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## **Distinguished Jurist Panel: Insights and Perspectives on the History and Development of Human Rights Norms**

*Panelists: Justice Richard Goldstone and Judge Fausto Pocar*

*Moderator: Professor Linda Carter*

**Professor Carter:** Let's first go back in time and think about a starting point for each of you when you first became involved in human rights. What was that starting point? What were the issues then?

**Justice Goldstone:** For me, the beginning of my involvement in human rights was really when I became active as a first year student in the anti-apartheid movement. The anti-apartheid movement was really a human rights movement. We were very lucky in South Africa that it was so. It was more human rights than political in many senses and, of course, literally, the bible of Nelson Mandela and other black leaders in South Africa was the Universal Declaration of Human Rights. It was in 1956 that the African National Congress held a huge meeting that was on the second day broken up by the South African police. It was a huge meeting held in what now is called Soweto, where there was overwhelming support for what became known as the Freedom Charter, which was an inspirational constitution for a future democratic non-racist and non-sexist society. For 1956 in Southern Africa, it was a very avant garde approach. It also referred to social and economic rights. It was a very advanced document for its time and, of course, it was branded by the South African government as being a communist-inspired document and it was really an anathema, but that was the basis when I became a young student in the late 1950's and early 1960's. The international community, particularly the United States, had engaged South Africa, so I became a student leader involved with leaders of the United States National Student Association. Allard Lowenstein paid a visit to Johannesburg and we became friendly, and I nearly got in trouble because he smuggled a student out of South Africa illegally in the trunk of his car. He had gotten in as a result of—the excuse was—to come visit some student leaders, and I was one of them. I didn't know what he was going to do, fortunately, because I don't think I would have slept at all at night. But that was the beginning of human rights for me.

The other earliest memory I might have was, as a young law student, being approached to sit on a committee of just three students to investigate the possibility of having a limited franchise in a democratic South Africa. The idea was a qualified voters' roll based on land ownership or education. It was, of course, a hopeless idea. That is the way it began for me.

**Judge Pocar:** My involvement coincided with my election to the Human Rights Committee. It happened by chance. My government wanted to nominate somebody to that election in 1984. There were very, very few chances to be elected—almost zero—and I was offered something in exchange. They said, “Will you accept?”—because they wanted to nominate somebody—and, “You will be our delegate to the Committee for the peaceful uses of outer space.” So I accepted and eventually I was elected and both positions continued with outer space and human rights. But I didn’t go to the point of dealing with human rights in outer space. However, I was more deeply involved with human rights, and as of that moment never stopped working in this field.

**Professor Carter:** What year was it that you became a member of the Human Rights Committee?

**Judge Pocar:** 1985.

**Professor Carter:** At that time what were the major issues coming before the Human Rights Committee?

**Judge Pocar:** I was a bit surprised when I joined the Committee because I had a different view of the situation of human rights. The world was still divided by the Cold War. I had been told that the West was supporting civil and political rights and the East was supporting economic and social rights. This is what Richard was just saying. In fact, when I approached the system that’s what it started to do. It’s true that there are two covenants—the International Covenant for Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESC”)—but it’s not that one was supported by the West and the other by the East—it’s simply linked to the mechanism of implementation of one set of rights and the other set of rights. The evidence of this is that the Soviet Union supported the Covenant on Civil and Political Rights. The problem was that their interpretation was different. But the Eastern show of universality of rights was still an issue that was accepted by everybody. The universality principle of the Universal Declaration was supported by the Teheran Declaration—the first U.N. conference on human rights in 1968—and it was only at the end of the Cold War that the principle started to lose support. But as I say, the interpretation was very, very much different, to the point that, in order to reflect the different approaches, in the Human Rights Committee—we were the main human rights independent body in the U.N., but I assume it was the same with other bodies like the International Law Commission (“ILC”)—it was felt necessary, if Germany was represented, to have both a Western Germany and Eastern Germany member. Obviously, their position was not normally the same on many issues, although once I wrote a dissenting opinion together with the two of them.

**Professor Carter:** Let’s go back to an earlier point where we were talking about universal human rights and the Universal Declaration of Human Rights.

Apartheid was a clear target to go after in terms of human rights. In terms of the broader instruments such as the ICCPR or the Universal Declaration of Human Rights, what in your minds was the significant impetus for the development of international human rights instruments?

**Justice Goldstone:** It was a post-World War II development. I think World War II introduced people from around the world to new ideas. On a macro and micro level. In South Africa, for example, many black South Africans fought in the South African army against the Nazis in North Africa and in Central Africa. The army didn't practice racial discrimination. The black troops weren't in the top positions, but there was no discrimination. When they came back home, they came back to the old horrible segregation—in the American terms Uncle Tom laws. That led to political agitation on the part of black South Africans and, of course, it worked against them because they kept going backwards. That led eventually to Nelson Mandela and his colleagues turning to using violence against non-civilian targets. I always, in my imagination, wish I was a writer. It would make a wonderful book to have an imaginary conversation between Nelson Mandela and Martin Luther King, Jr. on the use of violence in South Africa to bring down apartheid. In Europe, colonialism was up and running—and for that reason the anti-apartheid movement was blunted. The Western European powers abstained from all the anti-apartheid conventions and resolutions in the United Nations because they were lively issues in their own countries. Australia had its own racial immigration policy. So it was a very complex world, but that's really where the international human rights movement was born.

**Judge Pocar:** I agree completely; these were the issues at the time.

**Professor Carter:** It sounds like the reaction of states during this period was mixed to the idea of international human rights. There was some resistance because of the skeletons in the closet, but there was movement towards it because World War II triggered a lot of thinking about how people were treated, especially after the war. Judge Pocar, you referred to having both East and West Germany represented on the committee. Given that the states had skeletons in their closets or different interpretations of human rights, what accounts for the fact that we were able to develop international human rights instruments like the ICCPR, which really came into force in 1976?

**Judge Pocar:** Well I think it was part of a general movement. On one hand, there was the wish of the West to stress certain principles and to have some implementation mechanisms; on the other hand, developing countries—which became independent after the Universal Declaration—wanted to have an instrument with more precise rights than those contained in the Declaration. Both wanted to improve the situation. This probably played a significant role in drafting the covenants. Furthermore, it was already a commitment that was taken by the General Assembly when adopting the Universal Declaration to draft

treaties on that basis, to provide for implementation mechanisms. Drafting mechanisms was more the idea than drafting rights.

**Professor Carter:** The Universal Declaration came about in 1948 after World War II. We can think back to the ending of apartheid; we can think of World War II; we can think about immediately post-World War II in this situation. If you think about the developments in human rights, is there anything that surprises you about developments today?

**Justice Goldstone:** What is surprising is the rapid movement and the rapid development of international human rights and international humanitarian law. In historic terms, they are very young. If you look at the history of the law, you can go back thousands of years, but a little more than two decades ago there was no such thing really as international criminal law—it didn't exist. International human rights law didn't exist. There was certainly no court anywhere and very few, if any, domestic courts that implemented human rights standards. They were sort of lauded in some democratic countries—Western Europe and North America—but that's it. Today it has obviously become a huge industry. The proliferation of international human rights courts, the wide domestic use of human rights, modern bills of rights or human rights bills of rights have become more and more common. It's interesting when one looks back at the end of colonialism. It's a bit amusing that Britain, for example, gave wonderful constitutional bills of rights to all its former colonies, but never thought of one for itself. It comes from power; it's a bit like the United States, which is a tremendous supporter of international human rights. "I think it's a wonderful idea, but for the rest of the world." There is this ambivalence which I think is a symptom of power.

**Professor Carter:** That is actually another area of questions I have for you about the United States, but, first, Judge Pocar, does anything surprise you with the development of human rights?

**Judge Pocar:** There are various elements that, when taking into account what Richard says, are fully correct. But states have played with human rights during the Cold War and even afterwards, maintaining different standards. One usual standard has been to say, "Developing countries must respect human rights but we don't have to do it, because we already behave correctly." Thus, the law is for the others. But on the other hand, it's almost contradictory because many of the major powers, at the same time, were telling the developing countries, "Don't respect the human rights," by supporting governments which did not protect human rights. So their position on human rights is double-faced. This has been played by the European former colonial powers all the time for many years, and probably as well by the United States to a certain extent, we have examples in it. The foreign policy of the United States has frequently supported authoritarian governments, instead of exporting human rights there. Although, formally, the

indication was that human rights should be respected. It's quite a contradictory picture.

**Professor Carter:** It is clear that politics plays a role here. Certainly the self-interest of countries has a role in what you are describing in the double standard going both ways. In other words, a country saying, "We want you to have human rights but we're not going to enforce them at home" or "We are not going to worry about your human rights because we want cheap labor." So does it then surprise you that we have, for instance, such an active European Court of Human Rights hearing these cases with forty-seven countries agreeing with them? I am using that court because it has such an incredible number of cases and such a long history from the 1950's of hearing cases and enforcing the European Convention. How have we made it to that point with the European Court of Human Rights?

**Justice Goldstone:** I think we should get an answer first from a European.

**Judge Pocar:** Without a doubt it has been the movement of the integration of Europe. Human rights have played a great role, because one factor of integration was cultural integration. The integration started in the economic field, later in the social field, and the cultural field was the last one to be taken into account. But culturally all these states had, after the war, similar constitutions. They adopted constitutions that were based on the same principle to a large extent—based on the Universal Declaration—and this was a measure to accept the new partners in the European institution, provided they have that culture mentioned. All the rest could be negotiated but not human rights. To participate in the Council of Europe, it is mandatory to accept the European Convention, and now with the European Union, too, because now the Council of Europe and European Union are to a large extent overlapping.

**Justice Goldstone:** That's a great achievement. I think Europeans should have every reason to take tremendous pride in the European Court of Human Rights, especially when you look at the other continents and see how backward they are—even the Caribbean Court which we visited with the Brandeis Institute of International Judges. I have forgotten how many members there are at the Caribbean Union, but there must be about ten or twelve. Only two of them have joined the court. They have this great courtroom in Trinidad. They got judges from around the Caribbean, but very few cases. But when you compare them, that's the one extreme. The other extreme is the European Court, which to me the worst possible nightmare is to be a judge in that court. I mean the backlog is now running into something like 100,000 cases or something like that. Imagine having a back-log knowing that, as many case as you can get rid of, you keep falling behind. One of the faults in the system is that it's been too successful, and I am not sure what it's going to do about it. There must be about 500 million people in the system, including Russia, maybe more. It would be like the United States

having less than one court at all levels dealing with all the human rights cases that come up in this country. So it's a huge problem, but that's the price for success.

**Professor Carter:** Let's talk about the United States, since we are here in California. How do you view the United States? What role has the United States played in the development of international human rights for good or ill?

**Justice Goldstone:** I think if I was going to examine the role of the United States, there are two different levels: a governmental level and a civil society level. At a civil society level, from my own perspective, the United States played the greatest possible role by far in assisting me and educating me in the area of human rights in South Africa and in the other countries in which I have been involved. The American Bar Association played an extraordinarily important role during apartheid in sending the National Institute for Trial Advocacy year after year, more than once a year, to give advocacy skills to young black lawyers in South Africa. It was the United States' legal fraternity that engaged South African judges and lawyers and brought them to this country, and sent us to seminars on the internationalization of human rights. The Aspen Institute, the American Bar Association, and many other civil society organizations had an enormous influence. It opened a whole new world to us—those few judges who were prepared to use international rulings and international human rights law—it was to the credit of the United States. The English bar and the English judges wrote us off. I don't blame them, but they really thought South Africa was beyond redemption and they broke off relationships, not officially, but they had nothing to do with us. Then there was a vacuum. It was the U.S. lawyers and judges who stepped in, and particularly African American leaders in the area. Leon Higginbotham, Nathaniel Jones, Julius Chambers, and Thelton Henderson. They all became role models, particularly for black South African lawyers, and one can't exaggerate or over-emphasize the importance they played. So that's a good one hundred percent answer.

The government intervention was much more of a mixed bag. You had a Republican Congress in the Reagan years that passed sanctions bills against South Africa. It was vetoed by President Reagan and was one of the few vetoes that President Reagan exercised. It went back to Congress and his veto was overridden. I don't know how many vetoes in American history have been overridden by Congress, but very few. There were very mixed signals coming in those years and there was a policy of constructive engagement, which was hated by black South African leaders because it was sort of fudging the whole anti-apartheid approach of the American Government, and so that was a more negative influence on South Africa. It was more the European governments. Some of them, importantly the United Kingdom and France, as well as a number of others, played a much more active role in supporting the anti-apartheid movement.

**Judge Pocar:** I think along the same lines because I remember in the Human Rights Committee we looked very much at the United States' developments on human rights issues and it certainly was a great source of inspiration in dealing with the interpretation of the standards. But if I have to assess the impact of the governmental action in the development of international institutional human rights, the contribution given by the United States to the implementation of the ICCPR is almost insignificant. The United States ratified the covenant with much delay. When the ratification was deposited, it was with lots of reservations. I remember the first time we heard the report of the United States, they took it seriously. It was a very serious approach to come with forty expert people to face a committee of eighteen. So the Committee was clearly outnumbered by the delegation, led by the legal counsel at the time. We put a lot of questions, and we put questions identifying reservations that, in our view, we thought were illegitimate, for instance the reservation to execute minors—to impose capital punishment on minors. Now we know that eventually the Supreme Court found it unconstitutional, but in those times—the 1990's—the government supported the opposite position. However, the most significant reservation that has been made to the covenant—which undermines completely the covenant—is that ratifying the covenant doesn't mean implementing it in the whole country. It is just ratified for the government. But there is a reservation that reserves the state legislation. That means “we will not implement, we maintain it was a legitimate legislation against the goal of the treaty.” Therefore, contribution has not been as great as it could have been, if one looks at the development in the country.

**Professor Carter:** I know Professor McCaffrey immediately said, “Yes, it was not self-executing.” So all of you studying international law in one course or another in the United States have undoubtedly run into those terms and know that, in the United States, if we have a treaty that is self-executing, then one can raise it directly in court, but not so if it's not self-executing. So it's very common for the United States to attach a reservation of some kind—a declaration or understanding—that it's not a self-executing treaty. That is something that the United States has bought into doing. I want to come back at a slightly later point to what role you would like to see the United States play in the future or where you see this going.

Keeping our thoughts in the current situation in the world, and moving now to look at domestic law. Of course we are talking about South Africa and that's a very good example, but the theme of our conference is what effect the human rights norms—these international instruments that we're talking about—have had in domestic law, are having in domestic law, or are likely to have in the future. We heard two excellent panels this morning—one on corporate governance and one on labor law—looking at these issues and the interplay of different kinds of issues. Whether it is the Delaware law of corporations and the policies that are being implemented compared with human rights instruments and that interplay,



or labor law where we were hearing about the difficulty of having the human rights norms on the books in various countries, but then having a different type of issue—the trade agreements coming in and undermining the implementation of those norms—that’s a challenge that I think we have. My question is what do you see as the major challenges today to the actual respect for implementation of human rights norms?

**Justice Goldstone:** Clearly international courts cannot succeed without the support of government. Whether they are international human rights courts or international humanitarian law courts, if governments don’t implement orders of international courts, then they are going to fail. No international courts in the foreseeable future or indeed during the lives of the youngest people in this room—no international courts are going to be given their own police or army to go and execute the orders they make. So they have to rely on government. I needn’t stress this in the presence of Fausto because this is one of the problems that faced the Yugoslavia tribunal in its earliest years where there were no arrests being made because the NATO powers refused to give orders to the troops to go and arrest people. That changed a little later. Of course the United States played an important role. This is when the United States used its political muscle to force Croatian generals to voluntarily give themselves up. One could imagine the American threats if they didn’t. It was similar pressure from the United States that got former President Milosevic to The Hague. The United States did play a crucial role. The single main problem with the future of international courts is the cooperation of governments. Of course it’s the powerful states that are less keen on cooperating. It’s not a coincidence that the United States, China, Russia, and India are holding out on the International Criminal Court (“ICC”). To the credit of European powers—Germany and France specifically—and also Japan, they have joined the ICC, so it’s not all the powerful nations that are staying out. But powerful nations stay out because they have a natural suspicion of bias against them and they don’t like people looking over their shoulders.

**Judge Pocar:** This certainly is one problem—one major problem—and I totally agree. My general concern regarding human rights standards is that I think the main challenge in the future might be to have full implementation of the international standards at the domestic level in state legislation, and have internal legislation conforming to international legislation, because this will authorize and encourage domestic judiciaries to deal with violations of such standards. On one hand, I believe the future of human rights protection still lies with the domestic judiciary, rather than with international courts and tribunals. On the other hand, domestic courts have to cooperate with international judicial bodies. If you look at the statute of the ICC, it is based on cooperation between domestic and international courts. The European Court of Human Rights and the European domestic courts work together. In my country, it has recently been declared by the Constitutional Court that any decision by the European Court of Human

Rights amounts to a constitutional principle. Thus, a law not conforming has to be repealed as being unconstitutional. This shows that a judicial dialogue between domestic and international institutions may be extremely useful for the cause of human rights. The judiciary is normally more reliable than the government because the judiciary should not follow political considerations in its approach.

**Professor Carter:** That's assuming that there is an independent judiciary in the country, of course.

**Justice Goldstone:** One South African example is that our bill of rights provides that courts interpreting the bill of rights are obliged to have regards for international law, and are invited to have a look at foreign law. Don't mention it to Justice Scalia, but that's what the Constitution provides. The result is that, in a majority of the cases, there are very copious references to international law, and international law has been interpreted by our Constitutional Court. We use not only international law that's binding on South Africa, but all international law—the Rome Treaty, the American human rights convention, and international labor laws are all taken into account. The Constitution goes on to provide that, in the interpretation of legislation, any interpretation that is consistent with international law has to be preferred to any interpretation of legislation that will be inconsistent with international law. So even if it's not the best interpretation on the face of it, an interpretation has to be given that is consistent with international law. There's a lot of "to'ing" and "fro'ing" between the South African courts and international courts.

One example Fausto may not know is in a case in the Constitutional Court. Rape in South Africa is a common law crime—there is no statute that outlaws rape. It's a common law crime. This is the position also in a number of Commonwealth countries. The issue was the anal rape in a horrible case—anal rape by a father of his ten year old daughter. Common law doesn't include anal penetration but the bill of rights provides that the common law courts have to change the common law to bring it in line with constitutional values. The court referred to the international definition of rape in the Yugoslavia tribunal, and used that as an example of rape internationally. It has become gender neutral, in that the international definition includes male and female rape, and also anal and vaginal penetration. So that's a good example of the Yugoslavia tribunal influencing common law in South Africa. I think it's a very exciting development.

**Professor Carter:** There are so many developments going on, listening to the panels this morning and listening to both of you talk about this. We look at the development of the human rights instruments, and we look at the influence of the human rights instruments on domestic law. We look at the growth of legislation and domestic jurisdictions as well that are incorporating the human

rights norms, sometimes doing it well and sometimes not, whether it's because they're not fully incorporating those rights or because there are competing issues that are limiting the actual enforcement of the rights. Let's look forward now into the future, let's say you have to have your crystal ball out to look at this. What types of human rights issues do you see arising that domestic jurisdictions will have to face?

**Judge Pocar:** It's difficult to see what the future will offer us, but I think there are still so many issues not fully settled that we don't have to invent new ones, new challenges. Because even in the areas where there have been more advancements, there is still so much to do. If we take one area which, in my view, in the last thirty years has been terrifically advanced, it is gender discrimination. If I look at the situation when I joined the Human Rights Committee in the 80's and the situation today, it is clear that there has been huge advancement. However, it is clear to everybody that this is still something that worldwide is a problem, and there is still too much to implement than to think of new possible challenges. And then, of course, there is the challenge of this brand new idea of a mechanism of protecting human rights by targeting the individual perpetrators of egregious violations of human rights, an additional mechanism based on the development of international criminal law and jurisdiction—an area that is still to be filled. It is true that too many states have not yet implemented the Rome Statute. But it is even more concerning that too many states have not yet implemented the Geneva Convention of 1949, as well as the 1948 Convention on genocide. When the International Criminal Tribunal for Rwanda (“ICTR”) wanted to refer a case of genocide—the two ad hoc tribunals were allowed by the Security Council to refer cases back to states—it wanted to send a case to Norway. The reaction was: “We can't prosecute for genocide because we didn't implement the Convention; we have no legislation for that. We can certainly prosecute for multiple murders, for extermination, but not genocide.” The ICTR tried to send the case to the Netherlands, but the answer was exactly the same. Now Norway has implemented the Convention, and the Netherlands has also done so. These are examples which show that in the future these situations will be handled differently. I am speaking of conventions in the forefront of human rights, I am not speaking of the others.

**Professor Carter:** Combining the matters of gender issues and domestic courts taking a more dominant role, as they need to do—because the international and regional tribunals really can only handle a certain number—one development I was reading about the other day, is in the Democratic Republic of the Congo. They now have a mobile gender justice court that is trying military leaders in the South Kivu area for crimes against humanity of rape and other sexual assault crimes. That's an example of really seeing that development in a domestic court.

In looking to the future, just thinking about within the last twenty or thirty years, what is a human rights norm that you think has developed very significantly?

**Justice Goldstone:** I really have no doubt that the single most important norm that has developed in Europe, certainly in parts of Africa and in the United States and Canada, certainly is the recognition of the importance of human dignity. I think that is fundamental to modern human rights. It's crucially important. If one recognizes the dignity of all human beings, one has to recognize their equality; one has to recognize that there should be an acceptance of differences. I don't like talk of tolerance. Tolerance is really demeaning others. If you tolerate something, it means that it's less worthy than your own, but you appear to tolerate it, sort of second-class. I think what is important from a dignitarian point of view is not only to recognize differences but really to rejoice in them—it makes the world interesting that we are not all the same, but that we have different cultures, different languages, different food, different music, and so forth. It worries me—and it's part of the post-9/11 world—that there is becoming less acceptance of differences and suspicion of differences, and that has to be opposed. At all costs the dignity of all human beings has to be really right in front, and many countries fail to do that, often through fear. If I can poke my nose into American politics, I think the hearing in Congress this week, into what role Muslim Americans are playing, is an example in my view of exactly what should not be happening. To label people is inconsistent with recognizing their dignity.

**Professor Carter:** And to stereotype or generalize as to behavior. Judge Pocar, a significant human rights norm?

**Judge Pocar:** I mentioned earlier the gender discrimination; of course I agree that it can be put in more general terms. The Universal Declaration was based on human dignity itself and on equality. The principle of equality is the key principle of the protection of rights and probably still has a lot to do in that field, as it is not sufficiently recognized in all its implications. For instance, take the European Convention of Human Rights, which is in Europe regarded as the highest instrument protecting human rights, and the role which is played therein by the principle of equality. It does not comprise, in the convention, a general principle of equal protection before the law, but is limited to equality in ensuring the rights provided for in the convention. An additional protocol has been adopted to amend the convention, but it has not yet come into force. But that *general principle is enshrined in the Universal Covenant adopted in 1966*. So there is still room for improvement. We consider the European Convention as the most progressive instrument on human rights. But, if you look at certain standards, we would be less proud of what we have done so far.

**Professor Carter:** Although the developments have been significant around the world despite the challenges that obviously we are seeing, I think this vertical interplay—as someone said this morning—between international and domestic is very important, as is the horizontal interplay from domestic jurisdiction to domestic jurisdiction. Now I want to open it up for questions.

**Professor Omar Dajani:** Thanks very much. It has been a fascinating conversation. I was struck, Justice Goldstone, by your observation that the anti-apartheid movement started as a human rights movement and that South Africans were lucky that it did. I was also struck by the frustration you expressed with the ambivalence that the U.S. Government expressed about the anti-apartheid movement of the 1980's. Both comments got me thinking about discourse about human rights—which issues we treat as rights issues and which issues we instead think of primarily through the lens of security, for example. One of the things that I think is quite frustrating is that, notwithstanding the extraordinary achievements of tribunals like those that you both have been involved with, there is nevertheless, I think, sometimes a sense that a conversation about rights occurs among a fairly narrow group of people and that conversations about rights are too often severed from conversations about policy. I think about the New York Times article today about Obama's pragmatism vis a vis the revolutions spreading across the Arab world, I think about the way we discuss Iraq or Afghanistan or the conflicts in the Middle East, even the way in which we talk about something like gay marriage here in California. I guess my question to you is, recognizing that in the 1940's and 1950's when some of these instruments that we have been discussing were being initiated and developed, like the Fourth Geneva Convention, the requirement of dissemination was injected into some of them in the sense that discourse about rights was central to implementation. How do we broaden discourse about rights beyond tribunals, human rights organizations, press releases, and the Human Rights Council in the United Nations?

**Justice Goldstone:** It is really to the credit of civil society in the democracies. Without human rights organizations, NGOs, domestic and international, there wouldn't have been an International Criminal Tribunal for the former Yugoslavia or for Rwanda. I mean it was a huge movement that got together, that pushed the major western nations—and in particular the United States—to push the Security Council into setting up the Yugoslavia tribunal. So to a great extent the power is that of the people in this room and others, particularly in academia. I can give you one personal example. When I first arrived in The Hague as the chief prosecutor of the Yugoslavia tribunal, I was besieged with thousands of letters pleading that I should give adequate attention to gender crimes. I didn't need much arm-twisting, but it did make me promote that issue on my agenda. What impressed me was that these were letters written by individuals. Had I received a petition signed by a million people, it wouldn't

have had nearly the impression on me that individual letters handwritten—no two the same, from people all over Europe and Canada and the United States—did. It made a difference and it was the woman judges that pushed the gender crime issues. So this was happening at a nongovernmental level and it seems to me that it really was one of the virtues of democracy that ordinary people can make things happen—for good or ill. It can work the other way. At the moment you have a conservative disease spreading throughout the western democracies where the people are moving to the right, mainly out of fear. I understand it; I regret it, but I understand it. That needs to be corrected. It's not going to be corrected by government. Governments follow. Unfortunately too few governments lead, and that's a pity. I think there are too few great leaders, and all of us can think about it. Unfortunately, when we think about leaders, we think of evil leaders, we think of the Hitlers and Stalins of the world, but we should think of the great leaders of the world, in this country, and who have pushed people in a direction they didn't want to go. President Roosevelt was a good example. He led the United States into a war that it didn't want to get into and thank goodness for that. One thinks of Nelson Mandela, who turned his people away from what could have been a very bloody revenge at the end of apartheid. So people do follow. It works both ways.

**Professor David Millon:** I wonder if the two of you could comment on prospects for the emergence as a norm of international law, the notion that transnational corporations have human rights responsibilities.

**Judge Pocar:** This is an emerging issue—the responsibility of transnational corporations—because traditionally, it was states that had the responsibility in these matters. But the more transnational corporations become powerful, even with respect to states, inevitably they have to take some of the rights and the powers of the states and they have to take on also the responsibility of the states. Whether this is already an achievement, probably it's too early to say. But definitely there is a trend in this direction with the development of codes of conduct. The social responsibility of corporations is something which starts having some legislation—maybe soft law on the U.N. level—something that is still under discussion. It's somewhat less soft within regional arrangements like the European Union, where there are some directives of the Council on this matter. It's something that does not have yet a final and settled response.

**Question from Audience:** I would like to ask both justices about the judicial movement to enforce economic and social environmental rights. Of course the South African Constitution is advanced in that direction, although the recent Mazibuko case on water didn't take it very far.

**Justice Goldstone:** I think transnational corporations and their international obligations and environmental issues are no doubt where we're going because of the enormity of these issues. The international community—whether it's the

United Nations or the European Union or whatever—is simply going to have to come to grips and grapple with these issues because they are becoming too important. Transnational corporations, some of them, have budgets that exceed those of many members of the United Nations themselves, and the way some of them violate fundamental human rights—whether it’s using child labor or whatever—can’t go on being ignored. It has especially come to the fore in recent wars, using private corporations to do what normally the army does—whether it’s in Afghanistan or one sees similar activity in Libya—and looking at the role that’s being played by mercenaries. So too with the environment. As the world population continues to grow apace and as resources get fewer, as the environment goes on being degraded, people are going to simply have to come to grips with it. It starts with soft law but the soft law pretty quickly has to develop into hard law. It must happen.

**Judge Pocar:** Maybe one of the issues on this matter—I’m going to jump into the next panel on environmental issues—is that there is a problem of accountability here and there are no mechanisms or insufficient mechanisms to monitor such accountability, to hold the person responsible. Everybody feels there is some responsibility, but it’s very difficult, unless a sort of class action is instituted, to target the persons or institutions that are accountable. Probably in the environmental field there are already some rights that are justiciable, that can proceed to court, to a certain extent. But it’s not developed enough. One should find mechanisms to protect these diffused rights also at the judicial level, or by some monitoring procedure or mechanism that could be found. I don’t have any solutions, but certainly something has to be done.

**Dean Elizabeth Parker:** Well this may be a bit provocative as a question, but looking at the glass for just a moment, it’s perhaps not clearly full, maybe even half empty when it comes to international criminal justice. Is there a day, particularly in the perspective of African countries, that this movement is going to be discredited as a type of victor’s justice? I suppose what I am really saying is, have we paid enough attention to how the norms being established in the international community are integrated into the actual fabric of the justice systems of these countries? I will just give one quick comment, but for me it was very powerful, Justice Goldstone. After you gave an elegant description of the origins of the ICC, I happened to be seated next to a Rwandan student and I said, “What do you think of what Justice Goldstone’s lecture has just shared with us?” She said, “I think it’s about jurisprudence, not about justice.” I was struck by that. Is there a problem that we haven’t talked about, particularly in the African context?

**Justice Goldstone:** Well I don’t like generalizing. If you look at my neck of the woods, Southern Africa, it’s a very mixed bag and I don’t think one can generalize. Take sexual orientation. In some Southern African democracies,

there's absolute non-acceptance of gay and lesbian people. In Libya—which is a democracy—that is true. In South Africa it has gone exactly the opposite way. When our Constitutional Court ordered our legislature to pass legislation providing for gay marriages, if it had been left to a free vote, it wouldn't have happened. But then President Mbeki said this is our constitution, this is our court, and they have ordered us to do this and we're not having a free vote and we will do it. So they did it in South Africa. Perhaps it's one of the positive consequences of apartheid that there is an understanding by the majority—talking about black South Africans—there is an understanding of what it means to be marginalized and to be discriminated against, and certainly it's been my experience on the Constitutional Court that my black colleagues, if anything, have felt more strongly about dignity and about this area. So I think it is about justice and jurisprudence. I think the two go hand in hand, but certainly I caution against generalizing. I think people do generalize too easily. You generalize about religious groups, you generalize about racial groups and one sees this and says, "This is what happens in Africa and this is what happens in the Muslim world," and no doubt from the Muslim world they talk about Americans and say, "This is what you get from white people." It just doesn't work that way. One only draws wrong conclusions from these sort of generalizations.

**Professor Jarrod Wong:** I was struck by Justice Goldstone's remarks that the U.S. Government has a very tentative approach towards anti-apartheid. We don't seem to gain very much progress on this front, considering the recent events in Cairo and the American Government's mixed approach to that particular issue. For now it looks like it probably doesn't matter, but it could well have turned out very differently. I guess in light of all the apparent progress that the agenda of human rights has had over the last decades, should we have expected the American Government to have responded in Cairo specifically?

**Justice Goldstone:** I think one must understand, and that certainly has been my experience, that all of us—they're sort of concentric circles—all of us are more concerned about what happens at home than concerned with what happens next door. You're more concerned in Sacramento about what happens in this city than about Chicago. Americans are more concerned about the United States than they are about Canada. North Americans are more concerned about North America rather than what happens in Europe. If you start talking about Africa and Asia, then it's a long way away, and this is human nature. I think it's a fact we have to accept. But it has to be overcome. I always admire the Scandinavians for seeming to be able to care so much for people tens of thousands of miles away from their homes, but it is difficult. One has to overcome that sort of lack of energy for things that are remote, things that are far away. I think that accounts for a lot of it. I think, too, that interests are important. The United States and every country in the world gets more exercised about problems in countries that are oil producing. You get more concerned about countries that are your trade



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partners than are not. It's easy to criticize, but it's human nature. I think we all react in that way to what happens in our little world and why shouldn't governments get more exercised about what happens in their world? So it's a question of pushing them. I think the human rights community must push on them to try and deal as fairly and equally as possible with all similar situations.