

A PIONEER IN INTERNATIONAL JUSTICE: LOUISE ARBOUR

*Remarks from Jonathan Fanton, President of the
John D. and Catherine T. MacArthur Foundation*

As President of the MacArthur Foundation, it is my great pleasure to introduce United Nations High Commissioner for Human Rights Louise Arbour's comments regarding the emerging system of international justice. In her current role, Louise Arbour has strengthened the UN's human rights field presence with an attention to prevention. A distinguished lawyer and Supreme Court judge in Canada, she was the first Chief Prosecutor for the International Criminal Tribunals in the former Yugoslavia and Rwanda. She originally presented her thoughts at a March 20, 2008 dinner at which the MacArthur Award for Advancing International Justice was conferred on former UN Secretary-General Kofi Annan.

Our purpose that night was to take stock on how far we have come in building the system of international justice and to face candidly what still needs to be done. We had chosen our panel with an eye to illuminate the tie between prevention and accountability. The dinner's panel, which included the leaders of the field of international justice such as Allan Rock, Juan Mendez, Francis Deng, Lloyd Axworthy and Luis Moreno-Ocampo, came together to recognize the progress that has made as well as the challenges ahead and what we must do to realize our aspirations for a world in which "Never again," is a promise fulfilled.

Over the years, the MacArthur Foundation has supported 600 human rights organizations working in 90 countries, some international organizations like Human Rights Watch, but mostly local groups strengthening the rule of law in places like Nigeria, Russia, and Mexico. Recently, we have focused on helping build a system of international justice, regional courts and commissions,

universal justice, special tribunals, and the new International Criminal Court (ICC). We have supported the Coalition for the ICC that is bringing the Court into existence more quickly than anyone expected. This coalition brings together Global Rights to gather evidence useful in the Court's first cases, the Institute of War and Peace Reporting to train local journalists to cover ICC trials, REDRESS to help engage victims and witnesses, and the International Bar Association for independent analysis of the of the Court's proceedings. Under this system, regional courts provide ordinary people the opportunity to appeal cases of police abuse, discrimination, and the abridgement of free expression and assembly, when they have exhausted remedies available in their national justice systems.

MacArthur supports civil society organizations around the world bringing precedence-setting cases to these courts in Europe and Latin America, and we are working to help the new African Court on Human and People's Rights take root. Regional courts may raise the quality of justice in national courts. A stronger rule of law culture may prevent everyday abuses from aggregating into the worst crimes imaginable. Stronger accountability may deter those who would commit mass atrocities even as we acknowledge that there will be situations requiring prompt action to prevent future Rwandas.

MacArthur was privileged to be invited by Canada to support the International Commission Intervention and State Sovereignty, which articulated the doctrine of the Responsibility to Protect, adopted by the UN in 2005. It affirms that when states fail to protect—or worse—commit abuses against their own citizens, the international community must step in to protect civilians.

The world has a stronger arsenal for justice than ever before. While each element has separate origins, we are on the cusp of forging an integrated system of international justice. Think of these examples: Slobodan Milosevic of Serbia was the first sitting head of state ever indicted. When Jean Kampana, former Prime Minister of Rwanda, faced charges of genocide, he pled guilty. With trials and appeals still underway, 239 people have been indicted and

78 convicted so far. Other national leaders have discovered that their status no longer confers immunity from prosecution. Augustus Pinochet was arrested in Britain under the theory of universal jurisdiction that allowed for his return to Chile where he died, facing over 300 criminal charges. Charles Taylor, former President of Liberia is now before a special tribunal at The Hague to answer for his alleged crimes against humanity in neighboring Sierra Leone. Five leaders of the Khmer Rouge are waiting to stand on trial before a special tribunal in Cambodia, and there is a reasonable chance that Hissène Habré of Chad will be brought to justice in a Senegalese court. At The Hague, the first ICC trial underway is of Thomas Lubanga, leader of the Union of Congolese Patriots militia in the Democratic Republic of Congo (DRC), who stands accused of kidnapping children for use as soldiers. Two more trials will follow from the DRC, and indictments have been issued in northern Uganda and in Darfur. In Kenya, we have seen the Responsibility to Protect in action as the African Union mission led by Kofi Annan brought compromise that avoided chaos.

The era of impunity is about to give way to an age of accountability. While steps still must be made and obstacles overcome, the groundbreaking work of Louise Arbour should offer hope for future progress toward an integrated international justice system.

I hope you enjoy her keen insights into the paths that lie before us.

Guest Essay

REMEDIES FOR RIGHTS:
INSIGHTS INTO INTERNATIONAL JUSTICE

Louise Arbour

There is much to say about the history of international criminal justice and international justice generally. Let's start with a few trite but important reminders and key events. The first is the creation of two ad hoc tribunals: the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994. Let's just remark and be reminded of a few significant features.

After Nuremberg, until the creation of the ICTY, it had become conventional wisdom that an international mechanism to establish personal criminal responsibility was infeasible. This could not be done. The reach of international law to the subject of law, that is, the reach between this body of law and individuals, seemed too hard to break. This could not be done. Well, I think it's very encouraging to observe that what could not be done ... got done. What's even more astonishing is that this extremely progressive—I would even say revolutionary—initiative was taken, somewhat surprisingly, by the United Nations Security Council, not a body otherwise known for its revolutionary, progressive initiatives. This is all a source of considerable comfort for those of us who are championing other revolutionary doctrines like the Responsibility to Protect in the face of a lot of skepticism that it has not yet been realized or that it is all rhetorical. Thus, we can be reminded that quite extraordinary things can be launched. The history of international criminal justice since then has been written loud and clear and eventually culminates in the creation of the International Criminal Court. In between, I like to think that the concept of universal jurisdiction of national courts is still very alive. Overall, there is a

Louise Arbour is the United Nations High Commissioner for Human Rights. Previously, she served as a Justice of the Supreme Court of Canada and as Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

whole landscape of accountability that appears very promising.

My concern is that there is a little more to justice than criminal justice, and in the international framework, we are a long way from having a comprehensive international justice environment. For those of us who believe there is no such thing as a right without a remedy, you look at the Universal Declaration of Human Rights, and you really have to ask yourself, "How long is it going to take before this is more than an aspirational resonance?"

We have been engaged over the course of this year in celebrating not only the sixtieth anniversary of the Universal Declaration of Human Rights on December 10 but also the Convention on the Prevention of Genocide on December 9. We should put just as much energy into correcting some of the shortcomings of that convention, including the fact that it is a bundle of rights without a lot of remedies. It is one of the very few international instruments that have no monitoring mechanism. There are lots of revolutionary, progressive ways in which we could correct that shortcoming very rapidly, either by an optional protocol or, some believe, by a simple General Assembly resolution. So those of us who believe that we need not only rights but also remedies, we should keep in mind those two possible solutions and move toward launching an initiative in that respect.

Some speak of a peace/justice trade-off in the sense that a diplomat might sacrifice justice in order to resolve a conflict, but there is a question of whether you can have peace without having justice as part of it. In regard to this so-called sequencing of peace versus justice, it is a terrible idea to put the two in competition. We have to recognize that we have not been in the international justice business for very long. We have been in the political business for a very long time, and look at where we are. Therefore, to privilege the political process is a leap of faith that I am not prepared to make. We must invest equally in believing that we should let the justice process follow its course. What we call "peace" is basically a political process leading to a case agreement. In that context, justice initiatives, indictments by courts, and so on are seen as irritants; they simply make the deal-making process a little more complicated.

However, trying to persuade, influence, or bully the justice process into being secondary to political initiatives to achieve a peace deal sends a signal that justice is subservient to political processes.

This also means that the next time, in fact every time, you launch a justice initiative, it will always be assumed that it is in the pursuit of a political agenda or interest. It is extremely critical to have these two tracks—those of peace and justice—follow their natural courses. For example, when we brought the Milosevic indictment at the height of the NATO air strikes in Kosovo, I abstained from the political debate. I had suspected that it probably would not have been a tremendously good idea to begin what could be perceived or what was anticipated as being an added difficulty in trying to bring Milosevic into peace negotiations. At the end of the day, the peace/justice trade-off assumption was proven completely wrong. Almost eight days after he was indicted, Milosevic essentially surrendered. This had not been predicted, and I am sure that if I had spoken to the politicians at the time and asked for instructions, I would have been told to back off and let the peace process unfold. Now, this is anecdotal; it proves nothing. But to me, it is not an empirical argument; it is an argument of principle that you cannot let a justice initiative be tainted by political considerations.

In regard to the question of women's rights, there is more to international justice than criminal justice. There is social justice; there is equality; there is equal protection under the law. It is not an enormous observation to realize that there are many groups who have yet to achieve these in their own countries. I think the recent research on women and initiatives that have been taken in that respect highlights again that this also is not just a question of deficiencies in developing countries. Frankly, at this stage I think about how little we've accomplished encouraging women to participate in their own governments. I think all that speaks very loudly to how far we have to go and, again on this, I believe that we have to invest in legal protection. And take Responsibility to Protect: one of its big challenges is to move from a kind of political aspirational framework to a set of legal guaranties and protections. I think women who have done well have done well under the protec-

tion of the law, and that's exactly the same thing for people with disabilities, for all kinds of excluded and marginalized groups, and unpopular minorities. I think we really have to anchor our efforts.

I know it is not part of the orthodoxy of the Responsibility to Protect doctrine, but I believe that, as a matter of international human rights law, all states have a responsibility not only to protect their people from genocide, war crimes, and crimes against humanity, but also to protect them against famine, disease, illiteracy—all affronts to human dignity. In fact, in the Universal Declaration of Human Rights, all rights are universally declared—civil and political rights but also fundamental economic, social, and cultural rights, including the right to health and the right to adequate housing

Now, shortly after the Universal Declaration of Human Rights was enacted, it was fractioned into two covenants: civil and political rights, which were embraced by Western countries, and economic and cultural rights, which were not. They are seen in many Western countries as being aspirational or the likely byproducts of a healthy free-market economy, but not as universal rights. Let me stress that we should never use the doctrine of the Responsibility to Protect, in its national component, to diminish the responsibilities of the state, *vis-à-vis* the welfare of its population, and reduce the Responsibility to Protect to an obligation to protect only against genocide, war crimes, and crimes against humanity. It takes nothing from the doctrine to recognize other forms of responsibility. In my view, its novelty, particularly as expressed in the Outcome Document, is that it calls on the international community as a default jurisdiction when a state is unwilling or unable. In that case, this collective responsibility to come to the protection of the citizens of a defaulting state is restricted to genocide, war crimes, crimes against humanity, and ethnic cleansing. However, we should be wary of excusing the profound failure of states to provide fundamental human rights under their jurisdiction.

International justice can no longer exclude any of the inequalities that modern society is facing. The world is calling for universal principled action, and the international legal community has a duty to respond.