

**FOR HUMANITY: REFLECTIONS OF A WAR CRIMES
INVESTIGATOR,**

Richard J. Goldstone (Yale University Press 2000).

**CRIMES AGAINST HUMANITY: THE STRUGGLE FOR
GLOBAL JUSTICE,**

Geoffrey Robertson (The New Press 2000).

REVIEWED BY

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The unique perspective of Justice Richard J. Goldstone, the world's first truly independent war crimes prosecutor, infuses and informs his reflections on fundamental international human rights issues with pragmatic wisdom. As the central actor in the legal drama produced by the Goldstone Commission, he investigated political violence in apartheid South Africa. As the chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Justice Goldstone faced daunting and unprecedented problems in transforming nascent principles of international justice into legal process and praxis.

In the pre-Nuremberg era, the international community had taken an ostrich-like approach to human rights abuses and buried both history and justice along with the dead. Some countries had granted blanket amnesties or pardons to alleged abusers; other countries had undertaken selective criminal prosecutions; and some emergent states with repressive colonial histories pursued political investigations which lacked meaningful remedial structures. Justice Goldstone's memoir addresses inadequate former approaches and more hopeful developments post-Nuremberg in the pursuit of justice for human rights victims. The precedent and legacy of the Nuremberg prosecutions firmly guided the U.N. Security Council's decisions to establish tribunals for former Yugoslavia and Rwanda. These tribunals faced enormous international pressure to enforce the paramount rule of law demand that individuals be held accountable for criminal violations of human rights. This necessity was often balanced against competing domestic political interests seeking to secure peaceful transition to rule of law cultures.

Justice Goldstone was transformed in 1980 from a mid-career commercial attorney to a judge on the Transvaal High Court. He describes his political consideration of whether to take an oath to apply faithfully the

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law of the land but, regrettably, he ducks addressing the core legal and moral issue which every South African judge faced, i.e., was apartheid law enforceable law?¹ He heard numerous appeals which chipped at apartheid's legal foundation. A November 1982 opinion which applied human rights principles and considered personal hardship equities received international attention. The opinion's political aftermath essentially halted all prosecutions under the Group Areas Act which had made it a criminal offense for a person of the "wrong" color to reside or own property in areas exclusively segregated by law. A prominent decision in 1986 involved the police seizure of "Release Mandela Campaign" posters which reprinted the preamble to the Freedom Charter.² Then Judge Goldstone set aside the seizure based on testimony that the Freedom Charter mirrored principles found in the Universal Declaration of Human Rights and other human rights conventions accepted as the legal norm in the U.S. and Western Europe. In the late 80's, he personally visited and investigated conditions of confinement for over 3,000 political prisoners detained without trial under emergency laws proclaimed by President Botha. In 1990, he was appointed by President deKlerk to conduct a judicial inquiry into the cause of death of Clayton Sizwe Sithole, who was found hanged in a prison cell in the Johannesburg Central Police Station.³ The earlier highly publicized death in detention of Steve Biko, leader of the Black Consciousness Movement, and several dozens of other political detainees who officially committed "suicide," finally had created a political crisis of conscience regarding South Africa's justice administration. After his elevation to the Supreme Court of Appeal, he was appointed by President deKlerk to investigate the 1990 Sebokeng Massacre when South African

¹ Wacks, *Judges and Injustice*, 101 S. Afr. J. of L. 266; Dugard, *Should Judges Resign? A Reply to Professor Wacks*, 101 S. Afr. J. of L. 286; 3 *Lawyers for Human Rights Bulletin* (1984); JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978); A. MATHEWS, *LAW, ORDER AND LIBERTY IN SOUTH AFRICA* (1971).

² Shrouded in mystery regarding its multiple origins, the Freedom Charter was unanimously adopted by a "Congress of the People" held in Kliptown, South Africa in June, 1955 as a manifesto for freedom from apartheid. The next year, 156 leaders of the four sponsoring organizations of the Freedom Charter were arrested and charged with treason. After a political trial which dragged on for four years, they were acquitted. However, the African National Congress and the Congress of Democrats were banned shortly thereafter and leaders of the other organizations were individually banned. For the text of the Freedom charter see <http://www.theFuturesite.com/ethnic/Freedom.html>.

³ Sithole was a soldier of Umkhonto we Sizwe, the armed wing of the African National Congress, and he was the father of Nelson and Winnie Mandela's grandson.

police killed eleven and injured over 400 people.⁴ Justice Goldstone, cast into the apartheid cesspool, undertook his independent judicial responsibilities with professional conviction and personal bravery.

The Goldstone Commission (formally, the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation) enacted by Parliament conducted over forty major investigations into human rights abuses in the early 90's and paved broad political consensus for the subsequent work of the Truth and Reconciliation Commission. The Goldstone Commission's investigations presaged and guided the U.N. Security Councils' deliberations and determination to redress the pervasive and unremitting human rights abuses then occurring in the former Yugoslavia and Rwanda.

In May 1994, the democratically elected South African government under President Nelson Mandela squarely faced its apartheid legacy and crisis of justice: How were the grave, systemic human rights abuses committed by prior regimes to be redressed? A Truth and Reconciliation Commission was created and offered conditional grants of amnesty to human rights abusers in order to facilitate reconciliation. This approach was deemed more appropriate than convening a criminal tribunal which would have had significant potential for political destabilization during the developing process of democratization.⁵ The Truth and Reconciliation Commission (in which Justice Goldstone played no role) created three committees which: 1) investigated human rights abuses; 2) considered amnesty applications; and 3) reviewed reparations petitions. Over 20,000 people gave evidence to the Committee on Human Rights Abuses and over 8,000 applications for amnesty were considered. Unquestionably, the Commission's work was critical during the transition to full democracy under the final Constitution of 1997.⁶

⁴ Subsequently, some policemen were prosecuted but received amnesty from the Truth and Reconciliation Commission. However, the government did pay civil damages to survivors—a precedent of great legal significance in South Africa. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR at 16 (2000).

⁵ The African National Congress and Nelson Mandela advocated unsuccessfully for Nuremberg-style trials for apartheid leaders. However, apartheid culture so thoroughly infected every level of judicial administration that very few judges or prosecutors would have risked professional and personal reprisal to participate in such intra-tribal proceedings; further, the potent South African military, state security forces, and police structures made such prosecutions highly improbable.

⁶ South Africa's approach to justice was further complicated by memories of the Boer War and the death of over 25,000 Afrikaners in British "concentration camps," the mythologies surrounding the Afrikaner Great Trek inland from the Cape of Good Hope, and the unresolved, deep grievances between the white political elites. Racial oppression in South Africa had prevailed since the arrival of the Dutch in the Cape in 1652. As Justice Goldstone discovered, ethnic pathology rooted in opposing mythological views of history was manifest also in Yugoslavia and Rwanda. GOLDSTONE, *supra* note 4, at 60.

Justice Goldstone considers how the South African experience informs the international community's contextual approach to human rights abuses in countries where reconciliation and amnesty are not politically acceptable initial options or where civil or ethnic wars blur political boundaries. In May 1993, the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia in The Hague, and Justice Goldstone was elected its chief prosecutor in July 1994. His narrative account of that Tribunal's work is straight-forward, though lacking in legal detail. He addresses the question of "Why Yugoslavia"? Why were war crimes tribunals not established for Cambodia and Iraq (and we can now add East Timor, Congo, Sierra Leone and several other countries)? Serbian military and political officials in particular continue to proclaim selective prosecution (and persecution).⁷ Justice Goldstone is convincing, however, that the totality of horrendous circumstances which Bosnian civilians faced under "ethnic cleansing" coupled with the intense international focus on their suffering amply justified the seemingly disproportionate assignment of U.N. personnel, technology, and financial resources to that region.

Perhaps surprisingly, Rwanda ultimately received nearly comparable resources despite far less international political pressure and media focus. The 1994 genocide resulted in over 500,000 Rwandans being murdered by other Rwandans. The near total collapse of the criminal justice system and other conditions on the ground posed unimaginable logistical problems for the Tribunal's work.⁸ Rwanda—which had voted against the Security Council resolution creating the tribunal—had three primary obligations to the tribunal, as established: 1) trials would be held in a foreign country, in Arusha, Tanzania; 2) the tribunal was not empowered to impose the death penalty; 3) the temporal jurisdiction of the tribunal was limited to the events of 1994 (whereas genocide planning took place in 1992-3).⁹

Justice Goldstone has returned to his current position as a member of the Constitutional Court of South Africa. He also chairs the International Independent Inquiry on Kosovo and heads the board of the Human Rights Institute of South Africa. His cumulative experiences have resulted in this memoir also serving as an urgent brief for ratification of the International

⁷ Indeed, Slobodan Milošević has directly compared the tribunal's investigations and actions against Serbs to the Nazi persecution of Jews. *What's News: World-Wide*, WALL ST. J., Feb. 5, 2001, at A1.

⁸ Over 90 percent of the judges and prosecutors, mostly Hutu, had been murdered. Hutu legal professionals and advisory people opposed to the genocide against the Tutsi were targeted by Hutu extremists. In the aftermath, fair trials in Kigala, Rwanda's capital and judicial center, would have been impossible. GOLDSTONE, *supra* note 4, at 109.

⁹ In 1998, the Rwanda government executed lesser genocide criminals while the tribunal was sentencing the political/military leaders to life sentences—an anomaly, but surely illustrative of jurisdictional tensions future tribunals will face. *Id.* at 112.

Criminal Court.¹⁰ He opposed the U.S. military argument that arresting indicted Serbian war suspects Karadžić and Mladić is outweighed by the possibility of violent reprisals. He regrets the ongoing lack of U.S. political leadership in the post-Dayton era which he speculates could have prevented "ethnic cleansing" in Kosovo in 1998-9.¹¹ And he is properly dismissive of U.S. objections to acceding to the proposed jurisdiction of the International Criminal Court. Justice Goldstone convincingly argues that under the system of complementarity, whereby the proposed court would lack jurisdiction over any U.S. (or any other national) citizen if that country has conducted a good-faith investigation into the alleged criminal conduct, fears of subjecting U.S. military personnel to reckless prosecutions are unfounded. Indeed, 120 countries have already agreed that the court's protective devices are secure and have signed the treaty. In his candid judgment, the ad hoc tribunals previously created by the U.N. Security Council have been an inefficient and unacceptable means of providing international justice. And he agrees with the Serbian argument that the Security Council--inherently a political body--should not exercise judicial power to decide whether and how humanitarian law will be enforced. In the final analysis, only a court of law can truly work justice.

The U. S. signed the International Criminal Court treaty on December 31, 2000. David J. Schaffer, ambassador at large for war crimes issues, signed at the United Nations "in honor of the victims of these crimes...and also in honor of the United States armed services, who uphold these laws of war...."¹² However, the new Republican Administration, Secretary of Defense Donald H. Rumsfeld, and the Pentagon are firmly opposed to the Treaty, which is not legally binding without Senate approval. Senator Jesse Helms, Chairman of the Foreign Relations Committee, has introduced legislation to block any American effort to support the court and called President Clinton's decision to sign the treaty "as outrageous as it is inexplicable."¹³ Justice Goldstone surely would counter that the treaty

¹⁰ For a detailed political analysis of the history of the international community's responses to war crimes and genocide BASS, *STAY THE HORROR OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS* (2000). Professor Bass strongly argues for the political propriety of trying individual alleged war criminals before courts structured to afford fair trials and available not guilty verdicts.

¹¹ Future analysis of the sustained slaughter in Kosovo will undoubtedly address the minimal deterrent effect of the former Yugoslavia Tribunal. Nevertheless, comments made by Justice Goldstone at his keynote address, and those of prominent jurists, bar association leaders, and others, at the American Bar Association Central And East European Law Initiative (CEELI) Commencement in Atlanta, Georgia on August 7, 1999 leave no doubt as to the international legal community's consensus that the proposed International Criminal Court will be the primary institution and option for enforcing human rights justice.

¹² Myers, U.S. Signs Treaty For World Court To try Atrocities, N. Y. TIMES, Jan. 1, 2001, at A1.

¹³ *Id.*

advances the most fundamental principle of the international justice movement which was succinctly summed by Benjamin B. Ferencz, the former Nuremberg prosecutor of the Einsatzgruppen case: "[L]aw is better than war."¹⁴

Geoffrey Robertson Q.C., a prominent British barrister whose portfolio of human rights litigation knows no boundaries, carries the pro-international justice brief to logical conclusions in his book. He argues that the doctrine of universal jurisdiction, exercised to enforce the developing international right and duty of humanitarian intervention, mandates the creation of legal institutions like the International Criminal Court. His argument follows a lively, personalized survey of human rights law history, beginning with the positivist inferences he finds in the ancient codes of the Greek City states, imperial Rome, and Christianity.¹⁵ Robertson telescopes three distinct periods of post-World War II human rights law: recognition of the rights of the individual as reflected in Article 6(c) of the Nuremberg Charter, followed by the creation of international processes to facilitate the emergence of human rights from domestic constitutional and statutory safeguards, and this new age of international enforcement.

The London Agreement of August 8, 1945 established the Nuremberg military tribunal and created the "crime against humanity." For the first time, international law created legal standing for individuals, e.g. Holocaust victims. The doctrine of universal jurisdiction was created by the four Geneva Conventions of 1949 to authorize prosecution of human rights violations in both international and national courts regardless of the nationality of the perpetrators or the victims. Universal jurisdiction was also set forth in the Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Significantly, Nuremberg also established individual criminal responsibility and guilt for war crimes--a principle central to investigation of war crimes in former Yugoslavia and Rwanda, and forevermore.

¹⁴ Crossette, *Crusader Hopes To Put Aggression on World List of War Crimes*, N.Y. Times, Dec. 31, 2000, at Y13. The Einsatzgruppen prosecutions resulted in the conviction of 22 Nazi SS members, including six generals, for mass murder. Ferencz passionately advocates for the inclusion of "aggression" (the crime of aggressive war) to be declared a war crime. Opponents, however, may seize on this idea as proof of the fuzzy boundaries of war crimes under which domestic (read U.S.) citizens may be subjected to arbitrary and retaliatory international prosecution.

¹⁵ Thus, he might breezily analogize from the proscription "thou shalt not kill" a positivist state duty owed to each individual to protect and secure life and liberty. Robertson views the death penalty (inflicted on most of the Nuremberg defendants) as the most difficult problem facing the human rights movement, and rails at its resurgence in the U.S.

Robertson weaves philosophy and political science into polemical and passionate arguments for "human rights warriors" engaged in legal combat with the forces of state sovereignty, cynical diplomacy, weak international institutions, and academic marginalization.¹⁶ Robertson critiques South Africa's Truth and Reconciliation Commission as an institutional process for plea bargaining in which truth is exchanged for amnesty or leniency--a real politik accommodation unavailable to true human rights advocate-warriors, who are ever and only in pursuit of the ultimate Holy Grail of justice. However, Robertson does make a meaningful distinction between amnesty granted under national law where unique, pragmatic considerations may necessitate reconciliation and the international community's independent demand for justice which is not compromised by domestic considerations and which ultimately trumps national judgment.

Robertson condemns as anachronistic the U.N. Charter's bedrock acceptance of sovereign independence and the mandatory unanimous approval of the five Security Council permanent members required to authorize humanitarian intervention. Thus, he supported NATO's military intervention in Kosovo--which had not received U.N. Security Council authorization--because of its moral imperative. Such willingness to jettison established law and protocol is the human rights advocate-warrior's ethical and strategic duty. Robertson devotes a chapter to law of war principles and offers a provocative and utopian prescription: What if the law of war incorporated tort law doctrine and imposed liability on combatants who performed their war duties negligently?¹⁷ Robertson develops his themes further in a chapter entitled "The Guernica Paradox: Bombing For Humanity" which addresses the right and necessity of humanitarian intervention in Kosovo and East Timor. Reduced to a core principle, Robertson argues that the international community must intervene militarily when necessary to protect human rights--but must not do so negligently.

Like Goldstone, Robertson is hopeful that the International Criminal Court will represent a new beginning in human rights enforcement and usher in the triumphant denouement of law over diplomacy as the ultimate venue for redressing human rights abuses.¹⁸ His analysis of the Balkan trials

¹⁶ Comments made to the author by Robertson following his lecture at the University of Wisconsin-Milwaukee Institute of World Affairs on September 12, 2000. Robertson's ambitions include liberating human rights from its "airy fairy" academic pigeonhole.

¹⁷ Leaping the high sovereign immunity barricade next confronts the human rights advocate-warrior with individual (qualified) immunity defenses--a judge-made thicket of doctrine and policy which, when coupled with entrenched law of war and customary defenses, threatens the availability of justice in international forums where the concept of individual responsibility and liability remain underdeveloped.

¹⁸ Robertson's aggressive pro-interventionist legal posture has brought a predictable attack from right wing neo-isolationists. E.g., Bolton, Abolish U.S. Sovereignty?, WASH. TIMES, Aug. 22, 2000, at A15.

resulting from the former Yugoslavia tribunal's work is insightful and fair but ultimately serves to buttress his argument that only the International Criminal Court will make universal jurisdiction over crimes against humanity truly universal. Ultimately, Robertson and Goldstone's plea for the Court as a first step towards justice ironically invokes and answers the Biblical query: "For if they do these things in the green wood, what will be done in the dry?"¹⁹

¹⁹ Luke 23:31 (New King James Version).