6 The ICC

A Place for Africans and Africans in Their Place?

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6.1 Introduction

This chapter is concerned with the higher politics of the International Criminal Court (ICC) as it has developed, and as it involves Africa now and in the near future. It is not, except incidentally, concerned with the history and procedures of that organization, nor with its personnel, or the way in which it conducts its business.

The chapter traces the origins of international justice and courts in a tradition of attempting to give a respectable face to political demands for revenge and punishment of those who have offended us. It notes the formidable practical and political difficulties of attempting to conduct fair and honest investigations and trials in such circumstances, and the grave problems the ICC will face in attempting to investigate the activities of western, western-allied or western-protected states, should it attempt to do so. It argues that, for that reason, Africa is likely to be more or less the exclusive customer of the ICC for the foreseeable future, and that the ICC itself is best seen as a kind of Human Rights Theatre, in which representatives of lesser cultures can be ceremonially prosecuted, to show that the western world really cares about human rights violations. Finally, the chapter looks at the likely political consequences of this quasi-exclusive focus of the ICC on Africa.

It should be emphasized at the outset that what follows is not intended as criticism of individuals, whether in governments or in the ICC itself. There have been trenchant criticisms of the ICC and its personnel elsewhere,[1] and I do not intend to add to them now. Rather, I am concerned with those objective political factors which dictate what the ICC is likely to be able to accomplish, irrespective of who is in charge of it, and what the likely political consequences will be.

1 See, for example, Julie Flint & Alex de Waal, *Case Closed: A Prosecutor without Borders,* World Affairs, (Spring 2009).

6.2 Contextualising International Justice in History

Most accounts of the rise of international humanitarian law and of courts and tribunals, come, naturally enough, from those with a human rights background, and they stress, understandably, cumulative attempts to limit "impunity" and to extend the "rule of law." Formally, this is partly true, in the sense that texts of laws, as well as organizations and procedures, have developed and strengthened over time. Likewise, the last generation has seen the rise of courts organized and staffed internationally, and able to try nationals of various different countries.

But the key to understanding the rise of these institutions lies in politics, because without political support, no idea, no matter how brilliant or morally compelling, will ever get implemented. So what are the political preconditions for courts and tribunals to be established, and to function properly? The first and most important point is that effective courts and tribunals are always, in practice, "victors' justice", because they rely for that effectiveness on the ability to conduct investigations, arrest suspects and summon witnesses, all of which depend on control of territory. An example would be the ability of the International Criminal Tribunal for Yugoslavia (ICTY) to conduct investigations in Bosnia after 1995, as opposed to its inability to do so in Croatia for some years thereafter, and of the ICC to conduct investigations in the Democratic Republic of Congo (DRC), as opposed to in Sudan. These are matters of degree, of course, since evidence can be destroyed, suspects protected and witnesses intimidated, even in a benign environment. Nonetheless, the basic requirement remains that the tribunal, and nations or organizations supporting it, have more power than those who may be trying to resist its operations. Conversely, it follows that nations supporting a court or tribunal will generally be powerful enough to prevent investigations being conducted against them, or their interests. Thus, whilst the Serbian government tried to mount trials of western leaders they held responsible for the bombing of civilian targets during the NATO attacks of 1999, they were unable to compel either the accused or western witnesses to appear. All this explains why trials tend to take place after hostilities are over, and when one (or more) faction is no longer strong enough to obstruct the process.

For most of history, organizing trials has not been the favoured method of dealing with an enemy after a war. Depending on the civilization, wholesale extermination, slavery or colonial subjugation were more usual. The first case where some kind of real thought seems to have been given to the fate of a defeated leader is after the abdication of the French Emperor Napoleon Bonaparte in 1814. (It is not an accident that this example comes from Europe: most of those that have helped to shape the development of the law of armed conflict have done so as well.) Napoleon's case is interesting for several reasons.

First, it seems to be the origin of the demonization of a national leader to provide a point of reference for hatred and demands for revenge: a tradition which persists until the present day. Faced with widespread popular sympathy for the ideas of the French Revolution, the British tried to build Napoleon into a pantomime villain and bloodthirsty monster. In parallel, the foreign interpretation of the French Revolution was probably the first systematic use of atrocity propaganda to mobilize popular hatred and revulsion, in this case against democracy and in favour of hereditary monarchy. Indeed, for most of the nineteenth century, the French Revolution, in the hands of popular novelists like Charles Dickens, became a kind of terrible warning against the bloody consequences of any move to a more democratic system of government in Europe. Finally, Napoleon's fate (exile first to the Mediterranean island of Elba, then to distant St. Helena after his unsuccessful attempt to regain power in 1815) was the first time a defeated national leader's future had been considered in this way. The monarchs arrayed against Napoleon would have certainly liked to have him executed, but they were realistic enough to know that this was unpopular politically in France, as well as setting an awkward precedent for themselves. It is not surprising therefore, that legends immediately sprang up that his death in 1821 was due to poison.[2]

In the nineteenth century, European powers fought relatively little among themselves, and devoted much of their energies to carving out colonies. They saw no need to make themselves accountable to anyone for their actions in these colonies, although revolts and uprisings by the natives were put down with some violence, and occasionally a lick of legal varnish. World reaction to the horrors of the Boer War was essentially because the victims – the Afrikaners – were white. Even so, there was no serious suggestion of legal proceedings against the British leaders responsible for the deaths of tens of thousands of women and children.

The beginning of modern thinking and practice about international criminal justice is to be found in the First World War in Europe. In 1914, the British government was confronted with the awkward question of how to sell to a suspicious public the idea of involvement in a potentially dangerous and destructive war against Germany and on the side of France. The British government wanted to stop the Germans dominating Europe and controlling the ports opposite the English coast, but was worried that public opinion would not accept this argument as adequate. As a result, stories of alleged atrocities committed by German troops invading Belgium were taken up, massively exaggerated and fed to an eager mass media. In recent years there has been a tendency to emphasize that some

2 Among the libraries of books devoted to this period, see Max Gallo, Napoleon, Tome 4 L'Immortel De Saint-Helene (2010).

atrocities actually did occur,[3] and they were not entirely invented. This is true, but irrelevant; for the British, the truth of the allegations was unimportant, so long as they could make political use of them.

As the War progressed through four years of mounting horror, political opinion became starkly polarized and ever more extreme. By 1918, the British popular press were howling for revenge against the Germans, (often described as "sub-humans" and unworthy of civilized treatment). Such anger and vengefulness demanded a target of some kind, and so "Hang the Kaiser" became a popular slogan.[4] It might have happened. Public support for hanging (or at least trying) the Kaiser was strong among the victorious powers, and the British Election of 1918 was partly fought on the issue. Conferences of British, French and American officials tried to draw up charges, and political pressure was put on the Netherlands (where the Kaiser had fled) to hand him over. But the Dutch declined to do so, and the idea eventually lapsed. The case is of interest though, because it displays the main characteristics of many later episodes. In the beginning, comes the atrocity propaganda and the cultivation of public opinion, on the basis of stories which may or may not be true. Then there are public demands for revenge, often couched in the vocabulary of justice. Finally, comes the botched realization and the recognition that converting indiscriminate hatred and vengefulness into criminal charges that can be proved beyond a reasonable doubt is not easy. In this case, as has become normal, the guilt of the accused was assumed even before it was obvious what he could be charged with, or even if he could be charged with anything at all. And, as always, the victors did not pause to examine their own conduct: the naval blockade of Germany which helped cause hundreds of thousands of deaths, and continued even after Germany's surrender, was regarded by them as entirely legitimate.

Today's war crimes prosecutors understandably flinch at the mention of the Nuremburg and Tokyo Tribunals, and the ad hoc tribunals and the ICC have certainly conducted themselves better. Yet the cases are interesting because they display essentially the same political dynamic which is behind the ICC. Moral considerations aside, it was obvious to Allied leaders that the Nazi high command could not be left alive after the war. The idea of Hitler taking refuge in Switzerland, for example, was unthinkable. Early suggestions of simply hunting down and killing the Nazi leadership were ultimately abandoned in favour of some kind of judicial process. Obviously the main Nazi leaders would have to be

3 Alan Kramer, Dynamic of Destruction: Culture and Mass Killing in the First World War, (2007), discusses these and other episodes.

4 As early as 1917, two American songwriters, James Brockman and James Kendis had written the popular hit *We're Going to Hang the Kaiser.* For Lloyd George and the 1918 election, see for example James Purcell, Lloyd George, 74-5 (2006).

executed; they therefore had to be found guilty, which meant that they had to be convicted of something, which meant that charges of some kind had to be brought. Once more, a guilty verdict was taken for granted before the defendants had actually been charged with anything. Framing charges was not easy. Some crimes ("waging an aggressive war") had to be invented for the occasion. Others – such as bombing undefended cities – were withdrawn, out of embarrassment as much as anything else, since the Allies had done far worse. Indeed, Nazi atrocities against the civilian population were not given special priority in the trials, partly because the Allies were uncomfortably aware of the half million German civilians who had died as a result of their bombing raids.

The political leadership probably did not have a great deal of choice. War has a radicalising effect on any population, and six years of brutal conflict had left the British population exhausted and clamouring for revenge. Although the US had not suffered directly from the war at all, its population was at least as radicalized, and in both countries, the political leaderships, the popular media and much public opinion encouraged each other. The Germans – and not just the Nazis – were seen as sub-humans for whom extermination would be too merciful a fate.

Needless to say, the correlation of forces was such that the Allies saw no need to put their own conduct in question, or even to mention it, and there was no one to require them to do so. Not for the first time, and certainly not for the last, the political forces organising the trials regarded themselves as politically and morally superior to the accused, and retrospectively justified in whatever it was that they had done.

The war in the Far East had been a brutally racial one from the beginning, marked by atrocities on both sides.[5] Even before the war, racialist views of the Japanese were widespread in the West, and war propaganda often painted them as animals – monkeys for example – rather than human beings. This, combined with the shock to white cultural superiority of their early victories, created a furious demand for revenge among public and elites alike. The result was the International Military Tribunal for the Far East, set up in Tokyo in 1946. In spite of its name (and the presence of a number of non-US judges) the Tribunal was American in origin, and largely funded and organized by the US. The logic was partly that of Nuremburg – the Japanese leadership had to be destroyed in some fashion – but with a powerful additional need to revenge racial humiliation.[6]

5 John Dower, War without Mercy: Race and Power in the Pacific War (1986).

6 For a recent attempt to partly rehabilitate the trials, see Neil Boister and Robert Cryer, The Tokyo International Military Tribunal: A Reappraisal (2008).

Yet if, as usual, the guilt of the defendants was decided in advance, it remained to convict them of something. The Japanese had destroyed many of their records, and there was little to link the main defendants with any crimes committed against allied forces. The solution was to invent the concept of "crimes against peace," and to charge the defendants with responsibility for such crimes going back to the start of the war in China in 1937. Under the rules of the court, it was not necessary to show that the defendants ordered, or even knew about the crimes: it was alleged instead that they were members of a conspiracy dating back to the 1920s. (Much of the argument depended on an alleged 1927 government document which is widely believed today to be a forgery).[7] In addition, all forms of evidence, including hearsay and even allied propaganda, were allowed to be introduced.

Political reality, however, intervened in one important way to limit the extent of the trials. Whatever the Emperor's personal responsibility for the war (and that is still being debated) it was impossible politically to put him on trial without creating an unprecedented political crisis. Moreover, the US needed Hirohito as a figure to promote stability in a country which few understood, and whose language hardly any Americans spoke. In addition, political imperatives change, and the same figures that were so hated in 1945 soon became valuable, because their nationalism and anti-communism made them useful allies in a country where the prevailing sentiment, after 1945, was pacifist and left-wing. So many were quietly released or pardoned in the years that followed. (Indeed, across the world, all except the highest profile Axis accused had been freed by the mid-1950s, and were often in positions of responsibility once more).

The outcome of the Tokyo trials was a disappointment to most of those involved. Many of the non-American judges expressed severe doubts about the process, and one – Judge Pal from India – eventually disowned it entirely.[8] Much more than at Nuremburg, there was a sense that little existed morally to differentiate the victors conducting the trial from the vanquished in the dock. The awful results of US air attacks on Tokyo were everywhere to be seen around the court as the trials unfolded. But once more, the correlation of political forces, mixed with the unquestioning assumption of moral superiority by the Allies, meant that such questions were not explored.

Other countries tried to deal with the legacy of the war as best they could. After the liberation of France in 1944, the new government under General de Gaulle tried to mount trials of those who had collaborated with the German occupation. Part of the purpose was, as

7 The weaknesses of the IMT and its rules of procedure and evidence are well documented in Richard H. Minear, Victor's Justice: The Tokyo War Crimes Trial (1971).

8 Pal voted for acquittal on all counts. See, among others, Timothy Brook, *The Tokyo Judgment and the Rape of Nanking*, 60 The Journal of Asian Studies, 673-700 (2001).

usual, to get rid of those who still posed a political threat. But it was also to establish the illegitimacy of the collaborationist government, and the legitimacy of the government of de Gaulle, as well as to respond to public anger and the desire for revenge. The eventual outcome was very mixed. Some defendants refused to apologize for anything they had done, claiming they had been defending a legitimate government against communist terrorists. In other cases, government officials admitted signing death warrants for resistance fighters, for example, but claimed that they had used their positions to save many more, and so were really members of the resistance themselves.[9] Most other countries which had been involved in the war, both in Europe and Asia, grappled with variants of the same problem.

The majority of the fighting in the world during the Cold War was related directly or indirectly to the struggle against colonialism and the consequences of it. Here, for the first time, Africans appear as actors. The western struggle to retain its colonies was marked by considerable brutality, and also by the use of legal devices to make agitation for independence a crime. Trial and imprisonment of nationalist leaders was commonplace, and where actual rebellions broke out, they were met with extreme violence, often of a judicial kind. In Kenya, the anti Mau-Mau campaign proceeded through the stages we have already noted: cultivation of public opinion through atrocity propaganda (some based, as usual, on real events), hysterical demands to "do something", followed by a decision to organize trials so that those who needed to disappear could be found guilty of something. Altogether, the British seem to have executed over 1000 alleged Mau-Mau "terrorists" for acts often vaguely defined, on evidence which scarcely stands up to scrutiny.[10] The British showed not the slightest scruple about behaving this way, or about the sadistic torture and casual killings which were a feature of the detention camps into which many alleged criminals were herded. But even the (fairly limited) protests in Britain called only for the policies to be stopped, not for those responsible to be punished. Much the same was true in Algeria, where the French not only tried and executed hundreds of nationalists for various crimes, but also carried out thousands of summary executions.[11] Yet in France, as in Britain, the majority of the population supported almost any policies adopted during the colonial wars, and even the strongest opponents of the Algerian war stopped short of actually demanding trials of those responsible for the killings and the torture. It was other people after all.

9 I have said rather more about this episode in David Chuter, Humanity's Soldier: France and International Security 218-25 (1996).

10 David Anderson, Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire (2005).

11 See an eye-opening memoir by a participant, Philippe Aussaresses, Services Spéciaux, Algérie 1955-1957 (2001).

Indeed, at all stages in the wars of de-colonization, the majority of the population of the colonialist nation supported what their troops were doing. This was true in Kenya and Algeria, and it was also true during the Vietnam War, itself an indirect result of de-colonization. Although large-scale massacres of Vietnamese civilians seem to have been very common, it was only massive media coverage after the accidental discovery of the 1968 My Lai massacre which eventually forced the US Army to put the junior officer responsible – Lt. Calley – on trial. Yet Americans overwhelmingly disapproved of the guilty verdict, and more than half of those subsequently questioned said that the massacre of civilians was justified "if they were communists."[12] Not for the first time, it was political reality, not the absence of suitable institutions, which precluded any further action.

Two important changes were already under way between the end of the decolonization phase, essentially complete by 1980, and the era of courts and tribunals in the 1990s, although each grew in importance between those two dates. The unaccustomed peace in Europe after 1945, and advances there in human rights and social justice, turned the focus of humanitarians in Europe towards the outside world. Much of their energy was initially devoted to anti-colonial campaigns, to opposing the Vietnam War, and to calling for the end of apartheid in South Africa. These campaigns had fewer and fewer targets after 1980, and reached a natural end by about 1990. Political changes in Eastern Europe also meant that human rights concerns there abated somewhat. But naturally the urge to do good in the world did not go away. It had also been mutating for some time. The human rights movement had begun after the Second World War as a way of putting pressure on governments to release those unjustly imprisoned (Amnesty International was founded in 1961). But as the movement grew, and as competition for publicity and resources became increasingly fierce, the focus necessarily changed. Large-scale publicity campaigns and demands for punishment of human rights violators, rather than freedom for the victims, became increasingly common. Human rights groups increasingly harangued governments, demanding that they intervene militarily around the world to prevent such abuses, and kill those responsible for them. Yet it was still hoped that Europe and its ex-colonies would be peaceful: with the end of the Cold War, surely the underlying motor of conflict there had been removed?

The other development was in newsgathering technology, where portable satellite terminals replaced expensive and slow news camera footage. Pictures of atrocities could travel round the world in minutes, presented by journalists who increasingly saw themselves as heroes and moral teachers, instructing governments on their duty. From the mid-1990s, the increasing use of the Internet meant that images and allegations did not even have to

12 Herbet C. Kelman & V. Lee Hamilton, Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility 169-179 (1989).

pass through traditional news media – although it also meant that the scope for manipulation and downright lying increased massively.

The first episode when all these elements came together was the fighting in the Former Yugoslavia from 1991-1995. To the consternation and fury of many, nationalist violence erupted in Europe again. Images previously only associated with Africa came to European (and American) TV screens every evening, but the victims were white, and living in a recognisably European environment only a few hundred kilometres from Rome and Vienna. Much of the reporting was exaggerated or misleading – sometimes deliberately so – and the conflict itself took place in a region where the manipulation of outside powers for support had been an art form for well over a century. Well-funded and organized public relations campaigns added to the confusion, and helped to create an angry, if poorly informed, coalition of journalists and human rights groups demanding violent military intervention.

The setting up of an international court – the ICTY – was, at least in part, an accident. Western decision makers were genuinely appalled by the violence on their doorstep, but they were also furious at the skill with which they were being manipulated by the local actors, and their own lack of success in bringing the crisis to an end. Faced with overwhelming demands to "do something" but obviously incapable of fulfilling the militaristic fantasies of human rights groups, they hit on the idea of a court, which would demonstrate that something was being done, and also undermine, or even remove from power, those who were frustrating their efforts. It was established by UN Security Council Resolution 827, in 1993.[13] There was then a precedent, which made it difficult to argue against the creation of the sister Tribunal, for Rwanda, after the events of 1994 in that country.

This was the first time that something resembling really independent judicial criminal organizations had been set up, and the difficulties became apparent immediately. Some practical issues are discussed in the next section, but here I want to emphasize the immediate cultural dissonance which resulted. The primary movers behind the Tribunals (as with the ICC) were human rights lawyers and international lawyers. They thought of law as something basically normative and assertive, and the function of the Tribunals as to punish the guilty. But the prosecutors were from a criminal law background. Their trade required them to prove cases beyond a reasonable doubt, to get their hands on reliable witnesses and compelling evidence, and to decide which charges, if brought, would stand a good chance of success. They were also more interested in conviction than exhaustive

13 The remainder of this chapter is heavily influenced by the author's own personal experience of the issues discussed. See also, David Chuter, War Crimes: Confronting Atrocity in the Modern World, (2003).

historical analysis, and so would often limit the charges brought to those they thought they could prove. In turn, this meant that many incidents, or alleged incidents, were never investigated, or if investigated never charged. Finally, they accepted that a percentage of charges would fail, and that some accused would be released.

They were accompanied by professional investigators, who were well aware that witnesses become confused, forget or invent things, and even lie, especially if money is offered. They were used to demanding standards for collecting and acquiring evidence, and the need to build a case which would stand up in court. On the other hand, they frequently encountered alleged witnesses who had been interviewed in an amateurish fashion by journalists and human rights groups and whose accounts were so contaminated as to be technically useless.

Finally, of course, even accused war criminals were entitled to legal representation, and to defend themselves, although this itself was controversial in some quarters. However, the establishment of the Tribunals was roughly contemporaneous with the triumph of the idea of Victimism in the United States, which spread subsequently to Britain and elsewhere. This doctrine enabled individuals and groups to identify themselves as "victims" of violence or abuse, especially sexual, and to demand compensation and what they described as "justice". Any attempt to question the validity of their testimony, usually procured under hypnosis by psychiatrists committed to their cause, was judged illegitimate because they were, after all, victims. So, for example, lawyers and psychiatrists in the US presented thousands of cases of children allegedly subjected to ritual satanic sexual abuse by organized groups including their parents, and refused to allow the "victims" to be cross-examined. A number of parents and others were actually convicted (normally of mundane offences only) though in general these verdicts were reversed on appeal. Thousands of families were destroyed in the process.[14] There was never any evidence that satanic abuse groups existed, but the media and human rights groups notably failed to question the fantastic allegations, or to provide support to the accused, so frightened were they of being labelled supporters of child abuse. Meanwhile, actual child abuse cases, both sexual and otherwise, went un-investigated for lack of resources.

The read-across to atrocity allegations is obvious enough, and does not need to be laboured here. It is just worth saying that chronologically the satanic panic had died down by the early 1990s, but the cult of the victim, and the fear of questioning what an alleged victim said, remained extremely powerful, and found a new and convenient home in the human rights and war crimes agenda.

14 See among other accounts, Debbie Nathan & Michael R. Snedeker, Satan's Abuse: Ritual Abuse and the Making of a Modern American Witch Hunt (1995).

Inevitably, once allegations of war crimes were looked at by professionals, it emerged that witnesses were indeed sometimes confused, and often contradicted each other, that they gave wrong or misleading testimony, that some were liars, that some had been paid and some threatened. In Arusha, several witnesses had to be discharged after giving highly colourful evidence of things they had not seen, but had heard of from others. In their own culture, the difference between individual knowledge and collective understanding was not so emphasized.

None of this really should have come as any surprise to someone who had been on a jury, let alone someone familiar with the extensive literature which has shown that eyewitness testimony about violent crime is, essentially, useless.[15] But the results, including some acquittals, did come as a severe shock to groups who took it as an article of faith that all of the accused were obviously guilty, and that everyone who claimed to be a victim should be treated as one. In some cases, though, it was less alleged victims who were complaining than the media and Non-Governmental Organizations (NGOs). Quite quickly after the start of the fighting in Bosnia in 1992, for example, NGOs began to charge, and journalists to report, that the Bosnian Serb forces were deliberately committing mass rapes of (usually Muslim) women as some kind of an act of war to destroy Muslim society. There were echoes of the satanic abuse panic, not least in the conspiratorial framework, and the reluctance to allow alleged victims to be interviewed. Other parts of the media and other NGOs naturally felt squeamish about subjecting the claims to any real critical examination, because they did not want to be labelled protectors of rapists. The Yugoslavia Tribunal was sufficiently concerned to devote several years of investigation by an all-female team to the allegations, without turning up any evidence that such a scheme had ever existed. The best informal estimate was that there had been some 10,000 rapes over the three years of the war; a figure that was, sadly, not much higher than the peacetime norm. Individual cases of rape, as well as organized episodes (for example around Foca in Eastern Bosnia) certainly existed, and many were investigated and prosecuted. But the "rape as a weapon of war" meme could not be factually substantiated, although it continues to lead a vigorous life in the media even today.[16]

6.3 The Problem with the International Criminal Court

The collision between the moral impulse to seek punishment of the guilty on behalf of those one had identified as victims on one hand, and the banal processes of criminal

15 See for example Elizabeth E. Loftus, Eyewitness Testimony (1996).

16 See a recent summation of the problem, Amber Peterman, Dara Kay Cohen, Tia Palermo and Amelia Hoover Green, *Rape Reporting During War: Why the Numbers Don't Mean What You Think They Do*, Foreign Affairs (August 2011). For a scholarly demolition of various atrocity statistics, see Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict (Peter Andreas and Kelly M. Greenhill eds., 2010).

justice on the other, are a part of the problems of today's ICC, as they were of its predecessors. But there are a series of other ICC problems which relate to the type of organization it is. Some examples are given below. (My concern here is not with the legal status of the ICC, so much as with the sociology of how organizations work.)

Firstly, the ICC is an international treaty organization, rather than a creature of the Security Council. This means that it is analogous to the African Union or the International Telecommunications Union. Membership is voluntary, and can be suspended or even revoked if the state wishes. As with most such organizations, there are obligations, but little ability to police them, and few penalties for non-compliance. In theory, non-compliance with the ad hoc tribunals could have meant being reported to the Security Council, although states or entities supported by the West seldom suffered as a result. Nothing of comparable severity exists in the ICC Statute. Thus, nations are essentially expected to collaborate out of good intentions and respect for treaties they have signed.

In turn, this is because the ICC is an example of a type of international treaty organization where it is assumed that everyone will benefit from membership, and therefore everyone has an incentive to behave. It is like the International Air Transport Association – everyone would be worse off without it. Yet in practice, of course, this is not true, and therein lies one of the organization's main problems. There is, in reality, little practical benefit from becoming a state party other than moral satisfaction. At a minimum, it can involve obligations which are tedious (provision of witnesses, hosting of criminals serving sentences) or potentially awkward (providing documents, arresting indictees). At worst, it can involve handing over elements of one's own leadership to a foreign court, which history has shown to be something between unwise and politically suicidal. Even simple adhesion to the statute implies that the state might lose the right to prosecute those it wishes to, something that even the weakest state will cling to as part of its sovereignty.

So it is not surprising that many of the delegations in Rome in 1998 were nervous and fearful, wondering what it was they would be asked to sign up to this time. The exceptions, of course, were the major western states, apart from the US. These never imagined for a moment that the ICC would ever be used against them, but rather saw the operations of the Court as strengthening their own foreign policy agendas. In this sense, the Court is not so far from the World Trade Organization or the International Monetary Fund. Although in theory its rules and ideology are neutral, in practice it tends to be dominated by a small number of states and to benefit them more, in practice, than the rest of humanity.

The ICC is also an example of an international executive organization set up under a treaty regime. Here, the obvious comparisons are with the International Atomic Energy

Agency, which not only has its own Statute and General Conference but also a link with the Nuclear Non-proliferation Treaty, and the Organization for the Prohibition of Chemical Weapons, the executive arm of the Chemical Weapons Convention. In these cases, as with the ICC, the work of the organization is both technically complex and politically sensitive. The more important the task, the more fundamental are questions of management and expertise within the organization, and the more difficulties arise.

Some of the difficulties are, superficially, banal. In the case of the ICC, there are many excellent judges, prosecutors and investigators around the world, but it will be impossible for them to function unless, in practice, they understand English. The ICC, like many other international organizations, has impeccable multilingual credentials, but field reports, requests to attend meetings, or correspondence with outside governments and the media will overwhelmingly be in English. The seat of the ICC (like the OPCW and the ICTY) is in The Hague, a small, bourgeois, city which is the seat of government (but not the capital) of the Netherlands. Cold and rainy in winter, and mild in summer, its only real industries are government, embassies and international organizations. Government and ordinary people speak English, and sometimes German, but seldom French or any other language. Some understanding of Dutch (a guttural Germanic language spoken nowhere else) is needed to live there on a daily basis. Understandably, the ICTY had difficulty in attracting and retaining a genuinely international cadre of investigators and prosecutors, and even its large Australian contingent complained vocally about the weather.

There are more subtle problems also. The nearest analogy to war crimes investigations is serious transnational organized crime. There are not many countries in the world with experience of investigating and trying such offences. A senior ICTY figure suggested to the author some years ago that there were no more than twelve such states, and, if this number has increased recently, it is probably not by much. Investigators from states without these capacities can never expect to reach senior positions. Likewise, disciplines of criminal and military intelligence analysis, which underpin much of the investigations, are very unevenly represented around the world. Similarly, ICTY judges, even from some western countries, found themselves hopelessly out of their depth with the complexity of political and military factors which impinged on some of the major trials, for which nothing in their experience had prepared them. There is too little collective experience in the ICC to be sure, but there is a good chance that, in practice, Africans will be investigated, analysed, prosecuted and judged predominantly by non-Africans, and not for the first time in history.

These problems exist in part because of the way that war crimes investigations and trials have developed, seeking ever higher and more important targets. The events which give

rise to pictures and videos of atrocity, and which cause us to demand revenge and punishment, are by definition relatively small-scale. There is only so much you can show on a screen. But increasingly we have insisted that the *real* criminals be punished; not some anonymous group of militiamen, but the bosses, and the bosses of the bosses. From the time of the ICTY and ICTR Statutes, documents began to talk of those who "planned" "instigated" and "ordered" crimes. Today it is taken for granted that investigations should be launched against senior commanders and even political leaders, in almost every case. But as the level of the target is raised, so the investigation and the trial become exponentially more complex.

Essentially, if someone was not at the scene or did not issue a written order for a crime, then it has to be shown that they were in some way responsible for the crime being committed, or at least did nothing to stop it when they could have done so. This can be a hugely complex endeavour, especially with civilian leaders and irregular military forces. But, from the German Kaiser onwards, we have seen that demands for revenge and punishment tend to cluster around identifiable, high profile figures, and that often moral or legal responsibility is presumed to translate handily into responsibility for criminal acts. This is often not the case.

The complexity of these situations means that a major case, before the ICC, for example, might need to cover a wide range of relatively arcane issues. They could include formal and informal patterns of control within the security forces and between those forces and the government, family, clan, tribal, ethnic, religious and commercial links between actors and their relative importance, ease of communications between main actors, military doctrines, standard and content of training, technical command and control issues, observed patterns of control in the past, written orders, laws and constitutional provisions, whether they reflected reality, records of investigations and trials, if any, as well as all the same factors as they affect second or third nations that might be involved.

Several points need making here. First, with trivial exceptions, these are not legal issues, but technical issues of fact and interpretation, where judges have no special skills. Indeed, they are the kind of subjects that political analysts, anthropologists, historians, journalists and intelligence officers spend decades becoming experts on. Second, it is very hard, if not impossible, to demonstrate any hypothesis on these subjects to a criminal standard of proof. (A century after it finished, there is no sign that one interpretation of the Boer War has been "proved": indeed, it is not clear that this is even possible.) Third, all this is merely background, and does not mean that the guilt of anyone has actually been proved, even if a consensus has been reached on some technical point. So a future trial chamber may decide that even though the President of Country A was at Staff College with the President of Country B and has kept in touch since, and that there are clan links between the

two families, there is insufficient evidence that the military support given by A to B in the fighting against the rebels means that the President of A is guilty of any crime committed by the forces of B. Another group of judges, on the same evidence, may decide that there is just enough proof that he is guilty, and condemn him to life imprisonment. A third group of judges, of course, may overturn either verdict.

These problems have become progressively worse as the targets of investigations have become more significant figures. We have seen that, since the days of the Kaiser, it has been normal to demand punishment of those who symbolize countries we dislike, but that it has always been difficult to turn what may in some cases be arguable moral responsibility or political influence into actual criminal charges, unless those charges were invented for the occasion. The most thoroughgoing attempt to charge and convict an acting head of state, and the only complete story (since the individual died in custody) is that of the former Yugoslav President, Slobodan Milosevic. It is a powerful warning of the problems involved.[17]

Milosevic was President first of the Republic of Serbia, and then of the remains of the old Yugoslavia. A former senior Communist Party official, he was elected President in a charged atmosphere where the fate of the Serb minorities in neighbouring Bosnia and Croatia was a sensitive issue. Milosevic's ambition was to be the undisputed political leader of all Serbs, and he faced considerable opposition from hardliners claiming he was selling out his foreign brothers, especially when fighting broke out in the two countries. He appeared to support separatists seeking to join the Serb minorities to Serbia proper, until it became clear that this would be impossible. Milosevic was not a nice man (or he would not have got far in Balkan politics) and there is a respectable argument that his influence on the crisis was at least as malign as anyone else's. But that is very far from saying that there is any proof he had committed criminal offences.

Nonetheless, for the West, he was seen as an obstacle to the final resolution of the Balkans conflict, a skilful politician who taunted western leaders, operated his own agenda, and refused to respect theirs. They were desperate to overthrow him, and replace him with a leader who would work with them. But in the face of a divided opposition, Milosevic continued to win elections, helped by a ruthless political machine. The solution turned out to lie in the southern province of Kosovo, where Serbs were a small minority, and where the majority Albanian community were at odds with Belgrade. A small group of former Maoists, the Kosovar Liberation Army, launched a guerrilla

17 Shortly before this book went to press, former President Charles Taylor of Liberia was found guilty of offences related to the war in Sierra Leone and sentenced to fifty years in prison. Details of the judges' reasoning are not available at the time of writing, but it is already clear that the trial encountered much the same problems as are described in the Milosevic case.

campaign against Belgrade in 1996. As good Maoists, they hoped to mobilize the people by provoking the authorities, after which they hoped that the West would intervene. This strategy broadly worked, and the Serb police overreacted to bombings and shootings by attacking Albanian villages. Several hundred people had died by 1998. The West believed it could use the threat of investigation and prosecution to force concessions from Milosevic – essentially the surrender of Kosovo – which would lead to him being voted out of office.

The campaign went through the various stages we have reviewed. The nasty little insurgency was hyped by the West into a genocidal ethnic cleansing nightmare, and soon NGOs, the media and human rights groups, who had long wanted to get rid of Milosevic, were screaming for him to be prosecuted. After a clumsy NATO bombing campaign in 1999, Kosovo was duly surrendered and Milosevic lost the next election. His political enemies rapidly transferred him to The Hague. That was where the problems started.

There was a reasonably well-established, although rather small, crime-base of atrocities committed by Serb forces in Kosovo during the NATO bombing, and there was a respectable, though not overwhelming, case that Milosevic, as President, either agreed to them or should have stopped them. The majority view is that, had there been a verdict, Milosevic would probably have been found guilty on some of the counts. But the idea of charging him with involvement in atrocities committed by ethnic Serb forces in Bosnia and Croatia had been around for years, and the Tribunal appears to have decided that it had nothing to lose now by bringing charges under those headings. Yet reading the indictments one is struck immediately by the fact that, in effect, he was never charged with anything. It was not actually suggested that he had committed any crimes, rather it was stated, "(T)he Prosecutor does not intend to suggest that the accused physically committed any of the crimes charged personally. "Committed" in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator."[18] It was, in other words, the existence of a "joint criminal enterprise" (effectively a conspiracy), which the Prosecution was trying to demonstrate. If this enterprise could be shown to exist, then Milosevic was vicariously guilty of all of the acts committed by the various members, whether or not he even knew of them.

We will never know whether the judges would have accepted this interesting line of argument (based, as will be apparent, on the methodology of the Tokyo trials), but there are signs that, with the prosecution of Charles Taylor and others, it is becoming the standard

18 *Prosecutor v. Slobodan Milosevic*, IT-02-54-T Amended indictment (Bosnia).

method of attacking national leaders. In many ways, it amounts to a confession of failure; not simply to find evidence, but rather to apply criminal law successfully to high-level strategic political issues. As a result, national leaders who are prosecuted in the future may need, in effect, to have crimes specially designed for them, of which they can then be convicted. The "joint criminal enterprise" argument is very difficult to refute, and the defendant is in a sense required to prove their innocence.

The natural urge to convict an indicted criminal will be accompanied by an equal fear of failure. Acquittals would not be popular, and would lead to accusations of incompetence against the ICC, and demands for resignations of its staff. This is because, in the end, criminal law is only the language in which this debate takes place. The real crimes of national leaders, in the eyes of many, are moral and political, and it is on that basis that vengeance and punishment are sought. Criminal law is only a mechanism, tolerated as long as it produces the right answer. That is why it is acceptable, uniquely in this context, for the guilt of the accused to be assumed before they have been charged with anything, let alone convicted. Their guilt is moral and thus not subject to ordinary rules of criminal evidence. So when the well-known human rights lawyer Geoffrey Robertson claimed that the Hague Tribunal existed to "try those guilty of crimes against humanity in the Former Yugoslavia" his casual dismissal of hundreds of years of the presumption of innocence was not regarded as controversial. He also demanded that Slobodan Milosevic be arrested, at a point where no charges had been laid.[19]

In turn, this has to do with the Judeo-Christian heritage of our traditions of thinking about crime and punishment. What we are really demanding, as we move up the political food chain towards national leaders, is the punishment of sin. And sin, we recall, is a frame of mind, and a moral decision, not the transgression of a set of rules. Virtue consists of doing God's will, even if we do not understand why. Sin is opposing God's will and turning away from obedience, for which we must expect to be punished. Pride (*i.e.* having a different opinion from God) was always the worst sin. This is one reason why it is impossible to imagine any verdict, any punishment, which would have satisfied the mood of apocalyptic hysteria which surrounded the trial of Milosevic.

There will therefore be enormous pressure to indict, and even more to convict, national leaders. If this means doing violence to legal processes, and altering definitions of crime to fit the circumstances (as has happened with genocide, for example), then so be it. Even if it proves possible to mount trials of national leaders, however, such trials require enormous

19 ABC Television broadcast, March 30, 1999. Also The Independent, June 20, 1999.

preparation and huge resources to do properly. In turn, this will only happen if there is a substantial consensus among major players that these indictments and trials are necessary. We have seen that trials in the past have only been possible when there has been an overwhelming correlation of forces in favour. Even the simple Dutch refusal to hand over the Kaiser in 1919 was enough to derail years of planning and preparation. We can take it as read that no major power, treaty signatory or not, will agree to hand its own nationals to the ICC willingly, and that solidarity among major powers will incline them to support each other in such cases. Major powers will also intervene to protect client states or allies, and to obstruct investigations which might reveal embarrassing facts about their own behaviour.

The nations concerned would probably not see such actions as cynical. The great myth of international justice (and I do not use that term unkindly) is that the law is the same for all, and that context makes no difference. But, as we all know, context is everything. Who does what, against whom, and under what circumstances, determines almost entirely what we think of particular episodes. We all make excuses for our own actions, or actions of those we support, even whilst condemning those we dislike. Sometimes, this assumption is revealed almost in passing. Thus, the BBC reported widespread dissatisfaction in Sierra Leone with the prosecution of Hinga Norman, the Kamajor leader during the Civil War, who is "regarded by some in Sierra Leone as a hero for standing up to the rebels who were trying to oust an elected government … his supporters are angry that he is being placed in the same bracket as the rebels."[20] Now logically, whether Norman was a "hero" or not has nothing to do with the issue. But in practice we all believe that "heroes" – or people we support – are entitled to commit crimes where others are not. Likewise, we often have difficulty in imagining that we should be subject to the same rules as everyone else. The author recalls being in Washington at the time of the 1999 NATO attack on Serbia and finding US officials genuinely incredulous that provisions of the ICTY Statute should be thought to apply to them. ("Isn't there something in the Statute that says this doesn't apply to the good guys?" wondered one of them in my presence.) And later it was depressing to see officials from such countries as the US and Israel defending their conduct in the same terms, and sometimes in the same words, that I was used to hearing from the dock in The Hague. The effect of all this is that actually mustering an international consensus to support a prosecution is very difficult, but that obstructing it is relatively easy.

The interference does not have to be overt. The ICC is never going to risk putting itself at odds with even one major power, and may well discreetly sound them all out before opening sensitive investigations. At the other end of the spectrum, a Security Council

20 *Sierra Leone war 'hero' on trial* (BBC News, June 10, 2004).

reference would only come after long informal consultations, since a veto would be in no-one's interest. And even if there is no political objection raised, a state can still discourage an investigation by pointing out privately how difficult the investigation will be, and how little evidence it suspects is available.

In turn, this is because the ICC is fundamentally dependent on states for its effectiveness. Money, personnel, witnesses, logistics, transport, investigation assistance, targeting, arrests, transfers, and many other elements are not really feasible without international help. A simple statement that "we have no information on that, sorry" may be enough to slow down or stop a promising investigation. Witnesses and documents may mysteriously disappear and arrests may never take place. (By contrast, leads, discreet briefings and hints about where to look will be very important in guiding the ICC's work, and these, of course, can be manipulated.)

6.4 The International Criminal Court and Africa

The result of the high-level politics of international criminal justice as described above is that it is likely that the only real action the ICC is likely to be able to undertake will be against small, poor, friendless states, especially in Africa. It is no coincidence that, as this piece was initially being written, Burma was being suggested as the first non-African target: a small, poor, isolated nation whose government has been at odds with the West for decades.

If we accept that Africa will be the main, if not the only area of activity for the ICC, what follows? First, western states are likely to have a large influence on what cases are addressed. The Darfur case may well be iconic here. The Save Darfur Campaign, without which the ICC cases would never have been brought, was a deliberate and well-funded attempt to use atrocity propaganda (once more partly based on reality) to mobilise western opinion to demand military interventions and trials. None of its substantial budget was ever spent in Africa: all went on lobbying and public relations in the US, including the funding of local groups, at universities and elsewhere.[21] The campaign was successful in purchasing the support of many American politicians, and led to the Hollywood star and public face of the Nespresso coffee-maker, George Clooney, being allowed to address the Security Council on the subject. More importantly, its simplistic Arab/African stereotype

21 See Mahmood Mamdani, Saviours and Survivors: Darfur, Politics and the War on Terror 48-71 (2009).

seems to have influenced the ICC as well.[22] This is likely to represent the pattern for the future.

Second, propaganda about crimes in Africa will serve to deflect attention from crises elsewhere. It cannot be a coincidence that the Save Darfur campaign was launched at a time when two wars begun by the United States, in Afghanistan and Iraq, were reaching a peak of destructiveness. The energy of human rights groups and others, which might have demanded withdrawal by the US from these wars, was deflected into other, and safer, channels.

Third, because the ICC is a permanent organization, it will need to take care always to look busy, to avoid having its budget cut. The means that even small-scale incidents in Africa (such as recently in Guinea) will be grist to the mill. It means in turn that for the foreseeable future the typical western narrative of Africa will continue to be of violence and conflict. Issues such as health and education, or the effects of world trade practices, will tend to be squeezed out for lack of time. But everybody knows that the main problems of Africa are not war crimes, or even war. The major causes of suffering and death in Africa lie elsewhere.

Fourth, as a consequence, the ICC will perpetuate the image of Africa under international tutelage, unable to address its own problems, and depending on western justice, as it depends on the IMF and the World Bank for money.

Fifth, because Africans have little control over where the ICC decides to investigate, their own attempts to manage political crises in the continent may well be derailed by the ICC's activities, or even rumours about them. Immunity from ICC investigations is likely to be a routine demand at the start of peace negotiations in the future, although of course no state can grant that. The tension between ICC investigations and the search for peaceful solutions is often presented as one of "justice vs. peace", or more controversially as sordid political calculation against the blinding light of truth. In practice, as we have seen, justice has little to do with it. Rather, we are faced with a conflict between the instinct for revenge and the instinct to pass on. And the instinct for revenge frequently comes from outside, rather than from Africa. However, if you are a western NGO or a Hollywood star, seeking revenge under the label of "justice", then you are, as Mamdani puts it, seeking "the right to punish but without being held accountable."[23] If a massive Sudan-style publicity campaign

22 A thorough (and overwhelming) critique of the ICC in Sudan is Alex De Waal, a Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir (2009).

23 *Id.* at 300.

in the future leads to a Security Council reference to the ICC, and a dormant war breaks out again, then, well, it is not our problem. Justice has been served.

Conversely, the very independence of the ICC may cause a wholly new series of problems for African conflicts as circumstances change on the ground. Thus, the reference of Libya to the ICC, by the Security Council (three of whose five Permanent Members are opposed to the Court) seemed initially a clever idea to destabilize Khadafy. Once it became clear that the Libyan leader would not go easily, however, doubts began to set in, and by the time of his killing in October 2011, mention of the indictment had effectively disappeared from the international discourse. It had become clear that the first rule of any normative system was in play here: be careful what you ask for, because you might get it.

Sixth, the ICC's western-influenced brand of retributive personal justice may be inappropriate to many – perhaps most – post-conflict situations. African states have begun to make use of traditional dispute resolution mechanisms which draw on deeply-embedded social structures and practices. This may be the pragmatic way forward in certain cases, but it will not be possible if the ICC is able to operate independently to bring criminal charges.

Finally, the way that the ICC investigates and brings charges will also inevitably shape understanding and discussion of African security problems. The use of the discourse of "ethnicity" and "genocide" in Rwanda, for example, is explained by the relentless ethnicization of African society by western thinkers over the last century. It seems to have begun as a simple mistake in the *Akayesu* case, and was too embarrassing to correct later. This ethicized vision is helpful, because it reinforces western perceptions of Africa as a place of brutal ancient ethnic hatreds and endless tribal violence, rather than as an area where many of the growing pains of western civilization itself are being replicated. An accusation of genocide, even if the term is now meaningless, remains a powerful political weapon. It is for this reason, rather than any legal concerns, that the ICC Prosecutor is trying to have the President of Sudan prosecuted for genocide, when ironically, as one Sudanese expert noted, most Sudanese are "unclear about the concept of genocide, which so absent from the country's political culture".[24] But then nobody is going to ask Africans what they think.

Many Africans concede, if sometimes reluctantly, all or most of the above. Two arguments are made in reply, one serious and one silly. The silly argument is that "you want them to get away with it then!" This is not really an argument at all, but a kind of moral blackmail. Not only does it imply once more that the guilt of all accused (and many who have not

24 Nesrine Malik, The ICC's Blunder on Sudan, The Guardian, February 4, 2010.

yet been accused) can be assumed without a trial, it is also dangerous and misleading in the implicit alternative it proposes. People have been "getting away with it" for centuries, and will continue to do so. In domestic jurisdictions, crimes are not reported or not investigated, the wrong people are arrested or prosecuted, innocent people convicted and guilty people set free. And in every state through history, wealth, privilege and power have conferred at least a degree of impunity. Nothing is more dangerous and irresponsible than to suggest that anything different will result from vastly more complex and difficult investigations and trials by the ICC. Indeed, as we have seen, the result may well be to *increase* impunity by turning the ICC into a spectacle of Human Rights Theatre, whilst major powers continue to act as they wish.

A more sustainable argument consists of saying that Africans have supported the ICC, have signed and ratified the statute in large numbers and in some cases have asked the ICC to become involved. This is true as far as it goes but is not really the point. African states had effectively no influence on the preparations for the Rome Statute negotiations, or on those negotiations themselves. They also had little choice but to sign. Only large and powerful states (China, Russia), or states protected by them (Israel) could afford to stand aside. Not signing would have been unthinkable for African states, especially since major supporters of the ICC were also major donors. Moreover, few African states seem to have given much thought to the consequences of signature – discussions with government and military personnel some years later revealed widespread ignorance about what the Statute said, or even that it existed. And of course doing what foreign powers want, and manipulating it to your benefit, has been a necessary survival skill in Africa for a long time.

6.5 Conclusion

In the end, the question is whether Some Justice is better than No Justice. Often, the answer is yes. In some cases (as with ICTY) justice of a sort was done, without favour. In other cases (such as ICTR) artificial limits on the court's mandate severely undermined its credibility. Although the ICC is likely to represent Some Justice, it will do so in a very partial way. Imagine a country with a functioning judicial system, but where only petty criminals are ever prosecuted. Wealth and power provide almost total impunity, and finding a patron, or buying protection, is usually enough to ensure that you are never bothered by the police. Even if the prisons were full, few would regard such a system as effective or acceptable.

That is the risk with the ICC, and recognition of that fact may lie behind the hostility of African states to the indictment of President Bashir. Beyond the specific details of the case,

there is a much more important issue of Africa's place in the international system of which the ICC is part, and its treatment in comparison with other regions. In effect, a shot has been fired across the bows of the West, and of its concept of the ICC as mainly Human Rights Theatre for Africans. If this resistance is not successful, then behind a façade of universal justice, the ICC may become simply a place to try Africans, as well as a way of keeping Africans in their place.