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THE SEVENTIETH CLEVELAND-MARSHALL FUND LECTURE

INTERNATIONAL JURISDICTION AND PROSECUTORIAL CRIMES

RICHARD J. GOLDSTONE¹

The topic of this address is international jurisdiction and prosecutorial crimes. This in itself is significant because fifty years ago, this topic would not have made much sense to anyone, given that there was no such thing as international jurisdiction (except, perhaps, some purists would say, in respect of various ancient laws dealing with piracy). In large measure, the subject matter of this address has its roots in that horrendous schism of the twentieth century: the Holocaust. The notion of international jurisdiction giving rise to the prosecution of war criminals was very much a consequence of the Holocaust, and in particular of the Nuremberg trials which followed its wake. Indeed, Nuremberg is often referred to as the precursor of the United Nations tribunals for the former Yugoslavia and Rwanda, and of the permanent International Criminal Court agreed to by the Conference of Plenipotentiaries in Rome in 1998.

It should be remembered, however, that Nuremberg was not really an international war crimes tribunal, but rather a multi-national tribunal since it constituted only the victorious powers at the end of the Second World War. It was not until May of 1993, when the United Nations Security Council took the extraordinary step of establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), and the equally extraordinary establishment of the International Criminal Tribunal for Rwanda (ICTR) in November, 1994, that the first truly international courts came into existence.

Two distinct but pervasive issue-areas arise when discussing international jurisdiction and prosecutorial crimes. The first relates to the ability of domestic or national courts, whether in the United States or any other country, to try people for international crimes committed either within or outside their borders. The second concerns the establishment of supra-national or international courts with inherent international criminal jurisdiction.

I believe that these two facets of the enforcement of international criminal law are neither inconsistent, nor contradictory. Although practical difficulties may well arise where national courts and international bodies have concurrent jurisdiction, as has happened in Rwanda with the tension between domestic prosecution and the work of the ICTR, I believe that such difficulties can be overcome. As long as there exists a willingness at both levels to cooperate and the rules controlling each level

¹Remarks of the 70th Cleveland-Marshall Fund Visiting Scholar Lecture. Richard Goldstone is a Justice of the Constitutional Court of South Africa, and the former Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. I would like to thank my law clerk, Estelle Dehon, for her assistance in researching and editing this article.

clearly establish the primacy of one over the other, I am convinced that in principle and in practice, national and international courts can exercise international jurisdiction simultaneously and harmoniously.

DOMESTIC COURTS

I turn, then, to the position of domestic courts. The origins of international jurisdiction, certainly in modern times, lie in the development of the concept of "crimes against humanity" which emerged as one of the most important legal inventions of the aftermath of the Second World War. The Charter of the Nuremberg Tribunal, which delineated its jurisdiction, was truly innovative in including crimes against humanity as one of three categories for which there would be individual criminal responsibility. The impetus for the recognition of this new concept was the fact that some of the atrocities committed by the Nazis in pursuit of racial purity were not directly related to or caused by the war and could thus not be categorized as "war crimes".

Although the way in which the Nuremberg Judgment dealt with crimes against humanity has been severely criticized, the inception in principle of this class of crime had an important effect. For the first time, it was recognized that some crimes are so shocking to the conscience of mankind that they can truly be said to be crimes not only against the immediate victims, not only against the people of the country in which those crimes are committed, but against all of human kind. And from that realization stems the idea that those who commit crimes against the whole of humanity can be brought to book by the whole of humanity.

Before the notion of crimes against humanity changed the way in which jurisdiction was conceptualized, the general rule in countries around the world was that the only people who could be brought to trial in domestic courts were people who committed crimes in the countries in which those courts were situated. In other words, criminal jurisdiction was territorially based. Of course, as with every general rule, there were exceptions. In some countries, such as England for example, extraterritorial criminal jurisdiction was conferred on the crime of treason — anyone who committed treason against the English king or queen could be brought to justice in the English courts, whether or not the act of treason took place outside the borders of England. The same has always been true in South Africa, and indeed, I think most countries protect their integrity by affording extraterritorial jurisdiction to acts of treason.

In apartheid South Africa, interestingly, there was an additional crime that, when committed outside of the republic, was punishable by the South African courts. That was violation of what was called the Immorality Act, which prohibited sexual contact across the color bar. It is a truly sad reflection on South Africa that, together with treason, interracial relationships were considered suitable "crimes" for the conferring international jurisdiction on the South African courts.

Another important leap in legal thought, which eventually opened the way for domestic courts to have international criminal jurisdiction, was the idea, incorporated in the United Nations Charter written in 1945, of looking at individual human rights through an international optic. The Charter saw one of the important functions of the United Nations to be the protection of the human rights of people around the world. That idea, of course, culminated in the Universal Declaration of Human Rights which, although intended merely to be an inspirational document, laid the

jurisprudential foundation for the international human rights conventions which followed in the 1960's.

Before the experience of the Second World War, the way that governments treated their citizens was not considered to be the business of the other governments or of any international community. Such treatment was purely an internal matter. It was accepted that the notion of the sovereignty of nations, upon which the United Nations was premised, precluded other governments and the international community from taking any action to protect the citizens of another country. Again, that changed with the Holocaust. It was realized that it was no longer acceptable simply to allow governments to do what they wished in violation of the human rights of their citizens.

Given this realization, it is not surprising that the first important instance of granting international criminal jurisdiction to domestic courts came in the Geneva Conventions of 1949, which augmented the laws of war that the Second World War had shown to be inadequate. In particular, the Convention Relative to the Protection of Civilian Persons in the Time of War was established to protect civilians, whose increasing vulnerability had been demonstrated by the widespread indiscriminate targeting of civilians during the War. One of the great innovations of the 1949 Conventions, however, was the inclusion of the concept of "grave breaches" of the Conventions — certain breaches that are so serious and so unacceptable that they justified the founding of universal jurisdiction. The Conventions oblige states to search for persons who commit such grave breaches and, regardless of their nationality or where their crime took place, either bring them before their own courts or hand them over for trial by another state. For the pre-eminent documents, regulating action taken during armed conflict to endorse the concept of universal jurisdiction was, I believe, an extraordinarily significant step, and indeed remains an important source of international obligation for the many states that have ratified the Conventions.

International jurisdiction has subsequently been recognized in other international conventions. In particular, the convention that declared apartheid in South Africa to be a crime against humanity conferred such jurisdiction. That convention required governments to bring to trial people in their territory whom they reasonably suspected of having committed the crime of apartheid. It is matter of regret that the criminalization of apartheid was not taken more seriously by the rest of the world and that so few countries ratified the convention. Had top level South African diplomats been arrested for committing the crime of apartheid, and had South Africa's political and business leaders been prevented from travelling for fear of being charged with the crime of apartheid, I have no doubt that apartheid would have died many years before it did.

In the United States there is an interesting history not of international criminal jurisdiction, but of international civil jurisdiction for human rights violations. Civil rights lawyers in this country imaginatively started using the Alien Torts Claims Act of 1789 to allow victims of human rights abuses to sue the perpetrators in the United States, no matter where the abuses were committed. Recently, such an action was brought in the courts of New York by Bosnian women against the former Bosnian Serb leader Radovan Karadzic for allegedly ordering mass rapes, forced prostitution, killings and torture. In a landmark decision, after deliberating for three days, the jury ordered Karadzic to pay \$745 million for the atrocities committed by his soldiers.

Across the Atlantic, nations seem increasingly willing to invoke universal criminal jurisdiction in order to prosecute people alleged to have committed war crimes or gross violations of human rights. The foremost example of this is undoubtedly the Pinochet case, which came before the House of Lords at the end of 1998. Only five or six years ago, international lawyers would have scoffed at the prospect of a former head of state of Chile being arrested in a London hospital at the request of a Spanish judge for crimes committed twenty years earlier in Latin America. The eventual outcome of the Pinochet case must not be allowed to obscure the extraordinary nature of that initial arrest.

Equally extraordinary was the arrest and prosecution of General Momir Talic, chief of staff of the Bosnian Serb army. He was invited by the Organization for Security and Cooperation in Europe to an important international conference organized in Vienna last year. On the second day of the conference, the Austrian police arrested Talic on a sealed indictment issued by the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia. Talic is now in a United Nations prison in The Hague, sitting trial for allegedly persecuting and expelling more than 100,000 Muslims and Croats in the Prijedor region. As a result of his arrest, one of the members of the Vienna City Council who had heard that Akram Al Duri, the second in command of the Iraqi army, was receiving medical treatment in a Vienna hospital, approached the courts for an arrest warrant against Al Duri for war crimes committed against the Kurds during the Gulf War. Apparently, when Al Duri became aware of this, he hid in an office until he could leave Vienna at the earliest opportunity.

The world, as it seems, has become a less hospitable place for international criminals. President Suharto, former president of Indonesia, recently cancelled medical treatment that he had been receiving for many years in a Frankfurt hospital for fear that there could be a warrant for his arrest for crimes committed by his regime. Then, too, the former brutal President of Ethiopia during what became known as the Red Terror, Mengistu Haile Miriam, who was being given a sanctuary in Zimbabwe, came to South Africa for medical treatment. Although he had, rather inappropriately, been granted a diplomatic passport, such a cry was raised by human rights organizations calling for South Africa to arrest and try him for crimes against humanity that Mengistu beat a hasty retreat to Zimbabwe. It is regrettable that the South African authorities did not act more quickly.

Most recently, Hisssein Habre, former dictator of Chad, was arrested in Senegal, West Africa, a country in which he had, in fact, sought sanctuary. The Senegalese government to its credit arrested and brought charges against Habre after the Dakar Regional Court heard testimony of six of Habre's victims and received information regarding hundreds of other crimes committed during a campaign of widespread abuse against the ethnic Hadjerai and the Zaghawa. In 1992, a truth commission accused Habre's regime of 40,000 political murders, 200,000 cases of torture and of stealing \$11.6 million from the Chadian treasury. Investigation into these allegations continues, and Habre's trial will possibly take place in Senegal later this year.²

²Since delivering this address the Senegalese Supreme Court regrettably held that the Courts of Senegal had no jurisdiction to place Habre on trial. Stephenie Young, *Charges of Torture Dropped Against Chadian Leader*, PANAFRICAN NEWS AGENCY, BBC available at <<http://dfn.org/news/news000702.htm>>.

So the message has gone out. It has gone out to past and present leaders, whether political or military, that they can no longer travel freely, for it is likely that warrants for their arrest would have been issued against them. This message must have some deterrent effect. It is certainly a positive development, both from a moral point of view, and from the point of view of international justice.

Another very positive effect relates to the Rome treaty establishing a permanent International Criminal Court (ICC). Many countries around the world are changing their domestic laws to recognize the international crimes delineated in the treaty, for that treaty gives domestic courts substantial primacy in prosecuting alleged war criminals. Article 17, which deals with "Issues of Admissibility" only allows the ICC to undertake a prosecution if the national courts where the suspect is being held are unwilling or unable genuinely to carry out an investigation or prosecution, or where a decision not to prosecute has resulted from the unwillingness or inability of a state genuinely to prosecute. Therefore, if an alleged war crime were committed by a South African, fighting perhaps somewhere in Africa, South Africa would be entitled to prevent the ICC from exercising jurisdiction and to prosecute the perpetrator by itself exercising that jurisdiction. In order to do that, South Africa would have to have ratified the ICC treaty and enacted legislation incorporating international crimes into our domestic law. This system has prompted many countries to begin the process of amending their legislation to enable their courts to bring to trial and punish their own citizens who may have committed war crimes.

Unfortunately, for reasons known to many people certainly in this audience, the United States has opted out of this development for the time being. The United States was one of seven countries that voted against the treaty of Rome and said it would not become a party. It is a great regret to all international and national human rights lawyers that the United States has adopted this position. But I am hopeful for many reasons that this will not be a permanent situation.

INTERNATIONAL COURTS

Let me now focus on international courts. As I have already mentioned, the world's first multi-national court was established in November of 1945 in Nuremberg to prosecute Nazi war criminals. In April of 1946, a somewhat less multi-national court was established in Tokyo to prosecute Japanese war criminals. Then, there was a gap — a fifty year gap. That there would be such a long interval before the establishment of an international court was certainly not anticipated. Indeed, the Genocide Convention of 1948 envisaged the establishment of an international criminal court, and talked about people being brought to justice for genocide in both national courts and in an international court.

Although the law of war has over the years developed through the emergence of customary international norms, and although the General Assembly in 1950 set up a Special Committee to prepare a draft statute for an international criminal court, no international enforcement body was established. This lack created a serious vacuum, for jurisprudentially, a system of what the International Committee of the Red Cross began to call "humanitarian law" was evolving through the harmonization of the modern laws of war in various international instruments. Cross-pollination of the law of war with the developing body of international human rights norms began to occur. Still, the Cold War, and the jealous guarding of national sovereignty, thwarted attempts to establish an enforcement mechanism.

Then, in the thaw of the Cold War, the perpetration of crimes against humanity in the Balkans too reminiscent of those the world had vowed would never again be committed, galvanised a seemingly frozen United Nations Security Council. Much to everybody's amazement, in May 1993, the Security Council invoked its powers under Chapter VII of the Charter and established the International Criminal Tribunal for the former Yugoslavia (ICTY). For the first time, a judicial body had been created as a means to restore and maintain peace and security. The international community was amazed, for the accepted understanding of the way in which such a body could be established was by treaty, which entailed all nations who would be bound by that treaty agreeing to its terms. No-one imagined that Chapter VII could be invoked by the fifteen member nations of the Security Council to set up an ad hoc criminal tribunal.

The reasoning of the Security Council was correct — if Chapter VII gave it the right to create multinational military forces to bring about peace, then it also conferred the right to take lesser steps to achieve that peace. And although the Security Council could not make laws, it could empower a judicial body to enforce the recognized laws of war: the Hague Conventions, the Geneva Conventions, crimes against humanity, and genocide.

Why could the Security Council take such groundbreaking action in 1993? I believe the reasons are not difficult to find. The first and most important, and one that I as an African regret to admit, is that the security threat and the horrors of what has euphemistically been called "ethnic cleansing" were happening in Europe. No longer was immense human suffering a far away concern. No longer were outrages against humanity something that happened in Africa, or Asia, or Latin America. Now, in the very backyard of Western Europe, people were murdering each other, starving each other, and setting up detention camps. The appalling photographs of emaciated men clutching at wire fences now came from Europe, and Europe responded.

Indeed, the international community responded, at the atrocities being committed in the Balkans and beamed across the world caused an international uproar, and drew strong public reaction particularly in the United States and Canada. And another powerful force also responded. National and international human rights organizations began to demand, in ever louder voices, that something be done to stop the carnage. These events also coincided with the end of the Cold War, freeing the Security Council, to some extent, from the paralysis of automatic veto, and allowing Russia and China to vote affirmatively to heed the international calls for action, and set up a convenient substitute for military intervention — an international criminal tribunal.

Then, between April and July of 1994, came the Rwanda Genocide, without question the worst genocide since the Second World War. An estimated half a million people were slaughtered by machete and club wielding Hutus, in massacres that were systematic, planned and coordinated at the highest government level. Almost 1.5 million people were displaced within Rwanda, and around 400,000 fled to neighbouring countries. Once the Tutsi-led Rwandan Patriotic Front had stemmed the genocide and formed a new government, the new President, Pasteur Bizimungu, approached the Security Council and proposed the creation of a second international criminal tribunal to bring those responsible for the genocide to justice.

The Security Council was again spurred to action, although not exactly in the form requested by Rwanda. The Rwandan government had asked for an internal

international tribunal that would help to eradicate the culture of impunity charactering Rwandan society, and that could assist in the restoration of Rwanda's completely shattered judicial system. The genocide had claimed over 90% of the judges and over 90% of the prosecutors in Rwanda, despite the fact that the majority of them had been Hutu. Rwanda also wanted the tribunal to dispense a specific form of justice for the most heinous criminals — capital punishment, which was allowed under the Rwandan penal code. The statute of the Rwanda Tribunal, however, based on its counterpart in the Hague, rules out the imposition of capital punishment with the result that Rwanda actually voted against Resolution 955 which established the Tribunal.

Interestingly, few international lawyers were critical or doubted the legality of the International Criminal Tribunals. The legality of the Tribunals was settled by the ruling in the *Tadic* case where the Appeals Chamber of the ICTY rejected a motion that the Tribunal had not been validly established. The problem with the Security Council's innovative actions is not legal validity, but political legitimacy. I shall never forget the first meeting I had in Belgrade after my appointment as the Chief Prosecutor for the Yugoslav Tribunal. I went to make courtesy calls to the Minister of Justice of the Federal Republic of Yugoslavia, and to discuss with him the work of the Prosecutor's Office. The arranged half-hour meeting turned out to be somewhat longer, as for the first 45 minutes he canvassed the history of Yugoslavia, and specifically, the history of the victimization of the Serb people, starting in 1389 and dealing in detail with the terrible fate of hundreds of thousands of Serbs who were killed by the Nazis during the Second World War. He ended with a very emotional critique of the United Nations for setting up the ICTY. He said why for us, why not for Pol Pot in Cambodia? He said why for us, why not for Saddam Hussain in Iraq? And he said that in other countries, specifically in Africa, millions of people had been killed or forced into refugee status. He asked why the international community should experiment on the former Yugoslavia?

Of course, what could I say to him, because he was correct. At that stage, the ICTY was a kind of act of discrimination. All I could say was that if the ICTY was the first and the last international criminal tribunal, he would have been absolutely justified in his criticism. But if the ICTY was to be the first of many such tribunals, there would be no basis on which Yugoslavia could complain merely for being the subject of the initial tribunal. Despite the establishment of the Rwanda Tribunal, it remains politically dubious that, given the veto power of the five permanent members of the Security Council, the decision to set up an international criminal tribunal was, and always will be, an uneven political decision. None of the permanent members would countenance the establishment of an international criminal tribunal to investigate the actions of their own people, nor would they sanction such a tribunal to investigate their political allies. Justice and judicial systems should not depend on these kinds of political decisions. If justice is to be respected it must be even-handed, it must be unbiased, and potential war criminals in countries around the world should know that they are subject to the same international justice.

It is therefore a matter of great regret for me that the United States is not prepared to be a party to the International Criminal Court and is not prepared to allow its citizens and troops to be subject to the same justice and judicial authority as the rest of the international community. This kind of attitude was again exhibited in the objection by the United States to the ICTY investigating the actions of its troops in

planning and executing the NATO bombing of Kosovo. On what legitimate basis should the Chief Prosecutor, Carla del Ponte, be obliged not to investigate the allegations made against the NATO forces, especially when those allegations were not capriciously made?

The response of the Pentagon to the Tribunal's decision to investigate was, to be frank, rather ridiculous. The Pentagon spokesman said that every step possible had been taken to ensure that the laws of war would be respected, that as a result, war crimes had not been committed, and that, therefore, the United States objected to being investigated. The illogicality of that assurance constituting sufficient bases for dictating that the validity of the assurance should not be investigated, is patent.

Despite the recalcitrance of certain nations, the successes of the UN tribunals has been enormous. And they demonstrate the point I made earlier about the successfulness of laws being dependent on their enforcement. This enforcement of the laws of war by the Rwanda and Yugoslav tribunals has been responsible for the advancement of humanitarian law. One area in particular stands out in this regard — developments surrounding gender related crimes.

When the ICTY was established, the law of war did not recognize systematic mass rape as a war crime, not even under the rubric of crimes against humanity. There were a number of reasons for this. First, and most obvious, was that the conventions setting out the laws of war were written by men and not women. Secondly, rape as a war crime was under-reported. The systematic use of rape during war was not an aberration of the 1990's — it had been used for centuries, but never recognized. We had to struggle at the Prosecutor's Office to find ways of charging systematic mass rapists and those who ordered the rapes. In some circumstances, we had to prosecute rape as inhumane treatment and sometimes we had to call it torture. We could not acknowledge rape as a crime in and of itself. That, thankfully, will no longer be the position. In the Rome Treaty establishing the International Criminal Court, rape and other forms of gender related crimes such as forced prostitution and forced impregnation of women are recognized and referred to, and have become part of international law. That would not have happened without the experience of the Yugoslav and Rwanda tribunals.

In fact, the success of the Rome Conference is, to some extent, attributable to the experience acquired by the International Tribunals. That this should be part of the legacy of the Tribunals is somewhat ironic. Without the political and financial support of the United States, and without the resources provided by the United States, the ICTY would never have gotten on its feet. I know from my own experience that without the push, particularly from then Ambassador Madeline Albright, and without the resources given to us in the Hague, the ICTY could have floundered, and the Rwanda Tribunal would be encountering significantly more difficulties than it already has to cope with. Also, without the United States, the Rome diplomatic conference which gave rise to the International Criminal Court treaty also would not have come about. There seems to be an ironic schizophrenia in the United States government and Congress. The U.S. completely condemns the commission of war crimes, but, at the same time, guards its sovereignty so vigorously that it precludes itself from joining the rest of the international community and becoming subject to universal rules of justice.

This unwillingness on the part of the United States is even more frustrating given the effect it has on bringing undemocratic and rogue states under the jurisdiction of an international court. The most powerful nation in the world cannot expect to

persuade the rest of the world to subject itself to international adjudication while refusing to do so itself. And one has seen the strange tensions this stance has created. One has seen the United States Ambassador for war crimes, David Scheffer, a good friend and a tremendous help to the two UN Tribunals, saying that the United States cannot be expected to provide its troops as peace keepers all over the world and then subject them to the whims of judges or prosecutors in the international community.

But, I believe, this situation will change. The permanent International Criminal Court will, I have no doubt, come on line sooner rather than later. The requisite ratifications are happening. The movement, both domestically and internationally, is increasingly to recognize the unacceptability of the commission of war crimes the unacceptability of governments treating their citizens in ways that grossly violate their fundamental human rights. And I believe that the people and the government of the United States are not going to want to be left outside this endeavor for too long. The United States will want to be a part, no doubt an integral part, of the movement to bring war criminals wherever they may be to justice. And I look forward to that day. Thank you.

