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Globalizing justice for mass atrocities

Introduction

I have agreed to talk today about the globalization of justice for mass atrocities. By this I mean the increasing recourse to prosecution, and punishment, of perpetrators who commit the most serious crimes in international law, war crimes, crimes against humanity, genocide, and torture. These are also often termed *jus cogens* crimes, because the obligation not to commit them is one from which no derogation is permitted. While the international human rights and humanitarian law on which these prosecutions rely dates back decades and even more than a century, the trend towards accountability has been accelerating since the end of the Cold War. I will analyze and assess, before turning to contemporary developments.

Post-cold war developments

It is perhaps not surprising that the end of the Cold War saw a turn to accountability for mass atrocities.

Firstly, the absence of bipolar rivalry made it possible for the UN Security Council to operate more fully, and made multilateral collaboration in a range of areas easier. While proposals for an international criminal court had been in development since just after the Second World War, there was no chance that a multilateral treaty creating one could be negotiated during the Cold War period.

Second, and less positively, the withdrawal of superpower support for a variety of regimes saw state collapse, and a rise in internal conflicts, particularly in Africa.

In particular, in response to the conflict in the former Yugoslavia and the genocide in Rwanda, the UN Security Council created two *ad hoc* criminal tribunals, in 1993 and 1994, respectively. Both are still running, and both are expected to end operations by about 2010—the deadline for completion has been something of a moving target. The creation of these tribunals, following on the explosion in transitional justice processes in democratizing states in Latin America and Eastern Europe, helped to re-start a movement for an international criminal court. A statute for the International Criminal Court was finally agreed in 1998, and it entered into force in mid-2002. Today, it has 104 member states. I will turn in a moment to the ICC's current caseload, but want to say something first about the range of accountability options, of which the ICC is just one.

The wide range of accountability options

There is of course a wide range of options for accountability that may be pursued by the international community, or of course a state with the support of the international community. Again, it is worth remembering that we are talking about, here,

individualized criminal accountability for crimes of international concern. These are therefore quite a narrow set of crimes: they are violations of specific customary and conventional international humanitarian and international human rights law. Specifically, we are talking about crimes such as war crimes, crimes against humanity, genocide, and torture.

a. International tribunal, whether *ad hoc* or permanent

International tribunals may be *ad hoc*, or they may be permanent--it is worth noting quickly the distinctions between them

- i. *Ad hoc* tribunals are temporary, as the term *ad hoc* might suggest. This is important, in that they have a clear time horizon, and are also territorially bounded. That is to say, they are only mandated to address crimes that occurred in a particular area, over a particular period of time. They are also expected to terminate, rather than be permanent, although they may run for a very long time. The Yugoslav tribunal, which began in 1993, and the Rwanda tribunal, approved in 1994, are both under pressure to pursue completion strategies, and to complete work in the coming years.

These particular *ad hoc* tribunals were also set up in a particular way--they were set up by the United Nations Security Council acting in Chapter VII mode, that is to say under its power to address threats to international peace and security.

- ii. Permanent tribunals are just that, and the International Criminal Court, whose statute entered into force in 2002, is just such a court. It has jurisdiction for all crimes committed since mid-2002, so long as they were committed by the national of a state party, or on the territory of a state party, or where the UN Security Council refers a situation to the Court. We will talk about each of these in turn shortly. We should note that while the jurisdiction of the ICC is much broader than that of the *ad hoc* tribunals, it is still limited, because it is dependent upon states signing and ratifying the treaty, or on Security Council referral. Also, it has direct jurisdiction over most of our *jus cogens* crimes: war crimes, genocide, and crimes against humanity, but not torture. Torture is treated as an act which may be part of these crimes but not as a separate crime. Finally, the ICC in principle has jurisdiction over the crime of aggression, but because states parties were unable to agree upon a definition of aggression, no prosecutions can currently be brought.

b. Domestic trials for international crimes

Of course international trials are not the only way in which crimes of international concern might be addressed. States have also held domestic trials for past human rights abuses: this was the case in several Latin American countries emerging from transition in the 1970s and 1980s, such as Argentina, and Sri Lanka has even tried some members of the security forces for abuses while that country's war has continued. Bosnian courts have

handled cases that have not reached the ad hoc Yugoslav tribunal, and many more are being transferred to Bosnia's War Crimes Chamber as the international tribunal completes its work. Rwanda's national courts have had concurrent stratified jurisdiction with the ICTR, meaning that they have operated at the same time as the international tribunal, but have had jurisdiction over different categories of crimes. Domestic trials are often difficult to pursue following authoritarian regimes or serious internal conflict, because of resistance by perpetrators, poor state capacity, etc. However, as the examples I have just noted demonstrate, they are more frequent than we might expect or realize. Nonetheless, the challenges to domestic processes mean that the international ones that I have just described, or the even more novel ones I am about to describe, may be of interest.

c. Transnational justice

Transnational justice may occur in the courts of a country, not where the original crimes of concern occurred, but another.

i. Transnational criminal accountability: universal jurisdiction.

A well-known example is the attempt by Spain to prosecute, through the exercise of universal jurisdiction, Augusto Pinochet Ugarte, the former Chilean dictator. Spain's claim to prosecute Pinochet was not the harms he had inflicted upon Spanish citizens, although those numbered among the crimes of which he was accused. Rather, charges were brought because, under the principle of universal jurisdiction, there are certain crimes which are of sufficient international concern that any state's courts might hear charges. These are, again, the *jus cogens* crimes referred to earlier.

ii. However, transnational accountability need not only take the form of criminal trials. It is also possible to bring civil suit, which may result in the payment of damages, against individuals or corporate entities for the violation of these same international legal norms. In the United States, the Alien Tort Claims Act, or ATCA, has been used to bring suit against individuals responsible for such crimes in a wide range of countries. The first suit was the *Filartiga* case, brought against a Paraguayan officer for torture of a Paraguayan citizen in Paraguay. As with the exercise of universal jurisdiction, the act need not have been committed in the US, although there are other jurisdictional requirements. More recent court cases in the US using ATCA have even reached judgments against corporations, although all of these are either under appeal or have been settled out of court. These have included cases against the Unocal corporation for its alleged complicity in crimes committed in Burma/Myanmar. The case brought against Talisman oil corporation for its alleged complicity with crimes committed in Sudan contributed to its decision to withdraw from the country. Civil cases are also possible in other countries, such as the United Kingdom, with the Ron Jones and Al-Skeini cases being ones of note, but not the only ones.

d. Hybrid justice

Another alternative is what is known as hybrid justice or mixed justice. While the processes I have been describing so far are either international, or domestic, in some instances hybrid processes are created, in part because of some of the criticisms that might be raised of other accountability processes, which I will turn to shortly. Hybrid processes are located within the country affected by the crimes, but are not purely domestic trials. Instead, they utilize a mix of domestic and international judges, lawyers, staff, or all of the above, to try crimes of international concern and in some instances to try crimes in domestic law as well. Examples of hybrid processes include those in East Timor, Kosovo, Sierra Leone, which I will discuss shortly, and the recently initiated Cambodia process. Each is structured a bit differently, and there isn't enough time to discuss all of them, although we can during the discussion period. What is critical about them is that they are meant to combine the immediacy, including access of the population and the victims, to the accountability process, that national trials may provide, with the expertise, resources, and lack of bias that international trials are meant to offer. In practice I will note, from the experience of the Special Court for Sierra Leone, these institutions while well-intentioned do have significant faults.

e. Traditional justice

Traditional justice processes are sometimes used, or recommended to be used, where none of the above processes are sufficient, or where there is a local demand for its use. Traditional justice is difficult to sum up because, of course, it derives from local processes and traditions, which vary not just from country to country, but across cultures and communities within countries. Broadly speaking, they are non-penal modes of justice and conflict resolution, that involve apology, reconciliation rituals, and/or reparations. A well-known example is the use of *gacaca* in Rwanda, where the ICTR was tasked to handle only a few of the gravest cases, and the national court system was overwhelmed by the scale of violations and perpetrators. Traditional justice clearly has virtues, such as local legitimacy, but may also prove problematic, as it will fail certain due process and human rights standards.

Criticisms of accountability processes

So much for the almost bewildering array of accountability processes. Before we turn to some of the criticisms, it is worth being clear about what they are meant to do, as we shouldn't criticize them for failing to achieve goals they haven't been set.

a. First, what is accountability for?

In promoting accountability, we often argue it is for a variety of things. These are not all compatible or achievable in every situation, so it is worth being clear about the range of goals we might hope it could achieve:

- (i) retribution: punishing wrongdoers

- (ii) education for society
- (iii) demonstrating a break with the past
- (iv) vindication for victims
- (v) deterrence of future abuses

There isn't sufficient time to talk about all of these purposes, although we can during the discussion period.

b. Criticism 1: it doesn't do what it says it does

A first criticism might be that accountability doesn't do what it claims, and this may, unfortunately, often be the case. There is very little evidence that deterrence works in this context. Victims may feel their claims have been vindicated, but often too they are further traumatized. If a process appears to be undertaken with a political agenda in mind, then there may be no clear break with a past in which the judiciary was, at best, a political pawn. Society may be educated, but trials can also be hijacked by the accused to solidify hardline positions. We have only to think about the behavior of Slobodan Milosevic at his trial. Trials may also have relatively little impact at all if they are held away from the society most affected. This was an early criticism of both of the *ad hoc* tribunals, neither of which heard cases in the countries affected.

c. Criticism 2: it is too expensive

A second criticism may be that accountability processes are too expensive. It is true that they are not cheap. The two *ad hoc* tribunals for the ex-Yugoslavia and Rwanda will each have cost over \$1 billion by the time they finish work. The Special Court for Sierra Leone, comparatively cheap, will cost over \$100 million. However, this begs an obvious question: too expensive in comparison to what? Studies have found international criminal prosecutions not to be individually more expensive than, say complex federal prosecutions in racketeering/mafia cases in the US. Certainly international crimes are at least as complex as those. The real question is, then, whether the cost is worth what is achieved, with reference to the goals noted above, or potentially worth the trade-off, if there are other pressing demands in post-conflict or post-atrocity societies that we think might merit these monies. These are judgments to be made, and not easy ones, that we can discuss more during the question period.

d. Criticism 3: it undermines peacebuilding

A final major criticism, although there are many more that have been made, is that pursuing prosecutions or accountability through any of these mechanisms undermines either conflict resolution or peacebuilding. It may be argued that fear of prosecution will prevent combatants in a civil war from reaching a peace agreement, or that, once such an agreement is reached, attempts at accountability lead them to resume violence. The evidence here is

mixed. Fighting forces do often demand amnesty, and have been known to withdraw from processes where it could not be guaranteed. They have also engaged in violence in some instances where prosecutions have occurred. However, this is not always the case, and any assessment would need to be context-specific.

Lessons from Sierra Leone?

I want to turn now briefly to the experience of the Special Court for Sierra Leone, or SCSL, because it illustrates some of these limitations and may also cast light on challenges for the International Criminal Court. The SCSL was established in 2000 by agreement between the government of Sierra Leone and the United Nations as a hybrid tribunal. I conducted field work there in the summer 2004, as substantive arguments were getting underway. While the SCSL clearly has important goals, and a talented set of judges, lawyers, and staff, a number of criticisms were persistently raised in my interviews.

- a. The court is somehow a political tool. Many interviewees suggested the court was either “Kabbah’s court”, meaning constrained by the preferences of the Sierra Leonean president, or a “US-UK court”, with somewhat more complex implications. In particular, the indictment of some, such as Chief Sam Hinga Norman, and not of others, including potentially Kabbah, were points of concern.
- b. The court could undermine peacebuilding. Some raised concerns that combatants would refuse to demobilize with the threat of prosecutions looming, or that in particular Hinga Norman’s supporters would use violence to stop his prosecution.
- c. The court is not relevant to the society or the victims. While sitting in Sierra Leone, and open to all in principle, the SCSL is not accessible to most in the country because of poverty and limited literacy. The outreach office has had an uphill battle in this regard, while doing an admirable job.
- d. The court has a negative impact on the victims. Some concerns were raised that victims were being re-traumatized, despite the best protection efforts at the victims and witnesses section of the Court, because of the repetitious nature of their statements of what happened to them. Many had made such statements to human rights groups, the truth commission, and then the Court.
- e. The money might have been better spent on peacebuilding in the country, say, support to the essentially collapsed judicial sector. This is partly overstated, because international donors were targeting specific funds for this as well.
- f. And of course, with the transfer of the trial of Charles Taylor to the Hague for trial, one of the key virtues of the SCSL has been undercut. It is no longer a localized body to which the population has access, but a distant one. This

may have been necessary for security purposes--it almost certainly was--but is problematic nonetheless.

Prospects for the ICC

The criticisms outlined above and the experience of the Special Court for Sierra Leone should encourage us to be cautious about what the International Criminal Court can accomplish, and about some of the possible pitfalls of its operation. It is now engaged in three active investigations--in the Darfur region of Sudan, in the north of Uganda, and in the Democratic Republic of Congo, and some of the concerns raised are already apparent. In the case of northern Uganda, the indictment of members of the Lord's Resistance Army, and the lack of open investigation into crimes allegedly committed by the Ugandan military, have both hampered peace negotiations, and raised concern about political manipulation. The Sudanese government not only refuses ICC investigators access to the Darfur region; in my interviews in Sudan fear of arrest of some officials was one of the reasons for the government's refusal to allow an expanded UN-AU force in the region. This may make little sense factually yet simultaneously be true. Time prohibits discussing the various ways in which the ICC may face the pitfalls discussed above, but we can discuss it in Q and A.

VII. Conclusion

By way of a very short conclusion, so that we can move into discussion, I have tried to highlight really two things. First, the rapid development and creativity of mechanisms for accountability. Particularly since the end of the cold war we have seen a rise in institutions, and numbers of cases, at all levels. We have also seen a creativity in type of mechanism, as illustrated by hybrid tribunals and the use of traditional justice. However, there is a second point, one of caution against excessive optimism. This is that these institutions can be unwieldy, and can fail to achieve their stated aims or even be counter-productive. This is by no means to suggest that we shouldn't continue to pursue accountability, but rather that we need to be attentive to its pitfalls, and to promote creative solutions and mechanisms in the future. Thank you for your time and attention, and I would be happy to take any questions.