Courts and the Making of Public Policy

Can International Courts Do Justice?
Conceptions of Justice in Responding to Conflict

REPORT AND ANALYSIS OF A WORKSHOP HELD AT
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Introduction

This workshop explored a range of issues regarding how international criminal tribunals and courts respond to harm caused during violent conflict. The sessions, comprising a keynote lecture by Professor Mark Drumbl and a full day of presentations and discussions among academic and policy specialists in international justice, investigated two principal themes: the conceptions of justice that institutions such as the International Criminal Court (ICC), the International Court of Justice (ICJ), and the ad hoc courts and tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Iraq, and Cambodia claim they pursue; and how effectively they have delivered these conceptions of justice in response to mass atrocity.

The workshop operated within a particular conceptual framework, which guided the discussions. Conceptions of justice pursued through the international institutions in question fall into three broad categories: retributive justice, which holds that justice in the form of punishment is necessary to give offenders what they deserve and to re-establish a sense of moral equilibrium in society; deterrent justice, which contends that we ultimately hold perpetrators accountable in order to deter future criminality; and restorative justice, which claims that processes and outcomes of justice, particularly the use of restitution and compensation, should be shaped toward reconciling perpetrators, victims, and communities. The workshop explored the use and impact of these three types of justice in the international realm, and the ways in which different courts’ conceptions of justice have affected their own operations and wider public policy.

Several unfolding developments in international justice formed the backdrop to these discussions. On 26 January 2009, two days before the workshop, the ICC began its first ever trial in the case against Congolese warlord Thomas Lubanga. Meanwhile, the ICC was reportedly preparing for the confirmation of charges against a second Congolese rebel leader, Jean-Pierre Bemba, and the indictment of Sudanese president Omar Hassan al-Bashir. Elsewhere, Navanethem Pillay, the United Nations High Commissioner for Human Rights, and several human rights groups called for international investigations into war crimes committed by Israeli troops during Operation Cast Lead in Gaza. This led the ICC prosecutor, Luis Moreno Ocampo, to announce a week later that he was considering investigating these crimes (Gray-Block 2009).

With these events in mind, the workshop participants debated the aims, methods, and impact of international justice responses to conflict. They drew on academic and practical experience, focusing on specific tribunals and conflict case studies, to explore the nuances of international justice. The purpose of this report is to provide a critical analysis of those discussions and to contribute to ongoing debates about the role of international courts in responding to mass conflict.
Justice after Atrocity: A Cosmopolitan Pluralist Approach

Keynote Lecture by Mark Drumbl, Professor of Law, Washington and Lee University
Chair: Professor Denis Galligan, Professor of Socio-Legal Studies, University of Oxford

Professor Mark Drumbl opened the workshop with a lecture that examined the meaning, legitimacy, and aspirations of international criminal justice and how it might become more effective in fulfilling these, and other, aspirations. He began with two claims: one descriptive, one analytic, before outlining his proposal for reform.

Throughout the lecture, he contended that, in discussing the role of international courts in addressing conflict, the lexicon of justice should be expanded to allow the pluralization of international criminal justice. Justice, he argued, transcends the courtroom and the jailhouse. Although accountability for atrocity is a shared cosmopolitan value, pluralism suggests that the process of accountability should take different forms in different places.

Regarding his descriptive claim, Drumbl argued that international criminal lawyers have too often conflated the different issues of international criminal law and justice in their responses to mass atrocity. Consequently, international criminal justice has become ideally implemented through the vocabulary, institutions, and modalities of liberal criminal law. In turn, this has become the template against which post-conflict justice initiatives are measured. According to this prevailing view, justice after atrocity involves adversarial criminal prosecutions and incarceration for the guilty and centres on the perpetrator as an individual.

The ascendency of this conception of liberal criminal law is not random but moored in a particular world view that derives from the intersection of two philosophical currents: legalism and liberalism. The preference for criminalization has subsequently prompted skepticism toward other mechanisms in the quest for justice. However, evidence from many societies in conflict reveals that affected populations often prefer justice approaches other than international criminal law. In practice, recourse to these alternate accountability modalities, including amnesty, remains steady in the resolution of conflicts around the world.

Drumbl then took up his second, analytic claim. He argued that international criminal law and procedure go some way to achieving justice, but not very far. More immediately, criminal prosecutions and sentences fall short of the many goals they espouse, namely retribution, deterrence, expressivism, and restoration. International criminal tribunals also lack a coherent penology. Regarding certain aspirations, in particular retribution and deterrence, it remains unclear whether a génocidaire can receive just deserts or, given the collective, propagandized and administrative nature of a mass crime such as genocide, ever be deterred by the prospect of being hauled before a tribunal in The Hague.

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Furthermore, Drumbl argued, the collective and systemic nature of atrocity should force us to look beyond the criminal law to consider what collective and systemic forms of justice would look like.
The perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime, which necessitates more criminological research on the etiology of atrocity.

Drumbl stressed that international institutions have not acquired a monopoly on the accountability for crimes committed during conflict. In fact, most accountability is carried out by national and local institutions. Nevertheless, international institutions serve as important, and often problematic, trendsetters for their national and local counterparts. The distinctions between international and national institutions are therefore far from watertight.

In the case of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), international influence over domestic justice is exerted through the primacy of these institutions over their national counterparts. The result is that international visions of liberal legalism seep into national jurisdictions. These international pressures are most evident today in the completion strategies of these two tribunals, which depend in part on the referral of cases from the ad hoc tribunals to national institutions. Referrals occur under Rule 11bis of the tribunals’ Rules of Procedures and Evidence. Rule 11bis determinations require the tribunal judges to be convinced that national proceedings satisfy their interpretation of international human rights standards.

To date, the ICTR has refused to transfer any of its existing caseload to the Rwandan national jurisdictions. In the end, Drumbl said, the same international community that sat idly by while genocide devastated Rwanda now claims the legitimacy to withhold Rwanda’s ability to judge individuals accused of genocide, because Rwandan courts are deemed to fall short in terms of their conformity to a liberal legalist template. Similarly, although the ICC is intended to be complementary to national initiatives, it also exerts conformist pressures on national and, in particular, local accountability mechanisms. This is because, under the rubric of the Rome Statute, states are incentivized to mimic international approaches in order to reduce the risk that the ICC will admit a case for international investigation and prosecution.

Drumbl predicted that, as the modalities of international tribunals continue to enter national legal frameworks through referrals, complementarity, and other processes, both the variety of sanction and range of sentences available within national frameworks will increasingly shrink. In particular, conformist pressures will continue to be placed on local approaches, such as restorative methodologies, as exemplified by the gacaca jurisdictions in Rwanda, which constitute a community-based approach to post-genocide justice and reconciliation.

Having diagnosed these problems with international criminal law, Drumbl moved to offer a remedy in the form of a cosmopolitan pluralist approach to international justice. The notion of diverse procedures for universal wrongdoing, he argued, fits within a cosmopolitan theory of law, although it also derives from the tenets of legal pluralism, hence the term ‘cosmopolitan pluralism’. One advantage of cosmopolitan pluralism, he said, is that it would welcome and reflect actual post-conflict practice in which we see considerably more variation in approaches to justice than the conformist expectations of the international criminal law paradigm. Consequently, cosmopolitan pluralism does not demand the development of a singular vision of punishment for extraordinary international criminals.

Drumbl outlined what a pluralist vision would look like in practice, focusing on two major areas of reform: one vertical and the other horizontal.

First, he proposed to substitute qualified deference for complementarity or primacy as the framework shaping vertical applications of institutional authority that are transferred from international institutions to the national and, in turn, to the local. Qualified deference allows more leeway to local variation from the trial and punishment orthodoxy of contemporary international criminal tribunals. Insofar as local and national accountability mechanisms are potentially corrupt, illegitimate, and susceptible to
Accordingly, Drumbl proposed that domestic justice modalities be accorded a presumption of deference, but that this presumption be qualified. He proposed that the following interpretive guidelines shape the implementation of qualified deference:

1. good faith;
2. the democratic legitimacy of the procedural rules in question;
3. the specific characteristics of the violence and of the current political context;
4. the avoidance of gratuitous or iterated punishment;
5. the effect of the procedure on the universal substance; and
6. the preclusion of the infliction of great evils on others.

These interpretive guidelines would operate disjunctively. In other words, not all of them must be met for the presumption of qualified deference to a local or national accountability measure to remain satisfied. However, a gross failure on the part of the accountability process to meet one of the guidelines could suffice to reverse the presumption in favour of qualified deference.

The second proposed reform is horizontal. Here, Drumbl argued for a diversification in which the hold of the criminal law paradigm on the accountability process yields through a two-step process: initially, to integrate approaches to accountability offered by law generally (such as judicialized civil sanctions or group-based public service) and, subsequently, to involve quasi-legal or fully extralegal accountability mechanisms such as truth commissions, legislative reparations, public inquiries, transparency, and the politics of commemoration.

If operationalized, these reforms would increase the possibility that a larger number of individuals could become implicated in the justice process, thereby inviting a broader conversation regarding the viability of collective responsibility for collective criminality. Drumbl stated that collective responsibility differs from collective guilt, which attaches to the question of culpability. Whereas many individuals are responsible for atrocity, a much smaller number are criminally guilty. A much larger number of people are responsible than can (and deserve to) be captured by criminal trials. Extraordinary international crimes are characterized, to varying degrees, by their collective elements. Downplaying this characteristic, Drumbl argued, inhibits the emergence of effective penological and criminological goals when addressing harm caused during mass conflict.

General Discussion

Much of the discussion revolved around two aspects of Drumbl’s presentation: collective responsibility and qualified deference. Some participants questioned whether collective responsibility allowed for sufficient recognition of the often blurred lines between victims and perpetrators in cases of mass conflict. In situations of mass crimes, it is often difficult to define the collective(s) in question — where they begin and end — and therefore who is responsible and who deserves justice. Furthermore, there was some concern that advocating systemic or collective forms of accountability to address systemic or collective crimes could involve prosecuting innocent parties, including children. It would be necessary to find ways to reflect the collective nature of crimes without criminalizing collectively.

Some participants argued that the case for qualified deference required further explication. In particular, what is the timeframe for this approach: how long should domestic processes be given before it is determined that they are incapable or unwilling to deliver adequate justice? There was also some concern over the criteria used to determine when deference to domestic processes was legitimate. In focusing on the democratic legitimacy of local approaches, to what extent does this rely on the satisfaction of affected parties and is it possible to adequately measure that? Some participants also expressed doubt over the ultimate goal of qualified deference, for example whether it was intended as an expression of the nature of mass violence or as a means to legitimize localized processes that could in turn help reduce future violence.
SESSION ONE:

International Justice: Dispute Settlement, Peace-Building, and Deterrence

Professor Vera Gowlland-Debbas, Professor of International Law, Graduate Institute of International and Development Studies, Geneva

‘The International Court of Justice, State Dispute Settlement, and Restitution’

Professor Vera Gowlland-Debbas opened the full day of workshop discussions by focusing on the ICJ and asking how it responds to harm caused during conflict, what types of justice it pursues, and how effectively it does so. She began by describing the dual function of the ICJ as the UN’s principal judicial body and an independent judicial institution with its own charter. This dual nature can often cause difficulties, as the ICJ must maintain judicial independence while also cooperating with the rest of the UN system.

Gowlland-Debbas argued that the ICJ contributes, along with state practice, to the development of international public policy. It does this by applying key human rights and other norms when adjudicating cases brought by states. These cases regularly stretch far beyond the claims of individual victims to encompass broader inter-state and international issues, as exemplified in the Lockerbie terrorist case or, more recently, Georgia’s case against Russia for aggression on its sovereign territory.

In interpreting the ICJ’s operational conception of justice, Gowlland-Debbas argued that this depends heavily on the vision of independent judges, who play a central role in shaping the objectives and processes of the Court. Interpretations of justice through the ICJ cannot be easily derived from its statute, except tacitly as the administration of procedural justice. ICJ Judge Rosalyn Higgins has previously argued that if justice goes beyond due process, it becomes highly subjective and can create major legal difficulties when norms and values inevitably clash.

Gowlland-Debbas described how, even though the ICJ has often demanded that states pay compensation to others, the Court denies that it delivers distributive justice, seeing equity as its guiding principle and a good emanating directly from due process. Since the creation of the ICJ in 1948, many of its supporters have praised this procedural approach to justice, while others have called for the Court to take a more expansive role and to articulate a fuller interpretation of justice.

Nevertheless, the ICJ fulfils an important function in expressing and moulding global norms, especially in response to harm caused during violent conflict. As expressed in Chapter VI of the UN Charter, the Court is afforded the role of helping to maintain international peace and security. In this vein, its jurisprudence has helped shape the concept of genocide, including the key elements of intent and complicity. The recognized importance of the ICJ in this regard largely explains the widespread disappointment in its 2007 judgment in the case of Bosnia and Herzegovina v. Serbia and Montenegro. In this case, the ICJ confirmed a previous ICTY judgment that genocide had taken place at Srebrenica in 1995. However, the ICJ found that Serbia had failed to prevent genocide but was neither directly responsible for it, nor complicit in it. The disagreement between the ICJ and ICTY over interpretations of complicity in genocide (the former requiring effective control of the state apparatus over specific acts to constitute responsibility, while the latter requires only effective general control without the issuance of specific instructions) highlights the
International Justice: Dispute Settlement, Peace-Building, and Deterrence.

The presentation concluded by illustrating through cases such as the Israel Wall, Bosnia and Herzegovina v. Serbia and Montenegro, and Democratic Republic of Congo vs. Uganda that the ICJ has recently gone through significant evolution regarding how responsibility should be recognized and justice should be delivered. Gowland-Debbas argued that early ICJ judgments emphasized the need for state reparations for damage caused, while more recently the Court has stressed the importance of simply recognizing legal breaches and restoring legal relations between states. Consequently, the ICJ appears to have increasingly interpreted its role as one of guaranteeing the integrity of the international legal system, as well as encouraging states to halt legal breaches in order to restore states to their previous relationships. This narrower vision of the ICJ's role and mandate, largely the result of individual judges' practices over time, has drawn criticism from many of the Court's supporters, as well as some states that have pursued recourse through the ICJ.

Dr Dan Butt, Fellow and Tutor in Politics, University of Oxford

In his response, Dr Butt began by asserting that narratives about the role of courts tend to fall into two categories: that of judicial activism, and that concerning other actors who seek to pursue their agenda through the courts. He suggested that Gowland-Debbas’s depiction of the ICJ appeared to fall in the second category, and that the ICJ’s role in public policy was largely dependent on the ways in which other actors chose (or were enlisted) to pursue their particular ends through the Court. It is possible that future parties to the ICJ may lift the Court’s role and practices in different directions. This led to questions regarding whether the ICJ might one day adopt a more activist strategy, particularly regarding reparations and seeking a broader role in distributive justice after conflict.

Butt also commented on the narrowness of the ICJ’s judgment in the Israel Wall case, in which it eschewed invoking moral damages, focusing only on questions of financial recompense, when finding that Israel had illegally constructed a wall in the Occupied Palestinian Territory. He questioned what this focus on financial recompense meant for the ICJ’s overall interpretation of restitution. In the Wall case, the Court highlighted Israel’s responsibility to repair the legal breach by erasing the consequences of the construction of the wall, but did not address the issue of what restitution would look like for the moral wrong entailed in the construction. This seemed to miss the moral essence of the conflict between the parties concerned and thus raised more general questions about the usefulness of the ICJ in addressing harm caused by states.

Dr Leslie Vinjamuri, Lecturer, Department of Politics and International Studies, SOAS, University of London

‘The Logic of Deterrence in Judicial Interventions: Dilemmas and Evidence’

Dr Vinjamuri’s presentation questioned the logic of deterrence as a justification for international judicial interventions after mass conflict. She argued that, before the 1990s, international criminal justice was viewed as a necessary expression of an absolute commitment to the judicial process for delivering accountability to perpetrators, victims, and society at large. Since the initial resurgence of attention to war crimes in the Balkans, however, deterrence of future atrocities has become the dominant justification for international criminal justice. This has found expression through the ICC and a range of peace agreements that include formal commitments to war crimes trials.

Drawing on her extensive empirical research, Vinjamuri argued that, alongside demands for international criminal justice and a wave of international and domestic war crime trials, two contradictory trends have emerged. First, judicial interventions have developed rapidly. Rather than pursuing justice in the aftermath of victories, international prosecutors
The consequentialist nature of deterrence justifications, Vinjamuri argued, allowed for empirical analysis of the practical impact of prosecutions on attempts at peace after mass conflict. An investigation of trends in the relationship between accountability mechanisms and the durability of peace following the end of war, she said, undermines two chief claims made by proponents of deterrence. First, sustained peace is not dependent on accountability. In eighty-three wars concluded between 1990 and 2007, fifty had no war crimes trials or truth commission and, of these fifty wars, twenty-nine were associated with sustained peace (ten years or more). Second, war crimes trials and truth commissions are more highly correlated with peace when they are deferred for at least two years after conflict ends. In conflict countries where trials were held (1990–2007), peace was sustained in twenty-eight cases, and in ten, war continued or broke out within five years. However, of these cases, only eleven wars were associated with sustained peace when tribunals were created during ongoing conflict or within two years of a war’s end, while eight conflict countries experienced renewed violence when tribunals were pursued during conflict or within two years of a war’s end. In wars where truth commissions or amnesties were initiated during ongoing conflict or within two years of war’s end, the positive association with peace was also greatly reduced as compared with those cases where the mechanisms for delivering accountability were deferred for more than two years after the conflict.

This research raises important questions about the possible negative consequences on peace if certain tools, notably amnesties, are denied mediators and political elites who are aiming to secure peace settlements. If external actors are determined to play a central role in ending wars, removing tools historically associated with negotiation may have the unintended consequence of increasing pressure to use military force to achieve their goals. More problematic for scholarship, the theory of conflict resolution and normative change embedded

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Since the resurgence of war crimes in the Balkans, deterrence of future atrocities has become the dominant justification for international criminal justice

Vinjamuri turned to the logic of deterrence that underpins war crimes trials and especially judicial interventions in ongoing conflict. She then went on to evaluate the relationship of that logic to that motivating the use of amnesty in peace negotiations. The decision to pursue justice during ongoing conflict has been justified primarily in terms of its capacity to alter the outcome of war by enhancing the prospects for peace.

The deterrence logic of international justice entails several key consequentialist claims, including that prosecutions will deter future conflict by individualizing guilt, decollectivizing identity, removing from the scene or at least discrediting key perpetrators who could foment further violence, and subjecting violence to the rule of law. In contrast, the logic of bargaining, which is central to many peace negotiations, holds that the best route to peace is to offer amnesty to lead perpetrators in order to encourage them to negotiate and eventually lay down their arms.
very poor understanding of the impact of justice on elite decision-making and conflict generally, for example, the extent to which indictments and prosecutions can help facilitate peace. This casts doubt on many of the key assumptions of scholars and policymakers dealing with issues of conflict and civilian protection.

Response: Professor Jennifer Welsh, Professor in International Relations, University of Oxford

Professor Welsh began her reply by commenting on the predominance of consequentialist arguments in international academic and policy debates about responses to conflict. For example, most academics and policymakers who invoke the increasingly influential principle of the ‘responsibility to protect’ in the context of humanitarian intervention, view the ICC and the ad hoc tribunals as key institutions for the prevention and deterrence of crimes. This preventive and deterrent potential of courts and tribunals is seen as vital to protecting civilian populations from grave harm. However, we have a
SESSION TWO:

International Criminal Tribunals, Consequentialsim, and the Challenge of Reparation

Professor Payam Akhavan
Professor of International Law, McGill University, Montreal

‘International Criminal Tribunals as a Means of Deterrent Justice’

Professor Payam Akhavan focused on what he called the ‘systemic deterrence’ of international courts and tribunals. This concept emphasizes the socio-pedagogical influence of legal systems and subliminal restrictions on combatant behaviour, rather than direct impact on individual calculus. While it is difficult to measure the impact of international justice in terms of systemic deterrence, impact is nonetheless the best justification for international criminal justice. The best arguments for the use of international law in responding to mass atrocity are utilitarian and consequentialist. As a corollary, the burden of proof lies on opponents of international justice to show that justice is an impediment to long-term social objectives such as peace and reconciliation.

Understanding why deterrence is crucial to a justification for international criminal law rests upon an understanding of the causes of most cases of mass violence around the world. Where Drumbl had focused on collective responsibility for mass crimes, Akhavan emphasized the role of elites. He argued that it is common to associate mass atrocity with perpetrators filled with primordial hatred and caught up in collective hysteria. Instead, most cases of mass violence involve elite calculation, manipulation, and systematic use of state bureaucracy to incite and commit murder. For example, in Rwanda, elites instrumentalized issues of ethnicity and identity to create the necessary environment for the genocide of Tutsi.

This basis for conflict, Akhavan argued, opens the possibility for international criminal justice to alter the cost–benefit calculus of elites who consider fomenting conflict. Before the early 1990s, he said, impunity predominated such that Pol Pot, Idi Amin, and other leaders could commit atrocities without fear of prosecution. In fact, they were often adept at playing the game of international politics, building allegiances with powerful nations, and therefore were generally rewarded for their acts and welcomed into the community of nations.

Impunity has consistently permitted mass violence. A more recent example of this is that of Foday Sankoh, leader of the Revolutionary United Front, who after the Lomé Accord in 1999 was given the position of vice president of Sierra Leone and control over key diamond mines. Soon after, he recommenced the conflict, highlighting the dangers of failing to prosecute key atrocity perpetrators and rewarding them with political prestige in an attempt to convince them to lay down their arms.

With the advent of international justice, that situation has changed. Even though it may not be possible to measure scientifically the impact of international justice, an analysis of elite decision-making in conflict contexts shows that it has a discernible effect. Akhavan argued that this was evident later in the Sierra Leone conflict when the UN special advisor on genocide, Juan Mendez, announced that those responsible for mass atrocity could be prosecuted, which led to a cessation of hostilities.

The ICC, as a permanent global court, has an even greater capacity than the ad hoc tribunals to facilitate systemic deterrence because of its permanent judicial
threat to those responsible for mass crimes. In the case of northern Uganda, the ICC was a key instrument in forcing the Lord’s Resistance Army (LRA) to the negotiating table. The ICC gained major credibility in the Uganda case because, by issuing arrest warrants for the commanders of the LRA, it pressured Sudan to halt its financial and military support of the LRA and thus altered the calculations of the rebel force. The problem for Uganda, Akhavan argued, was that the LRA’s sole reason for negotiating with the Ugandan government was to secure amnesty for its commanders, which would be unacceptable given the gravity of LRA atrocities and the effect of this in terms of perpetuating a culture of impunity. Similarly in the Darfur case, the ICC has altered the conflict dynamic by pressuring the Sudanese government to distance itself from Janjaweed atrocities. Feeling betrayed by the government, many Janjaweed have defected, thus increasing the possibility of peace in Darfur.

Response: Dr Phil Clark, Foundation Research Fellow in Courts and Public Policy, Centre for Socio-Legal Studies, University of Oxford

Dr Clark began his response by asking whether, given Akhavan’s argument about the limitations of measuring the deterrent potential of international justice, it was therefore preferable to adopt a retributive basis for justice, as this would avoid consequentialist arguments altogether. The problem with the deterrent justification is that it must also contend with emerging empirical evidence, such as the data discussed by Vinjamuri, which shows that sometimes amnesty, delayed justice, or other approaches are more effective than international prosecutions at securing long-term peace.

If one were to insist on a deterrent argument for justice, it is also unclear that this necessitates an international criminal legal response to conflict. For example, it may be possible to deliver justice through national or community-level processes that constitute fully-fledged modes of accountability and can help eradicate a culture of impunity.

Clark also questioned key elements of the case studies used by Akhavan in his defence of international criminal law. In the Uganda case, the ICC was one factor in encouraging the LRA to negotiate with the Ugandan government, but far from the most important factor. More critical in this regard were changing political and military dynamics in southern Sudan, as a result of the Comprehensive Peace Agreement, and other regional developments completely independent of the ICC intervention. It is also difficult to argue that the ICC has contributed to sustainable peace in Uganda, given that the LRA continues to operate in north-eastern DRC. The ICC has not so much halted LRA hostilities as displaced it to a neighbouring country.

Questions should also be asked about the politics of the ICC’s involvement in Uganda, given the lengthy negotiations between the Court and the Ugandan government that led to the ICC’s issuance of arrest warrants for the LRA commanders. It appears that the parties struck a deal whereby the government referred the case to the ICC (its first ever referral) as a way of combating the LRA in exchange for an assurance that the Court would not pursue prosecutions against government actors for their crimes in northern Uganda (Clark 2008; Clark 2009). What is the likely dividend for peace if the politics of ICC referrals insulates state actors from prosecution?

The ICC’s involvement in Darfur simply changed the way that Khartoum does violence, including more direct government attacks against civilians rather than relying on the proxy Janjaweed

In the Darfur case, Clark argued that while Akhavan was right to claim that the ICC had altered relations between the Sudanese government and the Janjaweed, this had hardly affected the conflict in Darfur. The ICC’s involvement had simply changed the way that Khartoum does violence, including more direct government attacks against civilians rather than relying on the proxy Janjaweed.
Professor Carolyn Hoyle, Reader in Criminology, and Fellow of Green College, University of Oxford

‘Can International Justice be Restorative Justice? The Role of Reparations’

Professor Carolyn Hoyle shifted discussions of international courts’ responses to mass conflict by focusing on issues of restorative justice and victim recognition. The growing importance of these issues in the international realm, she said, manifests important parallels with the rise of victims’ rights and restorative justice in Western domestic criminal justice systems.

The growing prominence of restorative justice at the international level derives largely from the recognition that justice after mass crimes requires more than the application of conventional (often Western-styled) paradigms of retributive and deterrent justice. It must instead encompass forms of justice (embracing notions such as truth, reconciliation, and reparation) aimed not only at punishing offenders, but also healing victims and repairing communities damaged by conflict.

The presentation began with an outline of conventional notions of domestic restorative justice. Hoyle emphasized that, while there is no universally agreed definition of restorative justice, its core values include: mutual respect; the empowerment of all parties involved in the justice process; accountability; and the inclusion of all the relevant parties in dialogue, in particular those considered to be the victims. Restoration should address emotional as well as material loss, safety, damaged relationships, and the dignity and self-respect of victims and other legitimate stakeholders, as well as reaching beyond this to include the wider community affected by conflict.

In terms of restorative justice in the context of international courts, Hoyle focused on the ICC. She argued that the ICC has gone much further, at least in terms of the ideas and processes embodied in the Rome Statute, than the ICTR, ICTY, and other international tribunals in promoting restorative justice via victims’ participation in proceedings and the pursuit of reparations. These moves represent a shift in international criminal law from a fundamentally retributive (non-victim centred) approach to one in which retributive and restorative ideals coexist. It will be necessary over time to evaluate the record of the ICC in terms of providing truly victim-centred international justice.

The theme of post-conflict reparations highlights the significant restorative potential of international criminal law. Hoyle argued that there is a general consensus in the academic literature over what victims and communities need after mass conflict. Given the physical, material, and psychological harm they have suffered, they generally require a combination of material and symbolic reparation to restore their dignity, power, and control, and to renew or strengthen their rights and citizenship.

Material reparations, such as restitution or compensation, may help to diminish victims’ desire for revenge and therefore may reduce the chances for an escalation of the conflict. These forms of reparations, by themselves, cannot sufficiently redress the harm that victims and their communities have suffered. Victims and communities will need much more than money. Therefore, the intention of compensation should not be to fully restore the status quo ante. Furthermore, victims and their communities must be fully involved in the decision-making process about what reparations, as well as other post-conflict strategies, should look like. If not, they will be disempowered, and the decisions made might even cause them further harm.

Symbolic reparations also serve an important function, particularly in the form of censuring perpetrators and collaborators and verifying facts about what occurred during conflict. Individual victims require recognition of their status as victims and a public record of the facts of what happened to them, not only for material benefits such as compensation and reparation, but also for the symbolic value of recognition. An opportunity for victims to narrate their own experiences, and to hear
apologies from those who have caused them harm, are also important participatory components of symbolic reparation.

The ICC can provide these forms of recognition for those cases within its jurisdiction, particularly given the Rome Statute's emphasis on victim participation, while also establishing documentary record of historical fact (Article 68). This should provide some benefit to victims, even if their own individual experiences have not been acknowledged by the ICC.

The presentation concluded that it is necessary to move beyond the unhelpful dichotomy of restorative versus retributive justice. While there is by no means consensus on the compatibility of restorative and retributive justice, it is clear that restorative justice (on the whole) does not necessarily reject all punitive measures associated with retributive justice and vice versa, and that there is more common ground between the two forms of justice than is often recognized.

In the case of the ICC, the Court tries to achieve a measure of restoration within an essentially retributive framework. International justice mechanisms such as the ICC can bridge the divide between people's micro and macro needs after conflict. They can deal with individual victims and offenders. But by targeting those at the top of the chain of command, their symbolic message has a broader impact, not only for communities directly affected by the defendants' crimes, but also for those who may be thinking of perpetrating crimes in the future. International justice can combat impunity through the act of prosecution, by securing public records, and creating international mechanisms to monitor, prevent, and try to resolve conflicts. By censuring the behaviour of perpetrators, international tribunals and courts acquire both a moral and a legal rationale, which meets the moral obligation to condemn and by so doing helps to develop universal human rights.

Response: Lars Waldorf, Lecturer and Director, Centre for International Human Rights, Institute of Commonwealth Studies, University of London

In his response, Waldorf began by assessing Hoyle’s presentation with regard to Drumbl’s lecture, questioning whether collective reparations might constitute an effective way of addressing collective responsibility. However, Waldorf echoed some of the concerns raised about Drumbl’s thesis, namely, that it is not always easy to identify victim and perpetrator collectives who should either receive or deliver reparations. Collective reparations that concern ethnic groups or other volatile collective identities could create resentment and the possibility of future violence.

Waldorf outlined several concerns with Hoyle’s argument. First, he questioned why restorative principles should be applied to perpetrators of very serious crimes, such as genocide and crimes against humanity. Restorative justice practices have yet to prove themselves in less complex domestic cases, for example involving juvenile offenders. We lack the empirical evidence that domestic restorative approaches lead to victim satisfaction. Therefore, it seems too early to eschew restorative principles in the context of more serious crimes. Furthermore, it is not clear that restoring relationships between victims and perpetrators is necessarily a desirable or feasible objective, given the severe harm that is caused during mass conflict.

Waldorf also questioned the linkage that Hoyle suggested between dialogic, participatory processes of justice and restoration. Dialogic processes can sometimes reinforce existing power relationships, depending on the nature of the processes, the actors involved, and the wider political context in which justice is delivered. Victim-perpetrator dialogue in which the latter displays no remorse for the harm caused could also further fracture relations between the parties.
Dr Adam Branch, Assistant Professor of Political Science, San Diego State University

"The International Politics of Impunity in Africa: The ICC in Historical Context"

Dr Branch explored the politics of the ICC in Africa, situating the Court’s operations in the larger historical context of external interventions in the continent. He argued that the ICC contributes to Africa’s international political subordination through the force of international criminal law.

Branch pursued two principal lines of argument. First, to understand current instances of international legal intervention in Africa, we must explore the history of international law on the continent, particularly the use of legal force during the colonial period. In the latter half of the nineteenth century, African political entities were denied sovereignty under European international law. These societies were represented as uncivilized, incapable of ruling themselves, and therefore in need of colonial legal and political control.

The refusal to recognize African sovereignty rendered Africans vulnerable to European force by refusing Africans the right to resist occupation or political subjugation. This was premised on the idea that, while the internal affairs of sovereign states were immune to external interference, nonsovereign entities had no such right. Therefore, European states could justifiably intervene in the affairs of African states, especially to employ ‘civilized’ European forms of warfare against African ‘savagery’. At heart, the idea that sovereign Europeans were civilized nonsovereign, savage Africans, and could do so through violence, justified the discretionary use of violence against Africans and removed it from any limitation by the laws of war.

In the second half of Branch’s presentation, he argued that much has changed in international law since the colonial period: the sovereignty of African states has been recognized; the use of force in international affairs has been made illegal outside of UN Security Council authorization or temporary self-defence; and the laws of war have been expanded and now apply to Africans. However, despite these formal changes, in practice international law has continued to be used in the service of the international domination of Africa, specifically by justifying the use of force against Africans and by releasing force from legal restrictions.

This global law, embodied most prominently in the ICC, is invoked to justify the use of force against African states and external interference in internal African affairs. Now, instead of simply rejecting the application of international law to Africans, one form of international law, the global law of humanity, is applied to Africans, albeit in a highly selective manner, the very application of which effectively withdraws Africa from the scope of the international law that enshrines the protections of state sovereignty.

Given the current US assertion of military power globally, including in Africa, it is not surprising that global law enforcement has been instrumentalized to that project through the selective prosecution of some Africans and affording immunity to others. Branch argued that there is a strong tendency for US enemies to be criminalized, made liable for violence they use, and established as legitimate targets of violence by Africans and international interveners. The ICC justifies this American-aligned selectivity on the basis of pragmatism, but this risks leading the ICC to release violence from legal limitation in Africa.
The force of enforcement can be deployed either by the West directly or by African states and actors. The use of force against Africans has not been effectively restricted by the law; instead, through the invocation of global law and human rights, it has often been released from the legal restrictions posed by sovereignty and made unaccountable to the very law it claims to uphold. However, this immunity is not restricted to the West intervening in Africa. Indeed, immunity can also be enjoyed by Africans when they act as partners in global law enforcement or when their international politics insulate them from prosecution.

Branch provided several reasons why the ICC is open to this dangerous international political instrumentalization. Inherently flexible and undefined concepts such as the responsibility to protect (R2P) or humanitarian intervention are open to instrumentalization because of their vagueness and lack of objective criteria; along these lines, it might be thought that the ICC, with its greater level of formalization, would be less open to manipulation. Indeed, it was precisely this aspect that has made the United States wary of the ICC but willing to embrace more informal and flexible justifications such as R2P for its use of force. But despite, or because of, US reservations, the ICC has proved itself to be a useful tool in the American arsenal, in particular in Uganda and Sudan.

The selectivity shown by the ICC in Africa — pursuing some perpetrators, such as Congolese and Ugandan rebels, while refusing to prosecute the governments of these countries — has had two main repercussions in terms of how violence is used and by whom. First, some African states and actors have assumed the role of the enforcers of international law. Like international actors who claim to enforce global law in Africa, these African actors find international legitimacy for their use of force and claim effective immunity from global law. Second, some African states and actors appear to have simply been granted immunity from the application of global law because of their international political alignment.

As a result of the ICC’s involvement, the Ugandan government has managed to drape its military campaign against the LRA and subjugation of the northern population, domestically and abroad, with the legitimacy of international law enforcement, to the detriment of peace, stability, and democracy in northern Uganda and the wider region. The Ugandan government has used the criminalization of the LRA to undermine peace talks with the rebels and to provide justification for its counterinsurgency when the peace talks predictably failed. This has contributed to the further militarization of the Ugandan government and the criminalization of dissent in Uganda.

Response: Professor David Anderson, Professor of African Politics and Director of the African Studies Centre, University of Oxford
In his response, Professor Anderson argued that, in order to make the case as presented by Branch, a deeper analysis of the ways in which political contingency determines political action is required. The ICC appears much more constrained in its actions than Branch suggests. We should analyse the Court’s political position, its leadership, the states and leaders who back it and influence its decisions, and generally the Court’s room for manoeuvre. Many of the problems associated with perceptions of the ICC as a neocolonialist enterprise derive not from ICC actions per se but from those of its state backers and other international actors.
Meanwhile, more active agency should be ascribed to the African states in question. In the Uganda case, for example, as discussed in response to Akhavan’s presentation, President Museveni proved adept at using the ICC for his own means. President Bashir in Sudan opposes the ICC because this wins him domestic political approval by virtue of his rejection of the perceived ‘neocolonialist agenda’ of the Court. Some elites in Kenya support the ICC for other contingent reasons, particularly invoking an international institution to convince the Kenyan government that impunity is unacceptable.

African leaders are not defenceless in the face of international criminal justice but rather have found ways to use the ICC and other international institutions for their own ends.

Anderson concluded by arguing that international justice as an enterprise is worthwhile because it promises accountability for those responsible for egregious crimes. It is important to differentiate between the flawed approaches of the ICC and other international courts to date (many of which result from the ICC’s tenuous political position as a fledging institution seeking legitimacy) and the continuing need for effective international justice, especially to address the harm caused to innocent civilians during conflict.

Bergsmo argued that, on the whole, the ad hoc tribunals have been a remarkable success, particularly considering the widespread scepticism regarding international criminal justice in the early 1990s, including within the tribunals themselves. He enumerated four principal contributions of and lessons from the ad hoc tribunals, which would be crucial for the future of the ICC and national criminal justice.

First, the tribunals have produced important jurisprudence for handling complex mass crimes, which will form the basis of future trials for mass atrocity. The tribunals have raised the standard of trials by requiring a greater degree of evidence than was previously thought necessary to prove the commission of crimes. This will force future investigators and prosecutors to improve their methods and thus the overall quality of justice.

Second, the ad hoc tribunals have fulfilled a vital truth-recovery role, highlighting the ground-level facts about conflict that might otherwise have been overlooked or forgotten. These processes were crucial in establishing a narrative of conflict and shaping memory of past events: features of the legal process that lawyers often ignore but that are crucial for societies affected by conflict.

Third, the ICC and national approaches to justice would do well to learn from some of the legal practices established by the ad hoc tribunals. Bergsmo began his presentation on the legacies of the ad hoc tribunals by highlighting two current trends in international criminal justice. First, the various ad hoc international tribunals and courts, such as those for the former Yugoslavia, Rwanda, and Sierra Leone, are in the process of shutting down, ensuring that the era of multiple jurisdictions will soon end and leaving the ICC as the sole remaining international criminal justice institution.

Second, since the ICC is constrained by the principle of complementarity, the centre of criminal justice for mass atrocity will shift to the national level.
International Justice and Neo-Colonialism: Lessons and Prospects for the ICC

and transferring more cases to national institutions. However, in the future, national jurisdictions will not have this option of transfer. There must be clear thinking on how to avoid immense backlogs of cases, such as the one currently confronting Bosnia, which has more than 1000 serious criminal cases on its books stemming from mass conflict in a system capable of handling only twenty-five cases per year.

Finally, the ICC and future national jurisdictions must learn lessons regarding the legitimacy of justice for mass atrocity. An important starting point in this regard is diversifying the geographical representation of these institutions. In the case of the ICTY, Milosevic argued justifiably that the makeup of the tribunal showed that he was being put on trial by the United States and United Kingdom.

Future institutions must grapple more effectively with the issue of whose justice is being delivered and for whom. Politics will play an inevitable role in this, as justice institutions will be guided and moulded by the interests of donor states. The experience of the ad hoc tribunals shows clearly that failing to account for these political factors damages external perceptions of the institutions, harming relations with domestic governments and populations and further complicating the task of doing justice.

**Response:** Professor Leigh Payne, Professor of Sociology, Latin America Centre, University of Oxford

In her response, Professor Payne questioned whether it really mattered which institutions could exert their influence on international justice efforts through their funding of the process, as long as justice was done. She also argued that, in discussing the legacies of the ad hoc tribunals, we should focus less on the legal processes they engendered and more on the tangible outcomes of their processes, especially in the countries affected by conflict. It might be difficult to quantify the impact of the tribunals in these settings but that should nonetheless be how we ultimately assess their legacy.

Payne argued that the ad hoc tribunals create a legacy but also derive from the legacy of previous legal institutions and practice, for example, by involving a complicated fusion of common and civil law. Given the difficulties faced by the tribunals in handling this fusion, it appears inevitable that they will also pass that legacy to future institutions, especially given the inevitable recycling of staff from current tribunals through the ICC and other jurisdictions. This limits the scope for positive evolution in future legal responses to conflict.

*Milosevic argued justifiably that the makeup of the tribunal showed that he was being put on trial by the United States and United Kingdom*
Conclusion

The discussions during the workshop were extremely rich and covered a wide range of international tribunals, courts, and conflict situations around the world. A recurring concern was the current lack of effective methodologies for measuring the impact of international justice on affected societies. Tribunals, their supporters, and opponents often make grand claims about the positive or negative effects these institutions can have, but there is little empirical evidence to support such statements. More research is required into the extent to which international justice affects the calculations of combatants, mediators, and the spread of conflict more generally. This research will illuminate the role and limitations of international tribunals and courts in addressing harm caused during conflict and will be crucial for shaping tribunals’ own conceptions of the forms of justice they should and can feasibly deliver. This workshop provided a critical basis for the development of empirical tools to better analyse the role and efficacy of international courts in addressing mass atrocity.

References


Cases cited


International Court of Justice, Advisory Opinion on the Wall Being Built by Israel in the Occupied Palestinian Territories (‘Israel Wall’ opinion), 9 July 2005.
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