

The International Criminal Tribunal: The task that lies ahead

The Honourable Mr Justice Richard J Goldstone, Judge of Appeal (he was recently also appointed as a judge of the Constitutional Court) was on 8 July 1994 appointed by the United Nations Security Council as the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia.

Born on 20 October 1938, Judge Goldstone was a member of the Johannesburg Bar from 1963 to 1980 when he was appointed as a Judge of the Transvaal Provincial Division of the Supreme Court. He was elevated to the Appellate Division with effect from 1 October 1990.

Since 1991 Judge Goldstone has served as the Chairman of the Standing Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, which was established under the National Peace Accord signed by political parties and groups in South Africa.

In addition to being an important personal honour to Judge Goldstone, this appointment represents international applause for the work done by the Goldstone Commission. It can also be seen as a signal that South Africa is now back in the family of nations.

Letty Mpho Molopa of the Pretoria Bar was asked to undertake the necessary research and to enlighten us on Judge Goldstone's new assignment. She responded as follows:

In a bid to bring to justice the perpetrators of genocide or other atrocities experienced within the territory of the former Yugoslavia, the United Nations Security Council decided, in 1993, to establish a war crimes Tribunal to prosecute those responsible for those atrocities. The International Criminal Tribunal for the former Yugoslavia was consequently



Letty Mpho Molopa

established by Resolution 827 (1993) – the first International body to try war criminals since the Nuremberg and Tokyo trials of World War II. This Tribunal is seated in the Hague, Netherlands.

The Tribunal is empowered:

- To prosecute persons alleged to have committed or ordered the commission of grave breaches of the Geneva Convention of 1949, the violations of the laws or customs of war, crimes against humanity and the crime of genocide.
- To try persons presumed responsible for violations of human rights in the former Yugoslavia.

The main focus of the Tribunal is individuals, both those who committed the crimes and those who participated in the planning and the preparation of such crimes.

The Tribunal is endowed, through the United Nations Security Council, with

the enforcement of measures which, failing the voluntary co-operation of the member states, would ensure compliance with the Tribunal's requests for judicial assistance.

The Tribunal, being a subsidiary organ of the Security Council, is to perform its functions independently of political considerations and shall not be subject to the control or authority of the Security Council with regard to the performance of its judicial functions.

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The Tribunal shall consist of three organs, namely two trial chambers and an appeal chamber.

In addition to the Prosecutor there is a Registry, which shall be responsible for the administration and the servicing of both the Chambers and the prosecutor, and which will serve as a channel of communications. Prof Theo van Boven of the University of Limburg in the Netherlands has been appointed as the acting Registrar of the Tribunal.

The Tribunal consists of eleven judges, who have been elected for a four year term by the General Assembly from a list of nominees submitted by States. The judges are from Italy, Costa Rica, Egypt, Canada, Nigeria, France, China, United States of America, Pakistan, Australia and Malaysia.

Three judges will sit in each Trial Chamber and five in the Appeals Chamber.

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There is also a Deputy-Prosecutor – Mr Graham Blewitt, former Director of the Australian War Crimes Prosecution Unit, who will work hand in hand with Judge Goldstone in the office of the Prosecutor.

The Office of the Prosecutor will include:

- The investigation unit;
- The prosecution unit; and
- The victims and witnesses unit

The Victims and Witnesses unit will recommend protective measures for victims and witnesses and provide counselling and support for them.

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The Tribunal shall apply only those Rules of International Humanitarian Law which are beyond any doubt part of customary International Law, which are embodied in:

- The 1949 Geneva Convention for the Protection of war victims;
- The 1907 Hague Convention of the laws and customs of war on land and the Regulations thereto;
- The Nuremberg Charter;
- The 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

and adopted by the United Nations Security Council in its resolution 827 (1993) of 25 May 1993.

In operating in this way, the Tribunal is set to receive the full backing and support of the international community.

These Rules provide the necessary structure for the functioning and organisation of the Tribunal, and also for the conduct of the pre-trial phase of the proceedings including:

- Investigation and indictment by the Prosecutor;
- Trials and appeals before the Tribunal;
- Detention of persons awaiting trial or appeal before the Tribunal;
- The admission of evidence;
- The protection of victims and witnesses;
- Orders and warrants; and

- The appointment or assignment of counsel to indigent suspects or accused.

What is of great importance here is that major legal systems of the world have been taken into consideration, thus the approach shall largely be adversarial as opposed to inquisitorial.

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Pursuant to Article 29 of the Statute adopted by the Security Council in its Resolution 827 (1993), the Rules place a strong emphasis on the obligation of the Nation States to co-operate with the Tribunal and to take whatever steps may be necessary to comply with any of its orders, including the enactment of national legislation, where necessary, to remove any impediments which may exist to the surrender or extradition of suspects or accused persons.

Where there is inaction or refusal to co-operate by a nation state, the Tribunal will report the matter to the United Nations Security Council for its decision.

These Rules confirm the primacy of the Tribunal over national Court proceedings on the same subject matter. The Tribunal is empowered to require a state to defer to the Tribunal's jurisdiction and may request a stay or deferral of proceedings, especially if it appears that the national Court proceedings are not impartial or are designed to shield the accused from international criminal responsibility. This reiterates the latitude extended to the Tribunal to enable it to function effectively and unhindered.

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The detainees are also catered for. At its third session held from 25 April to 5 May 1994 in the Hague, the Tribunal

amongst others discussed and adopted Rules governing the detention of persons awaiting trial or appeal before the Tribunal, or otherwise detained on the authority of the Tribunal, which Rules are now termed "The Rules of Detention". The latter Rules will govern the administration of the detention unit for detainees. Furthermore, these Rules are aimed at ensuring the protection of detainees' individual rights while in detention; the conditions of detention of inmates, including their rights and obligations from their detention to release; and also the basic criteria for management of the detention unit.

Counsel will also be assigned to indigent suspects or accused to ensure that every person involved has the right to legal representation.

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Several burning questions arise: What does or can the world expect? Will Judge Goldstone succeed in the enormous task he is faced with? Who is responsible for all the atrocities or genocide committed within the territory of the former Yugoslavia? How many people are going to be prosecuted? Will the trials *per se* stop the "crimes" or atrocities of the nature experienced within the former Yugoslavia? Will all these measures have any effect on other parts of the world threatened or faced with what former Yugoslavia experienced?

One thing is certain, The task facing Judge Goldstone as Prosecutor of this Tribunal is enormous. The fate of not only people of the former Yugoslavia, but also people elsewhere in the world will be influenced by both the outcome of the former Yugoslavia trials and the reaction thereto.

We wish Judge Goldstone the best of luck in the task ahead of him. □

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