International Law and the Holocaust

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JOSEPH AND REBECCA MEYERHOFF ANNUAL LECTURE
28 OCTOBER 2003

First printing, February 2004

THE JOSEPH AND REBECCA MEYERHOFF ANNUAL LECTURE on the Holocaust was endowed by the Meyerhoff family in 1994 to honor excellence in research and foster dissemination of cutting-edge scholarly work in the field of Holocaust studies. Joseph and Rebecca Meyerhoff of Baltimore, Maryland, were active philanthropists in the United States and abroad, focusing especially on Jewish learning and scholarship, as well as on music, the arts, and humanitarian causes. Their children, Eleanor Katz and Harvey M. Meyerhoff, who is Member and Chairman Emeritus of the United States Holocaust Memorial Council, have endowed this lecture, which is organized by Museum's Center for Advanced Holocaust Studies.

I. Introduction

I am profoundly honored to be this year's Joseph and Rebecca Meyerhoff Lecturer. The Meyerhoff family has made invaluable contributions to this Museum, not only in terms of financial resources but also in time and personal commitment. It is, therefore, a special privilege to have the Meyerhoff name associated with this lecture.

This Museum evokes very special feelings of awe and gratitude in me. When I came to the United States as a boy of 17, no one in my high school in Paterson, New Jersey, ever asked what it was like in the camps; they were either afraid to ask or did not care to know. And when in my sophomore or junior year in Bethany College, West Virginia—the only college, incidentally, that was willing to give me a scholarship despite my only three years of formal education—I published an article describing my experiences on the death march out of Auschwitz, most of my fellow students thought that I had written a piece of fiction.

It seemed to me in those years that the Holocaust was soon to become one more of those historical events that mankind wanted to forget because of the pain, vicarious shame and guilt they evoke. It was not until much later that things began to change, and the trend to reverse our self-induced amnesia set in.

To me this Museum symbolizes a permanent commitment to ensure that the crimes of Nazi Germany not be forgotten, not only in order to honor the memory of its victims, but also to serve as a permanent reminder to all mankind of the risk to humanity itself from those forces of evil who kill, enslave and torture to advance their false ideologies of racial, religious or ethnic superiority and hatred or simply to maintain themselves in power.

You may therefore be surprised to hear that, despite the fact that I have been connected with this Museum in one way or another since it was a mere idea and have attended many Council meetings on its 5th floor, I never really had the emotional courage or strength to go through the building from end to end. At one point, I decided to take my children with me through the Museum to explain some of what happened to us, but after first seeing a few of the exhibits on my own, I knew that I would not be able to do it—it was too early, I thought. I have now been saying that one day I would take my grandchildren, but I know now that I will never be able to do it—it is simply too painful.

But that is probably as it should be. This Museum is not for the tears of those of us who lived through the Holocaust; it is for the young people who daily line up outside the Museum doors waiting with their teachers to get in; it is for the people from all over America and the world who come and who, I fervently hope, will never again be the same for the experience of seeing and learning what the Holocaust was all about. We will have to count on them and the future generations who will follow in their footsteps in this building to ensure that "Never Again" becomes humanity's pledge that no people, no human beings, will ever again be treated as we were.

And this brings me to my lecture this evening on the "International Law and the Holocaust".

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It is sad but true that throughout history many significant advances in the field of international law in general and international human rights in particular have been

the result of wars or other catastrophes in which millions and millions of human beings lost their lives. But all prior advances in this regard are dwarfed by the impact of the Holocaust and the Second World War on the creation of the international law of human rights and the evolution of international criminal law. To understand and appreciate these developments, it is useful, initially, to take a snapshot of what international law looked like before World War II as far as human rights are concerned. Later in this lecture I will deal with the evolution of international criminal law.

II. Pre-World War II International Law

In the second edition of the most authoritative English-language treatise, *Oppenheim's International Law*, published in 1912, the author had the following to say on the subject of human rights:

> [W]hat is the position of individuals in International Law…? Now it is maintained that, although individuals cannot be subjects of International Law, they nevertheless acquire rights and duties from International Law. But it is impossible to find a basis for the existence of such rights and duties. International rights and duties they cannot be, for international rights and duties can only exist between States.
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> But what then is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects thereof. … When for instance, the Law of Nations recognizes the personal supremacy of every State over its subjects at home and abroad, these individuals appear just as much objects of the Law of Nations as the territory of the States does in consequence of the recognized territorial supremacy of the States.[1]

In other words, individuals as such had no rights under international law. They could not claim rights under international law since they were not subjects of international law. As objects of international law, their status did not differ from the State's territory or its other sovereign possessions.

In another part of his treatise, Oppenheim points out that whatever protection individuals enjoyed under international law was attributable to their nationality. That is, the state of the individual's nationality had the right under international law to protect its nationals on the theory that any injury sustained by the individual was deemed to be

an injury to the national's state. One cruel consequence of this rule of law was that a stateless person, that is, a person who had lost or otherwise lacked a nationality, enjoyed no protection under international law. Here is what Oppenheim had to say on this subject in 1912:

> As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals. On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such rights.

This, for all practical purposes, was the international law of the pre-World War I era, and it remained the law until World War II. The status of the individual under international law did not change in the period following the publication of Oppenheim's treatise in 1912 and the years preceding World War II. Thus, the fourth edition of Oppenheim's book, published in 1928, and the fifth edition, published in 1937, reproduce almost *verbatim* the language I quoted from the 1912 edition. What is interesting about the fifth edition is that it was edited by Hersch Lauterpacht, an eminent British international legal scholar and one of the strongest early international human rights advocates.[2]

In a footnote to his 1937 edition of Oppenheim's treatise, Lauterpacht reproduces some parts of the Declaration on the Rights of Man, adopted in 1929 by the Institute of International Law, a private association of leading international legal scholars. The Declaration proclaimed certain fundamental human rights principles. While expressing the view "…that the development of International Law in accordance with its true function is, in the last resort, bound up with the triumph of the spirit of these principles [proclaimed in the Declaration],…" Lauterpacht hastened to emphasize that these principles, "are not expressive of the law and practice of many states; neither is their non-observance treated by other states as a breach of International Law."[3] Lauterpacht's edition of Oppenheim's great treatise was published in 1937, one year before *Kristallnacht*. But even this brilliant international lawyer had to admit that the international law in force at that tragic moment in history provided no protection for German Jewish victims of Nazi persecution and brutality.

One important consequence of the international legal doctrines in force before World War II was that the manner in which a state treated its own nationals or stateless persons in its territory was a matter exclusively within its own domestic jurisdiction. As a result, no other state had the right to complain about their treatment or to protest against it. To do so would have constituted intervention in the domestic affairs of the other state, which was deemed to be a violation of international law. Thus, when the United States wished to express its concern over the pogroms and mass killings of Jews in Romania and Russia in the late 19th and early 20th centuries, it took care to avoid being charged with interference in the domestic affairs of these countries. To get around the domestic jurisdiction barrier, the US argued that the maltreatment of Jews in Romania, for example, led many poor and sick Romanian Jews to come to the United States, thereby imposing social and economic burdens on the US.[4] Note that it was only these interests and not humanitarian concerns that provided the United States with something of a valid international law basis for protesting against the pogroms.

The domestic jurisdiction principle also limited the humanitarian role the United States sought to play in confronting the Armenian genocide, particularly during its early stages.[5] And it prevented some countries from interceding with Germany in any meaningful way when Hitler embarked on his persecution of German Jews. Of course, the domestic jurisdiction doctrine also provided the many countries that wished to remain silent in the face of these Nazi measures with an excuse for not speaking out. Moreover, outrageous as it may sound to contemporary ears, Hitler would not have violated the international law in force at the time, had he limited himself to the extermination solely of German and stateless Jews. It is important to keep this sad truth in mind, in order to fully appreciate not only how far international law has come since the days of the Holocaust, but also how much this development is the direct result of the Holocaust.[6]

III. The Impact of World War Two

The need to change the status of individuals under international law underwent a dramatic transformation as the scale of Nazi atrocities became known. As early as

1941, President Franklin D. Roosevelt, in his "Four Freedoms" speech, called for a "world founded upon four essential human freedoms," namely, "freedom of speech and expression", "freedom of every person to worship God in his own way," "freedom from want," and "freedom from fear." Roosevelt's vision of "the moral order," as he characterized it, became the clarion call of the nations that fought the Axis in the Second World War and founded the United Nations. The war also quite naturally led to the realization that traditional international law concepts about the rights of individual human beings had to be drastically revised in order to empower the international community to deal with large-scale violations of human rights, irrespective of the nationality of the victims, and that it also had to provide for the punishment of those responsible for these violations.

When we compare the position of individuals under international law as it existed before the Second World War with their status under contemporary international law, it is evident that a dramatic legal and conceptual transformation has taken place. This transformation has "internationalized human rights and humanized international law."[7] As a result of the internationalization of human rights, the way a country today treats human beings generally, whether its citizens or not, is a legitimate subject of international concern and discussion. Due to the humanization of international law, individuals as such now have internationally guaranteed human rights, and to that extent are subjects of international law. Moreover, as we shall see, more and more international tribunals and institutions have been and continue to be created to permit individuals to assert their international human rights directly against states that have violated them. Of course—and this needs to be emphasized—we still have a long way to go as far as the effective international enforcement of these rights is concerned, but a great deal of progress is being made nevertheless.

The modern international law of human rights begins with the Charter of the United Nations, despite the fact that it contains only some vague statements relating to human rights.[8] Given the experience of the Second World War, the Holocaust, and the other horrendous crimes which had been committed by the Nazis, there was hope in San Francisco, where the Charter was drafted, that it would proclaim an enforceable

bill of rights. That was not to be, despite the support for such a document by many smaller countries participating in the San Francisco meeting and the extensive NGO lobbying, particularly by Jewish organizations and individual Jewish leaders.[9] The strongest opposition to the inclusion in the Charter of any meaningful human rights provisions came, not surprisingly, from Stalin's Soviet Union. But Britain, France and the United States were also not too eager at the time to support strong UN human rights provisions.

The reluctance of the United States was no doubt due to *de jure* racial discrimination, then still in force in the South, and to states' rights concerns. These policies and concerns would have posed serious obstacles to US ratification of the UN Charter had it contained binding human rights obligations barring racial discrimination. At the time, the US Senate was still controlled by a coalition of segregationist Southern Democrats and conservative Midwestern Republicans.[10] They violently opposed any treaty provisions that would have permitted US courts to override existing discriminatory laws and practices in force in many states of the Union. This Senate coalition would have blocked the ratification of the UN Charter if it had contained such provisions since, as a treaty of the US, the Charter would have superseded any state laws in conflict with it as well as earlier federal laws. The Truman Administration, well aware of President Woodrow Wilson's inability to get the US Senate to approve the ratification of the Covenant of the League of Nations, was not willing to risk making the same mistake with regard to the UN Charter. The US preferred therefore to have the UN Charter contain only very vague human rights language.

But that vague language—"the United Nations shall promote … universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion"—buttressed by a pledge of the UN Member States to cooperate with the UN in these promotional activities, set the stage, together with the Universal Declaration of Human Rights, for the contemporary human rights revolution.[11] The Universal Declaration of Human Rights, drafted by a distinguished UN committee consisting, among others, of Eleanor Roosevelt, René Cassin of France and Charles Malik of Lebanon, was proclaimed by the UN General

Assembly in 1948. Although adopted as a non-binding UN resolution, the Universal Declaration has over the years joined the Magna Carta, the French Declaration of the Rights and Duties of Man, and the American Declaration of Independence as a milestone in mankind's struggle for freedom and human dignity, becoming the foremost international instrument on the subject.[12]

Following the adoption of the Universal Declaration, the UN embarked on a drafting effort designed to convert the lofty language of the Declaration into binding treaty obligations.[13] The result has been a large body of international human rights agreements, now widely ratified, including such important instruments as the Genocide Convention, the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Some of these treaties provide for committees, consisting of independent experts, to supervise the implementation of the rights these instruments guarantee. Many states now also recognize the right of individuals to file complaints with these committees if their rights are violated. Additional human rights treaties have been adopted by the UN and its specialized agencies, among them UNESCO and the International Labor Organization, some with their own mechanisms of supervision.[14] Over the years, the US has gradually ratified many UN human rights instruments.

At this point, you may well be wondering whether the vast body of UN human rights law now on the books is being complied with by the states that are legally bound to give effect to it. This, after all, is the really important question, and I shall deal with it in a minute. But before I do so, let me say a word about the human rights law and institutions created within the framework of regional intergovernmental organizations, such as the Council of Europe, the Organization of American States and the Organization of African Unity.[15]

In the early 1950's, the Council of Europe, a regional intergovernmental organization then comprising only Western European democratic states, adopted the

European Convention of Human Rights. The preamble of the Convention expresses the resolve of

> the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights].

The main reason prompting the adoption of the European Convention by the Council of Europe had to do with the Holocaust and the lessons that Europe's post-World War II democratic leaders learned when watching Hitler's rise to power. Explaining the need for a European treaty guaranteeing human rights, one of its leading proponents, a former French Minister of Justice, put it as follows:

> Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating … to remove the levers of control. One by one, freedoms are suppressed, in one sphere after the other. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the 'Führer' is installed and the evolution continues even to the oven of the crematorium.
>
> It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm in the minds of a nation menaced by this progressive corruption, to warn them of a peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or to Dachau.[16]

Since the end of the Cold War, the membership in the European Convention of Human Rights has grown to more than 40 European countries, among them Russia, Germany, France and the United Kingdom. It now also includes many former Soviet Republics and the Soviet Union's erstwhile Eastern European allies. The catalog of rights guaranteed by the Convention has been enlarged over the years by means of additional protocols. The Convention also established the European Court of Human Rights, the first ever such international institution where individuals may institute proceedings against any state party to the Convention allegedly violating their rights. In the past, the Court has found many states in violation of one or more provisions of the Convention and required them to pay compensation or to repeal or amend national laws in conflict with the Convention. The Convention now enjoys the status of domestic law

in almost all of its states parties. In some states, moreover it has acquired constitutional law status. The United Kingdom, where the Convention for many years could not be applied directly by British courts, recently adopted legislation removing that obstacle. Over the years, the European Court of Human Rights has for all practical purposes become the constitutional court of Europe for questions of human rights and fundamental freedoms. What is more, its judgments are complied with as a matter of course.

The European Convention system is rightly considered to be the most effective international system for the protection of human rights in existence today. It has served as a model for other regional human rights treaties, notably the American Convention on Human Rights, adopted within the framework of the Organization of American States. In force since 1978, the Inter-American Commission and Court of Human Rights have increasingly played an important role in promoting and enforcing human rights in the Americas, without as yet being able to match the successes of the European system. Although President Carter signed the Convention, its ratification has been blocked in the US Senate. With the exception of Canada, the US and a number of smaller Commonwealth Caribbean countries, all Western hemisphere nations have now become parties to the Convention and accepted the jurisdiction of the Inter-American Court of Human Rights. A similar regional human rights treaty, the African Charter of Human and Peoples' Rights, has been in force for a number of years, but it has still not had a significant impact on the protection of human rights in Africa.

It would be dishonest not to admit that despite the vast body of international human rights law in existence today—as a matter of fact, I know of no other branch of international law which has produced more law—many states merely give lip-service to that law without complying with it. Put another way, international human rights law continues to be blatantly violated in many parts of the world despite often valiant efforts by democratic governments, by governmental and nongovernmental organizations, and by individual human beings around the world to prevent such violations.

Let us not lose sight of the other side of the coin, however. To start with, it is clear that international human rights standards and international efforts to enforce them have over time helped to improve human rights conditions in various countries around the world. The existence of these standards has also served to legitimate efforts by democratic governments to press for compliance and to tie trade preferences, development aid and military assistance to the improvement of human rights conditions in many countries. None of this was possible before World War II.

It is important also to remember that the various UN human rights institutions, such as the treaty bodies established to supervise compliance with the UN human rights treaties and conventions, have gradually been able to engage governments in ever more intrusive human rights dialogues, publicly exposing significant shortcomings.[17] These dialogues have not necessarily always or even frequently proved successful in remedying specific human rights violations, but they have made people around the world ever more aware of the existence of international human rights guarantees and of the obligations assumed by their governments to honor them. These expectations of compliance put pressure on governments to comply, making it increasingly more difficult for them simply to shrug off their international human rights obligations. Instead, governments find that they are being compelled to explain their non-compliance or to deny that they are guilty of alleged human rights violations. By thus implicitly acknowledging their human rights obligations, these governments are frequently forced to rethink their human rights policies and to improve their human rights practices.

The international climate that has produced the expectations of compliance has been reinforced by the work of regional human rights institutions and UN specialized agencies. An important role in this regard has also been played by the periodic UN-sponsored World Conferences on Human Rights, among them in particular the Vienna World Conference or the Fourth World Conference on Women. Important, too, have been the Follow-Up Conferences of the Organization for Security and Cooperation in Europe. Today, moreover, it is rare for major intergovernmental meetings or conferences not to deal with some aspect of human rights. Many governments have

now established human rights departments in their foreign ministries because of the growing foreign policy implications and importance of the subject. All these developments strengthen the public's perception of the centrality of human rights and expectations of governmental compliance, putting ever greater pressure on governments to act accordingly.

Equally relevant is the dramatic expansion in recent decades of the number of national and international human rights NGOs. Their existence and ever more important status is the direct result of the normative and institutional human rights developments I have described. These developments provide NGOs with the legitimacy they need to function effectively and facilitate NGO efforts to investigate and publicize human rights violations, to lobby for appropriate legal and institutional changes to prevent future violations, and to file complaints on behalf of victims of human rights violations. NGOs have played, and continue to play, a vital role in deepening mankind's expectations with regard to human rights and the obligations of governments to respect them.

Skeptics frequently forget that the human rights revolution played an important role in hastening the end of Apartheid in South Africa; it no doubt also contributed to speeding the demise of the Soviet Union. The fall of many oppressive regimes in different parts of the world can be attributed to it. This is not to say, of course, that other factors may not have played an equally or more important role in bringing about some of these changes in one or the other country. It should also not be forgotten that the human rights revolution was not able to prevent the Rwanda genocide or the horrendous crimes that were committed in the former Yugoslavia. But it would be a mistake not to recognize that, in today's world, human rights issues are closely intertwined with political and economic considerations, and this to such an extent that governments are frequently no longer able to separate one from the other. That, in turn, has an impact on their international human rights obligations and, in general, on improving human rights conditions and preventing human rights violations. If only some such system had existed before the Holocaust!

IV. International Criminal Law

Thus far, I have spoken only of the impact of the Holocaust on the development of international human rights law. Let me now turn to its impact on international criminal law and the institutions created to enforce it.[18]

Considering how many wars and atrocities mankind has had to endure throughout its history, it is at once surprising and telling that the Nuremberg Tribunal, established in 1945 by the Allied Powers to try major German war criminals,[19] was the first ever such international tribunal and, apart from the Tokyo International Military Tribunal, created about a year later, it was to remain the first and only international criminal court until 1993. In that year, the UN Security Council established the *ad hoc* International Criminal Tribunal for the Former Yugoslavia. It was followed a year later by its sister institution, the International Criminal Tribunal for Rwanda. The treaty creating the new permanent International Criminal Court came into force in 2002; the Court was formally constituted in 2003, about six decades after Nuremberg and the Holocaust. And this despite the fact that the Genocide Convention, which was adopted by the United Nations on December 9, 1948, one day before it promulgated the Universal Declaration on Human Rights, already anticipated the creation of such "an international penal tribunal".[20] You might ask why it took so long. Certainly not because there has been no need for such a court in the interim.

A comparison of the evolution of international human rights law with that of international criminal law indicates that the international responsibility of individuals for the commission of certain criminal offenses was recognized by international law long before it recognized that individuals generally had rights under international law. For example, the crime of piracy was the first in a series of international crimes for which individuals were deemed to be responsible and punishable under international law. War crimes, as defined in various pre-World War Two treaties, provide another example. But until Nuremberg and in the years that elapsed between Nuremberg and the recently created *ad hoc* and permanent international criminal tribunals, international criminal offenses were tried and punished, if at all, only in national courts because no international courts existed for that purpose. And national courts have generally not

been too eager to try and punish those alleged to have committed these crimes, particularly the "big fish".

Some of us who experienced the Holocaust in Nazi concentration camps, and who have witnessed the horrendous crimes to which human beings have been subjected in many parts of the world since then, may be forgiven for expressing satisfaction that a permanent International Criminal Court has finally been established, while profoundly regretting that the United States is not a party to it. This must be said and be heard said in this building, which is dedicated to the memory of those who died in the Holocaust, and where "Never Again" is not just a slogan but a commitment to never again let genocide and crimes against humanity go unpunished, regardless where and by whom committed.

While the ICC will not be able to punish all who commit genocide, war crimes or crimes against humanity, its deterrent effect on those who might contemplate such crimes in the future should not be underestimated, nor should some mainly imaginary threats to US interests be deemed to justify US non-participation. I am convinced that the US will eventually join the International Criminal Court, just as it eventually ratified the Genocide Convention—albeit 29 years after it was first submitted to the US Senate. We have also ratified many of the other human rights treaties, including the International Covenants and the Racial Convention, which for many years we said we would never ratify. Wisdom eventually prevails, but generally not before we miss an opportunity to enable Americans to help shape the policies and practices of these institutions.

The modern era of international criminal law begins with the establishment of the Nuremberg Tribunal. Here it is important to emphasize that the concept of war crimes and related crimes against humanity, that is, the violations of the laws of war, predated the creation of the Nuremberg Tribunal. But while the Nuremberg Judgment thus did not invent the concept of crimes against humanity,[21] it gave it a juridical legitimacy it did not previously have. The Nuremberg Judgment failed do the same for the crime of genocide, however. This crime was mentioned neither in the Charter of the International Military Tribunal at Nuremberg, the so-called London Charter, nor in the

Tribunal's Judgment, even though it was referred to in the Nuremberg Indictment.[22] The omission of the crime of genocide from the Nuremberg Judgment can be attributed to the fact that, at the time, genocide as such was not believed by some governments to have acquired the status of a crime under international law. Moreover, the Nuremberg Judgment punished only those crimes as crimes against humanity that were connected with or committed during the war. This approach had the consequence that crimes committed by the Nazis against Jews in Germany before the war were not punished in Nuremberg as crimes against humanity unless they could be linked to the war.[23]

Although it has taken the international community a long time to establish international criminal courts, international criminal law has evolved rapidly in recent decades. This is true particularly of war crimes. Their development has been advanced by the four Geneva Conventions of 1949 and their 1977 Protocols, which modernized and further refined the provisions of the 1949 Conventions. The concept of crimes against humanity, whose scope, as we have seen, was still disputed at the time of the Nuremberg Judgment,[24] is now generally deemed applicable not only in time of war but also in time of peace.[25] As such, it penalizes widespread or systematic attacks against civilian populations, including murder, extermination, enslavement, torture, deportation, rape, etc.

And while the crime of genocide as such was not formally punished by the Nuremberg Tribunal, it is the progeny of the Holocaust. Described by Winston Churchill in 1941 as "a crime without a name",[26] we owe the term genocide and its conceptualization to Professor Rafael Lemkin, who had to flee his native Poland because of the Holocaust. Lemkin articulated and defined genocide in his book, *Axis Rule in Occupied Europe*, published in 1944. His work and extensive lobbying efforts led to the adoption in 1948 of the Genocide Convention.

The Holocaust and its aftermath transformed genocide from a nameless crime to a crime whose very name evokes the horrors not only of the Holocaust, but also of the Armenian Genocide, of Rwanda, of the Former Yugoslavia and of the countless other terrible tragedies which have victimized mankind before and after the Holocaust. Today the prohibition of the crime of genocide, as defined in the Convention, has gained

general acceptance as a peremptory rule of international law, that is, a rule from which no derogation is permitted, placing genocide at the apex of international crimes. It must be recognized, however, that while today we have a name for this heinous crime, the names of its many future victims will remain unknown, and too many of its future perpetrators will escape punishment unless and until all members of the international community subject themselves unequivocally to the international criminal justice system.

In addition to international criminal tribunals, some national courts have tried and will continue to try individuals charged with the commission of serious international crimes.[27] The best example, tied directly to the Holocaust, is the Eichmann Trial which, as we know, took place in Israel.[28] More recently, the Pinochet extradition proceedings in the United Kingdom attracted much public attention. The decision of the new Argentine President to permit the extradition to Spain of a number of Argentine military officers accused of crimes against humanity and torture during Argentina's so-called "dirty war" and Mexico's extradition, also to Spain, of an Argentine naval officer similarly implicated, have already been widely acclaimed, particularly in Latin America, where impunity continues to shield many a former leader accused of such crimes. It may well be that the most recent action of the Argentine parliament, revoking earlier amnesties and pardons granted to individuals accused of serious crimes committed during the same period, may make extradition to Spain unnecessary.

Whether or not one supported the recently repealed Belgian law which, in reliance on the principle of universal jurisdiction, authorized Belgian courts to try and punish foreigners accused of serious international crimes regardless where they were committed, it should not be forgotten that this type of legislation was prompted by dissatisfaction in many quarters, and not only in Belgium, with the failure of the international community to establish effective international mechanisms to deal with such crimes. These same considerations may explain why, in what for treaties is a very short period of time, more than 90 states have already become parties to the Statute of the new International Criminal Court. The strong international reaction to the US

decision not to ratify the treaty establishing the Court and to US efforts to exempt itself from its application needs to be understood as the product of a widely held belief in many parts of the world that the Court is needed to confront international crimes which many governments are either not able or willing to prevent or punish.

The relatively recent emergence of so-called truth and reconciliation commissions[29] may also be related to the absence in the past of international criminal tribunals with general jurisdiction to investigate and punish those accused of serious international crimes. These commissions have varied in their composition. Some have been truly international in character, others were purely national commissions, while other still have had a mixed membership, consisting of national and foreign members.

As a rule, the mandates of truth commissions call for the investigation of serious violations of human rights committed in the country, usually during a long and brutal civil war or following the overthrow of a particularly oppressive regime. Truth commissions are usually also empowered or required to make recommendations for national reconciliation. While international criminal courts can perform important deterrent and punitive functions, their sole mandate is to pass on the guilt or innocence of the accused and to impose the appropriate punishment. Truth commissions, on the other hand, can provide a comprehensive analysis of the forces, causes and personalities that led to the massive violations of human rights in a particular country.[30]

I have often thought that Germany's as well as the world's understanding of the Holocaust would have been greatly enhanced if, in addition to the Nuremberg Tribunal, there had also existed a Truth Commission for Germany. Its findings and analysis of the Holocaust might have complemented in a very important respect the findings of the Nuremberg Tribunal. The recent Swiss effort, through the Bergier Commission, to put Switzerland's relations with Nazi Germany and its attitude towards Jews in its proper historical context,[31] although overdue by some 50 years, nevertheless provides a useful example of the role such investigations can perform in helping a country confront and understand its past. Courts by their very nature personalize the crimes they judge, since their focus is on the accused. Truth commissions, on the other hand, can present a comprehensive picture of the societal forces that made crimes against humanity and

genocide possible. A German truth commission might have been able to explore the pervasiveness of the evil that produced the Holocaust and serve to provide important insights into the crimes that were committed and how they might have been prevented.

V. Conclusion

The contemporary international law on human rights and international criminal law that I have described in this lecture has taken many decades to evolve. The development of these areas of the law owe much to the impact of the Holocaust and its influence in shaping mankind's consciousness of and reaction to the crimes against humanity and the genocides that the world has experienced since the Holocaust.

Time constraints have compelled me not to deal with other international law subjects that also owe their evolution or expansion to the Holocaust.[32] It is worth noting, however, that since the Second World War, international law in general has become ever more responsive to international humanitarian needs and to social, cultural and educational concerns. The largely sterile international law of the pre-World War Two era, with its almost exclusive emphasis on political diplomacy, state prerogatives and national sovereignty, has taken on a more human face. Although many other factors account for this gradual transformation, the Holocaust and the Second World War certainly contributed to it by getting governments to realize that international law must address mankind's concerns if it is to play a meaningful role in promoting and preserving a peaceful world.

The preamble to the Constitution of UNESCO, adopted shortly after the end of the war, expresses in almost lyrical terms the thinking that influenced the post-World War Two transformation of international law. "Since wars begin in the minds of men," it declares, "it is in the minds of men that the defences of peace must be constructed." The preamble further emphasizes that

> the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races.

Similar ideas are reflected in the preamble to the Charter of the United Nations, which expresses the determination of its founders "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small … and to promote social progress and better standards of life in larger freedom."

Contemporary international law now regulates many spheres of human endeavor that were previously deemed to fall within the domestic jurisdiction of states. This has forced international law to expand the scope of its legislative reach and to establish new international institutions to cope with contemporary societal problems. The ever more important role NGOs play on the global stage, frequently side-by-side with governments, illustrates the transformation international law has undergone and its greater relevance in addressing issues once thought to be the exclusive domain of national governments.

Despite its historic reticence to yielding sovereign power to international institutions, the United States has contributed probably more than any other country to this transformation of international law. The US played a vital role in promoting the Nuremberg Trials,[33] in the drafting of the Genocide Convention and the Universal Declaration of Human Rights. And while the US was very slow in ratifying the Genocide Convention and subsequent UN human rights treaties, it has pioneered and supported a large number of important national and international human rights initiatives, which have advanced the cause of human rights in the world.[34] It has also strongly supported the creation of the Yugoslav and Rwanda Criminal Tribunals.

The US was the first country to establish a high-profile human rights bureau in the Department of State. Similar positions have subsequently been created in other foreign ministries, although few have had the same policy impact over the years as our Assistant Secretaries for Human Rights. The US also pioneered the adoption of legislation making military and development assistance dependent upon the recipient government's human rights practices. And American human rights NGOs have been playing a leading role in promoting the protection of human rights on a worldwide basis.[35]

All of these policies and activities have been greatly facilitated by America's own constitutional commitment to the protection of human rights and the historic role our courts have played in ensuring the enjoyment of these rights. For much of our history, we have been able to look for protection to American courts and political institutions rather than to international human rights law and institutions when our human rights appeared to be threatened. This explains, I believe, why we tend not to appreciate why people in other countries often attach such great importance to international judicial and quasi-judicial human rights institutions and to human rights treaties.

Foreigners tend also not to understand why the US is so reluctant to join in these international efforts. They know that many now democratic countries owe their freedom to international efforts and to the human rights support provided by international organizations. And they also believe that without external assistance they would not have been able to escape from under the oppressive rule of military governments or dictatorial civilian regimes that were in power in their countries. Moreover, the people who live in countries where such regimes still hold sway, have little faith in the willingness or capacity of their national judicial and political institutions to protect their human rights without strong international pressure.

Whether we realize it or not, the widely held belief in many parts of the world that strong international human rights institutions and international criminal courts are necessary to protect mankind against future genocides and crimes against humanity is a legacy of the Holocaust and of US humanitarian policies. The violent and unseemly US opposition to the International Criminal Court is therefore seen by many around the world as a denial of much that the US has stood for since the Holocaust and Nuremberg. Maybe one has to live abroad, as I do at this time, to fully appreciate how deeply troubling this US attitude is to many foreign friends of the US, how seriously it undermines support for longstanding US policies and the admiration for the US as a nation committed to the international rule of law that has been such an important foreign policy asset to this country.

Nuremberg held out the promise to the world that international justice would henceforth seek to ensure that genocide, crimes against humanity and war crimes, regardless where committed, would be punished and thus help to prevent the commission of these crimes. Let us not, by undermining the International Criminal Court, besmirch the memory and promise of Nuremberg as victor's justice.

Notes

1. L. Oppenheim, International Law: A Treatise, vol. I, §§ 289–90 (2d. ed. 1912).

2. See H. Lauterpacht, International Law and Human Rights (1950), the most important early post-World War Two text on the subject.

3. L. Oppenheim, International Law: A Treatise, §292, p. 509, n. 4 (H. Lauterpacht, 5th ed., 1937).

4. Letter from US Secretary of State Hay, dated August 11, 1902, [1902] US Foreign Relations 42. The following passage from that letter illustrates the point in a most telling way:

> Putting together the facts now painfully brought home to this Government during the past few years, that many of the inhabitants of Romania are being forced, by artificially adverse discriminations, to quit their native country; that the hospitable asylum offered by this country is almost the only refuge left to them; that they come hither unfitted, by the conditions of their exile, to take part in the new life of this land under circumstances either profitable to themselves or beneficial to the community; and that they are objects of charity from the outset and for a long time—the right of remonstrance against the acts of the Romanian Government is clearly established in favor of this Government. *Ibid*. at 45.

5. See U.S. Secretary of States Root to O. Straus dated January 25, 1906, [1906] 2 US Foreign Relations 1417–19, reproduced in L. Sohn and T. Buergenthal, International Protection of Human Rights 183 (1973).

6. It could be argued that the doctrine of humanitarian intervention, which dates back to Grotius and according to which a group of states has the right to intervene by force to put an end to a state's massive violations of human rights that "shock the conscience of mankind", could have been invoked against Nazi Germany before World War II. See F. Tesón, Humanitarian Intervention: An Inquiry into law and Morality, 72 (2d. ed. 1997). In practice, however, when the doctrine was invoked in the 19th and early 20th centuries, it was used mainly for ulterior political reasons and rarely, if ever, for humanitarian purposes. I. Brownlie, International Law and the Use of Force by States 340 (1963). These considerations and the fact that the doctrine had not been invoked by Western powers against other Western powers, explain why humanitarian intervention was not seriously contemplated by the West in dealing with pre-World War II Germany.

7. For what may well have been the earliest use of this phrase, see T. Buergenthal, "Human Rights: A Challenge for Universities," 31 UNESCO Courier 25, 28 (1978).

8. See generally, T. Buergenthal, "The Normative and Institutional Evolution of International Human Rights," 19 Human Rights Quarterly 703 (1997).

9. W. Korey, NGOs and the Universal Declaration of Human Rights 33 (1998).

10. See *e.g.*, Robert Caro, Lyndon Johnson: Master of the Senate 96–97 (2002).

11. See L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," 32 American U.L. Rev. 1 (1982).

12. B. van der Heijden & B. Tahzib-Lie, (eds.), Reflections on the Universal Declaration of Human Rights (1998).

13. For these texts, see Human Rights: A Compilation of International Instruments, volumes I and II, published by the United Nations in 2002.

14. For the work of these and related UN bodies, see P. Alston (ed.), The United Nations and Human Rights: A critical Appraisal (1992). See also, T. Meron, Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (1986).

15. For a description of the human rights treaties and practice of these organizations, see generally, T. Buergenthal, D. Shelton & D. Stewart, International Human Rights in a Nutshell (3rd ed. 2002).

16. Former French Minister of Justice, Pierre-Henri Teitgen, speaking to the Consultative Assembly of the Council of Europe in August 1949, as quoted in A.H. Robertson, Human Rights in Europe 4 (2d ed. 1977).

17. For the work of one such body, see T. Buergenthal, "The U.N. Human Rights Committee," 5 Max Planck Yearbook of United Nations Law 341 (2001).

18. I prefer the term "international criminal law" to "international humanitarian law", which embraces international criminal law, because it describes more precisely the subject I am covering in this lecture. See A. Cassese, International Criminal Law 14 (2003).

19. See generally, T. Taylor, The Anatomy of the Nuremberg Trials (1992). See also, R.K. Woetzel, The Nuremberg Trials in International Law (Rev. ed. 1962).

20. Convention on the Prevention and Suppression of the Crime of Genocide, art. VI.

21. The term was apparently coined by the Russian foreign minister, Sergei Sazonov, in a 1915 letter to the British Foreign Office regarding the possible trial of members of the Young Turks movement for atrocities related to the Armenian genocide. See G.J. Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals 115–16 (2000).

22. See, e.g., The Trial of German Major War Criminals, Proceedings, Part I, p. 22 (1946).

23. See L. Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust 49–49 (2001).

24. E. Schwelb, "Crimes Against Humanity", 23 Brit. Yearbook Int'l L. 178 (1946).

25. See, *e.g.* Statute of the International Criminal Court, art. 7.

26. Korey, supra note 9, at 206.

27. See generally T. McCormack & G. Simpson (eds.), The Law of Crimes: National and International Approaches (1997).

28. G. Hausner, Justice in Jerusalem (1966); H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963).

29. See generally, N. Kritz (ed.), Transitional Justice, vol. I, at 223 *et seq*. (1995).

30. For a discussion of these different roles, see T. Buergenthal, "Truth Commissions and the Protection of International Human Rights," Forum Deusto, Los Derechos Humanos en un Mundo Dividido 127 (1999).

31. For a discussion of the Bergier Report, see M. Bazyler, Holocaust Justice: The Battle for Restitution in Americas Courts 25–26 92003).

32. For example, one of the subjects omitted is international refugee law, which was in its infancy in the League of Nations days. Another subject that might have been treated in these pages, if space permitted, would have been the emerging concepts of international restitution law applicable to victims of crimes against humanity and genocide. On the latter subject, see M. Bazyler, "The Holocaust Restitution Movement in Comparative Perspective," 20 Berkeley J.Int'l Law 11 (2002). See also M. Rosensaft and J. Rosensaft, "The Early History of German-Jewish Reparations," 25 Fordham Int'l L.J. S-1 (2001).

33. See generally T. Taylor, The Anatomy of the Nuremberg Trials (1992).

34. For an extensive discussion of this subject, see the chapter on "The U.S. and International Human Rights" in T. Buergenthal, D. Shelton & D. Stewart, International Human Rights in a Nutshell 347–401 (3d ed. 2002).

35. See W. Korey, NGOs and the Universal Declaration of Human Rights (1998).