

INTERNATIONAL CRIMINAL LAW: TAKING STOCK OF A BUSY DECADE

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I INTRODUCTION

*Only I never saw another butterfly.
That one was the last one.
Butterflies don't live here,
In the ghetto.¹*

Pavel Friedmann wrote these words as a teenager in the Terezín ghetto near Prague. Along with 15 000 other Jewish children from Terezín, he later perished in a concentration camp. Pavel's poetry makes it clear that he knew he was being grievously wronged. But never would he have expected that his tormentors face legal sanction. Moral condemnation, certainly. But courts of morality are ephemeral and for the afterlife; they are not courts of law.

Pavel's suffering — along with that of so many others — did motivate the creation of courts of law to condemn Nazi barbarity. But these tribunals, principally sited at Nuremberg, were neither global nor permanent. Nor were they civilian. Nuremberg easily could have gone either way: as a watershed or a flash in the pan. History has proven kind to Nuremberg, in so far as it remembers the trials that were held there as a watershed. Over time, these trials have in fact become lionised — mostly because of the events of the past decade.

Cumulatively, these events have mainstreamed courts of law as the reflexive first option for holding accountable those who commit extraordinary international crimes such as genocide, crimes against humanity, or widespread

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¹ Pavel Friedmann, 'The Butterfly' (1942).

war crimes. The atrocity trial glows in this iconic status. The architecture of justice involves courtrooms and jailhouses while the narrative of justice relates to individual culpability.² International criminal law ripples through the imaginative space of post-conflict justice and, thereby, aspires to fill the sullen void of impunity.

International criminal law dazzles by dint of its ambition. The claim that courtrooms can distil terribly complex episodes of collective atrocity is a bold one. So, too, is the claim that the jailhouse can punish the enemies of all humankind. Yet these ambitions have prompted action.

To commemorate the 10th anniversary of the *Melbourne Journal of International Law*, the Editors have asked for a reflection on major developments in international criminal law over the past decade and the challenges it faces for the future. I begin by setting out four such developments and then identify four challenges.

II DEVELOPMENTS

The four major developments that I identify are: institution-building; judicial and jurisprudential output; trendsetting and epistemic communities; and political management.

A *Institution-Building*

The past 10 years have witnessed tremendous institutional growth for international criminal law. Pre-existing institutions such as the ad hoc International Criminal Tribunal for the Former Yugoslavia ('ICTY', 1993) and International Criminal Tribunal for Rwanda ('ICTR', 1994) have consolidated their work.³ Moreover, new institutions have popped up. The topography of international relations now includes the permanent International Criminal Court ('ICC', 2002; currently with 108 states parties);⁴ hybrid tribunals such as the Special Court for Sierra Leone ('SCSL', 2002);⁵ the Extraordinary Chambers in

² The International Military Tribunal ('IMT') at Nuremberg famously held that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced': IMT, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 1, 223. At the time, the IMT intended to dispel defendants' arguments that they were not guilty because they were merely cogs in an abstract criminal state. Over time, however, these words have come to represent a preference: that the pursuit of post-conflict justice is best served through the selective prosecution and punishment of individual defendants.

³ See, eg, 'Registrars of ICTY and ICTR Sign Statement of Co-operation' (Press Release, 21 September 2001) <<http://www.icty.org/sid/7952>>.

⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁵ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002).

the Courts of Cambodia ('ECCC', 2003);⁶ and the Special Tribunal for Lebanon ('STL', 2007).⁷ International criminal law is everywhere.

B *Judicial and Jurisprudential Output*

The institutions of international criminal law are busy. The political economy of judicialised accountability is a going concern. Although trials continue and are forthcoming at each institution, the ICTY has convicted 70 offenders (including 15 cases that are under appeal); the ICTR has convicted 35 (including seven cases that are under appeal); and the SCSL has convicted eight (three convictions in the *Revolutionary United Front* case⁸ are likely to be appealed).⁹ Over 80 individuals have been convicted by another hybrid institution, the Special Panels for Serious Crimes in Timor-Leste, which closed down in May 2005 (leaving much of its work unfinished). The ICC is at work in four situations: Uganda, the Democratic Republic of the Congo, the Central African Republic and Sudan.

But these numbers tell only the quantitative part of the story. These institutions have also generated substantive law, thereby serving an important expressive and jurisprudential function. Over the past decade, international criminal law has advanced rapidly in terms of codification and interpretation. Crimes, and elements of crimes, are now set out in great detail. The case law interpreting textual documents is thick and robust. Moreover, the processes of codification and interpretation have, for the most part, been progressive. Both states and judges have expanded the ground covered by the law. Crimes committed against women and children, hitherto marginalised, have now become a focus of attention.¹⁰ Liability theories, such as, joint criminal enterprise, indirect co-perpetration, and command responsibility widen the range of potential perpetrators.¹¹

C *Trendsetting and Epistemic Communities*

International criminal law now reaches deep into national jurisdictions. Over the past decade, national courts have increasingly prosecuted and punished perpetrators of genocide, war crimes and crimes against humanity. In Rwanda

⁶ *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed 6 June 2003, 2329 UNTS 1-41723 (entered into force 29 April 2005).

⁷ SC Res 1757, UN SCOR, 62nd sess, 5685th mtg, UN Doc S/Res/1757 (30 May 2007).

⁸ *Prosecutor v Sesay (Trial Chamber)* Case No SCSL-04-15-T (8 April 2009) (Sentencing Judgment).

⁹ Six detainees have been acquitted at the ICTR; 11 at the ICTY; and none at the SCSL.

¹⁰ Several of the ICC's indictees are specifically charged with crimes against women and children, and both the ICTR and the ICTY have been major forces in criminalising sexual violence. See, eg, *Prosecutor v Lubanga (Trial Chamber)* Case No ICC-01/04-01/06 (26 January 2009); *Prosecutor v Ntaganda (Pre-Trial Chamber)* Case No ICC-01/04-02/06 (22 August 2006) (Warrant of Arrest); *Prosecutor v Kony (Pre-Trial Chamber)* Case No ICC-02/04-01/05 (8 July 2005) (Warrant of Arrest); *Prosecutor v Bemba (Pre-Trial Chamber)* Case No ICC-01/05-01/08 (12 January 2009) (Confirmation of Charges); *Prosecutor v Harun (Pre-Trial Chamber)* Case No ICC-02/05-01/07 (2 May 2007) (Warrant of Arrest).

¹¹ Assuredly, these liability theories, in particular joint criminal enterprise, have proven controversial and have not remained static in their scope. See, eg, *Prosecutor v Krajisnik (Appeals Chamber)* Case No IT-00-39 (17 March 2009) (Judgment).

alone, at least 10 000 individuals have come before national courts, and many hundreds of thousands — perhaps up to one million — more have appeared in neo-traditional *gacaca* proceedings.¹² Bosnia, Serbia and Croatia, spurred on by the ICTY's Completion Strategy, have each created domestic war crimes chambers.¹³ Uganda, too, is looking to create such a chamber provisionally called the Special Division of the High Court.¹⁴ The iconic status of the atrocity trial pervades the international plane but also seeps down into national and local jurisdictions, thereby serving a tangible social constructivist function. Despite its contested status, universal jurisdiction has become more vibrant than ever.

What is more, over the past decade, an entire generation of lawyers has cut its professional teeth at the various international criminal tribunals. These lawyers have become specialists, whose expertise in international criminal law and procedure is no longer just of academic value — it is marketable and the market values it. These lawyers now have an interest in maintaining the value of their expertise. Within the college of international law, an energetic, transnational and networked epistemic community of international criminal lawyers has arisen.

D *Political Management*

The ICTY, ICTR and ICC touch much more than just law. They also affect domestic political structures in the countries whose tragedies they judicialise.¹⁵ At times, these effects are salutary: they inspire the rule of law, promote transparency, and hollow out reprehensible governments. In other instances, international courts might help sitting governments consolidate their own power and stigmatise atrocious political opponents, while shielding their own illiberal practices from scrutiny. Arguably, the Rwandan and Ugandan governments have managed the ICTR and ICC, respectively, to these ends.¹⁶ Securing justice for rebels or losers comes at the price of insulating the government or winners from justice. National prosecutions for atrocity also can achieve ulterior purposes — both in terms of who is targeted and who is not targeted. One example is the exclusion of the Rwandan Patriotic Front's crimes from the scope of the Rwandan *gacaca* tribunals and the inclusion of certain proceedings against suspects based on charges of genocidal ideology, negationism and divisionism.¹⁷

It also remains unclear whether ICC indictments or arrest warrants actually improve the situation of victims in afflicted societies. The pursuit of criminal justice may come at the expense of humanitarian justice. Although it is far too

¹² See, eg, Allison Corey and Sandra F Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004) 103 *African Affairs* 73; 'Rwandan Cabinet Resolves to Entrust Gacaca Archives to Commission', *Hirondelle News Agency* (Tanzania) 17 April 2009 <<http://www.hirondellenews.com/content/view/3192/182>>.

¹³ The ICTY Completion Strategy is set out in SC Res 1503, UN SCOR, 58th sess, 4817th mtg, UN Doc S/RES/1503 (28 August 2003) [2], [7].

¹⁴ Joe De Capua, 'Uganda Plans for War Crimes Trials', *Voice of America* (Washington DC, United States) 24 December 2008 <<http://www.voanews.com/english/archive/2008-12/2008-12-24-voa32.cfm?moddate=2008-12-24>>.

¹⁵ See, eg, William Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557, 559.

¹⁶ Max Du Plessis, *The International Criminal Court and Its Work in Africa: Confronting the Myths* (Institute for Security Studies Paper No 173, November 2008) 1, 11.

¹⁷ Corey and Joireman, above n 12, 86.

early to tell definitively, the expulsion of aid groups from Sudan following the March 2009 issuance of an arrest warrant against Sudanese head of state Omar Al-Bashir might constitute an example.¹⁸ On the other hand, reports are also emerging out of Sudan that Al-Bashir's indictment is mobilising his internal political opponents and eroding his political support (although some of Al-Bashir's challengers may be even less respectful of human rights).¹⁹ What the community of international criminal lawyers should eschew, however, is glibness that humanitarian justice necessarily parallels criminal justice; that amnesties inevitably deserve scorn; that indictments inexorably help victimised groups; and that criminal justice is a prerequisite to peace. The realities are much more complex.

III CHALLENGES

Although dazzling, the development of international criminal law also frustrates. I posit four challenges for the future: (re)nationalisation: from technique to context; diversity: from law to justice; scrutiny: from faith to science; and truths: from convenience to discomfort.

A *(Re)nationalisation: From Technique to Context*

Although international criminal law is everywhere, in a sense, it is also nowhere. The emergence of international criminal law as an impartial technique has come at the expense of context or area studies. The pursuit of neutrality has — deliberately or inadvertently — tended to sideline victims from the process of justice, subordinate traditional approaches to dispute resolution, and externalise justice from afflicted communities. Now that the institutions of international criminal law are embedded in the fabric of international relations, might they develop the confidence to better welcome the local and, thereby, more proximately align themselves with the place most relevant to most of us — namely, the parochial and quotidian? There are some positive signs in this regard. Outreach efforts have become prioritised.²⁰ Furthermore, r 23 of the *ECCC Internal Rules*²¹ permits victims to participate in criminal proceedings brought by the ECCC prosecutors and to seek collective and moral reparations. Specifically, a victim who suffers a physical, material or psychological injury can claim rights for a civil party action before the ECCC. This injury must be personal, the direct consequence of the offence and have actually come into being. The ICC also permits victims a participatory role in trial proceedings;²² and reparations may be possible through the Victims' Trust Fund.²³ But there are

¹⁸ *Prosecutor v Al Bashir (Pre-Trial Chamber)* Case No ICC-02/05-01/09 (4 March 2009) (Warrant of Arrest).

¹⁹ See, eg, Kevin Jon Heller, 'Internal Conflict in the Sudanese Government?' in *Opinio Juris* (Blog, 14 March 2009) <<http://opiniojuris.org/2009/03/14/internal-conflict-in-the-sudanese-government>>.

²⁰ See, eg, ICTR, 'ICTR Opens Two More Information Centres in Rwanda' (Press Release, 23 February 2009).

²¹ Extraordinary Chambers in the Courts of Cambodia, Cambodia, *Internal Rules and Regulations* (2009) r 23 <http://www.eccc.gov.kh/english/internal_rules.aspx> ('*ECCC Internal Rules*').

²² *Rome Statute*, above n 4, art 68.

²³ *Ibid* art 79.

also some troubling signs — for example, the ICC’s failure to encourage Uganda to take up cases domestically, and the subordination in practice of *mato oput* and other local forms of dispute resolution in Acholiland.²⁴

Chief Prosecutor Luis Moreno-Ocampo is correct when he concludes that ‘[a]fter five years of operations the *Rome Statute* is modifying the way in which we think about the law at [the] national level’.²⁵ But it remains unclear whether the modernity narrative upon which international criminal law sails necessarily means that nothing is lost amid the progressive gains. The point is not for the technique of the international to domesticate or otherwise tame the nativism of the domestic. Rather, the international might revisit its relationship with the domestic to promote synergy and inclusively foster bottom-up input. Hence, the goal could move from domestication to renationalisation.

B *Diversity: From Law to Justice*

Together with incorporating the local, international criminal law would do well to open up to other accountability mechanisms. Can we readily assume that liberal legalist trials, which international criminal tribunals borrow and tweak from influential national criminal justice systems, are suitable for the perpetrator of extraordinary international crimes? Such crimes are often crimes of obedience. Does the *génocidaire* really have that much in common with the transgressive and deviant common criminal? International criminal law’s predicate of individual culpability and incarceration may simply not be favoured among all victim communities. Nor do all victim communities idealise the atrocity trial. Many such communities prefer other justice modalities, or an admixture thereof — including truth commissions, lustration, memorialisation, public inquiries, community service and traditional re-integrative practices. Moreover, the collective nature of mass atrocity is such that collective forms of responsibility that target states, organisations, non-state actors and corporations may more accurately reflect the aetiology of the crime. In the end, a challenge for international criminal law is to foster other justice mechanisms, not dissuade them or view them suspiciously as competitors. International criminal justice should involve much more than just international criminal law. Although talking about cost may be vulgar, the fact remains that as far as accountability mechanisms go, international criminal trials are very expensive. Very rough calculations put the cost of each ICTR conviction at about US\$30 million. In Rwanda, nearly everyone lives on less than US\$2 per day.²⁶

²⁴ Abdul Karim Bangura, ‘The Politics of the Struggle to Resolve the Conflict in Uganda: Westerners Pushing Their Legal Approach versus Ugandans Insisting on Their Mato Oput’ (2005) 2(5) *The Journal of Pan African Studies* 142, 142–3.

²⁵ Luis Moreno-Ocampo, ‘The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law’ (Speech delivered at the London School of Economics, London, United Kingdom, 8 October 2008) 8.

²⁶ World Bank, *World Development Indicators 2005: Table 2.5 (Poverty)* (2005) <http://devdata.worldbank.org/wdi2005/Table2_5.htm>.

C *Scrutiny: From Faith to Science*

The driving force behind international criminal law, to clumsily paraphrase Holmes, is neither logic *nor* experience.²⁷ Instead, it is faith — always inspired and often exuberant.²⁸ Faith was necessary in order to actually establish the juridical institutions. However, this same faith has also oversold the transformative power of the atrocity trial. Criminal prosecution and incarceration for the guilty is claimed to promote a broad array of goals, including deterrence, retribution, collective reconciliation, re-integration, rehabilitation, expressivism, truth-telling and ending impunity.

Are these goals being attained? Are they even attainable? Now that the institutions are up and running, the only way to find out is to move from faith to science and thereby treat the institutions that enforce international criminal law as subjects of study in the same way that domestic scholars treat domestic courts. Happily, there has been remarkable growth in interdisciplinary and empirical scholarship that examines many aspects of international criminal law and practice. Cognate fields, such as transitional justice, human rights and humanitarian law, have also boomed.²⁹ The challenge for international criminal law is to encourage such study and then absorb the lessons that legitimately conducted research has to offer.

D *Truths: From Convenience to Discomfort*

Although the tale of international criminal law is often presented as a heroic struggle by lawyers, activists and organisations against state interests, the reality is considerably more complex. Without states, there would be no institutions of international criminal law and no prospect of enforcement. There would be no financing. Chief Prosecutor Moreno-Ocampo may describe the *Rome Statute* as ‘a criminal justice system without a State’,³⁰ but in reality, the ICC exists largely *because* of state action, consent and financing.

States do get something out of the ICC. States have some interest — along with international organisations — in the kinds of truth-telling that international courts achieve. The atrocity trial pins blame on the ugliest and most reprehensible individuals. In reality, however, atrocity is the product of many factors. Individual action is one of these. But disappeared from the truth-telling process is the involvement (or nonfeasance) of state actors and international organisations. Also disappeared is the catalytic role of benefiting bystanders, transnational capital and colonial histories. The truths told by international criminal law are convenient. They are manageable. By blaming the few for the murder of the many, these truths comfort. They do not embarrass too much or too many. But the origin of atrocity is much more discomfiting and discomfiting. If we move into a mindset where the current truths of

²⁷ See Oliver Wendell Holmes, *The Common Law* (1881) 1.

²⁸ See generally David Koller, ‘The Faith of the International Criminal Lawyer’ (2008) 40 *New York University Journal of International Law and Politics* 1019, 1020–2.

²⁹ A recent survey of the political science literature found that the 15 leading journals in the field published 36 articles about human rights in the 1980s; 60 in the 1990s; and 103 since 2000: Scott Jaschik, ‘Political Scientists and Human Rights’, *Inside Higher Ed* (US) 20 January 2009 <<http://insidehighered.com/news/2009/01/20/polisci>>.

³⁰ Moreno-Ocampo, above n 25, 2.

international criminal law become totalising and exclusionary of all others, then we achieve some justice but we actually settle for a very cramped understanding of justice. One of the reasons why international criminal law may have limited transformative potential — despite the lofty rhetoric — is because it only scratches the surface of what justice actually entails following mass atrocity.

IV CONCLUSION

The spirited development of international criminal law this past decade belies the fact that we still know very little about what atrocity trials actually accomplish. To this end, instead of being bullish, perhaps we should err on the side of modesty. I think we are making some movement in this direction. The temperament of the field has become more mature. This is a positive trend.

Admittedly, it may have been strategic for international criminal lawyers to aggressively tout the transformative potential of the atrocity trial in order to convince states to support institutions, donors to fund them and persons to devote their professional lives and intellectual capital to them. But now that the institutions are a going concern, and have become normative fixtures of the process of transitional justice, perhaps the political pressure for trumpeting the transformative potential of the atrocity trial has waned. As a result, we might become more circumspect about what atrocity trials actually can do and what the skill-set of the international criminal lawyer actually can accomplish.