

CHECK AGAINST DELIVERY!

Peace and justice, power and principle: From Nuremberg to The Hague

Statement of Mr. Max van der Stoel, OSCE High Commissioner on National Minorities, to the Seminar on "Punishing war crimes in the Former Yugoslavia : A critical juncture for the international community"

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In the vernacular, "peace" connotes tranquility, ease and harmony. It also conveys a sense of balance in nature, with all things in their right place and in relation to each other. For Plato, this last condition is called "justice": there are inherent qualities in all things and that each be in its rightful position to fulfill its proper function would be the very balance, indeed essence, of justice. In this ideal, there would be no clashes since each would have its place and only its place. So, justice means peace.

I am afraid we live in a world far removed from the Platonic ideal. For most of recorded history, interests have collided violently in competition for the same place or position. The notion of peace has more accurately been assimilated with the absence of war, and there has been precious little of it from a global perspective. Unless we were to use a Darwinian interpretation of history, as some Elitist philosophers do, we would probably also have to admit that there has accordingly been little justice for most people as the necessities of war have so often in the past driven civilization. We are, therefore, left to speak of peace and justice in relative terms. That is, the relativity of their values and their inter-relationship.

Faced with the knowledge of the terrible destruction of the last great wars and even of contemporary conflicts, we cannot look too disparagingly at the value of stopping war. To put the matter the other way around, life itself is

universally considered to be among the highest values, if not the highest. Certainly, any development of civilization presumes the existence of life. So, to protect and preserve life is imperative. But, life is not the only value. Indeed, what distinguishes the human condition from the rest of the animal kingdom is believed to be additional values manifested in the processes and fruits of civilization. The free development of the individual human spirit is the paramount consideration from this perspective since it is the cumulative effect of individual talents and skills which drives civilization. To suppress the human spirit is to place a road-block before the development of civilization and thus to undermine the distinguishing characteristic of human life. So, the mere absence of war is an insufficient value. It must facilitate something greater. It is as such no more than part of any solution.

The absence of war may be said to have facilitated the construction of civilizations. I say this in the plural because there was historically no universal accord over the substance or legitimacy of any particular civilization. To the contrary, history features never-ending clashes between civilizations in a competition for supremacy. From the myopic perspective of individual Princes and Kings, it was only just that the strongest should prevail: might was right. Elitist philosophers agreed and conquest was legitimized.

But with not all things being in their "right" place, it was in fact opposing interpretations of justice which generated conflict as the competing claims of Princes and Kings were settled through the force of arms. The belief of Princes and Kings that justice meant their personal supremacy eventually gave way to the similar belief of nations. This competition effectively between ideologies pitted one version of truth against another in a bloody and economically costly spiral of violence. The transposition of this conflict from a contest of Princes to nations, empires and finally global alliances gave rise to the horrors of two world wars in the first half of this century.

It was the particular size and nature of the Second World War which stimulated the revolutionary consensus articulated in the Preamble of the Charter of the United Nations. Precisely "to save succeeding generations from the scourge of war", the international community resolved "to maintain international peace and security", "to develop friendly relations among nations", and "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". This heralded a new paradigm for international relations and the development of the global community. It was revolutionary because not

only did it reject the supremacy of one ideology or version of truth over all others, but it entrenched a new and universally applicable concept of justice: the free development of every human being in dignity. The beauty of this system of justice founded on respect for human rights is that, while universally applicable, it is compatible with tremendous diversity.

One may ask, Where exactly is the justice in human rights? First, it is located in the premise of equality: "All human beings are born free and equal in dignity and rights". But, what follows from this is a rational set of standards, progressively more detailed, which pertain to most areas of life. It is this rationality which is the core of justice, because it responds to the arbitrariness which is at the heart of abuse of power. To assure rationality, we turn to the Rule of Law. We do so in the knowledge that life is not a perfectly calculable venture, nor are all human beings motivated by good objectives. If justice is that all human beings who are born equal in dignity and rights should be equally free to develop as they wish, then to ensure that justice is achieved requires regulation. More particularly, to protect against abuse, aggressive use of force must be outlawed while, at the same time, there must be some legally sanctioned use of force both defensive and in the collective interest. This is not only true in relations between States where sovereign equality is to prevail, but also in relations between the State and individual human beings where the use of force must be regulated by the Rule of Law. Thus we come to the issue of power.

The exercise of power in the animal kingdom is clear and simple. There is only one effective principle: might is right. We like to claim that humans have moved beyond this brutishness. Some may counter that even legally sanctioned use of force ultimately relies on might if it is to prevail over illegal uses of force, which is why it is important to maintain public forces. It is of course true that force might be necessary to repel aggression, but force alone is not enough. Justice is the vital ingredient in this distinction, with "justice" in international relations meaning the Rule of Law as articulated in the UN Charter, including respect for human rights. Accordingly, the only legitimate use of force is that which is legally sanctioned. The principle, then, is that might may be employed only for just purposes, or, in other terms, authority is the legal use of power.

This principle finds expression throughout the Charter of the United Nations, beginning with the Preamble and the explicit prohibition in Article 2(4) of the aggressive use of force to the sanctioning of collective use of force pursuant to Chapter VII and making allowance in Article 51 for the use of force in self-defense until the Security Council takes

effective action. Thus, the only legal uses of power are for collective purposes or in self-defense.

As already inferred, the new paradigm heralded by the foundation of the United Nations was clear and explicit about its rationale. In the first paragraph of the Preamble of the UN Charter, the objective of peace, the reaffirmation of respect for human rights, the importance of justice and the ultimate goal of development are declared in a linear fashion. This Peace & Human Rights & Justice & Development continuum is the product of a lesson learned with the greatest of difficulty, and it instructs us how to avoid repeating the errors of history.

This clearly does not mean passivity in the face of gross violations and threats to the peace. I know that some may prefer inaction in the name of neutrality. But, this is a misplaced notion and it dangerously under-estimates the stakes to the international community. I say it is misplaced because seeking respect for human rights has to be considered indispensable for lasting stability and maintenance of the peace is of vital interest for the entire world community. In other words, neutrality implies impartiality, but we have long ago declared ourselves decidedly partial to respect for human rights and maintenance of peace, so we cannot remain "neutral" in the face of serious violations. For to do so is also dangerous because it is a step on a slippery slope of non-respect of international obligations, thus inviting others to similarly ignore or flaunt the law. We, therefore, require resolute action in favour of the principles of the Charter _ in favour of peace and justice.

On a regional level, the Organization for Security and Cooperation in Europe has followed the same essential thinking as expressed in the UN Charter. Indeed, from the beginning, the then CSCE declared itself to be acting in conformity with, and furtherance of, the purposes and principles of the United Nations. This was stated explicitly in the Helsinki Final Act in 1975. Both the Preamble and Decalogue of the Helsinki Final Act make it clear through their language and specific content that the inter-relationship between Peace, Human Rights, Justice and Development also premises and drives the work of the now expanded OSCE. It does so through the dynamic and intimate relationship between its three "baskets" of concerns: I. Questions relating to security; II. Co-operation in the fields of economics, science and technology, and the environment; and III. Co-operation in humanitarian and other fields, the so-called Human Dimension. Their inter-relationship has been constantly reaffirmed and has become ever more entrenched in the progressive development of the OSCE's concept of "comprehensive security". Moreover, the OSCE has developed its institutions and fora in order to take account of misbehaviour and to facilitate evaluations and regular discourse.

"Security" ultimately means a sense of well-being with some degree of predictability on the basis of which people may plan their lives. Of course, we must first and foremost be concerned about security in the sense of protection of human life. This applies both in terms of peaceful relations between States and in terms of peaceful and just relations between State authorities and individual human beings. Accordingly, we must be concerned about personal security within the State in time of peace, not to mention other forms of security. There is an inter-linkage between these concerns which cannot be denied. Focusing our attentions on this inter-linkage returns us again to a consideration of justice in terms of ensuring the Rule of Law. For history has taught us another valuable lesson: where there is injustice, there is insecurity and this in time gives rise to instability and ultimately threats to the peace. Certainly, history also shows that injustice can be maintained for a very long time. When there was little inter-relationship between the internal affairs of States, this was not too troubling to those who did not so suffer. But, in an era of increasing inter-dependence, not to say integration, this is no longer the case. Injustice and instability in one State is increasingly of concern to neighbouring and third States.

What applies between States, then, applies within States, i.e. the notion of justice is not only inter-State but universal in terms of its applicability within each State. That is to say, the Rule of Law must apply within each State in order to ensure that the equal dignity and rights of every human being will be respected. This means that the use of force within the State must be restricted only to legitimate authorities. Legitimacy, in turn, is to be determined by the will of the people, i.e. democratic rule.

While consensus was reached at San Francisco in terms of applicable principles, hundreds of wars and bloody conflicts since then have betrayed our difficulty in bringing practice into conformity with theory. Indeed, there have been and continue to be challenges to the very concepts of the UN Charter. We have nevertheless achieved some progress if viewed from the perspective of ensuring that the will of the people be the basis of authority in the State and that force is used only according to the Rule of Law. We have seen the fall of a great number of dictatorial regimes and the end of communism in Europe. We may also observe the growing tendency of an increasing number of governments to oppose gross violations of human rights. And we may say that we have managed so far to avoid a Third World War. Despite this progress, we are still fundamentally struggling to realize for the peoples of the world the full benefits of the consensus on peace and justice.

Challenges to the consensus on peace and justice are to be found in all corners of the world. But, I am afraid that one of the greatest challenges faces us here in Europe. We are now facing the real risk that the end to war achieved not so long ago in Dayton will not give way to sustainable peace. This is because so far it was not possible to ensure that justice is done in Bosnia-Herzegovina. As the OSCE Chairman-in Office, among others, has observed, "the fact that indicted war criminals remain complicates the process of creating a climate without violence and intimidation". There are as such both moral and practical grounds upon which to insist that justice be done at least with regard to allegedly major, and surely notorious, wrong-doers. If we fail to respond to their contemptuous behaviour, they will remain free to undermine and ruin the peace. Moreover, we will be setting a dangerous precedent as millions watch and learn from their flaunting of the violation of international law _ that there are seemingly no consequences for even the most serious of crimes. With the continued participation of indicted war criminals undermining the fragile peace in Bosnia-Herzegovina, in clear violation of the Dayton Accord itself, we know that neither is justice being done nor is it seen as being done. Such effects constitute a direct challenge to the sustainability of the peace _ even in the limited sense of the absence of war.

If there is no perception of justice and no justice in fact, then peace will only be interim. We may certainly consider, as some have argued, that the absence of war is an opportunity to construct lasting peace on the foundation of justice. But, in the end, some sense of justice must prevail or peace will be lost. This conclusion has been essentially reached by the Dayton negotiator himself, Richard Holbrooke, who is reported to have recently acknowledged that "By ending the war we did not bring peace to Bosnia-Herzegovina".

I have already argued that the absence of war without justice is an insufficient end and that it contains the seeds of new wars. Moreover, we know it is unacceptable because some people will fight for more than mere existence, and we know it is unsustainable in the long-term because it becomes ultimately unstable even under the harshest of regimes. Even Elitist philosophers know this to be true. But, we also know that perfect and complete justice is unattainable: it is simply impossible to correct or undo every wrong. So, we must seek sustainable peace through imperfect justice. We recognize, of course, that we are not speaking about absolute values ... for example, "Peace at any cost". We have already seen the real cost of seeking to placate injustice in the name of preserving such a peace: Munich will forever ring true to this lesson. Similarly, neither should the pursuit of justice be held as an absolute value, for in the pursuit of "Justice at any cost" we may turn minor offenders into fanatical defenders of their masters

and their causes. Thus, there is a balance to be found. It is a question of degree. We know this to be true for there are in fact and in law different degrees of responsibility. The balance we seek, therefore, is to sustain peace through such a justice as will respond to the major wrong-doers, to those with the most reprehensible and incorrigible attitudes who, if not brought to justice, facilitate and incite further wrong-doing. Thus, we seek to establish the Rule of Law _ to limit arbitrariness and ultimately instability. This in turn sustains peace and transforms its character into much more than the mere absence of war.

In relation to the specific context of Bosnia-Herzegovina, US Assistant Secretary of State, John Shattuck, has observed that "Peace is negotiable, but justice is not." This seems to me to be absolutely correct if we mean by "justice" the Rule of Law itself. Certainly, the Rule of Law cannot be compromised. As such, "justice" must somewhere be included in the peace, both in fact and as perceived _ which returns us to the issue of war criminals and, in particular, those most responsible for crimes against humanity and genocide. Can any sense of justice be done or perceived as long as those who are believed to be most responsible for such major crimes remain unaccountable and even rewarded? Surely not. As I have just argued, the implications are clear and advertised. If justice is not to be done in these cases, then it is unlikely it will be done at all and, in the absence of justice, the sustainability of peace is in doubt. No one will have confidence. To the contrary, people will have fear. To ignore these facts is to ignore fundamental reality and to betray the principles which are declared to be the basis of international relations. Thus, the persistence of accused war criminals in positions of authority becomes "disruptive" to the entire process and sustainability of peace. The conspicuousness of such injustice is simply not reconcilable with peace. There is no balance.

We should not forget that history has taught us another lesson: some things are worth dying for. Justice is among these. We believe it is in all our interests. But, surely we cannot ignore the specific determination of the persons most concerned, i.e. the victims. First and foremost, we cannot deny them their inherent right to self-defense. Yet, is it sufficient to accept this in principle, while remaining essentially passive? Must we not come to their assistance? There are, of course, degrees of assistance: moral and political assistance, technical advice, provision of arms and finally the provision of armed forces. There will always be a tendency of governments to try to reduce the risks to themselves, their own States and to try to avoid casualties. This might be comprehensible. But, is this not then to decide on the relative value of lives? The calculations are most difficult. Still, if the victims are prepared to lay down their own lives to fight against aggression or in the interest of justice, should we not at least support those who do so through every

other means? If we are not prepared to fight, we should at least do our utmost to bring maximum political and economic pressures to bear upon those opposed to justice?

Faced with the injustices spawned of National Socialism, the free world eventually responded with more than political and legal pressure. At long last, it felt compelled to respond with arms. Political scientists tell us that this was a necessary response to a genuine threat to our own authority. But, military victory was accompanied by the attempt to construct a new international political order and by an endeavour to do some justice at Nuremberg and Tokyo. In a sense, these were inter-related, for the building of a new order required a clear identification of wrong-doing and major wrong-doers. It was perhaps also cathartic for the defeated nations ... a sort of line being drawn in the sand releasing them to embark upon new horizons. It thus facilitated both internal and international reconciliation. And its memory still significantly propels European politics.

There were undeniable short-comings with the Tribunals at Nuremberg and Tokyo from the point of view both of law and politics. These do not exist in the context of the International Criminal Tribunal for the former Yugoslavia. The standards of law are quite clear and the nature of the tribunal is evidently impartial. Much has gone wrong in the former Yugoslavia, but there is now the opportunity of doing genuine justice and at least setting the course aright for the future.

We should now remain stubborn in the pursuit of justice. Should we choose to shy away from the task, we will risk undermining both the fragile peace and the international order. Those responsible for aggression will be able to continue their evil practices and pursuits. Disillusioned surviving victims will be tempted to retaliate indiscriminately, thus prolonging vendettas rooted in general injustice. If we abandon the Rule of Law, they will be left only with options of self-help and to reconcile matters for themselves. Such a situation is fertile ground for the development of new support for aggressive forces. In this respect, the International Criminal Tribunal for the former Yugoslavia is a necessary substitute for personal revenge and an important vehicle for the development of a new social contract in Bosnia-Herzegovina under the Rule of Law. Only this can be the basis for sustainable peace not only in the sense of the absence of war, but also in the sense of civil tranquility and enduring public security which will allow the seeds of reconciliation and renewal to germinate and grow. We must ask ourselves, Is our message ultimately one of justice or injustice, of a temporary absence of war or of sustainable peace?

Certainly, the pursuit of justice is difficult and obtaining it is even more elusive. But, the difficulty of the task is no reason for its avoidance. Indeed, the task is imperative so the means must be found, beginning with the political and moral courage. The overall lesson is clear: in the long run, there will be no sustainable peace without at least some justice. As a result of this determination, we have managed to achieve certain progress in the second half of this century, notwithstanding constant challenges and setbacks. What is at stake in Bosnia-Herzegovina is to save what has been achieved from being undermined. If we fail in the case of Bosnia-Herzegovina, we will have failed to have learned from history and failed to have applied our standards which are to guide the Tribunal at The Hague.

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