INTRODUCTORY NOTE TO THE SEVENTH ANNUAL CHAUTAUQUA DECLARATION

BY LEILA SADAT*

[August 27, 2013]
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Introduction

From August 25 to 27, 2013, the Seventh Annual International Humanitarian Law Dialogs were held at the Chautauqua Institution in Lake Chautauqua, New York.[1] Primarily organized by the Robert H. Jackson Center and co-sponsored by other institutions and organizations including the American Society of International Law, the Dialogs bring together international criminal prosecutors, practitioners of international justice, scholars, NGO leaders, human rights activists, students, and members of the public to discuss pressing issues of international peace and justice.

This year's program focused upon "The Long Hot Summer After the Arab Spring," a fitting choice given the revelations in spring and summer 2013 of chemical weapons attacks in Syria,[2] the fall of the Morsi government in Egypt,[3] difficulties regarding the Security Council's referral of the situation in Libya to the International Criminal Court (ICC),[4] continued tensions between Israel and the Palestinians,[5] and political unrest in many parts of the Middle East.[6] The topic also underscored that international criminal courts—a historic and crucial focus of the Dialogs from their inception—face considerable challenges, including insufficient resources, lack of political support, resistance to arrest warrants and other forms of interstate co-operation, and criticism of the project of international criminal justice itself. The discussions during the Dialogs suggested a variety of reasons why these challenges are particularly acute in the Arab world and the wider Middle East.

The Core Statements of the Seventh Declaration

The Seventh Chautauqua Declaration (the Declaration) is the shortest of the seven instruments resulting from the Dialogs. It was signed by Fatou Bensouda, Chief Prosecutor of the International Criminal Court, as well as the Chief Prosecutors and one former Chief Prosecutor from the U.N. International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the U.N. International Criminal Tribunal for the former Yugoslavia (ICTY). As with earlier instruments, the Declaration calls upon States and the international community to keep the spirit of the Nuremberg Principles alive. To this end, it first calls upon them to "prevent[] and condemn[] the use of weapons of mass destruction, including chemical weapons, and ensur[e] accountability for all those who use such weapons." Second, it urges States to "ensur[e] accountability for the perpetrators of all crimes and recognize[e] all victims, in particular, the most vulnerable, i.e., women and children." Third, it calls on States to "provid[e] sufficient resources for all international criminal courts, tribunals and residual mechanisms to achieve their mandates, and in particular to continue to protect and support witnesses and those made vulnerable by their cooperation." Finally, the Declaration urges States to "locate, arrest and transfer all fugitives from international justice."[7]

The Declaration evidences the passage of time. Two of the international criminal courts and tribunals established during the past two decades, the ICTY and ICTR, have now transitioned to a "Mechanism for International Criminal Tribunals."[8] Furthermore, during the Dialogs the SCSL Chief Prosecutor was anxiously awaiting an Appeals Chamber decision in the *Prosecutor v. Charles Taylor* case, finishing the work of that Court.[9] Prior Dialog*s* were all attended by former Nuremberg prosecutors, including William Caming, Benjamin Ferencz, Whitney Harris and Henry King, but in 2013 no one represented the International Military Tribunal at Nuremberg.[10]

Analysis

Two of the most interesting substantive issues raised by this year's declaration were the paragraphs in the preambular language noting with concern the alleged use of chemical weapons against "civilians and non-combatants in Syria" and the rejection of amnesty and immunity clauses in peace deals as incentives to negotiators to swap justice for peace. The certainty that chemical weapons had been used in Syria on multiple occasions, particularly in the brutal attack on Ghouta on August 21st, just days prior to the Dialogs,[11] leading to the possibility of military action as a humanitarian response was one of the most serious threats to international peace and stability of 2013. Although not a party to the Chemical Weapons Convention at the time of the alleged attacks, being one of a handful of nations

* Henry H. Oberschelp Professor of Law and Director, Whitney R. Harris World Law Institute, Washington University in St. Louis.

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that had neither signed nor acceded to the Convention,[12] Syria had acceded to the 1925 Geneva Protocol banning the use of asphyxiating gases,[13] and most commentators assumed that regardless of its treaty obligations, if it was the government using chemical weapons, it was a violation of the customary laws of war as well.[14] Even had the attacks been perpetrated by rebel forces, they violated customary international law in the views of the International Committee of the Red Cross (ICRC) and most observers, given what most scholars and the ICRC itself believe to be the *per se* prohibition on the use of chemical weapons in war-fare. Indeed, the ICRC study on customary international humanitarian law notes that "[n]o State has claimed that chemical weapons may lawfully be used in either international or non-international armed conflicts."[15] This restriction applies not only to "first uses," in the views of the ICRC, but on retaliatory uses as well.[16]

The Declaration does not apparently take the view that use of chemical weapons is *per se* unlawful, but only unlawful if the targets were "civilians and non-combatants."[17] Though this stance may be due to the unfortunate omission of chemical weapons from the list of weapons which are illegal *per se* under Article 8(2)(b)(xx) of the Rome Statute, it is surprising given the general consensus as to their illegality under customary international law. And, of course, the Prosecutors signing the Declaration represented several different international courts and tribunals. Indeed, the *Tadić* case from the ICTY held that "there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts."[18] The Rome Statute is, however, arguably more restrictive. In addition to the omission of chemical weapons in Article 8(2)(b)(xx), although Article 8(2)(b)(xviii) prohibits the use of "asphyxiating, poisonous or other gases," in international armed conflicts, there is no comparable provision in Article 8(2)(e) of the Statute covering crimes committed in non-international armed conflict. Perhaps the Rome Statute should be amended in light of the international response to Syria's alleged use of chemical weapons, which eventually resulted in Syria's accession to the Chemical Weapons Convention.[19]

This omission was perhaps due to the fact that the ICC is the only international court potentially available to exercise jurisdiction over actors in Syria who were responsible for the attacks. At the same time, the Syrian situation has not been referred to the ICC and is unlikely to be referred by the Security Council anytime soon. This suggests that the language in the Declaration both as regards the criminality of chemical weapons attacks and the need to bring those perpetrating them to justice was, at least for the time being, only aspirational in character, rather like the Moscow and St. James declarations during World War II suggesting allied prosecution of Nazi war crimes.[20]

The Syrian example underscores a major challenge to international criminal justice: its selectivity and sporadic enforcement. Because countries can avoid the jurisdiction of the International Criminal Court by declining to ratify the ICC Statute, as most Arab and Middle Eastern countries have done,[21] and it can be very difficult to muster the consensus needed for a referral or other action amongst the Permanent Members of the Security Council, there are situations like Syria that warrant ICC investigation but lack political will to effectuate that possibility. For example, the Council's failure to take effective action in the Syrian situation is in direct contrast to its proactive stance regarding Libya, wherein the Security Council unanimously referred the Libyan situation to the ICC and later backed this referral with limited military force.[22] The death toll in Libya was, perhaps unsurprisingly, much lower than the casualty figures in Syria, which continue to climb. Until the Security Council abandons its ad hoc approach to international criminal justice and States are willing to provide the necessary resources for its implementation, its effectiveness and predictability is unlikely to improve.

ENDNOTES

1 7th Annual International Humanitarian Law Dialogs, Aug. 25–27, 2013, *7th Chautauqua Declaration* (Aug. 27, 2013) [hereinafter Declaration].

2 *Syria Chemical Arms 'Probably Used' in Five Cases, UN Finds*, BBC NEWS MIDDLE EAST (Dec. 12, 2013), http://www.bbc.co.uk/news/world-middle-east-25360088.

3 *Egypt Crisis: Army Ousts President Mohammed Morsi*, BBC NEWS MIDDLE EAST (July 4, 2013), http://www.bbc.co.uk/news/world-middle-east-23173794.

4 *ICC: Libya's Bids to Try Gaddafi, Sanussi*, HUMAN RIGHTS WATCH (May 13, 2012), http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court.

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5 Harriet Sherwood, *Israeli Settlements Approval Raises Tensions Before Middle East Peace Talks*, THE GUARDIAN (Aug. 9, 2013), http://www.theguardian.com/world/2013/aug/09/israel-settlements-middle-east-talks.

6 *The Aftermath of the Unrest in Turkey: Tear Gas as a Dangerous Weapon*, THE ECONOMIST (July 5, 2013, 2:04 PM), http://www.economist.com/blogs/charlemagne/2013/07/aftermath-unrest-turkey; Shaun Waterman, *Syrian Contagion: Unrest and Violence Spread to Lebanon as Prime Minister Resigns*, THE WASHINGTON TIMES (Mar. 25, 2013), http://www.washingtontimes.com/news/2013/mar/25/syrian-contagion-unrest-and-violence-spread-lebano/; *Iraq Unrest: Deadly Blast at Baquba Political Rally*, BBC NEWS MIDDLE EAST (Apr. 6, 2013), http://www.bbc.co.uk/news/world-middle-east-22051123.

7 Declaration, *supra* note 1, at 2.

8 INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, *The Mechanism for International Criminal Tribunals*, *available at* http://www.icty.org/sid/10874.

9 The judgment was rendered later in the fall. *See* Prosecutor v. Charles Taylor, Case No. SCSL-03-01-A-1389, Appeals Judgment (Oct. 4, 2013).

10 Remington Whitcomb, *Seventh Annual International Humanitarian Law Dialogs Conclude*, THE POST-JOURNAL (Aug. 28, 2013), http://www.post-journal.com/page/content.detail/id/627369/Seventh-Annual-International-Humanitarian-Law-Dialogs-Conclude.html?nav=5057.

11 Bridget Kendall, *Syria 'Chemical Attack': Distressing Footage Under Analysis*, BBC WORLD NEWS MIDDLE EAST (Aug. 23, 2013), http://www.bbc.co.uk/news/world-middle-east-23806491.

12 Organisation for the Prohibition of Chemical Weapons, *Note by the Technical Secretariat, Status of Participation in the Chemical Weapons Convention as at 21 May 2009*, OPCW Doc. S/768/2009 (May 27, 2009), http://www.opcw.org/index.php?eID=dam_frontend_push&docID=13069http://www.opcw.org/index.php?eID=dam_frontend_push&docID=13069.

13 UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, PROTOCOL FOR THE PROHIBITION OF THE USE IN WAR OF ASPHYXIATING, POISONOUS OR OTHER GASES, AND OF BACTERIOLOGICAL METHODS OF WARFARE, http://disarmament.un.org/treaties/t/1925 (last visited, Dec. 16, 2013).

14 *Rule 74: Chemical Weapons*, *in* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 259–63 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005).

15 *Id.* at 263.

16 *Id.* at 260. The ICRC study is less categoric as regards prohibition of retaliatory uses, noting that a handful of states which entered reservations to the Geneva Gas Protocol stating that if an adverse party does not respect the Protocol, the ratifying State will no longer consider it bound by it, have not ratified the CWC which prohibits all uses of chemical weapons. Three of those states, however, have asserted that they will never use chemical weapons or are strongly committed to their elimination.

17 Declaration, *supra* note 1, at 1.

18 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 124 (Appeals Chamber) (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

19 Leila Sadat, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 300–302 (1994) (formerly Leila Sadat Wexler).

20 S.C. Res 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

21 Of the 18 countries in the Middle and North African region, only 2 have ratified the ICC Statute: Jordan and Tunisia. U.N. TREATY COLLECTION, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited, Dec. 16, 2013).

22 S.C. Res 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

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THE SEVENTH ANNUAL CHAUTAUQUA DECLARATION*

[August 27, 2013]

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The Seventh Chautauqua Declaration
August 27, 2013



In the spirit of humanity and peace the assembled current and former international prosecutors here at the Chautauqua Institution . . .

Recognizing the continuing need for justice and the rule of law as the foundation to international peace and security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:

Commending Ms. Shabana Basij-Rasikh as the fifth recipient of the Joshua Heintz Humanitarian Award for her important and impressive work in Afghanistan;

Noting with grave concern the recent developments in the Middle East and North Africa and the need for compliance with international humanitarian law and for accountability for crimes committed against civilians and non-combatants, particularly, in light of the alleged use of chemical weapons in Syria;

Urging states and the international community to end impunity for the gravest crimes by refusing to include or accept amnesty or immunity clauses in their peace agreements and calling on mediators and peace negotiators to integrate the international criminal justice dimension in their activities;

Noting that trials can only proceed with the arrest of fugitives and further noting the need for all states to cooperate with courts and tribunals by devising tangible efforts and effective strategies to ensure the location, arrest and transfer of fugitives;

Noting the conclusion of the trials of the International Criminal Tribunal for Rwanda and of the judicial mandate of the Special Court for Sierra Leone and the commencement of the last trial of the International Criminal Tribunal for the Former Yugoslavia, and being aware of the commencement of the residual mechanisms of these courts;

Now do solemnly declare and call upon states and the international community to keep the spirit of the Nuremberg Principles alive by:

Preventing and condemning the use of weapons of mass destruction, including chemical weapons, and ensuring accountability for all those who use such weapons;

Ensuring accountability for the perpetrators of all crimes and recognizing all victims, in particular, the most vulnerable, i.e. women and children;

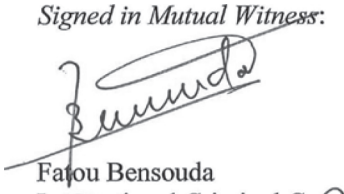
Providing sufficient resources for all international criminal courts, tribunals and residual mechanisms to achieve their mandates, in particular, to continue to protect and support witnesses and those made vulnerable by their cooperation;

Fulfilling their obligations to locate, arrest and transfer all fugitives from international justice, to include Omar al-Bashir, Ahmad Harun, Ali Kushayb, Abdel Raheem Muhammad Hussein, Joseph Kony, Okot Odhiambo, Dominic Ongwen, Felicien Kabuga, Protais Mpiranya, and Augustin Bizimana.

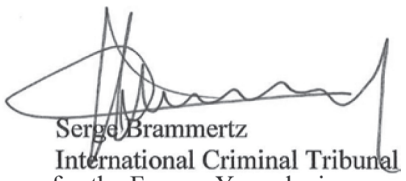
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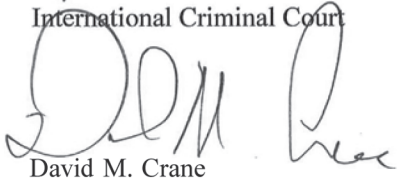
Signed in Mutual Witness:



Fatou Bensouda
International Criminal Court



Serge Brammertz
International Criminal Tribunal
for the Former Yugoslavia



David M. Crane
Special Court for Sierra Leone



Brenda J. Hollis
Special Court for Sierra Leone



Hassan Jallow
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