TRIALS AND TRIBULATIONS OF INTERNATIONAL PROSECUTION

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Introduction

Current Issues Confronting International Criminal Prosecutions

Stacey M. Mitchell and Henry F. Carey

The twentieth century has been dubbed the "age of politically sanctioned mass murder."[1] The mass murders by the Khmer Rouge, Hitler, and Saddam Hussein's regimes among others are what Drumbl refers to as "extraordinary crimes."[2] They differ from ordinary crimes in that crimes against humanity, many war crimes, and genocide are committed by collectives against collectives. Moreover, murders, rapes, acts of torture have group component traits, as well as individual participation that does not fit into legal paradigms of individual criminal deviance.[3] Because these crimes violate universal *jus cogens* norms, they are seen as violating the conscience of humanity, even if they do not necessarily violate the consciences and norms of the societies in which they occur. Whether or not perpetrators really believe they have done nothing wrong because they were merely targeting "enemies," such prosecutions inevitably are difficult because they are commonly perceived as politically motivated and biased.

Because there have been few domestic prosecutions of *jus cogens* crimes, international prosecution has been established for these "core crimes."[4] This is thought to serve justice, as well as to deter and punish criminals. International

prosecutions are alternatives or supplements to truth or other fact-finding commissions, which involve broader investigations of crimes without necessarily holding individuals responsible for violations of international criminal law.

A lasting legacy of the Nuremberg and Tokyo tribunals, the concept of individual responsibility is commonly considered to be one of the merits of the international criminal model because it avoids the creation of collective guilt. This makes such prosecutions politically controversial and difficult to induce true accountability, which would deter future crimes, as well as alter national narratives of innocence. Consequently individual responsibility may or may not induce a "cathartic or healing effect [that] may contribute to peace."[5]

International courts, including the International Criminal Court (ICC), hybrid tribunals, and the *ad hoc* tribunals with superior jurisdiction—the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)—have been lauded as effective tools with which to fight impunity. They focus largely on prosecuting the "big fish": military and political leaders who are the "architects" of egregious crimes. By incapacitating extremists, the ICTY, ICTR, and other courts have arguably established important legal precedents and institutions that have changed international criminal norms, defused intolerance, and created conditions for peace.[6]

International tribunals are not solely concerned with the utilitarian goal of deterrence although it has been cited as one of the foremost rationales for punishing human rights offenders.[7] Other goals include retribution, reconciliation, and strengthening the rule of law. These goals are inter-dependent,[8] meaning they all improve or deteriorate together, depending on how the courts behave, how the international community, domestic leaders, and civil societies perceive trials, and how they respond to those perceptions.

A key indicator of successful prosecution is whether domestic prosecutions are induced as a result of international trials, as well as broader formal or informal domestic investigations and greater national debates about historical crimes. Without some degree of accountability induced from international prosecution, future governments in the immediate country can be expected to perpetrate such crimes again whenever they so feel the need. A trend of increasing use of domestic criminal courts to try mass murderers may be the result of the establishment of international prosecution in the mid-1990s, as well as an indication that states prefer dispensing justice rather than leaving it to the ICC.[9] However, the adequacy of national criminal courts depends on factors including political will and stability, as well as credible institutional development which most post-conflict countries lack in varying degrees.

A hypothesis test of whether the international criminal courts induce more domestic prosecution would be whether the international criminal trials of perpetrators of extraordinary crimes increase greater awareness of and reliance on international law as a tool in not only domestic trials, but also in domestic politics and discourse. If international law conditions the norms used to resolve disputes by threatening legal punishment of these international crimes,[10] they may

also "blunt the hatred of the victims and their desire for revenge."[11] Thus prosecutions are closely linked with peacemaking and peace building; hence the role of the United Nations Security Council (UNSC) in the justice process.[12]

As Schabas explains, prosecutions by international and/or domestic courts today are contrasted with the Nuremberg and Tokyo tribunals, which were products of the unconditional surrenders of Germany and Japan.[13] However, both of these courts, by most accounts, *did* change national narratives of innocence (in Germany more than Japan), inducing political systems and attitudes which had no role for denial of past crimes or justification for future ones. Many of the cases with which international criminal courts *now* contend, however, concern crimes perpetrated in ongoing conflicts or where peace agreements result from negotiations born of war weariness rather than victory. Thus, there is no shame of defeat which might induce the broader purposes achieved by the two post-World War II tribunals.

The chapters in this volume examine the multitude of factors that contribute to the successes or failures of prosecutions of violators of international humanitarian and criminal law. The contributions to this volume add to a current trend in scholarship about the international criminal justice model, which Fichtelberg characterizes as a shift from explaining why and how tribunals are established to whether or not they actually fulfill their mandates.[14]

Fichtelberg characterizes the dominant scholarship as a legalistic approach, reflecting a "fundamental faith in the value of legal norms and procedures."[15] Within this group, however, are skeptics and advocates. Skeptics focus their criticisms largely on the perceived negative impact international mechanisms of justice have on the core principles of sovereignty and non-intervention, as well as diplomatic relations between states. They contend that threats of trials undermine diplomatic solutions to war when the indicted criminals are real or potential interlocutors. Advocates, on the other hand, emphasize the value international tribunals have for the rule of law. Interestingly, neither group fully addresses the successes of international courts.

An alternative approach to legalism discussed by Fichtelberg is constructivism, which evaluates the extent to which international criminal prosecutions affect international and domestic criminal norm formation and implementation, and any consequent normative shifts on perceptions of impunity, as well as international and domestic courts themselves.[16] A hypothesis test of constructivist approaches would include changes in public opinion which would support or oppose prosecutions of major violators of international criminal law. Some of the contributions in this volume tackle this issue by addressing international and domestic criminal norm change and its influence on domestic and international criminal prosecutions.

Although they acknowledge and examine serious weaknesses in the international criminal justice regime all of the contributors to this volume agree that international and hybrid tribunals have made substantial contributions to the development of international criminal and procedural law.

Clearly, norm change at the level of international criminal law is the clearest contribution accruing from international prosecution. In the *Akayesu*[17] case, for example, the ICTR clarified aspects of the definition of genocide under international law, the type of intent required for the commission of genocide, and for the first time, established rape as a genocide-related offense.[18] Moreover the *Kambanda* case marked the first conviction of a former head of government for the crime of genocide.[19]

The ICTY reinforced the norm that no longer privileges sovereign or head of state immunity, by indicting and trying a number of high profile offenders. In *Krstić*,[20] the Court elaborated further on the *mens rea* element of the crime of genocide, and in *Tadić* the ICTY contributed to the formulation of the doctrine of joint criminal enterprise (JCE), and articulated the principle that international humanitarian law applies to intra-state as well as inter-state conflicts.[21] These precedents set by the ICTY and ICTR have been and continue to be influential on international and hybrid courts, as well as national courts.[22]

Moreover the ICC and the Special Court for Sierra Leone (SCSL) are responsible for the indictment, trial and/or conviction of a number of military and militia leaders for the enlistment and use of children for combat, including Thomas Lubanga Dyilo and former President of Liberia Charles Taylor, respectively. The ICC has also made substantial contributions to the development of international procedural law, laying out in its statute rules governing the manner in which investigations are to be conducted and evidence admitted, rules governing the administration of the Court, and the protection of witnesses and basic trial proceedings.[23]

Despite these significant accomplishments, ICC arrest warrants following the indictments of Joseph Kony of the Lord's Resistance Army and President Omar Hassan Ahmad al Bashir of Northern Sudan demonstrate that courts remain embedded in international and domestic politics. This challenges the legal authority and political credibility of the ICC as an institution of justice.[24] Moreover political and other groups are *still* excluded from the protections of the *United Nations Genocide Convention* (UNGC).[25] And it was only in June 2010 that the crime of aggression was formerly defined and officially added to the jurisdiction of the ICC. Of course the weakness of the definition of aggression, in addition to a seven year moratorium on its implementation, will likely enable many countries to avoid accountability for past (and present) misdeeds.[26]

Moreover the various difficulties associated with complementary jurisdiction means the ICC might be sidetracked into dealing with admissibility and jurisdictional challenges from states who claim that they have investigated and cleared potential defendants, rather than actively fulfilling its mandate. Relying on referrals from the UNSC as a method to avoid jurisdictional problems adds the burden of obtaining support from the United States, China, and Russia, three countries that have not yet ratified the Rome Statute.

Advocates for the ICC nevertheless contend that complementary jurisdiction places the onus of prosecution on domestic jurisdictions where it should be. In this light, the ICC is theoretically effective as a court of last resort. Yet others

contend that this hope is seriously misplaced.[27] After all, indictments have only occurred for Africans. The behavior of states clearly demonstrates a lack of commitment and enthusiasm for the prosecution of perpetrators of international crimes."[28]

This problem is further aggravated by the fact that the ICC, like the ICTY and ICTR, "needs artificial limbs to walk and work. And these artificial limbs are state authorities."[29] The ICC depends heavily on inter-state cooperation to arrest and extradite war criminals, as well as a legal case that the country with territorial or citizenship jurisdiction is not credible. More generally the powers granted the ICC and the various ways in which member states can opt out of compliance demonstrate that the international criminal justice regime has hardly achieved "post-Westphalian" status,[30] or for that matter the "communitarian cosmopolitan" status wherein the international community stands solidly united in the pursuit of justice for violations of *jus cogens* norms.[31] In practice, the strength of the ICC and many hybrid courts is a function of the political will and correlation of forces in international politics.

As Michael Thurston discusses in his chapter, with regard to the ICTY and ICTR, political will is demonstrated through the use of prosecutorial discretion by these courts. Whether or not uncooperative states will be coerced into compliance with the courts or not is a function of how they are perceived by the international community: as aggressor (e.g. Serbia) or victim (e.g. Rwanda). This of course raises problems of selective prosecution.

Moreover if states refuse to cooperate with the ICC, there is little the Court can do. Instead the ICC "(through the Assembly of States Parties) can only fall back on the usual international law mechanisms for inducing compliance with international obligations. It lacks any special authority, or power, or means of putting into effect its orders, or generally discharging its mission, on the territory of a recalcitrant state party."[32] As long as the great powers are divided over specific indicted war criminals, ICC member and non-member states will normally be unable to cooperate. Renegade states can then disregard ICC international arrest warrants in the name or "guise of state sovereignty."[33] If this continues, ICC will "have little more than normative impact."[34] Such sovereignty constraints impose similar obstacles on other issues of intervention, such as the emerging Responsibility to Protect (R2P) doctrine authorizing coercion to provide humanitarian relief and, where necessary, remove murderous governments.[35] R2P and the ICC are both are intended to respond to and prevent *jus cogens* violations. They also face similar hazards as Benjamin Schiff addresses in his chapter which compares the establishment and purposes of the ICC with the formulation of the R2P norm.

Political will, specifically the relationship between the will of domestic and international actors and the process of post-conflict justice, also impacts domestic prosecutions, as well as the work of the hybrid courts. Beth Dougherty's essay about the arrest of Charles Taylor addresses the degree to which Taylor's pursuit was shaped by the conflict between the US Congress and the presidency, two branches of government with opposing ideas about Taylor's fate. Johanna

Herman's contribution assesses the efforts of the Cambodian state to limit the process of justice for the victims of the Khmer Rouge. Stacey Mitchell's chapter on *gacaca* tribunals examines the efforts of the Government of Rwanda to curtail the justice process and subsequently the "truth" about inter-group violence in Rwanda. Joanna Quinn's contribution assesses the effectiveness of local conflict resolution mechanisms being used in the north against President Museveni's own efforts to achieve peace in Uganda. Lastly Jo-Marie Burt explores the impact of domestic and international actors and institutions on the creation of an accountability environment in relation to the prosecution of former president Alberto Fujimori and others in Peru. She suggests that continued domestic support for trials will likely be a function of the extant political environment in Peru. All told these chapters demonstrate that political will can be an asset to, or in the alternative, an inhibitor of prosecution.

Many contributors to this volume also evaluate the practical limitations encountered by the international criminal justice model as a whole. For one thing, case law is a subsidiary means of determining international law, since legal precedents are not automatically binding on other international courts.[36] This derives from the civil law tradition of most of the world's countries. Consequently different international and domestic courts will continue to have different views on various aspects of the law,[37] which can lead to forum shopping. Added to this is the fact that judges in the ICTY and ICTR have relied on the *Vienna Convention on the Law of Treaties,* Article 31,[38] which permits looking at legislative history if the ordinary meaning of the text is unclear, to interpret a court's statute. The result is a problem of consistency.

These differing interpretations create challenges for substantive criminal law.[39] James Larry Taulbee's essay examines the obstacles international tribunals encounter in developing the legal concepts of crimes against humanity and war crimes. Similar to Kelly-Kate Pease's chapter in this volume about the case against Charles Taylor in the SCSL, Taulbee examines the ICTY's formulation and use of the JCE doctrine to demonstrate the problems that a lack of uniformity creates for the legitimacy of the international criminal model as a fair and impartial vehicle for justice.[40] Kimberly Lanegran writes in similar vein about the SCSL's formulation of the legal concepts pertaining to the use of child soldiers, including the meanings of "conscription," and "enlistment." She suggests that disagreements between the Trial and Appeals Chambers of the SCSL over the definition of "enlistment," problems of evidence, as well as controversies over the use of JCE as a mode of liability, demonstrate some of the impediments that remain for future prosecutions of the crime in the SCSL and other courts. Legal controversies also surround ICTR prosecutions for songs as incitement to genocide and/or persecution. This specifically applies to the case against Simon Bikindi which Susan Benesch addresses in her chapter. Benesch focuses on the unresolved issues that remain on this matter particularly in light of Bikindi's acquittal for the majority of charges filed against him.

Additional problems generally associated with the international criminal justice model include the slow pace of justice in international courts which, as

some suggest, "undercuts the incentive for states to hold their own trials."[41] For example, since its inception in 1993, proceedings for only 126 persons have been concluded in the ICTY.[42] The pace of justice in the ICC is equally as slow. To date there are only sixteen ongoing cases based on referrals from three states (Central African Republic, Democratic Republic of the Congo, Uganda), from the UNSC, and the Office of the Prosecutor.[43] The ICC is also conducting preliminary investigations regarding allegations of human rights atrocities perpetrated in only eight other countries.[44]

Moreover limitations on the temporal scope of crimes considered by the ICC has meant that victims of human rights atrocities perpetrated *before* 2002 in the DRC, Uganda and elsewhere will not get their day in court. Similar problems are encountered by *ad hoc,* hybrid and domestic courts.[45] As Mitchell, Herman, and Olga Martin-Ortega discuss in their chapters, the failure to bring all relevant parties to justice seriously hampers the truth-telling function of courts (part of the "expressivist" function of institutions of justice).[46] Yuki Takatori addresses this issue with respect to the International Military Tribunal for the Far East (IMTFE); specifically addressing the impact that a failure to hold the Japanese emperor accountable for war crimes; geopolitical considerations that shielded members of the infamous Unit 731 from justice; and the exclusion of cases involving forced labor and prostitution, had on the truth-telling function of the tribunal, as well as its overall legitimacy.

International courts have also been faulted for their detachment from the victims of atrocity crimes,[47] which limits their ability to achieve the goals of strengthening rule of law, and achieving reconciliation in post-conflict societies. This is a topic taken up in the chapter by Adam Smith. Smith specifically examines perceptions of the work of international courts—the ICTY, ICTR, Nuremberg, Tokyo—by the effected societies and explores the ways in which future courts (the ICC) can "bridge" the existing gap.

Overall the perceived decline in legitimacy strengthens critics' charges that these courts are merely imposing "selective justice" which may de-legitimate or undermine international criminal justice as a whole.[48] Aspiring to universal jurisdiction was always part of the original rationale for the creation of a permanent criminal court, yet, the actions of the ICC in response to self-referrals demonstrates that it is not necessarily immune from charges of selective justice.[49]

As indicated previously a number of authors in this volume focus their analysis on the work of hybrid tribunals. These chapters help to close a gap in the existing literature, the bulk of which has focused largely on *ad hoc* tribunals and the ICC.[50] Hybrid tribunals embody a mixture of international and domestic law and are staffed by international and domestic jurists, lawyers, and other personnel. As such, they are believed to administer justice in a more "un-biased and even-handed manner,"[51] consistent with international principles of justice. Moreover because of their location they help to provide greater domestic ownership of the justice process. As Kathleen Barrett argues in her contribution to this volume, hybrid tribunals can therefore partially overcome charges of political

bias and Western influence commonly leveled against international tribunals. At the same time she and others contend that enthusiasm for the hybrid justice model should be tempered somewhat by practical considerations including, but not limited to, the need for political stability, the status of ongoing peace processes, a lack of qualified legal personnel, and the role of mass media.

Moreover transitional justice is about more than achieving retribution for the perpetration of human rights atrocities. Trials—domestic, international, hybrid—are also expected to contribute to reconciliation for societies effected by mass conflict. In other words mechanisms of justice are expected to contribute to both negative and positive peace.[52] The pursuit of justice and conflict resolution can foster peace in divided countries by, among other things, marginalizing and stigmatizing extremists and violators of international criminal law.[53] However others contend that trials are useful only when they occur well after peace negotiations have transpired, thus avoiding disruption of peace negotiations or post-pact implementation of agreements.[54]

This is a problem in particular when it comes to live indictments issued by the ICC. As Peter Stoett discusses in his contribution to this volume, live indictments have been selective, largely political, and consequently counterproductive in that they have not achieved their objectives: there has been no deterrence; no end to cultures of impunity. For reasons such as these Candace H. Blake-Amarante suggests in her chapter that an alternative litigation model, such as the domestic tort litigation model proposed by Anthony D'Amato, may provide a suitable alternative; one which preserves both sovereignty and the interests of the parties involved. In any event, as Mahmood Monshipouri discusses, any application of international law standards to ongoing conflicts has become increasingly difficult given the changing nature of warfare and the advent of transnational terrorism.

In some cases amnesties may be the preferred solution to prosecution, particularly from the point of view of the aggressors. Werle suggests: "a waiver of punishment may be essential in certain situations to restore peace and facilitate national reconciliation."[55] As a general rule, however, amnesties face a number of serious problems, especially when they are considered for crimes that violate *jus cogens* norms.[56]

The issue of amnesties is taken up in this volume by Quinn and Burt. Quinn's contribution about the process of transitional justice in Uganda makes it clear that the voluntary amnesties granted prior to the conflict's conclusion may be insufficient for reconciliation and deterrence in Uganda. Amnesties met with far stiffer resistance in the case of Peru. As Burt discusses this resistance laid the foundation for future prosecutions of perpetrators of grave violations of human rights in Peru. However Peru's is a cautionary tale. Despite the success of the Fujimori trial the push for amnesties in Peru has not necessarily disappeared.

As the chapters in this also volume indicate, norms induce a desire for justice whether by formal or informal means. It is also important that domestic justice mechanisms conform to existing normative standards. This latter theme is addressed by Quinn, Mitchell, and Burt among others who address the conse-

quences of integrating (or failing to integrate) the justice process within a culturally accepted normative framework. In most cases domestic judicial institutions ensure greater ownership of the justice process for post-conflict societies. However whether or not adherence to internationally accepted standards of due process ensures for greater legitimacy (as in the case of Peru) or is an obstacle to achieving justice (e.g. Rwanda) must be assessed on a case-by-case basis.

The chapters in this volume contribute to the body of literature that examines the link between norms and international criminal justice, including Addis' work about the mutually constitutive function of the concept of universal jurisdiction, Sikkink's analysis about Argentina's influence on the diffusion of human rights norms and transitional justice practices in other Latin American countries, and studies which examine the evolution of the R2P concept.[57] In one way or another all of the contributors to this volume demonstrate that the diffusion of international human rights norms has influenced and continues to influence the decision-making processes of political leaders and societies with regard to holding past leaders accountable for grave violations of international criminal law.

Organization of the Book

As stated previously, the purpose of this volume is to contribute to the growing discussion and debate about the effectiveness of the international criminal justice model. Similar to the studies by Drumbl, Mani, Fichtelberg, and many others, the contributions to this volume assess the variety of factors that continue to impede the ability of international courts to achieve their mandates.[58]

This volume is divided into two sections. Part I examines thematic approaches about the impact the prosecution of perpetrators of extraordinary crimes has on the development of international criminal law, as well as on the legitimacy and effectiveness of the international criminal justice model more broadly. The chapters by Taulbee, Pease, Lanegran, and Benesch examine the impact court decisions have on substantive aspects of international criminal law. Other authors, such as Smith, Stoett, and Blake-Amarante suggest that enthusiasm for the work of the *ad hoc*, permanent, and hybrid international tribunals should be tempered by the challenges these courts continue to face; challenges that likely inhibit them from fully realizing their respective mandates.

Many of these challenges have to do with the political willingness of powerful actors in the domestic and international community to prosecute wrongdoers. The chapters included in Part II address the impact of political will and other influential factors on the work of specific tribunals and trials. Dougherty evaluates the general political problems of arresting indicted war criminals by focusing on the case of Charles Taylor. Quinn addresses the impact of President Yoweri Museveni's heavy-handed policy-making style on the process of transitional justice in Uganda; focusing on the relationship between politics and a

multitude of justice mechanisms. The other chapters in this section consider specific criminal tribunals such as for Cambodia by Herman, Bosnia by Martin-Ortega, and Lebanon by Barrett, as well *gacaca* by Mitchell and Prisca Uwigabye, and Burt's thorough examination of the factors that contributed to the prosecution and conviction of former Peruvian president Fujimori and the implications his trial has for justice and the rule of law in Peru.

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Notes

1. R.W. Smith, "Human Destructiveness and Politics: the Twentieth Century as an Age of Genocide," in *Genocide and the Modern Age: Case Studies of Mass Deaths,* ed. I. Wallimann and M. N. Dobkowski (New York: Greenwood Press, 1987), 22.

2. Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 3-6.

3. Drumbl, *Atrocity*, 24.

4. Werle also includes wars of aggression as a core crime. Gerhard Werle, *Principles of International Criminal Law,* 2d ed. (Hague, The Netherlands: T-M-C Asser Press, 2009), 29.

5. Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford: Oxford University Press, 2008), 422.

6. David Wippman, "Exaggerating the ICC," in *Bringing Justice to Power? The Prospects of the International Criminal Court,* ed. Johanna Harrington, Michael Milde and Richard Vernon (Montreal: McGill-Queen's University Press, 2006), 123.

7. Werle, *Principles of International Criminal Law,* 34-35.

8. Drumbl, *Atrocity*, 149. See also William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 67-73.

9. Adam M. Smith, "International Organizations and Criminal Justice," *The International Studies Encyclopedia,* Robert A. Denemark (Blackwell Publishing, 2010), 27-28. http://www.isacompendium.com/subscriber/tocnode?id=g9781444336597_chunk_g978144433659711_ss1-41 (accessed November 15, 2010). Schabas points out that domestic courts are the preferred venue for addressing these types of cases. William A. Schabas, *Genocide in International Law: The Crime of Crimes,* 2d ed. (Cambridge: Cambridge University Press, 2009), 400-401.

10. Werle, *Principles of International Criminal Law*, 35; also Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31, no. 3 (August 2009): 624-654.

11. Cassese, *Human Dimension*, 422.

12. Schabas, *UN International Criminal Tribunals*, 68-69. Sometimes the UNSC will condition its resolutions by insisting on international and domestic prosecutions and/or other types of investigation and accountability.