

Ad-hoc Tribunals: The Failure to Contribute to Precedence-setting for a Universal Model of International Justice

By
Masayoshi Mukai

INTRODUCTION

More than sixty years after the Nuremburg trials, international war crimes tribunals remain in their infancy. While the International Criminal Court, or ICC, has been championed as a force to combat genocide and war crimes, a judicial void lingers years after its creation. Legal scholar William Burke-White observes that

the creation of the ICC has given states an excuse to shift, at least rhetorically, the burdens of prosecuting international crimes from national governments to the new international tribunal. As a result of unrealistic expectations and limited resources, the Court may well be seen as a failure.¹

As an alternative, Burke-White proposes a policy of “proactive complementarity,” which would require the ICC to “cooperate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes.”² This raises an important question regarding international law: Is the expectation of justice indeed “unrealistic”? This article proposes a new direction for international war crimes prosecutions—one that recognizes that every war crime tribunal that appeals to universal jurisdiction as the impetus behind its objective has not only the ability, but also the obligation, to aid in the construction of a universal model of

* Masayoshi Mukai is a graduate student at the University of Cambridge.

1. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 54-59 (2008).

2. *Id.* at 54.

international justice. The weaknesses of the ICC are not inherent to the ideal of international justice, but are distinct to the ICC's governing statutes, and the ICC's means—or lack thereof—to enforce them. War crimes tribunals, as evident with the Extraordinary Chambers of the Courts in Cambodia, or ECCC, that take on the responsibility of educating the public³ have deviated from their purpose as trial courts governed by an objective rule of law. Political and social forces have transformed the war crimes tribunal into a comprehensive humanitarian gesture by adopting obscure goals and responsibilities extraneous to its true purpose. Further, ad-hoc tribunals, when custom-tailored, severely limit the contributions that can be made to subsequent prosecutions. The current model of international justice should be modified to perceive international justice as a progression, and every tribunal and international court as the predecessors to what can evolve into a fully functional system of institutional international justice.

This article does not intend to address the technical jurisdictional issues surrounding any debate on international law. Instead, as a premise, it assumes an existing imperative driven by the recognition of a higher ideal that transcends any claims of jurisdictional sovereignty or authority. The emergence of the term, “crimes against humanity,” and its incorporation into international statute,⁴ recognize, to some extent, the importance of a universal standard of criminal law that governs all of humanity. The modern-day civil system of justice—with a centralized police force and court system that, at least in theory, governs efficiently and impartially—has been adopted by nearly every locally governing power. This emerged not out of an abstract idealistic objective, but out of necessity arising from the growth of condensed, highly populated societies. As globalization takes its course and the world's discrete, individual communities grow ever more interdependent, it becomes increasingly urgent to create a structured, autonomous system of international justice. Granted, overwhelming obstacles stand in the way of creating an international force capable of administering justice to all, regardless of nationality or the means to resist. The United States' refusal to become party to the ICC is a good example of such an obstacle.⁵ However, the precedents that will be set and the institutionalization that will emerge from current efforts are essential to any meaningful contribution to the future. The continuity of international justice accentuates the importance of contemporary war crimes tribunals and international courts, as they will be the predecessors of any truly functional system.

3. This was stated as one of the goals of the ECCC. See Public Affairs Section, Extraordinary Chambers in the Courts of Cambodia, *An Introduction to The Khmer Rouge Trials* 5 (3d. ed. 2008), available at <http://www.eccc.gov.kh/english/publications.book.aspx> (last visited Jan. 10, 2010).

4. See Rome Statute of the International Criminal Court, art. 7 (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, available at <http://untreaty.un.org/cod/icc/statute/rome.htm> (last visited Jan. 10, 2010).

5. See CRS Report 31595, *U.S. Policy Regarding the International Criminal Court* (Aug. 29, 2006) (prepared by Jennifer K. Elsea).

THE DISTINCT NATURE OF WAR CRIMES

A fluid definition of “war crime” may concern matters that range from battles between two official military entities to the domestic persecution of select groups of people by a ruling regime. Attempts to determine and define what qualifies as a “war crime” can spawn endless debate, as the subjectivity allows for strategic interpretations. There are however, some rudimentary commonalities that underlie nearly all war crimes. As the occurrence of a war crime is generally concomitant to the commission of a larger general military objective, prosecutions are usually only feasible after there has been a disruption of power or a cessation of conflict. Thus, as is evident from the past, the prosecution usually relies, in varying levels, on a catalyst that is derived from the conflict itself, often orchestrated by successor parties to a fallen regime, or as in the case of the tribunals following World War II, a victorious foreign nation that has achieved military control over their enemies. For the prosecution of a war crime to serve justice in an impartial and legitimate manner, it is necessary to divorce from the political realm the process that is commissioned to determine guilt and execute punishment.

NECESSITY FOR TRUE IMPARTIALITY AND THE CONTRADICTION NATURE OF THE AD-HOC TRIBUNAL

At the crux of the implementation of international judicial proceedings is the complex issue of jurisdiction, which interested parties often predicate by asserting tenuous claims of authority. This highlights the inherently problematic nature of the war crimes tribunal. The absence of true neutrality is reflected in the ad-hoc nature of the tribunals themselves. As tribunals are essentially created from scratch to seek justice and to prosecute specific individuals, it appears inevitable that justice will be equated with a conviction; and, if the defendant(s) are acquitted, the tribunal will be seen to have failed in its purpose. When the tribunal is created, or even influenced by the enemies of the defendants, the prospects for dispassionate judgment fade away. In such cases, trials threaten to become instruments of legitimized revenge, bearing the countenance of justice, at the expense of substantive fairness.

Scholars Margot Light and Karen Smith reflect on this in the case of the Allied prosecution of the Germans and Japanese in Nuremberg and Tokyo:

[b]oth Tribunals were primarily US initiatives and they were tainted by the accusation of meting out “victors’ justice.” They were generally seen to be highly politicized in that they were not convened as a result of an international treaty, and hence were of dubious standing in customary and international law.⁶

6. See MARGOT LIGHT AND KAREN SMITH, *ETHICS AND FOREIGN POLICY* (Cambridge University Press, 2001).

It seems reasonable to believe that, had the Axis powers achieved victory, there would have been German- and Japanese-facilitated tribunals trying the US military for the sinking of German merchant ships or the bombing of Japanese cities. The war crime tribunal has, in the past, been fundamentally tied to a political objective and only possible after comprehensive political, social, and military coordination. The prosecution of war crimes, therefore, is usually conducted at the conjunction of the military and civilian realms. Prosecutions are often driven by civilian demand, both local and international. The prosecution of war crimes thus involves all the complexities of both the military and the general public, and must account for their differing values and ideologies. In particular, the disparities between the military's and the public's respective conceptions of "crime," and the function of criminal courts, are difficult for tribunals to accommodate. A criminal court prosecuting a war crime becomes a precarious space where subjectivity dominates, and wherein various political forces battle to exert influence. The susceptibility of ad-hoc tribunals to narrowly tailoring rules and objectives to case-specific needs contradicts the nature of a trial court, which must be capable of the static objectivity that only comes from an independent party adhering to an impartial rule of law.

While the function of a war crimes tribunal may be enigmatic even to internal participants, the civilian court enjoys grounding in tradition and in some respects, global universality—crimes such as murder are nearly always condemned, and in many cases, defendants are offered basic protections under law. While civilian criminal courts function to punish guilty parties, they also serve to deter would-be criminals. By contrast, deterrence is not a function normally attributed to war crimes tribunals. The overarching purpose of the civilian court is to maintain order in the society over which it has jurisdiction; and it is in this respect that the functions of the two court systems digress. War crime tribunals arise only after a transgression has taken place, and are therefore at risk of appearing obligatorily ad-hoc in nature. Only by having an existing, functioning system in place could this instability be avoided.

The civilian conception of crime often creates a background that convolutes discourse that surrounds a war crimes tribunal. Civilians in many parts of the world enjoy a system where illegal acts need only be identified and supplemented with sufficient evidence before the existing legal framework provides for punitive measures. The system in place is swift and persistent, which creates a strong deterrence factor. In contrast, in the aftermath of a military attack on civilians, judicial action fails to materialize without directed effort by qualified political entities. In the case of war crimes prosecutions, the civilian court system can be looked to as a model for what the international community should aspire to create. Application of pertinent international legislation on war crimes has been selectively applied world-wide, with victimized parties usually requiring the advocacy of a major international power that, often, only provides assistance if doing so comports with its own political interests. The current state of affairs in regards to war crime prosecutions is analogous to a society where, after a citizen is victimized, she would need to

rally for political support and hire a prosecutor before she could seek justice. This framework disproportionately favors individuals with more resources; and the same principle applies in the international context, to the detriment of nations and ethnic groups that are victims of war crimes. Modern societies have progressed beyond this state of affairs; some even endow stationary prosecutors with the responsibility and power to pursue justice. Thus, many of the deficiencies of the current model of international justice can be remedied by emulating the fixed nature of civilian criminal courts.

ECCC IN CAMBODIA: A LOST OPPORTUNITY

The ECCC in Cambodia was recently formed to prosecute five individuals accused of participating in the Cambodian genocide. Due to the lack of local resources, international help has been immense and instrumental. The Cambodian government has been able to pledge less than a fraction of the required funding for the courts; the rest was provided through international monetary aid and numerous legal experts from around the world who helped craft the court's infrastructure.

The international assistance is being framed as a benevolent gesture akin to a gift to the Cambodian people who have suffered immeasurably and are deficient in the resources necessary to undertake such an endeavor. While the court does indeed possess the capability to offer some measure of justice to the people of Cambodia, the proposed benefit is not at all restricted to Cambodians. Foreign aid should be seen as less of a gift, and more like a symbiotic investment. The very existence of the ECCC and the necessity of its creation without the guidance of strong precedent reflect an institutional worldwide deficiency. While the international community watches the trials taking place in Cambodia and asks whether justice will be served for the Cambodians, the universal pertinence of the trials should not be ignored. The international community has a fundamental, vested interest in ensuring the success of the trials, which represent a critical point in the progression of international law.

While the objective of the court to "ease the burden that weighs on the survivors"⁷ is admirable, it has led to a misdirection that may prove to limit the ECCC's ability to contribute to a universal model of war crime prosecutions. The trial court has espoused the responsibility of "educat[ing] Cambodia's youth about the darkest chapter in our country's history."⁸ While this reflects the court's good nature, and a genuine concern for the people of Cambodia by participants both Cambodian and international, it also represents the amalgamation of two entirely separate goals. Using the ECCC as a venue for educating the public highlights a weakness in the court and the importance to

7. See Public Affairs Section, Extraordinary Chambers in the Courts of Cambodia, *An Introduction to The Khmer Rouge Trials* 5, *supra*, note 3.

8. *Id.*

distinguish actual measures of justice and actions carried out for their symbolic nature. In the case of Cambodia, with the death of Pol Pot and many other responsible parties (which left very few people to prosecute), social services and victim outreach may be of even greater importance than justice itself. However, this should not result in the creation of a court that functions in anything less than a fully professional capacity with one clear objective: impartial justice. In addition, the emphasis on Cambodian-specific sensitivities will render the proceedings irrelevant to any universal model. The misplaced agenda of the tribunal can, to some extent, be attributed to the misconceptions of a few contributors. Eric Stover, a foreign participant of the ECCC and a former aid to the International Criminal Tribunal for the former Yugoslavia in The Hague, argues that a purpose of the war crimes tribunal is to facilitate relief for victims via participation in the court process. As he stated in a recent publication,

[t]hese survivors find that they can transform the meaning of their personal tragedy through social action, including the pursuit of justice. . . . The need to speak for the dead was so pervasive, most witnesses declared, that even if they had complaints or misgivings about the Hague tribunal, they would testify again if only to ensure that the fate of their families and neighbors would not be forgotten.⁹

In The Hague, according to Stover, the court's responsibilities were not only judicial, but therapeutic as well. Although this view is undoubtedly good-natured, it is a serious misdirection of the court's responsibility, which requires a professionalism that does not accommodate these two very distinct, and potentially mutually exclusive, goals. The prevalence of such misguided sentiments driving ad-hoc tribunals at the time of their founding threatens the institution of justice. Courts should set the standard higher than providing a social service, and take advantage of the opportunity to not only carry out justice, but also contribute to the evolution of an institution of international justice.

9. See ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (U. Penn. Press 2007).