

TENTH ANNUAL GROTIUS LECTURE SERIES

FOR LOVE OF COUNTRY AND INTERNATIONAL CRIMINAL LAW*

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I will begin with two observations. The first is the well-accepted understanding that any effort to separate law from the exercise of political authority along neat, tidy lines is a challenge filled with anxiety for those willing to try it—an embrace so complex, it far exceeds my ability to attempt it. That being said, within our experiences, there are circumstances that would seem to loosen some of these knots and turn this interplay of politics and law, into a simpler, clearer, although more tense, relationship.

One such condition is when political authority finds itself, or supposes by virtue of probability it will eventually find itself, pitted against the world of international law and, more specifically, the world of individual criminal responsibility. And it is easy to see how this may be.

I do not believe any one of us would doubt that humans are most sensitive to the law when it is violated in the extreme. When human suffering, particularly that of children, is so astonishing in its breadth

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and so numbing in its ferocity, it arouses in us the most unambiguous emotions. And when, in that specific context, suspicions edge up against a particular individual holding office the battle-lines distinguishing the world of law (however we choose to interpret it) from the world that has clearly abandoned all law can sharpen and the two worlds begin to reveal themselves with greater clarity.

That is not to say, of course, that the political world somehow rallies in support of a monster who commits such offenses—far from it. The perpetrator will often provoke howls of genuine condemnation, heartfelt disgust, and calls for action to be taken from political establishments everywhere.¹ But the political world will also likely perceive, by virtue of analogous thinking and with some imagination, that the modern day equivalents of the Barons at Runnymede—the lawyers—often make more demands of the political world than may yet be acceptable to the practitioners of sovereign authority.²

The second assertion that I wish to make early on in this Lecture is that it is not states who legislate international law, nor is it states who campaign for or negotiate international treaties and then seek compliance with them. Rather, it is persons bearing names, with personal histories and individual beliefs, who also happen to be the representatives of these states, who do all of this: campaign for new treaties, negotiate them, and seek compliance with them. I make this point because it is astonishing how, to an ordinary diplomat like me,³ it is so often lost in the mists of scholarly discussion.⁴

1. See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 284 (2007) (recognizing the evolution of the term “crimes against humanity” from the atrocities of Nazi Germany and the international war tribunals subsequently established in the former Yugoslavia and Rwanda to address such impunities).

2. See, e.g., *id.* (noting that for some time the international community “begrudgingly” accepted domestic amnesty programs as a redress for impunities, thwarted by state leaders “wielding the shield of state sovereignty”).

3. Press Release, Embassy of Jordan, Prince Zeid Bin Ra'ad Begins New Post as Jordan's Ambassador to the United States (Feb. 27, 2007), available at <http://www.jordanembassyus.org/new/pr/pr02272007.shtml>.

4. See generally Christian Reus-Smit, *The Politics of International Law*, in THE POLITICS OF INTERNATIONAL LAW 14-44 (Christian Reus-Smit ed., 2004) (providing a refined analysis of the major schools of contemporary scholarship covering the relationship between law and politics).

In my own experience, success in treaty negotiations always seemed to depend on the same three crucial ingredients: a determination by at least a majority of states to have a treaty negotiated, a well thought-out methodology for how this outcome could best be achieved, and skilled lawyer-diplomats at hand to chair the proceedings. By far the most important requirement, however, was the presence of enough individual negotiators prepared to unhinge their views from their initial instructions and then allow those views to conform to the contours of an emerging consensus. Without elasticity guided in some measure by one's own conscience, and a knitting together of friendships between the delegates, no agreement, let alone a durable treaty, would be attainable. If every negotiator stuck rigidly to the instructions of their respective governments, without ceding ground on a single point to fellow delegates, customary international law itself could never have been codified.

I have chosen to make these two assertions because it is the individual, not the state, who arouses fear and inspiration. It is the individual who will, if accused of an outrage, invoke his or her country's name, its laws and honor, and the right of immunities attaching to his or her sovereign office—even though the crimes for which this figure is accused should properly extinguish all and every argument serving their bid for impunity. It is the individual who will see this from afar, and then seek to envelop himself with every measure of national protection, placing his country between himself and the outside world and its "world law."

It is also the individual who will react to any flagrant abuse of power, call for change, and seek the creation of a new legal framework. The question is: are there enough individuals to make a sustained difference?

In general terms, the legal community that serves political authority directly too often sees itself merely as a technical service. Skilled craftsmen employed by politicians who line the channels of expediency with legal reasoning sufficient to ensure the triumph of expediency or political freedom of action over everything else.⁵ In

5. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 197 (2005) (describing modern skepticism about international law as the belief that international law is normatively flexible

the context of international relations, this point is as obvious as it is ubiquitous.

I say this because in recognizing the state system as a legal system, we also acknowledge that nationality is one of the principal points of reference for us—one of the prime sources of our identity.⁶ And, for many of us, as we make our way into the soup of international affairs, it can indeed be “the” principal identity. To borrow from the celebrated script of the late Abby Mann, we will do much “for love of country;”⁷ there is, after all, a genuine loyalty the majority of us feel toward our respective national points of origin. We often elect judges to international criminal tribunals solely because our country has been offered a trade or reciprocal agreement for another position it seeks elsewhere—with little consideration given to the legal qualifications of the candidate.⁸ We condemn publicly the abuses committed by international peacekeeping personnel, abuses that include the crimes of rape, the trafficking of human beings and illicit narcotics, but we remain tight-lipped when it is our own peacekeepers who commit them.⁹ The lawyers often

and determined by that which is politically expedient).

6. In his book, *Identity and Violence: the Illusion of Destiny*, Amartya Sen demonstrates how our inclination to lay specific emphasis on only one or two of the many identities or affiliations we enjoy (and for the most part he is concerned with religious affiliations) can fall easy prey to those militants and chauvinists who will exploit and catapult this popular tendency to an extreme wherein it begets violence. He argues persuasively, the extent to which we must therefore broaden our appreciation of whom we are. See AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* 83 (2006).

7. See ABBY MANN, *JUDGMENT AT NUREMBERG* 114 (1961) (telling the story of the “Judges’ Trial” of 1947—the third of the twelve subsequent trials held in Nuremberg).

8. See Adam M. Smith, “Judicial Nationalism” in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 *TEX. INT’L L.J.* 197, 231 (2004-2005) (arguing that some considerations beyond the qualifications of a particular judge, such as nationality, defy the notion of objectivity but may still have good practical reasons for remaining a part of the international judicial nomination process).

9. Compare U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 230 (2007) [hereinafter *TRAFFICKING IN PERSONS REPORT*] (condemning the acts of sexual exploitation and abuse perpetrated by UN peacekeepers in the Democratic Republic of Congo), with Susan A. Notar, *Peacekeepers as Perpetrators: Sexual exploitation and Abuse of Women and Children in the Democratic Republic of the Congo*, 14 *AM. U. J. GENDER SOC. POL’Y & L.* 413, 425-27 (2006) (outlining the measures taken by the United States, such as the American Service Members Protection Act, to prevent U.S. peacekeepers from being prosecuted in

argue during the UN Security Council meetings or in other gatherings of states' parties that international criminal justice is too expensive. The spending must be brought under control, they say, knowing full well this is not their burden to carry, but that of their compatriots representing the finance ministries with whom they seek to curry favor. And when I say "we" or "the lawyers" I mean of course all of us, generally speaking, with no reference intended to any specific nationality.

Therefore, the problem presents itself clearly in the following way, and other colleagues working in adjacent streams of government are not unaware of this tendency. In the event the legal experts mount a vigorous defense of broader legal principle, their arguments may well be prone to ridicule, thus staining their credibility.¹⁰ At the extreme, we could very well be viewed as the inseparable companions of hypocrisy.

This legal community, which in other circumstances would practice and teach international law in all its variety, so often while in the service of government, will rush to place its craft together with its moral underpinnings—however amorphous their nature—high on a scaffold for others to perform the public execution. There are the few who would, of course, resign if policy ran roughshod over the better interests of the legal profession or over general legal principle. But so rare are these occurrences it is small wonder they then become newsworthy and the lawyers concerned emerge from the backrooms of government to become folk heroes.

In his seminal work on courage, Lord Moran observed almost a century ago what seems so obvious to us now, that "[c]ourage is a moral quality; it is not a chance gift of nature like an aptitude for games. It is a cold choice between two alternatives . . . Courage is will power."¹¹ Because it requires a mental adjustment, an understanding that courageous choices may include the loss of a job, a career, freedom perhaps, sometimes friends, and even family, a demonstration of moral courage can be rare indeed. And why all the

international tribunals).

10. Reus-Smit, *supra* note 4, at 15-16 (arguing that the pervasive realist view of international politics draws a sharp line between the law and politics, where law lacks significance without politics and the defense of the law outside of a political context is inherently untenable).

11. LORD MORAN, *THE ANATOMY OF COURAGE* 61 (2d ed. 1966).

sacrifice? Only to be comfortable in the knowledge that there is no self-betrayal, that in advancing a position, there is a correctness, a deeper purpose behind it, and also—fundamentally—a justness to it (however we may interpret that justness). It is very much all individual, as Sir Thomas More, that paragon of courage, well knew the night of April 12, 1534: the eve of his dramatic declaration that his own conscience would not allow him to swear the oath of obedience, recognizing the recently passed Act of Succession.¹² Every prisoner of conscience before and since has surely also felt it. As More spent his second month in the Tower of London, wedded to his famous silence, the government knew it could ill-afford to act against him unlawfully and therefore sought to impose the king's will "while preserving legalities."¹³ Over one year later, this was done, courtesy of the judges who ensured, in the words of one biographer: "tyranny succeeded not through war, but through law."¹⁴

I am always struck by the lessons of extremes and, in this vein, by the experience of the White Rose movement in Germany in 1942 and early 1943—a movement whose actions represent one of the purest acts of heroism in the Second World War.¹⁵

While there were many young men in Germany who, for love of country, threw themselves into death's embrace on the Eastern front in 1942, there were many other men on the Eastern front, or with the *Einsatzgruppen*, or in Poland—for example the 101 Reserve Police Battalion—who, for the same love of country, engaged in the vilest atrocities against civilian men, women, and children.¹⁶ And of course

12. See RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* 458-61 (1984) (detailing the impact of the Act of Succession, which required all subjects to swear an oath to recognize Elizabeth, daughter of King Henry VIII and Anne Boleyn, as the true successor to the crown and More's subsequent refusal to swear an oath of obedience to heirs produced by the marriage).

13. See *id.* at 479-82 (detailing the lengths to which the government went to keep More in the Tower, such as changing the statute to encompass the charges leveled against him).

14. See GERARD B. WEGEMER, *THOMAS MORE: A PORTRAIT OF COURAGE* 210-17 (1995) (detailing the arguments and judgment made at More's trial, including the failure of the judges to address More's defense).

15. See MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA* 160 (Thomas Dunlap trans., Univ. of Chicago Press 1998) (1994) (recognizing that the respect due to the resistance fighters of the White Rose movement is made greater by the fact that they knowingly broke valid law out of moral conviction, thereby condemning themselves to death in the Nazi court system).

16. In Christopher Browning's book, the actions of ordinary Germans

there was the Holocaust: the mathematical killing of humanity itself, with the perpetrators of these colossal crimes numbering in the tens of thousands. Against all of this, there was the movement of the White Rose, numbering at its core five students and a professor.

With the truth rapping loudly against their consciences, a truth which held that Hitler's state, as well as its wars, was a form of monstrous criminality, these six Germans took to opposing the regime by distributing copies of six leaflets throughout Germany, filled with their exquisite denunciations.¹⁷ Their courage, expressed in the full knowledge of the sacrifice to be made if they were caught at a time when almost all of the country appeared tranquillized, was one of gigantic proportions. It was so, I believe because for them, the victims of Nazi Germany had by November 1942 invaded the very center of their thinking.¹⁸ By displacing all other considerations, including a love of country, the victims became the principal point of reference for the members of the Movement, stimulating a yearning for a country these members once knew as Germany.

It is often only when victims own this perspective completely, that we can be moved as humans, and indeed respond as human beings. Yet it is remarkable the extent to which this point is so often obscured by other considerations.

Two years ago, I was Kofi Annan's Adviser on Sexual Exploitation and Abuse in U.N. Peacekeeping. After exploring the phenomenon thoroughly for the United Nations, I was left feeling

committing the most unspeakable crimes is analyzed in great detail and from a variety of angles. What emerges from his analysis is his conclusion that most of the ordinary men of the Reserve Police Battalion 101, believing "their people" to be in a race war against an objectified enemy threatening Germany, and conditioned to accept, at a very fundamental level, "their Germanic Racial Superiority", committed mass murder willingly with few reservations. CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* 73, 159-89, 191-92 (1992).

17. INGE SCHOLL, *STUDENTS AGAINST TYRANNY: THE RESISTANCE OF THE WHITE ROSE, MUNICH, 1942-1943* 94-103 (Arthur R. Schultz trans., Wesleyan Univ. Press 1970) (1952) (providing an eloquent and moving description concerning the method of resistance chosen).

18. ANNETTE DUMBACH & JUD NEWBORN, *SOPHIE SCHOLL AND THE WHITE ROSE 190-92* (Oneworld Publications 2006) (1986) (reprinting the text of the Second Leaflet, which called on German citizens to awaken from "their dull, stupid sleep" to the atrocities committed by the German government and to accept their complicity in these crimes by overthrowing the Nazis).

numb by the extent to which people can be made to suffer. The young women of Bunia, in the Democratic Republic of the Congo, had survived the most gruesome wartime experiences—massacres, multiple rapes, disease and hunger—only to then find themselves tormented by the very people who were sent in to save them. It was clear these people had endured unabashed cruelty.

We set about seeking to remedy every aspect of this odious experience, including the United Nations' investigation of the initial allegations. After some time I had a conversation with a senior U.N. official who opposed a recommendation that all personnel serving in the field submit a sample of their DNA as they embarked on their assignments on the understanding they would recover their sample once they had completed their mission.¹⁹ My friend, a very distinguished lawyer, argued that some countries may view this proposed measure as a violation of the civil and political rights of their citizens serving with the United Nations.²⁰ Maybe so, I remember saying, but I maintained that if the victims of U.N. abuse were no longer considered an afterthought, but were properly regarded, those fears ought to be the lesser of the two concerns.

Similarly, if the victims of U.N. abuse were properly treated today, the negotiators at the United Nations, representing all our countries, would by now have agreed to the mandatory holding of all court-martials in the territorial or host state, whenever the accused came from a military contingent. They would have allowed for joint United Nations-member state investigations of alleged criminal offenses. They would have agreed by now to the terms of a proposed convention that would ensure jurisdictional coverage on the part of the sending state whenever civilian personnel are suspected of committing abuse and the host state has no functioning judiciary. For

19. See The Secretary General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, 15, 25-26, U.N. Doc. A/59/710 (Mar. 24, 2005) (prepared by Prince Zeid Ra'ad Zeid Al-Hussein) [hereinafter *Zeid Report*] (recommending that UN personnel be subject to DNA testing if a question of paternity arises in the course of an investigation or there is general suspicion that a criminal offense has occurred).

20. See Alexandra R. Harrington, *Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing Them in the Future*, 12 ILSA J. INT'L & COMP. L. 125, 150 (2005-2006) (recognizing that DNA testing prior to the deployment of UN peacekeepers may violate civil libertarian principles, particularly in the United States).

lawyers from the world's respective defense establishments and various ministries to think only of securing and defending the rights of their own soldiers, of their own nationals, with little regard to the victims thereof begs the rather obvious question: if not them, then who? In the context of the present discussions at the United Nations in New York, who will argue on behalf of the victims?

Is not this impulse, after all, identical to that which drives us toward an acceptance of the Responsibility to Protect idea—the generally welcomed notion that Governments have a duty to protect their people and if they violate their obligations, *erga omnes*, the international community may be required, or even obliged, to intervene diplomatically or otherwise?²¹ Three years ago, the combined Heads of State and Government of all countries accepted this logic, albeit more in the abstract than in operational terms.²² However, at least they recognized the vulnerability of the individual human being and the need for us to worry less about the rights of those who torment and more about the suffering of their victims. Yet the Responsibility to Protect, as a principle, is calibrated more to the developing world and so finds easy acceptance within the developed world. When it comes to abuses within the context of peacekeeping activities, where the accused have in the past come from a broad range of countries, North and South, resistance to any question of improved accountability stiffens.²³

To return you to our original question: insofar as the advance of international criminal law is concerned, are there a sufficient number of lawyers to make a positive difference?

In the case of the International Criminal Court, the passions of a decade ago, once raw, have ebbed somewhat, giving way to a more studied approach to the Court's performance. And all of us are the

21. See *generally* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2002), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (elaborating in detail the founding principles and state obligations of the Responsibility to Protect).

22. See G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (committing the signatories to protecting “populations from genocide, war crimes, ethnic cleansing and crimes against humanity”).

23. See Alex de Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFF. 1039, 1054 (2007) (arguing that the failure of the Responsibility to Protect in Darfur was the result of practical limitations not envisioned when the policy was first formed).

more relieved for it. However, and notwithstanding the caution still exhibited by many countries toward the Court, there are two features in particular that make it a truly historic institution. The first feature is captured elegantly by Article twenty-seven of the Rome Statute: now often overlooked, but still the simplest and most profound article ever to be written into a multilateral treaty, or any other treaty for that matter.

This golden article of the Rome Statute represents the field over which the battle between law and politics was joined, with each discipline exerting its influence over the question of whether there should be a Court in the first place.

It is worth recalling the whole article:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.²⁴

The irrelevance of official capacity, as a statutory principle, has now been accepted by the 108 states across the international community who have acceded to the Rome Statute, thereby accepting the Court's jurisdiction over the four so-called "core crimes," or as my distinguished discussant Ambassador David Scheffer has more accurately termed them the "atrocities crimes"—Genocide, Crimes Against Humanity, War Crimes and the soon-to-be defined Crime of Aggression.²⁵ Put another way, 108 countries have voluntarily placed, not just their citizenry but also their highest officials, every single one of them, under the jurisdiction of an

24. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15- July 17, 1998, *Rome Statute of the International Criminal Court*, art. 27, U.N. Doc. A/ CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

25. *Id.*, art. 5.

international criminal court.²⁶ It is a step so enlightened it simply has no historical equivalent or precedent. No matter what the nature of the remaining criticisms directed at the court or its statute, one has to admire the nerve of those countries acceding to the Rome Statute. Others may call this naiveté, recklessness or even folly, and they would bring forward their repertoire of arguments: the inevitable corruptibility of court officials, no clear accountability, unchecked prosecutorial powers, and so forth.

But these arguments bear some importance only when the victims of those gravest of offenses are marginal to the discussion. In any final analysis, we build a criminal court for the victims: because it is they, and their kin, who ultimately will decide whether a society will ever fully recover from the brutalities of war. No country or society can possibly claw itself into lasting reconciliation once massive crimes have been committed if the victims and their views are not addressed as a central priority of the country and of the international community. In this, the International Criminal Court is rather unique, and this is my second point about its historic quality. Only a few weeks ago, and for the first time in an international court, the pre-trial chamber cleared the way for victims to take part in hearings, not as witnesses but as victims in their own right.²⁷ And for the first time there is an International Criminal Court with a statute that not only provides for reparations, but also is in possession of a trust fund, managed by a Board, from which so-called humanitarian payments could be provided to victims in advance of a conviction if the Board deems it necessary and the Court has no objection to it.²⁸

When the victims no longer exert any direct influence on our discussions of international justice or peace after war, we often find

26. See International Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menu/ASP/states+parties/> (last visited Mar. 6, 2009) (listing member states, which include Brazil, France, Germany, Japan and the United Kingdom).

27. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01-04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 41 (Jan. 17, 2006) (determining that the six victims of crimes including torture, unlawful detention, murder of family members, and enslavement had a right to “participate in the proceedings at the stage of investigation of the situation in the DRC”).

28. See *Rome Statute*, *supra* note 24, at art. 79 (establishing a trust fund for the benefit of the victims of crimes tried in the International Criminal Court as well as their families).

ourselves entering into a world of interminable debate, with valid arguments being presented from every direction.²⁹ For anyone who has experienced war and its horrors, however, these discussions can often appear to be in need of more subdued reflection.

It is my belief that if one seeks to patrol the currents of international criminal law, one ought to know as best one can, what it is they are patrolling. When it comes to crimes committed in war or against humanity as a whole, more lawyers, I believe, need to be in the war or be where these crimes find expression, to grasp, very simply, the thinnest slice of what a victim experiences.

It is not the same as claiming, in an ordinary context, that one must witness a murder to know the pain of the victim; we know enough about what a murder is without actually needing to see such a crime unfold before us. However, when we talk or write about atrocity crimes, there is a more pressing need for us to feel firsthand the extent to which the environment contributes toward the suffering of the potential victim (quite aside from the physical deprivations they experience), like the immobilizing fear associated with not knowing if, or when, their turn to bear the incomprehensible will come. And it is incomprehensible, even to those who have devoted their lives to the criminal sciences. Perhaps one of the best descriptions to be found anywhere lies in the case prosecuted in 1947 by Benjamin Ferencz: the *Einsatzgruppen* trial. In its judgment the Nuremberg Criminal Tribunal found that:

If what the prosecution maintains is true, we have here participation in a crime of such unprecedented brutality and of such inconceivable savagery that the mind rebels against its own thought image and the imagination staggers in the contemplation of a human degradation beyond the power of language to adequately portray.³⁰

29. In some of the earlier pieces of scholarship on the International Criminal Court long essays were devoted to exposing the perceptions and desires of the delegates who negotiated the statute with commendable, but not always with complete, accuracy. Unfortunately, many of these scholars in their early writings also omitted the centrality of victims in shaping our perceptions as delegates to the Rome Conference and in the overriding need to extinguish impunity from the world for the most barbaric of crimes. See, e.g., David Wippman, *The International Criminal Court*, in *THE POLITICS OF INTERNATIONAL LAW* 151-68 (Christian Reus-Smit ed., 2004).

30. 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under

Indeed, if asked today, many of the distinguished judges at either of the two *ad hoc* international tribunals would probably acknowledge that a career filled with exposure to ordinary crimes is little preparation for the surprise and revulsion they feel when encountering the foulest of criminal extremes.

If lawyers could collect these impressions from actual experience and then embroider them with the calmer reasoning offered by distance, they will invariably, in my experience, place the victims where they should be placed: firmly at the center of the debate on international justice, and place themselves among those who advocate passionately for international criminal justice.

As a Court whose purpose it is to rid the world of impunity for those who will commit such offenses, with a statute that does not recognize amnesties or pardons, the ICC gives no leeway for those bearing the gravest responsibility. And for good reason: witness the reversal or repudiation of a significant number of the amnesties granted in Latin-America through the 1970s and 1980s.³¹ Even the Inter-American Court has discredited most, if not all, of them in recent years.³²

To build stable societies after the compressions of war or extreme violence, the first threads of a national memory need assembly, using accountability as the first cornerstone. Any thought that carefully applied amnesia is sufficient to create smooth and durable transitions to peace is playing a game of high chance, because the tensions and bitterness will lie like dry gunpowder waiting only for that charismatic chauvinist to arrive on the political scene and light it.

The Court serves to retrieve memory from trauma, and therefore to allow an injured society the indulgence of believing a full recovery is possible. Notwithstanding the general hesitation of lawyers in government service when it comes to the challenges expediency poses to international law, there are still enough individuals who understand the extraordinary nature of the International Criminal

Control Council No. 10, at 412 (1951) [hereinafter Nuernberg Trials].

31. See Trumbull, *supra* note 1, at 302-03 (observing that the blanket amnesties granted by Chile and Peru were invalidated and that those states granting amnesty combined amnesty with other forms of accountability).

32. See, e.g., *id.* at 300 (noting that the Inter-American Court of Human Rights found Peru's amnesty law legally invalid and in violation of the American Convention on Human Rights).

Court and the centrality of victims in its construction and operation. It is these individuals, scattered across the international community, who have essentially built the Court and who, while entirely loyal to their own governments, are able also to identify and sympathize with the suffering of people elsewhere.

Over the last several years, there have been numerous attacks mounted against international criminal justice from humanitarian groups and political experts who believe that without the inducement of amnesties, now effectively proscribed by the International Criminal Court, conflicts are doomed to continue until they exhaust themselves or one party prevails decisively over the other.³³ In a major international conference held in Nuremburg last June, where the entire agenda was devoted to this issue, this displeasure was well felt.³⁴ In attendance were government lawyers drawn from all five continents, who parried off these assaults as best as they could.

What appeared more important to me than the outcome (the lawyers won of course) was that they were not arguing as German lawyers, nor as Jordanian lawyers or as Finns, but only as lawyers. And the foundation of their position was also clear: the world had already crossed the Rubicon. Prior to July 2002, and the entry into force of the Rome Statute, impunity flourished in the oxygen supplied by amnesties: amnesties which were almost always enacted by actors who themselves were never the victims. After the entry into force of the statute, that condition has been more difficult to obtain (the UN, for example, does not now support amnesties) and so the world must continue to adjust to it, as it has done in more limited cases in the past.³⁵

33. See Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 871 (2005-2006) (asserting that amnesties and other alternatives, like South Africa's Truth and Reconciliation Commission, should still be considered by the ICC because the alternatives may be a better way to do justice, avoid harm to third parties, and adopt a pluralist philosophy).

34. See U.N. GAOR, 62d Sess., Letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General at Annex, ¶ 2.6, U.N. Doc A/62/885 (June 19, 2008) (transmitting the final Nuremberg Declaration on Peace and Justice, which was developed at an international conference in Nuremberg and includes a compromise that permits amnesties in certain circumstances for those not primarily responsible for genocide, crimes against humanity, or war crimes).

35. See *Rome Statute*, *supra* note 24, at pmbl. (calling for the end of impunity

I last spoke at this annual meeting in August, 2005 and on that occasion I began with a recollection that I will now use toward the end of my statement for this evening. And I will do so because, to my mind, it demonstrates the extent to which law can reframe an entire approach when it is left to operate according to its own logic; not as the mere servant of political expediency, but at the service of a broader need. Often it does need a champion, a leader; although it is also accepted that the individual in question may not even be aware they are viewed as such.

On April 24, 1995, Justice Richard Goldstone, the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, announced he was investigating Radovan Karadžić, Ratko Mladić, and Mico Stanišić for Genocide and Crimes Against Humanity. For those of us in the former Yugoslavia, inured into believing that justice had no friend in a land where expediency on the part of the United Nations and much of the international community reigned supreme, the news burst like a thunderclap. I offer no great revelation this evening when I note how the announcement was not popular with certain major capitals, notwithstanding the continued high levels of bloodletting in Bosnia and Herzegovina. Indeed, there were many in the United Nations who panicked over the prospect of no further talks with the Bosnian Serb leadership. How, they wondered, were we going to end the war now, if we could no longer negotiate with the likes of Karadžić and Mladić?

Goldstone, acting very much against the conventional expectations of the time, courageously and in one stroke forced us to think differently. One month later, the Tribunal issued its first indictments of both Karadžić and Mladić. While they did not prevent the nightmare of Srebrenica, nor did they lead to the arrest of Karadžić and Mladić (a fact that has kept Bosnia and Herzegovina in this state of insecurity for so long), they did open the way for NATO and subsequently Dayton and the end to the fighting itself by October 1995.³⁶

for the perpetrators of the most serious crimes).

36. Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 874 (1997) (underscoring Justice Goldstone's belief that peace agreements cannot be successful without simultaneous accountability for war criminals, and, as such, the indictment of Karadzic was a crucial step in attaining peace in the former Yugoslavia).

President Bill Clinton and his administration, as well as the North Atlantic Council, were accorded great credit for bringing the hostilities to an end, and rightly so. They brought, through their combined will and effort, the bitter killing to an end.³⁷ Nevertheless, the war's final chapter began with the launch of specific criminal investigations ordered by an international prosecutor, who brought his office into action on the basis of evidence gathered by his investigators and at a time when any such judicial intervention was viewed by many political experts as needlessly complicating, if not naive. These experts were wrong of course. And the world adjusted itself to Goldstone's reality.

It is at this type of juncture, though not always at the threshold I just described, when the world of political expediency will acknowledge that its methods have failed and so reluctantly make room for another non-political approach. This movement will be made reluctantly, because, as I suggested at the beginning of this talk, if successful, others would ask, with suspicion, where this march of international criminal law would ultimately lead.

Is it not a measure of how small we can be when all some have to offer the victims of the most terrible offenses is little more than the hypothetical question: yes, but what would happen if? If the International Criminal Court succeeded, what would happen then? What would it mean for the future exercise of political power, given these first assaults on the right to sovereign immunity? Ultimately, the question also arises as to whether it all has to be so dramatic or cast in language so threatening?

Is it not possible for us to imagine a vibrant political world, free of our most extreme and violent excesses and iniquities? Can we not accomplish this by supporting the only permanent international criminal court without sacrificing that political power necessary for any country to provide its people a dignified existence? Are the political powers we judge indispensable to the preservation of that dignity and the Right to Sovereign immunity one and the same thing? Under ordinary circumstances, perhaps the answer is yes, but surely not so if the country in question hosts or commits crimes

37. WAYNE BERT, *THE RELUCTANT SUPERPOWER* 224 (1997) (arguing that despite the Clinton Administration's initial reluctance to use military power, the United State's use of force was critical to stopping the advancement of the Serbs and providing an impetus for successful negotiations).

whose description lies “beyond the power of language to adequately portray.”³⁸ Such an authority forfeits not only the dignity of its people, but every fiber of its legitimacy.

All 108 heads of state and governments of the states party to the Rome Statute have accepted this maxim; while they continue to maintain their rights to sovereign immunities in all other matters, this right is suspended where atrocity crimes are in evidence. They are not all unrestrained idealists, and the world will long remain imperfect. But they acknowledge by their actions that we can no longer offer license to impunity through the perversion of a customary right when human conduct turns barbarous.

We, the politicians and diplomats, will better preserve the dignity of our people not by clinging steadfast to whatever right will shield us from our political foes, but by some resort to moral courage and enlightened thought, and it does not have to be at the expense of expediency. The restoration and maintenance of peace and security—the basic grammar of our international work—does not flow simply from raw security, nor from the physical reconstruction of societies shredded by war, but from what the victims themselves will allow us or decide for us. It is the victims of our worst excesses, their kin and their immediate descendents, who determine the durability of peace agreements, or whether a return to war is likely. Serve them well, serve their desire for accountability, for recognition, for dignity and the political world will have what it wants most: a reckoning, the essential precursor to a lasting reconciliation, and then security, stability and, ultimately, predictability.

It is also the victims who can bind us individuals within our respective countries, all of us, lawyers and non-lawyers, not just in common recognition of their terrible misfortune, but, should we genuinely seek it, in our resolve and effort to restore to them some basic sense of human decency. And the equation could not be simpler; we place these victims high within the configuration of our government priorities, and they, in turn, elevate our own sense of community and the very worth of the state we serve before humanity as a whole.

38. Nuernberg Trials, *supra* note 30, at 412.

If any country is worthy of the love of its people, surely it is the country distinguishing itself among all of the 193 countries in the world today by offering humanity a more mature and hopeful future. If not for my own, Ladies and Gentlemen, then for love of that country and to it, would I wish to belong.