

EVAP Ep. 32 Leila Sadat

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SPEAKERS

Jaclyn Streitfeld-Hall, Leila Sadat

J Jaclyn Streitfeld-Hall 00:12

Welcome to Expert Voices on Atrocity Prevention by the Global Centre for the Responsibility to Protect. I'm Jaclyn Streitfeld-Hall, Research Director at the Global Centre. This podcast features one-on-one conversations with practitioners from the fields of human rights, conflict prevention, and atrocity prevention. These conversations will give us a glimpse of the personal and professional side of how practitioners approach human rights protection and atrocity prevention, allowing us to explore challenges, identify best practices, and share lessons learned on how we can protect populations more effectively. Today, I'm joined by Leila Sadat, James Carr Professor of International Criminal Law at Washington University School of Law. She's the former Special Adviser to the ICC Prosecutor on Crimes Against Humanity and Director of the Crimes Against Humanity Initiative. Thanks for joining us today, Leila.

L Leila Sadat 01:04

Thank you. It's my pleasure.

J Jaclyn Streitfeld-Hall 01:06

Leila, you've been one of the leaders on a Draft Crimes Against Humanity Convention that is currently being discussed in the UN General Assembly's Legal Committee. Could you share with our listeners a bit about the background of this Draft Convention and how this process was launched?

L Leila Sadat 01:21

Absolutely. It's been a real privilege to be able to lead in a way this project and see it transition from sort of a gleam in the eye of academics to a potential treaty that's actually sitting right now in the General Assembly. And really, the impetus was in the 1990s, when we were reconstructing, if you like, the edifice of international criminal law, that had essentially lain

fallow since the Nuremberg Trials in 1945 and the subsequent trials. We were able to do that because of this opening in the Security Council. The fall of the Berlin Wall had led to a thaw and East-West relations, but we'd also seen the outbreak of conflict. We saw the war in the former Yugoslavia, the genocide in Rwanda, and that had led to the establishment of new international criminal tribunals and a resurgent effort to create an International Criminal Court. And when the ICC and the ICTY and the ICTR are all on the drafting board being established, there's this recognition that unlike genocide and Geneva, we have no treaty on crimes against humanity. And so all of a sudden, the drafters of those instruments have to sort of start from scratch. They only have the Nuremberg Tribunal charter. And more than that we saw in the Bosnia versus Serbia case a little later, that without a treaty on crimes against humanity, most atrocity crimes are actually not able to be reached by international courts and tribunals, especially a court like the International Court of Justice, because in that case, when Bosnia took Serbia to the ICJ, Bosnia argued that genocide had been committed in the former Yugoslavia in its territory, and the Court was basically saying, "Look, these might have been crimes against humanity. But that's not within our jurisdiction. The only thing in our jurisdiction is genocide, because that's the only treaty we have." And so along with some colleagues who had worked very assiduously on these ideas for a long time, Cherif Bassiouni, who had chaired the Drafting Committee for the ICC, Richard Goldstone, the first chief prosecutor for the ICTY and ICTR, Hans Corell, the Undersecretary for Legal Affairs, etc. We said, you know, why not draft a treaty and produce a document that then we can deliver to the international community to show what a draft convention could look like and how they could take it forward? So really, it was the confluence of atrocities combined with this gap in the law that allowed us to say let's try this as an academic project to take it forward.

J Jaclyn Streitfeld-Hall 04:16

And now that, you know, we have the Rome Statute, there are, you know, ways in which these crimes can be prosecuted. Why do you think having a convention on crimes against humanity is so necessary?

L Leila Sadat 04:29

Yeah, so here's the sad thing, is when I started my project in 2008, the ICC was still very young. And that was a natural question, right, Jackie? Everybody said that, well, we just have the ICC, yay. We we don't need this, you know, we don't need this new treaty. And we could point out all the legal elements and the legal deficiencies. The ICC statute doesn't have anything in it on preventing crimes against humanity. It's only the punishment side, not the prevention side. The ICC statute only applies where the ICC has jurisdiction, which is the states that ratify the treaty. Basically, the ICC is a vertical mechanism, not a horizontal mechanism, so there are lots of juridical reasons that are sort of obvious to the international lawyer, but maybe not to the public at large. But then there's this other element, which is very sad. And one is in 2008, we made two predictions. One is that the ICC would take very few cases, and so there would be more crimes, than there was capacity. And that was especially true because remember, the Yugoslavia and the Rwanda tribunals and the Sierra Leone Tribunal and the Cambodia Tribunal, they were all projected to have a very short shelf life. So we would be left with nothing but the ICC in just a few years, and we knew the ICC had limited capacity. And the other prediction we made was that the crimes would continue to increase in significant scope and volume. And unfortunately, right now, both of those predictions are painfully true. The ICC did not have a

single judgment last year, not one substantive judgment during the entire year. I'm a huge fan of the ICC, but given the atrocities we're seeing everywhere in the world, that's clearly not sufficient to deal with the level of criminality in the world. And unfortunately, we're in a world on fire with multiplying atrocities around the planet. So we have to be able to shore up our capacity to address these, and the most robust tools we have are actually inside national systems, inside states. You know, the police here in St. Louis, where I live enforce court judgments. When the court wants documents, it sends the police out to get them, when we want defendants, we can arrest them. It's much harder on the international plane to bring individuals to book before an international court. So it's an obvious gap, right? And it's even more painfully obvious than it was in 2008.

J

Jaclyn Streitfeld-Hall 07:08

Absolutely. And, you know, as you noted, the world is very much on fire, and I think, crimes against humanity we see in so many crises around the world today. How has your position as the ICC Chief Prosecutor Special Advisor on Crimes Against Humanity shaped your advocacy for this convention? Well, I love that you put that question because I don't often get asked that. And I was very proud to serve Prosecutor Bensouda for her entire term. And, you know, she arrived as prosecutor at a time when the Court had just finished its first complete trial, the Lubanga case. And the court was starting, the Office of the Prosecutor was starting to lay down policy papers and methods of working, there was a new policy she developed on sexual and gender-based crimes, a policy on cultural heritage, lots of interesting policies. And one of the things I was asked to do when I became Special Adviser, and even before that I've worked with the Office, was to look at cases that were in the preliminary examination stage and try to ascertain whether or not they amounted to crimes within the jurisdiction of the Court. And what I recognized, and I published this as a study in 2013, what I realized from being inside the Court and asked to really look at these cases in an early stage, is that the ICC, because it works in real time, uses crimes against humanity much, much more than any of the other courts and tribunals we've ever seen created. Why is that? Because they can happen in peacetime before the onset of civil war, or interstate conflict, and they don't require genocidal intent. And so one of the discoveries I made was not only the big issue in crimes against humanity law, then is this sort of where's the frontier between when human rights violations end and criminality begins? Because at some point, you have what I call an atrocity cascade where a state that's committing human rights violations, let's say they're torturing people in prison, or there's a minority population in that state and it's being subjected to some kind of harassment. At some point, those things can spill over so that they become criminal. They're not initially criminal, right states are supposed to deal with those things on their own, the human rights bodies, of course, can make reports and establish commissions of inquiry and have a relationship with states to try to get the state to bring its practices into line with human rights law. But at some point, if those things are not addressed, they can become criminal and they become crimes against humanity. And I spend a lot of my time studying that like what is the frontier between widespread and systematic human rights abuses and actual crimes. And the other thing that I really thought about is so many of our situations at the ICC, and this was revolutionary, really, are crimes against humanity only cases. They don't involve war crimes and they don't involve genocide. So the Kenya cases, the Philippines, the Venezuela, many, many situations, we don't charge for crimes or genocide, we charge only crimes against humanity. And that had never been true before. That wasn't true at Nuremberg. And that wasn't true in the former Yugoslavia or Rwanda, and that may be realized that this gap is much bigger than even I had originally thought in 2008 when we started thinking about this new treaty. The gap is enormous, because crimes against humanity really are the most ubiquitous of the atrocity crimes. And so it really

underscored my willingness to work on this for 16 years because it's a pretty big gap. Absolutely. I really like that framing you just shared about the atrocity cascade. Because you're right, we get that question a lot, especially when we're doing trainings on identifying risk factors for atrocities and alerting, kind of, government systems of things you've seen of, you know, how do you know the difference between a human rights crisis and atrocity situation? And it's, you're right, that there's sort of a moment where it just cascades.

L

Leila Sadat 11:33

Exactly, and it's a little bit of a riff on Kathryn Sikkink's "justice cascade", right? She's looking at a justice cascade to say how, in fact, justice can lead to more justice to more justice. And I'm like, well, the flip side of that is atrocities lead to more atrocities lead to more atrocities. And I think the progression we see, alas, is that frontier, if you get past that frontier, where crimes against humanity are being committed in peacetime, if you can't intervene, then you often will have the outbreak of civil war with even bigger atrocities, and probably pockets of genocide taking place. And I think Syria is a great example of that. It was a situation of simmering human rights problems. You know, freedom of speech was under threat, journalists were being locked up, torture in prison, all kinds of human rights problems. And when the people demonstrated against that the government fought back, and then they re-armed, and all of a sudden, you're in a civil war, with a complete descent into chaos. So, sort of thinking about what are the earlier entry points? Why do we have to wait for genocide in order to be able to go to the ICJ, or allegations of genocide, we ought to be able to go to the International Court of Justice earlier or to other bodies. So that's the idea in terms of prevention.

J

Jaclyn Streitfeld-Hall 13:03

Excellent. And, you know, I want to go back to something you said at the beginning about, in the 1990s, there was this coming together of a lot of atrocities happening around the world and a movement around international criminal justice and accountability. Many experts now claim that this era of states coming together to jointly push for international criminal justice and the promotion of human rights is over. So what is your assessment of the current climate and its potential impact on these treaty negotiations?

L

Leila Sadat 13:36

Well, lots of questions there. There is no doubt that if the 1990s were the, I think the General Assembly called it the era of international law, right, the decade of international law. And it wasn't just the ICC, we saw lots of international institutions and frameworks being established in the 1990s because we had a recognition of the problem and we had the political will to solve it. And the great powers were able to work together reasonably well, in order to promote a sort of liberalizing and humanizing agenda, or at least didn't get in each other's way, right? Maybe that's a better way to put it. Right now, we have total dysfunction in the Security Council with a few bright spots on the horizon. So we have to look back to prior decades and think, well, there were people in the 1960s and the 1970s and the 1980s, who were, you know, sort of keeping the flame alive, were thinking about how to move international law and institutions forward even given the Cold War, the hostilities, all kinds of problems in the international community. So I'm cautiously optimistic but worried, obviously. The conflicts in Ukraine, the conflicts in

Gaza, the conflicts in Sudan are leading to greater recognition on behalf of many that we need to shore up our international institutions and take action. At the same time, the political obstacles to that action are multiplying. And it's not a lot of states. When I look at the move for this particular treaty without trying to look at the whole world, we've seen a steady increase and increasing momentum in every year that it's been sitting in the General Assembly, which is since 2019. And so now we have upwards of 120 states that are actively saying, in meetings, we want to negotiate a new treaty. And the number of naysayer states has remained constant. It's, you know, between five and ten. The problem is the Sixth Committee works through consensus, so even five or ten states can make it very difficult to achieve your objectives. That hasn't changed. And in fact, in some ways, I think the conflict in Gaza has brought some states that were otherwise sort of sitting on the sidelines, thinking this is not my problem, to realize this is all of our problem. These conflicts don't stay isolated, they need to be addressed. So I think that I'm cautiously optimistic that the enthusiasm of the 120+ states will grow that will get to 130, 140. And that next October, we'll be able to take the treaty forward and overcome the opposition of a handful of states. That said, the states who are opposing are dug in, they're dug in, they're pretty obdurate in their, in their resistance to this idea.

J Jaclyn Streitfeld-Hall 16:52

That's, that's often what we faced with R2P as well, there's many, many friendly states, but the ones who are not friendly towards R2P stay consistent throughout the years.

L Leila Sadat 17:04

Yeah, and the Security Council vetoes over Gaza haven't been helping, right? The polarization and the fragmentation even inside Western - the WEOG group - has, it's really roiled the international community, I would say. And so I think there needs to be a little bit of soul-searching in Western governments about their commitment to the rules, no matter where that commitment leads you. And that's what's really hard.

J Jaclyn Streitfeld-Hall 17:36

Absolutely, I mean, these things apply everywhere at all times, not just where you want them to.

L Leila Sadat 17:42

It's reciprocal. And so I think that's where, if you really believe in a rule of law, and a rules-based system, that means that your friends, and you have to all comply with the rules, just like the other guys have to comply with the rules, because it's going to be better for everybody, right, if everybody complies with the rules. So I think that's where there's some real soul-searching going on. There are some very dedicated smaller states and Global South states who are deeply committed to this treaty and the possibilities it offers to them. And I think that's an exciting area of development and encouragement.

J

Jaclyn Streitfeld-Hall 18:23

And you made reference to October. So I want to ask you what what happens next in the process? Do discussions continue at the UN? Is there something else that happens? And where do we go from there?

L

Leila Sadat 18:36

What I hope is going to happen, I mean, there are a lot of different options. So under Resolution, under Resolution 77/249, a two-year process was created for states to quote "discuss in an interactive format, the draft articles on the Treaty on Crimes Against Humanity." Last year, they did so, and it was a very positive experience. But not that many states intervened in April of 2023. We had many more states intervening in October. Again, I think Gaza kind of got states speaking out, even though it was on October 10. And the attack, of course, was October 7. So there was already a lot of energy in October, a lot of positive momentum. And this April, we had a huge number of states, actually on the list. I didn't think the co-facilitators would get through, through everything, and they did. We had upwards of 70 states call for the next step to happen, which is the calling of a diplomatic conference or the adoption of the treaty by the General Assembly. We had, again, a handful of states say we're not ready we think it's pretty mature. Mostly they don't say things like this is a bad idea. They just say it's premature or we're not ready. And then we had a very disappointing and surprising last session last week where the states in opposition refused to allow the chair summary to be formally adopted and attached to the summary of the meetings, the technical summary of the last two years of meetings. But instead, the resolution now says that they'll take note. And what that really means is they have not given up their resistance after two years with lots of engagement, lots of substantive conversations, very good conversations, where states could say, "look, we're concerned about this or that or the other thing", there're, as I said, a handful that are negative. What happens now is the Sixth Committee takes it up again this October 2024, to, quote, "take a decision" on what to do next. And the worst thing would be, would, I think, be to keep it in the Sixth Committee where, which has become sort of the graveyard of treaties. And the best thing would be to kick it into a diplomatic conference. Maybe there'd be some preliminary stab where it would go to a committee in order to be worked on in the modalities, etc. But I think after five years, states are ready to move forward. And so the question is, if that can't be done inside the Sixth Committee, will states wanting to go forward to get out of the UN entirely, as they did with the Mutual Legal Assistance Treaty, will they try to move it to another General Assembly committee that doesn't use the consensus principle? Well, they introduced a resolution in the General Assembly trying to get the GA to go forward. So I think there are a lot of very good procedurally-oriented delegations. And I wrote a paper on this two years ago that the global... that are published with me, where we basically said, "Look, here's some different options, here's some examples: this is how the landmines treaty got done, this is how this treaty got done." There lots of different ways that treaties can become law. This is the traditional vehicle coming to the Sixth Committee and then the Sixth Committee sending it to a treaty conference. And I think many states hope that this will work because it does say something important about the ability of the United Nations to function. Right, here we had the International Law Commission, it works for several years to produce this document, it goes back to states, it goes back to the ILC, it comes back to states, it's been pretty carefully vetted by now. This started 10 years ago, not to mention the project that we ran starting 15 years ago. So this document has been well-studied, it's been thoroughly vetted, and it's time

for it to move. If it can't move inside the Sixth Committee, I suppose there are other ways we can get it to move, and I think we're taking a look at those now because there's a distinct possibility that the Sixth Committee will refuse to vote or will be unable to achieve consensus.

J Jaclyn Streitfeld-Hall 23:09

Do you see a role for civil society in this process? How and where do you think, you know, civil society organizations can be instrumental here?

L Leila Sadat 23:16

So I love civil society, I'm part of civil society. I attended the Rome Conference for the ICC. As a delegate for the International Law Association, I was not affiliated with a government. That didn't mean I didn't have access, obviously, to informal meetings. But it also gave me a sense of how important both the information dissemination function and the pressure and the, just, expertise civil society can bring. When we started our project, I had actually thought about our project very carefully when I designed it in 2008, based upon a project I had been engaged in at Princeton University called the Princeton Project on Universal Jurisdiction. And Princeton did not include members of civil society in that project, and it was designed to formulate universal jurisdiction principles. And I thought that was a problem because I do think civil society organizations are also closest to victim groups, right? Sometimes they're representing victims. And the whole point of these instruments is to make people's lives better not to make more, you know, not to give me another book to write as an academic. And so I do think the fact that civil society represents victims and a different set of interests, maybe, than states is very important. So in our project, we have always worked with civil society, but civil society wasn't very interested until we started to get close to really achieving the goal. And I'm thrilled because a couple of years ago, I reached out to Global Justice Center in New York, which is a small organization working really on issues relating to, to gender, reproductive rights, women's issues, and I happen to know their then president, who's a dynamo, Akila Radhakrishnan. And I said, "Why don't you help me?" and "We need civil society." Because it was, like, me and Amnesty and, you know, there'd be three of us at these meetings. And this is important, this is too important to be left to states and a few experts. And so we started slow with just a few of us. And now this time around, we got a declaration from over 380 civil society organizations and individuals from all over the world coming in and on my text chain, I was so tickled because one of them created a text chain with our logo, which I loved. And we had over 40 people on that chain, you know, representing disability rights organizations, indigenous, some of the international NGOs, TRIAL International, International Commission of Jurists, so much broader, much broader civil society participation. And civil society performs so many functions in this, in this space. You know, the other thing is delegates have told me they liked working with civil society and it makes them feel that what they're doing matters to somebody that is not just showing up to some conference room in a windowless basement that the United Nations to fight about a paragraph in a draft, it's actually going to make a difference in the lives of real people. And so I think that's where I'm starting to feel, I won't say this is unstoppable, but when you're starting to get, you know, we have two Nobel Prize winners on this list, I mean, really distinguished experts, and big civil society organizations from every corner of the globe. And when you start to see that kind of enthusiasm, you start to think you know what? This is going to be unstoppable. And of course, that's our goal. Our goal is basically to spend the next five months so that when delegates come back to New York, they have, I've made I don't have one

here, but I have little silicone bracelets that say "CAH Treaty now". And they all get their package of information, and they feel some pressure from civil society. We've only had one delegation that said she didn't like civil society, most of them really appreciate the work, the work that that civil society does. I know I certainly do. I did have I have one more sort of vignette, which is I got to go to a meeting where some survivors were present, and there was a woman from the Democratic Republic of the Congo, who had been the victim of rape and sexual violence in wartime, and who had a child actually born of that. And I got to meet her, and I got to listen to her. And I had been on a webinar where she had been present before. And she said, "You know, until you made it clear", and she was struggling a little bit with some of the, you know, the conceptual framing, which can be hyper-technical, but there is this moment of epiphany, and she said, "Now, I know I have a right not to be subjected to crimes against humanity." And the way she said it, so proudly, I realized that in places where these atrocities are happening, the individuals feel like they've been forgotten, this is just the way it is, I'm worthless, I'm less than nothing. And to have the international community stand up and say, "No, you have a legal right not to be treated this way", is so powerful. And I think Jackie, that would be the last thing I would say is that the idea behind this treaty is really to empower victims to know that they are not alone, they haven't been forgotten, and they have a right not to be the victim of this kind of atrocity crime. And I think that's what keeps us going day after day and year after year.

J

Jaclyn Streitfeld-Hall 29:20

And what is your ideal outcome of this? I mean, obviously, to actually get a treaty, but beyond that, what is your ideal outcome of this process?

L

Leila Sadat 29:29

I don't, I don't, I guess I don't just want a treaty. I want a good treaty. And that was, you know, when we started our project, and we wrote our model, and our model sat on the desks of the International Law Commission, as it worked, I saw it. We really thought about... given the knowledge at the time, I think there are actually some improvements I would make now based upon, you know, 15 years past, but we want a good treaty. We want a treaty that really has robust provisions on prevention. We want a treaty that has fair trial rights to prevent politicized, right, we want one of the Nuremberg principles is that a defendant is always entitled to human rights protections in a fair trial in the law and the facts. And that meets the objection that these are going to be politicized trials. We don't want them to be politicized. At the same time, we do want to have universal jurisdiction, not mandatory, but the obligation of try or extradite means that if the person is in your territory and you don't try, you have an obligation of extradition. We want jurisdiction vested in the International Court of Justice to get good judgments from the World Court on what does it mean for a state to fulfill its duty not to commit and to prevent or punish crimes against humanity. So I'm very hopeful that, not only will we get a treaty conference, but that during the negotiations, we will use this as a vehicle to reinforce some of the core tenants of international criminal law that were established at Nuremberg, that are under siege. We see states asserting immunity now in cases that we couldn't imagine asserting immunity maybe 10 years ago, we see one member of the P5 say, "I'm not sure if crimes against humanity are jus cogens crimes." That's a shocking idea, given R2P, given the world outcome, right? I mean, just, so there's been a little bit of a push back to norms that we thought were well-established. And I see this process as helping to galvanize

support for those norms. I think that's really important. This could really be the treaty of our generation. And I think it can also be a rallying cry for those of us who are just depressed about the state of the world, that we're not going to give up that we're going to keep reinforcing the principles and keep trying to bring individuals to justice and to prevent these atrocities from taking place.



Jaclyn Streitfeld-Hall 32:06

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