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BLAINE SLOAN LECTURE

**SEARCHING FOR JUSTICE IN THE
WORLD OF *REALPOLITIK***

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To paraphrase a verse from the Talmud, the world rests on three pillars: peace, justice, and truth. In reality, the three are but one.

When we deal with relations between nations and relations between people, one would hope that the goals would be the three pillars of peace, justice, and truth. Human history spans some 35,000 to 39,000 years and approximately forty different civilizations. Studies by famous historians such as Toynbee reveal that one constant theme emanates throughout all of these civilizations: justice. Every civilization created a system of justice, attempted to develop a judiciary of some form or another,

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tried to balance the rights of the individual with the rights of society, and, among other things, sought various approaches to justice, punishment, and retribution.

Justice is endemic to human nature. I cannot be sure that the notion of justice is embedded in us as is any other instinct that we have developed, whether it is the instinct of survival or otherwise. I am also sure other scientists will dispute that it is endemic and say justice is behavioral or something that is learned. Yet, it is extraordinary how a sense of justice permeates us as individuals and as societies, how even children at a very early age feel a sense of justice and injustice.

And yet, as we go through life, our sense of justice is eroded rather than strengthened and honed. Perhaps it is the continual contact with a reality that seems so opposed to justice that causes us to reconsider our original youthful expectations. This is why each subsequent generation must come to the fore. As the current generation's enthusiasm wanes and skepticism increases, the new generation infuses the battle with its enthusiasm and its idealism.

Truth is seldom pure and rarely simple. When we look at the world's three pillars - peace, justice, and truth - it is with a sense of absoluteness. In our attempt to achieve those goals, however, we soon realize that they are relative. Throughout the various civilizations of the last 35,000 to 39,000 years, therefore, it has always been a struggle to try to find ways by which we can circumscribe that relativity. We do this in order to avoid being in the position that Niccolo Machiavelli described some five centuries ago in *The Prince*:¹ namely, that the end justifies the means.

The notion of *realpolitik* emerged from the writings of Machiavelli, from the 1815 Congress of Vienna, the works of Metternich, and, in its latest incarnation, in Henry Kissinger and Richard Holbrook. The foregoing all look at peace as the art of the possible, as the art of the political compromise, as avoiding at all costs anything that smacks of principle and anything that resembles truth or approaches justice. All of the efforts at political peacemaking have been shrouded in

¹ NICCOLO MACHIAVELLI, *THE PRINCE* (George A. Bull trans., Penguin Books 1983).

machinations that seem not only to shun these basic values, but to reject them.

Henry Kissinger is perhaps a sorcerer in the field of forging peace and has managed to achieve great success. In 1973 he realized that if Egypt crossed the Suez Canal and defeated the Israelis, there could never be a peace treaty between Egypt and Israel. Together with the Israelis, therefore, Kissinger engineered a crossing of the Suez in the Deversoir area by a special unit under General Sharon. After Sharon's unit had occupied a certain portion of Egyptian territory, Kissinger announced that both sides had achieved victories they could claim for their respective internal constituencies and that discussions about a disengagement agreement could begin. Subsequently, each time the concept of a peace treaty was broached, General Sharon dissented in favor of a simple disengagement agreement.

Ultimately, disengagement agreements were reached in 1974 and in 1975. Kissinger thought these disengagement agreements would build to a crescendo over time. He was absolutely right. Without having orchestrated the Israeli counterattack, it would have been impossible for a defeated Israel to make a peace treaty, and the Egyptians would have been much more difficult to deal with had they achieved complete victory. Kissinger's assessment, therefore, produced a positive result.

On the other hand, as a result of his involvement in the administration of every stage of the plan with a great deal of minutiae, Kissinger lost sight of the big picture of achieving a lasting peace. Consequently, in 1975 and 1976, I determined that we needed to make a qualitative jump into the area of agreements in principle. A colleague of mine, a dear friend, Mort Kaplan of the University of Chicago and I role-played the negotiation of a peace treaty. Our negotiations originally consisted of 13 points, but we split one point in two in recollection of Woodrow Wilson's famous 14 points.² With these points, we produced a text that we proceeded to submit to the United States and Egyptian governments.

² See GADDIS SMITH, *WOODROW WILSON'S FOURTEEN POINTS AFTER 75 YEARS* (Carnegie Ethics & In. 993); see also <http://www.lib.byu.edu/~rdh/wwi/1918/14points.html>.

I brought the text to the attention of then President Ford and President Sadat, but they were not interested. During the 1976 presidential campaign, however, I met Jimmy Carter while in Chicago. Carter saw the merit in the plan and asked Secretary Vance to pursue it as soon as he took office. Eventually, of course, the principles were established at Camp David.

While peace was eventually established at Camp David, the following brief vignette illustrates a hidden but all important impetus behind the success of that peace process. The director general of Israeli Prime Minister Begin's office was General Tamir, who is still alive and revered as a hero. He had fought wars for Israel since 1948 and is presently the military adviser to President Weitzman. General Tamir was extremely effective at Camp David, and, as a testament to his character, he gained the complete confidence of President Sadat. It was amazing to witness President Sadat at the negotiating table disregarding his own generals to consult periodically with General Tamir. It was just an extraordinary experience.

General Tamir and I still work together with a group of experts on the Middle East. During one of those meetings, we were talking, and General Tamir said that people will never realize that one of the key ingredients in bringing about peace is something that is totally unknown. When I inquired as to what it was, he stated that over the years Israel has had a lot of Egyptian prisoners and Egypt, as well, has had a lot of Israeli prisoners. Notwithstanding, he went on to note that there has never been an incident where either an Egyptian or an Israeli prisoner was killed or tortured. He said that one of the biggest stumbling blocks to peace with Syria is that six Israeli airmen were killed in 1973.

It struck me that of all of the examples I could ever think of to demonstrate the impact of humanitarian law on peace, this one is a simple one of something that is totally invisible. The fact that two countries at war with one another could fight each other honorably and follow the rules of the game by not violating international humanitarian law did more to achieve the resulting peace than anything else.

In 1956, I had an important experience just after I returned to Cairo from the front at the Suez Canal Zone, where I had been wounded. One evening when I was serving as duty officer

at a camp in the center of Cairo, I heard a great deal of commotion. In response to this commotion, I asked some people what had occurred. They replied that an Israeli plane had been shot down and that the pilot had parachuted from the plane. My first instinct was to gather the ten soldiers on night guard duty with me. We each grabbed the first weapon we could find, and we rushed to protect the pilot from the mob. When I related this incident to General Tamir, he said that this is the type of thing that creates a lasting impact in the minds of people. In the final analysis, then, when peace is made, it is not made on a piece of paper but between people. Once people can relate to one another as human beings, they are capable of transcending all political difficulties.

I now return to the machinations involved in political peacemaking. While the merits of the Kissinger approach are evident, unfortunately this is not true of the sorcerer's apprentice approach, Richard Holbrook. During his time in the former Yugoslavia, Holbrook came to the conclusion that there were some things that could not be accomplished through negotiations, but only outside the negotiations. For example, there is an area in Croatia known as the Krajinas. Serbs historically occupied the Krajinas. The Serbs moved there subsequent to their defeat at the Battle of Kosovo in 1389. By the mid-1990s, there were 200,000 Serbs living in the Krajinas. The Croatian government, however, wanted the Serbs out and the Krajinas returned to Croatian control.

At the same time, the Bosnian Serbs wanted to enlarge a corridor stretching from Srebrenica to Brcko in the northernmost section of Bosnia, along the Drina River. Basically, this corridor would connect the Serb-inhabited areas of Bosnia with Serbia proper. The corridor was part of the greater Serbian plan.

Holbrook, however, realized that achieving these ends through a public settlement or negotiation would be difficult. Instead, therefore, he arranged for the Croatian army to be retrained by a major U.S. corporation headed by a former secretary of defense. With the agreement of the North Atlantic Treaty Organization (NATO), former U.S. military personnel trained them with weapons supplied by Germany. The weapons were all East German, and the new unified Germany did

not need them. In addition, the weapons were of the same make as those made throughout the former Yugoslavia. The new Croatian army became strong, well-disciplined, well-organized, and eventually moved on to the Krajinas. The American ambassador rode behind the reconnaissance forces to ensure that nothing worse than removal would happen to the Serbs in the region. Croatian control of the Krajinas, therefore, became the new reality, irrespective of issues of justice or of the rights of the people involved.

The same type of operation was supposed to occur in the Srebrenica-Brcko corridor. Unfortunately, however, Holbrook failed to give credence to my negative assessment of General Radtko Mladic, and this butcher was given the task of clearing the corridor. While Mladic accumulated approximately 4,000 troops and moved on the corridor, the French president told the local French commander, General Jean-Vie, not to request any NATO strikes. When Mladic moved in, therefore, there were about 500 Dutch soldiers with small sidearm weapons who were easily overtaken. In total, 7,000 men were killed and thrown in a field.

The next day, Ambassador Madeleine Albright showed satellite imagery of that field and those corpses to the United Nation's Security Council (Security Council). During my two years as chairman of the Security Council's commission to investigate the war crimes in the former Yugoslavia, I was never given the benefit of a single satellite photo. On that occasion, however, the satellite photo promptly surfaced. Needless to say, the day after the photo was shown to the Security Council, the field was bulldozed. Only a few remains were left behind.

Holbrook's treatment of the former Yugoslavia led to the Dayton agreements³ and, eventually, to the *de facto* impunity of Milosevic, Mladic, and Karadzic. Do agreements that grant impunity to the likes of these men achieve the goals of peace, justice, or truth? Although it may be naive and idealistic of me, I think that although it may be difficult to deal with the truth at times, the truth has a way of enduring longer than half-truths and misrepresentations found in political settlement agreements.

³ Dayton Peace Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, 35 I.L.M. 170.

Historically, there have been struggles within each society between those who are in power and those who are disenfranchised or who are without power. We see these struggles constantly being fought on the battlefield of justice, and the same sorts of struggles occur on the international level.

Before pursuing this line of thought further, allow me to make an observation about the evolution of international humanitarian law. Perhaps one of the early manifestations of this body of law comes in the form of a sixth century B.C. book entitled *The Art of War*,⁴ by the Chinese writer Sun-Tzu. Now, Sun-Tzu obviously did not write that book from the perspective of humanism, but it is uncanny how neatly the proscriptions and prescriptions contained in the book fall within the category of humanitarian law. For example, Sun-Tzu proscribed the killing of prisoners, women, children, and the elderly, and the destruction of places of worship. He also prescribed respect for those who seek sanctuary and refuge in places of worship. According to Sun-Tzu, if a military leader were to follow these proscriptions and prescriptions, he would be a more successful conqueror, and the conquests undertaken would be less painful and less costly. *The Art of War* can be described as an early cost-benefit analysis of the effects of humanist thinking and conduct.

Interestingly, there also exists an Indian book called *Mano's Matte*, or *Book of Mano*, that was published almost a century and a half after *The Art of War*. China was extremely insular at the time, and there is no indication at all of the migration of ideas from China to India during that period. The building of the Great Wall, which was intended not only to keep invaders from entering China, but also to keep people and ideas from leaving China, evidences this Chinese insularity. Nevertheless, despite the fact that the Chinese had absolutely no intention of exporting their ideas, in the *Book of Mano* we find the same basic proscriptions and prescriptions addressed by Sun-Tzu.

Furthermore, much to my surprise, I learned that the same types of proscriptions have also been found in fourth century B.C. . Mayan remnants in North America and in the Caliph of Islam's admonitions to his troops at the beginning of the sev-

⁴ SUN-TZU, *THE ART OF WAR* (Thomas Cleary trans., Shambhala Publications 1991).

enth century A.D. . Again, there is no evidence of the migration of ideas between and among these societies and the societies in which *The Art of War* and the *Book of Mano* were written. The fact that the same or very similar proscriptions and prescriptions appear in the discrete societies of the sixth century B.C. Chinese, the fifth century B.C. Indians, the fourth century B.C. Mayans, and the seventh century A.D. Muslims indicates that there are certain shared humanistic values that seem to transcend religious or philosophic differences.

During the period of the Crusades and the Fourth Lateran Council, a new proscription emerged. It was decided that the Crusaders would no longer use the crossbow because it was a weapon that caused unnecessary pain and suffering. Amazingly, as an aside, the same language was used in the 1907 Hague Regulation of Armed Conflict.⁵ At any rate, the proscription against the use of the crossbow was concomitant with the development of the concept of chivalry, a humanist concept that migrated along the paths of the Crusades. A clear example of this migration can be seen in the works of canonist writers like Suarez and Ayala. While Suarez and Ayala wrote proscriptions for the Spanish Army that were inspired primarily by Aristotle, these proscriptions also make reference to the conduct of the Crusades.

The period of the Crusades, however, witnessed not only the migration of humanist ideas, but also the first wide-scale transformation of those ideas into practice. For example, when Salahuddin defeated the French ruler Louis IX, he confined him to a nice home and permitted him to communicate via letters with people in France. This manner of treating a prisoner of war, albeit not an ordinary prisoner of war, is demonstrative of the transformation of humanist ideas into practical international law.

Several centuries later, Napoleon abandoned any pretense of following international law. While a legend, there has probably been no greater barbarian at war than Napoleon. Napoleon, after all, violated just about every rule regarding armed conflict. Ironically, however, Napoleon's conduct was responsible for pushing international humanitarian law to a higher level.

⁵ Convention Respecting the Laws & Customs of War on Land (Hague, IV), Oct. 18, 1907, 1 Bevans 631.

After his defeat, at the 1815 Congress of Vienna, an effort was made to do more than simply restore peace between nations and divide territory.⁶ The Congress of Vienna, for example, addressed the protection of cultural property and the elimination of slavery. Such ideals of justice emerged as the foundation of a peace between individuals, not just a cessation of hostilities between nations.

The continuing development of ideals of justice after the Congress of Vienna is represented in the convening of the Hague Conference of 1899,⁷ in the Conference's codification of the regulation of armed conflict, and in the 1907 amendment to this regulation.⁸ Similar goals were pursued at the Geneva Conventions of 1864,⁹ 1929,¹⁰ 1949,¹¹ and 1977.¹² Between the Hague and Geneva, there are 39 different conventions that deal with the elimination, prohibition, and/or criminalization of a variety of weapons.

Unfortunately, however, the degree of enforceability of these weapons-related conventions is an open question. Even where large numbers of states have ratified the conventions, and even where the conventions have been put into practice, it is not clear whether the conventions rise to the level of customary international law. The recent land mines convention provides a significant example of the problems relating to enforceability.¹³ Despite the fact that more than 120 countries have subscribed to the land mines convention, the United

⁶ See generally *The Final Act of the Congress of Vienna*, June 9, 1815, 64 Consol. T.S. 453 (Fr.).

⁷ *The First International Peace Conference*, The Hague, 1899, *reprinted in* 1 AM. J. INT'L. L. 1, 106 (supp. 1908).

⁸ *The First International Peace Conference*, The Hague, 1907, *reprinted in* 2 AM. J. INT'L. L. 1, 106 (supp. 1908).

⁹ Convention [No. III] for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263.

¹⁰ Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

¹¹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3.

¹³ See Convention on the Prohibition of the Use, Stockpiling, Production & Transfer of Anti-Personnel Mine & on Their Destruction, Sept. 18, 1997, *reprinted in* 36 I.L.M. 1507 (1997).

States rejects it and does not consider it to be part of customary international law.

What exists then, is a series of circles. One circle is the intellectual circle, the circle of the evolution of ideas, ideas that derive from social values predicated on philosophic and religious values. That circle develops and expands over the course of time, but it is only capable of influencing other circles. The second circle is the circle of the evolution of international instruments, instruments from which we may derive proscriptive and prescriptive norms. The elements of enforcement of these norms are very sparse, but they begin to develop the body of binding legal obligation. The third circle is the circle of enforcement. History teaches us that proscriptions and prescriptions are largely meaningless in the absence of the effective, fair, and impartial enforcement and administration of justice. Nevertheless, while we have developed enforcement models at the national levels, for many reasons we have been reluctant to develop such models at the international level.

One such reason may be the intricate relationship between the administration of justice and notions of national sovereignty. Transcending the psychological attachment to national sovereignty in favor of an international system of enforcement may be too much for many to bear. Another reason for the failure to develop international enforcement models may be that those, like myself, who work in the field of criminal justice are not broad-minded or open-minded enough to make the leap from the national model to the globalization of justice.

Enforcement is a problem for international criminal law in general, but particularly so in the context of crimes that involve or affect a state or states. Enforcement of such crimes does not occur in a vacuum. On the contrary, in such cases, there is likely to exist a strong political dimension that must be taken into consideration. For example, simply by supporting the enforcement of international criminal law, one state may grant another a degree of political legitimacy. This explains why Israel has never recognized the applicability of the Geneva Conventions¹⁴ to the Palestinians. While Israel abides by the terms

¹⁴ See Convention for Amelioration of the Condition of the Wounded & Sick in Armed Forces in the Field, Aug 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick & Ship-

of the Conventions, it does not wish to acknowledge that the Conventions apply to the Palestinians because it believes such acknowledgement would give the Palestinian's nation-building effort increased political status. The Israel-Palestine situation is representative of the dilemma inherent in attempting to enforce international humanitarian law in a neutral manner binding on all states when each state has its own political priorities.

The same dilemma has frustrated efforts to reach an international agreement in regards to terrorism. The problem is that what some countries deem to be terrorist activity is not so deemed by others. Of course, this problem can be addressed by eliminating the label of terrorism from the efforts to curtail certain types of conduct. If the label of terrorism is avoided, perhaps an agreement can be reached that will proscribe the killing of women and children irrespective of the perceived legitimacy of the goals sought to be achieved by such acts.

The ultimate question, then, is how to develop value neutral rules that can be enforced upon all sides. Ideally, for pure enforcement purposes, one might wish to develop a supranational system of justice, but such a concept remains internationally unacceptable. The next best choice is an international system accepted by consent of the states. If a system is based on consent of the states, however, it will be only as strong as the states wish it to be. An additional problem with such an international system is the effect of a weak member. If one state's enforcement of the agreed international norms is sufficiently weak that it will become a state of refuge for international criminals, that state will be the Achilles heel of the international system.

Thus, we are now in the stage of attempting to develop an international criminal court that will be international rather than supranational, that will be dependent upon states, and

wrecked Members of the Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention for the Treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. at 3328, 75 U.N.T.S. at 146; Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of 12 August 1949 & Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1997 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442.

that will be complementary. There is a French word, *complémentarité*, that does not exist in English, but which has been translated into English as "complementarity." This underlying principle creates the impression, or the feeling, of national systems that have an extra gear that can be shifted into a new gear, which constitute the international system. This impression, however, is just an illusion. There are two separate gearboxes.

I wish the systems were better connected, so that the International Criminal Court could be a true extension of national criminal jurisdiction, with the equivalent of a change of venue motion allowing some national cases to be brought before the International Criminal Court, but this is not at all the case. That is how it must be at this stage. After all, each historic period witnesses the development of certain institutions, and these institutions become the bases and foundations for the next generation of institutions; and sometimes the weaknesses of one generation are cured by the next. Whenever I feel particularly discouraged, I look to my good friend Ben Ferencz, a former Nuremberg prosecutor, and say to myself, "I'll pick up from where he left off." Because if he had the fortitude to carry it forward for so many years, and if he is still in great spirits and full of enthusiasm, then I will do my share before passing it on to my students, and then they will do their share before finding someone else to carry on. In a sense, then, that is the evolutionary process with which we are dealing.

What I am attempting to convey in what is an absolute hodgepodge of information and ideas is that we have multiple parallel tracks. On one track, we have the track of law, legal institutions, the evolutions of norms, the strengthening of norms, the development of new institutions, the strengthening of institutions, and so on and so forth. On the other track is what we do not frequently see, the track of *realpolitik*.

Let me give you some additional examples to illustrate the point. There were twenty-four people indicted at Nuremberg and twenty-two that stood trial.¹⁵ In the subsequent American, British, Russian, and French proceedings, another 50,000 peo-

¹⁵ See generally Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10: Nuremberg, October 1946-1949 (U.S. Government Printing Office 1994).

ple were tried. In the Far East, General Douglas MacArthur issued a proclamation establishing another international military tribunal patterned after the one in Nuremberg. The original Nuremberg tribunal was a product of the London Treaty of August 8, 1945,¹⁶ which was signed by four countries and acceded to by nineteen others. In the Far East, on the other hand, the tribunal's foundation rested on General MacArthur's issuance of a proclamation and appointment of judges. After the proceedings began, twenty-eight people were indicted, and the Allies proceeded to prosecute over 5,700 people in various areas. The first major trials in Tokyo were concluded by 1947, and the subsequent trials that continued in various parts of Asia were conducted principally by the Americans, the British, the Australians, the New Zealanders, the French, the Dutch, and the Chinese.

In 1951, the Japanese reacted against having their people jailed in all of these different places. These prisoners were, therefore, brought back to prison in central Tokyo. In 1953, the United States and Japan signed a peace treaty in San Francisco.¹⁷ By the end of that year, not a single Japanese prisoner of war who had been convicted of war crimes remained in prison. Of the more than 15,000 persons sentenced to many years of imprisonment for war crimes, not one remained in prison by the end of 1953. In 1954, subsequent to new elections, a Japanese cabinet was formed that included two persons who had been tried and convicted at the Tokyo trials, the prime minister and the foreign minister.

You might recall that when MacArthur entered Tokyo, Emperor Hirohito was still in his palace. You might further recall that Emperor Hirohito was never charged with a crime of aggression, despite the fact that Japan could never have gone to war had the emperor so much as lifted his finger against it. Moreover, there was not a single person who was indicted or

¹⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹⁷ Treaty of Peace, Sept. 8, 1951, U.S. - Japan, 3 U.S.T. 3169, T.I.A.S. No. 2490; *see also* Treaty of Friendship, Commerce & Navigation, Apr. 2, 1953, U.S. - Japan, 4 U.S.T. 2065.

prosecuted for what is widely known as the "Rape of Nanking."¹⁸

MacArthur viewed these trials as a manner of achieving control over the occupied territories. To the extent that justice could be manipulated, it was. General Yamashita was condemned in the Philippines not for crimes of which he had absolutely no knowledge, but because MacArthur wanted to make an example of him. General Yamashita was convicted on the grounds that a commanding officer bears criminal responsibility for what he should know about what his troops might do. General Yamashita had issued orders to his troops prohibiting crimes against civilians, and he had no actual knowledge of any such crimes being committed. Nevertheless, MacArthur knew that he needed General Yamashita as an example, just as he knew that he needed to keep Emperor Hirohito in his palace behind the moat if MacArthur was to control and rule Japan.

Justice was used by MacArthur as an illusion in true Potemkin fashion. Just as the Russian General Potemkin built villages in Crimea along the river so that Catherine the Great would have the impression that the Crimean peasants were well-fed, well-nourished, and satisfied, so too did the prosecutions in the Far East give the impression that justice was being done.

In fact, what we witnessed in the Far East is what might be termed as Potemkin international criminal justice. We are seeing a little bit of criminal justice, a little bit of realism on occasion, and a few effective trials. Certainly, the International Criminal Tribunal for the Former Yugoslavia¹⁹ has produced some very effective prosecutions, and there have been some successful prosecutions in the Rwanda tribunal.²⁰ While we must recognize the great merits of these accomplishments, we must not forget that there is much left to be accomplished. I say this because major perpetrators remain at large, and will probably

¹⁸ See THE TOKYO WAR CRIMES TRIAL (Nov. 1948), *reprinted in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1060-61 (Leon Friedman ed., 1972).

¹⁹ Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, UN SCOR 48th Sess., 3217th mtg., U.N. doc. S/RES/827, *reprinted in* 32 I.L.M. 1159 (1993).

²⁰ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, UN SCOR 49th Sess., 3453d mtg., U.N. doc S/RES/955, *reprinted in* 32 I.L.M. 1598 (1994).

continue to remain at large for so long as they serve a political purpose. Moreover, some 90,000 violators await a domestic prosecution in Rwanda. Ultimately, we must deal with this tension between the attempt to develop international criminal justice in its own right, and the *realpolitik* view of international criminal justice as a useful tool in the achievement of desired political results.

Perhaps an additional example is the indictment of Milosevic by the International Criminal Tribunal for the former-Yugoslavia. Shortly after Serb forces committed terrible crimes in Kosovo and shortly after approximately 800,000 people were ethnically cleansed, the International Criminal Tribunal for the Former Yugoslavia indicted Milosevic. Milosevic, however, was never indicted for any crimes committed from 1991 to 1995 in Bosnia or in Croatia. Yet, there is ample evidence that he ordered some of those crimes, or, at the very least, that he should be held accountable for some of those crimes under the standard of command responsibility. The indictment, then, is not based on all of the crimes he committed. It is a very narrowly drafted indictment that deals with the killing of thirty-five people in a particular village, alleging that Milosevic himself gave the order.

Now, I submit to you that there is no way that tribunal is ever going to be able to prove that Milosevic gave that order. Of course, there are the rumors that the United States will assist the prosecution by providing satellite pictures and that the Defense Intelligence Agency (DIA) will provide information. Can anyone in his wildest imagination think that a DIA expert is going to testify to having had a satellite in place on the fateful day, that the satellite took this image of the site, that the DIA enhanced the image, and that the DIA preserved the image with a proper chain of evidence? Or, does anyone believe that someone from the DIA is going to testify to how the agency captured a telephone conversation between Milosevic and one of his generals in which Milosevic gave the kill order? It is not likely.

So, the question arises: Why was the indictment issued? It was issued for two reasons. One, it indicated to Milosevic that while he was given a pass because he signed Dayton,²¹ he was

²¹ Dayton Peace Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, 35 I.L.M. 170.

not going to get away with the killings. Two, in the form of an order the tribunal issued the next day for the discovery of assets, Milosevic was informed that he would be hit where it hurt. The U.S. government is aware of what I discovered in 1993, that Milosevic and his entourage have assets valued at hundreds of millions of dollars in foreign accounts, and the message to Milosevic was: "You won't always be in power. One day, you will need this money, and we know where it is. So, be a good boy." At any rate, the next day assurances were given, Serb troops were pulled out, NATO troops went in, no body bags were returned, and everybody was happy.

Haiti provides another recent example. President Clinton declares to the United States people that the regime of General Cedras is the worst in the world and that the regime has committed all the worst possible crimes. President Clinton then proceeds to send General Colin Powell to Haiti, and General Powell makes a deal with Cedras. The deal is that Cedras will go to Panama where he will receive a villa, a lump sum payment, and a monthly check. General Powell returns to the United States and declares Cedras to be an honorable general. Cedras leaves Haiti with full military honors to live a quiet non-extraditable life in Panama.

Adding to the unreality of the Haiti scenario is the fact that General Manuel Noriega brokered the deal from prison. General Noriega, by the way, is the only federal prisoner I know of who receives his four-star military uniform starched each day. General Noriega also has a two-room suite for a cell with private furniture in the bedroom, and he has access to a phone and a fax machine. Just to complete the irony, General Noriega is considered a prisoner of war.

At stake in the deal to remove Cedras was not justice for the Haitian people. At stake was not the issue of whether or not Cedras' regime was a terrible one. At stake was not the issue of Cedras' victims. What was at stake was politics. President Clinton simply could not afford to have body bags with United States soldiers being shipped back from Haiti, and, therefore, President Clinton authorized a deal that would avoid the possibility of such an event.

Whether such a deal is a good or a bad thing is difficult to determine. The fact that a deal was reached to remove Cedras

from Haiti does at least represent some intervention. The deal did not redress the wrongs of the past, but it may prevent those of the future. Similarly, it is difficult to describe as entirely wrong the decision to give Milosevic a pass to sign the Dayton agreement.²² After all, threatening him with prosecution might have caused another 10,000 or 20,000 people to be killed.

The choices are not easy. There is real tension between the two goals of achieving political solutions and achieving higher values. And, just as there is a checks and balances system in place in the United States, there is an informal checks and balances system at the international level. This informal system consists of those few people who will continue to keep the pressure on governments, that will make it difficult for governments to make the most egregious or outrageous deals, that will denounce governments when necessary, and that will praise governments when they act honorably and in accordance with international humanist principles. These few people will ensure a sense of continuity and progress. While progress may be slow, the evolution of humankind and the history of law teaches us that progress has always been slow and painstaking.

It is my hope that in this age of globalization, when more people are studying law than ever, that these prospective lawyers will be the true legions of justice. No matter how limited their efforts and no matter how small their voices may be, I think these prospective lawyers will add a strong voice to what I call "international civil society," and I think international civil society is the necessary countervailing force to the forces of cynicism and *realpolitik*. The presence of an international civil society makes it more difficult for the forces of cynicism and *realpolitik* to achieve their ultimate goals of compromising justice.

I am convinced that there can truly be no peace without justice; and, certainly, there can be no justice without truth. Difficult as it may be, we should be dedicated to the pursuit of those goals. We should attempt to approximate them as best we can and to dedicate some of our efforts to preventing the cynics, the skeptics, and the *realpolitician* from compromising justice. If we fail to do so, we are condemned to repeat our mistakes.

²² See *id.*

Perhaps, in closing I will recount a difficult story to hear, but one that I carry like one carries a cross on his shoulder. The events of this story occurred in 1993. We were in the midst of conducting the largest rape investigation in history. Initial fruits of the investigation were the Foca rapes that are now being prosecuted in the Yugoslavian tribunal.²³ I had thirty-three women volunteering in this investigation, and these women were divided into eleven teams. Each team consisted of a prosecutor, a psychiatrist, and an interpreter. They traveled throughout the country with lists of witnesses. The teams interviewed a total of 223 rape victims.

We took great pains to protect the identity of these victims and to protect the integrity of the impending prosecutions. In order to avoid the potential danger of prior inconsistent statements that defense attorneys could use against the victims, the prosecutor for each team would take notes, in her own words, of each victim interview, and then report to me in writing. The only written materials created would therefore be deemed attorney work-product and undiscoverable.

One of my prosecutors was a Crown prosecutor from Canada with nine years of experience in violent crimes. She came to me in tears one day and said that she had to leave. She said that she had to drop the job because she could not take it anymore. When I asked her what had happened, she explained that a man had come to see her that day. The man was on crutches, and he looked as if he could have been sixty and eighty years old and aged beyond repair, but in actuality he was probably in his forties. He said he was a soccer player from the Croatian neighborhood of Sarajevo, but he had stopped playing soccer in his early thirties when he met the Serb widow of a Muslim man. He fell in love with her, married her, and adopted her two lovely daughters. It was as if they were his own children. His wife had a nice apartment on the Serb side of town so they moved in together there. To make a living they opened a little café in the neighborhood. They decorated the café with soccer motifs, and as he was partial to the Croatian soccer team on the other side of town, he would often have lively discussions

²³ See e.g., *The Prosecution of the Tribunal Against Gagovic & Others* (June 26, 1999), at <http://www.un.org/icty/indictment/english/gagovic.htm>.

with the Serb youths who would come and patronize his business.

Then the war came. One day thereafter, a number of young hooligans who were ostensibly militia volunteers came into the café with weapons. They destroyed the place and then took the man to their station post. They tied him up, threw him on the ground, and broke both of his legs with their rifle butts. The man's wife and daughters were then brought into the station post. The wife was told that unless she did whatever the men directed her to do by the five men who were there, her twelve year-old daughter and her fourteen year-old daughter would be raped. The man's wife could not allow this to happen to her children, so she did a striptease and was forced to perform all sorts of horrible acts before being raped in every possible way by the five men. And then, totally unexpectedly, the man's wife was turned to face he and his daughters, and one of the men slit her throat and threw her on the floor to wither and slowly die as her blood drained out.

The men then jumped the two little girls, raped them, and slit their throats as well. In an act of ultimate cruelty, the man was thrown into the street with his broken legs and told to live so that he could remember what he had seen, and so that he could tell others what would be done to people like him.

The man then explained to my prosecutor that he had lived for the moment that he could tell somebody the story. He said, "I want justice." The next day, he committed suicide.

No books or theories will ever be as poignant as this particular story. Here is a victim who wanted justice. Here is a victim who was dehumanized and wanted justice. Here is a victim who was dehumanized and wanted justice from the United Nations and from the world. I submit to you that we owe justice to this victim and to the victims that we do not know. We owe justice to victims all over the world, justice that prevents these occurrences, justice that deters people. We also owe it to ourselves because if we forget that obligation we have to those unknown victims, we also forget who we are as human beings.