

ATROCITY CRIMES LITIGATION: YEAR-IN-REVIEW (2010) CONFERENCE

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I would like to offer you today what some would consider a cynical view or a cynical perspective. The reason is to alert you to the hurdles and difficulties that one faces in the field of international criminal justice because to truly be an idealist, you have to know what the hurdles are and learn how to overcome them. Otherwise, you become an ineffective idealist.

When I was first appointed Chairman of the Security Council Commission and had the pleasure of meeting Professor David Scheffer, we were running into a lot of obstacles, most of which were coming from the U.N. bureaucracy. And at the beginning, I was convinced that this was a product of a mastermind conspiracy, until one of my fellow workers who had been at the U.N. for a long time said, “You really don’t need to think of conspiracies when you have the U.N. bureaucracy to deal with. It is capable of creating all of the hurdles of whatever conspiracy you can imagine and even more.” And so, I spent the next two years having to deal with the budgetary difficulties and the authorizations and the issuances of contracts and things which you all deal with and which are such significant impediments to an effective functioning of it.

Suddenly you find yourself, notwithstanding all of your good intentions and your good will in making the tribunal work, trying to advance the cases, cases that are taking an inordinate amount of time, with the tribunals getting blamed for their high costs and their slowness. Then it’s time to close the circle and come back to the conspiracy theory and say, well, maybe there was some method to the madness

of those who are doing that because you know, when you ultimately come back and you say, all right, let's look at these tribunals over the last few years and how many people have been indicted and how many of them have been convicted; what is the average length of a case and how much does it cost, and you say it costs an average of ten million dollars to prosecute a person. Big question mark—how long is international criminal justice law going to continue? So, you not only have the questions, at what price is international criminal justice and what is the effectiveness of it, but you also have those big questions about time and cost.

At which point I, having completed my various U.N. assignments, thought maybe I'll engage in an academic exercise of trying to find out what really happened in the field of conflicts since the end of World War II. And I went to a number of databases showing the number of conflicts and the number of victimizations, none of which were very satisfactory. Probably the best one is at the University of Michigan, which is working with a project in Sweden. It's understandable that you have difficulty in determining particularly the number of victims or contexts of different conflicts and also the legal characterization of the conflict so that you know under which category you're going to put them.

To give you a little bit of the raw data: after two and a half years of research with forty-three researchers working on five regions in the world, we came up with an estimate of 313 conflicts that took place in the world from 1948 to 2008, with a total number of victims—92 million people. You've got to stop and think—92 million people killed. Comparatively, that's twice as many people killed as in World Wars I and II put together. You sort of shift back from reading the hard data to something else and the something else that came to my mind is, whatever happened to the “never again?” You sort of do a psychological double take and you say, wait a minute. We just finished World War II and suddenly as of 1948 we have 313 conflicts, 92 million people dead, twice as many as World Wars I and II put together.

What did that produce? Did we reach something Professor Scheffer has been actively working on, namely, the responsibility to protect and thus some action, some intervention? What's the record of the Security Council? How many people were prosecuted? And I thought of asking a few more questions to our team of researchers. I said, "Let me ask you a general question. What did states in which these conflicts occurred do?" Our common experience would tell you that most states did nothing. But I said, let me try to prove it. And one of the indicia was that 127 countries had the audacity of passing general amnesty orders. And this was open and above board, unabashed. You know, wipe the slate clean—nobody committed any crime, no responsibility. You look at the rest and you start seeing selective prosecutions as you have seen in Argentina, or in Chile. And a thought came to my mind, "Well, let's get a few sociologists and statisticians together and say—assuming we had 92 million people killed and 313 conflicts over a 60-year period, how many people would it take to kill 92 million people?"

So the statisticians went back and forth and it went from one to three million people, and they took as a model both Nazi Germany and the USSR and said: if you have a certain genocide that involves the entire bureaucracy, such as the Nazis, you required a lot of people. But in a situation like Rwanda, yes, you required a lot of people as individuals but you're not involving an entire bureaucracy because no bureaucracy for all practical purposes existed. It was not an institutionalized system of violence within a bureaucratic system—it was institutionalized within a movement more than anything else. Suddenly the sociologists gave them all sorts of distinctions as to how you're going to classify these types of collective manifestations of violence. I said, all right. Let me settle for one million. That is a minimum figure we're not going to dispute.

And then we started looking actually at what I call the incongruities of international humanitarian law.

If you're Hamas, and you're trapped in Gaza and you have no way of leaving, and Israel has planes and tanks, what is the only weapon you can have? You can send suicide bombers, kill civilians, and send crude rockets, no matter where they land. That is the only way you're going to be able to respond to your opponent in any manner, whether it's meaningful or not meaningful is not the question. And then you find that in addition to that, you're dealing basically with people who engage in violence, who are not state actors, and who in addition to having to redress the military imbalance in the asymmetry of power, need to redress also the financial imbalance or economic imbalance. In other words, they need to fund their activities. And how are they going to fund their activities?

And suddenly you see a shifting of the gears which international criminal law does not recognize, from the combatant in the theoretically pure sense of the word to those who engage in organized crime. It becomes an organized crime activity indispensable to the funding of their activities. At which point you realize when you start sorting through these conflicts, that it's not that clear when these people started as genuine, ideologically motivated non-state actors and when they shifted to be a part of organized crime or whether it is the other way around. Charles Taylor wound up being a head of state claiming to be involved in some type of armed conflict, but in reality he started simply in organized crime activity. At what point are you going to distinguish Hamas as a genuine national liberation group fighting for whatever Marxist ideals they have, and at what point do you distinguish them as the protectors of the trafficking and drugs business in Gaza?

Now, their argument is that they need to do that in order to support their ideologically motivated military campaign, but the moment you get the mixture of that, you suddenly realize, wait a minute—if nothing else, international law in general, and international criminal law in particular, is woefully deficient because what it does is it compartmentalizes conduct without realizing that in reality there is no such compartmentalization.

You suddenly realize, we're getting back to the old theory of conspiracy here. Is there really some method to the madness of the international legislative process? Is it purposely designed or built to fail? Well, it's not really built to fail, but it's built to work inefficiently in order to create wiggle room and escape hatches for senior members of government. That's what it's all about and basically, we really haven't changed much throughout history. States still pursue their national interests, their strategic interests, their power and wealth goals, and these prevail. International criminal justice is not yet one of the values of an international, globalized society and until it becomes part of it, and until states realize that these values are not incompatible with their interests, that their interests can best be achieved through the pursuit of these values, we will continue to see a perpetuation of a conflict between *Realpolitik* and international criminal justice.

And through this conflict you now see how in a sense this amorphous thing we call the international community has now realized that it has to pay some lip service to international criminal justice. And so, what it does is, it says, "How do we co-opt international criminal justice? What is it that you want? You want international criminal tribunals? Okay, we'll give you international tribunals. For Yugoslavia and Rwanda, it's going to be limited to these conflicts and then it's going to be subject to the Security Council and then it's going to be subject to Special Modalities in terms of funding." Then we're going to come to the point and say, "You know what, it's time for you guys to go." And then we're going to be able to say, "You know, we gave you the international tribunals. Look at what they did... We have Milošević!" And then you stop for a minute and you say, "Now wait a minute. Wait, wait, wait... Let's run this thing backwards. When did we get Milošević? After Dayton? After he started bombing Kosovo?" Is there any hint that in the event that he was not going to be that stupid to go bomb Kosovo he could've gotten a pass? I don't know. I'm not into the latest developments of the Court, but I have to ask myself the question, why aren't Milošević's assets seized?

Why are Mrs. Milošević and his son living happily in Russia, spending the money? And, by the way, how did these blood diamonds circulate? Something about DeBeers company buying them and then the money was sort of nicely laundered again through Swiss banks which allowed certain Russian, Ukrainian, and Belarus arms dealers to be able to provide the arms by transshipping them through Dubai. You look at all of that and you say, “Now wait a minute. Where is the will of the international community to connect the dots that would make it more difficult for the commission of international crimes?”

But who is going to speak for the 92 million people who have been killed in the last sixty years? 92 million, and it's not one or two. Think about it. It's almost incredible; it's almost impossible for the human mind to absorb this enormous number. And you have to pause and see that the situation that we face is a situation in which those of us who are going to be committed to international criminal justice as part of human rights have to come to the realization that international criminal justice is a way of enforcing human rights, much as in domestic law. We have to come to recognize that the use of criminal law is the enforcement of other social interests by harsher means than by having simple civil damages or sanctions. We also are going to have to come to the realization that we have many dots in the firmament of international criminal law. And these dots aren't connected. In less than 100 years, we have adopted over 285 international conventions on international criminal law. They're divided into 28 different categories, and again I'm coming back to what I was saying in terms of the legislative policy concerning terrorism. Why don't we have a comprehensive convention? Why don't we have a comprehensive mechanism? Why don't we have connections between organized crime and money laundering and conflicts of a non-international character and international character and so on and so forth? If the purpose of the international legislative policy is to minimize the crimes, to achieve a higher level of prevention, to produce a higher level of deterrence, and

as a result to minimize the harm, we have to focus on these connections.

Shortly after I finished my function at the Rome conference (1998), which Professor Scheffer addressed, I found myself appointed without being asked, and unknowingly, by the Commission on Human Rights as the Independent Expert on Victim Compensation. So I went to Geneva, still with a little bit of idealism left in me and forgetting all of the lessons that I should have learned in my many prior years and said, “Oh, wow, now we’re going to move ahead and there will be a U.N. resolution on the protection of victims.” After two years we produced a very viable declaration on the rights of the victims of crime and compensation. And this was just before the U.N. conference on racism in Durban. And suddenly the U.S. came and said, “Wait a minute. You can’t go any further with that,” and marshaled all of the European countries and said, “Do you realize that if this is adopted, then in America all of the former slaves will ask for compensation? And you know what, you Europeans have acted as colonizers in all of these African and Asian countries, so you too are going to be exposed.” So suddenly, totally unexpectedly, I found a huge coalition of countries opposed to the work that I was doing, and it took from 2002 until 2006, four years of diplomatic efforts, to get the resolution adopted by the U.N. General Assembly in 2006. Every one of these governments made a statement saying, “This is not mandatory. This is not binding. This is soft law.” Their aim was to minimize it.

One of the provisions I put in was that part of the rights of victims is their right to see people who committed the crimes investigated, and if the investigation produces sufficient evidence, for them to be prosecuted and punished. That was the most hard fought provision. You want money, it’s okay. But don’t come seeking prosecution. Of course, built in that little section dealing with prosecution was the removal of impunities of heads of states, and that really hurt. We have to develop new thinking. It’s not very innovative, it’s not very imaginative. We’re still fighting the same old battles under new forms and new shapes. We have to

continue to support existing international institutions, existing international tribunals, and move them ahead, but we have to also realize that within a short period of time we may find ourselves with nothing else but the ICC as the only gig in town. And we all have our concerns, either because of the slow start of the ICC or because of a variety of decisions by its prosecutors. We all have to be also concerned about the possible future politicization of the ICC.

I think the future is going to rely more on what is called the complementarity approach to international criminal justice—how do we strengthen national capacity and develop national criminal justice systems? And you know we unfortunately do not see many developed countries in the world, such as the U.S. and those within the E.U. and others, putting resources into developing national capacity-building and national legal systems in order to have these national legal systems take over the task of prosecution.

Realpolitik prevails. I hope you will forgive me if I conclude with this contemporary note. As you can see, even events in Egypt demonstrate that the military junta is going to continue to remain in power. This military junta was established in 1952 and it continues. It is engaged in massive human rights violations and torture in Egypt. The United States government has not seen fit to condemn these practices. On the contrary it has supported it. It is quite likely that the army will use its military forces to repress the popular uprising. If that's the case, it will be a violation of U.S. law because U.S. law prohibits the use of U.S. military assistance for a violation of human rights. But neither the President nor the Secretary of State mentioned anything in their announcement on the subject.

So, in a sense it is business as usual. Egypt has been the recipient of extraordinary renditions and torture on behalf of and for the United States. Many countries continue their practices of torture. The United States claims that it upholds its laws, its Constitution, and international laws, and yet we have seen the

institutionalization of torture by senior officials in the prior administration. We have seen a number of lawyers violate their code of ethics by producing legal opinions that are contrary to international and domestic law. It is not only a question of Guantanamo with over 800 people who have been tortured. It's an estimated 150,000 people who have been tortured in Iraq and Afghanistan in the last nine years in addition to the extraordinary renditions. In this context, an estimated 200 people have been killed under torture, at least those we know of. None of the lawyers have been brought to bar, even to question their ethics.

Not only have the architects of the Bush Administration's torture been allowed to pass, they've been allowed to brag about it on television, to put it in books, and to sell it and make money out of it and to get away with it. And those who perpetrated the torture, with the exception of a few lowly soldiers who received minor disciplinary action, were not prosecuted. Nobody even speaks of the doctors and medical professionals who participated in furthering the torture and prolonged the suffering of those who had been tortured. If we let this go by, then what else are we going to let go by in terms of violations of our international legal obligations, of our Constitutions, of our criminal laws under U.S.C. Title 18, of our criminal laws under the Uniform Code of Military Justice? It is so tragic that this is happening, and it is even worse that American public opinion remains so indifferent about it. When we look back at the history of atrocity crimes, it is not so much the few who commit the crimes that count, but it is the many who remain indifferent to these crimes that make them possible.