

## **THE JOHN BRAY ORATION 2009**

### **REVENGE OR FORGIVENESS: TRUTH AND RECONCILIATION IN THE AFTERMATH OF HUMAN RIGHTS VIOLATIONS**

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#### **JUSTICE RICHARD GOLDSTONE**

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Mr Chancellor, Judge Barrett, Dean Owens, Ms Matthews, ladies and gentlemen.

Thank you, firstly to the Chancellor for his very generous introduction. And thank you also for inviting me to deliver the 2009 John Bray Oration. It's a great privilege, in particular, for two reasons.

Firstly for following a long line of distinguished speakers who have given this Oration in the past. I was informed not more than a few minutes ago that I am the first non Australian to deliver the John Bray Oration, and that's an additional privilege.

But more to the point it is a privilege because I am able to join with you in celebrating the life and career of a distinguished Chief Justice of South Australia, and a Chancellor of this University.

Justice Michael Kirby, in an essay he wrote not too many years ago on Justice Bray put it rather well, and I couldn't help but think that I should repeat his words now.

“Bray disdained the trivial, the polemical and ephemeral. He kept his eye on the long haul, stimulated by a deep respect for history and informed by an appreciation of the strengths as well as the weaknesses of our laws and institutions. He was a special Judge; a fine poet and an engaging man. It is right that we honour his memory. In courtrooms around Australia that memory is still invoked. Still it illuminates the search of justice under the law As Bray knew, such is the legacy that a good judge leaves behind to the generations that follow.”

So it's fitting that this University should celebrate the life of Chief Justice Bray.”

I propose to talk about two particular aspects of international and domestic justice.

The one is what's come to be known as transitional justice; justice that applies when a country is moving from oppression and human rights violations into freedom and democracy. How do you deal with the past?

And the second, a related area, is the International Criminal Court and its place in transitional justice.

Transitional justice is a comparatively new phenomenon, and began in Latin America in the 1960s when some nations there started their movement towards democracy, and we should rejoice

in the fact that there is and has been a growing industry, called transitional justice, as more and more countries have come out of colonial bondage and other forms of oppression.

This welcome trend has also spread to Africa. The problem facing these societies is really this, what do you do about the past? Do we take the easy way out and forget about it? It is very beguiling and very understandably popular for the previous oppressive leaders to say, let's forget about the past, why waste our energies and our money and all the rest of it on looking backward, let's join hands and walk together into a bright and sunny future. Well that's the one option, to forget about the past.

At the other extreme, perhaps, is Nuremberg style trials, putting the former criminal, oppressive leaders on trial and if found guilty, putting them away for a long period of time. The second is obviously popular with the new leaders, with the freedom fighters, if you will, in many countries. But of course, that option makes it very difficult to negotiate a settlement. If the former oppressive leaders think they are going to end up in prison they are not going to be amenable to agreeing to give up power. So the third option, which has become popular in some countries including my own, was to set up a truth and reconciliation commission; neither to forget the past, nor to have trials. In South Africa it was combined, and I will come back to that shortly, it was combined with a procedure for amnesties.

The first option, forgetting the past, I would suggest is a disaster. It is a recipe that's bound to end up in unhappiness, and in many

countries, where the past has been forgotten, people have been doomed to repeat that past. If one looks at the former Yugoslavia going right back the 14<sup>th</sup> century, there have been cycles of violence. The past was never dealt with. It was never looked at. Victims were never acknowledged. In Rwanda , similarly, over a period of at least a century there were outbreaks of violence between the two dominant tribes, the Hutu and the Tutsi, and never any attempt to grapple with the past and to have some sunlight allowed in to illuminate what happened. I need hardly add that serious human rights violations are perpetrated in darkness.

In a perfect society, the second option, that is putting criminals on trial, is the moral way forward. People who commit crimes of the magnitude that have been committed in the countries to which I have referred, the former Yugoslavia and Rwanda, and in many others, whether it be in Northern Ireland, the Middle East, you name it. Until recently there was no attempt at all to bring the perpetrators to justice. There was, in effect, complete international impunity for war criminals. But for the reason I mentioned a little earlier, to have Nuremberg style trials might, in some situations, hamper peace negotiations.

Apart from the political difficulty associated with the holding of trials for past human-rights violators, there are also logistical problems. Take Rwanda as a paradigm. In the middle of 1994, there were some 800,000 people murdered in about a hundred days. Quite unimaginable efficiency in the killings, especially if one takes into account the fact that these were eyeball to eyeball killings. They weren't the people who were killed by use of modern arms. So in

Rwanda, a conservative estimate would yield a statistic of about 300,000 murderers in that small country. Murders committed as I say in approximately three months. Now no criminal justice system in the world, even in the wealthiest country of the world, the United States, (or certainly it was until recently), couldn't put on trial 300,000 people. If they lived long enough, the process would take hundreds of years. And that is true, too, in the former Yugoslavia, in Sierra Leone, or in the Sudan. So from a practical point of view, there are simply insufficient courts to hold trials for all of the criminals.

The tendency has been to do nothing, and that, as I've said is not a good idea and leads to revenge eating away at peace in the community. If victims are not acknowledged and made public, revenge becomes their preoccupation. Their healing process very often doesn't begin.

So it is in that context that this compromise of a truth and reconciliation commission becomes relevant.

And it is a compromise. It is a political compromise for the reason I've mentioned between doing nothing on the one hand, and having prosecutions on the other, and obviously it is a moral compromise too, because the victims are being robbed of full justice. They are not seeing the perpetrators of their misery dealt with in an appropriate manner.

Truth commissions and prosecutions are not mutually exclusive. In South Africa that we had the Truth and Reconciliation

Commission headed by Archbishop Desmond Tutu, and simultaneously we had the prosecution of apartheid criminals.

Before I move on let us look a little more closely at the experiences of Chile and South Africa. The Chilean experiences played an important role in assisting South Africa decide on its own truth and reconciliation commission.

The Chilean commission was set up in the aftermath of decades of oppression under the military regime of General Pinochet.

Pinochet gave up power voluntarily. He said, I'm prepared to hand over to a civilian government duly elected in an open election. At the end of the 1980's President Patricio Aylwin was the first civilian democratically elected Head of State. He had promised his people that if he was elected there would be a truth commission to lay bare what had happened to many victims during the Pinochet regime. However, Pinochet then still controlled the army he told Aylwin that he was prepared to allow him to have a truth commission, but subject to conditions. He said that is Aylwin did not accept his conditions the army would remain in power, and Aylwin's government would not be permitted to take office.

The three conditions laid down by Pinochet, which Aylwin had to accept were the following. First, that the Commission could only investigate disappearances (this horrible concept that people "had been disappeared). And why did he say only the disappeared? Because he knew that there would be no witnesses who could point a finger at members of his armed forces. If he had allowed torture to be investigated many of the victims could have named

the torturers. In the case of the disappeared there could be such identification.

The second condition was “no public hearings”. The evidence given to the Truth Commission was to be given in private without any media presence.

And the third important condition was that no names of the perpetrators could be made public.

So it was a very limited truth commission, but it was that or nothing, and Aylwin accepted those difficult and inappropriate conditions. The Chilean Commission nonetheless had some success. It began its work in May of 1991 and completed it very promptly in February of 1992. It investigated over 3000 disappearances, and the evidence was collected in volumes of evidence and findings. It was formally handed to President Aylwin on public television and President Aylwin made a fulsome apology to the people of Chile.

He said it wasn't his government, it was the predecessor government, but all governments are responsible for what their predecessors did. And he apologised to the people of Chile for the suffering that they were put to by the then government.

So, the work of the Chilean commission, notwithstanding that it had limitations did assist with reconciliation in Chile. It did enable the country to go forward into a democracy with at least the benefits that flowed from the acknowledgement. And, President

Aylwin, to his credit, sent copies of the report to all the victim families, with a personal letter saying “here is the full report of the Commission, you will find your family, or your father or your mother or your whatever it is, referred to at page 2646 of the report”.

The sequel took place years later, at the end of 1998, when Pinochet was arrested in a London clinic. The arrest was effected on the strength of an arrest warrant issued by a Spanish judge claiming the extradition of Pinochet for crimes committed during the time of his regime. Some of the charges against Pinochet were under the 1984 Torture Convention to which both Spain and the United Kingdom were parties. To the surprise of many, the House of Lords ultimately upheld the arrest. The then Home Secretary, Jack Straw, had the final say on whether Pinochet was to be sent to Spain to face trial. He took the view, probably influenced by the politics of the situation, that because of Pinochet's poor medical condition he should not be sent to Spain. He returned to Chile with startling consequences. The people of Chile immediately demanded greater access to the truth. In the result, Pinochet's self granted amnesty was withdrawn by the Supreme Court. He had appointed himself a Senator for life and too was withdrawn. Fraud and torture charges were brought against him. Unfortunately, he died before he was brought to trial. The effect on the people of Chile was substantial and beneficial.

As in Chile, most of South Africa's human rights violations during the apartheid era were committed in the dark, and particularly in police cells, where many innocent South Africans were tortured, and many were murdered. The response of the apartheid

government was denial. It was denied that people were murdered in police cells. It was reported that they had slipped on bars of soap and suffered fatal head injuries. It was reported that they had attacked police officers who, in self-defence, inflicted injuries that proved to be fatal. These fanciful and often ridiculous fabrications were by and large believed by a gullible white public. It was more comfortable for white South Africans to accept these denials of criminality that were ostensibly committed on their behalf.

At about the time that apartheid was coming to an end there were enquiries into African National Congress human rights violations in their camps in some of the African countries. And, under the leadership then of Oliver Tambo and Nelson Mandela, they held their own unofficial enquiries into human rights violations in their camps. And they were found wanting and apologies were made by the African National Congress. And when South Africa was moving to democracy, members of the African National Congress said to Mandela, “you know, if we investigated allegations made against us, on what basis do we not investigate human rights violations committed in numbers that far exceed those that we have investigated.”

Well, if Nelson Mandela had got his way, I've no doubt he would have liked to have seen Nuremberg style trials for some of the apartheid leaders, and particularly the senior officials in the police, and the army, and no doubt some of the political leaders too. But he knew that that demand would not result in a negotiated transition to democracy in South Africa.

President de Klerk, the last apartheid President, if he had been granted his way, would have had no trials at all, and no truth commission. What his government wanted, and tried to get, were blanket amnesties. Legislation was attempted, unsuccessfully I'm happy to say, to grant amnesties to all the apartheid officials.

So, as I've indicated there was this political and moral compromise in having a truth and reconciliation commission. In addition to the evidence of victims, the South African Truth Commission was given the authority by Parliament to grant amnesties, discrete amnesties, to people who came forward and confessed fully to crimes committed during the apartheid era. So it was amnesty in return for a complete and frank confession. No apology was required. It was felt that apologies are too easy. What victims want is acknowledgement. I would suggest that in this country there has been much confusion between apology and acknowledgement.

What victims need is the public acknowledgement of what happened to them. That's what they need. It's not simply I'm saying I'm sorry, which is often cheap and easy and thus not meaningful.

And certainly the acknowledgements that were made by some who sought amnesty in South Africa were very important. There was a huge outpouring of evidence in South Africa. Over 20,000 victims gave evidence of what happened to them. And that was only in the area of serious human rights violations. It wasn't the so-called "petty" apartheid laws that made the life of 80% of our people

unbearable from the day they were born until the day that they died.

In my view the greatest gift to my country from the Truth and Reconciliation Commission was that in consequence we have one version of the history of what happened during the apartheid era.

Without that Truth and Reconciliation Commission we would have at least two histories. Broadly speaking, there would have been a white history, based on fabrication and denial. And there would have been a black history, which would have approximated the truth because the victims know what happened to them. The result of the Truth Commission is that my grandchildren and their grandchildren will be taught, the same history of Apartheid South Africa as will be taught to all other South African students.

Allow me, in the time remaining, to turn to international criminal justice. Until the middle of the 1990s, when the United Nations Security Council set up the International Criminal Tribunal for the former Yugoslavia, there was no such thing as international criminal Justice. There was no International Criminal Court in existence. For the first time, there was a truly international court. Nuremberg was a multinational but not an international court. At Nuremberg the judges came from the four victor nations. In the case of the Yugoslavia Tribunal the judges did not come from the nations where the crimes were committed but from other nations on five continents. As many of you will know, one of the original eleven judges was Sir Ninian Stephen, a former Governor General of Australia. That Tribunal was followed, towards the end of 1994

by the International Criminal Tribunal for Rwanda. For the first time people were brought before an international court and made to face charges of gross criminality, including genocide and crimes against humanity, including systematic mass rape. Those were crimes that caused the deaths of hundreds of thousands of people. In some cases they caused millions of people to flee their homes and become displaced persons, or refugees. In the case of Rwanda caused the destabilisation of the whole of the Great Lakes area of Central Africa. Those events are causing seismic disruptions even today.

So, that was something new and those tribunals were sufficiently successful to give rise to other tribunals, so-called mixed tribunals, for Sierra Leone, for East Timor, for Cambodia, and most recently for Lebanon. The Lebanon tribunal was only inaugurated last week in The Hague.

And of course we have Charles Taylor, the former Head of State of Liberia standing trial before the Sierra Leone tribunal. We have Karadzic, the self-proclaimed president of the Republika Srpska, the Serb enclave of Bosnia-Herzegovina, similarly standing trial before the Yugoslavia Tribunal. Those tribunals were sufficiently successful to give encourage steps to be taken to set up a permanent International Criminal Court. I'm happy to say that both your country and mine played important roles in supporting that movement, which started in Rome in 1998. Today, 108 nations have ratified the Rome Treaty setting up the International Criminal Court.

There are four situations before the court at the moment. All come out of Africa, importantly, not at the instance of the prosecutor. Three of the situations, in the Democratic Republic of Congo, in the Central African Republic, and Uganda, were self-referred by their respective governments. And the fourth, the Sudan, was referred to the Court by the Security Council. So any talk of the court being anti-African or being biased in any way against Africa is really without foundation

It is interesting to consider, as a hypothetical, what might have happened in the event that the International Criminal Court had been up and operating at the time of the South African Truth and Reconciliation Commission. Assume that some victims had referred the Apartheid crimes for investigation and prosecution. Would the Prosecutor have attempted to second-guess the decision of the democratically elected South African Parliament?

I would suggest that the solution is found in the Rome Statute. First, there is the system of complementarity. This means that the ICC is a court of last resort. If nations are willing able to prosecute their own criminals the international court has no jurisdiction in respect of those crimes. Furthermore, the Prosecutor, under the Rome Statute may decline to prosecute where it is not in the interests of justice to do so. In a case like South Africa, I would imagine a prosecutor would have said: "It's not in the interests of justice to second-guess the victims of apartheid, who through their democratically elected parliament wanted to have a truth and reconciliation commission." As serious as the Apartheid crimes might have been, they did not constitute genocide. In a United

Nations Convention of 1973 Apartheid was, with every justification, held to be a crime against humanity. But the level of criminality may just have enabled a prosecutor to find that if this is how South Africa wants to handle it, and they're also having prosecutions, it is not a matter for the International Criminal Court.

In more serious cases such as the Sudan, where in my view there is strong evidence of genocide I think it's very different. I don't believe that criminality at that level should be dealt with in any way other than by criminal prosecution. That is the way the global community is going. It seems to me that the international community, your country and my country and now 108 countries, are saying that that it's enough of impunity, and that war criminals must be brought to justice before an International Criminal Court, unless their countries are not prepared to investigate and put those people on trial. So, that's the approach, and its certainly gathering force.

One of the problems of course, is the lack of support thus, far from the United States. That too is changing. Even in the last two years of the Bush administration, the attitude of the American administration has changed from one of trying to kill off the International Criminal Court, to assisting it in cases that are consistent with the foreign policy of the United States. And there is no question that the Obama administration is going to go much further along that route. The recently appointed Ambassador to the United Nations, Susan Rice, is a supporter of the International Criminal Court.

I support the action of the ICC in issuing an arrest warrant against President al Bashir of the Sudan. The charges brought against him of atrocities of the worst sort, call for prosecution. Since its issue, he has compounded his crimes by expelling important aid agencies from Darfur and so imperilled the lives of many more hundreds of thousands of people in that region of his country.

So, ladies and gentlemen, let me stop there by saying too, that what's exciting in the modern world, and particularly in democracies, is that these developments have happened to a great extent because of a ground swell from civil society. Its human rights organisations in Europe and America and Canada, in your country and mine, that have persuaded governments to become more actively involved in this area. Students here have asked me during a wonderful week in Adelaide, how they should become involved. The answer I give them is that they can do a great deal by becoming involved, not only in their professions, but in your private lives, by encouraging governments to do the right thing at home with regard to human rights.

I was very fortunate when I became the chief prosecutor of the Yugoslavia tribunal in having absolutely outstanding assistance from Australia. I had never prosecuted, and my deputy prosecutor Graham Blewitt was an exceedingly efficient prosecutor who had been involved in Nazi investigations in Australia. He and other Australians played an important role and I think this should encourage people in this country to take in those achievements, and to encourage more people to become involved in these very important endeavours for the future.

Thank you very much.

## **Questions and answers**

### **Zimbabwe.**

Well, the Zimbabwe question obviously is a very complex one and one would need a complete lecture on itself to talk about it. There does appear to have been a healthy development in recent weeks with the power-sharing agreement and the appointment of opposition leader Morgan Tsvangirai as Prime Minister. However, I remain pessimistic for the short term. I think that Mugabe still has control of the army and the police. He's driven his country into ruin, economic ruin, the health system has almost been completely destroyed, and the only people, who according to my information, who are really receiving any sort of decent income are the police and army who are supporting Mugabe. So, my fear is that as long as he is there true democracy is not going to come to Zimbabwe. I hope and pray I am wrong, I hope that it does work and I hope that the power-sharing agreement will bring not only peace but at least reverse the tremendous nosedive into penury and starvation. Let me say too that as part of what must be an incomplete answer to your question that I regret that African leaders have done so little, and particularly until recently, President Mbeki of South Africa. It seems to me that it is to some extent part of a postcolonial syndrome from which Africa has suffered and from which it is slowly recovering. One of the symptoms is that its leaders not wishing publicly to criticise each other. One is witnessing it right now in the opposition of the African Union and the leaders to

issue by the ICC of an arrest warrant for President al Basher of Sudan. They didn't object when Milosevic, then Head of State of Serbia was indicted by the ICTY. They were not concerned when a former head of state, Charles Taylor of Liberia was brought before the Special Court for Sierra Leone. However, an arrest warrant for a current head of state was too much. It is a pity that more pressure was no put on Mugabe by African leaders. The fact that such pressure and criticism came mainly from the North and the West made it more difficult. It was dressed up by Mugabe as an anti-African vendetta. Of course it wasn't. But I suggest that stronger action from Zimbabwe's neighbours might well have had a more effect.

### **Women's rights and victimhood**

It's also a complex subject. I would say in response that the development of women's rights, and the recognition of women's victimhood has taken tremendous strides in recent decades. I can give you one example in the area in which I been involved in the case of war crimes. When I came to The Hague, I was impressed by thousands of letters I received from women, mainly women, but also men, in many countries on all continents beseeching me to take into account systematic mass rape in the former Yugoslavia. And when we started with Rwanda there was a similar incidence of systematic mass rape and other huge gender crimes - enforced prostitution, enforced pregnancies, the most horrible crimes. There was no reference in the Laws of War to gender crimes. In

particular there was no reference to systematic mass rape. There is reference to inhumane treatment, to murder and torture but no reference to gender crimes at all. My guess is that the reason for that is lies in the fact that those laws were written by men for men and it was assumed that rape, like plunder, was accepted as an inevitable consequence of war. No thought was given to rape having been used over the centuries by evil leaders as a way of waging war. With the encouragement of some women judges, in particular, Elizabeth Odio Benito from Costa Rica on the Yugoslavia tribunal, and Navanethem Pillay from South Africa on the Rwanda Tribunal (she is now the United Nations High Commissioner for Human Rights), the law has changed. And if you look at the Rome treaty, you will find appropriate treatment of gender related crimes.

### **Truth Commissions across and beyond borders?**

You refer to the Balkans and to Japan. I think there are very few countries where truth commission of one kind or another would not be beneficial. In South Africa , in less than two a half years, a period of 40 years of apartheid was covered. You can't do that by criminal process. Its too cumbersome, and if you're going to have fair trials it takes a long time. So truth commissions have a huge advantage of producing the truth, as it were, wholesale rather than by use of the retail system of criminal prosecutions. There are substantial benefits from a truth and reconciliation commission. Not all countries can have them. Firstly, they cost a lot of money. We were fortunate in South Africa in that we could afford to have a sophisticated truth and reconciliation commission. Secondly, there

has to be the political will, and some governments don't have the political will. And thirdly, it's got to be militarily possible. As I mentioned, in Chile it wouldn't have been possible from a political or military point of view. It's difficult to generalise. I think the short answer is that every country has to decide for itself what's possible and what is beneficial.

### **How do you decide who to prosecute?**

An international prosecutor has literally thousands of people from whom to choose. How does one decide? Well all of the international prosecutors, and all of the courts I have mentioned have all been agreed that one should go for the most guilty, to go as high as the evidence will allow you to go. The guiltiest people are the people who order these things to happen. They are more guilty even than the people who carry out the orders. When we began in the former Yugoslavia, we didn't have evidence against the leaders. So we had to start at a lower level against people in respect of whom we had evidence. No professional prosecutor with any integrity is going to bring out indictments against people if there is not sufficient evidence. So we had to start with indictments against people at a lower level. There were no smoking guns. We didn't have the sort of documents that were available to the Nuremberg prosecutors. We had to build up our cases by using eyewitnesses and they normally dealt with lower-level perpetrators. A leader such as Karadzic was eventually indicted for genocide and crimes against humanity. So the theory is easy, you go for the guiltiest. But that has to be tempered by the necessity of going for people against whom you have sufficient

evidence and waiting if necessary for cases against those who are more guilty.

### **Provision of compensation as part of a Truth and Reconciliation Commission**

Well thank you, I think it's very important question you've raised. Not many governments, in the aftermath of serious human rights violations can afford to compensate the thousands of victims in their societies. In many respects too much is expected of justice, of prosecutions, of truth and reconciliation commissions. They are only one tool amongst many that are needed to heal a society that suffered to the extent to which South Africa and other countries have suffered. One of the many problems in South Africa is the very high rate of unemployment. It is estimated at some 30 – 40 %. The conditions for many black South Africans have not really improved since the end of apartheid. The benefits from democracy have not really filtered down. I am happy to say that many millions of black South Africans now have got roofs over their heads when they did not prior to 1994. Even more millions have running water and electricity. Black townships, which were really run down with few tarred roads and no playing fields and no decent schools have been upgraded tremendously during the 14 or 15 years since the end of apartheid. But it's a slow process. Government funding is limited and populations grow apace. We also suffer from having to cope with many millions of illegal immigrants. That, too, is fuelling the criminal violence. So there are huge problems, but I think you're right. What people want to see are benefits for themselves. One of the challenges in countries like

South Africa is the ability of government to demonstrate that democracy can improve the lives of the people. If I was a black South African after 15 years of democracy, and in a worse off position, I would question the system. I would see some benefit from the system in Zimbabwe where the deprived helped themselves to the farms of the wealthy white farmers. There are huge imbalances in our society between the wealthy and the poor. The wealthy now include a large number of black South Africans who have benefited from the end of racism. Governments have to demonstrate to their people that there are some benefits for them from the system that's been adopted.

## **Sudan**

I really think I should invite you to come and answer your own question, because I'm really not an expert, either on the Sudan or particularly on Sudanese politics. But what I do know is that the peace efforts have not come to a great deal in the Sudan, and I believe ultimately, it's all a question of leadership. Without good leadership South Africa wouldn't have experienced a comparatively peaceful end to apartheid. I say comparatively peaceful because many people died in the negotiating period between 1990 and 1994. Unfortunately many areas of the world where there are huge troubles don't have the sort of leadership that South Africa was blessed with in having a model such as Nelson Mandela, and pragmatist such as President de Klerk who saw the writing on the wall and was prepared to get his people to go along with him in handing over power. I don't see that sort of leadership in the Sudan at the moment and I believe it's important

to get people like President Bashir out of the way so that new leaders can emerge on all sides and negotiate peace.