

Former ICTY head sounds optimistic note about international criminal law

By Angus McLeod

Justice Richard Goldstone can safely be called an optimist. Despite his long history of dealing with some of the worst criminals of the modern era, the feeling he left his Castan Centre audience with on a windy night in early March was one of hope. Hope that, despite long periods of stagnation and failure, international criminal justice can and will become an institution that ensures that crimes against humanity never go unpunished.

Justice Goldstone's optimism means something because of his critical role in the development of international criminal law. He was Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), arguably the first true international criminal courts. Justice Goldstone came to the Chief Prosecutor position after a lifetime of experience in the law. He was chair of South Africa's Commission of Inquiry Regarding Public Violence and Intimidation (the "Goldstone Commission") which investigated political violence during Apartheid's dying days, and was a founding member of the Constitutional Court of South Africa. Since his time at the ICTY, Justice Goldstone has been chair of the International Independent Inquiry in Kosovo, chair of the International Bar Association's International Task Force on Terrorism and member of the Independent International Committee investigating the Iraq Oil for Food program.

For the benefit of his lay audience, Justice Goldstone started his talk by tracing the development of the three pillars of international criminal law: crimes against humanity, universal jurisdiction and international human rights. The interesting aspect of Justice Goldstone's history is that he contends that universal jurisdiction has been present ever since the Geneva Conventions (1949). He also highlighted the Apartheid Convention of 1973, which he argued also assumed universal jurisdiction despite never being applied universally. Only after the end of the Cold War and the onset of American unipolar power did there exist a court to enforce international criminal law – the ICTY.

Indeed, the conflict between the sovereignty of nations and the trans-boundary jurisdiction of international criminal law was particularly pertinent on the night Justice Goldstone spoke. The International Criminal Court (ICC) was just hours away from announcing the first arrest warrant for a sitting head of state, Omar al-Bashir of Sudan, and protests on the streets of Sudan were imminent. Justice Goldstone talked of the other ex-leaders who had been indicted (and some tried) by various courts, including Pinochet, Suharto, Milosevic, Charles Taylor and Radovan Karadzic, and noted that the Bashir arrest warrant was another milestone for international criminal law. He cautioned, however, that especially now the ICC would need "leadership and political will" to do its job.

Throughout much of the talk Justice Goldstone sought to highlight the support that America has given to the development of international criminal justice. While noting America's opposition to the ICC, he pointed out that it was America which insisted on the

Nuremburg trials rather than summary executions, it was America that ensured the ICTY and ICTR came about and that Milosevic was sent to the Hague, and that during the last two years of the Bush administration it was America that diminished its antagonism towards the ICC. Justice Goldstone's optimism about the future of international criminal law rests with America and in particular President Obama – who supports the UN and ICC – and Susan Rice, the new US Ambassador to the UN.

While the bulk of the talk was optimistic, most of the questions fielded at the end were focused on the darker sides of Justice Goldstone's main themes. Firstly, on the question of whether a tribunal to investigate the post 9/11 treatment of prisoners in the US should be established, Justice Goldstone emphasised that it is always important for a country and the world to know what has actually happened, but that we must also be careful to distinguish between crimes against humanity and more conventional crimes. Whatever happened in Abu Ghraib – as reprehensible as that was – did not come close to the Rwandan massacres, and also can (and has been in some respects) be dealt with on a domestic level. International criminal law must be primarily concerned with crimes on a larger scale.

Justice Goldstone sought to delineate the boundary between universal jurisdiction and politics, an issue also brought out by the next question: whether international arrest warrants for leaders would cause them to prolong conflicts. Justice Goldstone noted that in some situations an arrest warrant had actually led to a shorter conflict due to the restrictions it placed on the indicted leader's movements, for example in the case of Karadzic.

Finally he was asked whether the crime of Aggression (used at Nuremburg) has contemporary relevance. Justice Goldstone pointed out that determining the aggressors in any given situation is essentially a political question. He quipped that if he had had to determine who was the aggressor in the Yugoslavian conflict he would have had to listen to claims stretching as far back as the 14th century. Even though the crime is found in the Rome Statute, it lacks proper definition, and he considers it an issue best left to determination by the Security Council which has the power to refer any situation to the ICC.

Justice Goldstone cast an optimistic defence of a much debated field, enhanced greatly by his own personal insight, poise and humour. The next day the ICC indicted Bashir, and James Bone of *The Times* wrote "now that the court has finally issued an arrest warrant for al-Bashir, the Obama Administration has a decision of principle to make" – will it support the ICC, ratify the Rome Statute and usher in a new era of American leadership in International criminal justice? Soon the world will know whether Justice Goldstone's optimism was well founded.