JUDICIALIZING INTERNATIONAL LAW: CHALLENGES TO INTERNATIONAL CRIMINAL JUSTICE

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The creation of the International Criminal Court is only the latest step in the institutional turn in international law. Especially in the field of human rights, we have shifted away from raw politics toward rule-based global agencies like treaty bodies and, recently, international criminal tribunals.

These agencies and tribunals embody new enforcement regimes for human rights norms, but these are not merely new modes by which to apply the same substantive norms. When we shift from the parliament of the streets toward these global institutions, we do not merely course the same norms through a different procedure. Particularly with international criminal tribunals, we actually redefine the justice that we seek, clarify to whom it is owed, and in the end reconceive what it means to vindicate a right.

In a way, here I propose that H.L.A. Hart's secondary rules, the "rules about rules," actually loop back to the primary rules, the do's and don'ts that lay down obligations and countervailing rights. In the field of international human rights protection, those primary rules consist of the actual rights protected in international treaties and covenants. For a long while, those rights were enforced through politics, either via domestic mobilization and protest, or global maneuvering by states and international civil society.

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But in addition, those international instruments also include the secondary rules that embody the institutional turn cited above, namely, enforcement mechanisms like *reporting obligations* and – subject to additional consent requirements – *petitions mechanisms* where individual victims may file "communications" before treaty bodies. These mechanisms enforce *state responsibility*.

More recently, however, new international tribunals have been created that enforce *individual criminal responsibility* on persons guilty of the "most serious crimes of concern to the international community as a whole."[1] These international courts themselves carry their own unique institutional values, particularly respect for the accused's right to a fair trial and the victims' right to participate and seek reparations. We need to respect those constraints lest we foster unrealistic expectations of international justice or unfounded fears of international courts.

From State Responsibility to Individual Criminal Responsibility

With the creation of international criminal tribunals, the enforcement regime focuses on individuals rather than states, and holds these individuals responsible criminally rather than civilly.

The recourse to international criminal courts actually emerged earlier in the aftermath of the Second World War. At the Nuremberg Tribunal, the chief prosecutor for the United States, Justice Robert Jackson, explained:

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power....
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> This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which *operates only on states* can be enforced only by war because the most practicable method of coercing a state is warfare.... Only *sanctions which reach individuals* can peacefully and effectively be enforced. (emphases supplied)[2]

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[1] ROME STATUTE, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (hereinafter, ROME STATUTE).

[2] *Opening Statement before the International Military Tribunal*, Second Day, Wednesday, 11/21/1945, Part 04, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY

That principle was applied at the International Military Tribunal for the Far East,[3] or the Tokyo War Crimes Tribunal, and in national level prosecutions in Europe and Asia. In the Philippines, the leading examples are *In re Yamashita*[4] which established command responsibility for crimes against humanity, and *Kuroda v. Jalandoni*[5] which held that certain international humanitarian treaty obligations have crystallized into custom. International criminal justice remained dormant during the nearly half century of the Cold War since the rival permanent members of the U.N. Security Council held the veto amongst each other. But with the thawing of the Cold War, the U.N. Security Council created two *ad hoc* international criminal tribunals, in 1993 and 1994, respectively, for the mass atrocity crimes in Yugoslavia and Rwanda. By 1998, the International Criminal Court, a fully international, standing tribunal, was established by multilateral treaty, namely, the Rome Statute.

Yet this recent turn to individual criminal responsibility represents not just a change of forum, from treaty bodies to international criminal courts, but also a change in the standards of justice that are applied.

The "Poisoned Chalice" Metaphor: Fair Trial and Evidentiary Standards

The high threshold for due process protection for the accused or, in the language of the Rome Statute, the fair trial guarantees, was set by Justice Jackson at Nuremberg, when he spoke of the "poisoned chalice."

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us

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TRIBUNAL. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, pp. 98-102.

[3] *Judgment of International Military Tribunal for the Far East*, Part A (Chapters I, II, III) *et seq*., https://www.legal-tools.org/en/browse/record/321854/.

[4] *In re Yamashita,* 327 U.S. 1 (1946), affirming *Yamashita v. Styer*, G.R. No. L-129, [December 19, 1945], 75 PHIL 563-607) (for "having permitted members of his command "to commit brutal atrocities and other high crimes ... against unarmed non-combatant civilians").

[5] *Shigenori Kuroda v. Jalandoni*, G.R. No. L-2662, [March 26, 1949], 83 PHIL 171-194 (the Courts are "not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory" but may apply "the Hague and Geneva Conventions [which] form part of and are wholly based on the generally accepted principles of international law.")

> tomorrow. *To pass these defendants a poisoned chalice is to put it to our own lips as well.*
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> ....
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> If [the Nazi accused] are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law.
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> ....
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> Despite the fact that public opinion already condemns their acts, we agree that here they must be given a *presumption of innocence*, and we accept the *burden of proving* criminal acts and the responsibility of these defendants for their commission. [6]

These principles are now codified in the Rome Statute. The accused enjoys the presumption of innocence[7]. The prosecution must prove his guilt beyond reasonable doubt.[8] The accused has the right to confront the witnesses against him; to be informed of the charges against him "in a language that [he] fully understands and speaks;"[9] to counsel of his own choosing;[10] to confront the witnesses against him and to call his own witnesses;[11] and the right against self-incrimination.[12]

For instance, contrast the presumption of innocence and the "reasonable doubt" standard required for individual criminal responsibility with the lower evidentiary standard for state responsibility where the truth may be proved with circumstantial evidence or historical studies and patterns. In a *desaparecido* case before the Inter-American Court of Human Rights, the Court held:

> 130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only

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[6] *Opening Statement before the International Military Tribunal*, *supra* note 2.
[7] ROME STATUTE, article 66, para. 1 (*Presumption of Innocence*).
[8] ROME STATUTE, article 66, paras. 2-3. (*Presumption of Innocence*).
[9] ROME STATUTE, article 67, para. 1.a (*Rights of the Accused*).
[10] ROME STATUTE, article 67, para. 1.b-1.c (*Rights of the Accused*).
[11] ROME STATUTE, article 67, para. 1.e (*Rights of the Accused*).
[12] ROME STATUTE, article 67, para. 1.g (*Rights of the Accused*).

> type of evidence that may be legitimately considered in reaching a decision. *Circumstantial evidence, indicia, and presumptions* may be considered, so long as they lead to conclusions consistent with the facts.
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> 131. *Circumstantial or presumptive evidence* is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim. (emphases supplied)[13]

Significantly, the Court expressly contrasts its work to that of criminal tribunals which are held to higher evidentiary standards.

> 134. The international protection of human rights should not be confused with criminal justice. *States do not appear before the Court as defendants in a criminal action.* The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible. (emphasis supplied) [14]

Victim Participation and Victim Reparations

The Rome Statute has elaborate rules allowing victim participation. The Statute enables the victims to present their "views and concerns" when their "personal interests are affected."[15] Victims' counsel takes part in questioning witnesses and, at appropriate stages of the trial, may be allowed to present their own evidence. The ICC Appeals Chamber has held that "to give effect to the spirit and intention of [victim participation] in the context of trial proceedings it must be interpreted so as to make participation by victims meaningful."[16]

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[13] *Velasquez Rodriguez*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[14] *Id.*

[15] ROME STATUTE, article 68.3 (*Protection of the Victims and Witnesses and their Participation in the Proceedings*).

[16] *The Prosecutor v. Thomas Lubanga Dyilo,* Appeals Chamber (Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber's I Decision on Victim's Participation of 19 January 2008) ICC-01/04-01/16-1432 (11 July 2008), paras. 96-97.

This was a response to criticisms of the *ad hoc* international criminal tribunals that failed to bring the judicial process closer to the victim communities.

> The underlying idea of this *new victim-focus* in international criminal prosecutions is to bring the proceedings closer to the affected communities and, in doing so, strengthen their legitimacy. The better integration of victims into the proceedings is also meant to prevent them from taking vengeance, help them recover from their traumatic experiences, and contribute to the reconciliation of the society.[17] (emphasis in the original)

> International justice must provide redress for these victims in the name of securing peace, drawing a line between the present and the past, and facilitating the healing and moving forward of society.[18]

The rationale is that victims are not passive recipients of justice but active participants in the process by which they vindicate their rights, and that having a voice in the trial is part of the justice that they seek.

The Statute also provides for victim reparations "including restitution, compensation and rehabilitation."[19] The convicted person may be ordered to pay reparations to his victims,[20] but in addition, the Statute creates a Trust Fund[21] that receives contributions to carry out a two-fold mandate, *first*, to implement awards ordered by the Court against convicted persons (*reparations mandate*) and *second*, to provide "physical, psychological, and material support to victims and their families" on its own and separate from judicial orders (*assistance mandate*).[22]

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[17] KAI AMBOS, III TREATISE ON INTERNATIONAL CRIMINAL LAW 170 (hereinafter, AMBOS III) (Oxford, 2016) (citations omitted).

[18] OTTO TRIFFTERER AND KAI AMBOS (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1685 (3rd ed., C.H. Beck, Hart, Nomos, 2016).

[19] ROME STATUTE, article 75 (*Reparations to Victims*).

[20] ROME STATUTE, article 75, para. 2 (*Reparations to Victims*).

[21] ROME STATUTE, article 79 (*Trust Fund*).

[22] RULES OF EVIDENCE AND PROCEDURE, rule 98 (*Trust Fund*); REGULATIONS OF THE TRUST FUND FOR VICTIMS, regulations 47 and 48; *see also* Trust Fund for Victims, Press Release Following Mr. Bemba's acquittal, 13 June 2018, available at https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR.

The important place of the victim under the Rome Statute is laudatory, unassailable and indispensable at this stage of history, but it entails significant risks in legitimacy, efficiency and judicial costs.

One, whereas the traditional criminal proceedings have only two sets of counsel, the Prosecution and Defense, at the ICC, there is a third set of counsel, namely, the Legal Representative for Victims, who take part in the presentation and the questioning of witnesses, and are entitled to be heard during the proceedings. This imposes additional burdens on both the material and symbolic resources of the ICC.

This entails new procedural burdens as it "generates a conflict with the right of the accused to an expeditious and fair trial [and] may undermine the strategy of the Prosecutor and thus hamper the prosecution and conviction of a defendant."[23] It also "create[s] high expectations for victims" that may lead to "disappointment and frustration,"[24] raising the "principled question of whether (international) criminal proceedings really are an appropriate forum for this empowerment exercise in the first place or if the (procedural) costs are rather too high."[25]

Two, the victims can be awarded reparations only if the accused is found guilty. In case of an acquittal, the victims are not entitled to any award even after they had actually proved in court the harms they suffered. Following the first reversal of guilt by the ICC Appeals Chamber in 2018,[26] the Trial Chamber hearing the reparations claims said:

> 3. The Chamber agrees … that no reparations order can be made against [the accused] under Article 75 of the Statute. *The Chamber must respect the limitations of this Court* and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial for his or her participation in those crimes has been found guilty.
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> ….

[23] AMBOS III, *supra* n. 17, at 170-1.

[24] AMBOS III, *supra* n. 17, at 171.

[25] AMBOS III, *supra* n. 17, at 170.

[26] *The Prosecutor v. Jean-Pierre Bemba Gombo,* Appeals Chamber (Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute), ICC-01/05-01/08-3636-Red (8 June 2018).

> 6. The Chamber takes note of the Legal Representatives' submissions that *the victims are disappointed and have lost faith in the justice process* following [the] acquittal, highlighting that the Court was the only exception to the "climate of total impunity" prevalent in the Central African Republic ("CAR"). In this context, the Chamber notes that the Appeals Chamber's decision was not premised on any doubt about the harm suffered by the victims participating in the case. The Chamber recalls that the Appeals Chamber has recognised that certain crimes occurred ... and accordingly did not challenge the victims' status as such.
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> 11. Noting that this Final Decision marks the formal end of the reparations proceedings in this case, the Chamber stresses the importance of the [Trust Fund's] *assistance mandate* ....[27] (emphases supplied)

In this instance, the acquittal terminated the victims' claim to reparations and it was only the Trust Fund's assistance mandate that now enables the Court to address the harms suffered.

Three, on the other hand, given finite resources, consistent with the Trial Chamber's sense that we must "respect the limitations of this Court," we must ensure that resources for judicial reparations are not displaced by projects under the open-ended assistance mandate. Otherwise, the Court becomes indistinguishable from welfare agencies and other non-judicial international bodies more suited for such humanitarian assistance.

"Fair Labeling" of the Crime Charged

Pursuing the logic of victim participation further, it is essential that the accused be charged with the crime that most faithfully reflects the true evil committed against the victim, and not simply the crime that is easiest to prove. More specifically, there may be other viable charges whose "elements" may be easier to satisfy, or for which more evidence is readily available, or for which jurisdiction is more secure and less prone to challenge. However, the principle of

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[27] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III (Final decision on the reparations proceedings), 01/05-01/08 (3 August 2018).

"fair labeling" requires that charging the precise crime is needed to satisfy the victim's sense of justice even if it raises the bar for the prosecution.[28] Given that more exacting standard of justice, an Al Capone-style prosecution will simply not suffice, e.g., of an underworld crime boss jailed for mere tax evasion.

To use an example, though in a state responsibility context, recall the debate on the so-called "comfort women" during the Second World War. How do we characterize legally the crime committed against them by the Japanese military?

At the outset, the term "comfort women" was rejected by a U.N. Special Rapporteur for its "derogatory connotations" and for serving as a "euphemistic term" to downplay the evil committed.[29] Another Special Rapporteur stated:

> [T]he phrase "comfort women" *does not in the least reflect the suffering*, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase "military sexual slaves" *represents a much more accurate and appropriate* terminology.[30] (emphases supplied)

Both Rapporteurs characterize the abuse as slavery, which is proscribed under a *jus cogens* prohibition, a peremptory norm of international law that brooks no derogation.[31] The term "systematic," it was explained, was used merely "as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of

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[28] See *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II (Judgment Pursuant to Article 74 of the Statute) (Concurring Opinion of Judge Christine Van den Wyngaert), ICC-01/04-02/12 (18 December 2018), paras. 28-29; Douglas Guilfoyle, *Responsibility for Collective Atrocities: Fair Labeling and Approaches to Commission in International Criminal Law*, 64 CURRENT LEGAL PROBLEMS 260(2011).

[29] Gay J. McDougall, Special Rapporteur, *Contemporary Forms Of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13 22 June 1998, at Fn. 1 (hereinafter, McDougall Report).

[30] *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45. Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime*, E/CN.4/1996/53/Add.1 (4 January 1996).

[31] McDougall Report, *supra* n. 29, para. 28

rape."[32] The word "sexual" was used merely "as an adjective to describe a form of slavery, not to denote a separate offence."[33] To denote a new crime would have diluted the *jus cogens* character of the ban on slavery. Thus the preferred term "military sexual slavery," which does not soften the absoluteness of the prohibition, while meeting the victim's fair labeling concerns.

In the same vein, the ICC has upheld, in an interlocutory appeal, its jurisdiction *ratione materiae* over crimes of rape and sexual offenses allegedly committed by members of an armed group against child soldiers belonging to their own group.[34] Note that the *Ntaganda* indictment already included a wide range of charges: thirteen counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers and using them to participate actively in hostilities) and five crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population).

The mistreatment of children in *Ntaganda* was already generally alleged under the charges of enlisting, conscripting and using child soldiers. But limiting the child soldier charges only to these would have excluded any sexual violence component. As of this writing, this case is pending a final determination by ICC Trial Chamber VI.

Courts as Chroniclers of History

History can be recorded by professional historians, investigative journalists, and human rights activist and their organizations. Their books and reports can document difficult historical periods where the truth is highly contested or elusive. They can serve as repositories of the collective memory. They can help victim communities bring closure to traumatic episodes in their lives.

But international criminal tribunals have one unique advantage in the task of authenticating the historical record. Criminal courts rely only on facts that have

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[32] McDougall Report, *supra* n. 29, para. 17.

[33] McDougall Report, *supra* n. 29, paras. 17, 30.

[34] *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber (Judgment on the appeal of Mr. Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06 OA5 (15 June 2017). The author sat as *ad hoc* member of the Appeals Chamber in this case.

been proved beyond reasonable doubt and fully vetted through adversarial proceedings, where the party adversely affected has the full opportunity to challenge and exclude dubious evidence. Judicial decisions are specific; they contain names, dates and places. They give a human face to the broad sweep of history, and the details of the evil inflicted and traumas endured. Most important of all, they are neutral, compared to politicized sources that have a conscious ideological bent or agenda.

But courts see things through the prism of the concrete facts of a case, oblivious to history's panorama and the resulting narrative can be skewed or inadequate. The historians may tell us the exciting story of Al Capone the mobster imprisoned by crusading prosecutors, but the paltry records of courts tell merely a dull account of a tax evader done in by a blundering bookkeeper.

The Nature of Courts

The shift from politics to institutions also reminds us that courts' procedural constraints make them, in the words of Benjamin Cardozo, sanctuaries where

> the great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles ....[35]

In contrast, international human rights advocates aim for humanitarian outcomes that are more attuned, in the words of Oliver Wendell Holmes, to "overwhelming interest[s that] appeal [] to the feelings and distort [] the judgment."

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.[36]

Traditional courts are called upon to perform a straightforward function, namely, to punish the guilty and acquit the innocent. On the other hand, international criminal courts face additional, non-traditional expectations,

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[35] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1921).

[36] *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), Holmes, J., dissenting.

namely, as a source of communal therapy, welfare support, and historical vindication. They exemplify the tension between the advocates' push for immediate decisions that are just and humane, and the judges' duty to keep the distance and neutrality required by rule-based decision-making.

An enforcement regime carries with it its own internal norms, its own rules of the game. In order to play, we need to respect those rules. Otherwise, we can score quick victories but in the long run erode the institution itself and render it damaged and ineffective for future cases. The episodic and opportunistic use of judicial institutions shows not just disregard for courts but also a lack of solidarity with future victims who thus inherit a damaged institution.