Case Western Reserve Journal of International Law

Volume 35 | Issue 2

2003

The Role of Justice in Building Peace: Foreword

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FOREWORD: THE ROLE OF JUSTICE IN BUILDING PEACE

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There have been some 250 international and internal armed conflicts across the globe in the last hundred years, resulting in an estimated 170 million casualties, many of them civilians. In the aftermath of World War II, the international community pledged "never again," meaning never again would countries stand by while genocide, crimes against humanity, and war crimes were being committed with impunity, or at the very least, that the countries of the world would collectively ensure that the perpetrators of such atrocities are brought to justice. The Nuremberg and Tokyo Tribunals would serve as the model for such action and the 1948 Genocide Convention and the 1949 Geneva Conventions would provide the legal framework for trying violators.

Despite this pledge, justice was not employed as part of peace-building efforts during the forty years following Nuremberg, despite Nazi-like atrocities committed in places such as Bangladesh, Uganda, Cambodia, Guatemala, and Ethiopia. Then, in the decade of the 1990s, a new revolution in international justice began to take shape, beginning with efforts by national courts to assert universal jurisdiction over Chilean former dictator, Augusto Pinochet; then building steam with the establishment of the ad hoc international tribunals for the Former Yugoslavia and Rwanda, and the creation of hybrid international criminal courts for Sierra Leone, East Timor, Kosovo, and Cambodia; and culminating in the establishment of the permanent International Criminal Court at The Hague.

Still, many peace-builders perceive an inherent conflict between these evolving norms and institutions of justice and their primary objective of negotiating a settlement, in order to put a halt to violence. Reared in the school of realism, peace-builders are often perplexed by the mantra of human rights advocates claiming "there can be no peace without justice," when in fact history appears to be replete with many instances of peace based on injustice, as well as situations where pursuing justice has thwarted the quest for peace, and where justice has been successfully traded for peace. While they can no longer ignore international justice completely, peace-builders routinely endeavor to compromise its application and subvert its implementation where it is seen as hindering attainment of their primary objective.

To explore this controversial issue, on February 28, 2003, the Frederick K. Cox International Law Center at Case School of Law inaugurated its war crimes research symposium series, with a conference

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entitled "The Role of Justice in Building Peace." The conference brought together former State Department officials, international prosecutors, military commanders, human rights experts, prominent journalists, and eminent scholars to examine the role of international justice "warts and all" in the peace building efforts of the last decade.

The "Role of Justice in Building Peace" conference began with my introductory remarks, which sought to define the concepts of "justice" and "anti-justice," identify the variety of functions performed by those norms during the peace-building process, and examine the perceived conflict between the approaches of accountability and accommodation which lies at the core of the common belief that it is sometimes necessary to swap justice for peace. This introductory analysis is captured in the first article of the Symposium Issue, entitled "The Functions of Justice and Anti-Justice in the Peace-Building Process."[1]

Immediately following this introduction was a keynote address delivered by Professor M. Cherif Bassiouni of DePaul University College of Law, who had served as the Chairman of the U.N. Commission to Investigate International Humanitarian Law Violations in the Former Yugoslavia and later as the Chairman of the Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court. In his article, "Justice and Peace: The Importance of Choosing Accountability Over Realpolitick,"[2] Professor Bassiouni traces the history of tension between realpolitik and accountability, focusing especially on the half-hearted response to German aggression following the first World War, the failure to respond to the Turkish genocide committed against the Armenian people, the prosecutions before the post-World War II Nuremberg and Tokyo Tribunals, and the efforts to bring those responsible for atrocities in the former Yugoslavia to justice in the 1990s. As Professor Bassiouni points out, these cases indicate an evolving international recognition of the central role that justice plays in establishing the foundations for genuine and long-lasting peace. And yet, Professor Bassiouni warns that the advocates of realpolitik will still seek to co-opt, subvert, and use justice as a fig leaf to achieve accommodation. The check against this, Bassiouni suggests, are the growing number of advocates for international justice across the globe, including many of the distinguished conference panelists, who will continue to keep the pressure on governments, who will make it difficult for governments to make the most egregious or outrageous deals, who will denounce governments when necessary, and who will praise governments when they act honorably and in accordance with international humanist principles.

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[1] Michael P. Scharf and Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT'L L. 161 (2003).

[2] M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitick*, 35 CASE W. RES. J. INT'L L. 191 (2003).

Following the Keynote Address, the first panel consisted of a debate between Professor Madeline Morris of Duke University School of Law and Jerry Fowler, a Director at the U.S. Holocaust Memorial Museum about the usefulness of the "G-Word" (genocide) in diplomacy during times of humanitarian crisis. In her article, "Genocide Politics and Policy,"[3] Professor Morris argues that it is neither good law nor good policy to emphasize the distinction between genocide and crimes against humanity of other types, and that there are substantial costs entailed in maintaining the distinction. In particular, she laments the tendency of human rights advocates to employ the term genocide "promiscuously," that is to use the term in reference to an ever-broadening range of conduct that do not technically constitute genocide in order to claim the rhetorical advantages of the term as a call to action. In the long run, this practice will only waters down the moral and legal significance of the term. At the same time, Professor Morris points out that the contours of the legal definition of the crime of genocide, leave out other equally heinous offenses, for example those targeting political, economic, or social groups which are not covered by the 1948 Genocide Convention. In this regard, Professor Morris takes issue with the popular characterization of genocide as the "crime of crimes," pointing out that this "hierarchy of horror" approach tends to diminish the gravity of other crimes against humanity, which should be combated and prosecuted with equal fervor.

In response, Jerry Fowler argues in "Diplomacy and 'the G-Word'"[4] that the term genocide continues to be useful at both the pre-justice and prosecution stage of responding to atrocities. But to avoid endless arguments about whether a situation qualifies as genocide -- debates that often result in a delayed response – Mr. Fowler proposes an innovative three-tiered warning system to characterize the state of atrocity: "genocide watch," "genocide warning," and "genocide emergency." Under this weather service-inspired approach, governments do not have to make a judgment that a situation constitutes genocide, but rather they can announce that the situation is in a range where indicators of genocide are present, which should be enough to justify action.

The Conference's second panel, "Accommodation Versus Accountability in Peace Negotiations and Implementation," featured several distinguished panelists with real-world experience negotiating peace agreements. Reflecting the nuances of the panel discussion is American University School of Law Professor Paul Williams' article, "The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement."[5] Drawing on his experience as Counsel to the Bosnian

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[3] Madeline Morris, *Genocide Politics and Policy*, 35 CASE W. RES. J. INT'L L. 205 (2003).

[4] Jerry Fowler, *Diplomacy and "the G-Word"*, 35 CASE W. RES. J. INT'L L. 213 (2003).

[5] Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement*, 35 CASE W. RES. J. INT'L L. 219 (2003).

Delegation to the Dayton peace negotiations, and the Kosovar Delegation to the Rambouillet/Paris peace talks, Professor Williams argues that employment of the norm and institutions of justice is necessary to limit the use and mitigate the consequences of the common peace-building approach, which he calls "coercive appeasement." According to Williams, coercive appeasement occurs when politically and militarily powerful third-party states or peace builders, such as the United States or European Union, seek to resolve a conflict by accommodating the primary interests of a rogue regime despite the regime's use of force and commission of atrocities. Coercive appeasement frequently involves efforts by international peace builders to enable those responsible for the conflict to accomplish their objectives by coercing the victim of aggression into accepting agreements conducive to the interests of the aggressor.

The third Conference panel was entitled "International Tribunals and Tribulations: A View from the Trenches." It featured three experts who worked intimately for the international prosecution of persons responsible for atrocities in Nazi Germany, the former Yugoslavia, Rwanda, and Sierra Leone: Professor Henry King of Case Western Reserve University School of Law, who served as one of the prosecutors at the Nuremberg Tribunal; Lt. Col. Michael Newton, who served as Senior Adviser to the U.S. Ambassador at Large for War Crimes issues; and Bruce MacKay, Counselor to the Prosecutor of the Special Court for Sierra Leone. In "Personal Reflections on Nuremberg,"[6] Professor King shared his personal recollections on what it was really like working at history's first international war crimes tribunal, including several first ever published descriptions of the social distractions, the disputes among the prosecutors, the organizational deficits of the prosecution team leaders, and the opposition of the American Bar and media. Despite these obstacles, Professor King describes Nuremberg as a tremendous success, serving as the birthplace of the human rights movement, and the genesis of the concept of universal jurisdiction.

Mr. Bruce MacKay was one of the first people hired by David Crane, the Prosecutor of the Special Court for Sierra Leone, and played a key role in building the institution from the ground up. In "The Special Court for Sierra Leone – The First Year,"[7] Mr. MacKay offers a personal potpourri of observations on the difficulties he and his colleagues faced in Freetown, divided into three categories: people, places, and things. According to Mr. MacKay, the Special Court for Sierra Leone differs from other international tribunals in several respects, some of which created unprecedented

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[6] Henry T. King, Jr. *Personal Reflections on Nüremberg*, 35 CASE W. RES. J. INT'L L. 257 (2003); *see also* Henry T. King, Jr., *Robert H. Jackson and the Triumph of Justice at Nüremberg*, 35 CASE W. RES. J. INT'L L. 263 (2003).

[7] Bruce MacKay, *The Special Court for Sierra Leone – The First Year*, 35 CASE W. RES. J. INT'L L. 273 (2003).

challenges: The Special Court, for example, includes a robust legal defense unit, supported by the Registry in the same manner as the prosecution staff. The Special Court had to operate at the same time as, and in coordination with, an international Truth and Reconciliation Commission, which was established to document the atrocities committed in Sierra Leone. The Special Court was established by an Agreement between Sierra Leone and the United Nations, rather than by a Security Council Resolution or a multilateral treaty like the Nuremberg Charter, raising a host of novel legal issues.

Lt. Col. Newton's article, "'A View from the Trenches': The Military Role in the Pursuit of Justice,"[8] explores the concrete lessons learned and practicalities inherent "in actualizing justice within an operational environment." The article focuses on the controversy surrounding the initial failure of the NATO troops to take action to apprehend indicted war criminals present in their area of operation in Bosnia. (To date, the NATO troops have not apprehended Radavan Karadzic, indicted for genocide, who remains present in Bosnia). Drawing from this experience, Col. Newton makes the case that "in the future, the military needs to ensure that the right mix of legal talent, translation skills, forensics expertise, and investigative capacity is front loaded as far as possible in the deployment cycle."

The fourth panel, entitled "Arresting War Criminals: Mission Creep or Mission Impossible?" featured Major General (Ret.) William Nash, who had served as Commander of the NATO forces in Bosnia and as U.N. Regional Administrator for Kosovo; Ambassador David Scheffer, the former U.S. Ambassador at Large for War Crimes Issues; and Professor Mary Ellen O'Connell of Ohio State University Moritz College of Law. In "Arresting War Criminals: Mission Creep or Mission Impossible?",[9] Ambassador Scheffer traces the evolution in using international forces to arrest war criminals from the failed efforts in Mogadishu, Somalia (the disaster popularly known as "Black Hawk Down") to the successes five years later in Bosnia, which were achieved only after a "battle within Washington" between those who argued that arresting war criminals was not part of NATO's mandate in Bosnia and those who felt the arrest of war criminals was essential to achieve NATO's mandate. Complimenting Col. Newton's article, which focused on the training, equipment, and specialized forces necessary to arrest war criminals, Ambassador Scheffer's piece highlights the political will that must exist to achieve this objective, concluding that the arrest of war criminals can occur only where the Commander-in-Chief and other top government officials place such action as the highest priority.

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[8] Lt. Col. Michael A. Newton, *"A View from the Trenches": The Military Role in the Pursuit of Justice,* 35 CASE W. RES. J. INT'L L. 287 (2003).

[9] David Scheffer, *Arresting War Criminals: Mission Creep or Mission Impossible*, 35 CASE W. RES. J. INT'L L. 319 (2003).

Employing the language of justice advocates, in the aftermath of the September 11th terrorist attacks, the Bush Administration pledged itself to either bring Osama Bin Laden and other leaders of the al Qaeda terrorist organization to justice or to bring justice to them. Following the use of an unmanned U.S. Predator drone, which fired a Hellfire missile against a vehicle in Yemen, killing a suspected terrorist and five other individuals, Bush Administration officials have said that the United States will target al Qaeda and other international terrorists around the world and those who support such terrorists without warning. In this context, Professor Mary Ellen O'Connell's article, "To Kill or Capture Suspects in the Global War on Terrorism,"[10] examines when international law permits killing a suspect and when the law requires an attempt to capture or arrest.

Scheduled to speak as one of the panelists of the final conference panel, "Building the Historic Record: Reporting on War Crimes and International Trials," was my good friend, Elizabeth Neuffer, Foreign Affairs Correspondent at *The Boston Globe*, and author of the critically acclaimed book, "The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda." Unfortunately, Elizabeth was not able to make it to the conference as a few days earlier she was dispatched by the *Boston Globe* to cover the war in Iraq, where she was later killed in the line of duty. Our Symposium Issue is dedicated to this courageous journalist who did so much to publicize the importance of the role of justice in achieving peace.

The journalist's panel is represented in this Symposium Issue by an article written by David Freudberg,[11] a documentary producer for Public Radio International, and host of PRI's "Humankind" series. In his article, Mr. Freudberg maintains that the press has an important role to play in the milieu of international justice, but laments the tendency among many journalists to play the role of stenographers to official power in times of armed conflict, a role which may facilitate the commission of war crimes. From Belgrade's statements about Bosnia to Washington's justifications for the invasion of Iraq, Mr. Freudberg maintains that the words and deeds of officials must be more sharply scrutinized, and more evenly balanced by coverage of unofficial sentiments expressed by those outside the halls of power who may be less beholden to the vested interests.

The closing remarks were delivered by Professor Leila Nadya Sadat of Washington University School of Law, who is a Commissioner for the United States Commission for International Religious Freedom and one of the foremost experts on the International Criminal Court. Professor Sadat's imaginative contribution to this Symposium Issue patterns itself on the

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[10] Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terrorism*, 35 CASE W. RES. J. INT'L L. 325 (2003).

[11] David Freudberg, *Building the Historical Record: Reporting on War Crimes and International Trials*, CASE W. RES. J. INT'L L. 333 (2003).

editorials published by Alexander Hamilton and James Madison in 1787 under the pseudonym "Publius," advocating the ratification of the United States Constitution. In "The Least Dangerous Branch: Six Letters from Publius to Cato in Support of the International Criminal Court,"[12] Professor Sadat makes a compelling case for U.S. ratification of the Rome Treaty establishing the International Criminal Court, employing the style and logic of the Federalist papers.

A few months after the "Role of Justice in Building Peace" Conference, Mr. Aryeh Neier came to Case Law School to deliver the annual Frederick K. Cox International Law Center Lecture. A holocaust survivor, Mr. Neier, has had a distinguished career, serving as Director of the American Civil Liberties Union, founder and Director of Human Rights Watch, and presently as President of the Open Society Institute, which is one of the foremost financial contributor of projects related to international justice. The author of several best selling books on accountability and human rights, Mr. Neier's piece[13] is the capstone of our Symposium Issue, serving as a clarion call to the human rights movement to help make the new International Criminal Court effective and to assist national courts in bringing perpetrators of international crimes to justice.

The "Role of Justice in Building Peace" conference was the first symposium organized by the Frederick K. Cox International Law Center's new War Crimes Research Office, established in 2002 with a grant from the Open Society Institute to serve as the focal point of several programs dealing with accountability for violations of international humanitarian law. Foremost among these is the International War Crimes Research Lab, a unique program in which Case Law students prepare research memoranda at the request of the international prosecutors on issues pending before the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the new International Criminal Court. With the permission of the international prosecutors, a year after the memos are submitted, they are posted for world wide viewing on the Cox Center's new War Crimes Research Portal: www.law.case.edu/war-crimes-research-portal. The Portal includes links to thousands of internet sites related to international humanitarian law and international criminal tribunals, and "instant analysis" articles written each month by prominent experts on salient issues in international criminal law. The War Crimes Research Office also serves as the research arm of the International Legal Assistance Consortium, a coalition of non-governmental organizations which, among other things, is helping to train the new Iraqi judges in International Humanitarian Law.

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[12] Leila Nadya Sadat, *The Least Dangerous Branch: Six Letters from Publius to Cato in Support of the International Criminal Court*, 35 CASE W. RES. J. INT'L L. 339 (2003).

[13] Aryeh Neier, *Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years*, 35 Case W. Res. J. Int'l L. 351 (2003).

The Frederick K. Cox International Law Center and Case Western Reserve University School of Law are extremely grateful to our distinguished panelists for their participation in the "Role of Justice in Building Peace" Conference and contributing to this Symposium Issue of the Case Journal of International Law. Our appreciation also goes out to the student editors of this volume who worked diligently on the preparation of this publication.