

## Are International Courts Effective?

Written by Sophie Crockett

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SOPHIE CROCKETT, NOV 27 2011

*"Impunity cannot be tolerated, and will not be. In an interdependent world, the Rule of the Law must prevail."* (Annan: 1997)

What led the Former Secretary-General of the United Nations to say the above is what motivates all international law scholars to advocate in favour of greater accountability: the need for greater support of international courts. International courts as they stand are flawed, however, they have accomplished a great deal in making the international order less anarchic. As sovereign states, it is easy to live within national legal frameworks but when it comes to issues of accountability and centralised institutions that enforce international legal norms, it becomes a lot more complex.

The idea of establishing an international court with the aim of regulating the behaviour of states is not recent. However, its major breakthrough came with the creation of the Permanent Court of International Justice in 1922, which was later re-established as the International Court of Justice in 1945. The establishment of the Court raised issues of punishment for war crimes and crimes against humanity that occurred during the First and Second World Wars. Punishments for war criminals were first addressed at the International Military Tribunals (IMT) and the International Military Tribunals for the Far East (IMTFE). (Cassese: 2005: 39) These set a precedent for the subsequent International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which will be analysed for the purposes of this paper. The UN International Criminal Tribunals are extremely important cases to examine, especially when looking at the effectiveness of international courts, as their establishment is considered to be among the most important contributions to international criminal law. They provided "a unique empirical basis for evaluating the impact of international criminal justice on post-conflict peace building." (Akhavan: 2001: 7)

The aim of this paper is to investigate whether international courts work. It does so by looking firstly at the so-called failures of international courts, namely ad-hoc criminal tribunals like the ICTY and the ICTR, as well as the issues they raise amongst the international community. It then focuses on counter-arguments, showing the ways in which the criminal tribunals have been successful and have meant a positive development in international criminal law. It concludes by demonstrating that international courts play a crucial role in international relations.

International courts, according to critics, are fundamentally ineffective as there are no plausible reasons why compliance with international law will be the top priority for a state. This means that if deemed necessary, states will not comply with international legal standards and will not abide by international law if it is not in their interest. Even when a state has agreed to comply with monitoring regulations imposed by international institutions, lack of control and inspection can allow violations to go unnoticed until the situation becomes critical. Within the international community, power is often fragmented and dispersed, which is why the lack of a central authority is one of the main criticisms of international law. (Cassese: 2005: 5) Many argue, however, that there is an undeniable tendency of nations to obey international custom due to the pressure of powerful states.

Many states in the international community raise the issue of sovereignty and the infringement of international law on national courts and jurisdictions. Due to the fact that states define the character of public international law, their acceptance of international courts' jurisdiction is entirely determined by them. An example of this occurred when Duško Tadić, a war criminal from the Former Yugoslavia, questioned the legal framework for the ICTY as well as its

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jurisdiction and power to apply international law to internal conflicts of the state of Former Yugoslavia. (Schabas: 2006: 49) The Appeals Chamber quickly and swiftly rejected Tadić's claim. This was an important validation of the principle of *Kompetenz-Kompetenz*, which refers to the 'inherent jurisdiction of the Tribunal to determine its own jurisdiction'.

Ad-hoc courts also show a certain level of inconsistency in their accountability of violations to international criminal law, which is one of the main criticisms. This leads to accusations that morality and ethics are only used as a basis for serving the self-interest of states, leading to double standards within the United Nations. (Falk in Wilkinson: 2005: 116) It is unrealistic to assume that hybrid courts and tribunals can address all international crimes. In fact, only when it is financially and politically beneficial for states, will they consider its creation and jurisdiction. Many argue that there have been no precedents to affirm the idea that obedience to international law will always be a states' top priority. This idea is often labelled as selective justice, and is applied to most decisions made at an international level, but one must consider the impossibility of addressing all crimes in the same way, so does the act of prioritising constitute a double standard?

Another argument against ad-hoc tribunals is that they are expensive and countries that have just been through civil war should be rebuilding their society and political system rather than spending millions on tribunals to try those responsible for violating international law. Schabas stated: "By 2004 the United Nations *ad hoc* tribunals consumed more than \$250 million per annum, which is about 15% of the UN's general budget." (Schabas: 2006: 6) Furthermore, many of the leaders that were on trial enjoyed popular support among their citizens and being tried in an international court can be perceived as discrediting national sovereignty. This view is very much advocated by scrutinizers of the international tribunals. Although the criticism that tribunals cost an excessive amount of money, one must understand that, before a society is rebuilt, it is important to establish a rule of law and closure for those who have suffered uncontested horrors.

Moreover, some go as far as to argue that the UN International Tribunals exacerbate tensions within communities rather than promoting reconciliation. Several polls carried out in the former Yugoslavia showed that many believed the ICTY did not succeed in its aim of reconciling the people of the region, generating a negative reaction to the tribunal, especially within the Serb and Croat public. (Hoare: 2008: 19) This diminished the credibility and integrity of the tribunal, especially with its failure to indict some infamous war criminals and obtain justice for the people of the region. Reflecting on this, one could easily make a case against the tribunals, but the reality is that if the ICTY were to indict and prosecute every individual responsible for the genocide it would have had to operate on a much larger scale. Reconciliation is a complex process and it often takes many years to accomplish, in addition, the lack of Serb awareness of their responsibility in the mass genocide gravely hindered the ICTY's work.

On the other hand, claiming that international courts have never worked and never will seems too extreme. The UN Criminal Tribunals have proved the strength of international accountability, the power of international law, and the consequences of violating them. This is exemplified in the ICTR's 'Trial Against *Hate Media*' in August 2003, when the tribunal issued life sentences to the three people responsible for encouraging the 1994 genocide, and the ICTY's indictment of 161 individuals for crimes against humanity in the former Yugoslavia. Since World War II, the ICTY and ICTR have been the first international tribunals to hold high-profile leaders accountable for their crimes against humanity. Notably the indictments of Jean Kambanda, the Rwandan Prime Minister, Pauline Nyiramasuhuko, the Rwandan Minister of Family and Women's Affairs, Slobodan Milosevic, the Yugoslav President, and Ratko Mladic and Radovan Karadzic, leaders of the Bosnian Serbs. (Ferencz in Lattimer and Sands: 2003: 41) In light of this, it seems that international courts can, in fact, be effective and valuable. Without the tribunals' convictions, those responsible for violations of international law would have been allowed to get away with their crimes and that is a crime in itself.

The three fundamental violations of international law, genocide, crimes against humanity, and war crimes, were initially addressed in Article 6 of the Charter of the International Military Tribunal at Nuremberg, and later detailed in the statutes of the former Yugoslavia and Rwanda tribunals. The international community has universally accepted these and the power of universal jurisdiction international courts hold. (Sadat: 2007: 184) According to Richard Goldstone, "the establishment of the ICTY and later the ICTR was the birth of international criminal justice and these

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courts have demonstrated that international courts work, which had never been a proven or assumed premise.” (Goldstone: 2009: 1) This is exemplified in the ICTY’s indictment of Duško Tadić, the first ever male tried and indicted for sexual violence, Zdravko Mucić, Esad Landžo and Zejnil Delalić for the use of rape as torture, and Dragoljub Kunarac, Radomir Kovač and Zoran Vuković for the use of sexual enslavement and rape as a crime against humanity. (ICTY Achievements: 2006: 1) Before the establishment of the ICTR and ICTY, international law was fairly overlooked, which meant precedents that were set by these tribunals changed the system of accountability in conflict situations. However, without the international community’s support, the tribunals would have quickly and undeniably crumbled under a whirl of bureaucracy and inaction.

Likewise, the idea that international courts are simply ineffective can be countered by the fact that power was consented to the tribunals to exercise jurisdiction over violations of the Geneva Conventions, including Article 3, and the customary laws of war. By holding accountable those who were responsible for committing crimes against humanity in the former Yugoslavia and Rwanda, the Tribunals sought justice for the thousands of individuals affected by the conflicts. This meant the victims were able to see those responsible for their suffering be convicted at an international criminal tribunal. However, many problems were presented with that, as acknowledged by ICTR’s prosecutor Hassan Jallow, “We learned that the legal process is an important and necessary part of conflict resolution, but it is not enough. Justice for the victims, justice for history, we cannot deliver; you need to put in place a diversity of mechanisms in order to deal with all aspects of the problem,” (International Justice Tribune: 2007: 1) Despite this, the legal foundations and the legacy of the tribunals have, so far, been well protected and the international community must continue their in their efforts to ensure this will last and international law is preserved and that courts remain effective.

International tribunals have also succeeded in strengthening of the rule of law in an international context. The ICTY, for instance, encouraged authorities in the newly established states of the former Yugoslavia to reform their judicial system. (ICTY Achievements: 2006: 1) The tribunals have also given invaluable knowledge on how to deal with war crimes and bring perpetrators to justice. For example, Jean Kambanda became the first ever person to plead guilty to the crime of genocide, and his conviction was a major breakthrough for the ICTR, and Jean-Paul Akayesu, a former Rwandan mayor set a precedent as the first person to be convicted of rape as a crime against humanity. According to the former President of the ICTY, “Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand.” (Cassese: 1995: 1) The establishment of a rule of law is indispensable for the reconstruction of a torn society. With the aid of foreign actors and the international community, one can hope this will strengthen the voice of so many oppressed victims. Instead of focusing on the positive or negative aspects of the tribunals we should rather focus on the improvements that can be made to the current system of hybrid courts to find a viable outcome.

Although the criticism that ad-hoc tribunals were inconsistent and only dealt with crimes committed in a country during a specific period of time, many believed they were important to reaffirm the values delineated by international law. It appears the ICTY and the ICTR have contributed significantly to the rebuilding of peace in post-conflict societies, and the formation of a criminal accountability culture in the international community. One of the ICTR’s greatest achievements was establishing a “critical, judicially verified factual record of the atrocities.” (Amoussouga: 2008: 1) This contributed to process of peace and reconciliation in the region, which is another fundamental achievement of the ICTR.

The tribunals accomplished what no international court had managed to do before, holding accountable individuals responsible for heinous war crimes and the leaders to take full responsibility for what they had done. “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility.” (Chesterman, Frank and Malone: 2008: 120) This can be illustrated in the ICTR’s joint indictment of Theoneste Bagosora, Anatole Nsengiyumva, Major Aloys Ntabakuze, and Brigadier-General Gratien Kabiligi and the ICTY’s indictment of Anto Furundžija and Radislav Krstić for rape and ethnic cleansing. This deters mutual hatred, as communities are spared the blame for the suffering of others; and promotes reconciliation in societies that have been torn apart, such as that of the former Yugoslavia and Rwanda.

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In conclusion, this paper has revealed the accomplishments of the International Criminal Tribunals for the former Yugoslavia and Rwanda and has aimed to show the importance of such courts to demonstrate the strength of international accountability, to exercise jurisdiction over violations of international treaties and conventions, to reinforce the rule of law, to rebuild peace in post-war societies and to individualise guilt. The jurisprudential legacy of the ad-hoc courts is widely recognized in the international community. Likewise, Richard Goldstone observed that, "without the ICTR and ICTY there would not have been an ICC and the greatest achievement of the international criminal court has been to get more than half of the members of the United Nations to ratify its existence." (Goldstone: 2009: 1) It would be naïve, however, to assume that the relative achievements of the ICTY and the ICTR have eradicated the risk of genocide and other heinous crimes against humanity. Indisputably, the successful prevention of the latter in a deep-rooted culture of impunity will not be achieved through the efforts of a few ad hoc tribunals. Professor David Wippman, famously noted that "international criminal prosecutions can strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative." (Wippman: 1999: 488) The idea is that even the most modest and limited powers of international criminal justice could mean hope and the start of a dramatic and transformative future for international law, which further confirms that international courts do, in fact, work.

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