

# International Law and Human Rights: The Power and the Pity

Rosalie Silberman Abella

Volume 55, numéro 4, novembre 2010

URI : <https://id.erudit.org/iderudit/1000787ar>

DOI : <https://doi.org/10.7202/1000787ar>

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Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)

1920-6356 (numérique)

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Citer cet article

Abella, R. S. (2010). International Law and Human Rights: The Power and the Pity. *McGill Law Journal / Revue de droit de McGill*, 55(4), 871–887.  
<https://doi.org/10.7202/1000787ar>

## INTERNATIONAL LAW AND HUMAN RIGHTS: THE POWER AND THE PITY

———MCGILL LAW JOURNAL ANNUAL LECTURE———

*Hon. Rosalie Silberman Abella\**

About ten years ago, Irwin Cotler organized a conference on the fiftieth anniversary of the Nuremberg Trials and invited me to speak on the topic, “The Instructive Power of Outrage”<sup>1</sup>. It launched me on a voyage of legal discovery that has kept me in intellectual thrall ever since. And looking back on that lecture and how hopeful we all were that Nuremberg’s lessons would prevail, I find myself wistful for that optimism, and somewhat disillusioned but unprepared to give up. As a result, I have called this lecture about international law and human rights “The Power and the Pity” in the hope that in this audience of brilliant students are the leaders who will take the world by the hand and help show it the way into the future.

Since 1945, the global community has demonstrated an enormous capacity for constructing legal systems and institutions to enhance and advance international law. Many areas of international law are free from controversy and generally effective: telecommunications and broadcasting; the international postal system; laws on shipping and bills of exchange; international travel; passport and customs control; international financial transactions; international trade of goods, services, and ideas; diplomatic and consular relations; and the mutual recognition of marriages, divorces, and university degrees. They are a less visible, but nonetheless significant, series of successes for international law.

And it is a tribute to the perceived legitimacy of international law that it is repeatedly invoked by the Supreme Court of Canada as an interpretive guide when deciding domestic cases. Whereas the Court made use of

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\* Justice, Supreme Court of Canada. This speech was delivered as the *McGill Law Journal* Annual Lecture at the Faculty of Law, McGill University on 26 January 2010.

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Citation: (2010) 55 McGill L.J. 871 ~ Référence : (2010) 55 R.D. McGill 871

<sup>1</sup> Rosalie Silberman Abella, “The Instructive Power of Outrage: Remembering Nuremberg” (2000) 46 McGill L.J. 113.

key international human rights instruments in fifty cases between 1984 and 1996 when interpreting the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> the Court cited foreign and international law in half of its 114 decisions in 2006 and 2007.<sup>3</sup>

Like international law generally, international economic law since 1945 has witnessed a proliferation of institutional organs established to administer the regime and to participate in legal development,<sup>4</sup> including Organisation for Economic Co-operation and Development (OECD); the World Intellectual Property Organization (WIPO);<sup>5</sup> the International Labour Organization (ILO);<sup>6</sup> the United Nations Commission on International Trade Law (UNCITRAL);<sup>7</sup> the International Bank for Reconstruction and Development (IBR), the International Finance Corporation (IFC), the International Development Association (IDA), the International Centre for the Settlement of Investment Disputes (ICSID) and the Multilat-

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> The cases where international law has been used have represented a wide range of issues. The Supreme Court of Canada has turned to international law for guidance in cases dealing with: trade obligations (*National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449); state secession (*Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385); extradition to the death penalty (*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438; *Reference Re Ng Extradition*, [1991] 2 S.C.R. 858, 84 D.L.R. (4th) 498; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) 1); international crimes (*R. v. Finta*, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, 254 D.L.R. (4th) 200); deportation to torture (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1); collective bargaining (*Health Services and Support—Facilities Subsector Bargaining Association v. B.C.*, 2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40); duty to disclose (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, 293 D.L.R. (4th) 629); extraterritorial search and seizure (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385 [*Hape*]); extraterritorial reach of domestic laws (*Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, 240 D.L.R. (4th) 193; *Hape*, *supra*); immunity (*Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841, 158 D.L.R. (4th) 577); young offenders (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, 92 O.R. (3d) 399); and prisoners' right to vote (*Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, 218 D.L.R. (4th) 577).

<sup>4</sup> I am indebted to my law clerk, Kate Glover, for her research on international trade law.

<sup>5</sup> *Convention Establishing the World Intellectual Property Organization (WIPO)*, 14 July 1967, 828 U.N.T.S. 3, 21 U.S.T. 1749.

<sup>6</sup> *International Labour Organization (ILO) Constitution*, 15 U.N.T.S. 40, online: ILO <<http://www.ilo.org>>.

<sup>7</sup> *Establishment of the United Nations Commission on International Trade Law (UNCITRAL)*, GA Res. 2205(XXI), UN GAOR, 21st Sess., UN Doc. A/RES/2205(XXI) (1966).

eral Investment Guarantee Agency (MIGA);<sup>8</sup> and the United Nations Environment Programme (UNEP).<sup>9</sup> In addition, organizations and legal instruments have been established at the regional level to ensure closer economic co-operation between states, including the European Community (EC); the *North American Free Trade Agreement* (NAFTA);<sup>10</sup> the Southern African Development Community (SADC);<sup>11</sup> the West African Economic and Monetary Union (WAEMU);<sup>12</sup> the Association of Southeast Asian Nations (ASEAN);<sup>13</sup> MERCOSUR and the *Central American Free Trade Agreement*;<sup>14</sup> and, of course, the IMF, the World Bank, and GATT.<sup>15</sup>

Then, in 1994, the *Marrakesh Agreement* established the World Trade Organization (WTO),<sup>16</sup> which came into being on 1 January 1995, dramatically extending the reach of trade regulation and creating a comprehensive international legal and institutional framework for international trade. After only fifteen years in operation, the WTO is in essence international law's child prodigy. Like the UN, the WTO struggles with reconciling the interests of the most powerful states and the least, as is obvious from the tumultuous eight-year saga of the Doha Development Round of

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<sup>8</sup> The IBRD, IFC, IDA, ICSID, and MIGA comprise the five bodies of the World Bank Group, online: The World Bank <<http://www.worldbank.org>>.

<sup>9</sup> *Institutional and Financial Arrangements for International Environmental Co-operation*, GA res. 2997(XXVII), UN GAOR, 27th Sess., UN doc. A/RES/2997(XXVII) (1975).

<sup>10</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289, 605.

<sup>11</sup> *Treaty of the Southern African Development Community (SADC)*, 17 August 1992, 32 I.L.M. 116, 5 A.J.I.C.L. 418.

<sup>12</sup> WAEMU is commonly known by the French title, l'Union Economique et Monétaire Ouest Africaine (UEMOA). See *Traité de l'Union Economique et Monétaire Ouest Africaine*, 10 January 1994, online: UEMOA <<http://www.uemoa.int>>.

<sup>13</sup> *ASEAN Declaration*, 8 August 1967, 6 I.L.M. 1233. See also *ASEAN Charter*, online: ASEAN <<http://www.aseansec.org>>.

<sup>14</sup> See *Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, 26 March 1991, 30 I.L.M. 1041 [MERCOSUR]; *Central America–Dominican Republic–United States Free Trade Agreement*, 5 August 2004, 43 I.L.M. 514 (commonly known as CAFTA or CAFTA-DR).

<sup>15</sup> See *Articles of Agreement of the International Monetary Fund*, 27 December 1945, 2 U.N.T.S. 39 (Bretton Woods Agreement). See also *General Agreement on Tariffs and Trade* (GATT 1947), 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948); *General Agreement on Tariffs and Trade* (GATT 1994), 15 April 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

<sup>16</sup> *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154; 33 I.L.M. 1144.

negotiations.<sup>17</sup> Yet despite occasional criticism, the WTO and its dispute settlement mechanism in particular are regarded as legitimate, effective, and influential in international relations.

International trade law has, like international human rights law, constructed a complex network of institutions and norms to regulate state conduct. But unlike international human rights law, states *comply* with international trade law and, in the event of non-compliance, an effective settlement mechanism is available to resolve disputes. In other words, what states have been unable to achieve in sixty-five years of international human rights law, is up and running after only fifteen years of international trade regulation. I find this dissonance stark and unsettling.

If we examine international trade law and international human rights law in parallel, we can make a number of discouraging observations. First, unlike the UN, the WTO is extremely difficult to join. That means that the global community agrees that obtaining membership in a trade organization should be more onerous than obtaining membership in an organization responsible for saving humanity from inhumanity. Second, the global community has implemented non-discrimination (as between states) as an enforceable tenet of international trade law, but cannot implement the same principle as between people. Third, the global community agrees that the products of one state should be treated the same as products from every other state, but cannot agree that individuals have rights as individuals, not as citizens of particular states. And fourth, the global community agrees on the principles underlying international trade law: non-discrimination and most favoured nation. In contrast, the global community cannot agree on the principles underlying international law generally, and sovereignty and human rights continue to conflict.

Is it fair to ask, when looking at this picture, what the dissonance between international trade law and international human rights law says about our global priorities? I would say it is not only fair, it is essential.

Through the *UN Charter*, the “peoples of the United Nations” determined 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.”<sup>18</sup> It was created for the purpose of achieving international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

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<sup>17</sup> See WTO, *Doha WTO Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (2001), 41 I.L.M. 746.

<sup>18</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Preamble [*UN Charter*].

We have clearly seen the emergence of the individual as an actor on the international legal scene. In fields such as human rights, criminal law, humanitarian law, and environmental law, individuals have international legal obligations to other individuals and can be held accountable for their breaches, representing a dramatic change from classical international law, which construed “the state” as the only legal entity subject to regulation. That is why there was so much cheering when we thought the global community had finally resolved the rancorous, longstanding debate about humanitarian intervention through the UN General Assembly’s unanimous endorsement of the doctrine of the Responsibility to Protect (R2P) in 2005.<sup>19</sup> It seemed, at last, that we had seen a triumph of human rights over sovereignty. Yet, at the end of July 2009, the UN General Assembly debated R2P for the first time since unanimously endorsing the doctrine in 2005 and it seemed to unravel before our eyes.<sup>20</sup>

How did we get there, why did we get there, where is this leading us, and what do we need to think about to fix it? And fix it we must, because unless we pay attention to intolerance, the world’s fastest growth industry, we risk losing the civilizing sinews that flexed the world’s muscles after World War II. We changed the world’s institutions and laws then because they had lost their legitimacy and integrity. We may be there again, not so much because our *laws* need changing, but because a good argument can be made that our existing institutions, and especially the UN’s deliberative role, are playing fast and loose with *their* legitimacy and *our* integrity.

What has happened to the miraculous regeneration and luminous moral vision that brought us the *Universal Declaration of Human Rights*,<sup>21</sup> the *Genocide Convention*,<sup>22</sup> and the Nuremberg Trials—those phoenixes that rose from the ashes of Auschwitz and roared their outrage, those instruments of justice that yielded, in the next sixty years, the most sophisticated array of laws, treaties, and conventions the international community has ever known, all stating that rights abuses will not be tolerated?

It is not clear to me what our multilateral solutions *should* be, but it is clear to me that the status quo is not the solution. So this is a lecture about the moral choices we will be asked to make as a global community and what to think about when we make those choices.

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<sup>19</sup> 2005 World Summit Outcome, UN GAOR, 60th Sess., UN Doc. A/60/1 (2005) at 30.

<sup>20</sup> United Nations Department of Public Information, News Release, “Press Conference on General Assembly Dialogue on Responsibility to Protect” (23 July 2009), online: UN <<http://www.un.org>>.

<sup>21</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>22</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*].

In his remarkable play, *Copenhagen*,<sup>23</sup> Michael Frayn explored this theme through a fictionalized account of a real meeting in Copenhagen in September 1941 between two Nobel Laureates, Niels Bohr and his former student and German physicist, Werner Heisenberg. The meeting took place at Bohr's home. Together the two men had revolutionized atomic physics in the 1920s with their work on quantum mechanics and the uncertainty principle.

The play is a sophisticated, intellectual exposé on the justice of developing nuclear weapons, and whether there was a moral distinction between developing them for the Allies and developing them for Hitler. The moral question at the heart of the play is Heisenberg's duty as a loyal German and as a scientist in charge of its nuclear program. Was he obliged to help protect Germany by developing the atomic bomb, or was he obliged to protect the world *from* Germany, by sabotaging its production? The atom bomb was never developed in Germany and the play leaves unclear whether this was due to Heisenberg's deliberate derailment of the German atomic project or just as a result of getting the calculations wrong.

The genius of the play is the way it plays on the tensions between the mentor, Niels Bohr, half-Jewish and living self-consciously and proudly in occupied Denmark developing nuclear expertise for the Allies, and the acolyte, Werner Heisenberg, working conscientiously and proudly for the occupier and the honour of German science. Both scientists blame themselves and each other for perceived breaches of their moral responsibilities as scientists—Bohr for coming to America where he worked at Los Alamos and playing what he called his “small but helpful part in the deaths of 100,000 people” at Hiroshima and Nagasaki, and Heisenberg for working for a crazed dictator.<sup>24</sup>

I found the most interesting speech in the play to be Heisenberg's explanation for his ambivalence, when he says:

We have one set of obligations to the world in general, and we have other sets, never to be reconciled, to our fellow countrymen, to our neighbors, to our friends, to our family, to our children ... *All we can do is look afterwards, and see what happened.*<sup>25</sup>

The point of the play is not what actually happened at the meeting between Bohr and Heisenberg because no one really knows, but what it tells us about how we make moral choices and how the context of the moment may not be a sufficient defence in history's court. It is time, in other words, that judges how just we have been.

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<sup>23</sup> Michael Frayn, *Copenhagen* (New York: Samuel French, 1998).

<sup>24</sup> *Ibid.* at 75.

<sup>25</sup> *Ibid.* at 65 [emphasis added].

This is the context for what I want to discuss with you today. We are at a crossroads in so many ways, and the choices we will make in many areas will determine not only how history will judge us, but also what kind of world we will have. The environment, the economy, trade, poverty, health, and education are only some of the global policy challenges we will need to address. But the one I want to address today is the international justice crossroads, not by pretending to have any solutions, but by offering some conceptual mortar for international law's edifice. What I propose is to make these observations around the themes of democracy, the Rule of Law, and human rights.

Let us start with the term "Rule of Law", the Holy Grail of rights discourse today. I confess that I have always been somewhat confused by the use of this term as an organizing principle. Beyond students of scholars like Joseph Raz, H.L.A. Hart, and Ronald Dworkin,<sup>26</sup> I think that the debate between positivists who see the Rule of Law as a procedural concept and those who see it as one with moral substance is lost on most lawyers, let alone members of the public. Universal principles, to which most of us are expected to give aspirational loyalty, should be unshackled from semantically ambiguous rhetoric like "Rule of Law". After all, this generation has seen the Rule of Law impose apartheid, segregation, and genocidal discrimination. It makes me wonder why we cling so tenaciously to the moniker.

So what are we really talking about? We're talking, I think, about some universal goals—ensuring limitations on arbitrary state power, protection against rule by whim, and about our belief in law as an instrument of procedural and substantive justice. If I am right that that is what we are really talking about when we talk about a *just* Rule of Law, are we not talking about what we have come to see as the indispensable instruments of democracy: due process; an independent bar and judiciary; protection for minorities; a free press; as well as rights of association, religion, and expression? These are core democratic values, and I, for one, am not the least bit embarrassed to trumpet them, because when we trumpet these core democratic values, we trumpet the instruments of justice.

Who can argue that a society that tolerates differences, that encourages freedom of expression and dissent, that respects women and minorities, that has an independent bar and judiciary, and whose government is accountable—a society, in short, where justice is both the motivating core

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<sup>26</sup> For a sample of influential works by these thinkers, see generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1975); Joseph Raz, "The Rule of Law and Its Virtue" in *Liberty and the Rule of Law*, ed. by Robert L. Cunningham (College Station, Tex.: Texas A&M University Press, 1979) 3; H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963); Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).



and the legally protected goal—is not a better society than one whose greatest tolerance is for *intolerance*? So why are we out there internationally promoting a euphemism like the “Rule of Law” instead of what we really mean—the promotion of the universalism of democratic values, the instruments of justice that emerged triumphant from World War II? We need the Rule of Justice, not just the Rule of Law.

Democratic values, while no guarantee, are the best aspirational goals in my view, because without democracy there are no rights, without rights there is no tolerance, without tolerance there is no justice, and without justice there is no hope.

What kind of rights are we talking about? Two kinds—human rights and civil liberties, both crucial mainstays of our democratic catechism, and both at risk from neglect. What’s the difference between them?

Civil liberties is about treating everyone the same; human rights is about acknowledging people’s differences so that they can be treated as equals. Civil liberties is only about the individual; human rights is about how individuals are treated because they are part of a group. Civil liberties is a concept of rights that requires the state *not* to interfere with our liberties; human rights, on the other hand, cannot be realized *without* the state’s intervention.

But we have to start at the beginning of the story. The human rights story in North America, like many of our legal stories, started in England. The rampant religious, feudal, and monarchical repression in seventeenth-century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill—philosophies protecting individuals from having their freedoms interfered with by governments.<sup>27</sup>

They were also the theories that journeyed across the Atlantic Ocean and found themselves firmly planted in American soil, receiving confirmation in the Declaration of Independence guaranteeing that every “man” enjoyed the right of life, liberty, and the pursuit of happiness, and that the government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for *Americans*—the belief that every American had the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences.

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<sup>27</sup> See e.g. Thomas Hobbes, *Leviathan*, rev. student ed. by Richard Tuck (Cambridge: Cambridge University Press, 1996); John Locke, “The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government” in *Two Treatises of Government*, 3d ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) 265; John Stuart Mill, *Three Essays* (London, U.K.: Oxford University Press, 1975).

Unlike the United States, we in Canada were never only concerned with the rights of individuals. Our historical roots involved as well a constitutional appreciation that the two groups at the constitutional bargaining table, the French and the English, could remain distinct and unassimilated, yet theoretically of equal worth and entitlement. That is, unlike the United States, whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate, based on differences, has as much legal and political integrity as the right to assimilate.

In any event, the individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual *regardless* of differences, became America's most significant international export and the exclusive rights barometer for countries in the Western world. Concern for the rights of the individual monopolized the remedial endeavours of the pursuers of justice all over the world.

It was not until 1945 that we came to the realization that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, the rights of individuals in different groups to retain their different identities without fear of the loss of life, liberty, or the pursuit of happiness.

It was World War II that jolted us permanently from our complacent belief that the only way to protect rights was to keep government at a distance and to protect each individual. What jolted us was the horrifying spectacle of group destruction—a spectacle so far removed from what we thought were the limits of rights violations in civilized societies that we found our entire vocabulary and remedial arsenal inadequate. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but *because of* their differences, and started to formulate ways to protect the rights of the group in addition to those of the individual.

We had, in short, come to see the brutal role of discrimination—a word we had never and could never use in a concept like civil rights that permitted no differences—and invented the term “human rights” to confront it. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race, religion, gender, or ethnicity, and we respected government's new right to treat us differently to redress the abuses our differences attracted. So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played, and extended the prospect of full socio-economic participation to women, non-whites, aboriginal people, persons with disabilities, and those with different sexual preferences. And, most significantly, we

offered this full participation and accommodation *based on* and *notwithstanding* group differences.

Civil liberties gave us the universal right to be equally free from an intrusive state, regardless of group identity; human rights had given us the universal right to be equally free from discrimination *based on* group identity. We needed both. Then, in North America, we seemed to stall as the last century was winding down.

What we appeared to do, having watched the dazzling success of so many individuals in so many of the groups we had previously excluded, is conclude that the battle with discrimination had been won and that we could, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; and having constructed hundreds of ramps for persons with disabilities, many were no longer persuaded that the diversity theory of rights was any longer relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We started to dismissively call a differences-based approach reverse discrimination, political correctness, an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle.

Somehow we started to let those who had enough say “enough is enough,” allowing them to set the agenda while they accused everyone else of having an “agenda”, and leaving millions wondering where the human rights they were promised had gone, and why so many people who already had them thought the rest of the continent didn’t need them.

We started to ignore the built-in headwinds for those who are different, who were thwarted in their conscious choices by stereotypes unconsciously assigned, and who could not be expected to understand why the evolutionary knowledge we came to call human rights appeared to suffer such swift Orwellian obliteration. We seemed to forget the courage our horror gave us after World War II to expand our understanding and tolerance.

We were, I would argue, in a kind of rights distress by the end of the last decade of the century, the 1990s: the decade of deficit reduction, Beavis and Butthead, globalization, and Microsoft; the decade when Americans didn’t ask and didn’t tell; and the decade when they stood by their man, the President, but spent over \$60 million trying to find out if he had had an extramarital affair (something a good matrimonial lawyer could have done for half the money ... ). Everyone appeared to be taking at face

value Yogi Berra's suggestion that when you come to a fork in the road, take it.<sup>28</sup>

The crash of four planes changed everything.

We realized to our horror that while we were riveted on hanging chads and butterfly ballots, terrorists were next door learning how to fly commercial airplanes into buildings. In less than two hours on the morning of September 11, 2001, we went from being a Western world luxuriating in conceptual moral conflicts, to being a Western world terrorized into grappling with fatal ones.

I think what irrevocably shocked us about the horror of September 11 was how massively it violated our assumptions that our expectations about justice were universally shared, at least to the extent that they would be respected in North America. Whether these expectations were reasonable is not the issue. They were genuine. We felt safe. We no longer do. And we are right not to.

The human rights abuses occurring in some parts of the world are putting the rest of the world in danger because intolerance, in its hegemonic insularity, seeks to impose its intolerant truth on others. Yet we appear to be reluctant to call to account the intolerant countries that abuse their citizens, and instead hide behind silencing concepts like cultural relativism, domestic sovereignty, or root causes.

These are concepts that excuse intolerance. Silence in the face of intolerance means intolerance wins.

This week is the sixty-fifth anniversary of the liberation of Auschwitz. And we just finished recognizing—I don't think "celebrating" is appropriate—some of the most iconic global anniversaries in the modern era: the sixtieth anniversary of the *Universal Declaration of Human Rights*, the *Genocide Convention*, and the last of the Nuremberg Trials. To me, they represent the mirror we are obliged to hold up, look into, and ask ourselves, "Are we the fairest of them all?" They were soon followed by other steps in the promotion of international human rights: the *European Convention on Human Rights*;<sup>29</sup> the *Convention on the Political Rights of Women*;<sup>30</sup> the *Protocol amending the Slavery Convention*;<sup>31</sup> the *International Covenant on Civil and Political Rights* and its two optional proto-

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<sup>28</sup> Yogi Berra with Dave Kaplan, *When You Come to a Fork in the Road, Take It!* (New York: Hyperion, 2001).

<sup>29</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, E.T.S. 5 (entered into force 3 September 1953) [*European Convention on Human Rights*].

<sup>30</sup> 20 December 1952, 193 U.N.T.S. 135, (entered into force 7 July 1954).

<sup>31</sup> 23 October 1953, 182 U.N.T.S. 51 (entered into force 7 December 1953).

cols;<sup>32</sup> the *International Covenant on Economic, Social and Cultural Rights*;<sup>33</sup> the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*;<sup>34</sup> the *International Convention on the Suppression and Punishment of the Crime of Apartheid*;<sup>35</sup> the *International Convention against the Taking of Hostages*;<sup>36</sup> the *African Charter on Human and Peoples' Rights*;<sup>37</sup> the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and its optional protocol;<sup>38</sup> the *Convention relating to the Status of Refugees*;<sup>39</sup> the *Convention relating to the Status of Stateless Persons*;<sup>40</sup> the *Convention on the Reduction of Statelessness*;<sup>41</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination*;<sup>42</sup> the *Convention on the Elimination of All Forms of Discrimination against Women* and its optional protocol;<sup>43</sup> the *Convention on the Rights of the Child*;<sup>44</sup> the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*;<sup>45</sup> and the *Convention on the Rights of Persons with Disabilities*,<sup>46</sup> among others. These agree-

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<sup>32</sup> 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976). See also *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res. 44/127, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) at 207 (entered into force 11 July 1991).

<sup>33</sup> 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 (entered into force 3 January 1976).

<sup>34</sup> 26 November 1968, 754 U.N.T.S. 73, 18 I.L.M. 68 (entered into force 11 November 1970).

<sup>35</sup> 30 November 1973, 1015 U.N.T.S. 243 (entered into force 18 July 1976).

<sup>36</sup> 17 December 1979, 1316 U.N.T.S. 205, 18 I.L.M. 145 (entered into force 3 June 1983).

<sup>37</sup> 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force 21 October 1986).

<sup>38</sup> 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, 42 I.L.M. 26 (entered into force 22 June 2006).

<sup>39</sup> 14 December 1950, 189 U.N.T.S. 150 (entered into force 22 April 1954). See also *Protocol relating to the Status of Refugees*, 4 October 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967).

<sup>40</sup> 26 April 1954, 360 U.N.T.S. 117 (entered into force 6 June 1960).

<sup>41</sup> 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).

<sup>42</sup> 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969).

<sup>43</sup> 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force 3 September 1981); *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, 10 December 1999, 2131 U.N.T.S. 83 (entered into force 20 December 2000).

<sup>44</sup> 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990).

<sup>45</sup> 18 September 1997, 2056 U.N.T.S. 241, 36 I.L.M. 1507 (entered into force 1 March 1999).

<sup>46</sup> UN GAOR, 61st Sess., Annex I, UN Doc. A/RES/61/106 (2006).

ments removed human rights from the exclusive domain of domestic jurisdiction and converted them into matters of international concern.

Yet consider some of the events that have occurred around the world since then: we had genocide in Rwanda; the massacres in Bosnia and the Congo; the violent expropriations, the judicial constructive dismissals, and sheer immorality in Zimbabwe; the assassination of law enforcers in Colombia and Indonesia; the repression in Chechnya; the slavery and child soldiers in Sudan; the cultural annihilation of women, Hindus, and ancient Buddhist temples by the Taliban; the attempted genocide of the Kurds in Iraq; the rampant racism tolerated at the UN World Conference against Racism in Durban;<sup>47</sup> the world's shocking lassitude in confronting AIDS in Africa; the disgraceful chapter in global insensitivity as the world formulated a strategy of astonishingly glacial and anaemic proportions in Darfur, China, Myanmar, and Pakistan; the nuclear roguery of North Korea; and the moral roguery period in Iran.

The world was supposed to have learned three indelible lessons from the concentration camps of Europe.

1. Indifference is injustice's incubator;
2. It's not just what you stand for, it's what you stand *up* for; and
3. We must never forget how the world looks to those who are vulnerable.

As Justice Robert Jackson said in his opening address at the Nuremberg Trials,

[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.<sup>48</sup>

But clearly what remains elusive is our willingness as an international community to protect humanity from injustice.

To me, this is not just theory. I am the child of survivors. My parents spent four years in concentration camps. Their two-and-a-half-year-old son (my brother), my father's parents, and my father's three younger brothers were all killed at Treblinka. My father was the only person in his family to survive the war. He was thirty-five when the war ended and my mother was twenty-eight. As I reached each of those ages, I tried to imag-

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<sup>47</sup> See *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/12 (2001), online: WCAR <<http://www.un.org/WCAR>>.

<sup>48</sup> "Second Day, Wednesday 21 November 1945" in *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set)*, vol. 2, 94 at 97-98, online: The Avalon Project <<http://avalon.law.yale.edu>>.

ine how they felt when they faced an unknown future as survivors of an unimaginable past. And as each of my two sons reached the age my brother had been when he was killed, I tried to imagine my parents' pain in losing a two-and-a-half-year-old child. I couldn't.

After the war, my parents went to Germany, where my father, a lawyer, taught himself English. The Americans hired him as a defence counsel for displaced persons in the Allied Zone in Southwest Germany. In an act that seems to me to be almost incomprehensible in its breathtaking optimism, my parents transcended the inhumanity they had experienced and decided to have more children. I was born in Stuttgart in 1946, a few months after the Nuremberg Trials started, and came to Canada with my family in 1950, a few months after the trials ended.

I never asked my parents if they took any comfort from the Nuremberg Trials, which were going on for four of the five years we were in Germany until we got permission to come to Canada in 1950. I have no idea if they got any consolation from the conviction of dozens of the worst offenders. But of this I am sure: they would have preferred, by far, that the sense of outrage that inspired the Allies to establish the International Military Tribunal of Nuremberg had been aroused many years earlier, before the events that led to the Nuremberg Trials ever took place. They would have preferred, I'm sure, that world reaction to the 1933 Reichstag Fire Decree<sup>49</sup> suspending whole portions of the *Weimar Constitution*;<sup>50</sup> to the expulsion of Jewish lawyers and judges from their professions that same year; to the 1935 Nuremberg laws prohibiting social contact with Jews; or to the brutal rampage of Kristallnacht in 1938—they would have preferred that world reaction to any or all of these events had been, at the very least, public censure.

But there was no such world reaction. By the time World War II started on 3 September 1939, the day my parents got married, it was too late. Millions of lives were lost because no one was sufficiently offended by the systematic destruction of every conceivable right for Jews in Germany to feel the need for any form of response. And so, the vitriolic language and venal rights abuses, unrestrained by anyone's conscience anywhere, in or out of Germany, turned into the ultimate rights abuse: genocide. That is why we poured our souls and agony into the *Universal Declaration of Human Rights*, the *Genocide Convention*, and the Nuremberg Trials.

Lawyers like me, I think, have a tendency to take some comfort, and properly so, in the possibility of subsequent judicial reckoning, such as those that occurred at the Nuremberg Trials. But is subsequent justice

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<sup>49</sup> *Order of the Reich President for the Protection of People and State*, 28 February 1933.

<sup>50</sup> *Die Verfassung des deutschen Reichs*, 11 August 1919, *mit allen Anderungen bis zum* 30 January 1933.

really an adequate substitute for justice? I do not for one moment want to suggest that the Nuremberg Trials were not important. They were a crucial and heroic attempt to hold the unimaginably guilty to judicial account, and showed the world the banality of evil and the evil of indifference. At Nuremberg, victims bore public witness to horror, and history thereby committed to memory the unspeakable indignities so cruelly imposed. And there is no doubt that some justice did in fact emerge in the aftermath of the Nuremberg Trials, and there are many connective dots of history leading to the present, of which we can be proud.

But we still have not learned the most important justice lesson of all—to try to prevent the abuses in the first place. All over the world, in the name of religion, national interest, economic exigency, or sheer arrogance, men, women, and children are being murdered, abused, imprisoned, terrorized, and exploited. With impunity.

So Lesson #1 not yet learned: Indifference is injustice's incubator.

Between the values the international community articulates and the values it enforces, the gap is so wide that almost any country that wants to can push its abuses through it. No national abuser seems to worry whether there will be a "Nuremberg Trial" later because usually there isn't, and in any event, by the time there is, all the damage that was sought to be done, has already been done. Where injustice is preventable, it should be prevented when first identified, not permitted to create its human devastation first before being held to account. What we see instead, for the most part, is an inexplicable international tentativeness in asserting that the humanity we sought to restore in 1948 is an enforceable objective today.

What has kept the global community from liberating the *Universal Declaration of Human Rights* and the *Genocide Convention* from the inhibiting politics and parochialism to which they are tethered, so that they can be free to help create, once again, a civilized world confident and willing to provide a future of tolerance and justice?

Does this raise questions about the effectiveness of the UN as a deliberative body? Frankly, it should. And this to me is the most significant international justice challenge in the years ahead. I think we have reached a turning point.

It is true that the UN's agencies have achieved great success in a number of areas. They have provided shelter and relief to refugees and displaced persons, and supported their repatriation and resettlement of refugees and displaced persons. UNICEF has gathered hundreds of millions of dollars worth of supplies for children, operated safe water and sanitation program in ninety countries, served as the primary agency aiding the millions of African AIDS orphans and was the leader in aiding



tsunami survivors in 2005.<sup>51</sup> And the World Health Organization has been central to the fights against polio, malaria, and smallpox.<sup>52</sup> The UN has also raised awareness about global issues such as violence against women, the environment, and the plight of children. In addition, the fact that much of international law works is often due to UN-based agencies. The UN's International Civil Aviation Organization,<sup>53</sup> Universal Postal Union,<sup>54</sup> and International Telecommunication Union<sup>55</sup> ensure the smooth flow of international travel, mail delivery, and communications. And its successes in peacekeeping and with the WTO have been breathtaking.

But the UN was the institution the world set up to implement "Never Again". Its historical tutor was the Holocaust, yet it seems hardly to be an eager pupil. What was never supposed to happen again, has. Again and again.

Ninety years ago we created the League of Nations to prevent a second world war. It failed and we replaced it with the UN. I wonder if we have not come to the point where the human rights community needs to think about whether the illegitimacy of the UN's rule-making moral authority requires the courage to have that most difficult of global conversations: Is the UN really the best we can do? The UN has spent years discussing reform, but I think the record now shows that it either cannot change, or it will not change. Nations debate; people die. Nations dissemble; people die. Nations defy; people die.

We need more than the rhetoric of justice. We need justice.

Lesson #2 not yet learned: It's not just what you stand for, it's what you stand up for.

I have already told you that after the war my parents went to Germany, and that my father was hired as a lawyer by the Americans. A few years ago, my mother gave me some of his papers and letters from Europe. The letters were from American lawyers, prosecutors, and judges he worked with in the U.S. Zone in Stuttgart. They were warm, compassionate, and encouraging letters either recommending, appointing, or qualifying my father for various legal roles in the system that the Americans had

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<sup>51</sup> See generally United Nations International Children's Fund (UNICEF), online: UNICEF <<http://www.unicef.org>>.

<sup>52</sup> See generally World Health Organization (WHO), online: WHO <<http://www.who.int>>. See also *Constitution of the World Health Organization*, 22 July 1946, 14 U.N.T.S. 185 (entered into force 7 April 1948).

<sup>53</sup> See International Civil Aviation Organization, online: ICAO <<http://www.icao.int>>.

<sup>54</sup> See *Constitution of the Universal Postal Union (UPU)*, 10 July 1964, 611 U.N.T.S. 7 (entered into force 1 January 1966). See generally online: UPU <<http://www.upu.int>>.

<sup>55</sup> See generally International Telecommunication Union, online: ITU <<http://www.itu.int>>.

set up in Germany after the war. These people not only restored him, they also gave him back his belief that justice was possible.

One of the most powerful documents I found was written by my father when he was head of the Displaced Persons Camp in Stuttgart where we lived. It was his introduction of Eleanor Roosevelt when she came to visit our D.P. Camp in 1948. He wrote:

We welcome you, Mrs. Roosevelt, as the representative of a great nation, whose victorious army liberated the remnants of European Jewry from death and so highly contributed to their moral and physical rehabilitation. We shall never forget that aid rendered by both the American people and army. We are not in a position of showing you many assets. The best we are able to produce are these few children. They alone are our fortune and our sole hope for the future.

I was one of those children. And as one of those children, I am here to tell you that the gift of justice is the gift that just keeps on giving.

My life started in a country where there had been no democracy, no rights, and no justice. It created an unquenchable thirst in me for all three. My father died two months before I finished law school, but not before he taught me that democracies and their laws represent the best possibility of justice, and that, as lawyers, we have a particular duty to make that justice happen. That means that we have a duty to make sure that we will do everything possible to make the world safer for our children than it was for their grandparents so that all children, regardless of race, religion, or gender, can wear their identities with pride, in dignity, and in peace.

Lesson #3: We must never forget how the world looks to those who are vulnerable.

I am very proud to be a member of the legal profession, but I will never forget why I joined it.

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