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Exploring the Boundaries of International Criminal Justice

Edited by
Ralph Henham and Mark Findlay

International and Comparative Criminal Justice

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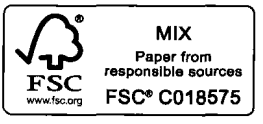

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Chapter 1
Introduction: Rethinking International Criminal Justice?[1]

International criminal justice is in transition. Fifteen years after the emergence of the modern institutions of international criminal justice through the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), the 'idea' of international criminal justice has become normalised to an extent that few imagined possible at its inception. Experimentation with international investigation and adjudication techniques and processes during this period has also helped normalise the use of criminal justice tools in international conflict resolution interventions. Yet the system that has been 'normalised' remains a specific and contested vision of what shape international criminal justice (ICJ) can and should take, the nature of its operation and institutions, the impacts it has and interests it should serve – and the direction in which it should evolve.

The formalised dimensions of international criminal justice, especially with the advent of the permanent International Criminal Court (ICC), now predominate as the exemplary if not prevailing face of global justice. With its emphasis on complementarity between international prosecution and domestic process, the ICC has offered out recognition of international criminal justice as a peace and justice paradigm of last resort. In this shadow of complementarity – and growing international donor *fatigue* – we are seeing increasing resort to variations and adaptations in the fact-finding, truth-seeking, norm-enforcing and liability-apportioning processes that implement international criminal norms, especially at the national level. Traditional and localised forms of justice[2] and victim voices[3] are beginning to find a tentative place in the unfurling system of international criminal justice. And there is increasing cross-fertilisation between international and domestic criminal trial processes, other types of fact-finding bodies, expeditionary policing and other international control mechanisms (such as sanctions and peacekeeping). All this is further evidence of the incorporation of international criminal justice into efforts at global governance beyond political hegemony and international agency. New

1 Some of the thoughts and reflections in the early and later part of this Introduction are assisted by the work of James Cockayne and the *Re-imagining International Criminal Justice Project* Team of the International and Comparative Criminal Justice Network.

2 See for example the issue of the *International Journal of Transitional Justice* (November 2009) on 'Global and Local Approaches to Transitional Justice'.

3 See for example Mark Findlay, 'Activating a Victim Constituency in International Criminal Justice' (2009) *International Journal of Transitional Justice*, 3: 183–206.

ideologies of international justice are being advanced by NG0s as well as regional state alignments keen to employ justice in peace-making and reconstruction. The ambit of international criminal justice, and its fluid mandate, has exploded well beyond the intentions of the Nuremberg and Tokyo tribunals.

But the mixed evaluations of the International Criminal Court after half a decade of operation and its first prosecutions have challenged the sense of inevitability that had begun to develop around the progressive 'criminalisation' of international security and control strategies. The 'success' of the 'project' of international criminal justice is increasingly doubted, opening up new opportunities and obligations to re-imagine international criminal justice,[4] and to question if there might be other – perhaps even better – ways of achieving some of the objectives that international criminal justice seeks to achieve.[5] An increasing number of courts, practitioners and commentators are questioning whether and how the autonomous development of this 'system' can be justified. They want its understanding limited instrumentally, as part of a broader set of related regulatory tools and strategies for effective global governance, including UN sanctions, peacemaking and peacekeeping, diplomatic fact-finding, international police cooperation and international human rights mechanisms.[6] Some even argue that absolutist notions of 'justice' should consequently give way to larger regulatory objectives – such as the pursuit of peace, or the protection of human rights. Other commentators embrace the widest aspirations for international criminal justice and argue for new conceptions and forms of trial (and alternative) justice to take global governance into a new and exciting age of pluralist regulation opportunity.[7] How are these two divergent positions to be reconciled in any cohesive or consistent development for international criminal justice?

Not co-incidentally in international relations literature and policy commentary, there are strident criticisms of the selective and apparently symbolic nature of the system as it actually operates. Attention is increasingly drawn to the gap between the rhetoric of its most ardent backers and the lived-experience of victims of injustice. The growth in victim opinion survey research in recent times gives

4 See Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) *Chicago Kent Law Review*, 83(1): 329.

5 Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Cullompton: Willan Publishing, 2005); Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (Basingstoke: Palgrave MacMillan, 2010).

6 See for example James Cockayne, 'Unintended Justice: The UN Security Council and International Criminal Governance', in Adam Crawford, ed., *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (Cambridge University Press, forthcoming); and Mark Findlay, *Governing through Globalised Crime: Futures for International Criminal Justice* (Cullompton: Willan Publishing, 2008).

7 See Mark Findlay, *Crisis What Crisis: Legal Regulation in New Visions of Global Risk and Security* (London: Taylor & Francis, forthcoming).

empirical substance to our worries for legitimacy that the absence of any true victim constituency plaguing international criminal justice will present. This gap fuels arguments that there are incompatibilities between the pursuit of 'peace' and the rendering of 'justice'. There are associated reservations about the expanding divide between the massive investment of political, human and financial capital in adversarial trial processes and the lack of attention to other aspects that one might expect of a true 'system' of international criminal justice: effective and rights-respecting policing and enforcement systems, effective detention arrangements, and alternative remedial avenues for those to whom the system of 'high' international criminal justice is not accessible.

As a result, there is developing interest among policy-makers and academic commentators alike in generating credible concepts of 'effectiveness' in transitional and international criminal justice.[8] This evaluation requires an associated reflection on a more appropriate framework for international criminal justice service delivery particularly in its trial forms so essential for declaratory influence and due process advancement.[9] But that trend, which has so far tended to focus on efforts to developing empirical methodologies for measuring the impacts of justice on local perceptions and broader justice outcomes, has not yet been accompanied by a critical examination of what *kind* of outcomes we do, can and should expect international criminal justice to deliver. How should we assess the adequacy of international criminal justice? What contribution do we expect it to make to larger projects of global governance and the maintenance of public order? What have been the strengths and weaknesses of the system of international criminal justice, as it has developed recently?

Why the Need to Re-imagine International Criminal Justice

After a decade and a half of the latest phase of international criminal justice, scholars are no closer to a multi-disciplined appreciation of this regulatory frame. There are many reasons for this. We have identified:

- competition over what analytical form predominates as the authorised language of commentary and critique;
- an unhealthy attachment of research and scholarship to the political mission of international criminal justice; as a result
- the failing of scholars and researchers to dig deep into some of the metaphors and symbols on which international criminal justice is based;
- a western-centric approach to the analysis of aims and functions, particularly where connections such as rights and justice are asserted;

8 See for example the forthcoming issue of the *International Journal of Transitional Justice* on measuring effectiveness in transitional justice.

9 Findlay and Henham (2010), chaps 5, 6 and 7.

- assumptions about the constitutional legality informing international criminal justice which are self-serving particularly to international customary law;
- fundamental disjunctures over what international criminal justice should be doing and for whom it operates;
- an essential incapacity to question the relevance of international criminal justice for global governance.

This is to name but a few.

Against these realisations is the reality that the legal, operational, policy, political and normative ramifications of whatever international criminal justice might be are moving along paths of discourse and development that rarely intersect. Lawyers, politicians, diplomats, policy analysts, NGO officials and scholarly commentators are not talking the same language, and seem little concerned by the divergence.

That could be said to be so until the ICC became an active (if a somewhat dysfunctional) institution, and its first trial revealed just how endangered is the global legitimacy of international criminal justice for victim communities in particular. If truth and reconciliation commissions, war crimes tribunals, transnational crime conventions, mutual assistance policing and victim reparation and state reconstruction are somehow to come together into a credible global justice form then much more needs to be done in analysing the expectations and responses to the aims of ICJ. This challenge is more relevant when international criminal justice misses out on the 'givens' that underpin most credible domestic criminal justice traditions:

- established constitutional authority
- resilient legislative frameworks
- well-developed legal jurisprudence
- coherent procedural entity
- profitable and independent professionals
- robust institutions and agencies
- complementary collateral regulatory paradigms

The question that therefore presents itself is 'where-to International Criminal Justice?'

A precondition for any coalescence of understanding between 'those who do' and 'those who critique' in justice circles is the development of compatible language and a resultant conversation between the stakeholders in each sector which values the other, and respects different forms of analysis. This collection, we hope, will advance the relevance of research-based policy and broaden the common discourse around crucial theoretical and operational challenges for international criminal justice

Scholarly Imaginings?

In an essay[10] some years back which looked at the foundations of international criminal justice we identified two motivating paradigms:

- human rights concerns
- political pragmatism

These influences are not mutually exclusive or even distinct. In fact, to suggest them as separate motivations was itself a little misleading. Dialectic analysis of justice forms is common in socio-legal studies. However, it tends to distract the understanding of justice complexities by over-emphasising either their normative representations or their political utility. In addition, this type of analysis alienates practitioners and professionals by divesting justice of its potentialities as well as recognising its limitations.

Simplistic as the distinction may be it does suggest two of the primary directions of scholarship concerning international criminal justice in the last decade. The *human rights school* grows from a mix of international humanitarian law and restorative justice foundations and has spawned much of the commentary on international criminal law and on transitional justice. So it could be said that the human rights commentators and analysts have serviced major NGO peace and conflict resolution initiatives. The influence of this perspective in arguing a jurisprudence of international criminal law could be seen as no less influential than the judicial narrative emerging from the war crimes tribunals and associated legal commentary. Rights discourse has offered much more than procedural technologies as arguing international criminal law.

The *political pragmatists* are the expertise behind the institutional explosion in ICJ. It would be wrong to see this influence as limited to formal institutionalisation. Obviously the expert panels that supported the international law commission and helped draft and ground the UN internatinal criminal justice entities were critical to their legitimacy. But also, parallel justice processes like truth commissions and juridical hybrids required the legitimation of supportive scholarship.

Whatever path taken, those scholars with 'clout' in a policy and operational sense were closely aligned with the mechanisms and emerging traditions which they reviewed. It is not surprising then that those of us who were critical of this synergy challenged the analytical independence and integrity of much of the resultant literature. Influence came at a price.

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10 Mark Findlay and Clare Mclean, 'Emerging International Criminal Justice', (2007) *Current Issues in Criminal Justice* 18/3: 457–80.

International Criminal Justice – All Things to All Men?

For those researchers and scholars on the inside, or those throwing rocks at the window, it was rare to see an essential reflection on the nature and form of international criminal justice as a problematic entity of global governance. What is international criminal justice? Like international criminal law, does it yet merit investigation as a discreet regulatory system or does it remain not much more than an off-shoot of other legal or administrative systems, themselves exhibiting suspect independence from bi-lateral or state-accorded authority?

To start with what is *international* about it? Just because the institutions of global justice exercise jurisdiction beyond the state or the region, and claim to deal with mass victimisation through new laws or merged traditions, internationalism evades many of the features of ICJ. The initial activity of the ICC, for instance, has branded it more an African criminal court rather than being concerned in any proportionate or incremental way with the most significant global harms. It is logical that the internationalism of the formal institutions of ICJ in particular will be easily impugned as they rely so essentially on the constitutional authority of a deeply sectarian Security Council.

Are the major global crimes the primary concerns of ICJ? The general public would no doubt be amazed that the ICC and the international tribunals do not prosecute terrorism, drug-trafficking, money-laundering, transnational organised crime or international corruption. Even if we incorporate the principal international conventions against transnational crime within the remit of ICJ, economic and environmental crimes most likely to harm most of us don't get much attention.

And what of its justice? The victors in post-military conflict are never before the international criminal tribunals. At best the ICC can only deal selectively with a dozen or so perpetrators annually. Truth and reconciliation does not give retribution to the victim. Mass localised justice endangers the rights of victim witnesses left behind after their testimony is heard. Where is the justice in any of that?

Managing Unhelpful Dichotomies

The distinction between formal and informal international criminal justice which is at the heart of the transitional justice movement presents a danger not only for justice service delivery. If most media and political interest is focused on the international criminal justice symbolic *top end*, while the majority of justice that victim communities access, remains informal, under-resourced and unreported, accountability and procedural fairness are the first to be sacrificed.

Second-class justice for the masses, without the benefit of professional intervention or legal regulation, is the reality of international criminal justice on the ground. This is a consequence of legal separatism, the suspicions of the restorative movement, profound misunderstandings of victim expectations, the politicisation of the international criminal trial and the failure to recognise humanity rather

than hegemony as the natural constituency of international criminal justice. We have argued in several contexts that transformation of global justice and the international criminal trial in particular holds out much to bridge the two tiers of justice and thereby enhance victim-based legitimacy.

But for legal purists like Damaška the fault is not with justice dichotomies but unrealistic and expansive aims for international criminal justice which should embrace the frameworks of adversarial retributivism, and eschew peace and conflict resolution. What this argument fails to understand is that the eventual legitimacy of international criminal justice rests on much more than show trials. Victims worlds-away from The Hague will not for long accept the declaratory dimension of the ICC as enough to merit their confidence and commitment.

Dichotomies plague policy and operational discourse in similar measure. The criminal justice tools of the UN are wedged by an artificial but irreconcilable peace and justice divide. It is here that scholarly critique and applied research can reveal pathways to reconciliation and a more effective regulatory pluralism.

Need for Dialogue – Talking the Same Language?

To achieve the type of regulatory pluralism wherein the potential of international criminal justice and its relevance are maximised sectoral stakeholders need to start talking the same language. We predict that as the risk/security focus of globalisation moves away from the allegory of global terror and toward risks we will all suffer (global warming, health pandemics and economic collapse) real and resounding questions will be asked of regulatory and control mechanisms such as criminal justice. The answers will be tested against a cost benefit critique which crime control has never faced in past neo-liberal neo-conservative decades. It will be then that those who make their living from planning, authorising, practising or modelling and evaluating criminal justice will be of necessity forced to seek similar languages of justification and relevance.

Adding a Critical Dimension

Criminal justice, international even more than domestic, in the wake of the recent global economic collapse is being called to account as an independent regulatory strategy. Against most regulatory process and outcome measures the formal justice institutions in particular, have been exposed as failures in terms of cost/benefit, and even their own limited control or prevention aspirations. Policing will not be justified in terms of perception management. Courts and trials will need to achieve more than symbolic presence. Punishment will no longer benefit from an untested confidence in deterrence. Disillusionment with retribution as reason enough to punish is already upon us. Politicians who have relied on governing through crime will as quickly turn on criminal justice when its regulatory potency is called into

account by constituencies more universally exposed to risk and requiring security. Policy makers and practitioners will be forced to incorporate rather than ignore critical scholarship if they are to weather the disenchantment of political hegemony and civil society.

The challenge for scholars and researchers will be to avoid the compromise caused from panic as research funding dries up, or the rejection of irrelevance if they cannot provide new models and not just old critiques of the justice processes in decline. For this outcome to be minimised, practitioners as well as researchers face the prospect of letting go their traditional trappings of status, and to re-skill and reinvent in a new age of regulatory pluralism and disciplinary cross-over. Old enemies and old allies will need to be engaged with in a context where critical scholarship is repositioned and policy promotion is far more scrutinised.

Resolving Conflicts of Interest

The Lubanga trial has exposed conflicts of interest for practitioners and policy makers which scholars and practitioners should have seen coming. A very few critics with an eye on the need to transform international criminal justice to meet its expansive aims have been forewarning these outcomes from the inception of the court and the growing prominence of the show trial as the declaration of global justice. But practitioners were convinced that their conventional ways of doing business, without the benefit of academic augmentation would see them through. They were wrong. And now lawyers, judges, administrators and policy-makers are scratching their heads and looking for answers, many contained in the literature with which they are totally unfamiliar. A distinct challenge for scholars and researchers is to make accessible that literature and to enrich it with the practical outcomes and applications of critical theorising.

An example of these solutions lies in our arguments for trial transformation. Put simply, we say that victim communities are the rightful constituency for international criminal justice. That being the case legitimate victim expectations should inform the procedures and outcomes of international criminal trials, remaining central as they are to the political imagining of global justice. Surveys show that these interests expect retributive and restorative justice and that there is no acceptance of two separate tiers of justice to service these needs. In fact, the due process considerations of trial procedure should not be left to those very few victims attaining witness status. Having argued that there is nothing normatively and procedurally intractable about the international criminal trial which bars inclusion of restorative perspectives, the challenge was then to show how it would work. How would fact and evidence sit with truth and history? How would the role of the juridical professional change to accommodate and facilitate this transition? How would competing victim expectations be reconciled? Could responsibility replace liability as a legitimate trial outcome?