

PEACE VERSUS JUSTICE*

The Honorable Richard J. Goldstone†

The relationship between peace and justice was present at the very birth of the two United Nations ad hoc international criminal tribunals. They were established under the powers conferred upon the Security Council by Chapter VII of the United Nations Charter. That chapter is entitled "Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression." When the Security Council has made a determination under Article 39 that there is the existence of such a threat it is empowered to decide on measures to maintain or restore international peace and security. The kinds of measures it may take are described in Articles 41 and 42. The former provide for measures not involving the use of armed force, and the latter, if peaceful measures fail or are deemed inappropriate, for the use of armed force.

Article 41 does not refer to the war crimes tribunals or any form of justice as a peacekeeping measure. However, in Resolution 808 of February 22, 1993 the Security Council decided that an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration of peace and security in the former Yugoslavia. It made a similar determination with regard to Rwanda in Resolution 955 of November 23, 1994.

From the inception of the work of the two tribunals there has been much debate as to whether they have justified the mission created for them, and if so, the extent of their success.

At the outset I would concede that prosecuting political leaders might hamper or even wreck peace negotiations. The converse is also true. In my experience the threat of prosecutions and the issue of indictments against senior political players have aided rather than retarded peace negotiations. In July of 1995, as Chief Prosecutor of the Yugoslavia Tribunal, I issued indictments charging Radovan Karadzic and Ratko Mladic with crimes against humanity. The former was the self-appointed President of the Bosnia Serb enclave called Republika Srpska. The latter was the leader of the Bosnian Serb Army. Two months later the Bosnian Serb Army massacred over 8 000 Muslim men and boys near Srebrenica.

In November 1995, the United States called a meeting in Dayton, Ohio, of leaders of the former Yugoslavia to discuss an end to the Balkan war that began in 1991. There can be no doubt that had Karadzic been a participant at Dayton, the Bosniak leaders, a mere two months after the massacre, would not have

* Address delivered at the Law School of the University of Las Vegas Law School on October 15, 2005.

† Richard J. Goldstone is a former Justice of the Constitutional Court of South Africa and the former chief prosecutor of the United Nations Criminal Tribunals for the former Yugoslavia and Rwanda. He also chaired the Independent International Commission on Kosovo.

been prepared to attend the meeting. That was indeed confirmed in my presence some months later by the then Bosnian Foreign Minister, Mohamed Sacirby. The indictment issued against Karadzic effectively prevented his attendance at Dayton. He would have been arrested by the United States and transferred to The Hague for trial. The Russian Government approached me with the request that the indictment be suspended to allow the attendance at Dayton of Karadzic. I had no authority to make such a move and I was certainly not prepared to approach the judges for such an order, even if they might have had the power to issue one. Karadzic was forced to accept that the then Serbian head of state, Slobodan Milosevic, would also represent the Republika Srbska. The Dayton meeting put an end to the war and that agreement is still of force and effect.

I might add that I issued a second indictment against Karadzic and Mladic while the Dayton meeting was actually in progress. That indictment included a count of genocide arising from the Srebrenica massacre. The first indictment enabled the meeting to proceed and the second in no way inhibited the peace negotiations.

On May 27, 1999, my successor as chief prosecutor, Louise Arbour, issued an indictment for genocide against Milosevic, then President of the Federal Republic of Yugoslavia, during the NATO bombing of Serbia designed to end the ethnic cleansing of the Kosovo Albanian population by the Serb army and paramilitary. Indicted with him were Serbian President, Milan Milutinovic, deputy Yugoslav Prime Minister, Nikola Sainovic and the military chief of staff Dragoljub Ojdanic and Serbian Internal Affairs Minister, Vljako Stojilkovic. They were charged with 340 counts of murder and 740,000 forced deportations from the Serb province of Kosovo after the beginning of 1999.

At the time that indictment was issued, efforts were being made to bring the NATO bombing to an end. The United Nations had appointed the former Prime Minister of the Russian Federation, Viktor Chernomyrdin, and the European Union had appointed the Finnish President, Martti Ahtisaari, to negotiate with Milosevic to end the war. As chairman of the Independent International Commission on Kosovo (established by the Swedish Prime Minister, Goran Persson) I met with both Chernomyrdin and Ahtisaari and discussed with them their views on the issue of the indictment at that time. Both independently informed me of their dismay in the belief that it would make the negotiations substantially more difficult. Both also said that in the result the indictment appeared to make no difference at all and was never mentioned by Milosevic. He clearly felt secure in Belgrade and did not imagine that he would ever end up on the trial in The Hague.

There is much debate now on whether the indictments issued by the International Criminal Court against the leaders of the so-called Lords Resistance Army in Uganda will wreck the peace negotiations there. It is too early to make an assessment.

I would suggest that the wider effects of justice as an aid to peace and reconciliation cannot be doubted. I refer in particular to the manner in which court proceedings and truth and reconciliation commissions officially and credibly record fraught history and put an end to false denials. I turn to some illustrations, again from personal experience.

Drazan Erdemovic was a Bosnian Croat who fought for the Bosnian Serb army of Karadzic and Mladic. For complex reasons he decided some months after the Srebrenica massacre to make public his role as a member of a firing squad. He contacted an American news journalist and granted her an interview in which he stated that he had lost count after he had shot and killed over seventy men and boys who, together with many others, were buried in a mass grave. When this became public, the Yugoslavia Tribunal demanded his transfer from Serbia to The Hague. To my surprise Milosevic agreed to comply and Erdemovic stood trial for war crimes. He pleaded guilty and his evidence of extreme duress was accepted by the trial judges. On appeal he was sentenced to a term of imprisonment for five years.

When Erdemovic's evidence first became public, the Republika Srbska army spokesman continued to deny the Srebrenica massacre and described it as U.S. propaganda. When the mass grave was identified by Erdemovic the spokesman said that if there was one, it would contain the bodies of those killed in earlier battles. The mass grave was exhumed and it was established by credible forensic evidence that the bodies were those of men and boys who died in about September 1995 and that they had been shot in the back of the head with their hands tied behind their backs. That is hardly the manner in which deaths occur on the battlefield. The evidence of Erdemovic supported by the forensic evidence had the effect of putting an end to the fabricated denials.

Immediately after the genocide perpetrated in Rwanda from April to June, 1994 there were widespread denials that indeed the killings had been planned. Those denials came not only from Rwanda but also from Belgium and France. The U.S. State Department hesitated to acknowledge that it was genocide. The evidence of hundreds of witnesses who testified before the Rwanda Tribunal has put an end to the denials.

In South Africa, the serious violations of human rights perpetrated by the Apartheid police and army had been systematically denied by government spokesmen. Generally speaking, white South Africans believed the denials, even when they were accompanied, as they frequently were, by less than credible excuses. The thousands of witnesses who testified before the Truth and Reconciliation Commission and the evidence of thousands more who applied for amnesties have established a single history of the crimes committed during the Apartheid era. The denials have stopped. South African school children of all colors will be taught a single history of the crimes against humanity that were committed in the Apartheid years. That is a gift of inestimable value from the Truth and Reconciliation to present and future generations of South Africans.

Before concluding these remarks, I would like to express a concern about the present trial of Saddam Hussein. The manner in which it is being conducted will not create any meaningful historic record of the crimes committed by him during his rule in Iraq. The security situation in Baghdad makes a fair and open trial impossible. Limiting the indictment to the murder of 143 people in 1982 is calculated to rob hundreds of thousands of victims of Saddam Hussein's crimes of any meaningful form of justice. It is also calculated to make him a martyr and instill doubt in the minds of his followers with regard to the veracity of the other heinous crimes alleged to have been committed by him.

I may well have been fortunate in having been involved in situations where justice has aided peace. As I said at the outset, it is not necessarily so. No human institution comes without cost. However, I remain convinced that the evidence points convincingly to the conclusion that international justice will bring more gains than costs.