

THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE

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CEDRIC RYNGAERT
(editor)

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Cedric Ryngaert (editor)

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¹ See for more information: www2.law.uu.nl/english/sim/costaction28/.

² At the time of writing, this report, although submitted, was not yet officially available. It should be posted on www2.law.uu.nl/english/sim/costaction28/reports.html.

INTRODUCTION

CEDRIC RYNGAERT

‘Being effective’ is generally understood as having the quality of ‘producing a desired or intended result’.³ Thus, the effectiveness of an institution, such as an international criminal tribunal, can only be measured by comparing the institution’s stated aims and anticipated results with the realization of those aims and the actual results. Quantifying the effectiveness and the impact of the institution on the public goods it is supposed to deliver and the stakeholders it is meant to serve is in itself an extremely tall order. However, the mere identification of the aims, results and data on which the comparison is based is already a first, crucial step. It may set the stage for more thorough empirical research by social scientists.

In that sense, this volume is reluctant to be overly ambitious. Impact and effectiveness assessments of international criminal justice are still in their infancy, and it would be methodologically inaccurate to rashly ascribe, for instance, apparent political reconciliation in post-conflict countries to the fact that certain international criminal tribunals have taken amnesties into account, or the apparent well-functioning of domestic criminal tribunals to the threat of prosecution of presumed offenders by international criminal tribunals. From an empirical perspective, clearly, the causal link between international criminal justice and a durable peace, political reconciliation, and the entrenchment of the rule of law has not yet been conclusively proven.

However, it is conspicuous that most policy-makers in international criminal justice circles do believe that such a link exists, in spite of there being no strong empirical evidence to that effect. The drafters of the Rome Statute of the International Criminal Court (ICC), for instance, clearly believed that the participation of victims of international crimes in the ICC’s procedure could enhance the sense of local ownership of faraway criminal procedures, and thus positively impact on societal reconciliation. And the international criminal tribunals’ increased attention to the human rights protection of the defendants before the tribunals is at least partly informed by the tribunals’ belief that they should serve as human rights beacons for the societies they are meant to pacify

³ Cf. *The Concise Oxford Dictionary*, 10th ed., 2001, Oxford, Oxford University Press, 2001, p. 456.

(and of course by the less instrumental rationale of every human being's dignity).

International policy-makers' belief in the peace and reconciliation-promoting role of international criminal tribunals, unhindered by political imperatives, is nicely illustrated by an op-ed from former ICTY Prosecutor Louise Arbour – arguing against a UN Security Council suspension of the ICC's investigations in the Darfur/Sudan situation – in a recent issue of the *International Herald Tribune*:

'The ICC was founded on the principle that accountability for the world's most serious crimes is a prerequisite for long-term peace and security. It is presumably with that in mind that the Security Council referred the Darfur case to the ICC in the first place in 2005... Justice is a partner to peace, not an impediment to it... There is little hope for the promotion of the rule of law internationally if the most powerful international body makes it subservient to the rule of political expediency.'⁴

It is the main aim of this volume to outline the dominant effectiveness discourses in international criminal and transitional justice circles, and to make a preliminary assessment, without yet conducting empirical research into the actual impact of specific justice processes.

Before embarking on this exercise, it is useful, first, to take a step back, and to reconsider why the promoters of the first international criminal tribunals – the International Military Tribunals of Nuremberg and Tokyo – thought that the establishment of those tribunals would be the most effective solution in order to deal with the large-scale atrocities committed during the Second World War, and to effect societal reconciliation. In the first substantive contribution to this volume, Erik Andre Andersen traces the roots of those historic tribunals, and appraises their processes and significance from an effectiveness perspective. What is quite probably the most important legacy of the tribunals in this respect is that, by meting out *individual* criminal justice, they were able to attribute individual instead of collective guilt, thereby paving the way for the reconstruction of the war-ravaged former Axis powers. The successful reconstruction and pacification of both Germany and Japan are of course not solely attributable to the atonement effect of the military tribunals, but it is undeniable that the tribunals served as a flashpoint and a watershed, allowing both countries (although Germany probably more than Japan), and the international community at large, to come to terms with a recent bloody past, and to move towards a brighter future.

The other contributions focus on the effectiveness of the current international criminal tribunals and are thus of topical value. Mikaela Heikkilä sets the stage

⁴ *International Herald Tribune*, 16 September 2008.

for all other contributions by setting out the conceptual parameters that can affect performance and evaluations of the international criminal tribunals' effectiveness. Because it is important to fully understand the methodological issues involved in effectiveness evaluations, this contribution is essential reading. It helps to frame the issues which are later addressed in the book, while also dampening the impact expectations we may have from the tribunals. Heikkilä espouses a very innovative approach, drawing on the 'balanced scorecard model', which she borrows from accountancy and adapts to the very specific nature and ambitions of international criminal tribunals. Of course, unlike the performance of a business, the effective performance of a tribunal cannot simply be measured by comparing numbers, e.g., the number of those indicted with the number of those convicted (the conviction rate). However, as Heikkilä deftly demonstrates, other performance indicators – one could say the less numerical ones – could shed some light on the effectiveness of the tribunals in a most useful manner. For one thing, like any organization, an international criminal tribunal has a mission, a strategy, a vision. Even the mere establishment of international tribunals reflects a vision of the international community – the desire to see justice done – and a conviction that, somehow, they will be effective – in the sense of contributing to a lasting peace.⁵

Admittedly, 'deconstructivists' may argue that some international criminal tribunals, such as the ICC or the ICTY, were never conjured up to really function.⁶ They may have been established out of a sense of guilt – the major powers not having been able to prevent atrocities – and could thus be seen as mainly symbolic gestures; the tribunals' promoters may never have thought that they would actually bite. As such they may be seen as a sign of impotence *vis-à-vis* atrocities. Yet it remains no less true that the actors *within* the international criminal justice system, e.g., the prosecutor, as opposed to the political operators behind the scenes, tend to interpret the tribunals' mandate quite literally, broadly, and idealistically, as indeed requiring criminal prosecution for peace and justice to prevail. The purpose and mission of the tribunal as interpreted by the

⁵ Cf. UN Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993), preamble ('Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them; Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace, Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed').

⁶ E.g., F. Hartmann, *Paix et châiment*, Paris, Flammarion, 2007, p. 24.

tribunals' actors themselves should therefore be used as the primary point of reference for an effectiveness assessment of the work of the tribunals. It would indeed be rather nonsensical to compare what the tribunal delivered with the purposes and mission as contemplated in backroom dealings by diplomats: as nothing was really expected, such a comparison will almost inevitably yield a high success score in terms of effectiveness. It would be a fascinating endeavour nonetheless to study the way international criminal tribunals rise above their initial political instrumentalization and render the tribunal effective for humanity: to bring perpetrators of the gravest crimes to book and thereby to contribute to political reconciliation. For the tribunals, this involves truly realizing, and anticipating, that during the life of the tribunal, the political powers will attempt to instrumentalize them, e.g. by refusing to bring sufficient pressure to bear on States that are unwilling to arrest indicted persons, or by withholding evidence.

Returning after this brief digression to factors indicating the performance and effectiveness of international criminal tribunals, it is notable, as Heikkilä also points out, that the effectiveness expectations are not only shaped by the international political community that has established the tribunal, but also by a variety of stakeholders, victims in particular, but also civil society groups (NGOs) and defendants. The rights and interests of defendants and victims are the subject of the next two contributions to this volume.

Obviously, the perpetrators themselves are the main 'stakeholders' in international criminal justice, in the sense that they, as defendants, are the object of criminal proceedings. In fact, international criminal justice has so far concentrated excessively on the perpetrator, thereby neglecting the interests of the victims and the wider community, thus possibly reducing the overall effectiveness of the proceedings. In addition, while concentrating on the perpetrator, the tribunals may have overemphasized the need to bring the perpetrator to justice at all costs, in accordance with their mandate to end impunity. As a result, they may have paid insufficient attention to the duties which they have *vis-à-vis* the perpetrator (as opposed to an international community intent on breaking the cycle of violence and impunity), and the corresponding human rights of the perpetrator. As we write, however, few would doubt that the international criminal tribunals should comply with basic human rights standards (although the exact legal source of that normative statement is still unclear).⁷ For Masha Fedorova, Sten Verhoeven and Jan Wouters the link with effectiveness is readily apparent: no effective justice could be meted out without procedural fairness. *Effective* justice is indeed different from simply putting the accused safely behind bars. If the tribunals are resolved 'to guarantee

⁷ See also the special issue on human rights and international criminal tribunals, *Human Rights and International Legal Discourse* 2009/1.

lasting respect for and the enforcement of international justice',⁸ they cannot possibly sacrifice one aspect of justice (the human dignity of those who stand trial) for the sake of another (the imperative to fight impunity). Effective justice requires that they bring international criminal law to bear on the presumed offenders, while at the same time protecting the substantive and procedural rights of those offenders to the greatest extent. This is not to deny that both aspects of effective justice will never clash. They will, e.g., when fairness mandates that the violation of certain procedural rights of the defendant is remedied by a stay of proceedings or the dismissal of jurisdiction. But for international criminal tribunals it is important that they develop a principled approach to getting to grips with those issues; only by ensuring effective prosecution and safeguarding the interests of the defence will effective justice be administered.

The effective administration of justice not only requires criminal prosecution and respect for the rights of the defence. In recent times, voices have been raised to also include victims of atrocities in the circle of affected stakeholders entitled to certain procedural rights within the international criminal justice process. It is believed that victim participation increases the local ownership of an at times faraway justice process and allows victims to tell their story in a courtroom and directly vindicate their interests, thereby enhancing the impact on the ground of that process. In her contribution, Brianne McGonigle examines how victim participation could be given shape most efficiently in two international/internationalized criminal tribunals which have been at the vanguard of granting and implementing victims' participatory rights, the ICC and the Extraordinary Chambers in the Courts of Cambodia (ECCC). She focuses on internal, systemic efficiency, which implies that she does not specifically look at the extraneous effectiveness of victim participation on the victimized society. Rather, assuming, in line with previous socio-legal research, that victim participation in the international criminal justice process is itself a global public good contributing to the healing of wounds in the victimized society, McGonigle looks into how victims' participation could, from a technical perspective, be maximized at the ICC and ECCC. Of course, this requires the tribunals to tread carefully, as the full realization of victims' rights may be to the detriment of the interests of other stakeholders (the international community, the defence), which might, in the end, detract from the overall effectiveness of the tribunals' work. She is particularly charmed by the efforts of the ECCC (notably an institution which has come in for a great deal of criticism for its alleged politicization and venality), which has indeed gone to great lengths to accommodate the rights and interests of victims. By including them in initial legal documents, the tribunal's backers have forestalled lengthy and costly legal wrangling in the courtroom. This legal

⁸ Last preambular paragraph of the Rome Statute of the ICC.

wrangling has unfortunately taken place at the ICC, the founding documents of which have given a lot of leeway to the Court to implement victims' rights.

Victims and defendants are in fact rather new stakeholders 'served' by international criminal tribunals. Because of the international nature of the crimes adjudicated by the tribunals, the international community of States may be seen as the main stakeholder. It is *the* stakeholder who in the end will determine the success and effectiveness of the tribunal. For one thing, it is the international community of States which decides to set up international criminal tribunals, by international agreement (e.g., the Rome Statute establishing the ICC), through international organizations (e.g., the UN Security Council resolutions setting up the ICTY and the ICTR), or through a mixture of both (e.g., the agreements of the UN with Sierra Leone and Cambodia, resulting in the establishment of 'hybrid' tribunals). For another, it is the continuous funding of the tribunals by States which guarantees their longevity and eventual effectiveness. Of course, not all States have been particularly keen on supporting international tribunals, which may be seen in some quarters as agents of Western imperialism. Indeed, the tribunals' staunchest supporters have been Western countries, European ones in particular. In their contribution Sudeshna Basu and Jan Wouters analyze in greater detail in what ways the European Union has backed the Court. Doubtless, the lifeline and diplomatic support offered to the ICC by Europe may allow it to function relatively effectively, although one may wonder whether the perception of the Court as a European court for African States does not blunt its legitimacy and eventual effectiveness in (post-)conflict countries.

The first part of this volume has an *internal* focus. It examines to what extent the effective functioning of international criminal tribunals could be enhanced, e.g., how could the rights of the defence adequately be secured, or how could victims participate fully in international criminal justice processes? Limiting the effectiveness analysis to the effective functioning of the tribunals would be to miss half of the picture, however. One cannot assume that a well-functioning tribunal will also produce a desirable state of affairs in the (post-)conflict society which it is meant to serve. This touches on the question of whether it is in fact a good idea to endow an international criminal tribunal with the mandate to bring perpetrators to book. Is it really a good idea to establish an international tribunal, if the ultimate aim is to make the difference 'on the ground'? Can international criminal tribunals effectively contribute to peace and reconciliation in post-conflict societies? While the question itself is a rather straightforward one, the answer thereto is extremely complicated. It definitely requires more empirical research into the impact of retributive justice mechanisms on victimized societies. It is not the ambition of this volume to provide definitive answers, certainly not in the second part. Nonetheless, in a number of contributions

alternative mechanisms for providing effective justice will be explored and be contrasted with international criminal justice. These mechanisms – such as domestic criminal prosecutions, reparations, and the restitution of property – may be viewed as *complementing* international criminal justice efforts. After all, the international community may be seen as having a *duty to prosecute* international crimes, with all other ‘transitional justice’ efforts being of an optional nature: useful, but perhaps not obligatory.

That view is changing, however. The international community seems to have realized that international criminal justice is not always that effective, and that at times it may even be counterproductive. As I outline in my own contribution to this volume, domestic prosecutions are no longer seen as complementing international efforts, rather to the contrary. The drafters of the ICC Statute and the ICC Prosecutor have come round to believing that effective prosecution is best served by endowing *domestic authorities* with the primary duty to prosecute, with the ICC only having a complementary role to play (the ‘complementarity principle’). Because of their proximity to the crime scene, their ready access to evidence, the presence of victims, and the anticipated beneficial impact on local reconciliation processes, local prosecutorial efforts present some distinct advantages over international prosecution. Therefore, international prosecutors, rather than attracting as many situations and cases as possible, should make sure that they enable local authorities to assume their responsibility to investigate and prosecute. This ‘positive’ complementarity approach necessitates a complete, effectiveness-oriented rethinking of the role of international criminal justice. In practice, however, as I illustrate in my contribution, discussing the four situations which the ICC is investigating, the Court has not always lived up to the standards it has set for itself, and has attracted situations which local authorities could well have dealt with on their own, at least when some (gentle) pressure had been brought to bear. One should bear in mind in this respect that the genuine promotion of the rule of law in post-conflict societies requires strengthening domestic institutions rather than transferring cases to the international level. The internalization of the triumph of law over power, especially in relation to political and ethnic violence, can only successfully take place when the example is set *within* the society whose fractures are to be healed.

Therefore also, one could only applaud the referrals of cases by the ICTY and the ICTR back to States. Whilst the ICTY and the ICTR enjoy primacy of jurisdiction *vis-à-vis* States, it has become apparent that the tribunals could not close shop on time if they were to see through all the indictments. Thus, the tribunals’ completion strategy has mandated the referral of cases to domestic courts (not necessarily in the State where the crimes have been committed), subject to certain standards. In her contribution, Inneke Onsea outlines the hobbled process of referrals from the ICTR to Rwandan courts under Rule 11*bis*

of the ICTR Rules of Procedure and Evidence. Because the ICTR referral bench has set rather high due process standards for referrals to the Rwandan court system, cases have so far not been referred to Rwandan courts. While one could have expected a backlash against the tribunal's attitude – which has indeed occurred in the past – the ICTR's gentle prodding has spurred still ongoing legal reforms in Rwanda. This is a fine example of an international criminal tribunal being effective on the ground, within the society where the atrocities have been committed: thanks to the ICTR's jurisprudence, laws are revised and are brought into line with international standards, to the benefit of defendants, victims, and witnesses alike.

All this is still to assume that the most effective way of dealing with a violent past is criminal prosecution, whether it is international or domestic. This is an assumption that is not necessarily rooted in facts or backed up by empirical research. A competing assumption could well be that prosecution may precisely reopen old wounds, breed more resentment between rival political or ethnic groups than it eases, and may even fail to bring an end to an ongoing conflict. Those risks of prosecution have informed a practice of States granting amnesties to perpetrators of crimes, either on the government side or on the insurgents' side. Louise Mallinder argues that such a practice, while seemingly at loggerheads with a purported international *duty* to prosecute, should not always be condemned. Under carefully defined circumstances, amnesties can indeed bring peace to a (post-)conflict society. It is arguable that peace may at times outweigh the thirst for justice, in particular when combatants refuse to lay down their arms if they are not shielded, in one way or another, from prosecution, and the risk of a prolonged conflict is accordingly high. It remains to be seen whether long-term political reconciliation can do without any form of accountability for gross crimes, however. Given the need for some truth telling, repentance and atonement, blanket, unconditional amnesties for gross crimes should undeniably not pass muster, especially not if they are accorded to those most responsible or the ringleaders. Since empirical research into the actual impact of amnesties on the transformation of conflicts is sorely lacking, it is difficult to determine the ideal amnesty potion, though. Conflicts can be transformed and solved by a variety of mechanisms, including criminal prosecution, and thus it may well-nigh be impossible to isolate the contribution of one mechanism, such as amnesty. Therefore, Mallinder ends her contribution by calling on governments and researchers to develop more qualitative and quantitative research indicators with respect to the actual impact of amnesties on long-term peace processes. In the end, as already hinted at, this is also this volume's overarching plea: without enlisting the help of the empirical social sciences, the effectiveness of international criminal justice or alternative justice or peace mechanisms cannot adequately be measured, but only impressionistically be guessed.

It has been argued that amnesties, if accorded, ought to be conditional. They should be accompanied by atonement by the perpetrators *vis-à-vis* the victims. One measure, which may or even should also accompany (international) criminal justice efforts, is *reparation*, one of the darlings of the transitional justice movement. Reparation, as a modality of restorative justice, does not focus on bringing the perpetrator to account, but is aimed at undoing the harm done to victims. It is arguable that reparation, such as financial compensation, may be more effective, as it is more concrete and ‘material’ for the victims than abstract justice dispensed by an (international) criminal tribunal. In that sense, it may more effectively contribute to societal reconciliation.

If that assumption is indeed true – more empirical research into this needs to be done – the question arises as to what reparation mechanism is most appropriate. As Peter Malcontent examines: should financial compensation be obtained through judicial proceedings or political bargaining? Intuitively, one may be attracted by judicial proceedings, as these guarantee legal certainty on the basis of clearly enunciated principles of justice. Malcontent, however, demonstrates that the veneer of justice potentially offered by judicial proceedings is only thin, and that those proceedings have quite a number of unwelcome side-effects. For one thing, it can be argued that hard legal proceedings do not change a bad man into a good man, as the perpetrator can ‘pay’ for his guilt by simply paying financial compensation without atoning for his crimes. This hardly contributes to societal reconciliation. In contrast, in more political bargaining processes and dialogues, circumstances can be created that are more propitious to perpetrators asking for forgiveness, victims accepting reparation, and both parties willing to turn the dark pages of history. For another, the political process may provide an insurance against overshooting. The danger is real that the application of black-letter law – one might even say legal fundamentalism – adhered to by many tribunals may undermine reconciliation, as astronomic damages possibly awarded by courts may wreck the perpetrators or even the State financially. It may result in many turning against the newly-formed politico-legal consensus, and may contain the seeds for the eruption of a new cycle of violence. Political bargaining may then ensure that the reparation granted remains within reasonable bounds, while at the same time being guided by certain principles and guaranteeing that victims are adequately compensated.

Financial compensation is not the only restorative justice mechanism. Truth telling, the reintegration of former combatants and purification rituals can all potentially effect more systemic change than retributive criminal justice. So can the restitution of housing and property, as Antoine Buyse convincingly argues in the last article of this volume. Property restitution may notably remove the economic injustices of a conflict and thus positively contribute to societal reconciliation. Espousing a human rights approach (the right to housing), Buyse

outlines how property was returned after the Bosnian war. Like many justice processes, this restitution process was smirched with problems. Buyse interestingly pinpoints as the main obstacle the fact that restitution was taken hostage by political bargaining processes, instead of being based on individual human rights. This assessment does not necessarily conflict with Peter Malcontent's preference for political bargaining over judicial processes. It only serves to highlight the danger of decoupling claims in the framework of political processes from human rights principles. Buyse shows that property was only effectively restituted in Bosnia once the restitution processes became governed by the rule of law instead of political pragmatism. Thus, his contribution demonstrates that the successful impact of transitional justice mechanisms may crucially depend on their being embedded in a rights discourse. This rights discourse may in turn have broader beneficial effects on the entrenchment of the rule of law beyond mere transitional justice. If anything, also outside the retributive justice culture within which the international criminal tribunals work, law has a continuous vital role to play as a reliable and fair arbiter of sorts to settle post-conflict claims.

It would be understandable if the reader were somewhat disappointed after reading this volume. (S)he may have expected to find some compelling answers to questions relating to the effectiveness of international criminal tribunals and international justice. More than some tentative answers have not been provided, though. This is mainly because the contributors, who mainly come from the legal discipline, have not conducted empirical research into the effectiveness of international criminal tribunals *on the ground* in the (post-)conflict area. This volume wants to signal that this research is overdue, although at the same time, one should not be overoptimistic as to the success of this research. It will be difficult to identify the right parameters to measure effectiveness. And it will be extremely difficult to establish a causal link between international or transitional justice, on the one hand, and political reconciliation or long-term peace, on the other, since many variables may account for successful reconciliation.

Nonetheless, if one assumes that international criminal tribunals *can* have some beneficial effects for post-conflict countries, and their establishment thus serves a purpose, this volume has outlined what criteria should be met for the tribunals to be internally effective, internal effectiveness being understood as streamlining the functioning of the tribunals in order to satisfy the demands of the various actors which have a stake in international criminal justice (the defendants, the victims, the international community, the victimized society). This is already quite something.

It now remains to be seen whether empirical research can vindicate the international community's choice for the establishment of international criminal tribunals in order to effect societal change for the better in victimized societies.

Any relevant empirical research will probably be quite limited in scope, focusing at most on one society or geographic area. Any such research may possibly yield some conclusions as to the impact of international criminal justice, or as the case may be non-penal transitional justice, on reconciliation and atonement processes. Yet I am afraid that those conclusions will probably be context-specific, and not generalizable, e.g., in relation to any amnesty or any truth and reconciliation commission anywhere in the world. But I might be mistaken. Because I do not want to prejudge any research outcome, I strongly support ambitious empirical research that compares the impact of international criminal justice across various post-conflict zones. After all, all the funds allocated to international criminal tribunals and transitional justice mechanisms, supported by an array of consultants, are in dire need of justification. If those tribunals and mechanisms do not adequately work (e.g., they do not contribute to reconciliation, they do not promote the rule of law in any meaningful manner, they do not bring to a halt a climate of impunity...), 'received wisdom' as to their beneficial role should be challenged; they should be reformed, or they should be abolished altogether. Given the amount of money thrown at post-conflict justice, the stakes are indeed high.

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