

Politics of the International Criminal Court 2001

I first became concerned about international criminal proceedings as part of the research for my book on peace-making. Neither of the existing tribunals, for Rwanda and Bosnia, seem to be contributing to solidifying the peace in those two places. What is more, indicting Milosevic was impossible while the peace-making process was in its infancy. The "criminal" was essential to making peace. And yet, justice, blame and memory are indeed integral to building an enduring peace, so concerns about these questions need to be handled with polish and integrity. Furthermore, neither tribunal serves as a model of effective judicial procedure: they are expensive, arbitrary in their indictments, excruciatingly slow and conduct their business hundreds of miles from the communities affected by the cases.

Among the seven cases in my book on peace-making, South Africa's Truth and Reconciliation Commission stands in marked contrast to UN mandated courts, as a process by which the warring community handled thousands of cases and contributed directly if imperfectly to the peace-making process. In the context of attempts to bring a war to an end, the outcome in South Africa looks settled, while those in Bosnia and Rwanda do not.

Now to more general qualms about the planned ICC, in no particular order.

1) The International Criminal Court has an oddly lop-sided group of advocates - Europeans and a few South American countries and a smattering of others. I cannot help noticing that China and Japan, India and Pakistan and Iraq have not signed on at all. I cannot help noticing that almost none of the Arab nations signed on until the very last moment, like the Israelis and the US, though the hesitations in the Arab world were much less widely publicized than those in the US and Israel. Unlike many progressives, I have some sympathy with official US reservations. American interventions in others wars are commonplace, by aid workers as well as by soldiers, and the court is not likely to make this challenging work any easier.

2) The catalogue of crimes in the current Rome agreement represents the embodiment of bureaucratic thinking, with too little understanding of the ways in which war might be distinguishable from criminal behavior. Which perhaps it is not, but if it were, the current definitions of criminal behavior are flawed in two ways. Firstly: the types of behavior made illegal are identical in all three arenas: war crimes, crimes against humanity and genocide. The only distinctions are in the victims. War crimes are perpetrated against soldiers, crimes against humanity are against civilians and genocide is directed against racial etc. "others." Secondly: these are very crude distinctions in a time when wars are often framed in ethnic terms and 95% of all casualties are civilians. I side with Walzer here and argue that war crimes trials ought to be paying particular attention to torture, massacre and slavery.

3) I remain concerned that, with "Just War theory" as a central rationale for the creation of an international court, the framers have proved incapable of defining "aggressive" war, which Just War declared to be illegal centuries ago. While I have never been inclined to rest much faith in Just War theory, preferring instead to see war in Elaine

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Scarry's terms, as a mechanism for achieving irreversible outcomes, the failure to define aggressive war does call into question the basic mission of the court.

4) I fear that the existing UN tribunals are a harbinger of things to come in relation to the peoples whose actions will actually be subject to the court. Poorer nations will be called to account, while the rich, the nuclear armed, the white, the English speaking and in particular those who have 2 or more of these qualities, will not. I see little chance that the various parties in the Troubles in the North of Ireland would have gone on trial (though I acknowledge that the European Court of Human Rights did stop some of the worst of the London government's excesses). I see little chance that Russia and Israel and the Palestinians would go on trial, because the wars in Chechnya and in Israel/Palestine are freighted with too much international baggage. Others wars would be much more likely to be scrutinized.

5) I have seen three examples of the existing Tribunals behaving with alarming impunity. The first occurred on the occasion of the Milosevic surrender, when the rich nations simply blackmailed Serbia into handing the man over. The second has just happened. The UN's prosecutor in the Milosevic case, Carla del Ponte, reacted to the Yugoslav Constitutional Court's decision overturning the Serbian government decree for cooperation with the Hague Court, by claiming that Serbia could simply hand people like Milosevic over without any procedure or rationale. The third event in Arusha, led to the release of a key perpetrator in the Rwandan genocide because the prosecutors had failed to act in accord with the timelines set out in their own procedures.

Now, finally to the center of my own work on the court, which relates back to questions about peace-making. I have begun to think that most scholars who focus on forgiveness and reconciliation at the end of wars are missing the degree to which the first phases of peace depend also on mercy. Reflections on the TRC process led me to wonder where amnesty and mercy are to be found as prerogatives of the court or the UN system more generally.

So I am studying sentencing and the court, with the following among my questions/ concerns/hypotheses: Sentencing models now in use seem too European in their approach, with a sadly enlightenment arrogance about them - "how civilized we are to abhor the death penalty, while these Rwandans are crying out for it." Fundamental to "western" rationales for punishment is the notion of retribution, while in other communities punishment has a cleansing function. The court as now constituted lacks the requisite mechanisms for acting mercifully -- the identifiable sovereign leader, the spiritual justifications, the simple power to decide that some case or series of cases must be addressed mercifully.