“Auschwitz Never Again”

Lecture by Hon. Louise Arbour, President & CEO, International Crisis Group to the Dutch Auschwitz Committee, Royal Tropical Institute, Amsterdam, 27 January 2010

Before anything else, allow me to thank the Netherlands Auschwitz Committee, the Netherlands Pensions and Benefits Board, the Center for Holocaust and Genocide Studies, and the Royal Netherlands Academy of Sciences for having invited me to give this year’s “Auschwitz Never Again” Lecture. It is humbling to share the same honour with extraordinary past recipients such as Raul Hilberg, Albie Sachs, Simone Veil, Jorge Semprun, Irene Khan and Thomas Bürgenthal. It is also a great honour to be able to speak with you on this international day of remembrance for the victims of the Holocaust and of other genocides, corresponding to the anniversary of the date of the liberation of Nazi death camp Auschwitz-Birkenau.

I would like to begin my remarks this evening by briefly explaining why this award has such great personal significance for me.

Unlike some of the past honorees, I do not have a personal experience or family background that directly tied my life to Auschwitz or the Shoah. Yet in many ways, much of my professional life has occurred in its shadow. Whether as a lawyer and a judge in Canada deeply committed to the Rule of Law, whether during my tenure as Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or as the UN High Commissioner for Human Rights, I have always understood “Never Again” not as the acknowledgment of a new reality but as a call to action, a challenge to the indifference with which we so often respond to atrocious suffering from which we believe we will always be immune. That indifference attained unconscionable heights in preventing the Shoah and in failing to stop it once the extermination became known. From where I stand, it is painfully apparent that this was also facilitated by a legal system that became complicit in its own erosion, with legal order supporting oppression, losing any form of moral compass.

Maybe because I had no family history tying me to the horrors of the Second World War, I have always thought that I was approaching issues in a clinical, rational, dispassionate way. I believed that my own response to the Never Again call for action was grounded in a professional training and a moral choice, not in a more intangible, emotional reaction based on one’s complex humanity. I was confronted with a different reality when I first went to Rwanda on the eve of becoming the Chief Prosecutor for the Tribunal. This was in the fall of 1996. I went to visit a massacre site, where the bodies had been left lying and decomposing in the school in which men, women and children had been slaughtered. After my visit to the site, I was driven back to Kigali where I had an appointment with the President. I first went back to my hotel and had a long shower to wash away the odour of death that I felt had not left me. At the president’s residence, I was asked to sit in a waiting room and a young woman brought me a guest book to sign. I wrote

something in the book, trying to capture the extraordinary turn that my professional life had taken. I took a few minutes to write something and gave her back the book. She soon came back to me and said could I please sign and date my comments. I did, and she left again. She returned shortly, looking very puzzled, and said I had written the wrong date. We were in late September 1996. Under my name, I had written April 6 1994. The night the genocide began. I was shocked. I understood for the first time the extraordinary grip that the past can have on you, once you realize that you are part of it.

I want to return to my professional realm and discuss with you tonight what extraordinary strides we have made though the law to build the foundation for a world in which the promise of "Never Again" has greater resonance. In particular, I want to share with you tonight my own sense about the importance of justice in helping honor that promise.

The idea of justice, and in particular of personal criminal responsibility for crimes almost too great to be attributed to a single individual, was captured powerfully in the creation of the Nuremberg Tribunal, and carried through in modern times by, among other things, the establishment of a permanent International Criminal Court. It is one of the most powerful legacies to have emerged from the human ruins of the Shoah. It may seem obscene to claim a positive legacy from the Shoah, and worse to draw rudimentary moral lessons from moral failures of this magnitude. And it may seem absurd to claim that a worthy legal system could emerge form the ultimate failure of the Rule of Law and its pathetic surrender to brutality. But I suggest to you that the universal moral impulse that led to the a modern concept of justice is very much anchored in what Auschwitz has come to represent: a call for justice, not just in the narrow sense of punishment, retribution and deterrence but rather in the broadest possible sense, encompassing sustained and universal progress in the domain of human rights, particularly in the commitment to ideals of equality, non-discrimination, and the protective umbrella of civil, political economic, social and cultural rights.

Let's consider for a moment the huge distance we have travelled as an international community in the last 65 years by looking at what has happened on the international scene – in terms of law, policy, and institutions. In early 1945, there was no United Nations, no European Union, no Council of Europe, no human rights law, no international criminal law, no refugee law, and only the rudimentary framework of the law of armed conflict. There were no human rights courts, no international criminal tribunals. Both in domestic legal systems and in international law states ruled supreme. International laws and institutions were few and weak, and the individual human right to dignity was a notion rooted in religious or moral teachings, but nothing more than an aspiration, poorly reflected in the law, and of course unenforcable as a right.

That legal world, as it existed at the start of 1945, is in part the one that enabled the Shoah to occur.

In this respect we might ask: what choice did the international community have at that time but to reassess its fundamental beliefs concerning what was right and good about the international legal and institutional order?

With this broad question in mind, what I propose to do this evening, very briefly, is to explore two particularly significant legacies that emerged from the Shoah:

1. The emergence of human rights as an idea and as a body of law, with its accompanying set of institutions; and
2. The idea of individual justice after genocide, as embodied in international criminal law and institutions.

International Human Rights Law: The Rise of State Responsibility

For centuries, and right up to the end of the Second World War, public international law accorded individuals few meaningful rights. States were the only lawmakers and the only subjects of international law, and they could generally treat their own citizens as they wished. International law was truly the law of sovereign states; individuals and groups of individuals had no standing in the international order.

It was precisely the events of the Shoah that crystallized political will behind a new international norm of human rights. If there had been any doubt that some of the worst atrocities are committed by governments against their own people, that doubt was irredeemably shattered by the Shoah. The events of Second World War made a link between international law and individual rights unavoidable.

The first major source of international human rights law was, of course, the Universal Declaration of Human Rights, adopted without dissent in 1948 by the UN General Assembly. The UDHR is premised on the principle of the equality of all human beings in rights and dignity. It goes on to articulate the right to life, liberty and security of the person, and to further enumerate a series of rights that in a sense unpack Franklin Roosevelt's inspired prescription of freedom from fear and freedom from want.Yet the Universal Declaration was not a binding treaty. For that reason, most human rights supporters saw it as a major compromise. They had wanted a legally binding Bill of Rights.

As things turned out, for the next 28 years the Universal Declaration was the only comprehensive human rights instrument at the international level, and a major influence on the content of domestic constitutions and regional human rights treaties. Then, beginning in 1966, and continuing up to today, a significant range of international human rights treaties came into force, including treaties on civil and political rights; on economic, social and cultural rights; on children's rights; on the elimination of discrimination on the basis of race or gender and, more recently, on the basis of physical or metal disability; and, of course, on the prohibition of torture, and cruel, inhumane or degrading treatment or punishment.

More than eighty percent of today's states have ratified most of these treaties. Thus Professor Louis Henkin has observed, "By the end of the twentieth century, human rights,

a political-philosophical idea, had become an ideology, *the* ideology of our times, achieving near-universal acceptance…"

Also emerging from the ashes of the Shoah were the field of international refugee law – a related but independent field from international human rights law – and the expansion of international humanitarian law in the form of the 1949 Geneva Conventions and their related protocols.

Let me now turn to the institutional framework within which international human rights must be protected. The UDHR was of course developed by the United Nations Commission of Human Rights, under the intellectual and political leadership, in particular, of Eleanor Roosevelt (... I saw a few years ago in Geneva at the International Human Rights Film Festival the original film footage of the adoption of the UDHR by the GA including the speech by the only woman visible in the room. The President addressed the Assembly as "Gentlemen"…somewhat surprisingly, they were not all smoking…)

The CHR became much maligned over the years, and early in my tenure as High Commissioner I was party to the process that led to its demise and replacement by the Human Rights Council. In my view the profound malaise that led to the abolition of the Commission on Human Rights had many roots. In part it reflected a dissatisfaction and indeed a bitterness in the human rights discourse in the United Nations that has not and could not have been resolved by a mere institutional adjustment. But fundamentally I think that the Commission had outlived its usefulness as a mostly normative body, and had been unable to successfully reincarnate itself as a monitoring body for the enforcement of rights and of norms and standards. And, frankly, the normative era had largely overrun its course. Between 1948 and 2005 the world had equipped itself with a broad range of excellent normative documents: conventions, treaties, declarations, comments, but continued to be very deficient at ensuring that norms be implemented, standards adhered to and rights enforced. The efforts made by the Commission on Human Rights to transform itself into an implementation forum were not only unsuccessful but destroyed the effectiveness of the Commission even as a normative body. When it started to move from the creation of thematic special rapporteurs to country specific mandates, the Commission quickly became accused of politicization, selectivity and double standards. Country specific discussions in the Commission were of course never welcome by the country under scrutiny, and that antagonism led to the formation of political alliances resisting the specific finger pointing. Eventually, the Commission became a lame duck institution, having lost on the one hand the support of many developing countries who felt selectively exposed for their human rights shortcomings and, most significantly of the United States and several western countries who believed that the Commission had become a forum of choice for unfair Israel bashing. So the momentum for the abolition of the Commission was not difficult to create. The positive creation of its successor institution, the Human Rights Council proved considerably more challenging, and to this day the UN Human Rights Council continues to be an institution in search of its legitimacy. Meanwhile, some 15 years ago, the General Assembly created the Office of the High Commissioner for Human Rights, often mistakenly associated

exclusively with the functions of the Human Rights Council, but in fact mandated independently to promote and protect all human rights. This, in my view, requires that the Office of the High Commissioner strive to operate on the ground, in an attempt to prevent and denounce human rights violations when no other authority is able or willing to do so.

Of course, the UN system is not alone in protecting international human rights. There are also regional equivalents to the UN bodies, which are responsible for supervising the implementation of regional human rights law in Europe, the Americas, and Africa. These systems provide crucial protection complementary to the UN system.

And yet, even an effective combination of UN and regional law and institutions cannot diminish the primary role that *states* must play in the promotion and protection of human rights. The state, and not the UN or any regional body, remains the most important guarantor of human rights. This was true in 1945 and remains so today. The international system is there as a backstop: as a device of last resort if the state's protection of human rights fails. As a rule, the international system should offer protection only when effective domestic action is impossible, whether due to incapacity or unwillingness.

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The international law of human rights has one other limitation. It only provides for state, rather than individual, responsibility. So we must ask: what law is there to apply to the individuals who actually commit the violations? What emerged after the Shoah to take account of this more personal scale of accountability? Here we come to the domain of international criminal law, the second major topic I want to briefly address with you tonight.

International Criminal Law: The Rise of Individual Responsibility

In the shadow of the Shoah, many profound philosophical questions arise about recourse to criminal sanctions in the face of crimes of that magnitude. Is there *any* proper response that law or institutions can offer to acts as massive and grotesque as those so vividly embodied in the images of Auschwitz? Remember Hannah Arendt's compelling observation that "Men are unable to forgive what they cannot punish and . . . they are unable to punish what turns out to be unforgivable."

And can we truly purport to appropriate the plight of the victims by standing, in their name, to call perpetrators to account, to measure the levels of their culpability, to exonerate, to mitigate or to denounce their guilt and extend what the law says is the appropriate punishment?

Troubling as these questions might be, there is no choice but to reconcile the past with the future. I believe that we cannot do so by simply grieving. This is what the "Auschwitz Never Again" call to action really means. Criminal punishment is not only based on the expectation of deterrence. Frankly it is not always clear that the fear of punishment would prevent actions grounded in such a twisted sense of personal

superiority and contempt for the rest of humanity. But our commitment to prevent genocide and crimes against humanity requires, at a minimum, that we denounce the unspeakable, and that we collectively re-construct the moral world in which we intend to live. Through the imposition of a criminal sanction therefore, we do not purport to make the victims whole again, to make their suffering disappear, to make it all better. Not just by denunciation and deterrence, but by the loud re-affirmation of our moral choice we undertake to extend the protection of the law to all, including to those whose conduct will be judged under the very rules that they have so grossly repudiated.

The ideas that gave rise to international criminal law, to the reach on the international community into individual conduct, like human rights law, may be traced in their modern form to the events of the Second World War. More specifically they may be traced to the post-War trials of Nuremberg, and to a lesser extent Tokyo.

As I'm sure all here know, the Allied Powers were determined not to repeat the mistake they had made after the First World War, when they opted against an international tribunal to try leaders of the Central Powers for war crimes. So in August 1945 the American, British, Soviet and French governments agreed to establish an International Military Tribunal in Nuremberg, Germany, with the purpose of prosecuting the Nazi leadership.

The Charter for the Tribunal empowered it to try cases involving three types of crime: crimes against peace (also known as the crime of "aggression"), war crimes, and crimes against humanity. Genocide was not an enumerated crime under the Charter: the adoption of the Genocide Convention, which we also honour today, took place three years later.

In his opening statement at Nuremberg Robert Jackson conceded the limitations of the law, particularly as a deterrent to war. As he then said to the Tribunal:

> *I am too well aware of the weaknesses of juridical action alone to contend that in itself your decision under this Charter can prevent future wars. Judicial action always comes after the event. Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible.*

In my view, his words were even more powerful when he addressed not war itself, but the conduct of warfare and the perpetration of war crimes. The most often quoted part of his address articulates the most cogent foundation for international criminal law. He said:

> *The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flush with victory and stung with injury stay the hand of vengeance*

> *and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.*

Yet the ensuing Cold War meant that it would be another 48 years before the world saw any modern equivalent of the Nuremberg Tribunal. That body was the ICTY, established by the UN Security Council in 1993 in response to the deaths of tens of thousands of civilians in the former Yugoslavia. This was probably the most imaginative step ever taken by the Security Council, a bold step calling for personal accountability of political and military leaders for crimes that were unfolding before the eyes of the world on a daily basis.

Remarkably, less than one year later, Hutu extremists in Rwanda murdered approximately 800,000 Tutsis and moderate Hutus in a genocide that lasted little more than three months. The international community failed to halt the genocide, despite many prior warnings and opportunities to intervene.

Though a wholly inadequate response, in November 1994 the Security Council finally declared that – like the former Yugoslavia – the situation in Rwanda constituted a threat to international peace and security under Chapter VII of the UN Charter and established another Tribunal, the ICTR, to try those responsible.

I have alluded at the outset of my remarks to my personal involvement with these revolutionary institutions. Like many, at first I feared the Tribunals would be nothing more than paper tigers. In the case of the former Yugoslavia, we knew the locations of many of the suspects, but they were on the territories of states that would not cooperate to arrest them on the Tribunals' behalf. Consequently, we started to keep our indictments secret, so that it would be easier, particularly for the NATO forces in Bosnia, to apprehend suspects who did not realize that they could be arrested. In the case of Rwanda, the situation was entirely the opposite: those most responsible for the genocide had fled the country and had to be located before any action could be taken against them. In both cases we started focusing our investigations directly on the top leaders, the chief suspects who bore most responsibility for the worst atrocities – just as the Nuremberg Tribunal had done in its time.

As many of you will know, on May 27, 1999, I indicted Serbian President Slobodan Milosevic, on charges of war crimes and crimes against humanity. He was in office at the time, and NATO was at war with Serbia. This was an early example of what would become the debate between the imperatives of peace and those of justice, and the only one so far where justice was in the lead, although peace followed shortly thereafter. In that sense, it is the only impirical evidence that contradicts the assumption that justice can be an impediment to peace. As you know, Milosevic was eventually turned over to the Tribunal by Serbian authorities and stood trial in The Hague.

Milosevic died in custody before the trial could be completed, but his case marked an end to the longstanding impunity enjoyed by political and military leaders. Fifteen years ago, the likes of Slobodan Milosevic had every reason to believe that they would be forever

unanswerable for their crimes, whatever the magnitude of the harm they caused, and regardless of the extend of their direct or command responsibility for these atrocities. It took a very long time for the legacy of Nuremberg to start taking hold. The momentum, however, is irreversible.

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The tribunals for the former Yugoslavia and Rwanda demonstrated that fair trials at the international level are possible. This not only helped inspire so-called hybrid (or mixed national-international) tribunals in places such as Kosovo, Bosnia, Sierra Leone, and Cambodia. It also – and more significantly – helped inspire states to establish the permanent International Criminal Court, the world's first and only such court. There are currently 110 state parties to the Rome Statute, the treaty that established the ICC and gave it authority to try genocide, crimes against humanity, and war crimes – as well as the future possibility of trying crimes of aggression if states parties so agree.

The ICC cannot be, and was not designed to be, a substitute for national prosecutions. States bear the primary responsibility to prevent and punish human rights violations and war crimes. But the direct reach of international law to individuals as personal holders of rights vis-à-vis not only their state but vis-à-vis the whole world is an incredible consequence of the world having done so little to protect to those died, and those who survived Auschwitz.

Ladies and Gentlemen,

I now serve as President of the International Crisis Group, an organization committed to the prevention and resolution of deadly armed conflicts, with its attention focused on nearly 60 countries worldwide.

As a recent in-house editorial of The Guardian newspaper put it:

> ICG grew out of the perception that the world could have done more to tackle Somalia, Rwanda and Bosnia in the 1990s if it had only seen them coming. It blew the whistle on Darfur, East Timor and northern Uganda before those conflicts erupted. It reliably provides cool analysis of major conflagrations within days of them breaking out - such as with the 22-day war in Gaza. Even more impressive, though, is its coverage of forgotten lands - including, in the few months since Gaza, Haiti, Nepal and Tajikistan. When the world's gaze moves on, the ICG stays, to monitor the unfinished business conflict leaves behind.

My involvement with ICG is part of a continuum. I feel very privileged to have worked in institutions devoted to justice and invested in the call for action that Never Again truly represents. I have now joined the ranks of civil society actors as I believe in the extraordinary mobilization of non-governmental initiatives to advance the public good. I also believe in being there, in protection by presence, and in speaking up.

We live in a world of unconscionable inequities, within states, and between states. A world of unaddressed grievances and injustices, of democratic deficits with unpopular minorities always at risk, and with competition for elusive resources fierce and relentless. Inevitably, we live with conflict, ignorance, and hatred. But we also live with the tools and the knowhow to intervene, and we are a generation that understands what happens if we don't. "Never again" means "Not if I can help it", and there is always a way to help. We have already built a great legal infrastructure and a reasonably adequate set of institutions. We have mobilized groups and individuals from all walks of life: people come with their talents, their money, their good will, to work together in the memory of those who were once abandoned in the most shameful way.

I feel extremely honoured to be associated with those who take heart in this enterprise, and I thank you most sincerely for the privilege of addressing you tonight.