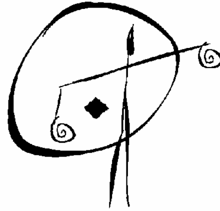

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Prosecuting Violations of International Criminal Law: Who should be tried?

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1. Introduction

In general, violations of international criminal law – particularly war crimes, crimes against humanity and genocide – do not occur in isolation. Rather, they occur as part of a plan or policy to commit such crimes, often on a widespread or systematic basis. As a result, when the time comes to address these crimes through legal means, i.e. by criminal prosecutions, whether in an international or national jurisdiction, there will be a wide pool of potential defendants with varying degrees of responsibility as well as a wide number and variety of crimes that could be tried.

This policy paper takes as an underlying premise that there must be a measure of criminal accountability for the violation of crimes under international law, through prosecutions in a court of law, to satisfy the principles of the rule of law and the demands of justice. Nevertheless, this does not mean that all persons who allegedly commit crimes under international law should be prosecuted in an international criminal jurisdiction such as the International Criminal Court. Indeed, there are compelling reasons why this would be inappropriate, both from the practical perspective (such as the lack of available resources, particularly financial resources) and from the policy perspective (such as the benefits of such an approach in terms of deterrence), both of which are discussed below. This paper therefore addresses the question of which alleged perpetrators and alleged crimes should be dealt with by an international criminal justice mechanism and what are the criteria by which such choices could or should be made.

2. Background

Since the beginning of the 1990s, there has been increased interest in the prosecution of violations of international humanitarian law before an international criminal jurisdiction. This began with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, through the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994 and the successful adoption of the Rome Statute for the International Criminal Court in 1998, together with a variety of other international and internationalised mechanisms in the late 1990s.[1]

However, the way in which the ad hoc Tribunals in particular have conducted their work has met with a great deal of criticism, not necessarily because of the quality of that work but because they are viewed by many as having been accompanied by a massive bureaucracy [2] and budget[3] for partial and unsatisfactory results.[4] Since the late 1990s, States have been reluctant to finance international criminal justice mechanisms at prices they consider to be too high, which is evidenced by discussions on the Special Court for Sierra Leone. Initial cost estimates for the Court's three-year lifespan amounted to a

[1] For an overview of some of these mechanisms, see Romano, C, Nollkaemper, A and Kleffner, J, *Internationalized Criminal Courts - Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, *forthcoming* October 2004.

[2] 1,062 people are currently working for the ICTY and 1,042 for the ICTR.

[3] The total cost of the ICTY for its 12 years of work is 1,194,383,622 USD.

[4] See, for example, Zacklin, R, 'The Failings of Ad Hoc International Tribunals', 2(2) *Journal of International Criminal Justice*, p 541.

modest 114.6m USD, 20m USD less than the current annual budget of the ICTY. This was reduced to 57m USD[5] and there was a need to supplement the voluntary funding process through a subvention grant from the General Assembly to cover costs for the year 2005. Now, while the Special Court has already had to present its Completion Strategy just three years after it has begun work, the Court is again facing a funding crisis in relation to completing the trials in each of the three cases, including appeals.[6]

While it is true that the budgets of both the ICTY and the ICTR have grown considerably since they began operations, the cost of international justice mechanisms is not so much when compared with the cost of peacekeeping or other United Nations Missions. For example, the ICTR biannual budget rose from an initial 7.28m USD to 208m USD for 2004-2005,[7] whereas the annual budget for the United Nations Assistance Mission in Rwanda was approximately 193m USD.[8] The example of the Special Court throws the cost of international justice and the cost of peacekeeping into even starker contrast: the Special Court costs roughly 20m USD per year, whereas the 2001 budget for the United Nations Mission in Sierra Leone was 650m USD[9] and is still more than 113m USD for 2005-2006.[10]

Whether available resources are considered too abundant or too lacking, one criterion by which international criminal justice mechanisms should be measured is the number and, more importantly, the level of accused being processed through international criminal justice mechanisms. While some 128 accused had appeared before the ICTY by 27 July 2005, there were only 55 completed cases, some of whom were high-ranking officials but many of whom were lower-ranking individuals.[11] By August 2005, the ICTR had completed 14 cases, including the former Prime Minister, other Government officials and lower-ranking individuals. 8 people are awaiting appeal, 25 cases are in progress and 26 have not yet begun. [12] As of August 2005, the Special Court for Sierra Leone has 9 individuals standing trial, including a former Minister for Internal Affairs. Of the two indictments where the trials have not yet begun, Charles Taylor is expected to be transferred to the court some time in 2006, while the whereabouts and fate of Johnny Paul Koroma is unknown.[13]

[5] Letter of the Secretary-General to the President of the Security Council, 12 July 2001, UN Doc. S2001/693.
[6] See http://www.npwj.org/?q=npwj_topics/international_law_community_of_democracy/2005/11/15/special_court_for_sierra_leone_summary_of_brussels_meeting for a summary of a briefing on the Special Court co-organised by the Court and No Peace Without Justice on 8 November 2005.
[7] General Assembly Resolution of 13 January 2004, UN Doc. A/RES/58/253.
[8] http://www.gmu.edu/departments/t-po/peace/toc.html, link last visited on 26 August 2005.
[9] Press Briefing, 20 November 2001, Mr. Behrooz Sadry, Acting Special Representative Of The Secretary-General in Sierra Leone: http://www.un.org/Depts/dpko/unamsil/DB/db201101.htm.
[10] For further information, see http://www.un.org/Depts/dpko/missions/unamsil/
[11] For further information, see http://www.un.org/icty.
[12] For further information, see http://www.ictr.org.
[13] For further information, see http://www.sc-sl.org; see also http://www.specialcourt.org.

3. Who should be prosecuted?

In recent years, there have been moves to limit people tried in international criminal mechanisms to "those who bear the greatest responsibility"[14] or "those most responsible",[15] leaving those who bear a lesser degree of responsibility either to national jurisdictions, or to some other form of accountability.[16] The rationale behind such a limitation is that it represents the best chance of deterring would-be perpetrators. These types of crimes generally occur as the result of a deliberate choice at the highest levels of decision-making. Increasing the likelihood of criminal prosecution for these decision makers increases the chances of prosecution being a deterrent factor when they make their choices about how to conduct warfare. In addition, selecting those who bear the greatest responsibility represents the best chance of reaching the greatest number of victims. The people falling within that category will be at or towards the top of the decision-making hierarchy that is responsible for the commission of crimes as a whole, thereby involving a greater number of victims than the commission of a single crime. Finally, this type of limitation is necessary due to practical constraints on international criminal mechanisms, including a lack of available financial resources and the need to manage those and other resources effectively and efficiently. For all of these reasons, those people who bear the greatest responsibility are most suitable for prosecution before an international criminal justice mechanism.

4. Criteria for selection

The question therefore arises as to what is meant – or should be meant – by "those who bear the greatest responsibility".[17] In his report on the establishment of the Special Court for Sierra Leone, the UN Secretary-General indicated that the term "those who bear the greatest responsibility" was intended to be a reference to the command authority of the alleged perpetrator as well as to the gravity or scale of the crime.[18] In this respect, the crime is not so much the individual massacres or other violations; rather, the crime is the deliberate plan to conduct warfare in violation of the law. For example, in the Kosovo indictment, Slobodan Milosevic has been charged with murder; he is not accused of having committed each murder himself, but rather with having planned and instigated the mass murder of hundreds of Kosovar Albanians, as evidenced by the individual acts of murder committed by persons under his control. Seen in this light, the

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[14] In the Special Court for Sierra Leone, this limitation is part of the personal jurisdiction. At the International Criminal Court, it appears to be a policy limitation favoured by the Prosecutor: see Policy Paper of September 2003, para 2.1.

[15] See the amendments of 14 April 2004 to the Rules of Procedure and Evidence of the ICTY, rule 28 of which refers to the "most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal".

[16] While recognising the importance of the issue, the question of what might be suitable forms of accountability for dealing with other alleged perpetrators is beyond the scope of this paper. Nevertheless, it is worth highlighting that blanket amnesties do not establish accountability for crimes under international law, tend to erode the rule of law and do not contribute to a lasting and sustainable peace; as such, blanket amnesties are an inappropriate response.

[17] The Statute of the Special Court for Sierra Leone elaborates this by adding, "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone": article 1(1).

[18] Report of the Secretary-General on the establishment of the Special Court, UN Doc. S/2000/915, para 29.

crime is not so much the individual acts of murder; rather, the individual occurrences of murder are evidence of the plan that the murder of civilians be committed. Thus the person or persons responsible for the planning and instigation of large-scale violations of international criminal law are those who bear the greatest responsibility for the crimes committed during the conflict.[19]

What the term does not suggest – either on a plain reading or by reference to the interpretative aids available to date – is that an equal number of accused should be chosen from each faction fighting in a particular conflict.[20] In determining who bears the greatest responsibility, a prosecutor is required to be independent[21] and impartial when investigating what large-scale violations were committed and who was responsible for planning and instigating those violations. Impartiality requires that no regard be had to a potential defendant's membership in one fighting faction or another when determining who to indict. The sole question that should guide the Prosecutor in determining who to indict before an international criminal justice mechanism is whether that person bears the greatest responsibility for the crimes committed during the conflict as a whole.

Furthermore, to impose an "equality" requirement in the selection process would be to dilute the ability of international criminal justice mechanisms to provide accountability to the victims of the conflict. While experience shows that where crimes are committed during an armed conflict – particularly when impunity reinforces a cycle of violence – they tend to be committed by more than one side, the scale and intensity of violations is rarely equal among the fighting factions. Generally, violations will tend to be committed more by one faction than another, reflecting the overall plan by the leaders of that faction to conduct warfare in violation of the law. Thus the selection for prosecution of equal numbers of people from each fighting faction does not reflect the experiences of the victims as a whole that violations were committed more by one side or that the scale of violations tended to be greater on one side.

The question of the message sent seems to be present in front of all internationals tribunals: in Sierra Leone, for example, the ongoing trials of nine indictees – three

[19] Cf. the apparent approach of the Prosecutor of the ICC, which seems to be first to select the area with the gravest crimes, then select the most serious incidents, then trace it back to the persons most responsible: Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005, p 7, available from http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf. However, the leader of a faction that commits the worst massacre may or may not coincide with the person who bears the greatest responsibility for the pattern of crimes in a conflict as a whole.

[20] Note that the Prosecutor of the ICC appears to be adopting this approach, stating that "impartiality does not mean that we must necessarily prosecute all groups in a given situation. Impartiality means that we will apply the same criteria for all, in order to determine whether the high thresholds of the Statute are met and our policy of focusing on the persons most responsible is satisfied": Statement by Luis Moreno-Ocampo, above n 19, p 6.

[21] See, for example, Statute of the Special Court, article 15 and Rome Statute of the ICC, article 42.

members each from the three main fighting factions[22] – tends to suggest that each group bears equal responsibility for the crimes committed in Sierra Leone as a whole, which is not borne out by the facts.[23] In Rwanda, the former prosecutor wanted to indict members of the FPR, who were responsible for stopping the genocide. At the ICTY, the case of Nasser Oric is also symptomatic of the problem: this former commander of Muslim forces in the Bosnian town of Srebrenica was initially indicted for not having punished plunder committed by the people of Srebrenica. Even assuming he may have had a control over this population, it is questionable whether it is an appropriate policy choice to place this type of crime on the same level as the crime of genocide, particularly if the overarching policy is to try those who bear the greatest responsibility for the crimes as a whole.

At the international level, and as reflected by local media, all of those conflicts run the risk to be shown as generalised disorders, where everybody is both victim and criminal, particularly where the implication is that the alleged commission of crimes such as those Naser Oric was initially indicted for somehow justify the commission of the larger crime of genocide.

5. Conclusion

In conclusion, it is recommended that when determining who to indict and prosecute before an international criminal justice mechanism, the policy should be to limit potential defendants to those who bear the greatest responsibility for the crimes committed during the conflict as a whole. As such, an overall assessment of the crimes committed during the conflict is necessary in order to determine who should be tried. Furthermore, it is strongly recommended that in undertaking such an analysis, impartiality, different from equality, should be the lodestone. In other words, the membership of a person in a fighting faction should be neither a reason for someone to be tried nor a reason for someone not to be tried. Rather, the sole criteria should be whether that person bears the greatest responsibility for the crimes as a whole.

[22] That is, the main fighting factions active after the start date of the temporal jurisdiction, which limits the Court's jurisdiction to those crimes committed after November 1996, even although the conflict in Sierra Leone began in 1991.

[23] See the NPWJ Sierra Leone Conflict Mapping Report (www.specialcourt.org/Outreach/ConflictMapping/NPWJ_CMR_ES_10MAR04.zip), which found that by far the majority and the widest variety of crimes were committed by members of the RUF, whether acting alone or in concert with the AFRC. Another example concerns the conflict in Colombia, where the majority of violence against civilians has been inflicted by the paramilitaries: see, for example, the Human Rights Watch reports on this situation (http://www.hrw.org/wr2k3/americas4.html).