violence, prosecuting it and punishing it appropriately. I don't think that it's a coincidence that sexual violence was not prosecuted at Nuremberg, but is now at the forefront of the international prosecutorial agenda. It reflects very much what is happening throughout the liberal democracies that have been the champions of the protection of rights in the court system.

The second point is that, because of the progress that had been made domestically in countries that were attentive to what was happening internationally, it would have been unthinkable for the international tribunal, in particular the international prosecutor, not to be fully engaged in the prosecution and de-

nunciation of sexual violence. It could not have happened without the work that happened domestically, and, because of that, it could not have happened internationally.

My third point is that now, both in courts with international jurisdiction and in our domestic courts, we are developing and understanding what was intended in the prosecution of offenses on which we had long ago closed the book, and that, for a long time conveniently went unnoticed. So, we are fully engaged in what I have called an “era of enforcement.”

What have we learned? I don’t know where to begin. I’ll try to touch on the broad issues, and when there is time for questions at the end, you can take me back to the areas that interest you most. In the prosecution of sexual offenses before these international tribunals, the very first thing you have to do is look at the broad policy choices. One of the debates that we had constantly in the office of the prosecutor was: should we “normalize” the prosecution of sexual violence, or should we keep nurturing it as a separate issue? The debate was whether we should just announce that a sexual offence was like any other offence that all investigators must be attentive to and must prosecute as part of any investigation.

When you investigate crimes against humanity or crimes of genocide, violations of human rights, murder or extermination, you look for torture and rape. The question is how sexual offenses should be investigated. Should we investigate them as we would any other crime, or, alternatively, because of the difficulty of investigating sexual offenses, should we continue to use a team that is particularly trained and sensitive to the special needs of this kind of an investigation, one that will ensure that these investigations are not neglected? We have these policy debates all the time.

Another debate that was a constant source of tension in the office of the prosecutor was the exercise of prosecutorial discretion. The offenses in the former Yugoslavia and Rwanda that fell within our jurisdiction were so numerous and deserving of prosecution that we had to be very strict about how we prioritized cases. In general terms, we determined that we had to concentrate on the most serious offenses that could bring us to the highest possible echelons of command. Accordingly, we would select for prosecution events like Srebrenica, where there was massive loss of human life, and the promise of climbing up the chain of command to visit the responsibility of the highest echelons was greatest.

Part of the debate concerned whether prosecuting the direct perpetrators of sexual offenses was an equally appropriate prosecutorial strategy. We discussed whether there was more to be gained by prosecuting actual perpetrators, the Mr. Nobodies who actually committed the crimes, rather than deciding that the goal of prosecution was to move up the chain of command. Punishment would, in the case of sexual violence, be particularly difficult to visit on the commanders under the doctrine of command responsibility. It would require proving that the commanders either participated in the offenses, or knew that the offenses were being committed but failed to punish those responsible.

The use of the doctrine of command responsibility in sexual violence was also a source of constant debate: should we create a special team for these kinds of offenses and actually focus on the actual perpetrators? If so, would we be trivializing these crimes by not normalizing them and putting them in the fold of our general prosecution? We had enormous operational difficulties. Our contacts were obviously extremely traumatized witnesses and victims. In addition, all of our conversations took place through interpreters. It was very difficult work for the interpreters, who got the first shock wave of stories they were being told. All of the difficulties of investigation in a domestic setting were amplified.

We also had tremendous difficulties with respect to protecting victims. This is endemic in the work of these international institutions, and is particularly keen in sexual violence cases. In that field more than any other, it was obvious how difficult it was to offer a criminal justice system without the rest of the infrastructure that we take for granted in our own national systems. There was no Children's Aid Society, no social services and no health care of any sort to work in partnership with criminal law enforcement. This was particularly acute in Rwanda, where we had a lot of interaction particularly with local NGOs, who worked with women in the country. This interaction, which was certainly helpful to us in performing our work, was also creating completely unrealistic expectations as to what this international institution could deliver.

By the time we went to trial, the difficulties were even more enormous. There may be some of you here who have looked at these issues. The cases can be found on the website of the tribunals. Real progress has been made in the development of, for instance, providing a definition of rape in an international environment. It's amazing that, in so little time, writing of such quality was produced. The judgments were not without controversy, however, and there are parts of them that I found rather timid in their approach. But the judgments made progress. If you look at the definitions of sexual offenses that were provided in the *Akayesu*, *Kovac*, *Furundzija* and *Foca* cases, you can see that they were forming a definition of *actus reus* and *mens rea*, bringing the international forum to the cutting edge of what is being done in most domestic departments.

Lawyers also bring cutting-edge issues and litigation techniques to these international tribunals. Any lawyer in good standing from any jurisdiction can appear before these international institutions. This country, this state, produces very good lawyers. Some of them appear in the defense of accused war criminals before international institutions. These lawyers bring with them the latest issues in the litigation of sexual violence from their own country to an environment where it is just beginning.

I'll give you one example, which is documented in one of the cases. In *Furundzija*, after the case was closed for both parties I received a phone call at my office. The phone message was the following: a trial opinion in another case had come to the disturbing discovery that we had not disclosed to the defense the records of therapy of the main complainant. This woman had received psychotherapy after extremely brutal sexual violence which she'd been subjected to at the hands of, not the accused personally, but his associate. There were

records of therapy in existence and we had, of course, a disclosure obligation that would be familiar to those of you taking criminal law and criminal procedure: the prosecution must turn over to the defense essentially its case, and any exculpatory evidence that may be relevant to the presentation of the defense. The issue of the disclosure of therapy records of the plaintiffs was an issue that in Canada we had just finished struggling with. The Supreme Court of Canada had pronounced on the relevance of, and the level of access that a defendant in criminal proceedings should be afforded to therapy materials, a matter that goes to the very heart of the right to privacy of the complainant.

In my view, we had to disclose the records. We had to disclose them and then argue vigorously that they were weak, irrelevant and not admissible, but we could not undertake the responsibility to make that decision without telling the court and the defense. Eventually, we did disclose the records and took a huge penalty for having disclosed late. The only reason that I bring this point to your attention is that, in domestic jurisdictions, it took us 100 years to get to that level of sophistication with respect to the relevance of certain materials in the prosecution and the defense of sexual violence. And, yet, in these international institutions where we were only starting, where the environment was so challenging and the witnesses were so vulnerable, defendants were presenting aggressive, modern defenses. And that is probably how it should have been. In the end, it's probably a good thing that these international institutions are catching on to the cutting-edge litigation that is taking place in our own systems.

Where do we go from here? I'll have to preface my next remark by saying, in Canada, there is a great feeling of optimism towards the future of these international criminal tribunals. You may know that, in the summer of 1998 in Rome, 120 countries signed the Rome Treaty creating the International Criminal Court. The expectations were that it would take years to collect the sixty ratifications necessary to bring the court into existence. We speculated that it would take about six, eight or even ten years. But now, there are fifty-two ratifications at last count. Conventional wisdom is that there will be sixty by the summer for sure. It is happening. It's an amazing development. It's a development that holds promise. It's also an environment in which there will be enormous difficulties. I won't spend a lot of time discussing it, but I'll just put forth, for the true international lawyers among you, a few questions that really trouble me.

With the advent of the ICC we have also seen, in a parallel movement, the growth of universal jurisdiction in domestic states. The two are sort of competing for prominence. Again, I'll use the example of Canada. In the statute that Canada enacted in order to ratify the International Criminal Court, Canada, by the same act, broadened its universal jurisdiction, giving itself jurisdiction over genocide, crimes against humanity, and war crimes. The act did not limit jurisdiction to crimes committed in Canada.

Other countries went even further. Belgium, for instance, equipped itself with a form of universal jurisdiction that created a severe headache for its government when a magistrate interpreted that jurisdiction literally, and with a vengeance. Belgium gave itself jurisdiction over crimes committed against

humanity, regardless of whether committed by or against a Belgian national. Essentially, it declared jurisdiction over all crimes against humanity committed anywhere by anyone. That decision led, as you may know, to a recent decision of the International Court of Justice which ratified an arrest warrant against a foreign minister of the Democratic Republic of the Congo, which had been issued by a Belgian magistrate.

With respect to the International Criminal Court, the one question that is on everybody's mind is whether we can do this without the United States. The answer seems to be, "We have no choice but to do so." It will happen. And it will, unfortunately, with or without the United States. Speaking for myself, it seems that, in view of this growth of universal jurisdiction, the ICC, the International Criminal Court, is bound to become the least unattractive alternative for the United States. I cannot imagine a nation facing potential exposure to prosecution in a multiplicity of national forums without mastering exactly how they will operate. It seems to me that, if that growth continues, this is the one forum where you can be a player, where you can have your own people influencing the thinking of the court and staffing the office of the prosecutor, as unattractive as that might be. It might just become considerably more attractive than what the world is going to look like with this checkered view of universal jurisdiction.

So one big question is, "Can this be done without the United States?" The next big question is, "The court will be operational imminently, certainly before the end of the year. Where will the work come from? Is it likely to come from the Security Council?" Again, it will depend on what position the United States takes. If, in its opposition to the court, it is so hostile that it will not do anything to recognize it, then it probably will not permit certain cases to be heard in the court—those cases that the Security Council would like to see in the International Tribunal. Will the work come from the prosecutor on his or her own motion? I think most probably the exercise of that discretion is going to be extremely challenging. This is too complicated to get into, but on the question of primacy, complementarity of primacy could just jam the international court for years in jurisdictional conflict with states who will want to assert their jurisdiction every time the court launches an investigation.

The question that I ask myself on all of these issues is, "What is it that we are afraid of; is it people or is it institutions?" Someone said, and I very much regret that I cannot attribute that quote to anybody, but it stayed with me when I heard it said by somebody else: "Nothing happens without people, but nothing lasts without institutions." I think that the prosecution of sexual violence could not have happened without the impetus that was generated in many national jurisdictions by people, very many in the legal profession, who made it a life-time project to tackle this issue. From there, it could not have happened on the international scene without institutions like the International Tribunal. I think people deserve immense credit in the years to come, not only for the prosecution of genocide, crimes against humanity and war crimes generally, but, more particularly, for having been at the forefront of the policy and the prosecution of sexual violence. Thank you very much.

I'm very happy to answer your questions.

Question: Given the political opposition of the U.S., and that the U.S. has said that it doesn't want its soldiers prosecuted abroad—and maybe even some higher officials, though there hasn't been mention of that—how much reach could this ever have over the U.S.? That is, could the U.S. just completely block any prosecution of its nationals if it wanted?

Answer: Actually, interestingly enough, if the United States ratifies the Rome Treaty, it could, to use your term, "block" the prosecution of a U.S. national anytime. All they'd have to do is do it themselves. The international court is secondary to national jurisdiction. The national courts of countries that ratify the Rome Treaty have primacy over the ICC. So, if an international prosecutor decides to launch an investigation and eventually prosecute person X for alleged commission of offenses, any country possessing jurisdiction under its national law—either because the crime was committed on its territory, its nationals were the victims, or the accused or the target of the prosecution is one of its nationals—could assert jurisdiction and essentially trump the prosecutor. And the only way the prosecutor could bypass this primacy of national court is by showing that the national court in question is not genuinely ready, willing and able to do it.

That is not likely to be the case if, for instance, there is an international investigation involving a U.S. official. The United States (all fifty states) could assert jurisdiction and prosecute. What do you think are the chances of an international prosecutor persuading a panel of judges, and I'll get to the credibility and legitimacy of judges in a minute, that the United States is neither genuinely able nor willing to conduct a criminal investigation? That would be the end of the question, right there. That is immense protection for a country that is paralyzed by fear of an unfair prosecutor.

If the United States does not ratify, it's still in the same position, I suppose, that any nation would be. If a U.S. citizen goes to Canada and commits a crime, for example, he or she is subject to Canadian law and may be prosecuted in Canada. Frankly, in terms of exposure, I'm not sure there's a big difference whether you ratify it or you don't ratify it.

Question: You mentioned that the United States may not only stay outside of the convention, but may also be hostile to the convention, thereby pressuring others to be hostile as well. I wanted to get your views on an alternative that's emerging, namely, special tribunals such as in Sierra Leone, East Timor and Cambodia, which in some ways are supported by the United States.

Answer: The United States' support for the Cambodia commission, which used to be very strong and ongoing, seems to have totally collapsed. The issue is the utility of these ad-hoc initiatives in an era where so many countries—in fact, most of the countries of the European Union, as well as Canada—have now embraced a more universal and readily-available alternative.

These ad-hoc tribunals also tend to be backward-looking. The fact that they are surgical interventions after the fact deprives them, as far as criminal law enforcement is concerned, of some of the attributes of criminal law, such as

deterrence and the ability to act rapidly. Certainly, that was the case with the former Yugoslavia. There, the tribunal had jurisdiction from 1991 onward. Its jurisdiction included the entire territory of the former Yugoslavia, that is, the six republics. When Srebrenica occurred in 1995, the tribunal was just barely operational. When Kosovo happened, on the other hand, we were a real-time law enforcement operation. We had staff, we had vehicles, we had equipment, we had money and, sure enough, in three months, we had Milosevic for what happened in Kosovo.

That's what an international criminal court can do—it can anticipate. It's not hard, at the moment, for the international prosecutors to anticipate work stemming from international crises. Human Rights Watch can feed information about where a conflict is likely to erupt. There's a lot of information from multiple sources that we can start collecting. These on-again, off-again ad-hoc initiatives look to the past, instead of the future and, therefore, have less utility today. They were important in the past, but, with the ICC in place, I think ad-hoc tribunals have become of less interest to those who are embracing the ICC.

Question: [Can you speculate how the International Criminal Court will affect the persons the United States captured in Afghanistan and currently detained in Cuba?]²

Answer: First of all, the question would assume that the international criminal court is already in existence. Assuming it comes into effect in July, its jurisdiction will only be prospective. If and when it comes into effect there's nothing it will be able to do after the fact. The second thing is, as I indicated before, it does not have primacy over national courts. So, if national courts assert their jurisdiction, the most the prosecutors can do is challenge that.

Question: [How does the ICC determine whether it has jurisdiction over a criminal defendant?]

Answer: First of all, it would depend on what crimes it is alleged these people committed. The ICC only has jurisdiction over war crimes and crimes against humanity, genocide, and the breaching of the Geneva Convention. You first have to determine what it is that these people are to be charged with, whether it falls under the jurisdiction of the ICC, and whether there is a competent national jurisdiction that is asserting its primacy. And, if so, that's the end of the case.

Question: I wanted you to articulate a little further why you think the ICC [will be a better alternative even for nations, like the United States, that oppose it].

Answer: I think I was trying to develop an argument that, from the point of view of those who are reluctant to embrace the idea of an ICC, they don't have much choice with respect to universal jurisdiction. Given that lack of choice, I believe the ICC would be a better forum. Why? Because it's an international

2. Portions of some questions from the question-and-answer period were unintelligible and could not be transcribed verbatim. These questions have been paraphrased. The paraphrased portions appear in brackets.

institution, and, if the United States were to become a signatory, it could play, it could have judges, it could have prosecutors.

You know, when you work within an institution, you give it a culture. The International Criminal Tribunal for the former Yugoslavia was originally staffed by twenty-five U.S. attorneys who donated their time for a couple of years. Many European countries were outraged by the large number of Americans and felt that the United States had basically hijacked the institution culturally. And it had, to a large extent. It was a common-law jurisdiction, and the way of doing business was very North American because the Americans were there from day one. It's easier to fight something from within, if you're not comfortable with it, than it is to fight this growth of universal jurisdiction. I can't imagine that the universal jurisdiction of the laws of Belgium did not create a problem for the United States.

Question: Just for the purposes of the enforcement of human rights, what are the advantages of the ICC?

Answer: From the human rights or the humanitarian law enforcement perspective, I think, the more the merrier. You want broad-based universal jurisdiction and a strong ICC. And you want the ICC to be essentially the default jurisdiction. Now, the problem in the long run is that the ICC will then become the default jurisdiction for the developing world. Let me give you an example from the former Yugoslavia and Rwanda. I'll talk more specifically about Croatia, the most European of the Yugoslavian republics.

We had cases involving Croatian nationals, Blaskic and Kordic. If this had been under an ICC regime, I would still be in court today fighting Croatia. They would have asserted their jurisdiction—these were their generals who had fought in their war on their side, and I was trying to prosecute them. Given the choice, they would have asserted their primacy, and I would still be there, trying to prove that Croatia was not genuinely winning the war. But I could never attempt to show that they weren't able, with courts, buildings, judges, lawyers and money, to have all the trappings of a functioning criminal justice system. How do you prove that judges are not truly independent? How do you prove that the prosecutor will be manipulated by political interests?

In the case of Rwanda, 100 days after the onslaught of the genocide, with 800,000 people dead, when the FPR came into power, there was not a single lawyer or judge standing in the country. The international jurisdiction could have taken over immediately and said to Rwanda, "You are not able to do it! You don't have the resources." I think the danger for the ICC is that it will become subject to default jurisdiction for countries that are either not physically able to prosecute, or whose human rights—I mean rights of the defendant—just do not meet the expectations of fairness.

Question: If we consider briefly the record of allegedly Western enlightened democracies, the U.S. has No Ben Ri in Korea; Japan has the Rape of Nanking, for which they have not apologized and which is not discussed in Japanese history books; France has Algeria, where someone who actually acknowledged the events is in trouble with French law right now; and the U.K.

[has similar events in its history, as well]. If these nations are not willing to apologize and prosecute those responsible for such acts, how likely is it that renegade countries would?

Answer: I think the gamble we have to take is that we could actually invest a huge amount of effort into redressing history. In some cases, it's important because there are issues that were such an affront to all of mankind that we can never turn our backs and say, "It's too late. It's too far in the past." There are very few of those.

You have to be sort of forward-looking and say, "It starts now." From now on, there will be accountability, there will be a forum. Maybe you can do both. And maybe the impetus to go forward will also revive an interest in revisiting some events of the past. The range of remedies then becomes very difficult. There is no longer anyone to apply criminal sanctions to, but you can use various forms of compensation, and expose the truth. But I would like to think that for the most part the gamble is in making a better future. If there's only so much energy going to be applied, it should be applied to the future.

Question: [Do you see any problems with the fact that, unlike the American judicial system, for example, the ICC does not have the equivalent of a legislative or executive branch providing a check on its power?]

Answer: That goes to the root of the problem that the ICC will have, which is to establish its legitimacy—to establish its credentials completely when it doesn't have the partners that you normally have in a democratic setting. If you look at the tribunals, God knows that a lot of mistakes were made. They were far from perfect. I was the first one to complain. For instance, in a typical judicial system, the judges cannot both enact the rules and then interpret them. Only the legislature can enact the rules. In the tribunal, the substantive role was enacted by the Security Council through a resolution, but all the laws of evidence and procedures were delegated to the judges for enactment. It sounds like a small point, but it's an illustration.

In the ICC, there will be an Assembly of State Parties. It's going to start looking a little more, it seems to me, like a body that will be able to exercise some kind of political oversight over the prosecutor. For example, it can fire the prosecutor. Theoretically, the Security Council could have done that to me as well. I could have said to its ambassadors, "Listen, you've appointed me. I've been doing exactly what I've been mandated to do. If you're not happy with my work, just pass a resolution to have me removed." I think the chances of getting a veto over removal were good enough.

You cannot duplicate all of these national institutions internationally, but if you have a strong Assembly of State Parties, and if you have this theoretical role of a prosecutor out of touch with reality, it's pretty clear that there would be political consequences. The Assembly of State Parties would reign in that prosecutor. In that sense, you have a semblance of a legislative and executive type of system. But, you need a lot of imagination to duplicate all of this infrastructure that you're used to. That's the real challenge. It's hard to create an institution. I've argued to my American friends many times that you cannot create an

institution on the assumption that it will be run by incompetent, corrupt, idiotic people. You have to make sure it doesn't happen and, if it does, then you must have a mechanism to fix it. You have to have your own checks and balances built in. That's why I ask, "What is it we're afraid of? Are we afraid of people or are we afraid of institutions?"

Question: Just to shift away from the ICC a bit, I'm really interested in the victims in all this, and I'm wondering if you had time to get a sense of how an institutional litigation solution to these atrocities felt for the victim. There's a debate about whether truth commissions are better; should we prosecute these people; and how does that work for them? Did you get any sense of the women involved, how they felt?

Answer: Frankly, I can't speak for all of them. At times, you despair because, now, for instance, you hear from the press in the Balkans that people see Milosevic on trial and say, "Well, I don't care about him, he's not the one who killed my brother or burned my house." And that's so true. The same thing is true in Rwanda: there are 130,000 people in jail inside Rwanda awaiting trial on genocide-related charges. For a lot of the victims, they're the ones who could identify who had done it. But that's not the mandate that was given to this kind of partnership. So there are times that we feel very disconnected from the people who were actually victimized by the conflict.

This is going to be my final war story. At the height of the NATO air strikes in Kosovo—in February or March of 1999—there was an exodus of people leaving Kosovo, and there were camps set up in Albania and Macedonia. A journalist came to the Hague to interview me. He had just come back from the camp of Kukes in Albania, which was full of Kosovar Albanian refugees, and he said to me, "I'll tell you a story. I'd like to have your reaction." He said that he met a woman in this camp. She had just crossed the border. She had just arrived in total despair, extremely traumatized by the conflict. I've forgotten all of the details—her son was missing, her husband had been killed, her entire village burned, and she was there, completely desperate. At this point, there was zero hope. Her papers had been seized and burned at the border, and this journalist told me he asked her, "If you can ever go back to Kosovo, what are your hopes, what do you want to do?" And she said, "When I go back, if I can, I will kill all the Serbs, but if I can't do that, I want to talk to that woman judge."

He said, "What do you think about that? I said, "If we had not been there, I know what she would have said. She would have said, when I go back to Kosovo, I will kill all the Serbs, and if I cannot do that I will tell my friends to kill all the Serbs, and I will tell all of my children and grandchildren to kill all the Serbs and I will work on that program until it's accomplished. There is no other alternative." What she articulated for the first time, however, was the rule of law as an alternative. Now, let's be very clear which alternative she preferred. But I felt very strongly that it was up to us to give her that choice. We have introduced the alternative, the rule of law alternative. The big step is to promote it as the better alternative, and that is a long road ahead of us.

Professor Guzman's Closing Remarks:

Thank you, Justice Arbour, for that terribly stimulating talk. I would be shocked if any of the pointy-headed academics in the room such as myself were rolling their eyes while you were speaking. I do have one point of disagreement, which is that for someone who claims to know nothing about international law, you seem to have an awfully subtle understanding of some of the more complex and treacherous areas in that field. I'm thinking that maybe you might want to strike that disclaimer from the beginning of the talk.

Before proceeding with the actual presentation of the Riesenfeld Award, I wanted to give my thanks to Phyllis Riesenfeld, whose support has made this possible. She's been generous to the International Law Program here in a lot of ways, this being one of them. And let me say just a couple of things about the award, and about Stefan Riesenfeld himself, in whose honor the award is being presented. Professor Riesenfeld was, without any doubt, one of the real giants of international law in the twentieth century, and a professor of this institution for a number of years. He came to the United States escaping another horrible incident in international law, which was Nazi Germany. He landed in Michigan, worked as a researcher there, and in very short order managed to get himself a law degree from Boalt Hall and a JSD from Harvard. Along the way, he found time to learn English as he was doing this. He then started teaching at the University of Minnesota, along the way serving in the U.S. Navy during the Second World War. And in 1952, Boalt Hall had the good sense to appoint him to the faculty here, and he remained on this faculty until his death in 1999.

I would like to list for you just the areas in which Professor Riesenfeld worked, but I would never be able to enumerate them and we don't have time in any event, so let me mention just a few: maritime law, trade law, development of treaty law, commercial law, and labor law, is a tiny sampling of areas, and in each of these areas he wrote authoritatively and influentially. This award, then, stands in tribute to him and his enormous effect on international law that we continue to feel both in the debates over international law and the practice of international law in the world. Now, let me turn to awarding the actual Award to Justice Arbour. I really want to say only this, which is that an award named after someone as inspiring as Professor Riesenfeld, and someone as influential as Professor Riesenfeld deserves to be given to another human being who is as inspiring and influential on the international law scene. I'm thrilled to be able to present this Award to Justice Arbour.