POLITICAL WILL AND MULTILATERAL COOPERATION IN INTERNATIONAL JUSTICE

An Interview with Richard Goldstone

YJIA: How would you characterize the main challenges facing the International Criminal Court (ICC) and the International Human Rights Tribunal?

Goldstone: The main challenge facing the ICC, compared with the two ad hoc tribunals for Yugoslavia and Rwanda, is that with the ad hoc tribunals, we were told where and what to investigate. The problem with the International Criminal Court is that it’s got most of the world within its jurisdiction, other than — unfortunately — some of the larger countries, and the prosecutor has a huge challenge in deciding where and what to investigate. It’s been made a little bit easier because of the seven situations before the ICC: Two were referred by the Security Council, three were referred by governments, and [the prosecutor] has only had to exercise his discretion — his personal jurisdiction — in the case of Kenya and most recently Côte d’Ivoire.

The fundamental problem has been exacerbated by the fact that all cases are African. That is causing some ignorant but negative reaction from some quarters in Africa. It’s unfair to blame the tribunal for having become involved in seven African situations when five of them were thrust, literally, onto the plate of the prosecutor and the judges. This is the one challenge.

The other is to try to have sufficient success to convince countries like the United States and India to come on board. Russia and China are likely to be less amenable to...
join but the United States and India are both democracies, and democracies should have a natural feeling for international justice. When and whether that will happen, remains to be seen. I know from my own experience that it is crucially important to have US support. This is obviously missing although the United States is at least now assisting the prosecution in many ways. It is to be hoped that this will continue in the coming years.

YJIA: Do you believe that sitting heads of state could in the future be held accountable for crimes against humanity?

Goldstone: It wouldn’t surprise me if President al-Bashir of Sudan appeared before the courts in The Hague, but it’s a question of politics. The course I will be teaching at the [Yale University] Jackson Institute is called “Political Dimensions of International Criminal Justice.” You can’t divorce politics from international justice. Without politics you don’t get justice, and without politics it cannot succeed. And if it fails, it will be because of politics. So it’s a very political area of international activity.

YJIA: What does your experience portend for future investigations of violations of the laws of war and humanitarian law?

Goldstone: There has been a huge momentum forward since 1993 when the Yugoslavia Tribunal was set up, and if one casts one’s mind back to before 1993, there was no such thing as “international criminal justice.” It’s a new development in the international community. If you bear that context in mind, it’s remarkable what advances have been made. The fact that 120 countries have joined the Rome Treaty is remarkable. There’s a strong momentum forward and, save a major catastrophe, I think that will continue.

YJIA: Do the inability to arrest President al-Bashir and the Libyan National Transition Council’s refusal to hand over Saif Gaddafi point to serious enforcement challenges facing the ICC?

Goldstone: Of course there are challenges. It’s disappointing that the Security Council hasn’t been firmer. Al-Bashir was indicted as a result of a Security Council resolution and Gadhafi’s sons were indicted as a result of a unanimous Security Council resolution. When the Security Council uses its peremptory powers to refer situations to the ICC, it is disappointing that it fails to follow up when members of the UN fail to carry out orders and requests made by the Court. It is allowing its own power to be flouted.

YJIA: Are there any mechanisms that can be employed by the ICC and the international community in order to enforce the ICC’s jurisdiction?

Goldstone: The ICC is completely dependent upon governments to carry out its orders. It has no police force or army and it never will have, so politics is determinative. It all depends on the political will of countries to cooperate with the ICC. If they don’t, there is nothing the court can do other than to make noise.
YJIA: Did the political agreement with al-Bashir to divide Sudan into North and South Sudan decrease the legitimacy of the International Criminal Court because Bashir was wanted by the court at that time?

Goldstone: I think that there was general recognition that terrible crimes were committed in Darfur, and that al-Bashir’s government was responsible for it, so I don’t believe that the agreement, as important as it may be, in any way lessens the moral and legal requirement of handing him over for trial.

YJIA: The Security Council’s adoption of Resolution 1973 to establish a no-fly zone over Libya marked an important precedent in international cooperation to protect civilians. From a legal perspective, how will these events in Libya affect the responsibility to protect in the future?

Goldstone: I think it’s the first clear use and recognition of the responsibility to protect since the General Assembly unanimously adopted the resolution recognizing that doctrine after the high-level group reported on it. Of course, Kosovo was the first, but that was before, and that really led to the responsibility to protect getting onto the international agenda.

Leaders of countries around the world are on notice that the way they treat their own citizens is now a matter of concern to the international community. That’s something new. When one sees what is going on right now in Syria—I was very pleased to see that the Arab League is taking the responsibility to protect the people of Syria—that’s a very important move.

YJIA: You believe that the experience in Libya itself will open the way for greater international cooperation, regional cooperation, and humanitarian intervention?

Goldstone: I do. I have no doubt that the first time is difficult. The second time is less difficult. This is the way that customary international law is made. It takes time but at least there’s a movement in that direction, and that’s the importance of the Libya resolution.

YJIA: To add to that, do you think there will be a time when the political is not more powerful than the legal?

Goldstone: Again, it’s all politics. The powerful don’t like oversight, and don’t like being policed. That’s why the United States and India have remained outside. The more powerful nations don’t like smaller nations judging their military and civilian leaders. I don’t think that’s going to change, but having said that, it remains important that those leaders are aware of new norms being set by the international community, and that they take part in making them. The United States is an interesting example: it fully supports international justice. It thinks that international justice is a great idea for the rest of the world but not such a good idea when it comes to home. But that’s half a win, and that’s important.
YJIA: As the Arab uprisings continue, popular demands have been voiced to carry out justice against important regime symbols. What lessons can be drawn from past experiences in political transformations in order to achieve justice and stability?

Goldstone: I don’t think one can give a generalized answer. Each situation has to be looked at on its own merits. Often it’s a question of political judgment, it’s a question of timing; it’s a question of means; and it’s a question of the prospects of success. I’ve got no doubt that military intervention should be a very last resort. And military intervention shouldn’t be considered unless there’s a strategy that can bring about a win. There’s no point in endangering people’s lives if there is going to be no good human rights outcome. Often it’s a matter of luck. I don’t think NATO thought that the Libya campaign would last for as long as it did. I don’t think NATO thought that the Kosovo campaign would last for 78 days—they expected maybe five or six days. It’s easy to judge after the event. It’s not so easy beforehand.

YJIA: On a domestic level—for example, in Egypt—you see a lot of calls to try former Mubarak regime affiliates. Would this be constructive for the achievement of justice and stability?

Goldstone: In most cases—maybe 90 percent of cases—justice and truth go hand in hand, together with peace. I don’t believe you can really get lasting peace without justice in the aftermath of serious human rights violations. People just don’t accept it and there are calls for revenge. Especially with modern technology—none of the grassroots campaigns we are seeing would have been possible before the Internet. This is a new era for political leaders. It’s important in democracies and even more important in non-democracies. Democracies have a free press and access to the Internet. In non-democracies, it’s a completely new beginning and I think we’re watching with our own eyes and hearing with our own ears how it’s going to play out.

YJIA: What mechanisms of international law could the Syrian opposition utilize in order to challenge the Assad regime?

Goldstone: They don’t have to do more than rely on what the Security Council is doing. They have international law, morality, and justice on their side and it seems to me that President Assad is more and more isolated. I think they know what to do and they’re doing it. It’s a game of politics—in the case of Syria, international politics. We can’t help but admire the courage of the people who have laid their lives down.

YJIA: The Goldstone Report on the war between Israel and Hamas in 2008 garnered much controversy and subsequently, a partial retraction on your part. Your stated aim was to undertake the investigation in an “evenhanded and impartial manner.” What challenges did you face in attempting to create an evenhanded report and in facing charges of bias from both sides?

Goldstone: The main problem was not getting the active cooperation of one of the parties, namely Israel. That made the investigation and the report very difficult—not getting both sides of the story. I’ve been a judge long enough to know that you need to hear both sides of the story.
After the report was released, we gave our recommendations and that was the end of my involvement. Obviously I was disappointed that there weren’t quicker and more effective domestic investigations on both sides. Some of the results on the Israeli side led to the rethink that I had and the Washington Post op-ed that followed. And on the opposite side, Hamas ignored the report and the recommendations completely. The firing of rockets, which we said was a serious war crime, continued. The political pressures and political situations are crucial.

**YJIA:** Considering the pressures that you have faced personally, would you take on such a controversial mandate in the future?

**Goldstone:** That’s a really difficult one, and I won’t commit myself one way or the other. I think I’ve done enough investigating, but I would never say never.

**YJIA:** What do you view as the central issues for the development of international justice today, and are you optimistic that there is progress in this regard?

**Goldstone:** The central issue for me is the issue of political will on the part of major nations to cooperate and want to participate in international justice. They have a clear choice between going back to the pre-1993 situation when there was effective impunity for war criminals and today when there is much more accountability for war criminals. This accountability requires active participation and support from the whole international community. It’s difficult not to be optimistic when you regard where we were less than 20 years ago and where we are now.

– Interview conducted by Danial Kaysi. Charles Faint served as Lead Editor.