

Views from the Field

The Hon. Richard Goldstone

Justice Richard Goldstone was a member of the Constitutional Court of South Africa and is the former chief prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia. He also chaired the Goldstone Commission on public violence and intimidation in South Africa from 1991 to 1994. He is the former Chancellor of the University of Witwatersand, Johannesburg, South Africa and is Co-Chair of the Human Rights Institute of the International Bar Association. Justice Goldstone also serves as a member of the Independent Inquiry into the UN Oil-for-Food Program. He is currently a visiting professor at Harvard Law School, Fordham Law School and NYU Law School. He spoke at The Fletcher School in March 2007 for the launch of the book, *Reconciliation in Divided Societies: Finding Common Ground* (University of Pennsylvania Press, 2007), co-authored by Professor Jeremy Sarkin and Erin Daly. PRAXIS spoke with him about his work in South Africa and his experiences shaping international human rights law.

Please tell us about your experience living and working under Apartheid South Africa. How has it shaped your personal experiences and your career?

My youth was obviously during the apartheid era and when I began my undergraduate degree at Witwatersrand University in Johannesburg, it became a human rights involvement. I became president of our student body at the university. Our main activity then was fighting apartheid, particularly the efforts by the then government to enforce segregation in our university. It was a very exciting, active time—marching through the streets, protesting and succeeding in keeping the doors open for some black students throughout the apartheid era. After I graduated, I got married and brought up a family, and I built up a large commercial practice. As a barrister, I didn't do any criminal work at all. I was involved with corporation law and other areas such as patents and tax.

Then when I was 40, I was invited to take a position as a judge in our provincial supreme court. That was in 1980. It was a very difficult decision during the apartheid era whether to become a judge and have to apply racist laws. But at that time, I'm happy to say, the human rights movement, with substantial support from America, had encouraged South Africans to set up public interest law firms that

PRAXIS editors **Corinne Onetto** and **Margherita Zuin** interviewed Justice Goldstone March 14, 2007 at Harvard Law School. Thanks to Senior Editor Eve Bower for her assistance.

began using the courts actively to establish rights for many millions of black South Africans. More liberal, anti-racist barristers were encouraged by the human rights community to accept positions on the bench; and not without difficulty, I decided I would do that. As a result, I got back into politics, with a small “p,” in being able to write opinions to alleviate the plight of many black South Africans and find holes in some of the apartheid laws. By the time apartheid started unravelling in the late 1980s, I had built up some sort of reputation across the black and the white community for, I suppose, even-handedness and integrity. As a result I was appointed by the government to investigate very difficult situations of violence in our country. In 1990, there was the shooting by a police line into a crowd of over 60,000 demonstrators, in which many were killed and many injured.

That brings us to your role as Chairperson of the Commission of Inquiry regarding Public Violence and Intimidation in South Africa, know as the Goldstone Commission. What were the challenges and what impact did the Commission have on the situation in South Africa? What do you think is the most important legacy of the Goldstone Commission?

I was appointed during the transition to investigate violence in what came to be known as the Goldstone Commission. That lasted from 1991 to 1994. That was a very difficult and complex job; I had very wide powers and I had my own investigation units. I insisted on having senior foreign police officers from five European countries and senior lawyers working with carefully chosen South African police officers to investigate the causes of violence; and particularly the allegations being made then, by Nelson Mandela and the African National Congress, that there were government security forces behind the violence — what they called the “third force.”

I’m happy to say, we established that police and army leaders were instigating violence in an attempt to stop the transition to democracy. The commission achieved a lot of international recognition and the Security Council of the United Nations said nice things about the Commission. That gave us a lot of extra power, because at that period it was difficult for the apartheid government to refuse the requests I made, for example, for international investigators. That was from 1991 to 1994—until our first election in April 1994. We investigated over 40 incidents of violence, huge incidents of violence in our country. We had separate investigations into how to control marches and public demonstrations and how to reduce violence in the first election.

What do you think is the most important legacy of the Goldstone Commission?

I think it uncovered sufficient nefarious activities on the part of the apartheid police and army to have laid the foundation for the Truth and Reconciliation Commission. It really took the rug from under the feet of the apartheid government who denied these things happened. It helped stop some of the denials.

In the meantime, in May 1993, the International Criminal Tribunal for the former Yugoslavia had been set up by the Security Council. By June of 1994 there was still no prosecutor. The reason for that was politics. A prosecutor was appointed from Venezuela in October 1993, the then Attorney-General of Venezuela. He told the then Secretary General of the UN, Boutros Boutros-Gali, that he wouldn’t be available until January of 1994 because he was prosecuting a former president of Venezuela

for fraud. Boutros-Gali had little option, so he said he would wait. (The Attorney-General) arrived in January and after 3 days, he resigned to take up a position as a cabinet minister and deputy prime minister of Venezuela. It is now seven months and there was no prosecutor! The judges were there working the rules, but without a prosecutor there was no chef in the kitchen to start preparing work for the judges.

Between January and June, Boutros-Gali proposed eight people to the Security Council to be prosecutors, but one or other member of the Security Council vetoed them. Five were vetoed by Russia, presumably because they came from NATO countries. The United Kingdom vetoed an American; because he was Muslim and they didn't think it was a good idea because they were mainly Muslim victims in Bosnia. Pakistan was then on the Security Council and, in retaliation, they vetoed someone from England and they also vetoed an Indian. So they were desperate. Then, a French judge suggested to the then president of the tribunal, Antonio Cassese, that if they could get somebody that Nelson Mandela approved of, a South African, then nobody would dare veto his choice. Nelson Mandela had just been appointed president of South Africa in May 1994 and because of my involvement and because my name was known as a result of the Goldstone Commission I was approached.

The first I knew of this was from Judge Cassese asking me if I was interested. And quite frankly my reaction was immediately no. I had never been a prosecutor, I knew nothing about humanitarian law and I knew next to nothing about the former Yugoslavia. So I was not the right person for the job. But I did not take into account the persuasive powers of both Nelson Mandela and my wife. They both thought it was a good idea for different reasons. Nelson Mandela said this was the first important job offered to a South African since we rejoined the international community at the end of apartheid. He also felt that South Africa owed a lot to the UN. He wanted me to do it and informed me that they also wanted me to be on the new Constitutional Court. He said that they had decided to amend the constitution to make it possible for me to take leave for two years from the court. My wife was keen because we were under heavy security and she thought it would be a good idea to go live in the middle of Europe for a couple of years. However, after six months or so I was again under heavy security when we indicted Karadzic and Mladic. So that is how I came into humanitarian law and it was a very steep learning curve.

How did you transfer your experience as a judge and commercial barrister in South Africa, and your role with the Goldstone Commission to your position as prosecutor? What were your sources of expertise and precedence?

How many books I have read on humanitarian law and Yugoslavian law? The law does help people to learn quickly. I mean that is what law is about—if you have a running down case and somebody had a broken leg, you learn all about that part of the leg. You do not know anything about any part of the leg two inches away. My experience on the Goldstone Commission was useful because I had dealt particularly with the political issues of government, local and international, and most importantly with the media. When I came to The Hague, the tribunal's credibility was zero. And I had to build it up in order to get funding and money and to recruit staff. We started with just about nothing and when I left two years later we had a staff of over 200 from about 40 countries in the Office of the Prosecutor.

In the meantime, Rwanda had come online. Overnight, I was appointed the chief prosecutor for the Rwanda tribunal. It was a very busy and very exciting period, and changed my life. I never ever expected as a South African, that I would have anything to do with the international community.

We were able to recruit outstanding experts from a number of countries onto our staff, experts not only in prosecuting, but also experts in humanitarian law. Together with our staff, we all had to learn. None of us knew a great deal. The prosecutors knew nothing about humanitarian law—they had been prosecutors in their own countries.

It took a lot of learning and study. But you know, as a lawyer you have a look at the Geneva Conventions and you look at the SC statute and it says “grave breaches” and you learn what the grave breaches are. It’s not that difficult to convert from being an investigator, or a commercial lawyer, to becoming a prosecutor. There are different standards, but it is still applying the law to the facts or the facts to the law.

As Chief Prosecutor what were the most difficulties responsibilities and challenges you were faced with in your role?

The biggest responsibility was signing indictments charging people as war criminals. That’s a huge responsibility. You are condemning somebody and whether they are found guilty or not it is not a pleasant prospect to be alleged a war criminal. That was a huge responsibility and the buck stopped at my desk. We had people from common law systems and civil law systems. Everything was new, everyday we were creating and inventing a new international jurisprudence—with new rules of evidence and procedure.

What evidence and precedents did the tribunal rely on to make its decisions?

An interesting comparison is with the work of the Nuremberg prosecutors. There they were able to rely on documentary evidence. The Germans had left behind meticulous records. If you look at the Nuremberg record, 75 percent of the evidence was written. We didn’t have that. We had no smoking guns; we had to use eyewitnesses. Therefore, the engine of the prosecutor’s office was the investigation section. It was important to get international staff who were experienced police or army investigators, and they did the work. They had to go interview witnesses and go back to the crime scenes; which wasn’t easy, because this was 1995 and we were then investigating crimes committed in 1991 to 1993. But we did have access potentially to many hundred of thousands of witnesses, because they were refugees. Three hundred thousand Bosnian refugees were in Germany. Many were in Italy and other European countries. I remember having to send two investigators to the Philippines to interview important witnesses.

The International Criminal Tribunal on the former Yugoslavia and International Criminal Tribunal on Rwanda set the groundwork for the creation of the International Criminal Court. Do you believe the role of the ICC is to have a deterrent effect on future violations of humanitarian law?

You know deterrence is very difficult to prove. How do you prove what would have happened if something hadn’t happened? But I’ve got no doubt that an efficient justice system is necessary. If you look in a domestic situation there is no doubt and

it is self-evident that the more efficient your police are, the lower the crime rate will be. You will never stop criminality because some people think they will get away with it; but the more corrupt and inefficient your police, the higher the crime rate.

If you didn't have a criminal justice system you can imagine what a chaotic society you would have. Some failed societies are exactly (in that situation), because they have no criminal justice system. I do not believe it's different in the international community. If we really had an efficient international criminal justice system, if we had international courts making more evil leaders believe that they might get caught, we would have a deterrent. The only proof of deterrence that I know of conclusively arises from bombing as a result of the Kosovo ethnic cleansing in 1998; when NATO bombed for 78 days, the heaviest bombing since the Second World War. Until that Kosovo campaign, in wars in the last hundred years, civilians have been intentionally targeted. Look at the Second World War, the firebombing of London and Coventry and the return fire bombing of German cities Berlin and Leipzig, and, then the atomic bombs dropped by the US on Nagasaki and Hiroshima. Civilian cities were intentionally targeted. If you look at the statistic from the Korean War, you will find that about 80 percent of the casualties, deaths and injuries, were civilians. In Vietnam it was over 90 percent.

In the more than 200 civil wars since 1945, over 90 percent were civilians. All of a sudden, in the bombing in Kosovo, fewer than 2,000 were civilian casualties. This was a complete reversal of the trend. I've discussed that with senior army people, military people, both in Washington D.C. and in Berlin, and I was in both cases given the same reasons. There were two reasons: firstly precision bombing, modern technology; and secondly, the ICTY was operating in The Hague and it had jurisdiction over war crimes committed in the former Yugoslavia. Military lawyers were sitting next to the generals in all the NATO capitals. They were advising what were justifiable military targets, and that it was a war crime to kill or injure civilians if there wasn't a military justification.

I think that is a good example of sorts of which there is evidence of deterrence. I wish I could tell you of evil leaders who have been deterred rather than NATO leaders. But if there are courts with jurisdiction, people think twice and if they have a choice they will do it the legal way and not the illegal way.

Looking back at your career, what do you see as the most valuable changes you brought to the International Criminal Tribunals for the former Yugoslavia and Rwanda, or what changes have you brought to international humanitarian law? What do you think is the future of international humanitarian law and, specifically, of the International Criminal Court?

The most important role I've played in the area of human security was to make a contribution in the success of the ad hoc tribunals. Had they been failures we wouldn't have an ICC. It was their success that fuelled the movement towards Rome in 1998. Of that there can be no doubt. The main success of the ad hoc tribunals was, firstly, establishing that international courts can work. There were a lot of well meaning people who doubted it. They doubted whether judges from all over the world, prosecutors from all over the world, investigators from all over the world could come and really create a workable system that is consistent with internal legal norms. We

proved that could be done. What it needed was a huge team effort, from the judges, my office, the registry; and the other huge success and, possibly the most important, was that we established that humanitarian law is meaningful if it is used. It had never been used before. The Geneva Conventions had never been implemented. And now they are being used. The most important illustration is in relation to gender crime—systematic mass rape and other gender crimes which had been completely neglected until the work of the two ad hoc tribunals. They were not really referred to in humanitarian law and the reason for that, I have no doubt, is humanitarian law, the law of war, had been written by men. And it was written for men who were fighting battles, not women, and rape was seen as one of the inevitable consequences. I think it was the human rights movements and particularly the women who pushed and who demanded that adequate attention be given to systematic mass rape and other gender crimes. And the women judges in particular, and also members of my staff took that seriously. And the result is the definition of gender crimes in the Rome treaty, which is adequate and appropriate. I think these are important successes that began a new movement to establish the ICC. Of course that Court is facing hurdles at the moment especially as a result of the United States opposition to it. And the biggest problem at the moment is whether the orders of the ICC are going to be carried out. Will the Darfur suspects be arrested? But if the court doesn't work and if you don't get defendants into the prison and into the court, the ICC could face a crisis.