

LECTURE

A Rawlsian Approach to International Criminal Justice and the International Criminal Court

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I. INTRODUCTION

The Eberhard P. Deutsch lecture is an important one, and I am so pleased to have been invited to deliver it. It is good to be back in New Orleans, and wonderful to enjoy some Nawlins' hospitality. Today is International Women's Day, and there is no doubt that the International Criminal Court (ICC) is a powerful instrument for protecting women's rights around the world. So as the first woman honored with being asked to deliver the Eberhard P. Deutsch lecture, it seems particularly fitting to address this topic today.

It is hard to imagine, taking in the delights of a New Orleans spring—the changing colors of the sky, the exuberant sounds of the French Quarter, the green of the trees, the smell of magnolia trees in bloom—that far away, on the other side of the world, things could not be more different. That in remote places with exotic names the same sun shines upon a landscape adorned not with trees and flowers, but with

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ruined buildings, destroyed crops, and polluted waters—a world inhabited by human suffering and unimaginable tragedy.

In the Central African Republic, rape is an instrument of war, and sexual violence has reached staggering proportions.¹ In Northern Uganda, and now in the Congo (and perhaps Sudan), the Lord's Resistance Army, led by Joseph Kony, abducts children and forces them to fight, destroys villages, and kills or mutilates all those they find there.² In the Ituri region of the Democratic Republic of the Congo, observers have reported thousands of civilian deaths, as well as a pattern of torture, rape, and forced displacement.³ And in Darfur, the latest manifestation of the terrible violence afflicting Sudan, the situation is so bad—with an estimated 400,000 persons killed since 2003 and two million displaced—that the United Nations Security Council referred the case to the International Criminal Court (ICC).⁴ What, if any, is our moral—and legal—obligation to those who are suffering from war crimes, genocide, or crimes against humanity? That is the subject of my remarks today.

Last summer I toured the Anne Frank House in Amsterdam with my then-fourteen-year-old son, Sam. It was upsetting to realize that Sam was just about Anne's age when she was deported, and to relive, through the extraordinary museum created in memory of her life, how Anne had died, as much from heartbreak, as from the awful conditions of imprisonment she had to endure. Sam's father is Jewish, as is my mother, and I realized that, truly, there but for the grace of God, would have gone he and I, had we been unlucky enough to have been born at another place and time. It caused me to wonder, as well, how is it that despite the searing presence that the Holocaust has in our collective consciousness, we somehow cannot translate that experience into preventing genocide in Rwanda, or perceive the little Palestinian children of Gaza and the little Hebrew children of Tel Aviv to be equally deserving of our protection. Why aren't we willing to put our weight behind the campaign to end the commission of atrocity crimes; and what can be done to change this?

1. HUMAN RIGHTS WATCH, COUNTRY SUMMARY: CENTRAL AFRICAN REPUBLIC (CAR) (Jan. 2009), http://hrw.org/sites/default/files/related_material/car.pdf.

2. HUMAN RIGHTS WATCH, DEMOCRATIC REPUBLIC OF CONGO: TRAIL OF DEATH: LRA ATROCITIES IN NORTHEASTERN CONGO 13-14 (Mar. 2010), <http://www.hrw.org/en/reports/2010/03/29/trail-death>.

3. *Democratic Republic of Congo (DRC)*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/world-report-2010/democratic-republic-congo-drc> (last visited Aug. 30, 2010).

4. *Darfur: ICC Moves Against Sudan's Leader*, HUMAN RIGHTS WATCH, July 14, 2008, <http://www.hrw.org/en/news/2008/07/13/darfur-icc-moves-against-sudan-s-leader>; SAVE DARFUR, DARFUR UPDATE 1 (2008), http://darfur.3cdn.net/46c257b8e3959746d5_ttm6bnauz.pdf.

Perhaps several hundred years ago, one could have argued that what happened in one country was of little import elsewhere. Time and space separated the peoples of the world in a way that seems unimaginable now, but even then, trade was extensive, colonization began, and the nations and peoples of earth began to be interlinked. Now that is even more true—as *New York Times* journalist Tom Friedman notes, markets, nations, and technologies appear locked together in an inexorable process of integration, permitting individuals, businesses, and governments to reach around the world, “farther, faster, deeper and cheaper than ever before.”⁵ Yet the prosperity that globalization has brought to us has a dark side—and one of the challenges of our time is to accept our responsibilities as global citizens—who, with less than five percent of the world’s population, consume twenty-five percent of its resources.⁶

In his *mémoire*, *A Lucky Child*, my friend and colleague—now-International Court of Justice Judge Thomas Buergenthal—writes of his experiences as a ten-year old child incarcerated at Auschwitz.⁷ He recounts an incident at a freight station in Berlin, when a train taking him back to Germany stopped for a few hours before moving on to the concentration camp that was to be his final destination. Soon after the train halted, he

heard a German woman exclaim for all to hear, “*Es stinkt schon wieder von Juden!*” (“It stinks of Jews again.”) About an hour later, [he writes,] our new SS guard . . . climbed off the train and got himself a cup of coffee. He must have seen me looking longingly at his cup. Without a word, he handed me the coffee and got himself another cup.⁸

This was little Tommy’s first warm drink in that cold winter. Judge Buergenthal notes that he has “never been able to reconcile these two events to [his] own satisfaction.”⁹ But it seems clear that the first woman could not see the humanity in Tommy’s little eyes, his little face. To her, he was a “Jew,” not a human being. One can imagine all sorts of things about what the SS guard might have been thinking—that he had a little boy at home who looked just like Tommy, that Tommy was just a little boy, after all, who was cold and thirsty and far from home—but there is no doubt that the guard looked at Tommy and saw his humanity.

5. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 7-8 (1999).

6. *The State of Consumption Today*, WORLDWATCH INST., <http://www.worldwatch.org/node/810> (last visited Aug. 30, 2010).

7. THOMAS BUERGENTHAL, *A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY* (2009).

8. *Id.* at 95.

9. *Id.*

And recognizing—and remembering—our common humanity is what can ultimately begin the change we wish to see in the world. As President Obama noted in his *New Beginnings* speech given at Cairo University last year:

[W]hen a financial system weakens in one country, prosperity is hurt everywhere. When a new flu infects one human being, all are at risk. . . . When violent extremists operate in one stretch of mountains, people are endangered across an ocean. When innocents in Bosnia and Darfur are slaughtered, that is a stain on our collective conscience. . . . That is what it means to share this world in the 21st century. That is the responsibility we have to one another as human beings.¹⁰

In my lecture today, I would like to build upon these ideas and suggest that practical efforts to build and apply the rule of law can help to tame a wretched world—that we can substitute justice for despair. I would also like to suggest that Americans have special talents to bring to this endeavor, as well as a special responsibility to help improve the lot of those less fortunate than themselves—a responsibility that has not only a moral dimension, but a legal one as well. Drawing inspiration from the great English legal philosopher John Rawls, I will suggest that America's moral obligations should arise not just from national self-interest, but should produce the greatest payoff for the least advantaged among us.¹¹ And for the law students in the room, I will argue that this is your task, should you accept it—to use your extraordinary legal skills to do good, and to believe that by doing so you will also do well.

I will start with the birth of international criminal law after the great wars of the last century, briefly discuss efforts to build a system of international criminal justice, and finally, talk about the United States and why it should not only support, but one day lead, the new International Criminal Court, and the world, in ending impunity for the commission of crimes against humanity.

II. THE NUREMBERG PARADIGM

The modern era of international criminal justice began with the holding of the Nuremberg Trials after World War II. But the foundations for those trials actually date back to World War I. Since time

10. Barack Obama, President of the United States, Remarks by the President on a New Beginning (June 4, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/.

11. JOHN RAWLS, A THEORY OF JUSTICE 136-41 (1971). This Essay relies upon Rawls' *A Theory of Justice* rather than his later work, *The Law of Peoples*, which was less well-suited to the argument made herein.

immemorial, in most societies, a privilege of the sovereign was the making of war. During the middle ages, monarchs waged wars and after the rise of the nation-state, states did the same, with little or no regard for the welfare of their people. This began to change slowly in the nineteenth century, and The Hague Conventions of 1899 and 1907 suggested that international disputes should be settled by arbitration—and opposed to war—and set out rules for land warfare that attempted to limit the degree to which a nation could wage total war.¹² But those treaties—which are still in force today—had no enforcement mechanisms other than the payment of reparations for breach¹³ and the ink was hardly dry on them when the first World War broke out, bringing with it the death of millions. Angry and upset, an international commission proposed, over American objections, that an international high tribunal should conduct war crimes trials, even of the German Kaiser himself.¹⁴ This was a revolutionary idea. Prior to that, international law applied only to states, not directly to human beings, and under the Westphalian system set up in 1648, with limited exceptions, only states had rights under international law.¹⁵ However, the Kaiser was never extradited by the Netherlands, and “the whole effort was generally considered a fiasco.”¹⁶ The League of Nations was established—without U.S. support, although it was an American idea—to try to make it impossible for the slaughter to be repeated. But although the League had many accomplishments, ending war was not one of them: its enforcement power was simply too weak, particularly without U.S. participation.¹⁷

When Hitler rose to power, the unsuccessful attempt to prosecute the Kaiser after the First World War was once again evoked. This time, it

12. See LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 22 (2002); WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* 3-4 (Kraus Reprint Co. 1970) (1908) (describing the nineteenth century and The Hague Conventions of 1899 and 1907).

13. For a breach of The Hague Convention IV, the only remedy was State responsibility and a right to compensation inuring to the injured party, “if the case demands.” SADAT, *supra* note 12, at 23.

14. See *id.* at 24; see also *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT’L L. 95, 123 (1920).

15. M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 90 (2003).

16. SADAT, *supra* note 12, at 24.

17. See Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 164-66 (2010); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392 n.45 (2000); e.g., ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW: 1918-1935*, at 301-06 (1936).

was the Americans who argued, over British objections, that trials of the major Axis war criminals should be held.¹⁸ It was understood that the primary response to the Nazi plan of total war and their so-called “final solution” of the Jewish question was, of course, a military one: without the defeat of Hitler’s Germany, no freedom-loving people would be safe. At the same time—as Justice Robert Jackson, Chief Prosecutor for the United States, argued before the International Military Tribunal at Nuremberg¹⁹—it was also necessary to establish, as a legal principle, that in the age of modern warfare no individual had the right to devastate another people by waging aggressive war against them, and no leader had the right to exterminate, or otherwise commit atrocities against, the peoples of any nation, including his own.²⁰ International law, stated the Nuremberg Tribunal, imposes duties upon men, not just upon nations, for the breach of which they may be tried and punished.²¹ What an extraordinary breakthrough; the Nuremberg and, to a lesser extent, the Tokyo trials spawned not only the creation of a system of international criminal justice, but the notion of international human rights, as well²²—after all, if human beings can acquire duties under international law, they may have rights, too.²³

III. BUILDING A SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

A. *The Ad Hoc Tribunals*

Following the Nuremberg Trials and the establishment of the United Nations, an effort was made to codify and build upon the Nuremberg legacy. The United States participated in international efforts to codify the crime of genocide and to elaborate the four Geneva Conventions.²⁴ There was also immediate support for the creation of a permanent international criminal court that could deter future war criminals.²⁵ However, the Cold War took precedence over the construction of the international legal order, and other than the adoption of treaties

18. See SADAT, *supra* note 12, at 28.

19. Robert H. Jackson, Chief Counsel for the U.S., Opening Statement for the United States of America at the Palace of Justice, Nürnberg, Germany (Nov. 21, 1945), *reprinted in* ROBERT H. JACKSON, THE NÜRNBERG CASE 30-94 (1971).

20. *Id.* at 93.

21. *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 221 (1947).

22. Henry T. King, Jr., *Address: The Meaning of Nuremberg*, 30 CASE W. RES. J. INT’L L. 143, 143-44 (1998).

23. *Id.* at 144.

24. SADAT, *supra* note 12, at 32.

25. *Id.*

addressing specific problems such as torture, apartheid, and terrorism, no real progress was made on the establishment of an effective international criminal justice system.²⁶ On the human rights side of the equation, many human rights treaties and declarations were adopted, but their enforcement mechanisms were weak.²⁷

The fall of communism in 1989 brought with it the possibility of using the United Nations for the purposes originally intended by the framers, particularly as regards the waging of war and the making of peace. When Iraq invaded Kuwait in 1990, President George Bush (41) went to the Security Council of the United Nations for resolutions condemning the invasion, and, ultimately, permitting the use of force against the invader.²⁸ The war in the Former Yugoslavia was another matter entirely, however, and the disintegration of Yugoslavia into component parts—accompanied as it was by ethnic cleansing, war crimes, the establishment of concentration camps, and mass rape—engendered a proposal to establish a war crimes tribunal for the Former Yugoslavia that could try persons accused of genocide, war crimes, and crimes against humanity.²⁹ The first international war crimes tribunal since the International Military Tribunal at Nuremberg, the ICTY has grown from a small seed into a major international organization with more than 1000 staff members, representing eighty-three different nationalities, and a budget of approximately \$300 million per year.³⁰ It is strongly supported by the United States, both financially and in terms of personnel,³¹ as is its sister tribunal, the ICTR—which is slightly smaller—established to try the perpetrators of the Rwandan genocide.³²

26. *Id.* at 36.

27. *Id.* at 32.

28. S.C. Res. 660, ¶ 1, U.N. Doc. S/RES/660 (Aug. 2, 1990) (condemning the Iraq invasion of Kuwait); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing States to use force to against Iraq). *See generally* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 63 (1991) (describing how the end of the Cold War has given the international community the opportunity to use the United Nations as its framers intended).

29. *About the ICTY*, INT'L CRIMINAL TRIBUNAL FOR YUGOSLAVIA (ICTY), <http://www.icty.org/sections/AbouttheICTY> (last visited Aug. 30, 2010).

30. *The Cost of Justice*, ICTY, <http://www.icty.org/sid/325> (last visited Sept. 2, 2010) (describing that as of June 2010 the ICTY employed 1039 staff members from 83 nationalities with a budget of \$301,895,900).

31. Kelly Dawn Askin, *The ICTY: An Introduction to Its Origins, Rules and Jurisprudence*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 13, 17 (Richard May et al. eds., 2001); *Support & Donations*, ICTY, <http://www.icty.org/sid/16> (last visited Sept. 12, 2010).

32. *General Information*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Sept. 2, 2010).

Together, the Yugoslavia and Rwanda Tribunals have tried or are currently conducting proceedings against more than 237 accused,³³ including virtually all the highest-ranking perpetrators of the war in the Former Yugoslavia and the genocide in Rwanda.³⁴ Indeed, the relative success of these two tribunals led to the creation of others: the Special Court for Sierra Leone, which is now trying former Liberian President Charles Taylor in The Hague;³⁵ the Khmer Rouge Tribunal to try some perpetrators of the Cambodian genocide;³⁶ the Special Court for Lebanon to try those indicted for the Hariri assassination;³⁷ and the Special Panels with Exclusive Jurisdiction over Serious Criminal Offenses in East Timor.³⁸ There has also been an explosion in the development of related initiatives, such as dozens of truth commissions set up to investigate human rights abuses all over the world³⁹ and national court cases based either on universal or territorial jurisdiction to try those accused of atrocity crimes⁴⁰—like the cases brought against General Pinochet in England, Spain, and Chile,⁴¹ or the case now pending against former

33. See U.N. Secretary-General, *Rep. of the International Tribunal for the Former Yugoslavia*, 4, U.N. Doc. A/64/205—S/2009/394 (July 31, 2009) (summarizing that the ICTY has concluded proceedings against 120 accused individuals out of the 161 individuals it indicted); *Status of Cases*, ICTR, <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Aug. 30, 2010) (noting that the ICTR has completed or begun proceedings on seventy-six of the individuals it has indicted); *Key Figures of ICTY Cases*, ICTY, <http://www.icty.org/sections/TheCases/KeyFigures> (last updated June 30, 2010).

34. *About the ICTY*, *supra* note 29; *General Information*, *supra* note 32.

35. See Leila Nadya Sadat, *Understanding the Complexities of International Criminal Tribunal Jurisdiction*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW (forthcoming 2010) (manuscript at 4, 16), available at <http://ssrn.com/abstract=1583105>; Statute of the Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES1315 (Aug. 14, 2000).

36. See Sadat, *supra* note 35, at 4; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 9, June 6, 2003, 2329 U.N.T.S. 117.

37. See Sadat, *supra* note 35, at 4-5; S.C. Res. 1757, art. 1, U.N. Doc. S/RES/1757 (May 30, 2007).

38. See Sadat, *supra* note 35, at 4; Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

39. See Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 984-85 (2006) (describing the establishment of truth commissions as mechanisms of transitional justice); John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 227, 287 (1998) (discussing truth commissions as an alternative to criminal prosecutions); see also Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 610 (1994).

40. See generally Sadat, *supra* note 39, at 1002-04; Sadat, *supra* note 35, at 5.

41. See Sadat, *supra* note 39, at 1002-04. See generally Naomi Roht-Arriaza, *Universal Jurisdictions: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 375 (2004).

Chadian dictator Hissène Habré in Senegal.⁴² We have also witnessed the creative use of indigenous methods of post-conflict justice, such as the Gacaca tribunals in Rwanda, which implement a Rwandan method originally designed by local elders to settle property disputes, to try perpetrators of the Rwandan genocide in a timely fashion and thereby bring closure and healing to the victims of that conflict.⁴³ All of these initiatives reawakened desires to fulfill the Nuremberg promise by establishing a permanent international criminal court, particularly given the fact that all the international criminal tribunals now in existence are temporary—created, like the International Military Tribunal at Nuremberg, for one specific conflict—and all of them except the ICC will be closed in the next few years.⁴⁴

B. *The International Criminal Court*

Let me now turn to the International Criminal Court and its establishment in the summer of 1998. I participated in many of these negotiations and three things, I think, are what ultimately caused them to be successful.

First, global civil society weighed in as never before. Victims and religious and humanitarian organizations banded together under the auspices of the Coalition for the International Criminal Court—which now boasts more than 2500 members, and which through e-mail, lobbying, and information campaigns, made the establishment of an effective, independent, and impartial Court a priority.

Second, a group of about sixty countries—known as the Like Minded Group of States⁴⁵—came to decide that the establishment of the Court was a priority.⁴⁶ The Like Minded Group included European States, Latin American States, African States, Canada, and other western democracies; and as the negotiations progressed, they developed a

42. Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT'L CRIM. JUSTICE 1047, 1057-58 (2009).

43. Sadat, *supra* note 39, at 990; Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, HUM. RTS. BRIEF, Spring 2001, at 15, 15-17, available at <http://www.wcl.american.edu/hrbrief/hrbrief083.pdf?rd=1>.

44. Press Release, Security Council, Justice Supersedes Completion Strategy Deadlines for International Criminal Tribunals in Security Council Debate, Following Briefings by Key Officials, U.N. Press Release SC/9801 (Dec. 3, 2009), <http://www.un.org/News/Press/docs/2009/sc9801.doc.htm> (discussing the extension of ICTY and ICTR judges' terms, however both courts should strive to meet completion strategy deadlines).

45. SADAT, *supra* note 12, at 6-7 n.23; M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1, 25 (M. Cherif Bassiouni ed., 1998).

46. SADAT, *supra* note 12, at 7 n.23.

common aspiration to see the century-old dream of an international criminal court become a reality.⁴⁷

Finally, there was undoubtedly some old-fashioned good luck. The ICC negotiations took place at the right time, in the right place, and were conducted by a team that was highly competent, talented, and able. This was true not only of the leaders of the Diplomatic Conference itself—particularly its Chairman, Ambassador Philippe Kirsch of Canada,⁴⁸ and its Drafting Committee Chair, Professor Cherif Bassiouni of DePaul University⁴⁹—but of the scores of delegates participating during the years of negotiations leading up to Rome,⁵⁰ including the U.S. delegation led by then-Ambassador-at-Large for War Crimes David Scheffer.⁵¹

The Rome Diplomatic Conference was an extraordinary event. I will never forget it. The conference was held in the Food and Agricultural building of the United Nations, *la FAO*, in Italian, which was a very ugly Mussolini-era building that was easy to get lost in—and I often did. Its only saving grace was the splendid terrace on the eighth floor, from which one could ingest a delicious espresso after lunch and gaze out over the Palatino, taking in the ruins of the Forum and Castel san Angelo. Indeed, scattered all around the building were symbols of the ravages of war. What better place to argue, on behalf of all humanity, that those who commit war crimes and crimes against humanity should be punished?⁵²

Delegates from more than 160 countries and 250 NGO's attended the ICC negotiations.⁵³ The conference was a major happening in the City of Rome—the proceedings were carried live on *Radio Radicale due*, and the city was plastered with posters with the words “we expect concrete results.” Amnesty International set up a huge tent just outside the conference venue as a host for the multitude of groups attending,⁵⁴ and indeed the diplomatic conference had all the trappings of a modern-day constitutional convention—like Philadelphia must have been in the summer of 1787. It was even hot! Victims came to demand that governments put a stop to the impunity of those committing atrocity crimes—that governments resist the temptation to support the rich and

47. *Id.*

48. *Id.* at 3 n.7.

49. *Id.* at 268 n.21.

50. *Id.* at 2-3.

51. Sadat, *supra* note 17, at 448.

52. *Id.* at 383-85.

53. *See id.* at 383; Rome Statute of the International Criminal Court, Annexes II, IV, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

54. Sadat, *supra* note 17, at 383 n.3.

powerful and, instead, commit themselves to prosecuting even heads of state who violated international humanitarian law. The debates were heated and, unsurprisingly, those with the most to lose from changing the status quo resisted the most.

The very talented U.S. delegation contributed greatly to the substance of the treaty, but at the end of the day, largely because there was no ironclad “American exception” to the Statute, it led the world in not supporting the Court’s establishment, but in attempting to prevent it.⁵⁵ In the final hours of the conference, both India and the United States moved to amend the Statute, thereby threatening to kill the adoption of the treaty before the time set for the negotiations was up.⁵⁶ A vote of no-action was proposed by Norway, which passed overwhelmingly.⁵⁷ Then, in a move that surprised many observers, rather than allowing the conference to act by consensus, the United States demanded a vote on the treaty itself.⁵⁸ In an emotional and extraordinary response to the U.S. initiative, a vote was taken and the United States was outvoted, 120 to 7, with the delegates of virtually all the free countries of the world clapping, cheering, and crying as the Statute was adopted, while the humiliated American delegates sat stonily in their seats.⁵⁹ Although the vote was unrecorded, it is widely believed that Iraq, Libya, Israel, and China also voted no.⁶⁰

IV. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

This stinging diplomatic defeat surely contributed to the depth of the U.S. opposition to the ICC and partly explains it. But why did the U.S. delegation call for a vote it was sure to lose? The answer is not entirely clear, but certainly, by instructing its negotiating team to vote against the ICC Statute, what the U.S. government—then headed by President Clinton—either did not understand or did not care vis-à-vis the Rome negotiations, was the tremendous moral fervor that the international criminal court idea had unleashed. The fall of communism

55. See *id.* at 448-49 (noting that one of the principal challenges of the United States to the Rome Statute, is the Court’s “right to exercise adjudicative jurisdiction over U.S. nationals (without the consent of the United States) who have committed crimes abroad in States that are either parties to the Statute or that accept the jurisdiction of the Court in a particular case”); see also SADAT, *supra* note 12, at 4, 43.

56. SADAT, *supra* note 12, at 4 n.8.

57. See *id.*; Bassiouni, *supra* note 45, at 31.

58. SADAT, *supra* note 12, at 4 n.9.

59. Bassiouni, *supra* note 45, at 31-32; Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

60. SADAT, *supra* note 12, at 4 n.9.

had opened a window of opportunity through which new political institutions could emerge—in order to help build a world premised on the force of law, as opposed to the law of force. A surge of optimism and renewed faith in international law swept the world—fueled, ironically, in large part by the money and effort being spent by the United States and other democracies to support the ICTY and the ICTR. Countries supporting the ICC did not become stronger or richer for doing so; international justice costs money, and building the International Criminal Court would take time, money, legal talent, and perseverance. But what they gained was legitimacy and a sense of doing the right thing.

If the wars of the twentieth century have taught any lessons at all, it is clear that to meet the challenges of a world in which the commission of atrocity crimes is all too common, we need three things: rules, institutions, and enforcement—rules that govern human behavior, institutions that apply those rules, and institutions that enforce those rules. We know that as individuals, we are prone to forgetfulness and that the veneer of civilization is very thin—indeed, many of the individuals committing terrible crimes during the Second World War were so-called “ordinary men,” not pathological monsters.⁶¹ Rules and institutions help us to remember our collective responsibilities, absorbing and transmitting information not just at a particular place and time, but serving as repositories for wisdom that can guide human societies over generations.

Recognizing this is why Tom Buergenthal, little Tommy, became a lawyer, a law professor, and a fierce advocate for human rights. He writes that he “tend[s] to believe that had our contemporary international human rights mechanisms and norms existed in the 1930s, they might well have saved many of the lives that were lost in the Holocaust.”⁶² Europeans have come to understand this, and have placed their national governments under the umbrella of the European Union; steeped as they are in the sorrow of three devastating wars taking place in a century’s time, they have learned the hard way of the destruction that racism and nationalism can bring about.⁶³ Americans, it seems, have not yet caught

61. See generally CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* 159-89 (1998).

62. BUERGENTHAL, *supra* note 7, at 223.

63. JEREMY RIFKIN, *THE EUROPEAN DREAM: HOW EUROPE’S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM* 6 (2004) (arguing that European Dream is based on a critique of the “basic assumptions of modernity” and their ability to “embrace a post-modern orientation,” and this “willingness has much to do with the devastation wrought by two world wars and the specter of a continent lying in near ruins in 1945 as a result of blind adherence to utopian visions and ideologies”).

on or come to see how vital international institutions like the ICC are⁶⁴ and how powerful the forces are that would undermine the fragile peace we now enjoy.

For what the drafters of the Rome Statute for the International Criminal Court intended was not to make war impossible, but, to paraphrase Justice Jackson, to put international law and its precepts squarely on the side of peace.⁶⁵ As Dag Hammarskjöld wrote about the United Nations itself, “the United Nations was created not to lead mankind to heaven, but to save humanity from hell.”⁶⁶ The same can be said of the International Criminal Court. Imagine what the United States would be like if there were no police, no courts, no jails, and no enforcement whatsoever to rules prohibiting assault, murder, and sexual violence.

There are now 114 states parties to the International Criminal Court Statute—all of Latin America and Europe, much of Africa and the Western World, and growing participation from Asia and the Middle East.⁶⁷ Nearly alone in the Western hemisphere the United States stands outside the ICC regime—there is no U.S. judge on an international court, for the first time in modern history. During the Bush administration, an effort was made to destroy the court by boycotting its meetings, attempting to “unsign” the Statute, adopting federal legislation preventing cooperation with it, using bilateral agreements to wrest

64. Former U.S. Ambassador to the United Nations, John Bolton, made a stinging critique of the ICC when he stated:

[I]t’s [the ICC that is] bad for the United States. . . . [T]his Statute of Rome creates not just a court, but it creates an enormous, potentially enormous, source of executive power: the prosecutor, just kind of out there in the international environment. Beyond control. Certainly beyond control of the United States and not part of any ordered structure of accountability. . . . The second major problem from the U.S. point of view is the substantive problems inherent in the Statute of Rome. These, so called, offenses are vague and elastic.

Symposium, *Toward an International Criminal Court? A Debate*, 14 EMORY INT’L L. REV. 159, 164-65 (2000); see Sadat, *supra* note 17, at 447-57; Press Release, U.S. Dep’t of State, International Criminal Court: Letter to UN Secretary-General Kofi Annan (May 6, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (“This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”).

65. See Jackson, *supra* note 19.

66. H.e. Sheikha Haya Rashed Al Khalifa, President of the U.N. Gen. Assembly, Statement of the United Nations Ministerial Conference of the Least Developed Countries “Making Globalization Work for LDCs” (July 9, 2007), <http://www.un.org/ga/president/61/statements/statement20070709.shtml>.

67. *The States Parties to the Rome Statute*, ICC, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Aug. 30, 2010).

exemptions for the United States from ICC states parties, and punishing states with economic sanctions if they refused to cooperate.⁶⁸ The United States did not vote for the Security Council referral of the Darfur situation to the Court and has refused to allow the United Nations to pay for the investigation and prosecution of those wanted in Sudan's genocide.⁶⁹ While other major powers such as China and Russia have also resisted inclusion in the ICC regime, none of them have so dramatically and deliberately attacked the Court and its mission, hiding their own lack of commitment to human rights behind the U.S. opposition to this beloved international institution.⁷⁰

Perhaps we are once again in a "League of Nations" moment, a juncture in history where U.S. support could either help prevent another convulsion of cataclysmic violence in the world or U.S. indifference (or even hostility) could embolden pathological leaders bent upon war and the commission of atrocities. Perhaps the window that opened in 1989 is about to slam shut. Yet imagine the strength that the International Criminal Court would have if the United States threw its weight behind it and helped make the promises of "never again" a reality—by contributing money, expertise, logistical support (particularly in arresting defendants), and political support.⁷¹ The ICC represents a very powerful idea—but is actually a very small and fragile institution, with only eighteen judges, a modest budget, and no police force.⁷² It represents the hope of millions of victims around the world—but it will handle only a fraction of the possible cases that could be brought. The rest of the work will have to be done by national court systems, which look and have been looking to international courts for practical guidance, training, and inspiration.⁷³

68. LEE FEINSTEIN & TOD LINDBERG, MEANS TO AN END: U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT 46-47, 51 (2009).

69. *Id.* at 54-55. The United States abstained from voting for Resolution 1593 (2005), however the U.S. representative stated that the United States had not dropped its objections to the ICC and that the United States was pleased that expenses of the investigation and the prosecution would only be borne by the parties to the Rome Statute, and not by the United Nations. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

70. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2010: THE STATE OF THE WORLD'S HUMAN RIGHTS, at xv-xvii (2010), http://thereport.amnesty.org/sites/default/files/AIR2010_EN.pdf.

71. WILLIAM H. TAFT IV ET AL., AM. SOC'Y OF INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT, at iii (Mar. 2009); FEINSTEIN & LINDBERG, *supra* note 68, at 5.

72. Sadat, *supra* note 17, at 397, 415.

73. SADAT, *supra* note 12, at 272.

President Obama has appointed individuals supportive of the ICC and its mission to many key posts, and in November 2009, a large and talented U.S. delegation attended the meeting of the Court's Assembly of States Parties in The Hague. At the same time, the U.S. Ambassador-at-Large for War Crimes Issues, Stephen Rapp, has made it clear that the United States has no intention to ratify the ICC Statute anytime soon.⁷⁴ The court has faced some significant challenges in its first years of operation and is just beginning its first trials.⁷⁵ A major challenge, of course, has been the resistance of Sudanese President Al Bashir, who not only has defied his indictment by the ICC, but expelled humanitarian aid groups in response to the issuance of the arrest warrant against him and attempted to muster African countries' support against the ICC.⁷⁶

From May 31 to June 11, 2010, the ICC held its first review conference in Kampala, Uganda, taking stock of the court's operations since its establishment, considering amendments to the Statute proposed by states parties, and considering the inclusion of the crime of aggression in the court's Statute.⁷⁷ Once again, the United States sent a large and talented delegation to the meeting, which was held on the shores of Lake Victoria. Although the U.S. delegation was not shy about articulating the U.S. position on the most difficult question taken up at Kampala—the crime of aggression—there were nonetheless encouraging signs that the modest *rapprochement* between the United States and the ICC would continue into the future, although there was certainly no inclination revealed either to “resign” the statute or submit it to the Senate for ratification.

V. BUT WHAT MIGHT RAWLS SAY?

There are a host of reasons why the United States should ratify the ICC treaty and become a full participant in the ICC and its governing body, the Assembly of States Parties of the Court. Reasons of self-interest, principles of justice and morality, and finally, questions of faith. In terms of self-interest, the court can serve as a tool of coercive diplomacy, aiming its indictments and arrest warrants at leaders who are disrupting international peace and security and U.S. prosperity, and,

74. Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, Speech to Assembly of States Parties (Nov. 19, 2009), http://state.gov/s/wci/us_releases/remarks/133316.htm.

75. *See id.*

76. AMNESTY INT'L, *supra* note 70, at xvii.

77. Leila Nadya Sadat, *On the Shores of Lake Victoria: Africa and the Review Conference for the International Criminal Court*, AFLA Q. (forthcoming 2010) (manuscript at 1-6), available at <http://law.wustl.edu/harris/papers/AfricaCCAFLASpring-final5-24-2010.pdf>.

therefore, making the world safer for the international trade that fuels our high standard of living. While military force will probably continue to play a central role in the conduct of foreign affairs, coercion without legal authority lacks legitimacy and breeds resentment. The ICC is also important in the fight against international terrorism. Indeed, several key features of the Court's legal regime are the same elements that the United States needs enforced in the counterterrorism area, including:

- the duty of states to try or extradite international criminals;
- the obligation of states not to give safe haven to international criminals; and
- the right of the international community to act together, if states are unable or unwilling to fulfill their obligations.⁷⁸

Under international criminal law, the rules applicable to the genocidal killers of Sudan, Rwanda, or the former Yugoslavia also cover bin Laden and his ilk.⁷⁹

So it is unsurprising that most democracies have decided that supporting the ICC serves their self-interest. But let us probe this question even more deeply. Having led efforts to try the Nazis at Nuremberg and having supported the ad hoc tribunals, is it moral for the United States now to reject the ICC because of a theoretical—and, I should add, probably remote—possibility that the ICC could try Americans? The real question is whether the United States is willing to apply to itself the rules it seems willing to apply to others—and to abide by its international obligations to follow the Geneva conventions, the torture convention, and the genocide convention, and, in the future, to abide by the U.N. Charter's prohibition on the use of force. Is it acceptable, in other words, to have international legal rules that apply to all the countries in the world except us?

The great legal philosopher John Rawls offers an interesting perspective on that question. In his "*Theory of Justice*," Rawls argues that one should evaluate the fairness—justness—of social rules from behind a "veil of ignorance."⁸⁰ Put succinctly, the idea is that everyone should choose the rules that produce the highest payoff for the least

78. Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOB. STUD. L. REV. 329, 338 (2005); accord Rome Statute, *supra* note 53, pmbl.

79. Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOB. STUD. L. REV. 135, 148-49 (2004).

80. RAWLS, *supra* note 11, at 136-41. As noted earlier, this essay relies upon *A Theory of Justice*, rather than *The Law of Peoples*. While these ideas are only minimally addressed in this essay, the reader may wish to consult THOMAS W. POSSE, *REALIZING RAWLS* (1989) for a fascinating analysis of the applicability of *A Theory of Justice* in other contexts.

advantaged position, as if they did not know whether or not they would be born weak or strong, poor or rich. From this original position, as he calls it, rules that promote social equality are the most desirable as they protect everyone.⁸¹ Extrapolating this to the international arena, the question we should ask as Americans when considering what system of international justice we prefer is not what system we as American citizens might like to maximize our freedom to do as we please, but what system would protect us if we were born in a different place and time—and unlucky enough to have been Jewish during the Holocaust, Tutsi during the Rwandan Genocide, a wearer of eyeglasses during the Khmer Rouge regime, or a Masalit or Fur tribe member in contemporary Darfur, Sudan. Under such conditions, would we not choose an international justice system capable of restraining the Pol Pots and Hitlers of the world, rather than the indifference our foreign policy now projects?

As Martin Niemoeller wrote:

First they came for the Communists but I was not a Communist so I did not speak out. Then they came for the Socialists and the Trade Unionists but I was not one of them, so I did not speak out. Then they came for the Jews but I was not Jewish so I did not speak out. And when they came for me, there was no one left to speak out for me.⁸²

Indifference to the plight of our fellow human beings is perhaps the worst punishment we can inflict upon them—as Edmund Burke once remarked, “All that is necessary for the triumph of evil is that good men do nothing.”⁸³ Elie Wiesel has made the same point in his writings so many times.⁸⁴

VI. CONCLUSION

Can we take the next step forward and support the establishment of international institutions that will enforce the moral values that we say we share? Or are we unable to do so unless we ourselves have felt the kind of despair that comes from being the victims of atrocity crimes? Can we walk in the shoes of our brothers and sisters around the world, whose appeals for help appear in the newspaper every day, and can we put our money, our American ingenuity, our material support, and our

81. RAWLS, *supra* note 11, at 136-41.

82. Quotation Details: Martin Niemoeller, QUOTATIONS PAGE, <http://www.quotationspage.com/quote/29611.html> (last visited Aug. 30, 2010).

83. YALE BOOK OF QUOTATIONS 116 (Fred R. Shapiro ed., 2006).

84. *See, e.g.*, Elie Wiesel, *The Perils of Indifference* (Apr. 12, 1999), in SPEECHES THAT CHANGED THE WORLD: THE STORIES AND TRANSCRIPTS OF THE MOMENTS THAT MADE HISTORY 214, 214-19 (2006).

legal talent behind those initiatives? The answer has to be yes, and here is my final thought about the United States and the international criminal justice system.

At some point, what it takes to do the work of combating atrocity crimes—whether it is serving as a forensic pathologist examining the bodies in a mass grave site; serving as a U.N. fact finder establishing evidence of atrocity crimes; coming to work as the prosecutor or defense counsel in preparing a case; becoming an international judge by leaving home to live in The Hague for months or years at a time; working as an intelligence officer gathering satellite photos and cell phone intercepts to be used as evidence at trial; risking one's life as a humanitarian aid worker responding to the needs of the victims; or as a Red Cross worker visiting a prisoner—what it takes to do this work, the hard work, the practical work of international justice, is faith—faith that one can make a difference, conviction in the possibility of a better world, belief in the hope of justice as a remedy to despair. There are thousands of people doing this work now—some paid, some volunteer—each of whom is trying to make a difference in the lives of someone they probably never met before, and may never meet again.

We as Americans must take our deep faith in the rule of law to the international stage and put our energies into creating positive and constructive solutions to international problems. Law is not a panacea for the world's ills, and yet legal rules create a framework for solving problems and avoiding misunderstandings. Legal institutions, as Eleanor Roosevelt once said of the United Nations itself, provide a “bridge upon which we can meet and talk.”⁸⁵ Even if we cannot force ourselves to feel empathy for individuals located in far corners of the globe,⁸⁶ we can develop methods of interaction that will prove productive and stabilizing in the long term.

The ICC by itself, of course, is not enough to prevent the commission of atrocities—the international community must do more in terms of conflict resolution, peacekeeping, and solving some of the problems that lead to the commission of atrocity crimes. But the ICC is a very important piece of the puzzle. There is good evidence that world leaders—and rebel leaders—are already modifying their behavior in response to the court's existence, for fear of an ICC indictment.⁸⁷ But that is a fragile normative shift, one that will easily be replaced by

85. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, at xix (2001).

86. Sadat, *supra* note 78, at 340.

87. See, e.g., FEINSTEIN & LINDBERG, *supra* note 68, at 88-90.

cynicism if the United States and other countries do not begin putting some real muscle behind the court's arrest warrants. The ICC has also given victims around the world hope—the hope that no one is above the law and that their despair can be salved with justice, that somebody will listen to their tales of horror, that they are not alone. Finally, there is evidence that post-conflict justice can lead to reconciliation even in situations that seem impossible; many of the perpetrators in the Bosnian conflict have apologized to their victims and there can be no denial that genocide took place during the Bosnian war, thanks to the work of the Yugoslavia Tribunal.⁸⁸ The same is true in Rwanda, although the legacy of that Tribunal is less clear.⁸⁹

Thus, little by little, incremental step by incremental step, we can make progress in dealing with the problem of mass atrocities. Will progress continue, building upon the success at Rome, and the more limited success of Kampala, or is the pendulum now destined to swing back in the other direction? Like Anne Frank, I continue to have faith in the peaceful future of humankind and to believe, as she did, that people are basically good.⁹⁰ I also believe in America's ability to help bring about such a future, but faith has to be combined with action. As director of the Whitney R. Harris World Law Institute, I have the honor to lead an institution with a direct and personal tie to the Nuremberg legacy, as my dear friend and late colleague, Whitney Harris, was the last living member of Justice Jackson's team at Nuremberg. We are currently leading a project to develop a crimes against humanity convention—a great unfinished work of the Nuremberg Trial⁹¹—and participated in the Kampala ICC Review Conference in June.

Let me say in concluding, my fellow Tulanians, that I received my legal education here, which has stood me in good stead throughout my career. Through the superb teaching that goes on here in all subjects, you

88. See DIANE F. ORENTLICHER, *SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* 37-39 (2008).

89. Jean Baptiste Kayigamba, *Without Justice, No Reconciliation: A Survivor's Experience of Genocide*, in *AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND* 33, 40-41 (Phil Clark & Zachary D. Kaufman eds., 2009).

90. ANNE FRANK, *THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION* 333 (Otto H. Frank & Mirjam Pressler eds., Susan Massotty trans., Doubleday 2001) (1995) ("It's difficult in times like these: ideals, dreams and cherished hopes rise within us, only to be crushed by grim reality. It's a wonder I haven't abandoned all my ideals, they seem so absurd and impractical. Yet I cling to them because I still believe, in spite of everything, that people are truly good at heart.").

91. Whitney R. Harris World Law Inst., Wash. Univ. Law Sch., Crimes Against Humanity Initiative: Declaration on the Need for a Comprehensive Convention on Crimes Against Humanity (Mar. 12, 2010), <http://law.wustl.edu/crimesagainsthumanity/documents/CAHInitiative031210.pdf>.

are ensuring that law students graduating from this institution are acquiring the skills they need to make them the leaders of tomorrow's international institutions. And who knows, one day the United States may ratify the ICC Statute, and a Tulane lawyer could be the first U.S. judge elected to that Court.