

## **Louise Arbour Speech**

*Remarks made by Justice Louise Arbour, United Nations High Commissioner for Human Rights*

*Monday, 17 October 2005, at the University of Connecticut, Storrs, CT*

"Senator Dodd, Justice Goldstone, President Austin, Ms. Kennelly, Distinguished guests, colleagues, and friends.

I am very honored to be with you today and extremely pleased to share the limelight with my friend Richard Goldstone. As I have spent an important part of my professional life in his footsteps, I am thrilled to have a chance to speak before him today. It gives me a wonderful opportunity to pay tribute to a trailblazer and to tell him, and all of you, that I can think of few greater honors than to have my name associated with his, and with that of Thomas J. Dodd. Our work reaches across continents and across decades to celebrate our common faith in justice and in legal process.

Thomas J. Dodd fully realized at Nuremberg, in the words of his son, that 'the way to respond to even the cruelest, and most callous, disregard for humanity was through laws, and justice.' Richard Goldstone believed that too, and put it to the test, both in South Africa and on the international scene. Like them I share the profound conviction that, as was so famously put by Justice Robert Jackson at the opening of the Nuremberg trial, '...to submit... captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.' This statement not only lays the foundation for the morally superior choice of justice over brutal revenge, but it also asserts the undeniable superiority of the Rule of Law over the rule of force.

We have seen, since the Second World War, the growth of international legalism. We have witnessed a proliferation of legal instruments, particularly in the field of human rights, which have led to a similar growth of domestic legislation and, although at a much slower pace, a growth in actual implementation of some now universally accepted international norms. But it took until the early 1990s for the true legacy of Nuremberg to bear fruit as we witnessed an irreversible trend in judicial accountability for serious violations of international human rights and humanitarian law. The death, a few weeks ago, of Simon Weisenthal, was a sharp reminder of the necessity to put in place institutions that will carry higher pursuits beyond the dedication of a single man.

Nuremberg has of course crystallized what is now the bedrock of international criminal justice, i.e. individual criminal responsibility. Individual criminal

responsibility was included in the London Charter, which established the Nuremberg Tribunal, and was subsequently endorsed by the General Assembly. Despite that, it was controversial then, as it continues to be resisted today. Defendants at Nuremberg submitted that international law is concerned with the actions of sovereign states, and provides no basis for punishment of individuals. Their arguments were rejected by the Tribunal, which held that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'

This landmark erosion of the concept of state sovereignty as a shield against personal accountability found its echo, some 50 years later, in the creation of the two international criminal tribunals with which Justice Goldstone and I have had the privilege of being associated and, in 2002, it was properly institutionalized with the creation of the International Criminal Court. Meanwhile jurisdictional gaps and – to be frank political expediency – have launched parallel initiatives: the Special Court in Sierra Leone, the Serious Crimes Unit in Timor Leste, as well as the soon to be and long awaited mixed jurisdiction in Cambodia to try the remaining Kmer Rouge engineers of the killing fields.

Furthermore, the doctrine of universal jurisdiction, which enables any state to try anyone accused of such international crimes, is now also beginning to be take roots. Best associated with the attempts to have Augusto Pinochet tried in Spain for torture, it is currently being invoked in the case of Hissène Habré, former dictator of Chad, against whom Belgium recently issued an international arrest warrant under its universal jurisdiction law. Domestic courts are also more willing to try their own nationals for international crimes. The supreme courts of Chile and Argentina gave a remarkable example, by stripping former powerful torturers of their immunities.

Yet the rise of international criminal justice has also met with strenuous resistance, ranging from cynical dismissal to outright hostility. So too did the Nuremberg initiative, including within the legal profession in this country. Chief Justice Stone, referring to the work of his colleague Justice Jackson acting as Chief US Prosecutor at Nuremberg, said this:

*Jackson is away conducting his high-grade lynching party in Nuremberg [...] I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas. (Quoted in Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law, New York, Viking, 1956, p.176: see Gary Bass "Stay the Hand of Vengeance; the Politics of War Crimes Tribunals", (Princeton University Press, 2000))*

In the same vein, a well known Canadian lawyer also referred more recently to the Milosevic trial in The Hague as a 'lynching,' on the basis, as he put it, that the presiding judge had unduly and arbitrarily restricted Mr. Milosevic's right to cross-examination, a well-known and inviolable principle of the common law.

Mr. Milosevic himself of course, like many Europeans, comes from a legal system in which there is no such well known principle since there is no right to cross-examination as we know that trial technique in the common law world.

My point simply is that a lynching is an illegal, unjustified killing, and no one ever suggested that the only way to run a fair trial in a democracy is as *per* the common law. But the unease with anything foreign, and therefore possibly different, is widespread, and there is no reason to assume that the entire legal community would be any more open-minded and responsive to novel approaches today than it was at the time that Harlan Stone was Chief Justice of the United States.

In fact, the dismissal of things foreign, and different, continues to have some currency in the highest judicial circles in this country. The comments of Chief Justice Renquist and Justice Scalia, dissenting in *Atkins v. Virginia* ( 536 U.S. 304 (2002), decided 20 June 2002, argued 20 February 2002) are very direct. The case dealt with the constitutionality of the imposition of the death penalty on persons said to be mentally retarded criminals. Among other things, the dissenting judges took objection to the majority's reference to the views of professional organizations, opinion polls and the laws and practices of other countries in the search for an evolving standard of decency in relation to the Eighth Amendment prohibition against cruel and unusual punishment. The dissenting judges repudiated in the strongest term any suggestion that foreign law could have any relevance to such determination. Justice Scalia said:

*The views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community", whose notions of justice are (thankfully) not always those of our people.*

This rejection, not on their merit, but simply as irrelevant, of the views of those who are not 'our people,' coming as it does from leading American jurists, is in my view cause for a sober assessment of the likelihood of persuading the United States to ratify the Rome Treaty creating the International Criminal Court. Not surprisingly, like many I deplore the United States rejection of the ICC. All the more so because of the substantial consensus that the need for an international criminal forum such as the ICC has generated in the community of nations. The rapid and robust expansion of accountability through the use of criminal sanctions on the world scene requires us to draw upon a rich capital of legal concepts,

ethical reflexes and practical know-how. This inevitable legal step forward merges the best of social purpose and legal creativity.

War crime trials are a natural extension of the idea of universal rights, which is itself the cornerstone of rights-based democratic regimes. The ICC reflects the emerging power of an international human rights culture. The old strategy of peace without accountability, to which there have been some historical exceptions, Nuremberg being the most noted, is no longer effective, nor is it keeping pace with the human rights expectations even of those who did not until recently know or believe that they were themselves human rights-holders. But now they know. Half a century after fundamental rights were declared, and decades after their infringements have been monitored, denounced and regretted, they are now beginning to be enforced and vindicated. It follows, in my view, that we are witnessing an irreversible globalization of human rights expectations, and a consequent growth in institutions necessary to remedy the grossest abuses of the most fundamental of these rights.

I believe that as American, South African and Canadian jurists, we are particularly attuned to the significance of this emerging recourse to judicial redress. The model of fundamental rights enforced by judges is very much part of our understanding of the role of law in a democratic society.

Courts have indeed become for many in our countries the forum of choice for the vindication of claims based essentially on an idea, and an ideal, of justice. I am not so naive as to suggest that we are on the eve of experiencing a similar primacy of the juridical over the political on the international scene. But I think that legalism is the inevitable by-product of globalization of rights.

It is fair to say that even within liberal democracies, the legalization of politics is not viewed by all as a positive development, just as the emergence of a juridical international regime of accountability for gross human rights violations is still struggling to establish its credentials. It seems that this debate will be with us for a long time. But I think that what should be ousted outright from that very legitimate debate is the idea that an international model should be rejected because of 'what is done to the common law' or because it is not 'that of our people.' It is difficult to operate comfortably and confidently in the disorganized broader world, and to participate in the dissonant discourse of all the people of the world claiming to have something to say. There is no doubt that it is easier, cleaner, more orderly, to just do things 'our way,' with 'our own people.' Our need to belong, to fit in, to discover our own identities through those with whom we associate makes us resistant to the accommodation of such a plurality of hopes, expectations and ways of doing business.

I think that the need to belong, to identify with and through others is both a wonderful source of collective human accomplishments and also, when it becomes pathological, a terrible impetus for exclusion and even for the elimination of all differences. Many of the old and current conflicts throughout the world are driven in large part by this kind of pathology which, as provocatively put by Michael Ignatieff, is also at the root of the impulse to commit genocide.

*So the history of genocide teaches us something about the history of the century in general: ours has been the first to perfect mass murder and the first to understand the exact sense in which this is a crime. Our future depends on whether our consciousness of it as a crime is equal to the strength of it as a temptation. Essay by Michael Ignatieff, 1998 in Simon Norfolk "For most of it I have no words - Genocide, Landscape, Memory."*

In my view, the International Criminal Court is the very first institution that posits the world's consciousness of genocide as a crime. This is the true legacy of Nuremberg. I hope its history will be one of inclusion.

Thank you very much for your kind attention."