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Owning Justice and Reckoning with its Complexity

Diane Orentlicher*

Abstract

A series of developments, both doctrinal and political, seem to signify a retreat from earlier innovations in the law and practice of international justice. On closer examination, however, recent developments in international justice cannot be reduced to a single trend line. Even as various actors and processes continue to work out the ground rules for exercising jurisdiction in respect of human rights violations that international law condemns as criminal, and as international and national courts work through the inherently challenging project of redressing mass atrocities, states have increasingly internalized, owned and acted on the principle that they should ensure accountability when their officials are legally responsible for atrocious crimes.

1. Introduction

At the dawn of the 21st century the law and practice of global justice changed with warp speed and seemed to herald a broader transformation of the architecture of global justice. The rapid succession of legal innovations remains astonishing today: in 1998, a diplomatic conference in Rome adopted a treaty to establish a permanent international criminal court (ICC), which entered into force in record time. In 1999, the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted a sitting head of state and secured his transfer to The Hague for trial two years later; in 2003, the Special Court for Sierra Leone (SCSL) indicted another head of state whom it, too, eventually brought to trial. Meanwhile, in 1999, the United Nations (UN), whose envoys had long encouraged warring factions to adopt blanket amnesties to advance an end to conflict, adopted guidelines admonishing its agents to avoid amnesties that foreclose prosecution of human rights crimes.

Perhaps no development more dramatically signalled a departure from settled practice than the saga of former Chilean President Augusto Pinochet, which at once seemed to validate a wider use for universal jurisdiction and, potentially, to be the leading edge of a 'further restriction of immunity ... in favor

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of human rights norms'.¹ Activating his country's broad law supporting universal jurisdiction, Spanish investigative judge Baltasar Garzón upended expectations when his pursuit of Pinochet on charges relating to human rights violations in Chile while he was head of state led British authorities to arrest Pinochet during a visit to London in 1998. More astonishing, in *Pinochet III* the United Kingdom's (UK) highest court ruled that Garzón's target was not immune from criminal process in respect of certain charges relating to torture in Chile. Lord Browne-Wilkinson captured the historic nature of the ruling when he observed, 'if Senator Pinochet is not entitled to immunity ... it will be the first time ... when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes'.²

Less clear, however, was the breadth of the judgment's doctrinal break with past practice,³ whether the Spanish model of universal jurisdiction would receive broader validation in the practice of states, and the degree to which the ICC would emerge as a robust institution for combating impunity. The past decade has begun to provide answers, though hardly in bright-line terms. In myriad ways, recent years have tempered expectations about further developments on the order of those seen at the turn of this century and highlighted the formidable challenges associated with doing justice for atrocious crimes. Yet alongside these developments, others signify a deepening commitment to the notion that atrocious crimes must be punished.

2. The Unsettled Legacy of *Pinochet III*: Immunities

On the doctrinal front, a series of rulings have belied the most far-reaching interpretations of *Pinochet III*, affirming the immunity of states,⁴ and of certain

1 L.M. Caplan, 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory', 97 *American Journal of International Law* (2003) 741–781, at 744.

2 *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. 24 March 1999) (hereafter '*Pinochet III*'), Opinion of Lord Browne-Wilkinson.

3 As has often been noted, *Pinochet III* is susceptible to several interpretations. On the widest reading, the judgment held that violations of *jus cogens* norms cannot be considered official acts shielded from the scrutiny of foreign courts. From this it might follow that, just as Pinochet did not enjoy immunity *ratione materiae* from criminal proceedings for torture, violations of *jus cogens* norms cannot shield states themselves or their former officials from the civil jurisdiction of foreign courts in respect of such violations. On the narrowest reading, *Pinochet III* held only that the combined effect of the definition of torture in the Convention against Torture, which requires official sanction, and that treaty's provision for mandatory universal criminal jurisdiction over torture was a withdrawal by states parties of the immunity *ratione materiae* of their officials in criminal prosecutions for torture, and that the UK's domestic legislation did not alter this conclusion.

4 See e.g. *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment of 3 February 2012, § 107; see also, *Al-Adsani v. United Kingdom* [GC], 21 November 2001, *ECHR Reports* 2001-XI, § 61; 123 *ILR* 24 (holding that UK courts' dismissal of torture claim against

incumbent officials in criminal proceedings,⁵ despite the *jus cogens* nature of the norms they were alleged to have breached. Perhaps most tellingly, in its 2006 judgment in *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, the UK House of Lords upheld not only the immunity of a foreign government but also that of its *former officials* in a civil action for torture — the same offence for which the law lords concluded Pinochet did not enjoy residual immunity in a criminal proceeding.⁶ There may be reasoned grounds to distinguish between civil and criminal actions against a former official of a foreign government, at least in some contexts (for example, when interpreting a national law or treaty that makes that distinction).⁷ Yet in a case involving conduct that international law has condemned as criminal, it is difficult to see a court justify its dismissal of a civil action on the ground that ‘acts of state officials acting in that capacity are not attributable to them personally but only to the state’,⁸ without recalling how decisively the Nuremberg tribunal dispatched this position,⁹ and wondering whether the distinction drawn between civil and criminal actions in relation to *this type of violation* reflects a principled difference.¹⁰

But post-*Pinochet* decisions have not uniformly gone the same way as *Jones*. In 2010, the United States (US) Supreme Court took much the opposite path in *Samantar v. Yousuf*,¹¹ which involved a civil lawsuit against a former Somali official accused of serious human rights violations. In a reversal of the dominant approach taken by US courts for some two decades, the Supreme Court held that the US Foreign Sovereign Immunities Act (FSIA) does *not* apply to foreign

Kuwaiti government on grounds of its immunity did not violate the European Convention of Human Rights).

5 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.

6 *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (hereafter ‘*Jones*’) (appeal taken from England).

7 Indeed, several law lords invoked this distinction in *Pinochet III* to counter Pinochet’s claims of immunity from criminal process on the ground that he would enjoy immunity from a civil suit for torture. See e.g. *Pinochet III*, Opinion of Lord Hutton, at 254, 264; Opinion of Lord Millett, at 278; Opinion of Lord Phillips, at 280–281, 287.

8 *Jones*, Opinion of Lord Hoffman, § 66.

9 I refer here to the following passage in the Nuremberg judgment: ‘The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law’.

10 Lord Hoffman seemed to recognize this anomaly in his opinion in *Jones* and addressed it by characterizing the Convention against Torture as explicitly and narrowly withdrawing the state immunity of former officials only for purposes of criminal proceedings on torture charges: *Jones*, Opinion of Lord Hoffman, § 68.

11 *Samantar v. Yousuf*, 560 U.S. (2010). The Court left open the possibility of finding ‘in some circumstances’ that ‘the immunity of the foreign state extends to an individual for acts taken in his official capacity’.

officials sued in their personal capacity, and thus does not shield them from the immunity of US courts. Notably, this judicial turnaround was supported by the US State Department, partly in recognition that ‘changes in international human rights norms ... have given rise to new views about the boundaries of official action appropriately subject to immunity’.¹² At a subsequent stage in *Samantar* where immunities outside the framework of the FSIA were at issue, the US Fourth Circuit Court found that ‘under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity’.¹³

In sum, if several rulings have belied the most far-reaching interpretations of *Pinochet III*, courts have hardly taken a uniform approach in respect of the immunities of former foreign officials in cases alleging their responsibility for gross violations of human rights. As several courts have noted, the law in this area remains in flux.

3. Amnesties and Universal Jurisdiction

Similarly contradictory trends can be seen in recent developments relating to the UN guidelines for peace negotiators that eschew UN endorsed amnesties for the most serious human rights violations. Although this aspect of the guidelines has been reaffirmed since 1999, when they were first adopted, a controversial Security Council resolution on Yemen adopted in 2011 endorsed an initiative that promised a blanket amnesty for the country’s then leader in exchange for his stepping down — even while condemning human rights violations attributed to his government and stressing ‘that all those responsible for violence, human rights violations and abuses should be held accountable’.¹⁴

Meanwhile, several specific attempts to exercise universal jurisdiction have provoked strong blowback, both from states unwilling to abide foreign prosecutions of their former officials and possessing the power to induce other states to curb their jurisdictional laws,¹⁵ and from African states that saw European attempts to prosecute their officials as a neocolonial judicial project. Tensions stemming from what the African Union (AU) saw as the ‘abuse of universal jurisdiction’ by Western states — exemplified above all by a French judge’s 2006 issuance of arrest warrants against nine Rwandan officials

12 Legal Adviser United States Department of State H.H. Koh, ‘Foreign Official Immunity After *Samantar*: A United States Government Perspective’, 44 *Vanderbilt Journal of Transnational Law* (2011) 1141–1161, at 1151.

13 *Yousuf v. Samantar* (4th Cir. 2012), No. 11-1479, Slip. Op. Nov. 2, 2012, at 21–22.

14 SC Res. 2014 (2011), operative § 2.

15 See R. Brody, ‘The world needs Spain’s Universal Jurisdiction Law’, 27 May 2009, available online at www.hrw.org/news/2009/05/27/world-needs-spain-s-universal-jurisdiction-law (visited 29 April 2013). While amendments to Spain’s law set some limits on when and how its courts could exercise universal jurisdiction, amendments have also actually expanded the roster of crimes for which universal jurisdiction could be exercised in Spain, adding new universal jurisdiction offences of female genital mutilation and human trafficking.

and a Spanish judge's indictment of 40 Rwandan army officers in 2008 — prompted initial discussions about adding criminal jurisdiction to the African Court, an effort many now see as an attempt to sideline the ICC. Significantly, however, these tensions have not produced a wholesale rejection of universal jurisdiction but instead have prompted efforts to define the appropriate boundaries of its use.¹⁶

4. The ICC and Africa

Tensions between the AU and ICC similar to those triggered by several European efforts to prosecute Rwandan officials brought one of the most serious challenges the fledgling Court had to confront during its formative years. Where the ICTY and SCSL earned institutional strength by successfully bringing former leaders to trial, the ICC suffered a debilitating backlash when it issued an arrest warrant against Sudanese President Omar al Bashir, who remains in office and free from arrest four years later. As is well known, in 2010, the AU called on member states not to cooperate in the arrest of al Bashir,¹⁷ and the next year endorsed Kenya's bid for a Security Council deferral of the ICC's Kenya investigation.¹⁸ Nor was it just the AU that took issue with the fledgling Court's action: others decried what they saw as the destabilizing impact of the Bashir arrest warrant,¹⁹ and other ICC actions.

More recently, Kenyans elected a president and deputy president who face charges before the Court; ominously, the President of Uganda, a Rome Statute state party that had 'self-referred' a situation to the ICC, used the occasion to denounce the 'arrogant actors' from the Court who carried out 'careless and shallow analysis'.²⁰ Meanwhile, the Court's strongest backers have been frustrated by its slow pace and glaring weaknesses in some of its early prosecutions; after all, it took a decade for the Court to complete its first trial (which was

16 For example, the previously-noted tensions produced by certain European cases against African officials led the EU and the AU to collaborate in a joint effort to develop principles governing the appropriate use of universal jurisdiction. In some respects a recent decision by the US Supreme Court represents a more significant retreat from the use of universal jurisdiction, albeit in the particular context of civil actions brought in US courts. On 17 April 2013, the Court held that the Alien Tort Statute, which had for many years provided jurisdiction in suits by non-US citizens against foreign defendants for human rights violations that occurred outside the United States, does not *generally* apply to conduct outside the United States. *Kiobel v. Royal Dutch Petroleum, Co.*, 185 L. Ed. 2d 671 (2013).

17 Assembly of the AU, Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010, §§ 5, 8, 9.

18 The AU supported a more recent initiative to have the ICC's Kenya cases sent back to Kenya at the organization's May 2013 summit. See 'African Union seeks deferral of Kenyan ICC cases', *BBC Monitoring Africa*, 28 May 2013.

19 See e.g. J. Flint and A. de Waal, 'To put justice before peace spells disaster for Sudan', *The Guardian*, 5 March 2009.

20 Uganda's President also congratulated Kenyan voters for rejecting 'the blackmail by the court and those who seek to abuse this institution for their own agenda'; see J. Hatcher, 'Museveni rails against the ICC during Kenyatta's inauguration', *Mail & Guardian*, 12 April 2013.

almost dismissed twice), and the only other trial to reach judgment ended in acquittal.

Yet, as with other developments that seem to signify setbacks for global justice, the challenges the ICC has faced in its early years are hardly the whole picture. Tensions between the first ICC prosecutor and the AU never translated into wholesale African opposition to the Court. Some African states have consistently declined to heed AU calls for non-cooperation with the ICC, refusing for example to allow al Bashir to visit their countries, and African states have continued to accede to the Rome Statute. Moreover, with the departure of the ICC's first prosecutor, who had a fractious relationship with the AU, and the appointment of his successor, whose candidacy was endorsed by the AU, relations between the two institutions have improved.²¹ In another indication of the Court's complex relations with African states, a sub-regional organization in West Africa called for ICC action in Mali,²² as did the African Commission on Human and Peoples' Rights.

Notably, as well, AU protests against Western states' 'abuse of universal jurisdiction' and aspects of the ICC's work have not been framed as a challenge to the core principles on which the Court was founded. Thus, for example, work on a protocol to add criminal jurisdiction to the African Court, far from implicitly rejecting those principles, instead would enlarge regional capacity to reckon with international crimes. In a similar vein, regional apprehensions about the implications of Belgium's bid to prosecute former Chadian dictator Hissène Habré did not translate into a rejection of international cooperation to ensure justice for Habré's alleged crimes, but instead produced a new, AU led innovation in the repertoire of global justice — the establishment of a court in Senegal where Habré is to be tried by African judges with financial support from European countries and the AU. To the extent, moreover, that the ICC's inability to secure custody of al Bashir has highlighted institutional weakness, its success in gaining custody of former Ivorian leader Laurent Gbagbo marked a significant milestone.²³

5. Bringing Justice Home

Although I have focused so far on two models many associate with international justice — universal and international jurisdiction — to my mind a more meaningful mark of progress is the degree to which international justice's core commitment to redress for atrocities has been taken up and practiced in the countries where such crimes occurred. By this measure, there are

21 There has also been a succession in AU leadership, bringing in a new head of the AU Commission who appears to be more supportive of the ICC than her predecessor. Still, the chairman of the AU criticized the ICC at the organization's May 2013 summit. See A. Laing, 'International Criminal Court Accused of "hunting Africans"', *The Daily Telegraph*, 28 May 2013.

22 See 'ECOWAS Call on ICC over "War Crimes" in Mali', *Al Jazeera*, 7 July 2012.

23 'Ivory Coast ex-President Laurent Gbagbo at ICC court', *BBC News*, 19 February 2013.

significant signs of change. A study published in 2009 found that no fewer than 67 former leaders were called to account in criminal proceedings between 1990 and 2008, about half on human rights charges and mostly in domestic courts.²⁴ If this study were updated, it would include more recent examples; as this essay was drafted, courts in Guatemala and Haiti had recently summoned former leaders of their countries to answer for human rights violations.²⁵

More and more countries now *own* the notion that they must ensure justice for grave violations of human rights — a more meaningful measure of the success of global justice than the number of trials held before international and foreign courts. Not incidentally, in many countries the prospect of international and universal jurisdiction has helped widen the space for accountability at home through processes of transitional justice, in a dynamic synergy of international, transnational and domestic judicial process. To be sure, in the domestic realm as in others, efforts to establish justice for past atrocities can be fraught with risks and challenges, as Egypt's prosecution of former President Hosni Mubarak and Bangladesh's war crimes prosecutions²⁶ remind us. These challenges point to the need to mine past practice for best practices but should not obscure the degree to states have taken up and domesticated the principles of accountability that underwrite international justice.

6. Challenges that are Specific to International Criminal Jurisdiction

However challenging state courts may find the practice of transitional justice, several fundamental features of the ICC make its task infinitely harder. First, the combined effect of the Court's finite capacity and global audience makes each selection of a situation a political minefield for the Court. *Why has the Prosecutor opened investigations only in African countries? Why has the Security Council referred the situation in Libya but not in Syria?* If a particular country selection seems legitimate to one segment of the global public, there is an excellent chance that the same choice will bring forth cries of indignation from another — or at least calls for 'balancing out' that selection by targeting another country from a different region or bloc.

Within each situation taken up by the ICC, the challenge of selection takes another form. *Why these suspects and not those?* The Prosecutor's general practice has been to prosecute a tiny handful of suspects in each situation

24 E.L. Lutz and C. Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press, 2009).

25 E. Malkin, 'Ex-Dictator Is Ordered to Trial in Guatemalan War Crimes Case', *New York Times*, 29 January 2013; I. Doucet and R.C. Archibold, 'Haitian Ex-Dictator Is Questioned in Court over Reign', *New York Times*, 1 March 2013.

26 J.A. Manik and J. Yardley, 'At Least 19 Are Killed as Unrest Persists in Bangladesh', *New York Times*, 4 March 2013.

the Court takes on, magnifying the significance of each decision to seek charges as well as the consequences of any acquittal. With such a small number of suspects in each situation, the acquittal of one or more can reverberate in ways that are far more consequential than is typically the case in a domestic setting. Experience with the ICTY, which has operated twice as long as the ICC, is instructive. The ICTY Appeals Chamber's November 2012 acquittal of two Croat suspects, Ante Gotovina and Mladen Markač, for crimes against Serb victims has been seen even among the ICTY's most stalwart supporters as disastrous for the legacy of the Tribunal in Serbia. One Serb lawyer described the impact of this verdict: 'The pervasive sense of failure of justice was shared, as rarely ever, across the whole Serbian society'. In his assessment, the damage to the Tribunal's legacy in Serbia 'is irreparable'.²⁷

The ICC's highly selective judicial interventions raise a question that goes to the heart of its work and has a significant bearing on how it will be judged. What is the theory of the case for extremely finite prosecutions by an international court? In the context of domestic prosecutions, leading experts in transitional justice have emphasized the risks associated with efforts to combat pervasive impunity that place excessive emphasis on prosecutions and fail to embed trials in a comprehensive project of justice and reform.²⁸ Conversely, recent studies suggest that human rights trials are most likely to contribute to a country's improved human rights record when undertaken in conjunction with other measures of transitional justice, such as truth commissions, reparations and institutional reform. These studies show why we might expect to see a very limited contributions flow from ICC cases unless the Court's work is complemented by other measures — ones that, with the exception of reparations, are or have been thought to be largely beyond the province of the Court itself.

And yet, if experience is a guide to the future, some countries will *need* the ICC to play an important (if never sufficient) role in ending the impunity that has devastated their societies. Here, the theory of the case for ICC engagement might go something like this. In some situations, a country's attempt to prosecute the masterminds of mass atrocities would be destabilizing, yet their impunity would be equally injurious and impede national reconstruction. The ICC can help relieve such fragile states of the twin burdens of destabilizing prosecutions and toxic impunity. But we doom the ICC to failure if we burden it with the expectation that its role, however important, is all that is needed to ensure that a country ravaged by violence turns the proverbial corner and remains securely on a path to social repair.

27 E-mail from Ivan Jovanović, 10 February 2013. From 2003 to 2012, Mr Jovanović led the programme of support to war crimes trials in Serbia of the Organization for Support and Co-operation in Europe.

28 See e.g. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, UN Doc. A/HRC/21/46, 9 August 2012.

Going forward, then, a major focus of efforts to bolster the Court should be complementary and robust initiatives to strengthen domestic capacity and commitments. For example, just as the ICTY worked closely with Bosnian authorities and other international actors to help establish a credible domestic judicial partner in Sarajevo,²⁹ more robust efforts should be developed by the ICC and its partners to ensure that its work is a catalyst for broader efforts to prevent a recurrence of violence and not a substitute for domestic reform.

Other challenges, however, fall squarely within the province of the ICC and its supporters. Worries about the length (and consequent costs) of the Court's trials are legitimate. At the same time, there are troubling indications that the ICC's Kenya cases may have stumbled in part because, in an effort to avoid unnecessary costs as well as minimize those at risk, the first prosecutor placed unwise weight on too few witnesses. One important step that should be taken to ensure the ICC has the resources it needs is to end the Security Council's practice of referring situations to the Court while insisting that no UN funds be used toward carrying out the new responsibilities it has just placed on the Court.³⁰

But the ICC must also do its part to streamline cumbersome proceedings. Lessons from the Balkans, Rwanda and Cambodia suggest that the legitimacy of the Court may in fact turn, at least in part, on its ability to do so. It has often been noted that the ICTY has significantly different constituencies, ranging from international lawyers to victims. Yet one criticism unites all of these audiences: the ICTY's trials take too long. The approaching end of the ICTY's work has spawned a rich literature assessing its legacy, which includes reflections by former judges and practitioners before the Tribunal exploring lessons learned about how its procedures could have been more efficient without cheating justice. The ICC's judges and other participants in its work would do well to mine and apply these authors' valuable insights with a view to avoiding the same mistakes.

7. Conclusion

To come finally, then, to the question that frames this symposium issue. Do recent developments signify a retreat from the global project of justice for atrocious crimes? I would instead say that states have continued to work through the basic ground rules governing the allocation of jurisdiction to provide redress for atrocious crimes and that earlier, unduly high, expectations

29 See D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Initiative and International Center for Transitional Justice, 2010), at Ch. VI.

30 See e.g. SC Res. 1970, operative § 8, recognizing 'that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily'.

that trials can produce extraordinary results have been tempered by a more mature appreciation of the complexity of doing justice in the wake of mass atrocities, even as many states' commitment to core values of justice have deepened. When it comes to the extraordinary engagement of the ICC, the challenge today is to harness its potential contributions without placing too great a burden of expectation on its finite, if at times vital, role.