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STEPHEN J. RAPP AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES

PRESS ROUNDTABLE

DHAKA, BANGLADESH
AUGUST 5, 2014

Ambassador Rapp: Thank you very much. It is good to be back in Bangladesh. AS people have noted, it's my fifth visit here. I am here because my job involves assisting countries in the process of finding the truth and establishing justice after the commission of the worst crimes known to humankind.

My own experience before I was appointed by President Obama five years ago was as a prosecutor in my own country. Then for nine years I was a prosecutor in Africa--six years in Rwanda dealing with the genocide, the murder of 800,000 people in 100 days; and then in Sierra Leone where horrible crimes happened. We even brought a president of a country to trial because of those crimes.

Part of our American policy is very much to support these cases being done at the national level. If the country itself can judge these individuals, investigate cases and decide them without fear or favor and hold the guilty parties responsible, it is much better that it be done that way than it be done far from the country at a UN or international tribunal. That's why I was excited to have received the invitation of the Foreign Secretary at the time, to come here in January of 2011 and I have returned four times since.

When I came I was asked to make recommendations, and as you recall, I have made several and the government quickly published those recommendations and the judges considered them. Now they were recommendations [that focused] on the rules of procedure and the practices. I did not deal with the [provisions] of the constitution or of the statute itself. But the challenge of this process was that we were dealing with a statute that had been written more than 40 years ago, that did not include some of the elements and the experience that had been developed at the international level dealing with issues like genocide and crimes against humanity. And we also had a [constitutional] provision that said that the rights that apply in other Bangladesh trials for other serious crimes do not apply in this court.

And so the approach that I took was to encourage by rule and practice that international standards be adopted. This was particularly appropriate because Bangladesh is a party to the International Criminal Court statute and also to the International Covenant on Civil and Political Rights that require certain things in terms of the rights of the defense and criminal processes.

As you remember, some of my recommendations were accepted and some were not. I was disappointed that several were rejected because I thought they were important. But when I returned in November of 2011, I remember saying that it was not a question of what is necessarily written down in the rule books, it is how these trials proceed.

Since that time the trials have proceeded and appeals have occurred, though we have had only one final judgment and one sentence that was upheld, and of course the execution of Kader Mullah that occurred toward the end of the year. And you recall that we did raise issues and there were communications from the highest levels of the U.S. government that raised concerns about that case and about the fact that the death sentence had only been imposed on appeal and that death sentence was not reviewed by another court, which is in my view, a requirement of international human rights law and a requirement of the International Covenant on Civil and Political Rights of which Bangladesh is a party.

But now other cases will be coming on and be decided both at the trial level and at the appeal level, and I wanted to come here to talk with people about the process to see how it was going, to see what could be done to improve it, and to ensure that at the end of the day this process would serve the interests of the victims of these horrible atrocities, and the future of Bangladesh and be a model for the rest of the world. I still think that that is possible.

I want to be clear that in every one of my engagements I express the greatest respect for the people that are working so hard in this process. I want to be clear, that in saying that I always noted that these cases need to be decided without fear or favor. They need to be decided without political influence. They need to be decided as on an international level. I'm not saying that that has happened yet. I am saying that that could happen and that needs to happen. And we will do everything that we can to assist in achieving it.

A couple of observations and then I will respond to your questions. First, as I have before noted after hearing arguments, reading briefs, reading decisions, I have seen international cases cited and I have seen issues decided as at the highest level, and progress has been achieved here. There will be a day when a case is decided here in Bangladesh that will be cited in The Hague and elsewhere. But I think that needs to be reinforced, and that this process needs to be one that is based upon the evidence and the facts and the law [according to] the highest standard. We will do everything we can to assist in that. And the professionalization of this process as well as the professionalization of the whole criminal justice system is highly important.

Additionally, of course, we have the question of death penalties that have been pronounced at the

trial level that are now on appeal. These cases do not involve the same issue as the Mullah case because there is a review by another court, by the criminal division of the Supreme Court on these issues, and so we will be watching carefully. And it's important to note that where both the United States and Bangladesh do have the death penalty, a great many countries have rejected it, [including] all of our allies in Europe. There is the expectation under international human rights law is that the death penalty only be used in the most exceptional case. It is used when the highest level of due process has been observed and where the evidence is basically solid and undisputed. You do not want to execute the wrong man.

We know that the death sentences can create intense passions and conflict within a society. So it is for that reason it is especially important. I observed in the past that there was some concern by people that were advocating death penalties that if there were not death penalties that people might be released, even if they had a life sentence. But I think we can all recognize that seeing what this court has done and how the process has gone forward, that whatever sentence is rendered, that sentence is going to be followed.

As we have learned in our country, sometimes it is most appropriate to sentence someone so they spend the rest of their days thinking about their crime and so that they die in jail. [A life sentence can be] as serious a penalty as a death penalty, and it may be one that does not inflame passions quite so much. But these are questions that are still in the hands of the judges, of course, and they will be decided in current cases and those that are selected for the future.

A third point I wanted to make [relates to what follows the cases] of the 20 individuals that have so far been charged. We know the horrors that occurred here, the thousands, the hundreds of thousands who were killed and victimized in other ways during 1971. I was reminded of that again with my second visit to the Liberation War Museum, and I look forward to returning again when it is in its new facility. But we have these horrendous crimes and we note, given the nature of those crimes, that there are certainly hundreds of people out there that are still alive that may be implicated in those crimes. Now this court, as it moves forward, needs to develop, and I am talking about the prosecutor and the investigative agency, to develop a strategy for making sure that before it completes its work that it prioritizes its cases, that it focuses on those that are the most serious, and those of the high level individuals. It [also needs to] cover the various parts of the country in which these crimes were committed and make sure that the historic record that is left by this court is comprehensive.

So in all of these tribunals, it is humanly impossible to get to every case. As important as each case is, you have to have a strategy for realistically completing the work and doing it in an expeditious way. And I encourage the prosecutors and the investigative agents and the ministers that I met to work on developing a strategy. We are not talking about individual cases, of prosecuting this guy instead of this guy. We are talking about the framework, the objective standards upon which decisions should be made.

The final point that I wanted to make is about individual criminal responsibility. At the

international level in the cases that I have done, the idea is that these crimes are committed by individuals. Not everybody in a particular political party or in a particular religious [group], not even the people that had a different position on the [major] issue in 1971, made the decision to go kill young persons whom they thought were supporters of liberation or to go kill the teachers or the doctors that were killed in such a horrible fashion on the days just before the surrender. People made individual decisions to do that and to organize others to commit these crimes. Others did not do it.

So what is so important about these trials is that they are about individuals, not groups. And it is essential to the process of reconciliation that this be a principle. That is what we have done at the international level. Individuals are held to account and by doing that societies reconcile. That is what has happened here to date and that is what I encourage continue to happen if this is going to be a process that helps peace and reconciliation in the future.

With those comments, as general as they may be, let me go ahead and answer your specific questions. Thank you very much.

Media: [Mainul Alam, Daily Ittefaq]. Thank you. Before asking my question, just a small clarification on the last part of your deliberation, process of peace and reconciliation, you mentioned just now. Can you just elaborate this? You asked about the process of peace and reconciliation. Can you make it clear again?

Ambassador Rapp: What I am referring to is specifically proposals to prosecute political parties as opposed to prosecuting individuals. That is not something that would help peace and reconciliation. What helps peace and reconciliation is focusing on individuals that made decisions and then separating those individuals from parties or from other groups and saying those are the people that committed the crimes. Not that people don't work together sometimes, that you don't have four or five, six, eight, ten people that worked together to accomplish a crime, but do not take the step of moving forward to use the criminal process to prosecute a political party or a large group.

Media: Now my question. Thank you. This is Mainul Alam from Daily Ittefaq. Last two days you made different parts, different groups, parties that are defense, prosecution, government, ministers, Law Minister, and last evening the defense team also briefed you and you discussed with them. Then a new [item e came out today that they, the defense team and they proposed for the trial should take place in somewhere else, in the third country. Is this came up and what's your impression? Because today, [the Law Minister Mr. Anisul Huq] also referred this comment and he denied, that this is not possible.

Ambassador Rapp: Obviously they spoke about it. I don't want to go reporting on everything that's said in every one of these meetings. People characterize what they heard in different ways. But I want to make clear that the defense did raise the issue of the idea that these trials should be conducted by some kind of mixed court or UN court with international judges or transferred to a

third country. There is even committee language that was recommended in a bill in the [U.S.] Congress that the U.S. government should push for this kind of idea.

My own attitude is that is all speculative. This process has begun at the national level. [Those involved have] reached out to people like myself and others to seek advice about doing it according to the highest standard. And to be frank, I do not think it is realistic at this stage that we be talking about an international court, nor do I think that a third country would have jurisdiction of these crimes. So I said that to the defense last night. They were disappointed with my position. It comes from someone that has done things at the international level and who thinks there are advantages to having a mix sometimes of international judges that can help people learn about the law. I am going to Cambodia where there is a mix of international judges. They are in the minority, the national judges are in the majority. And that I think has been a good process. But the decision was made here to do this under the national statute and seek international advice. That is where I think we are going and that is why I continue to engage here, encouraging a process that is a Bangladeshi one to follow the highest international standards, albeit a process within one country and under that country's laws.

Media: [Amir Khasru, VOA]. This is Amir Khasru. My first question is, just a small clarification. You have already just answered him that the individual is responsible, not the party. You want to mean that Jamaat shouldn't be responsible for this?

Ambassador Rapp: I don't want to get into specifics, but the consideration of legislation that would change, would allow the political party itself to be convicted. Countries can make decisions about what the standards are for political parties and pass their laws about that and deal with it under their election laws and that kind of thing, but I do not think a criminal process should be used for that purpose.

People here note that at Nuremburg back in 1945-1946, it was possible to declare that certain organizations were criminal—not to convict them but declare they were criminal. And thereafter you still had to have trials of the leaders [or members]. At the Nuremburg Tribunal they did not convict any organizations but they found that the Nazi leadership was criminal, not the Nazi party. They found that some were not criminal. But they then required individual processes. So even in that precedent it is not appropriate to convict a political party.

And since the 1940s, the international practice has been to be very careful to focus on individuals because if you focus on individuals then you separate out those that did bad things from those that did not, and that helps rebuild the society. If you say all of those people are bad, everybody that is associated with them, everybody that has ever joined them, et cetera, is bad, that makes it very hard for society to reconcile. So I do not think it is a positive thing. It is individuals that make decisions. It is not organizations. Individuals make decisions. That should be the focus of the criminal law.

Media: You just didn't get that specific answer though. I'm very happy what you --

Ambassador Rapp: I understand.

Media: But then I go to the question I had. A very small question. What we have seen in the newspaper and what we have heard in the television, that you are very happy with the entire process. But if we can remember, and especially I can remember in your first, second or the third visit, anyone, that you were unhappy with some of the things where the international standard is concerned. What is your position today? Are you happy with the entire process? Or if there is any loopholes, can you tell us what are the problems?

Ambassador Rapp: Well, first of all I want to be plain that as I leave my various meetings, I am a fellow that always smiles when I express my views and say how much I appreciated the work of the people [that I met]. I respect what they are doing, and I want to see a process in which it is done fairly and in which the judges are not threatened, and where people are not pressured politically, et cetera. I state certain things. There's a tendency for people then to go ahead and interpret that to say, oh, I'm saying everything is perfect. What I am doing is emphasizing the positive things and I am emphasizing what I hope to see, not necessarily what we have seen to date because these processes are not complete. It is only later when they are complete that we can evaluate them.

What I have noted before is that there are aspects as to the rights of the defense that are not observed in a way that is consistent with international law. The defense has had situations where they have not been able to summon witnesses on their own, and under the international covenant it is said the defense shall have the same right to summon witnesses as the prosecution. And when it comes to cross-examination, being able to cross-examine witnesses based on prior inconsistent statements has been restricted. When it comes to questions of the substantive law, I was very hopeful that it be clear that crimes against humanity would be defined as they are internationally, as being part of a widespread or systematic attack against a civilian population. Such attacks obviously happened here.

But it should be clear that the proof must be provided. And I think there were efforts by the prosecution to put on the proof that was there. Later on a decision was made that you do not need do it—that you do not need to follow these international standards. You can just say that a crime against humanity is any attack against a civilian. Well that is not an international crime. That is an ordinary murder.

So there are places where I have been disappointed, frankly, by the process. But it is not done yet and I am hopeful. I do not want to be someone that just criticizes and points to errors, because in every system there are challenges. But here in this one where you start with a statute that does not contain the modern international criminal law and when you have a constitutional provision that say none of the rights that apply under your constitution apply to this court, there is a lot of room for development. There are positive developments, positive aspects, and there are some that are less than positive.

So as we would say in our country, where we have juries: The jury is still out. We are still evaluating how this is going and are hoping that as this process moves forward that it will meet the high goals and aspirations that all of us have for it.

As I say, there are aspects about it which I am happy, others that I am not happy. Okay?

Media: I'm Shahariar Zaman, Dhaka Tribune. So far there is only one execution; that is Kader Mullah. In your opening statement you said that in most exceptional cases the execution should be awarded if the evidence is solid. Do you think the execution of Quader Mollah is one of the most exceptional cases where the evidence is solid? In other words, is U.S. happy over the execution? Thank you.

Ambassador Rapp: Well, this is in the past, obviously. Before the execution we encouraged a process where it would be reviewed, and it should be noted that there were those that argued that it should not even be reviewed by the Supreme Court which decided it, and we were pleased that a review was allowed by the Supreme Court even though, as you know, it affirmed the original decision.

I think our concern there was with the death penalty only coming up on appeal and only by reason of a law that passed after the trial court had rendered its judgment, you ended up in this extraordinary situation where the first court that pronounced the death sentence was the last court that decided the case. And international law really requires that you have a second court that evaluates the first court. That was the problem with that one, and that makes it I think procedurally defective under international human rights law.

In these other cases obviously the International Crimes Tribunal has decided [to order the death penalty] and now they are going up to the Supreme Court on appeal, so you do have a second court. They are hearing these arguments, they have been going on for some time, and we are hopeful that they will be applying the standards, which is that when you have a death sentence you need to have strong evidence and you need to observe the highest due process. And if you are talking about only one witness or hearsay evidence or other things like that, that may not be an appropriate case for the death sentence but I do not want to get involved in the specifics of any particular case. My interest is in making sure that the procedure is a fair and proper one and follows international standards.

Media: [Nurul Islam Hasib, BD News 24]. Thank you, Ambassador. So why you think that, I mean organization, I mean you said that individuals take the decision in 1971 for killings and atrocities, but why not the organization? Because we know Jamaat-e-Islami then operated a branch of Pakistan Jamaat-e-Islami and it was their political decision. So what makes you to think that the individuals should be tried, not the political parties? That's one part.

Another part regarding death penalty. So do you suggest that there should be no death penalty in

the War Crimes Tribunal case?

Ambassador Rapp: Again, I do not think under international law it is a good practice to have a prosecution which says a whole party and all of its members, which could be thousands of individuals, are responsible for the crime. These decisions are made individually. They were people who are with a party or maybe in a faction of a party or maybe in the leadership of a party that may take these decisions. Convict those people.

Now you may have people that form a militia, an al-Shams militia, an al-Badr Militia, or Razakers or whatever, banding together in a particular area. That group could be involved in a crime. But you present evidence about what members of that organization were saying or doing, and in the end you convict individuals. And as I say, this is what modern criminal law, international criminal law requires.

It also is good policy because it allows for reconciliation. It is not to say all these people are bad. There were some people that were bad, and it allows other people to rejoin the society and to participate and to reject those of their leaders that were doing these bad things. That is the practice that we followed in each of these courts and it actually helps as I have seen in various places. People come up to me and say every time you convict one of those bad guys that is saying that it is not all of us who did it. It was those people that did it.

Your second question involved the death penalty. I said in my original recommendations in March of 2011 that I thought that in terms of getting international assistance and cooperation for this court and extraditions and everything else, it would be helpful if there were not a death penalty. I said that while acknowledging that the United States has a death penalty in some of our states, and at the federal level, though we have not executed anyone at the federal level for a long time. But I was also acknowledging that under international human rights law, the International Covenant on Civil and Political Rights that was ratified by Bangladesh in 2000, says it is possible to have the death penalty. But if you have the death penalty you have to have a right of appeal. If you have the death penalty you have to have a high level of due process, et cetera. You have to have the rights to seek clemency or pardon or relief from the sentence in some other way. There are provisions that need to be abided by.

What I have discovered in my country, having talked to a lot of Americans about this issue and people in my home state, is one of the reasons people often support the death penalty is because they are afraid that these folks will get out, that they will be released, that there will be a change of government or a change of heart and they will be out there threatening their victims again. The answer to that in our system was to make absolutely sure that a life sentence meant a life sentence and that the person would die in prison. If people know that is the option many people would embrace it as an alternative to the death penalty.

But those are issues of policy and in the end, what happens here is going to depend on the judges and what I hope they will be doing is looking carefully at the evidence and determining whether

it is strong enough and whether the due process that has been applied in the case is great enough and whether the acts were heinous and the involvement of this individual was such that it deserves this penalty and make their decision accordingly. That may result obviously in death penalties being issued, we understand that. But they need to follow this very high standard.

Media: [Kabir Bhuiyan, The Independent]. Hi Ambassador, for the fifth time I'm covering your press conference. It's a rare occasion for any correspondent to cover a single individual visiting five times.

Ambassador Rapp: But over the course of almost three years.

Media: [Kabir Bhuiyan, The Independent]. But for the Ambassador.

I would like to refer to your meeting with our Foreign Minister. We understand that he raised the issue of Israeli action in Gaza. Since you head the office of global war crime issues I'd like to know what's your department's position on Israel's disproportionate use of force in Gaza that killed about 2,000 people. Many of them are civilians including children and women. Thank you.

Ambassador Rapp: Let me make plain that the United States has expressed some very strong views about attacks including the killing of students and other persons seeking refuge in the UN school two days ago, and we are profoundly concerned about the loss of life of civilians.

We very much want to see a ceasefire. We are pleased that there is now a negotiated 72-hour ceasefire that we hope holds and that is extended, and it is essential that this fighting end and that is our major priority at this point.

Understand that international humanitarian law, the law of war crimes, applies in this conflict. This is an international conflict. And international law basically says that if you are being attacked from an area where there are civilians, the people doing the attacking should not use the civilians as a shield. That is a violation of the laws of war. When they do the firing of missiles they should be aiming for military targets as opposed to civilian targets. In terms of a response by the Israelis, it needs to be done in a way that is to the maximum extent possible distinguishes between military and civilian targets and uses only proportionate force.

When this conflict is over, as we said two days ago in regard to the shelling of the school that resulted in the death of at least ten individuals, there needs to be investigations and appropriately those investigations, as I said here, should be by the national authorities on both sides, and look for those that are responsible for violating the laws of war, to be held to account. Then if there's a failure to investigate and to act, then the responsibility goes to the international level, to look for a way to achieve accountability.

But at this stage it's extremely important that the conflict end, the bombardment, the shooting off of rockets at civilian targets indiscriminately from inside Gaza into Israel end, and that the

operation against that effort cease as well, and that peace be established and that we work toward a solution in which Israel and Palestine can be two states and people living together side by side in peace.

Media: This is Mustafizur Rahman from New Age.

I'd like to just supplement his question. Do you think that Israeli attacks on Gaza amount to crimes against humanity? And how do you justify the U.S. policy regarding Israel?

Ambassador Rapp: I came here to talk about the situation in these cases from 1971 where things are being sorted out and judgments are being rendered. [Regarding Gaza], one cannot during the course of a conflict jump to conclusions about what was being targeted, whether there were missiles coming from a particular place, whether some [tactic] is appropriate or not. You need to investigate that. What you need to do is to investigate to determine whether it was a war crime.

Crimes against humanity are a different kind of crime, do not require a war necessarily, and really involve an intentional attack against a civilian population, going out and killing everyone because they are Tutsis [in Rwanda], or killing because they are Shias [in Iraq] or Alawites [in Syria] or Muslims in Srebrenica, these kind of horrible attacks that have occurred in the past in some places. Those are crimes against humanity, and it can include attacking people on a political basis which occurred here during the liberation war.

But going after military targets intentionally, if that's what you are doing, generally does not fall in the category of crimes against humanity. It can be a war crime, however, if you fire indiscriminately, if you aim at the civilians in order to change their minds about a [political] decision, or if you are not focusing on the military target, or if you use force that is disproportionate. When you are trying to take out one little emplacement, and you hit it with a big bomb and kill hundreds of people, it can be a war crime. What we are talking about here on both sides is something that will have to be investigated.

Media: This is Salauddin Mahmud from SA Television.

This morning our Law Minister mentioned that USA has changed their position on death penalty. If so, why?

Ambassador Rapp: I don't know what you are referring to specifically. As I indicated in my March of 2011 document which the government I believe then distributed and published, I said it would be wisest not to have the death penalty in this process in terms of the international help that you could get from countries that do not have the death penalty. On the other hand, the United States does and we can assist the process. Actually we did, if you remember in Iraq, assist the Iraqi High Tribunal that tried Saddam Hussein and others. We do not make that an absolute standard, but we do want very much for the death penalty only to be used in the most exceptional circumstances where you meet the high standards and where you do have a separate

court reviewing any death sentence. These are not new positions. They are positions we have taken throughout. So it is possible [to have the death penalty], but it should be rare.

Media: My name is Raheed Ejaaz. I represent Prothom Alo

U.S. administration pleading for human rights globally as well as the rights of the individuals. But as of now you are not parties for the accession of the Rome Statute. So why the U.S. not being a party of that? Is there any fear or afraid for being a party for that?

And I have a strong supplement regarding your statement that prosecuting individuals rather than a particular party or something that may, destroy the balance of the social fabric or the reconciliation. Do you hunt any sort of repercussion in a society that are any sort of initiative within the government or the court that may target participation of Jamaat?

Ambassador Rapp: To deal with that last question first, there was discussion that there might be an amendment to the statute that would permit a conviction of a political party. I have seen drafts, but this is not something that is moving at this point. This is something that I was responding to because I was asked by several people whether this was a good idea and I basically said that I did not think that it was. But whether that is going forward or not, I do not know, and I tend to think it's probably not. And I think that is a wise decision.

The other question was the Rome Statute and the United States. The United States is not a party to the Rome Statute, Bangladesh is. And the United States has nonetheless been a leader in this field. We've strongly supported international justice in courts like the Yugoslavia and Rwanda and Sierra Leone courts, the Cambodia court where I will visit on Thursday which is rendering its judgment on the two surviving leaders of the Khmer Rouge.

As far as the ICC is concerned, it would be a treaty that would require two-thirds of our Senate to ratify. That is a very high standard. It is necessary for our Senate to see how the ICC operates over the course of many years before they are prepared to take a decision for us to join the ICC.

On the other hand, the Obama administration has followed up on some moves at the end of the Bush administration to actively engage with the ICC. We have participated as an observer in a very active way in the assemblies of the International Criminal Court. We have, consistent with our law, supported each of the cases that the ICC has brought. And we are providing assistance and even rewards for arresting ICC fugitives. We are helping protect witnesses. We are looking for ways to share information about these crimes with the court. We are supporting it because we support international justice in appropriate cases, and understand that an appropriate case is one in which there is nothing happening at the national level. If something is going on at the national level and it is a genuine process, we much prefer that. We do not want it to go to the international level. But thus far each of the cases the ICC has taken have been ones where when they took them on nothing was going on, and to establish justice it was important to have it. [In fact], the countries themselves in five of the eight situations asked the ICC to get involved. We

think it is serving its purpose in that regard.

But before the United States moves forward to joining it through a two-thirds vote of our Senate, and before our President makes a decision to ask the Senate to do that, I think we have to see the track record of the court and make sure that it is doing its work right, that it is not politically motivated, but that it is looking to protect people from these crimes, and doing it effectively. That will take some time. But right now it is a very cooperative relationship.

Thank you very much.

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