Individual Criminal Responsibility in International Human Rights Law: The Contribution of the International Criminal Court

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Abstract: The road to developing an international institutional capacity to prosecute crimes against humanity, war crimes, and genocide has been a long one, and has in many ways concluded with the establishment of the International Criminal Court (ICC). By looking at the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as the ICC, this paper traces the evolution of the concept of individual criminal responsibility to its present incarnation. It argues that while the ICC presents its own unique ‘added value’ to the prosecution of international criminals, its application of justice continues to be biased by the influence of powerful states.

The concept of individual criminal responsibility is an old one, which in its initial incarnation was limited to piracy, slavery, and certain violations of the laws of war. Most would trace this concept’s current expression in international human rights law to a more recent time when, in 1945, the Charter of the International Military Tribunal was agreed upon by the Allied powers at the conclusion of World War II, establishing the Nuremberg Trials. That said,

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2 Ibid., 1.
individual criminal responsibility has long been a component of customary international law, and municipal courts have possessed the ability to exercise criminal jurisdiction according to the principles of territoriality, active personality, passive personality and protectivity for some time. Unfortunately, even with the emerging consensus about ‘universal jurisdiction’ over crimes that offend all of humanity in customary international law, there have been few instances in which domestic courts have been able to effectively prosecute international crimes of the gravest nature. The road to developing an international institutional capacity to prosecute crimes against humanity, war crimes, and genocide has been a long one, and has in many ways concluded with the establishment of the International Criminal Court (ICC).

The ICC has been heralded as a grand success by some, and has been dismissed and utterly criticized by others; as with many things, the truth appears to fall somewhere in between. The purpose of this paper will be to trace the evolution of individual criminal responsibility by looking at the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY), and finally the ICC. In doing so, it will be demonstrated that although the ICC has brought positive contributions to the field of individual criminal responsibility, it has ultimately failed to address many of the problems that have plagued prior attempts at prosecuting international criminals, leaving the project largely incomplete.

The Legacies of Nuremberg and Tokyo

The International Military Tribunal at Nuremberg was established by inter-Allied agreements between France, Great Britain, Russia and the United States, with the intent of prosecuting major German war criminals for atrocities committed during World War II, particularly

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3 See, for example, the Preambles of the 1899 and 1907 Hague Conventions ‘Marten’s clause,’ as well as the Geneva Conventions.

4 The crimes (such as torture, genocide, etc.) referred to here are those that have achieved the status of *jus cogens*, creating obligations *erga omnes* to either extradite or prosecute (*aut dedere aut judicare*).
focusing on the Holocaust of European Jews. The list of crimes established by its Charter included aggression as a violation of the Kellogg-Briand Pact but also included crimes bearing individual responsibility, namely: crimes against peace, war crimes, and crimes against humanity. Although prohibitions against crimes against humanity had long existed, Nuremberg marked the first time that these crimes were defined in positive international law. The Nuremberg Tribunal further developed the notion of individual criminal responsibility by eliminating two possible defences open to individuals accused of such crimes: the ‘act of state’ doctrine and the plea of ‘superior orders.’ The Tribunal eventually delivered twelve death sentences, seven prison terms and three acquittals, and the decisions constituted precedent to be followed in the future. The basic ideas regarding international criminal responsibility that were established by Nuremberg were eventually approved by the International Law Commission, which was asked to prepare a draft code relating to the Nuremberg Principles in 1947.

At the Nuremberg and Tokyo Tribunals, the Germans and Japanese were rightfully held accountable for a series of international crimes. However, because it was a coalition of the Allied forces that established the courts, their own crimes were never prosecuted. Indeed, Article 1 of the Nuremberg Charter clearly proclaims its role to be “the just and prompt trial and punishment of major war criminals of the European Axis” (emphasis added).

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7 Bassiouni, *Crimes Against Humanity in International Law*, 41.


9 Bassiouni, *Crimes Against Humanity in International Law*, 529.


Moreover, the Committee of Chief Counsels at Nuremberg was made up of eight justices, with two coming from each of the major Allied powers.\textsuperscript{12} A similar display of victor’s justice occurred at the Tokyo Tribunal, where indictments were filed solely by Allied prosecutors against solely Japanese defendants.\textsuperscript{13} Neither Tribunal prosecuted Allied war crimes, including the bombing of civilian targets in Europe and Japan.\textsuperscript{14} Therefore, while the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East marked a watershed moment in the establishment of individual accountability for violations of human rights, both involved processes that essentially resulted in the Allies imposing one-sided justice on their enemies.\textsuperscript{15} In order to be considered truly just, future courts would need to prosecute victors as well as those defeated. This was attempted by the next major international tribunals, the ICTY and ICTR.

**The International Criminal Tribunals for the Former Yugoslavia and Rwanda**

It was not until the 1990s that international criminal tribunals would resurface, coming into creation once again in the pursuit of justice following atrocities of a genocidal scale. The ICTY was established under a Chapter VII mandate of the United Nations Security Council by Resolution 827 of May 1993.\textsuperscript{16} The Tribunal’s mandate was to “prosecut[e] persons responsible for serious violations of international humanitarian law committed in the territory of the

\begin{itemize}
\item \textsuperscript{12} Bassiouni, *Crimes Against Humanity in International Law*, 528.
\item \textsuperscript{14} Ibid.
\end{itemize}
former Yugoslavia between January 1, 1991, and a date to be
determined by the Security Council upon the restoration of peace". As such, it was restricted both territorially (its jurisdiction limited to those crimes taking place in the Former Yugoslavia) and temporally (covering crimes that took place after January 1, 1991).

In November 1994, the Security Council established the ICTR with the passing of Resolution 955, giving the Tribunal the mandate to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”.

Similar to the ICTY, the ICTR was restricted by temporal limitations. However, the territorial restriction was omitted so as to give the Tribunal jurisdiction over crimes that took place by or against Rwandese citizens in neighbouring states.

Like the tribunals at Nuremberg and Tokyo, the ICTY and ICTR made significant contributions to the establishment of international criminal accountability. To begin, they were able to present an institutional legitimacy that was lacking under the Allied framework established after World War II. As creations of the United Nations, the ICTY and ICTR could lay claim to a certain degree of legitimacy, as they were supported by a diverse group of states as opposed to an exclusive group of victorious states. For example, in selecting the prosecutors and judges for the ICTY, the Security Council was very careful to ensure broad representation by including many states in the process. Another contribution of the ICTY and ICTR is that both tribunals employed a system of ‘concurrent jurisdictions’ with the national courts of the territories over which they were

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17 Ibid., Article 2.


19 Ibid.

adjudicating, a principle that would be revisited and slightly amended with the creation of the ICC.

Although the new tribunals made important advances to the regime surrounding international criminal responsibility, some of the classic problems that troubled Nuremberg and Tokyo were solved by neither the ICTY nor the ICTR. Perhaps the most problematic and obvious issue is that of victor’s justice, although it was different in nature to the type that was experienced during Nuremberg and Tokyo. While the ICTY and ICTR have the statutory ability to prosecute all criminals, substantiated claims of subjectivity have been levelled at these courts as well. For instance, despite the fact that the conflicts in the Former Yugoslavia and Rwanda included crimes on both sides of the conflict, there is an obvious lack of prosecution of Croatians by the ICTY and Tutsis (specifically Rwandan Patriotic Front soldiers) by the ICTR. This is said to have resulted from the tribunals’ weak enforcement powers, which has allowed the governments of the Former Yugoslavia and Rwanda too much leverage over those who are prosecuted. To make matters worse, the governments in Zagreb and Kigali have used a number of obstruction techniques to prevent certain prosecutions. These techniques have included hiding government non-compliance, justifying government non-compliance (for example, citing a lack of capacity to comply), presenting legal objections, and generally criticizing tribunals or their prosecutors. In the case of the Former Yugoslavia, it is important to note that the dichotomy of ‘winners’ and ‘losers’ does not simply include Croatians and Serbs; the Tribunal has failed to bring charges against the North Atlantic Treaty Organization forces for civilian casualties resulting from aerial

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23 Ibid., 228.

24 Ibid., 214.

25 Ibid., 217.
bombing campaigns of Serbia, in spite of its possession of the legal mandate to prosecute these crimes as well.\textsuperscript{26}

In addition to the problem of victor’s justice, the ICTY and ICTR have suffered other critiques. Some have argued that they are “costly, inefficient and ineffective”, taking up over ten percent of the UN budget and failing to contribute effectively to broader goals of peace and security.\textsuperscript{27} Furthermore, they continue to operate on an ad-hoc basis and, as such, are completely dependent on the political and financial support of the United Nations Security Council. Also, like Nuremberg and Tokyo before them, the ICTY and ICTR were only established at the conclusion of hostilities, after the genocidal atrocities had already taken place. The ICC would mark the first departure from this reactionary approach towards a more active approach.

\textbf{The International Criminal Court}

The ICC was established on July 17, 1998, with the adoption of the Rome Statute following the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court. Present at the conference were over 160 countries, 134 NGOs, seventeen intergovernmental organizations, and fourteen UN specialized agencies and funds. By April 2002 the sixty ratifications necessary to bring the Court into existence had been obtained.\textsuperscript{28} Article 1 of the Rome Statute clearly states the nature of the court:

\begin{quote}
[The Court] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of
\end{quote}

\textsuperscript{26} Peskin, “Beyond Victor’s Justice,” 228.


\textsuperscript{28} Moore et al., \textit{The New United Nations}, 244-5.
the Court shall be governed by the provisions of this Statute.\(^{29}\)

There are many benefits that resulted from the establishment of the ICC; as can be discerned from the article quoted above, the ICC differs from other tribunals in the sense that it is permanent. As such, it avoids the dependency and conditionality that was required from the international community, namely the United Nations Security Council, under the ad-hoc tribunal system. Similarly, the ICC is not territorially or temporally restricted, remedying another critique of the ad-hoc tribunals. Yet another feature of the ICC expressed in Article 1 is that of complementary jurisdiction, a slight modification of the system established by the ICTY and ICTR. According to Article 17 of the Rome Statute, the primary responsibility for prosecution remains with the state, but the ICC can adjudicate where domestic courts refuse, are unwilling or are unable to prosecute serious international crimes. This measure is essential to ensuring that states continue to bear primary responsibility (and sovereignty) over international criminals, but presents an alternate avenue of prosecution to theoretically prevent cases of impunity should national instruments fail.

A major achievement of the Rome Statute is the waiver of the ‘official capacity’ immunity. Article 27 cites the ‘Irrelevance of Official Capacity,’ reflecting the precedent established in the Pinochet case. This precedent holds that immunity for public officials cannot be conferred for acts that are plainly criminal under customary international law.\(^{30}\) Furthermore, as per Article 13(b) of the Rome Statute, cases can be referred to the ICC by the Security Council under Chapter VII of the Charter of the United Nations. This is to say that serving government officials and heads of state that are not party to the Rome Statute can face indictment. This was seen in the case of the recent request of ICC Prosecutor Luis Moreno-Ocampo to have an arrest warrant issued against Sudanese President Hassan Ahmad al-Bashir for genocide, crimes against humanity and


war crimes. Although Sudan is not a currently a state party to the ICC, the Prosecutor was referred by the Security Council to investigate crimes in Darfur, giving the court the prerogative to issue an arrest warrant. The case of Sudan’s al-Bashir marks the first occasion upon which a serving head of state may face trial by the ICC.

Other advantages of the ICC are less obvious but equally important. The ICC marks the first time that direct participation of alleged victims has been permitted. Victims are allowed to make written submissions, participate at every stage of criminal proceedings and seek compensation for damages. It also marks the first time that an international court has the authority to order an individual to compensate another individual by providing restitution, indemnification, or rehabilitation. Furthermore, the notion of ‘command responsibility’ was broadened during the Rome negotiations to encompass not only military leaders, but also civilian leaders. Finally, the empowered role of the Office of the Prosecutor to independently conduct investigations is often cited as a significant achievement in the pursuit of justice for international criminals.

There are a number of criticisms that have also been levelled at the ICC, some of them being reincarnations of unresolved issues of past tribunals. The first critique is the unfair application of justice. As was demonstrated above through the discussion of Nuremberg, Tokyo, the ICTY and ICTR, victor’s justice has played a role in undermining all four tribunals’ claim to fair prosecution of


33 Moore and Pubantz, The New United Nations, 244-5.

34 Ibid., 245.


international criminals. Unless the Prosecutor takes a more holistic approach to his investigations, a similar critique may be justifiably levelled against the ICC. Take, for instance, the fact that the only ‘situations’ before the court are for crimes committed by African actors (the Democratic Republic of the Congo, Uganda, Central African Republic, and Sudan).\(^{37}\) While there is substance to the Prosecutor’s allegations against these individuals, just as there was substance to allegations against the Nazis and the Hutu *genocidaires*, other legitimate cases appear to have been ignored. For example, despite having received over 240 complaints about the war in Iraq, Ocampo has summarily refused to investigate allegations against British and American military personnel.\(^{38}\) Citing a lack of ‘widespread’ crimes as a justification for turning down calls to investigate Iraq, Ocampo has forfeited the opportunity to prosecute those accused of committing war crimes, regardless of the scope of criminal actions. This suggests that the commission of war crimes will go unaddressed so long as they are not committed on a widespread scale. More importantly, this compromises the image of the ICC as a court that reflects the rule of law by applying its basic principles to all states equally, which is an essential component of achieving crucial political support for the court.\(^{39}\)

While Ocampo may bear some responsibility for refusing to prosecute citizens bearing certain nationalities, there are structural problems that exist within the ICC as well. For example, the ICC requires a mandate from the United Nations Security Council in order to investigate an allegation against individuals from a non-signatory state. Because the United States, China and Russia carry vetoes on the Security Council and are not parties to the Rome Statute, their military personnel can be easily shielded from prosecution by the ICC. Another structural issue is that of enforcement; like the ICTY and ICTR, the ICC requires state parties to


\(^{39}\) Ralph, "Between Cosmopolitan and American Democracy," 198.
cooperate in arresting and detaining suspects. States party to the Rome Statute do have a legal obligation to cooperate with the ICC, but such cooperation can be difficult to obtain in reality (as was evidenced by the experiences of the ICTY and ICTR).40 In the case of al-Bashir and others wanted for crimes occurring in Darfur, Sudan is not a state party to the Rome Statute and therefore has no obligation to cooperate with the ICC. Thus, while the ICC does introduce the possibility of prosecuting a serving head of state for serious international crimes, the process for doing so can be very difficult in practice. This has been evidenced most recently by the al-Bashir's unhindered travels to Eritrea, Egypt and Libya,41 as well as the African Union's near-unanimous decision not to cooperate with the ICC in the arrest of the Sudanese President.42

**Conclusion: The ‘Added Value’ of the International Criminal Court**

The intent of this paper is to chronicle the evolution of individual criminal responsibility by reviewing some of the major instruments that have contributed to its development. From a concept that was largely unknown in positive international human rights law prior to 1945, individual criminal responsibility has developed into one of the most significant components of international law. Most importantly, it is considered to be an essential component to ending the most serious crimes known to mankind, and it has been improved at each stage of its formation from Nuremberg to the ICC. Although not specifically discussed in this paper, it is important to

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40 Wedgewood, “The International Criminal Court,” 106.


note that there have also been a number of Conventions that have also contributed to this process.\textsuperscript{43}

Despite the progress that has been made since Nuremberg, it appears that the unfair application of justice is an issue that continues to haunt international criminal prosecution. As was mentioned above, the ICC will never gain legitimacy if it continues to ignore the crimes of powerful and influential states. The first step in gaining this legitimacy among the international community of nations was separating the ICC from the highly-politicized United Nations Security Council. What remains to be done, as Jason Ralph from the University of Leeds contends, is for states to accept the additional oversight provided by the ICC as “a small price to pay for a Court that would democratize global politics by holding to account those who commit [sic] the most serious abuses of human rights”.\textsuperscript{44}

With that said, it would be a mistake to outright dismiss the ICC for its imperfections. This new court has clearly brought ‘added value’ to the international human rights protection regime, including, most significantly, a departure from the ad-hoc approach. The extent to which the ICC serves as a deterrent is impossible to measure, but this is no reason to reject the possibility that the court will serve as a force of compulsion against the commission of serious international crimes. Furthermore, the fact that prosecutions have not yet been justly applied to all alleged criminals does not necessarily mean that current prosecutions are in vain. Certainly, the equal application of justice is an ideal to be vigorously pursued, and its lack of achievement does not qualify a wholehearted rejection of the ICC. As the Chairman of the Drafting Committee at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court remarked at the Rome Ceremony:

The ICC will not be a panacea for all of the ills of humankind. It will not eliminate conflicts, nor return victims to life, nor

\textsuperscript{43} These include, for example, the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), and the Convention on the Rights of the Child (1990), among others.

\textsuperscript{44} Ralph, “Between Cosmopolitan and American Democracy,” 198.
restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimization and bring justice to some of the perpetrators of these crimes [emphasis added]. In doing so, the ICC will strengthen world order and contribute to world peace and security. [sic] Ultimately, if the ICC saves but one life, as it is said in the Talmud, it will be as if it saved the whole of humanity.45

Bibliography


45Bassiouni, Crimes Against Humanity in International Law, 555-6.


