COMMENTARY

The Future of International Criminal Justice

Carsten Stahn*

1. THE STATUS QUO

Earlier this year, at the June 2009 Inter-sessional Meeting of the Crimes against Humanity Initiative,[1] Hague Prize Winner *Cherif Bassiouni* made a striking observation on international justice. He said: "In five years, we will mainly have the International Criminal Court (ICC) in the landscape of international institutions. The two *ad hoc* tribunals for the former Yugoslavia and Rwanda will close down and perhaps deal with some outstanding transitional issues. Other institutions will be completing their mandates."

What does this mean for the future of international justice? Does it mean that there is no real future, except for the ICC? Or is the future of international justice 'domestic', as predicted by International Relations scholar *Anne-Marie Slaughter*, who argued a couple of years ago, in an article in the *Harvard Journal of International law*, that the entire "Future of International Law is domestic."[2]

The actual picture appears to be more nuanced. The realities of conflict make it unlikely that international justice will lose its relevance. Current institutions are struggling to cope with the load of existing situations and cases. The experience of the first years of the ICC defeats any scepticism against international adjudication.

The first ICC practice, with self-referrals from the Democratic Republic of Congo, Uganda, the Central African Republic, and the acceptance of jurisdiction by the Ivory Coast, is vivid testimony that many domestic governments are very eager – some would perhaps even say too eager – in their ambition to devolve responsibilities and to have major cases investigated and prosecuted internationally, rather than domestically.

---

* Dr. jur., LL.M. (NYU), LL.M. (Cologne-Paris), Associate Professor of International Criminal Law, Leiden University, Programme Director, Grotius Centre for International Legal Studies. These remarks are based on the Opening of the Academic Year at Campus Den Haag, Leiden University. Thanks are owed to Ms. Ruth Shaikh for her editorial assistance.

1 For further information on this initiative, *see* < http://law.wustl.edu/crimesagainsthumanity/index.asp?id=7111>.

2 *See* A-M. Slaughter & W. Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 Harvard Journal of International Law 327 (2006).

HAGUE JUSTICE JOURNAL / JOURNAL JUDICIAIRE DE LA HAYE, VOL. 4, NO. 3 (2009), PP 257-266.

It is well known that African Union countries have remained critical towards the warrant of arrest against Sudanese President *Al-Bashir.* Yet, their statement in relation to *Al-Bashir*[3] was accompanied by a whole-hearted pledge of support for the engagement of the Court in relation to existing and potentially new situations, such as Kenya.

We are thus *de facto* still very far from the idealist vision which ICC Prosecutor *Moreno-Ocampo* outlined in 2003 when taking office, namely: the dream of an International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries.[4]

Where is international justice today? It appears to be in a stage of transition. It has been a remarkable success story since the end of the Cold War, but the idealism and faith in multilateralism that prevailed in the 1990s is fading. There is continuing commitment to the cause of international justice, but also an increasing look to alternative responses, and a growing debate about its effectiveness.

In 2004, former UN Assistant Secretary-General *Ralph Zacklin* claimed that the *ad hoc* tribunals exemplify an "approach that is no longer politically or financially viable".[5] Some features of international trials have come under fire. The typical criticisms are: International tribunals cost too much – the *ad hoc* tribunals cost 10 % of the UN's annual budget. They deliver too little. They are removed from the scene of the crime.

Not all of these criticisms are justified. They need to be put into perspective. It would be misleading to assess the record of international criminal courts merely by the quantity of cases and the number of trials. In fact, a Hague District Court decides more cases in a year than all of the international tribunals together.

But the categories of crimes, i.e. war crimes, crimes against humanity and genocide, are particular in the sense that they are atrocity-related and linked to a longer history of conflict. This makes investigations and prosecutions more complex than in classical domestic proceedings, in terms of the actors involved, the gathering and selection of evidence. Moreover, the effects of justice cannot be measured only by what is actually going on in the Court room, but by their impact internationally and domestically.

Yet, I would argue that the time has come to undertake a more nuanced assessment of the actual strengths and limits of international justice.

---

[3] *See* African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 19 July 2009, at <http://www.haguejusticeportal.net/Docs/Court Documents/ICC/African Union Press Release – ICC.pdf>.

[4] *See* Election of the Prosecutor, Statement by Mr Luis Moreno-Ocampo, New York, 22 April 2003, ICC-OTP-20030502-10: "The efficiency of the International Criminal Court should not be measured by the number of cases that reach the Court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this Court as a consequence of the regular functioning of national institutions, would be a major success".

[5] *See* R. Zacklin, *The Failings of the Ad Hoc Tribunals*, 2 Journal of International Criminal Justice 641 (2004).

Thus far, international justice is largely founded upon the assumption that it produces beneficial effects by enhancing accountability and promoting the "creation of an international rule of law". This claim is still in many respects a hypothesis, rather than an empirically proven reality.

In most contexts, international justice is part and parcel of a broader peace-building process. Studies on the short-term and long-term effects of justice are still very much an exception. The *ad hoc* tribunals are only slowly embarking on this exercise in the context of their own completion strategy.

In my view, the main challenge of the coming decades is two-fold.

Firstly, we need to examine more carefully what international justice can realistically achieve, and what impact it has on perpetrators, victims and affected societies. This foundational exercise is necessary in order to maintain the very credibility of the discipline, and to draw a proper balance between universal, regional and alternative approaches to justice. This effort goes widely beyond The Hague, but it must be part and parcel of legal engineering and our thought-processes here.

Secondly, it is fundamental to explore how international justice can interrelate better and more effectively with domestic justice systems.

Effects of justice are only sustainable if they are embedded and followed by consecutive domestic action.[6] If international criminal courts wish to leave a 'lasting footprint' on domestic societies, they must develop strategies to empower domestic institutions. This requires fresh thinking as to how international courts and tribunals interact with domestic jurisdictions in individual situations, in terms of mutual legal assistance and cooperation and sharing of responsibilities.

2. 'FAITH-BASED' TO 'FACT-BASED' JUSTICE

Empirical research has shown that there has been an exponential increase of international and domestic human rights trials over the past two decades.[7] The core question is: what do these trials achieve?

Human rights research typically provides three answers.

---

[6] This is a lesson learned from decades of UN experiences in peace-building. *See* e.g., Report of the Secretary-General on the Rule of Law and transitional justice in conflict and post-conflict societies, 3 August 2004 ("Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable. The role of the United Nations and the international community should be solidarity, not substitution […] The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations. In doing so, we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards").

[7] *See* e.g., P. Pham & P. Vinck, *Empirical Research and the Development and Assessment of Transitional Justice Mechanisms*, 1 International Journal of Transitional Justice 231 (2007); H. Kim, *Why and when do countries seek to address past human rights violations after transition? An event history analysis of 100 countries covering 1980-2004*, International Studies Association,

International trials are (i) said to have a certain "alert effect". They draw attention to facts and crimes and cause a "social alarm". (ii) They are credited for their "demonstration effect". Justice is "seen to be done". Moreover, they (iii) enhance accountability and enforcement, by – as Judge *Buergenthal* put it – providing "teeth" to the enforcement of human rights obligations.[8]

These general answers may be satisfactory from a human rights perspective. But they hardly suffice to satisfy the needs of victims of crime and international criminal law as a discipline. The fundamental questions are:

(i) How and to what extent can investigation or prosecution contribute to deterrence in and beyond communities affected by conflict?

(ii) To what extent does international justice contribute not only to "retribution", but also to broader "incapacitation" of perpetrators and the removal of root causes of conflict?

(iii) How do prosecutions interrelate with the interests of the victims of crime specifically, or victims of conflict?

(iv) To what extent do they communicate a sense of fairness or even facilitate societal reconciliation?

These questions have long been on the 'back-seat' of international justice. International justice has been focused on the 'move towards institutions', rather than an exploration of its specific benefits and limits.

Issues of impact and legacy are now gradually addressed as part of the completion strategy of the *ad hoc* tribunals. The Tribunals are most advanced in devoting attention to their mission and place in history. In the Presidency, a specific post has been created with the job title 'legacy officer'.

But the 'horse' needs to be placed back again in front of the wagon. The inquiry as to the proper goals and effects of international trials should be at the forefront and focus of all institutional responses. This requires new methods and approaches.[9]

In continental Europe, lawyers are often criticized for their lack of method and commitment to empirical research. One of the major challenges of international criminal law as a discipline is to engage more strongly with empirical research and social scientists to develop a conceptual framework to link goals of criminal justice to indicators, and to develop a methodology to assess impact.

What does this mean concretely? I would argue that, with the growing diversification of justice institutions and the development of alternative justice mechanisms, it is vital to inquire as to what each institution can deliver, and to what extent the international justice system as a whole is ready to meet its objectives.

Chicago (2007); O. N. T. Thoms, J. Ron & R. Paris, *Does Transitional Justice Work? Perspectives from Empirical Social Science* (2008), SSRN Working Paper, <http://ssrn.com/abstract=1302084>.

8 *See* T. Buergenthal, *The Contemporary Significance of International Human Rights Law*, 22 Leiden Journal of International Law 217 (2009).

9 *See* also the NWO Research Project on '*Post-Conflict Justice and Local Ownership*', at <http://www.grotiuscentre.org/com/doc.asp?DocID=436>.

We have witnessed this differentiation of roles and mandates of courts over centuries at the domestic level. It is now time to extend it to the arena of international justice. I will illustrate this with some examples.

2.1. DETERRENCE AND PREVENTION

Major responses to mass atrocities, such as Nuremberg, the Genocide Convention, the Chambers in Cambodia or the response to Darfur all came *after* the facts. When the UN advisors drafted the Statute of the *ad hoc* tribunals at the beginning of the 1990s, the focus was clearly on criminal adjudication. This approach contrasts with state duties to prevent crime under human rights law and the Genocide Convention.

Recently, Yale Professor *Michael Reisman* highlighted this dilemma. He suggested that "acting to prevent before the fact, as opposed to acting to punish after the fact" should be the 'primary technique of international law for dealing with mass murder".[10] He argued that "acting before victims become victims" should be the core task of international justice.

This poses the delicate question: what contribution can international justice realistically make to deterrence?

Deterrence poses special problems. It operates on the assumption that actors in conflict make their decisions on the basis of a rational cost-benefit analysis. This assumption is often a fiction, in light of the underlying political context of the conflict.

International crimes are mostly linked to ideology. If you interview 'clients' in the detention centre in Scheveningen, they will reply: "we are not ordinary 'perpetrators', we act by true conviction". This means that there is a risk that they are immune against deterrence, because they act no matter what price they will have to pay for the implementation of their cause.

Moreover, in order for deterrence to work, the perpetrator must identify the action as potentially wrong and be aware of the possibility of sanction. This is a particular challenge.

In the case of Uganda, a team of lawyers has actually managed to track down *Joseph Kony* in Garamba Park in the Congo and explain the charges to the Lord's Resistance Army. But this is very much the exception. People are normally aware of the national legal system, because they are confronted with it on a daily basis. They are less familiar with international norms and they do not always understand them properly.

Joseph Kony is again a case in point. He allegedly argued that the warrants were not legitimate because he was not heard prior to their issuance, and because there was no true distinction between innocent 'civilians' and legitimate targets in the conflict in North Uganda.

---

[10] *See* W. M. Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case Western Reserve Journal of International Law 57, at 59 (2008).

It does not come as a surprise that an expert study prepared by the Open Justice Initiative in 2008 came to a conclusion of *non liquet* when assessing the deterrent effect of the Tribunal.[11] It acknowledged that one "can [not] reach reliable conclusions about the ICTY's general deterrent impact".

It said: "[W]e know some things with sobering certainty: as has often been noted, the creation of the ICTY did not by itself end atrocities in the Balkans. The 1995 genocide in Srebrenica occurred two years after the ICTY was created, while atrocities in Kosovo surged during 1998–99". It is a sad historical reality that some defendants were already in the docket, and that fourteen suspects had been indicted when the Srebrenica massacre took place.

Deterrence has also played a role in the context of the current ICC situations. It has been claimed that the threat of ICC prosecutions prevented a further escalation of conflict in the Ivory Coast.[12] It has further been alleged that the ICC intervention in Uganda reduced the level of violence.

The development of peace negotiations has illustrated the fragility of the deterrence argument:

When the peace negotiations were ongoing, deterrence was praised as one of the factors that prompted the engagement in negotiations. But when the Lord's Resistance Army refused to sign and abide by the accountability agreement, the argument was turned around. It was claimed that the very engagement in peace talks was mainly a pretext by *Joseph Kony* to gain time and force to re-arm.

Logically, only one of these two narratives can be true. If the peace negotiations were only a pretext, it cannot be said that the warrants actually produced a meaningful deterrent effect in the first place.

This means: We therefore need more reliable tools and instruments to determine how, and under what circumstances international criminal tribunals can produce a lasting deterrent effect.

---

[11] Open Justice Initiative, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008). In its first annual report to the UN Security Council, the President of the ICTY still noted: "One of the main aims of the Security Council [in establishing the ICTY] was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes. It was hoped that, by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. In short, the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts".

[12] The Prosecutor defended the feasibility of ICC action in Ivory Coast on the basis of its preventive effect on hate crime more generally. He made this link expressly in his Nuremberg address, where he noted: "[T]he beneficial impact of the ICC, the value of the law to prevent recurring violence is clear: Deterrence has started to show its effect as in the case of Cote d'Ivoire where the prospect of prosecution of those using hate speech is deemed to have kept the main actors under some level of control". *See Building a Future on Peace and Justice*, Address. Nuremberg, 24/25 June 2007, at <http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf>.

2.2. INCAPACITATION

Can international justice make a contribution to incapacitation?

Some examples provide evidence to that effect. Most prominently, Mr. *Karadzic* was prevented from participating in the 1995 Dayton Peace Talks, because of the indictment brought against him by the ICTY.

The 2008 expert study on the impact of the ICTY came to the conclusion that the most important contribution of the ICTY was its de-legitimating effect in politics. The report found that the proceedings and evidence adduced in The Hague has significantly "shrunk the public space" in which political leaders can credibly deny key facts about notorious atrocities. One example is the clarification of the number of victims killed in Srebrenica. And, consequently, the entire report was called 'Shrinking the space for denial'.[13] But further clarity is needed. The theory is simple: the public condemnation of atrocities and the demonstration of wrongfulness of actions will help to de-legitimize former political elites and national 'heroes'.

But there are often compromising side-effects. There are conflicting views as to whether the physical removal of *Milosevic* and Serbian Radical Party leader *Seselj* from the region to The Hague had only positive effects. Some argue that the transfer to The Hague actually helped to 'mystify' them.

Moreover, it is difficult to establish a clear line of causation. The de-legitimization of political elites can rarely be ascribed to the impact of justice alone, nor does it occur on the spot. It is often a gradual process which is tied to a bundle of rationales, such as socio-economic benefits. In this plurality of causes, the individual contribution of justice is difficult to locate. There is further an inherent risk that 'dependency' on international tribunals and donor activities constrains or conditions domestic justice efforts.

2.3. RECONCILIATION

Whether and to what extent international criminal justice can successfully contribute to reconciliation is probably the most difficult question to answer.

There is an increasing trend in comparative criminal procedure to support victim participation in criminal proceedings and their right of access to justice. Proponents of restorative justice point to the benefits of participation: Victims can overcome trauma if the injustice done to them has been recognized publicly, if they receive an opportunity to make their personal story known and if they themselves learn about the details of what has happened.

But the reality is more complex. 'Victims' have a wide range of divergent interests. The interests of immediate 'victims of crime' do not necessarily coincide with the interests of the broader 'victims of the situation'. Both constituencies may, in fact, have conflicting prerogatives. The first proceedings at the ICC demonstrate this. Accountability is often a priority for the former, but of less immediate concern for the latter. This is vividly illustrated by the practice in the

[13] *See* Open Justice Initiative, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008).

situation in Darfur. In this situation, different groups of victims have presented motions for and against the issuance of warrants of arrest before the Court.[14] This adds a new dimension to criminal proceedings, and requires judges to adjudicate issues which are situated at the borderline of peace and justice.

Investigations and prosecutions of international courts and tribunals typically focus on leadership accountability. Immediate victims of crime, however, often wish to see their neighbour tried, as much as they seek accountability for core leaders.[15] The question as to why leadership accountability is to be given preference is typically not explained to them, nor made subject to their choice. This consideration is largely driven by prosecutorial strategy which is determined by motives of deterrence and incapacitation, in addition victims' interests.

Moreover, collective impact pre-supposes that each group has a willingness to inquire to what extent it bears collective responsibility through the actions of its members, and in particular its leadership. There is no guarantee that such a process will indeed effectively take place. Examples of Germany or Serbia show that society often takes a very long time to recognize the moral wrong committed and to condemn its own involvement in it.

Many experts argue, therefore, rightly that the role and impact of international trials on reconciliation is a modest one,[16] and that there should be adequate space for additional legal and institutional responses.

3. EMPOWERING DOMESTIC LEGAL SYSTEMS

This leads me to the second major challenge for the future of international justice, namely the relationship with domestic legal systems.

For a long time, there has been a disconnect between international and domestic justice.[17] International and domestic justice have been perceived as opposing forces, like *ying* and *yang*; two autonomous systems.

Today, the two systems work increasingly in tandem. The principle of complementarity[18] is gradually anchored in the exercise of domestic jurisdiction.

---

[14] *See* ICC, Situation in Darfur, the Sudan, Application on behalf of Citizens' Organisation of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008, Pre-Trial Chamber I, ICC-02/05-170, 11 January 2009.

[15] *See* E. Stover & H. Weinstein, My Neighbour, My Enemy (2005).

[16] *See* L. E. Fletcher & H. M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Human Rights Quarterly 573 (2002); V. Peskin, International Justice in Rwanda and the Balkans, p. 243 *et seq.* (2008); D. Mendelhoff, *Truth-Seeking, Truth Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 International Studies Review 355 (2004).

[17] In his *Rights of War and Peace* (1625), *Grotius* contemplated an early form of the principle "*aut dedere aut judicare*" (either extradite or prosecute). He argued that perpetrators of certain categories of offences should be either tried by the State which has custody over the person or by the injured party.

[18] For information, *see* the Research Project *The International Criminal Court and Complementarity: From Theory to Practice*, at <http://www.grotiuscentre.org/com/doc.asp?DocID=460>.

Domestic jurisdiction is increasingly exercised, when the State in which the crimes have been committed, or the State of nationality of the perpetrator, is either unwilling or unable to act.

Internationalized tribunals have tended to argue that they are 'international' rather than 'domestic' because this qualification enables them to strengthen the efficient adjudication of crimes in terms of immunity and cooperation.[19] But it is gradually recognized that what makes international criminal justice a success is ultimately its catalytic effect and its impact on domestic justice systems.

Courts, such as the Yugoslavia tribunal or the Special Court for Sierra Leone, have started to embrace the idea that justice is not only a tool to fill justice gaps at the domestic level, but an instrument to strengthen domestic justice efforts.

In the *ad hoc* tribunals, this move was born out of necessity. It resulted from the need to deal with a backlog of cases involving lower level perpetrators. All three organs of the tribunals agreed to create mechanisms to transfer cases back from the international to domestic courts, subject to fair trial safeguards.[20]

This process is gradually taking off. The Yugoslavia Tribunal has by now referred 10 cases to the newly created Bosnian War Crimes Chamber. Rwanda abolished the death penalty, in order to be eligible to receive cases.

But there are paradoxes and curiosities. The rule on transfer of cases from the *ad hoc* tribunals provides that only cases involving medium- and low-level perpetrators may be transferred to Bosnia or Serbia. Some of the defendants before the ICTY have been in detention for a considerable amount of time or preferred to be tried in The Hague, rather than domestically. In order to avoid transfer, they have argued before the tribunal that they were actually not small fish, but persons bearing great responsibility.

The Rome Statute contains a more systemic turn towards interaction between international and the domestic legal systems: it not only creates a Court, but it establishes a new system of justice.[21] It regulates the interplay between the Court and the role of domestic jurisdictions in the fight against impunity.

More than 10 years ago, the provisions of the Statute were drafted. It is timely to inquire whether the interpreters of the Statute are faithful to the intent of the drafters, or whether we are going in new directions.

Some argue that the "secrets" of the Statute and its complexity have not yet been fully brought to life.[22] We should thus focus on revealing the true 'meaning' of Article 17, or analyse more closely how complementarity has been treated in

---

[19] *See e.g.*, Prosecutor *v.* Charles Ghankay Taylor, Decision on Immunity from Jurisdiction (Appeals Chamber), Case No. SCSL-2003-01-I, 31 May 2004, para. 37 *et seq*.

[20] *See* the – by now – famous Rule 11*bis* of the ICTY Rules of Procedure and Evidence.

[21] For a discussion, *see* C. Stahn, *Complementarity: A Tale of Two Notions*, 19 Criminal Law Forum 87 (2008).

[22] *See* the recent decision of the ICC Appeals Chamber in Prosecutor *v.* Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Case No. ICC-01/04-01/07, 25 September 2009, para. 75 *et seq*., at <http://www.haguejusticeportal.net/eCache/DEF/11/104.html>.

the past, and what misperceptions prevail in its current perception. Others would argue that we need to go in new directions, and critically examine the provisions of the Statute in light of its objectives.

But we are facing a paradigm shift: in the future, international justice will not be measured by its own performance, but by its actual ability to solve problems. It will be judged by whether, and to what extent, it is able to make domestic jurisdictions work. Some call this 'positive complementarity'. It is – in fact – 'problem-solving'.

What the tribunals are facing in the completion stage is relevant to each single situation of the ICC. This requires new creativity.

It means that it is not enough to stand still and deplore the lack of cooperation by a defiant regime. It is the task of the Rome system of justice to develop strategies to overcome this unwillingness.

Likewise, it is too simple to merely recognize international jurisdiction on the basis of the inability of a domestic State. Ultimately, the task of the Court is to help overcome domestic inability. None of this is in the textbooks. It requires creative interpretation and criminal policies in the future.

4. CONCLUSION

I have tried to outline that justice in The Hague is no longer a one-way street – it is a dialogue among international institutions and jurisdictions and, most of all, a dialogue with domestic jurisdictions.

Does this mean the future of international justice is domestic? At the moment, the answer is: not quite yet. It will take, at least, another generation to find definite answers.

But we are at an important turning point in the history of international criminal justice. Critical analysis of what international justice can achieve realistically, and how it interrelates with domestic constituencies, must be at the forefront of our contemporary thinking.