

**New Paths to Peace: Summary of November 5th Keynote Address
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**“International Justice as a New Path to Peace:
The Role of American NGOs and Individuals”**

In the words of United Nations Secretary General Kofi Annan, the birth of the International Criminal Court is a “gift of hope,” that is, “at long last to prove we mean it when we say, never again.” The International Criminal Court or ICC is the culmination of over 50 years of perseverance on the part of the individuals and organizations that saw the seeds of justice and individual accountability sown at the Nuremberg and Tokyo Tribunals as the beginnings of a new way to punish international war criminals and, by so doing, to deter others from committing war crimes and crimes against humanity. As one who was privileged to play a role in setting up and assisting the International Criminal Tribunal for the former Yugoslavia (ICTY), I share and support the Secretary General’s hope for the International Criminal Court as a “new path to peace.”

The path to the ICC was largely blocked during the most of the second half of the 20th Century by super power rivalry that stifled such initiatives, despite great international legal progress in the form of the Geneva Protocol, the Genocide Convention and ongoing work by the United Nations International Law Commission. After the end of the Cold War and the collapse of the bi-polar stalemate, the barriers to international justice were temporarily weakened, and the public horrors of the former Yugoslavia and Rwanda led to the creation of the ad hoc international criminal tribunals for those two conflicts. These were incredible leaps forward and laid the groundwork for the permanent Court.

The ad hoc Tribunals did not, however, just happen when the Cold War died. They were the result of Herculean efforts by highly dedicated persons, and I would like to take a moment to mention just a few of the Americans among them. The first worthy of mention is Aryeh Neier, current President of the Soros Open Society Institute, who throughout his four decades of activism for liberty and rights never wavered in his dream of international criminal justice. Wielding the prestige and financial clout of George Soros’ foundation, Aryeh led the fight for international justice in the United States and abroad, nurtured the fledgling ad hoc Tribunals and, finally, shepherded the process of negotiating the ICC Statute, the winning of its rapid ratification by the requisite 60 States (the current total is 92) and pushing for the resources and personnel needed for the Court to begin its work.

A second person so very worthy of mentioning is Professor Cherif Bassiouni from DePaul University in Chicago. Egyptian-born, Dr. Bassiouni has been a tireless champion of the process leading up to both the ad hoc Tribunals and the International Criminal Court. He led the United Nations “Bassiouni” Commission in the Balkans that laid the evidentiary foundation for the work of the International Criminal Tribunal for the Former Yugoslavia and was a leading light in the NGO delegations to the Rome talks of 1998, where the ICC’s Statute was negotiated.

Among official persons, former UN Ambassador and Secretary of State Madeleine Albright deserves the appellation of “Godmother” of the ad hoc Tribunals, but former State Department lawyers Jim O’Brien and Michael Scharf, both of who started the ball rolling during the Administration of President George H. W. Bush, share in the credit for applying the lessons of the past 60 years. Included among these lessons was one from the war in El Salvador. During the peace talks, the Salvadoran military and the FMLN guerrillas agreed to grant each other immunity from crimes “of a political nature” committed during the war. This guaranteed that the many thousands of innocent victims of that war would never have recourse to criminal justice. Starting with the Yugoslav Tribunal and continuing through the International Criminal Court, the statute of every international criminal justice body has included a provision that ensures grants of immunity by parties to the conflict have no bearing in the jurisdiction of the respective international court.

NGOs also played a tremendous role in the modern surge toward international justice. Human rights NGOs like Human Rights Watch (co-founded by Aryeh Neier) and Amnesty International, to name only two, sounded the alarm about the new genocides and set the stage for the demands for mechanisms to render justice. Other NGOs combining both justice and human rights expertise like the Physicians for Human Rights, the Institute for International Criminal Investigations and the Coalition for International Justice were born and provided much of the technical and advocacy know-how that the new justice bodies lacked. Finally, the Coalition for the International Criminal Court (CICC), an international NGO, but headquartered in New York and led by American Bill Pace, did yeoman’s work in publicizing the Rome Statute and organizing the international drive for ratification that achieved the requisite ratification by 60 signatory States with stunning speed in the Spring of 2002. Currently, the Statute has been ratified by 92 countries, including most members of NATO and practically all of America’s closest traditional allies.

Today, the ICC is staffed and prepared to begin determining its first cases. Once again, private American foundations and NGOs are bringing cases to the attention of the Prosecutor and assisting in the initial collection and preservation of evidence. It is likely that the first official investigations will begin in the next few months, and, if what I hear is correct, suspects from the conflicts in the Democratic Republic of the Congo and Colombia could be among the first to taste the fruits of the long struggle for a permanent International Criminal Court. The latter country, of course, may be of particular concern to some in the United States because of American involvement in the conflict.

A few weeks ago, I spoke with the staff of the Prosecutor of the ICC, Luis Moreno Ocampo. An Argentinian who prosecuted perpetrators in the “dirty war” in his own country, Moreno Ocampo is an experienced, media-savvy, NGO-friendly jurist. He invites NGO and private individuals to continue to assist the Court in three areas: contributing to the process to *universalize* the Court (e.g., activities like that of the CICC to win more ratifications); contributing to the process to adopt appropriate *implementing* legislation by States Parties (necessary constitutional and legal revisions must be made by

countries who have ratified the Statute); contributing to the process of *enabling* national criminal justice systems to deal with cases rather than having them adjudicated by the ICC (supporting the concept of complementarity that forms the Court's jurisdictional mandate).

I mentioned earlier that the barriers to international criminal justice were only "temporarily" eased with the end of the Cold War. The United States, the country that has been the primary proponent of international criminal justice during the past 60 years has, for now, turned away from the International Criminal Court and become its biggest opponent. Consequently, if one wished to heed Prosecutor Moreno Ocampo's list of wishes for NGO activity, one would advocate for a change in United States policy toward the Court. This effort is currently being led by the American NGO Coalition for the International Criminal Court (AMICC) under the auspices of the United Nations Association of the USA. Simultaneously, various legal organizations including the American Bar Association (ABA) are advocating for changes in legal codes to ensure that all American citizens can be prosecuted in American courts for crimes falling under the jurisdiction of the ICC. This would enable American courts to take advantage of the principle of complementarity in which national courts have preference over the ICC when and if the country in question is willing and able to investigate and, if necessary, prosecute its citizens who are accused of genocide, crimes against humanity and war crimes. The Prosecutor's third wish for NGO activity does not really apply to the United States, since it has a functioning and well-resourced judicial system.

There are several other ways in which American NGOs and individuals can promote the credibility and successful functioning of the ICC. There are many lessons that have been learned from the experiences of the ad hoc Tribunals and the later hybrid Special Court for Sierra Leone (SCSL). One example that arose from, perhaps, the greatest failure of the ad hoc Tribunals is that someone needs to spread the message of the international legal process, thereby making the process accessible and credible to its recipients or clients. The ICTY has largely failed to communicate with the people of the Balkans, and this has led to a great lack of credibility among two out of three of the primary national groupings. The same can be said of the Rwandan Tribunal that has so failed to speak directly to the two ethnic groups that it has little currency with either. Building upon this lesson in Sierra Leone, the Prosecutor of the SCSL, American David Crane, has carried his message of the inner workings of the Court to the people. He has done this largely through the nationally-broadcast radio programs of an American conflict resolution NGO, Search for Common Ground.

Another way American NGOs can assist the ICC is by helping to train and professionalize both the prosecutorial and defense staffs. In the early days of the Yugoslav Tribunal, the American Bar Association sent a delegation to visit my boss, South African Prosecutor Richard Goldstone. The delegation arrived with offers of assistance to the prosecution, but Richard's response was to thank them politely and then to point out that we were trying to promote justice, not just effective prosecutions. Justice requires both a good prosecution and a competent defense. In this regard, he said that while we needed help, the defense side was far more under-resourced and in need of

training. The American Bar Association, through its ABA Central and East European Law Initiative (ABA/CEELI), proceeded to redirect its assistance to training and preparing defense attorneys to argue before the ICTY. Other NGOs like the American-conceived but very international Institute for International Criminal Investigations (IICI) are trying to assist both with professional investigations and forensics training as well as by supplying a standing pool of experts to fill positions on both prosecutorial and defense staffs. Finally, NGOs like the International Center for Transitional Justice (ICTJ) in New York are developing legal capacity in some of the world's poorest "transitional" societies so that they will be able to shoulder most of the prosecutorial burden as foreseen in the ICC Statute.

In the early days of the Yugoslav Tribunal, I was often called upon to speak about what we were trying to do. I explained it by referencing the scene from *Lawrence of Arabia* in which Lawrence has to execute a man he had saved from certain death in the desert in order to halt a round of tribal vengeance that would have broken up his fragile Arab alliance against the Turks. I would tell my audiences that the ICTY, like Lawrence, was outside the cycle of tribal or ethnic violence and so, hopefully, could play the role of a neutral third party - dispensing unbiased and therefore credible, justice. The trick is not just to put the old hatreds to sleep, but to kill them once and for all. The role of international justice is to help to bring reconciliation by replacing revenge with justice; the law of the jungle with the rule of law. It is only one of the new paths to peace, but together with many other paths, may one day form a super highway.