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MOVING FORWARD: A REFLECTION ON CURRENT ISSUES FACING INTERNATIONAL CRIMINAL JUSTICE WITH RICHARD GOLDSTONE

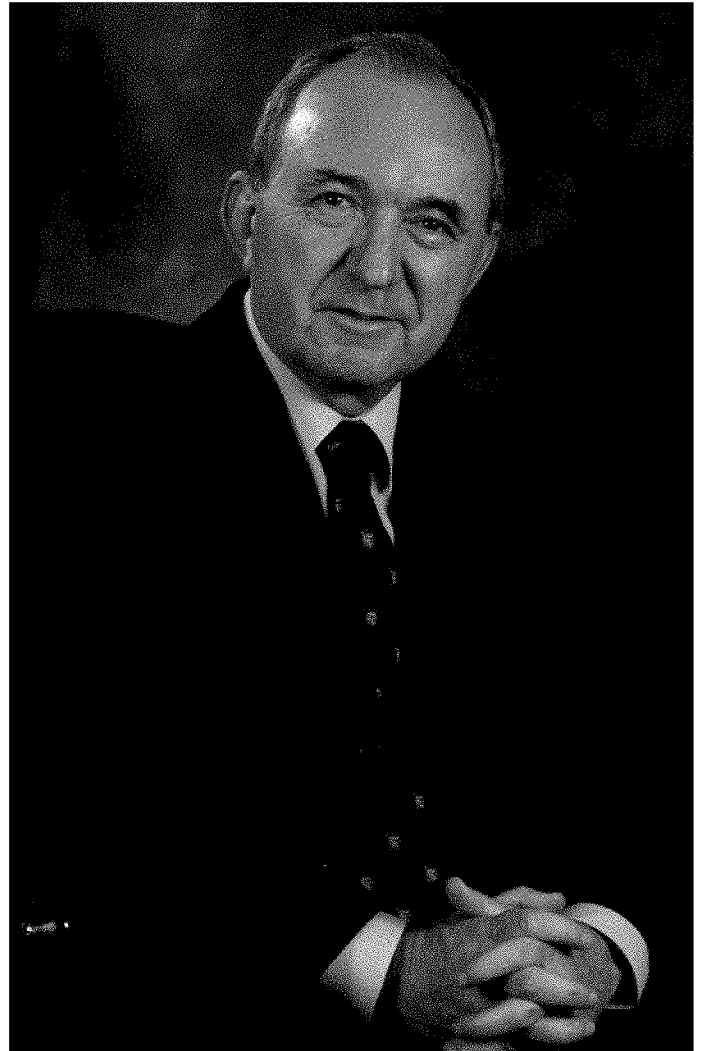
The Human Rights Brief conducted an interview with Richard Goldstone on March 25th, 2014, focusing on current issues facing international criminal justice. As a former Justice and Chief Prosecutor, Professor Goldstone offers a unique and expert voice on challenges and obstacles facing the International Criminal Court as it works toward ensuring accountability for the gravest of crimes and ending impunity for the worst of offenders.

Professor Goldstone is currently a distinguished visitor from the judiciary at Georgetown University Law Center. He was recently appointed Chairman of the Advisory Committee of the Coalition for the International Criminal Court. From July 1994 to October 2003, Professor Goldstone was a Justice of the Constitutional Court of South Africa. In addition, Professor Goldstone served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda from August 1994 to September 1996. Nearly three years later, from August 1999 until December 2001, he served as the chairperson of the International Independent Inquiry on Kosovo that was established by Swedish Prime Minister Goran Persson. He is presently the co-chairperson of the Rule of Law Action Group of the International Bar Association. From 1999 to 2003, he served as a member of the International Group of Advisers of the International Committee of the Red Cross. He was a member of the Committee, chaired by Paul A. Volcker, appointed by the Secretary-General of the United Nations, to investigate allegations of corruption regarding the Iraq Oil for Food Program. He serves on a number of boards, including the Human Rights Institute of South Africa, Physicians for Human Rights, and the Center for Economic and Social Rights. He chairs the International Advisory Committee of the International Center for Transitional Justice.

HRB: Recent allegations of witness tampering have raised a number of concerns over the protection of witnesses and veracity of their testimony. How do these concerns affect the International Criminal Court (ICC) and what obligations rest with the prosecutors to mitigate these concerns?

The situations facing prosecutors at the ICC are not unlike the challenges facing prosecutors in national trials. It is the prosecutor's job to collect the evidence, interview the witnesses, and, in the case of the ICC, apply to a pre-trial chamber for the issue of arrest warrants. Prosecutors rely on witnesses coming forward. They must do what they can to ensure that witnesses are reliable and that they are not fabricating evidence, which is not always an easy determination. Some witnesses who at first appear to be credible often turn out to be unreliable and, in contrast, a witness who at first appears unreliable may turn out to be an impressive witness.

Obviously, if facts come to light that indicate that a witness is lying or has been bribed, the prosecution has an obligation to inform the defense, and if it destroys the prosecutor's case then the case should be abandoned. I do not think there is anything to



Professor Richard Goldstone

be ashamed of when a prosecution collapses. Indeed, the worst thing that can happen is a guilty verdict as a result of an unfair trial or an absence of due process. Victims do not have a valid complaint merely because a case collapses; it is not justice for victims to have innocent people convicted. Clearly, judges owe it to the victims and to the accused to furnish full reasons for either convictions or acquittals.

The prosecutor must, of course, take into account the risks to victims, particularly when those who serve as witnesses are likely to be killed or attacked. Protecting witnesses goes to the heart of the judicial system and targeted violence should be avoided at all costs. During my time as Chief Prosecutor of the International Criminal Tribunal for Yugoslavia and Rwanda (ICTY and ICTR), I used to tell people in my office that the first dead witness will likely be the last witness. When people fear for their lives or safety, you cannot expect them to come forward willingly and give evidence. Additionally, there is a lot of confusion about witness protection. Witnesses in these sorts of

situations are not like the mafia or drug lords who give evidence and want new identities. In Bosnia, Rwanda, and likely Kenya, the people we are talking about here come from their homes and villages and do not want to move out; they want protection where they live and that is often difficult to provide, but it is certainly the job of the prosecutor to ensure that whatever can be done is done to protect the witnesses.

HRB: Oftentimes the Court protects witnesses through anonymity. How does this impact the validity of the trial and the fair trial rights of the defendant?

The degree of anonymity depends on the circumstances. It should be an absolute last resort and, in many circumstances, may not be an option; the witness cannot always be kept anonymous from the defendant. Defense counsels cannot do a proper job if they do not know who they are cross-examining and if they cannot get instructions from their client as to who the witnesses are or what reasons they might have for testifying. There are very few isolated cases where you can keep the witness's identity from the defendant. However, as long as the defendant knows who the witness is, the witness can be protected from the public. There cannot be any objection when the anonymity of the witness is to ensure the witness's safety. It is difficult, though, because people from the area may be able to identify the witness, even when the voice is modified, because they can work out from the facts the identity of the witness. For these reasons, it is an extremely difficult situation and has to be considered on a case-by-case basis. Generally speaking, the common law judges do not like it. The civil law judges, while they might not like it, are less opposed to it.

HRB: In addition to internal procedural issues facing the ICC, the Court is under intense scrutiny from the outside political actors. Specifically, Kenya has threatened to leave the ICC. What does this political posturing say about the effectiveness of the Court and will it affect the future of the ICC?

You know, Kenya has not left the ICC yet, and they are not likely to do so. Kenya would have left if they were going to do it, but they do not want to be seen as outliers. What is important to keep in mind is that there is really strong support for the ICC in Africa. So it seems to me that a divide has arisen between African leaders on the one hand and the people on the other. Some leaders who oppose the ICC do so in their own selfish interest and against the interests of the general population. In Kenya, for example, there is very strong support for the ICC, particularly among civil society groups. Leaders do not want to alienate too many people by leaving the ICC. This explains why Kenyatta and Ruto are cooperating; if it was not in their interest they would simply pull out from the ICC.

The perception that the ICC focuses on Africa is misguided. African leaders focus on the ICC. Of the eight cases, only two have come from the Prosecutor. While I think it would be good to have a non-African situation, one should not be manufactured. Furthermore, even if the ICC accepted three new non-African situations tomorrow, it would not minimize the "anti-African" complaints at all. The complaint that the Court is anti-African is an excuse, not a reason. There would still be the same complaints about indicting heads of state and all the rest, and I really do not think it is a bona fide complaint.

It is all politics, you know. These African leaders think it is in their political interest to refer cases to the ICC. And so the Prosecutor should be very careful when accepting referrals; the Prosecutor should know that she is being used for political reasons. It is very tempting to accept all cases, especially when there are no others, but it is very risky. Unfortunately, the reason that there are so many African cases is because there are so many war crimes being committed in Africa. International justice is all about politics. Without the right politics, we would not have the ICC, or the *ad hoc* or mixed tribunals. That being said, it is the work of the Prosecutor, Judges, and the Registry to do their jobs conscientiously.

HRB: Do you foresee a time in the future when the ICC would have the ability to rise above the external politics?

You cannot answer that question because you can never divorce yourself from the politics. Who will carry out the orders of the Court? The Court needs the support of governments to respond to the requests for assistance; that is politics. The Court will always operate in a very political context. But

that does not mean that the offices and organs of the Court should operate outside acceptable norms and standards of judicial prudence.

HRB: How do the politics of post-conflict justice affect courts outside the ICC? For instance, do you think that there will ever be an African Criminal Court of Justice capable of handling these grave situations?

It is not going to happen. There will be no African Criminal Court. I do not believe there is the political will and do not believe there is the money to resource it. So it appears to me to be hot air. I would love to see it; I think it would be a good thing to have an efficient African Criminal Court to stand between national governments and the ICC. Furthermore, a regional court is quite consistent with the whole philosophy of the ICC. But, unfortunately, the African states cannot get their act together to mount a human rights court, much less a criminal court. It seems to me that if it is going to happen, it is going to take decades. Many of the leaders do not want anything to do with it because they are protecting themselves and each other.

You cannot turn justice on and off like a tap. Either you have a system of international justice or you do not. One of the costs that you may have to pay in a particular situation is that peace may be made more difficult to a greater or lesser extent.

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it is not justice for victims to have innocent people convicted.

HRB: The political implications affect the gravity of the situation, but they also affect individual cases. For example, the ICC has recently granted defense motions to allow the defendants Kenyatta and Ruto to be absent from the trial during “special circumstances,” given their status as sitting heads of states. What impact will these political considerations have on the trial?

Well, I think it is a big mistake. Kenyatta and Ruto should have been imprisoned pending their trial. People charged with crimes against humanity should not be wandering around free and allowed to go home. Imagine the effect on the victims. Had they been apprehended and incarcerated, they would probably not be president and deputy president right now. It surprised me at the time that they were allowed to roam free, and that was before their election. There is no way that the ICTY would have let the Croatian generals and all the rest of them who came and gave themselves up to roam free. They were kept in the Tribunal prison pending their trials. If they were acquitted, and some were, they were released; if they were not, they were transferred from the awaiting trial prison to the permanent one.

HRB: The decision to prosecute one person over another also has political implications and can impact the perception of a tribunal, whether it was balanced or whether it prosecuted those most accountable. Reflecting back on your time as Chief Prosecutor at the ICTY, what led to your decisions to prosecute some individuals before others?

At the ICTY, we did not have enough evidence to start at the top, so we started at the bottom, and there was some criticism. Some made snide remarks about small fish that were being indicted. But it was important to start somewhere, and I think it was very useful starting at the level of Tadić. I think a lot of the initial, crucial jurisprudence came from the Tadić case. And far better to do it in the Tadić case than in the Milošević case. However, it was not a choice, it was the situation that was thrust upon us.

HRB: Should the political gravity of the crime be relevant when considering the admissibility of a case or situation under Article 17 of the Rome Statute?

The political gravity of the crimes should absolutely be taken into consideration. The Special Tribunal for Lebanon (STL) was set up exactly for that purpose. With regards to the STL, it is a huge machine to crack one nut. And to set up a huge tribunal with hundreds of people and hundreds of millions of dollars

being spent to investigate effectively one murder seems to be out of all proportion.

HRB: Many thought that the Rwandan Patriotic Front (RPF) should have been prosecuted for the abuses it committed during the aftermath of the genocide in Rwanda. How did the politics of the Rwandan situation affect the decision not to prosecute the RPF?

Fortunately, I did not have to face that decision during my term as Chief Prosecutor of the ICTR. However, my successors were faced with that very difficult question. If they had investigated crimes of the RPF, it is absolutely clear that Rwanda would have broken off its relationship with the ICTR. That would have meant the end of the tribunal. So, the question became whether the investigation of the RPF would have been worth the cost of bringing the tribunal to a premature end. I do not believe it would have been. The ICTR was primarily set up to investigate

the genocide of 1994; that was its job. The RPF crimes were revenge crimes. It is absolutely accepted that these crimes did not amount to genocide. On a scale of one to ten, the genocide was a ten. Those who aided and abetted were of eights and nines. The crimes committed by the RPF, however, would have been at fours and fives if accepted. I do not believe it would be worth jeopardizing the

mandate of the Tribunal, to investigate and prosecute the genocidaires, by investigating lesser crimes committed by the RPF.

However, I do think the decision to not investigate RPF crimes should have been publicly debated. I am critical of things being swept under the rug. That is a recipe for justifiable criticism. If it had come to me as Chief Prosecutor, I think I would have issued a position statement and explained why I was not investigating RPF crimes. Some people would have criticized it. Other people would have agreed with it. But an open debate on the issue is healthier than ignoring it. This was a prosecutor's decision not to prosecute, and it should have been a prosecutor's duty to explain the policy. Such a statement could have established the factual record and encouraged public debate. The more open and transparent a prosecutor is, the better. I do not think a prosecutor should play it too closely to the chest. What can be made public should be made public.

HRB: Should the ICC take into consideration the stability of a region when taking on a situation?

It may, but I don't think one can generalize; it depends on the circumstances. Nine times out of ten the prosecutors and judges do not know what the effects might be of prosecuting and investigating or indicting leaders. They are not politicians,

but they should obviously not be oblivious to the situation on the ground. But their main objective is to ensure that war crimes are not overlooked and that there is no impunity for war criminals; that is their prime obligation.

HRB: When you were Chief Prosecutor of the ICTY, how did you balance that prime obligation with the very real security concerns of the ongoing war at the time?

Well, as you know, we were set up during the war, and certainly during most of my tenure as Chief Prosecutor the war was raging in Bosnia. But the Security Council gave a very clear mandate to the Prosecutor to investigate and hand down indictments against people where evidence showed that they had committed a war crime; that was my mandate. And if prosecutions increased the prospects of continued war, it was still something that I had to do; we could not know the effects of the prosecutions. I was not a party to, and had no inside information about, what negotiations were going on. The then Secretary General, *Boutros Boutros-Ghali*, felt that I was wrong to indict Karadžić and Mladić. He was furious, but I said, you know, this is my job.

Little did I know, and little did *Boutros Boutros-Ghali* know, if the indictment had not been issued, the Dayton Agreement would not have been reached. Without the indictment, Karadžić would have been entitled to attend the Dayton Peace Conference and, consequently, the Bosnian leaders would not have gone. Bear in mind that the Dayton Conference was just two months

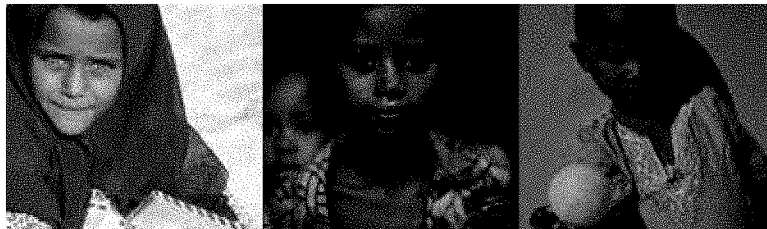
after the Srebrenica massacre. But because Karadžić was indicted, he could not attend Dayton. The Americans would have arrested him and sent him to The Hague for trial. And Dayton brought the war to an end. To this day, there has not been a shot fired in the former Yugoslavia. Where *Boutros-Ghali* thought that the indictment of Karadžić would result in a worse war, it had the opposite result. He could not have known. And I could not have known it.

Certainly, it may be that justice can act against peace. It would be foolhardy to deny that. I do not know of any situation where justice has impeded peace, though, but it could happen. Even if it did happen, there should still be international justice. You cannot turn justice on and off like a tap. Either you have a system of international justice or you do not. One of the costs that you may have to pay in a particular situation is that peace may be made more difficult to a greater or lesser extent. One has to look at the bottom line and ask whether we better off having international justice than if we didn't have international justice. But you can't have a little bit of international justice here and a little bit of international justice there; it just will not work that way.

Michelle Flash, Co-Editor-in-Chief of the Human Rights Brief, conducted this interview with Professor Goldstone on March 25, 2014. Michelle Flash is a 2014 J.D. Candidate at American University Washington College of Law.

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