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International Justice on Trial

OMAR G. ENCARNACIÓN

Since the end of the cold war, the world has witnessed a number of milestones in the development of international justice that attest to the advent of a new morality in global governance. The most prominent and consequential of these was the establishment in 2002 of the International Criminal Court (ICC). For decades after the United Nations was

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founded in 1945, the ICC had represented a dream deferred, as the ideological tensions surrounding East-West rivalry had made its creation virtually impossible.

The ICC is empowered by its treaty members (120 nations signed the Rome Statute of the International Criminal Court in 1998) to prosecute the unholy trinity of international offenses: genocide, war crimes, and crimes against humanity. Giving impetus to the establishment of a permanent international criminal court was the UN's creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda in 1994, to prosecute those responsible for atrocities during times of war and genocide. Among those prosecuted by these ad hoc tribunals, the most famous is the former Yugoslav president Slobodan Milosevic, “The Butcher of Belgrade,” who died in prison of a heart attack while he awaited his verdict.

Another milestone for international justice came in 1998 with the arrest in London of Augusto Pinochet, the former Chilean general and president, for his role in the 1973 coup d'état that crushed the left-wing government of Salvador Allende. Pinochet was taken into cus-

tody by officers from Scotland Yard acting on an arrest warrant, on charges of crimes against humanity, issued by a Spanish court. This represented the first time in history that one country had arrested a foreign leader on the authority of a different country. Although Pinochet was eventually declared mentally unfit to stand trial, his arrest established the legal precedent of “universal jurisprudence.” This enables any country to file human rights charges against the leaders (or former leaders) of another country.

Each step in the development of international justice has represented a triumph for the idea that human rights abuses, regardless of where they occur, are the business of the international community as a whole. Each step has also signaled the erosion of national territorial sovereignty, the foundation of modern international relations. The doctrine of national sovereignty, established by the 1648 Peace of Westphalia, a series of treaties that ended the Thirty Years' War, limits the capacity of one nation to interfere in the affairs of another. The post-Westphalian order has meant that, for centuries, human rights atrocities—such as the massacre of Armenians in the Ottoman Empire during World War I—have taken place amid international moral outrage but in the absence of any international legal means to punish the perpetrators.

Yet, even as tyrants find it more difficult to avoid prosecution for their evil deeds, international justice is besieged by criticisms and controversies. Nothing demonstrates this better than the case of Sudan's president, Omar Hassan al-Bashir. In March 2009, the ICC prosecutor Luis Moreno-Ocampo issued a warrant for the arrest of Bashir, who was accused of overseeing “a genocidal plot” in Darfur. This was the first time in the court's short history that charges were filed against a sitting head of state (previous ICC prosecutions had targeted warlords and rebels), and the first time

OMAR G. ENCARNACIÓN is a professor and the chair of political studies at Bard College. His books include *Spanish Politics: Democracy After Dictatorship* (Polity Press, 2008).

that an indictment included the incendiary charge of genocide.

Some quarters of the international community could hardly contain their displeasure. The African Union urged its members to refuse collaboration with the ICC (a stinging rebuke, considering that the bulk of the cases that the court handles comes from Africa and that the region comprises one of the largest regional blocs of member states). Several Sudanese human rights organizations deemed the court's action shortsighted and potentially counterproductive. And influential opinion-makers who ordinarily would be expected to agree on very little else have condemned the ICC's actions. Writing in the *Los Angeles Times*, the political commentator David Rieff branded the reasoning of Darfur activists in favor of the ICC action as "flawed," and predicted that the indictment would do nothing to bring peace to the people of Darfur. The evangelist and missionary Franklin Graham argued in *The New York Times* that arresting Bashir "will likely only create further chaos in Sudan."

TOOL OF IMPERIALISM?

The most common criticism of international justice is that it functions as a new tool of Western imperialism. In the view of many poor nations, international justice allows Western countries to impose universal standards of justice that disregard local customs and practices. This point was noted by former UN Secretary General Kofi Annan in an op-ed article published in *The New York Times* in June 2009: "Some African leaders have expressed the view that international justice as represented by the ICC is an imposition, if not a plot, by the industrialized West." Annan rebutted that view, arguing that it "demeans the yearning for human dignity that resides in every African heart."

A related criticism by African states is that the United States and its allies use international justice institutions to punish countries that oppose American foreign policy. The Bashir administration, for example, denounced the ICC indictment as "imperialistic" and motivated by economic factors. Sudanese officials contended that Western nations, mainly the United States, were using the court in an effort to bring down an oil-rich Islamic republic that often opposes US policies in Africa and the Middle East.

It is hard to make the case that international justice is imperialistic, but the charge is not entirely without basis. David Chandler, writing in *New Left Review*, observed in 2000 that international justice reflects "the hierarchy of global power." He offered the war crimes tribunal for the former Yugoslavia as an example, noting that the tribunal's charter (Article 16) explicitly states that the prosecutor shall act independently and shall not seek or receive instruction from any government. Yet, in Chandler's view, overt coordination between tribunal officials and representatives from Britain and the United States gave the impression that it was Western politicians, rather than tribunal officials, who ran the show. It was routine for the tribunal prosecutor, Louise Arbour, to appear at high-profile media briefings alongside NATO leaders, British Foreign Secretary Robin Cook, and American Secretary of State Madeleine Albright (referred to by one tribunal judge as "the mother of the tribunal").

Western officials also showed little concern about being seen as behaving above international law when they brushed off human rights activists' concerns that the bombing of Yugoslavia by NATO countries in the spring of

1999 could expose them to accusations of war crimes, very much like the crimes the tribunal was prosecuting. Responding to such concerns, James Shea, the NATO spokesman, said charges of war crimes would be "impossible." He added, "It was NATO countries who established the tribunal, who fund it, and support it on a daily basis."

Echoes of imperialism also have been detected in the way that international justice reinforces the values of the nations spearheading the movement. Underscoring this point was a conflict over capital punishment that erupted between the Rwandan government and officials with the International Criminal Tribunal for Rwanda who were prosecuting those responsible for genocide. Capital punishment was part of the Rwandan legal system when the international tribunal was organized; understandably, many Rwandans assumed that death sentences would be available for those found guilty. But capital punishment is unacceptable to the UN, as it is for the leading democracies of the world, save the United States.

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In the end, the Rwandan government was pressured into abolishing the death penalty so that the trials could proceed. This legal cajoling provoked considerable resentment among some Rwandans, who feel that the justice dispensed by the international tribunal is not commensurate with the horrors their country endured.

THE MYTH OF DETERRENCE

A more convincing criticism of international justice is that it has spectacularly failed to deliver on its central claim—that high-profile prosecutions of past atrocities can deter future ones. This claim of deterrence, often advanced by human rights activists as the main reason that international justice matters, is supported by several influential legal theories.

The best-known theory contends that instilling fear of prosecution in the hearts of existing or would-be dictators serves to curtail their murderous behavior. A less-known view sees prosecutions of human rights abuses as “teachable moments” that effect a normative change in the behavior of societies by making violence less appealing as a means for solving difficult political problems. These ideas underwrote the rise of international justice in the aftermath of World War II’s horrors—though geopolitical imperatives have consistently undercut them ever since.

The ICC draws its inspiration from the International Military Tribunal at Nuremberg, conducted by the victorious Allies in 1945–46 to prosecute Nazi officials for the crimes of the Holocaust. Although the Nuremberg trials succeeded in convicting notable Nazi officials (11 of them were hanged), the trials’ record in deterring future atrocities and acting as instructive mechanisms is disheartening.

Indeed, the very countries that led the way in dispensing justice against the Nazi regime failed to heed Nuremberg’s lessons. Russian participation in the trials limited their capacity to serve as a teaching moment in part because the Russian judges carefully avoided delving into moral and judicial questions that might draw attention to Stalin’s own grotesque abuses.

The United States, meanwhile, throughout the cold war sided with anticommunist despots across the Caribbean and East Asia; it aided in

the rise and maintenance of right-wing military regimes in South America that waged brutal “dirty wars” against left-wing dissidents; and it propped up thuggish governments in Central America—including Guatemala’s, which during the 1980s was engaged in a genocidal war against indigenous peoples.

Even with the growing consensus on international justice that has been facilitated by the end of the cold war, large-scale human rights abuses have become more common—partly because some of the world’s remotest spots, especially in Africa, have lost whatever geopolitical importance they had during the era of superpower competition. This has emboldened tyrants to engage in wanton violations of human rights, assured that the world’s leading powers will see no pressing need to intervene.

Some of the most gruesome acts of genocide and political violence since the Holocaust have occurred in the post-cold war period, in places like Rwanda, Liberia, Sierra Leone, and Sudan. As these countries sank into horrific violence, the world seemed virtually paralyzed, even though advance knowledge that such events would likely occur was often available.

Especially shocking was Rwanda, where rebels affiliated with the Hutu regime slaughtered an estimated 800,000 members of the Tutsi minority (historically, the ruling elite) between April and July 1994. Later, all the world could do was apologize for having failed to intervene. In March 1998, US President Bill Clinton observed that “the international community, together with nations in Africa, must bear its share of responsibility for this tragedy. We did not act quickly enough after the killing began.”

In a cruel twist of fate, the international commitment to fighting genocide that was born with the Holocaust actually facilitated the genocidal campaign in Rwanda. A principal reason that the Clinton administration refused to declare the violence in Rwanda genocide was that doing so would have forced the United States to intervene as a signatory of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly in 1948.

Such vacillation, often apparent in tortured debates over what is genocide and what is not,

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has made international justice retroactive rather than proactive. This is fine for punishing human rights abusers, but it does little to stop the killing while it is under way. Of the international justice tribunals and special courts organized since 1993 (Yugoslavia, Rwanda, Sierra Leone, and Lebanon), only the ICTY was active at the time that atrocities were being committed.

AN ENEMY OF PEACE?

The most distressing criticism of international justice, however, is that it encumbers peace and reconciliation efforts. This counterintuitive argument—it cuts to the very heart of the received wisdom about international justice as a peacemaking mechanism—hinges on two specific claims. The first is that international prosecutions undermine ongoing peace efforts in conflict-ridden societies, especially when indictments are entered against sitting heads of state accused of war crimes. This complaint first arose in 1995 when the ICTY indicted Radovan Karadzic—the wartime leader of Bosnia’s Serbs—shortly before the start of the Dayton peace conference.

Something similar happened in 1999, when the same tribunal indicted Milosevic just as NATO, in the hopes of accelerating a settlement with the Serbian president, was intervening in Kosovo. Supporters of international justice note, however, that while the indictments may in both cases have complicated peace negotiations, they did not prevent the end of the war in the former Yugoslavia.

A second and more recent claim that international justice undercuts peace has been raised in connection with the Bashir indictment. Among the indictment’s most vociferous critics are relief groups, such as Graham’s organization, Samaritan’s Purse, which has operated in Sudan for 16 years. These critics warn of a new wave of human rights abuses in Sudan, pointing to increased harassment of opposition leaders, journalists, human rights activists, and aid workers since the ICC began its criminal investigations. They also point out that the indictment may be for naught in any case, since the ICC lacks enforcement mechanisms of its own—meaning it is far from certain that Bashir will ever face a court of justice.

This weakness of the ICC has Rieff (and others) wondering if the price that the Darfuris are paying for the indictment is really worth it. He argues that “surely it would make more sense to try to restart negotiations in a serious way with Bashir and his government than to indulge in ‘Count of

Monte Cristo’-like fantasies of the wicked getting their comeuppance.”

In another line of criticism, advocates of international justice are accused of failing to recognize the potential of alternatives to justice—especially amnesty—for achieving goals that so far have proved elusive in prosecutions (ending civil conflicts; anchoring the rule of law; and promoting peace, democracy and reconciliation). This criticism essentially sees justice and peace as mutually exclusive. At a 2009 conference in London on the prosecution of presidents by international tribunals, *The Guardian’s* Jonathan Steele argued that “politics should trump law, since peace is more important than justice.” Steele’s argument finds resonance in a wide range of cases in which evil inheritances from old regimes have been treated as political dilemmas rather than as ethical or legal challenges.

The most talked-about case in which politics has trumped justice is Spain, arguably the world’s most successful new democracy. After the death of Francisco Franco in 1975, the Spanish political class declared a “pact of forgetting,” an agreement that precluded the government from pursuing any policy that would awaken memories of the past, especially the horrors of the Spanish Civil War. The intention of this agreement was to prevent the nation from obsessing over the past, especially over who bore ultimate responsibility for the Civil War, and to give the country a fresh start as a democratic, forward-looking society.

Hundreds of thousands died in the Spanish Civil War, with large numbers also killed in reprisals by the Franco regime against the defeated Republicans after the war. Yet Spain did not revisit that dark history until the passing of the 2007 Law of Historical Memory. Interestingly enough, this new law did not overturn the 1977 amnesty law on which the pact of forgetting rested; instead, it offered moral and financial reparations to those victimized by the Civil War and the Franco dictatorship.

In Chile and Uruguay, South America’s most stable new democracies, politics also trumped justice. Patricio Aylwin, Chile’s first president after that country’s return to democratic rule, declared a policy of “justice within the limits of what is possible,” when explaining why his government would not prosecute Pinochet and his henchmen. A more nakedly political approach was adopted by Uruguay—which at one point during the 1980s had the world’s highest number of political pris-

oners relative to its population. There, a national referendum decided how military crimes would be handled, with the public endorsing amnesty toward the military.

South Africa, everyone's favorite example of political reconciliation after the fall of an abusive and repressive regime, also hardly conforms to accepted standards of justice. As Rieff accurately notes, "real justice would have demanded that the leaders of the white racist regime pay for their crimes; peace, on the other hand, demanded an accommodation." At the heart of reconciliation politics in South Africa was a trade-off between justice and truth-telling. The enforcers of the apartheid regime, in exchange for confessing their transgressions, were let off scot-free.

Meanwhile, in several cases in which justice has been prioritized over everything else, democratization and reconciliation have been seriously imperiled. In Portugal, whose 1974 revolution inaugurated a global trend toward democracy, political trials intended to punish the old regime and its collaborators turned into a veritable witch hunt. With the country on the brink of civil war, the trials had to be stopped.

In Argentina, which was widely praised as a global human rights leader on account of staging Latin America's first-ever military trials, a sweeping amnesty law was passed in 1986 once it became apparent that the prosecution of military officers on human rights charges represented a threat to the stability of the new democracy. (Amnesty was revoked in 2005, after the nation had attained considerable political stability.)

Iraq's recent attempt at transitional justice has become an emblematic example of transitional revenge, or "victor's justice." The occupying Americans, inspired by the perceived success of the Nuremberg trials in contributing to postwar Germany's democratization, insisted on a policy of "de-Baathification" designed to cleanse Iraqi society of the influence of 35 years of Baathist dictatorship. Under heavy American influence, the new Iraqi government disbanded Iraq's army, purged from the public sector tens of thousands of people affiliated with former President Saddam Hussein's ruling political apparatus, and put the dictator on trial for war crimes, crimes against humanity, and genocide.

De-Baathification in time proved to be a huge blunder. It has been blamed for impeding political reconciliation, fueling sectarian violence, encouraging insurgency against the Americans, and tarnishing the dignity of the law.

JUSTICE REFORMED

How the international justice movement confronts the challenges that it currently faces could well determine its future—or at the very least its effectiveness. Arguably, the most pressing task is to minimize the widespread impression of international justice as a Western instrument. (After all, the places where respect for human rights is weakest are often the same places where hostility toward the West is strongest.) Protecting the impartiality of international justice tribunals is a good place to start. These bodies cannot afford to be seen as executing the wishes of Western powers, however noble these countries' leaders might believe their wishes to be.

Making international justice more international might be another step toward establishing a reputation for independence from Western powers. It is unfortunate that the three investigations undertaken by the ICC since it began operations in 2002 have all involved African countries (Uganda, the Democratic Republic of Congo, and Sudan). This emphasis conveys the impression that the ICC is beating up on Africa, and boosts African claims that the court is an imperialistic organization.

The most effective step toward internationalizing international justice, though it is an unrealistic one, would be to diversify the cases that the ICC chooses to handle, by including misdeeds committed by leaders of developed democracies. A more plausible approach would be to rely more on hybrid tribunals that incorporate foreign and local judges. Such tribunals likely would be seen as more legitimate in the country whose crimes are being prosecuted than are tribunals comprised exclusively of foreign judges. In addition, they hold the promise of being incorporated into the domestic fabric of the judicial system once the tribunals have concluded their proceedings.

The international community must also invest as much effort and as many resources toward strengthening national judicial infrastructures around the world as it does in staging high-profile

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international human rights prosecutions—domestic justice is always preferable to international justice. (The ICTY alone, which is expected to remain active until 2012, is staffed with 1,118 members from 82 countries, and operated at a cost of \$342 million in 2008–09.) Investment in judicial apparatuses is most sorely needed in Africa, where the rule of law has not traditionally been a priority for international donors, at least not when compared to economic development, civil society promotion, and electoral assistance.

Paradoxically, for many foreign governments and international donors the creation of the ICC has become a disincentive to prioritizing the development of African judicial systems, since it is presumed that the international court will take care of things. This attitude is abetted by the paternalistic prejudice among US and European governments that the only real or legitimate justice that can be delivered across the developing world is justice sanctioned by international bodies.

Curiously, some of the most effective prosecutions of human rights abuses of recent times have taken place in weak or emerging democracies, with little if any assistance from the international community. In April 2009, Peru became the first country in Latin America to convict a popularly elected leader on charges of human rights abuses. Former President Alberto Fujimori was sentenced to 25 years in prison for the kidnapping and murder of Maoist rebels in the 1990s, a tumultuous period in Peruvian politics. Fujimori had assumed autocratic powers and shut down democratic institutions, including the popularly elected congress, with the pretext of going after terrorists.

A more pragmatic understanding of justice must inform international endeavors. The one-size-fits-all approach upheld by the ICC and many human rights activists—the notion that all political crimes deserve prosecution—is compelling but unrealistic, and potentially counterproductive. In many instances, human rights violations are better confronted as a political problem rather than as an ethical or legal challenge.

Of course, it is something of a false dilemma to think of human rights abuses as entailing either a political or an ethical solution, since ethical judgments can incorporate pragmatic considerations. Even so, one of the great lessons from the most successful recent cases of democratization is that creating a stable democracy may well involve approaches that are currently deemed anathema in the international justice movement. From Spain to

Chile to South Africa, the path toward reconciliation and democracy was paved by amnesty and forgetting rather than by prosecutions.

Improving the effectiveness of international justice also requires that Western nations pay more than lip service to the work of international justice institutions. Although American officials took a leadership role in the creation of the ICC (they were instrumental in writing the body's charter), the United States has yet to join the organization for fear that this might put US officials (especially military officers abroad) at risk of prosecution. This fear is overblown, since the range of crimes that the ICC is allowed to investigate is quite narrow, and in any case the court can intervene only in cases in which domestic institutions are either unable or unwilling to investigate.

The American absence from the ICC fuels the impression that global standards of justice do not apply to the world's mightiest nation, and this emboldens other states to ignore ICC dictates. Sudan's ambassador to the United Nations, commenting on his government's decision to disregard the ICC's indictment of Bashir, said this: "We choose not to be part of [the ICC], like the United States."

SETTING AN EXAMPLE

The West, moreover, needs to lead by example. The cause of promoting justice around the world is not advanced when the very nations that portray themselves as on the vanguard of protecting human rights themselves become flagrant abusers. The tally of alleged human rights abuses committed in the George W. Bush administration's "war on terror" befitted a depraved Third World dictatorship, and included forced nudity, sleep deprivation, waterboarding, and prolonged confinement in "stress positions." These acts violated Article 3 of the Geneva Conventions, which unambiguously bans the "inhumane and degrading treatment" of prisoners of war.

Unsurprisingly, this record of torturing prisoners has provoked calls for some kind of transitional justice in the United States, along with accusations that America fails to practice at home what it preaches abroad. But the administration of Barack Obama has steadfastly refused calls for an investigation into the human rights abuses generated by the war on terror. Even as mild a recommendation as a truth commission has been rejected. The American message to the world when it comes to protecting human rights appears to be "Do as I say, not as I do." ■