into the proceedings the complex structural causalities of the vexed history of the Balkans as a pawn in the Great Power politics that had so carefully been left out when the material and the temporal jurisdiction of the Tribunal had been framed. And now it is Radovan Karadzic's turn. There is no reason to be surprised by his chosen strategy that has been described by his defence counsel as one of 'fighting for history'.

War-crimes trials are acts of remembrance, and that of forgetting. Histories may be re-ordered through trials. Memories may be erased in them. Whatever 'truth' will be produced by them will not be ideologically innocent. As well-intentioned and transformative as war-crimes trials may be, they are never free of implications for the accuser. It is important that we are aware of this, aware of the deeply political nature of the process; it is only then that we can reach for more consistent and fair procedures. While war crimes trials are judgments on history, history will ultimately judge our conduct of these trials.

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MEANDERING ALONG THE ICL PATH
WHERE ARE WE HEADED?

• KIRSTEN J. FISHER •

International criminal law (ICL) is still a fresh adventure. In an attempt to respond to atrocities that 'shock the conscience of humanity' (United Nations 1998), there were starts and stops and stumbles. The project of holding individuals accountable developed slowly, then came to a halt before regaining momentum; it faced charges of partiality and injustice, but is seen by many as a bright path in a fight to end impunity for perpetrators of pervasive and purposeful mass political violence. The current main debates concern the right institutions by which to administer ICL, including whether any judicial mechanism is necessary, or even reasonable, for transitional justice (see Tutu 1999). A major challenge is in developing an institution that can balance the ownership needs of a community with the need for a certain level of external evaluation of cultural practices and values, and the cessation of impunity for local powers.

Serious problems that overwhelmed the effectiveness of the first 'international' judicial mechanisms—post-Second World War tribunals, Nuremberg and Tokyo—still burden, to differing degrees, subsequent attempts at post-atrocity response. These are problems of authority, selectiveness and legitimacy, and with the validity of *ex post facto* or retrospective law. Questions of authority point to the legal basis for the judicial institution's existence. Selectiveness in prosecution is the perceived or very real choice by the court's agents to prosecute some perpetrators and not others. The application of *ex post facto* laws involves

charging individuals for crimes which were not previously established as punishable offenses under the legal system before which the defendants are to stand trial. In many cases, these problems aid in creating a problem of legitimacy. Legitimacy, in this context, is the perception of legitimacy for both the international and the local victimized populations, pointing to 'whether or not various local and international communities are likely, as a practical matter, to "buy in" to the approach and treat the activities of the institutions involved as legitimate' (Dickinson 2003: 301).

Nuremberg and Tokyo, as prototypes, exhibited all of these problems. They were established with specific agendas by the Allied victors, to try their vanquished enemies of war; the trials were restricted to punishing only European Axis war criminals (Nuremberg Trial Proceedings 2008). Both institutions were criticized because the judges were appointed by the victors and therefore, it was argued, could not be impartial. Furthermore, they applied *ex post facto* laws, charging individuals for actions which were, at the time committed, not technically crimes. This was the case for crimes against humanity (which had only once ever been used as a warning of personal accountability),[1]and the charges of planning, initiating and waging wars of aggression and other crimes against peace (which were truly newly conceived crimes).

Since Nuremberg and Tokyo, the subsequent two generations of international judicial mechanisms—international tribunals originating from the UN Security Council exercising its Chapter VII authority (ICTY and ICTR), and the International Criminal Court (ICC)[2]—as well as other judicial mechanisms such as domestic courts and hybrid courts (e.g. the Sierra Leone Special Court and the Extraordinary Chambers in the Courts of Cambodia), struggle to achieve a balance between the needs and capabilities of the local and international communities. Hybrid courts are established within the territory where the crimes occur, combining local and international faculty. Like the ICTY and ICTR, they are *ad hoc* institutions, created to deal with particular situations, for an established period of time, and therefore stand in stark contrast to the ICC which is a permanent court, with established and promulgated laws, far removed from the geographical scene of the atrocity or subsequent recovery.

Justifiable authority may be less a concern for courts of more international agency, the ICTY and ICTR (established by the UN Security Council) and especially ICC (treaty-based), than for their predecessors, Nuremberg and Tokyo, but domestic courts are probably the best at establishing legal authority. They are, of course, the traditional instruments of criminal law. Domestic courts, under international law, have the right to try cases in which the defendant is a national of the state, the victim is a national of the state, or there is some national security issue at stake. These courts, however, are most prone to fall victim to criticism that they are instruments of 'victor's justice' or show trials. Most often, like international tribunals, domestic courts must establish new special courts empowered to judge particular crimes and particular defendants. Since it is likely that domestic trials will be a new regime trying the old, the strong need for convictions and desire for harsh punishment will raise doubts about the presumption of innocence by a court that has been appointed in the clear hopes of establishing the guilt of the preceding regime. For hybrid courts, the legal authority comes primarily from the domestic context, but establishing *ad hoc* hybrid courts, of course, presents the challenges of introducing new features to old systems since the applicable law is domestic law which has been

adapted to conform to international standards. And so, as with domestic courts, there are concerns about selectiveness of prosecutions and applying *ex post facto* laws. Conforming domestic law to international standards is often challenging, so trying cases in domestic or hybrid courts sometimes involves prosecuting individuals for crimes that were not crimes under domestic codes at the time of commission. And so, the further removed from the affected population the judicial mechanism is, the more objective it is generally perceived, but the more questions arise concerning its legal authority.

Hybrid courts may be better at achieving both domestic and international legitimacy than either a purely domestic or purely international alternative, but their *ad hoc* nature causes too many practical problems, from the speed with which they are prepared to deal with cases to the inter-agency co-operation. And then, there is still the possibility of legitimacy concerns when international actors wield more power than locals; 'such hybrid relationships can raise new questions about who is really controlling the process' (Dickinson 2003: 306). While hybrid courts seem like a good compromise between the capacity-intensive international court and the community-owned national courts, the main problem for hybrid courts is the retrospective application of international criminal laws if they have not previously been acknowledged or applied at the domestic level.

And so, is there possibly another direction on this path we should consider? A less *ad hoc* institutional alternative might be the best option for satisfying most of these problems of balancing community ownership and perceived legitimacy with adherence to basic legal standards. Is it possible that a move to a regional criminal courts system might be the next step along the ICL path? Regional courts may offer a solution to this problem of applying *ex post facto* law, while at the same time employ agents more closely associated with the local affected population, therefore improving perceived legitimacy. And a treaty-based court system would solve the problem of authority as it did for ICC. There are a few regional courts the purpose of which is to try cases of human rights abuse. The most recently established is the African Court on Human and Peoples' Rights in Arusha, Tanzania, which entered into force in January 2004. There is also the European Court of Human Rights and the Inter-American Court. None of these courts, however, can try individuals for human rights violations; they can only determine state accountability. A regional court with criminal judicial capabilities is currently only a theoretical possibility, but one that requires consideration since it may be the solution to problems that current institutions struggle to solve, those of authority, legitimacy, selectiveness and *ex post facto* law.

Regional courts may face few serious legitimacy concerns. They could provide the answer to the tension between objectivity and community ownership, and may be a plausible alternative to any of the preceding options if they are constructed as permanent standing courts with international and local judges and lawyers within the geographical region in which the crimes occurred. These courts may be able to incorporate respect for certain cultural values distinctive to the region better than a single global permanent court housed half way across the globe. An Africa Regional Criminal Court, for example, guided by international standards and supplemented by international capacity, could be the answer to any concerns of Western imperialism in a different form.

In a meandering search for the most effective post-atrocity individual accountability mechanism, a regional court system might be the best option, and yet, if it is a viable

option, it is one far down the path. The ICC has just begun to try its first cases, other mechanisms are still being experimented with, and new options are not now being entertained. But, this long look down the path might show us where we possibly ought to be heading.

NOTES

[1] In fact, After World War I, an international war crimes commission recommended the creation of an international tribunal to try, in addition to war crimes, 'violations of the laws of humanity', but the US representative objected to the reference to the laws of humanity on the grounds that they were not precise enough for criminal law (see Cryer et al. 2007: 187).

[2] Although distinct in characteristics, these categories do not represent pure temporal succession.

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TRUTH COMMISSIONS AND THE END OF HISTORY

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Transitional justice refers to a set of judicial initiatives that have been used in so-called post-conflict societies in transition from war to peace or from authoritarian rule to democracy. By the turn of the millennium, transitional justice had become a dominant global model and the list of countries that have undertaken some form of transitional justice is large and constantly growing. Truth commissions are a popular form of transitional justice. They are defined as investigative bodies that have been mandated by their sponsor governments to clarify controversial historical events and contribute to