

**Outline of Testimony by Former Ambassador Stephen Rapp  
at the  
US Commission on International Religious Freedom and  
Tom Lantos Human Rights Commission Hearing  
July 28, 2021**

- I. Contemporary documentation is the key both to opening the door to justice, and then to success in holding high-level perpetrators to account.
  - A. It is important to know the extent and gravity of atrocities, and of all the human suffering, but justice for the victims cannot be achieved without probative evidence linking the high-level perpetrators to the crimes on the ground and showing the necessary intent.
  - B. The successful prosecution of high-level perpetrators is essential for deterrence of future atrocities because such individuals are almost always the true authors of the crimes and likely to have reached their positions of power because they were adept at calculating risks and avoiding courses of action that would create significant dangers to themselves.
  - C. Powerful documentation has made possible trials that otherwise never would have happened, such as the *Einsatzgruppen* trial at Nuremberg that happened only because of the discovery and analysis by Ben Ferencz of the field reports that had been circulated to the German Foreign Ministry, or the trial of former President Hissène Habré of Chad in the Extraordinary African Chambers in Senegal that happened only because of discovery by Chadian victims working with Human Rights Watch who found the original reports sent to Habré about the torture and murder of those in the government's dungeons (on which reports there were damning notes in his own hand).
  - D. There would not have been a "Media Trial" at the UN's Rwanda Tribunal or the historic convictions for Direct and Public Incitement to Genocide were not for courageous individuals who recorded the radio broadcasts of RTLM on their cassette players and of the genocide survivor expert who decoded the proverb-rich Kinyarwanda language to reveal the direction and power of the genocidal messages.
  - E. Today similar evidence is being brought out of Syria, Burma, and other scenes of atrocity crimes, by brave individuals and civil society groups. It is their evidence that is being gathered, collated, verified, and shared by the new mechanisms, like UNITAD, or the Syria IIM or Myanmar IIMM, without which these mechanisms would not have the most probative material to provide to prosecutors. These individuals and groups require our continued support and protection.

- F. There is also powerful evidence available from open sources, including the social media messages that incite violence, and which accounts are controlled by the high-level perpetrators, and from the accounts of followers who share images of the crimes with their cohorts. There is also digital evidence from closed sources, like the information on the thousands of smartphones of ISIS combatants now held by the Syrian Kurds. This requires that the investigative bodies have the tools, expertise, and support to preserve this digital information before it is erased and to then connect it to the crimes on the ground.
- II. Statutes should allow for the prosecution of the full range of international crimes and for the exercise of recognized forms of extraterritorial jurisdiction.
- A. Under the Genocide Convention, there are exacting requirements for proving this “crime of crimes” and convicting perpetrators, particularly as to the specific intent to destroy “in whole or in substantial part” a “national, ethnical, racial or religious group as such.” Many of history’s worst crimes would not qualify. This is why it is important to also have a Crimes Against Humanity (CAH) statute, to prosecute crimes of violence committed as part of a widespread or systematic attack against a civilian population. The specific offense known as Persecution as a Crime Against Humanity, which requires that the attack be committed on “national, political, ethnic, racial or religious grounds” is easier to prove than Genocide, covers all of history’s worst crimes, and should be viewed as an equivalent to Genocide. At the Rwanda tribunal in the Media trial, we thought it very important to prosecute those who delivered the messages that led to mass killing not only as Direct and Public Incitement to Genocide but also as CAH-Persecution, in particular to cover the vicious broadcasts that were directed not at Tutsis but at the Hutus who were protecting them.
  - B. The US Genocide Act and US War Crimes Act have never been used. Even in the so-called “Beatles case” of British IS members Alexandra Kotey and El Shafee Elsheikh who are implicated in the kidnapping and killing of Americans James Foley, Steven Sotloff, Kayla Mueller and Peter Kassig, the suspects are not charged with genocide or war crimes. I imagine that the US Attorney would find it challenging to tie them to the genocide of the Yezidi, or to show that required nexus to an armed conflict. But if there were a US CAH Act, this would be strong case for conviction for CAH-Murder, Imprisonment, Torture, Inhuman Acts, *and* Persecution.
  - C. Except for a handful of cases in Germany, all of the prosecutions of members of IS, despite their involvement in genocide and massive religious persecution, are for “material support to a terrorist organization”. As a prosecutor I like that

charge because it is easier than proving conduct, but it is also easier for the defendants and their followers to see those on trial as martyrs charged for their beliefs, rather than as the cruel and sadistic perpetrators of horrific violence upon children and other helpless and innocent victims.

- D. Almost all of our allies have a CAH statute, and the US needs one. We also need to join efforts for an international Crimes Against Humanity Convention, an initiative led for more than decade by the American Leila Sadat, a Professor at Washington University St. Louis, and shepherded through the International Law Commission to the UN General Assembly by Professor Sean Murphy, of GW Law School in Washington. Then the International Court of Justice could hear cases not only for state responsibility as to Genocide, where there is a risk that the technical legal requirements would not be met, but also for state responsibility as to Crimes Against Humanity.
- E. US statutes should also be amended to provide for the exercise of recognized forms of extraterritorial criminal jurisdiction. This would include jurisdiction over perpetrators present in the US, as current law does NOT allow prosecution of war crimes perpetrators who are present on US soil, or where a US citizen is the victim of the crime, as our torture or genocide statutes do NOT allow for such prosecutions.
- F. Finally, we must recognize that sometimes an international court is necessary and given that the UN Security Council is so often blocked by Russian or Chinese vetoes, and the worst crimes are being committed outside the territories of ICC member states, a new route must be developed. The answer is for a coalition of nations like our own to consider pooling their jurisdiction and personnel, as well as their power and influence, into an agreement-based court, as permitted by international law, in situations where there is no other path to independent justice in order to investigate, prosecute and try the perpetrators of the worst crimes known to humankind.