

# Reflections on International Criminal Justice

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*Your Majesty, your Royal Highness, Excellencies, Ladies and Gentlemen,*

In the dark labyrinth of our lives, one of the few things of which we can be certain is the intolerable amount of suffering that human beings cause to one another through cruelty, armed clashes, and aggression. Criminal justice is among the most civilized responses to such violence. It channels the victims' hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims' demands by punishing the culprit. Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for 'an eye for an eye' justice with the public need to prevent and repress any serious breach of public order and community values. In this way, criminal justice contributes potently to social peace.

These notions, of course, are not new. We find them — graphically portrayed — in that astounding repository of human wisdom that are the Greek tragedies. Aeschylus tells us that, to avenge the murder of his father Agamemnon, Orestes kills his mother Clytemnestra, who in turn had killed her husband, who years earlier was guilty of sacrificing their innocent daughter Iphigenia. Murder beget murder, in a cycle of uninterrupted violence. Orestes is not at peace, however. Ever since his murderous deed, he is pursued and tormented by the Erinyes, 'the daughters of Night', the spirits of revenge and retribution. The ineluctable cycle of death is only broken when Orestes is put on trial before the highest court, the Areopagus. And only when this impartial collective institution pronounces on his guilt or innocence, and he is acquitted, are

\* President, Special Tribunal for Lebanon; Editor-in-Chief of the *Journal*. On the occasion of the announcement of the award of the *Journal of International Criminal Justice* Prize 2010 and the Antonio Cassese Prize for International Criminal Law Studies 2009–2010, the *Journal* publishes a longer version of the speech Professor Cassese delivered in The Hague in accepting, with Benjamin Ferencz, the Erasmus Prize for 2009. This prize allowed the establishment of a Trust Fund set up to further and enhance the values of international criminal justice and facilitate the work of young scholars and practitioners contributing to the development of international courts and tribunals. The Antonio Cassese Fund for Younger Scholars today awards the two prizes associated with the *Journal*, supports the work of translation into English of foundational texts of international law and is about to embark on a major publishing effort in collaboration with Oxford University Press. (*Editors*)

the Erinyes turned into the Eumenides, that is to say, ‘the kindly ones’, the spirits of forgiveness and reconciliation. Only then is peace re-established. The trial before the Areopagus symbolizes the replacement of spiralling destructiveness and summary self-justice by the collective and impartial weighing up of good and evil. Justice puts a stop to violence and sweeps away hatred.

International justice too fulfils this role. The spread of international criminal justice is indeed one of the few major achievements of the world community we may observe in the last 20 years. It is significant for two reasons.

The first is that it responds to atrocities — and endeavours to put a stop to them — not by using traditional channels, that is, through nation states, but by a more direct and effective way: by making accountable those very individuals who, normally hiding behind the shield of state sovereignty, grossly breach human rights. Bringing to book such individuals is the most efficacious manner of ensuring respect for human rights. As the Nuremberg Military Tribunal aptly proclaimed in 1946, ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’<sup>1</sup> Consistent with this holding, the Nuremberg Tribunal did not issue orders and enjoinders to Germany; it directed its justice at individual human beings, the former leaders of the Reich.

This system of justice had been a dream for centuries. The dream came true in 1945 then halted but resumed in the early 1990s, with the establishment first of ad hoc tribunals and subsequently of the International Criminal Court and many hybrid courts.

The second reason why the emergence of such a system of justice has been a stupendous achievement in the world community is that it brought about a *revolutionary innovation* in this community: a seismic shift in thinking about sovereignty. Traditionally, Leviathans only faced one another. Monarchs and princes engaged in dealings solely among themselves; each wielded unlimited authority over his own nationals and had no say over the citizens of other rulers. The King of Prussia was not allowed to act against a British subject unless he had trampled upon Prussian laws on Prussian territory. The only circumstance that placed any state in direct contact with foreign individuals, whatever their nationality, was the fight against piracy. This exception, however, was not dictated by the need to safeguard a universal value; it was grounded in the joint interest of states to repress those troublemakers who hampered free transit on the high seas. It is indeed notable that no *international* body or institution for the repression of piracy was ever set up. No, the task of detaining and hanging pirates was left to each individual state. Save for this relatively minor exception, individuals were insignificant pawns in the society of states.

In the aftermath of the Second World War, this trend was dramatically broken and a *new nomos* was created, based on the *supremacy* of international

1 *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (Nuremberg, Germany, 1947), at 223.

law over domestic law. As a consequence, international legal imperatives began to have a direct impact on individuals. Article 6(c) of the Charter of the Nuremberg Tribunal provided that crimes against humanity would be punished even if they were not 'in violation of the domestic law of the country where perpetrated'. This meant that a person, although acting in conformity with his own national law, could nevertheless be punished for violating legal imperatives laid down by an entity other than the national legislature, namely the international community. As a US Military Tribunal sitting at Nuremberg held in the *Flick* case, 'international law, as such, binds every citizen just as does ordinary municipal law'.<sup>2</sup>

In sum, with the establishment of international criminal tribunals, for the first time international bodies penetrated that powerful and historically impervious fortress — state sovereignty — to reach out to all those who live within the fortress.

However, international criminal justice *pays heavily* for being at the cutting edge of a global society in which the Westphalian model of world order — the model that took shape after the Peace of Westphalia in 1648 — is still deeply ingrained; a society where national interests still play an overwhelming role and where community values are considered more as lofty proclamations than effective guiding standards; a society that, as noted by a German scholar back in 1932,<sup>3</sup> is still built on a volcano — sovereignty — with the consequence that any tremor of the volcano poses a threat to the network of fine edifices patiently built over centuries. And here lies the heavy price that criminal justice has to pay to the traditional structure of the world society: international criminal courts remain entangled in and fettered by the intricacies of sovereignty; put differently, they too are built on the volcano. States shy away from taking the only audacious step capable of making international criminal courts fully autonomous and effective: that is, authorizing once and for all that international investigators, police officers and court marshals be allowed freely to enter the territory of sovereign states and there execute international judicial orders to gather evidence, interview witnesses and arrest suspects or indictees. Such a step has been seen as an intolerable intrusion into the sovereign domain of each state. States have established international criminal courts and granted them authority to judge crimes of individuals — but they have stopped short of backing up this authority with all the enforcement tools required to make it fully operational.

International courts have been bestowed with the sceptre and the gavel, not however with the attendant sword. It follows that they can only operate as long as sovereign states are prepared to lend them a helping hand. Indeed, Milošević, Karadžić and Taylor were arrested and brought to trial only because

2 *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10*, vol. VI (Washington D.C.: US Government Printing Office, 1950), at 1192.

3 H.G. Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (Universitätsverlag von Robert Noske in Leipzig, 1932), at 3.

the national authorities had decided to cooperate with international courts. As soon as a state on whose territory a witness, material evidence, a suspect or an accused may be found, refuses to bow to international justice, international criminal courts remain powerless.

If this is so, you may well wonder *why* a traditional community substantially hinging on self-interest and the pursuit of national goals has accepted to establish such revolutionary institutions as international criminal courts. As we all know, initially, at Nuremberg and Tokyo, international tribunals were set up to dispose of the leaders of the vanquished states in a less undignified manner than their outright execution. Under American leadership, it was felt in addition that a public trial would also have a pedagogical effect, by exposing the misdeeds of the past to new generations. In the case of the Tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon, the creation of international accountability mechanisms served to make up either for the failure of states and international organizations to take decisive political, military or diplomatic action, or for the lack of a robust response at the domestic level. Only the International Criminal Court was born out of a genuine desire to dispense justice at the international level regardless of any policy considerations and without taking into account any geo-political context. However, the Court was left without a powerful back-up: the Court too derives its strength from, and is made conditional on, state cooperation. It follows that, however noble the ideals behind its creation, the ICC too can be hamstrung by lack of state assistance.

International criminal justice is also marred by *another significant deficiency*. In spite of the good intentions of a few states and individuals, it tends to suffer from the ‘Nuremberg syndrome’ that is the tendency to administer justice, during or at the end of an armed conflict, only with regard to crimes allegedly perpetrated by those who have lost at the military or political level. This trend has unfortunately materialized in the case of the former Yugoslavia and Rwanda Tribunals, and would seem to creep even into the action of the International Criminal Court, which so far has only taken action on crimes attributed to enemy rebels by the states that had deferred to the Court’s jurisdiction.

Is this failing destined to be a hallmark of international criminal justice? I do not think so. Nevertheless, I am keenly aware that human beings tend to be blind to and forget their own wrongs and instead are eager to prolong their military or political victory over hated adversaries by calling them to book once the weapons have been laid down. Indeed, to the best of my knowledge, the only case of deep compassion by the victor for the plight of the vanquished enemy belongs to fiction — thus proving that it is only in the realm of imagination that such compassion may emerge. I am referring again to a Greek tragedy: in the *Persians*, written in 472 BC, the Athenian Aeschylus, one of the victors, eight years after the defeat of Darius, the king of Persia, powerfully depicts the desperation of the vanquished and their misery — instead of extolling the glory of his own people, the Athenians.

Should all this lead us to doubt that international criminal justice will ever bring all its generous potential to fruition? I think not. International criminal courts are institutions that, precisely because of their profoundly innovative nature, may not display their results in the short term. If all those involved in those courts, by dint of patient if obscure efforts, work daily to make them vibrant institutions, in perhaps 20 to 30 years they are likely to bring to maturation the potential hidden in these institutions. The courts will thus increasingly contribute to the building of a robust dam against any future inhumanity.

To fulfil this task we must count on the young, on the salt of the earth. It is for this reason that I will entirely devote the grant generously awarded to me by the Erasmus Foundation, and for which I express my deep gratitude, to a Trust Fund. This Fund will be tasked to assist those young scholars and practitioners who are eager to make a contribution to the development of international courts. The Trust Fund will help them, I hope, to become instrumental in the gradual realization of our dream — the dream to see one day a fully-fledged, really effective, expeditious and fair international criminal justice.