

The Banality of International Justice

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Abstract

International criminal justice has grown cyclically over the past century, with periods of intense developments punctuated by rather long stretches of dormancy. It is legitimate to ask whether we are now in the downturn of yet another cycle. The International Criminal Court has failed to live up to its own expectations. But its real challenge is the declining enthusiasm for the Court in Africa. This is explained by its deference to the Security Council and its inability or reluctance to take on hard cases that threaten powerful states. At its best and most inspiring, international justice shows that it can confront the rich and powerful and not just the weak and marginal. It needs another Pinochet moment.

1. Introduction

Even if all of the recent setbacks to international criminal justice are added up, we are still light years ahead of where we were 20 years ago. It is so easy to forget how fragile the entire enterprise seemed in the early 1990s, when the late Antonio Cassese took the helm of the recently established International Criminal Tribunal for the former Yugoslavia (ICTY). The work had barely begun when there were ‘setbacks’. The first prosecutor resigned after a few months on the job, and without really doing anything. For more than a year there were no suspects in custody. Leading academics complained about the likelihood of failure because of an inadequate legal framework, which was premised on definitions of crimes that had been cut and pasted from the 1940s. When peace in the former Yugoslavia seemed in sight, some of the prime suspects including Slobodan Milošević were invited to the United States, guests of the government, for negotiations. Created over the opposition of the Rwandan government, the second tribunal — the International Criminal Tribunal for Rwanda (ICTR) — seemed to face insurmountable obstacles in terms of access to the crime sites. There was virtually no activity in international criminal

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justice at the national level. The leading universal jurisdiction trial of the era, of Imre Finta in Canada, had ended in an acquittal.

It was hard then to perceive that the glass was actually half full and that exciting breakthroughs were not far off. Some extraordinary individuals, like Antonio Cassese, Richard Goldstone and Louise Arbour, chose to invest some of the best years of their careers in the project, while others stood apart, focusing on other areas, convinced that international criminal justice was a dead end. The point here is that enumerating a series of ‘setbacks’ does not necessarily prove that there is a crisis, or that the wave has crested. At the same time, waves do crest. History shows a pattern of cycles in international criminal justice. An initial flurry of activity following the First World War, marked by provisions in the Treaty of Versailles and the Treaty of Sèvres, and capped by the significant but inadequate Leipzig trials, was followed by two decades of stagnancy during which a few academics — Pella, Donnedieu de Vabres, Lemkin — kept the flame alive. Things revived dramatically in the 1940s, yet the idea that the spirit of Nuremberg and Tokyo would continue through a permanent tribunal, something mooted in Article VI of the Genocide Convention, faltered in the sterile atmosphere of the Cold War. The project caught fire again in the 1990s, and has succeeded beyond the wildest expectations. But it cannot be ruled out that yet another lull is around the corner. It behoves us to reflect on the contemporary setbacks, to understand their causes and to consider solutions, if they exist.

2. The ICC’s Disappointing Performance

Should it be a surprise to anyone that some of the lustre of the International Criminal Court (ICC) has worn off, and that states are reflecting their discontent by, for example, putting pressure on the budget? The Court has not even lived up to its own expectations. At the very start, in 2004, the Prosecutor’s first budget proposal claimed that ‘[i]n 2005, the Office plans to conduct one full trial, begin a second and carry out two new investigations.’¹ A flow chart devised by the Court based upon the Prosecutor’s plans and the assessments of the judges indicated that the first trial before the Court would be completed by August 2005.² Now, almost a decade later, there is still only one conviction. Perhaps a second, of Germain Katanga, will come soon, but only because the trial judges reconfigured the charges many months into their deliberations.³ Of the 14 cases that the Prosecutor has taken to the Confirmation Hearing stage, four have been rejected. When that is added to the Ngudjolo acquittal

1 Draft Programme Budget for 2005, ICC-ASP/3/2, 26 July 2004, § 159.

2 *Ibid.*, at 49.

3 Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 21 November 2012.

and the collapse of the case against Muthaura,⁴ the Prosecutor has a batting average of <60%. It compares very poorly indeed with acquittal rates at other international criminal trials, including the International Military Tribunal, that average about 14%.⁵

This disappointing performance may have a number of explanations. Perhaps no single one is sufficient. Some may suggest this reflects upon the competence of the Office of the Prosecutor, yet it is staffed and led by experienced professionals, most of whom have proved their abilities at the ad hoc tribunals. Why were they so successful in one framework, yet frustratingly ineffective in the new environment of the ICC? It is becoming increasingly evident that there is something about the ICC that makes it profoundly different from the ad hoc tribunals. Possibly, the world was not ready for the radical project that emerged from the Rome Conference in 1998, as James Crawford, the architect of the more conservative approach proposed by the International Law Commission in 1994, has sometimes said. Disappointment today may be explained by unrealistic expectations resulting from the euphoria of the late 1990s, when international criminal justice generally and the ICC in particular seemed unstoppable.

3. The Politics of International Criminal Justice: The United States and Africa

If history is any guide, the cyclical downturns in international criminal justice of the past were mainly attributable to political factors. Technical difficulties, such as they existed, played a very secondary role at best. It is rather trite to dismiss the efforts at the end of the two world wars as an exercise in 'victors' justice'. But it cannot be gainsaid that they had both enthusiasts and detractors. The achievements at Nuremberg and Tokyo were lauded in North America and parts of Europe. In India, on the other hand, Judge Radha Binod Pal dismissed the Japanese prosecutions as little more than cynical neo-colonialism. Latin Americans were equally sceptical about the accomplishments at Nuremberg, and they campaigned for strict provisions on retroactive prosecution in the new human rights instruments in order to prevent a repeat of the post-war trials.

The global commitment to international justice and especially to the ICC could be overstated. At the level of the Security Council, only two of the permanent members are states parties to the Rome Statute. Yet the Council is capable of unanimity in activating the Court, as it did with Resolution 1970 on Libya. It cannot agree on Syria or Sri Lanka for the obvious reason that strategic interests of one or more of the permanent members come into play.

4 Decision on the withdrawal of charges against Mr Muthaura, *Muthaura and Kenyatta* (ICC-01/09-02/11), Trial Chamber V, 18 March 2013.

5 A. Smeulers, B. Hola and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', 13 *International Criminal Law Review* (2013) 7–41, at 20.

The problem does not lie exclusively with Russia and China alone, however. The United States, and even Britain and France, would not hesitate to invoke the veto if parts of the world where they have sensitivities were concerned.

Two features of the heady days of a decade ago seem to stand out: Africa had embraced international justice with astonishing enthusiasm and the United States seemed hell bent on destroying the ICC. All that has changed. Africa is increasingly disheartened, while the United States has become one of the Court's keenest promoters. Could it be that this change accounts for the malaise that today seems to afflict international justice?

It is sometimes difficult to recall how unexpected the African commitment to the ICC really was. Many participants in the Rome Conference assumed that the institution would be established by a relatively small number of countries in the Global North, with little if any support from the South. That is why, for example, there was such insistence during the Rome Conference that the Court's jurisdiction be premised on universality. When the final compromise emerged based upon territoriality and nationality, many believed this would doom the Court to failure because states in circumstances of conflict would be unlikely to join. The paradigm for such states was the African continent. Similarly, there were huge concerns that the 60-state threshold for entry into force of the Rome Statute was unattainable. There simply were not enough benign democracies in Europe to add up to 60, and there was no expectation of broad support for the Court elsewhere in the world.

Then, quite astonishingly, the ratifications started to pour in. Countries in Africa with conflicts in the present or the recent past seemed infected with enthusiasm for the Court: Sierra Leone, Burundi, Democratic Republic of the Congo, Uganda, Nigeria and the list goes on. Those who insisted upon universal jurisdiction and a 20-state threshold at the Rome Conference never imagined such a development. And while this wave of unexpected support for the Court was advancing, the Bush administration howled about a Court with a runaway prosecutor that it could only tame using the uncertain terms of Article 16.

It is important to understand why, contrary to predictions at Rome, African states were so keen on the Court. Frustrated by the inability of other international organizations to address the concerns of their troubled continent, they turned to a new experiment in global justice that did not seem to be characterized by the traditional dialectic of north and south, rich and poor, first world and third world, Great Powers and everyone else. The Court appeared genuinely egalitarian in structure and profoundly fair in conception. In order to avoid direct confrontation, the Security Council was left a seemingly marginal role, through Articles 13 and 16.

Back in 1994, when the ICTR was established, there was a sense that the Security Council was embarrassed at the suggestion of double standards. If a year earlier, it had acted on the former Yugoslavia, how could it not respond in a similar manner to the greatest manifestation of genocide since the Holocaust? It was often said at the time that the Rwanda Tribunal would never have been established were it not for the *fait accompli* of the Yugoslavia

Tribunal. The sense of indifference to African concerns was nowhere to be found when the ICC began its work. With activation of the first situations, in Uganda and the Democratic Republic of the Congo, it looked as if the Court would finally devote to Africa the attention that it deserved.

Meanwhile, the perspective of the United States on the Court began to evolve. Policy-makers in Washington were increasingly comfortable with an institution that seemed respectful of its sensitivities. The nightmare of an irresponsible prosecutor, which is to say a human rights activist with an anti-American agenda, no longer seemed realistic. How much of this was due to quiet signals Moreno-Ocampo sent to the United States we may never know. Thanks to Wikileaks, there is a bit of a paper trail. 'Ocampo has said that he was looking at the actions of British forces in Iraq — which ... led a British ICTY prosecutor nearly to fall off his chair', said a dispatch to Washington from one of the missions. 'Privately, Ocampo has said that he wishes to dispose of Iraq issues (i.e. Not to investigate them).'

The initial activities of the Court in Africa were greatly appreciated. It was clear that this was an institution that would not ignore the continent. As many have noted, the first situations of the Court were the result of self-referral. This confirmed the consensual nature of the prosecutions, although there were some concerns that these might be one-sided investigations directed at insurgents rather than government officials. In 2005, the Security Council became involved by referring the situation in Darfur. Although there was broad global concern about Sudan's ongoing conflict, the focus on Sudan came not from Africa itself but from the Bush administration. The process leading to referral of Darfur to the Court had begun in Washington during the 2004 election campaign, at the initiative of Bush and Powell. Initially, there was no particular sign of dissatisfaction in Africa as long as the Court focussed its attention on ministers and militia leaders.

The tipping point came in July 2008 when the Prosecutor announced his intention to prosecute President Bashir for genocide. When African leaders suggested that this might upset a delicate peace process, the Prosecutor told them that was not really his problem, and that Article 16 of the Rome Statute provided the appropriate mechanism to address the matter. The United States indicated it would invoke the veto to prevent the implementation of Article 16. Now the wheel had turned, and the Court's work was being shackled to the priorities of the Security Council, with all that this entails, including the veto.

The dream of a new institution that would be independent of the old system, in which all states would play an equal role, and whose work would be directed by a genuinely independent and impartial prosecutor, seemed to be going sour. This was looking increasingly like a case of 'same old, same old'. In fact, it was a huge mistake for the Prosecutor to suggest that Article 16 was the proper way to address the issue. Article 16 was an ugly concession, proposed during the negotiations in order to garner the support of the UK as part of a compromise package. Most African states, indeed the vast majority of the non-aligned, would probably have preferred a Statute where Article 16 (and its evil

twin, Article 13) were omitted entirely. There is no room for deference to the Security Council in a holistic, coherent and principled package of international justice.

4. The Inequality of International Criminal Justice

One of the great and defining moments of international justice in recent times was the arrest of Augusto Pinochet in London in October 1998. Occurring only a few months after the adoption of the Rome Statute, it sent a message that even the friends of the most powerful could be brought to book if a genuinely independent and impartial justice system was in operation. Pinochet was not some obscure African tyrant. He was an intimate friend of Margaret Thatcher, having seized power in a *coup d'état* and then held it for many years with the complicity of Washington. Fifteen years later, international criminal justice is focussed on global pariahs like Charles Taylor, Saif Gaddafi and Hissène Habré. The friends of the rich and powerful are nowhere to be seen. There are no more Pinochets in the dock. The ICC finds technical and unconvincing pretexts to avoid tackling hard cases like British atrocities in Iraq, Operation Cast Lead and the ongoing construction of settlements in the West Bank.

Other courts, like the International Court of Justice (ICJ), have faced similar challenges of credibility. At its best, the ICJ has shown itself to be capable of condemning the most powerful states. In its very first contentious case, *Corfu Channel*, the Court held — unanimously — that the UK had violated the sovereignty of Albania. In a famous paragraph, it explained:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.⁶

Later, in the 1960s, the Court generated enormous disappointment when it appeared to turn its back on the South African occupation of Namibia.⁷ It got its groove back in 1985, when it condemned the United States for supporting insurgents in Nicaragua.⁸ This was the Court's Pinochet moment. Encouraged by *Nicaragua*, states that had previously been indifferent to the ICJ began to accept its compulsory jurisdiction and to withdraw reservations that had been made to compromissory clauses within treaties like the Genocide Convention.

6 ICJ, *Corfu Channel Case (UK v. Albania)*, 9 April 1949, ICJ Reports (1949), 4 *et seq.*, at 35.

7 ICJ, *South West Africa, Second Phase*, 18 July 1966, ICJ Reports (1966), 6 *et seq.*

8 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Reports (1986), 14 *et seq.*

At its best, international justice is capable of compelling the most powerful states and individuals to behave by the same rules that these same states and individuals insist apply to the small and the weak. We are only really inspired by the project when it shows itself capable of such challenges.

There is great enthusiasm that international justice can finally be delivered to Hissène Habré, who faces trial in Senegal pursuant to the clear terms of the Torture Convention. Heroic Belgium was a catalyst for the process. Yet torture was also rather unashamedly used by the United States in the 2001–2008 period. It is even somewhat glorified in Hollywood blockbusters and television series. President Obama, whom we admire for so many reasons, including an unequivocal policy rejecting torture, simply shrugs and says that it would not be advisable to pursue criminal prosecution of those responsible for the abuses of the past. Why won't Belgium insist that American leaders like Rumsfeld and Cheney be extradited to stand trial, as it did with little Senegal? Africans have a point when they contend that this is King Leopold's last gasp. Why must impunity be addressed in Senegal — with a lot of American encouragement, including financial support — yet be ignored in Washington?

5. The Risk of Mediocrity

In this collective reflection on 'setbacks', it is probably misplaced to contemplate a total collapse analogous to what occurred in the 1920s and the 1950s. International justice seems to have become too important a feature of the international system. The real danger is that it becomes increasingly mediocre. From a vibrant and dynamic body, full of potential to alter the post-Second World War order with its fealty to a handful of 'great' powers, the ICC has now become far too deferential to the established order. Mostly it does not operate under a direct mandate from the Security Council, but that may be more illusory than real, because it never strays from the comfort zone of the permanent members. Despite the Rome Statute, the Court marches in lock step with the permanent members.

That large rich states seem to tire of international justice should not be the primary preoccupation. Indeed, that they reflect any wavering in a commitment to international justice, manifested in such measures as budget cuts for the Court, might be taken as a positive indicator rather than a sign of trouble. The real concern should be with the loss of enthusiasm for the Court in Africa and elsewhere in the South. Inevitably, the banality of international justice will also promote inertia and disaffection in civil society, whose momentum has been so important to international criminal justice over the past two decades. Right now international justice needs more Augusto Pinochets and fewer Hissène Habrés.