



Preserving International Justice in the Age of Donald Trump

By Trevor Sutton, John Norris, and Carolyn Kenney January 23, 2017

The election of Donald Trump as president of the United States imperils many of the accomplishments of the post-Cold War international order. Of these, perhaps none is more fragile than the project of international criminal justice and, in particular, its flagship institution: the International Criminal Court, or ICC. Since 1993, the United Nations—with strong support from the United States—has established tribunals with jurisdiction over war crimes and other human rights abuses committed in Bosnia, Croatia, Rwanda, Liberia, Sierra Leone, Lebanon, and Cambodia, along with the ICC, whose jurisdiction is currently recognized by more than 120 countries.¹ Collectively, these bodies have investigated more than 300 cases, prosecuted more than 200 defendants, and obtained more than 150 convictions.²

While international justice has made a quantum leap over the past 25 years, it has been a highly uneven and sometimes troubled journey. Some international criminal tribunals have performed more effectively than others—and none have been above controversy or valid criticism—but collectively, they have significantly advanced the goal of ending impunity for genocide, state-sponsored violence against civilians, and other war crimes and crimes against humanity.

Today, the future of international criminal justice is more in doubt than at any point since the end of the Cold War. The most successful and high-profile international criminal tribunals—the International Criminal Tribunals for Rwanda and the former Yugoslavia, or ICTR and ICTY, and the Special Court for Sierra Leone—have wound down operations or are in the process of doing so. Meanwhile, the ICC is facing unprecedented headwinds: The collapse of the ICC prosecutor's case against Kenyan President Uhuru Kenyatta in 2014 and the refusal of several African states to act on the court's indictment of Sudanese President Omar al-Bashir were both major blows to the institution's credibility. These failures presaged the African Union's call for mass withdrawal from the ICC on the grounds that the court has unfairly targeted African governments³—an action that laid the foundation for the governments of Burundi,⁴ South Africa,⁵ and Gambia⁶ to pass legislation to quit the institution in October 2016. And in November, Russia announced it was withdrawing its signature from the treaty that established the ICC—a symbolic but nonetheless potent gesture from a permanent U.N. Security Council member.⁷

Finally, and most wrenchingly, the still-unfolding catastrophe in Syria—where the Syrian government, Russian forces, the Islamic State, and others have used savage tactics against opposing forces and civilians with seeming impunity—has undercut the notion that warring parties and governments will be held accountable for their actions on the battlefield. At present, there is no realistic prospect for holding the perpetrators of these heinous crimes accountable for their actions.

President Trump and the coming U.S. retrenchment on human rights

Even before President Trump's surprise victory, these developments raised doubts about whether international criminal justice could remain an important feature of the international system—doubts exacerbated by other blows against long-settled principles of international law, such as Russia's annexation of Crimea and China's defiance of an international ruling on its entitlements in the South China Sea under the U.N. Convention on the Law of the Sea. But until November, advocates of international criminal justice could take comfort in the fact that the United States and other influential global actors have been strong supporters of the principle of accountability for grave human rights abuses. In particular, the United States has provided financial support to many international tribunals both through U.N. member contributions and voluntary donations to specific institutions. In addition, the United States has steadily and quietly worked to professionalize this system and its approach. Furthermore, although the U.S. relationship with the ICC has often been depicted in adversarial terms, the Obama administration has cooperated extensively with the body and assisted with its investigations.⁸ In fact, U.S. law enforcement and intelligence support to the ICC has been critical to the institution's ability to deliver on its mandate.⁹

A Trump presidency means that U.S. commitment to international criminal justice—and to human rights in general—may soon be a thing of the past. Although President Trump has not spoken specifically on the question of international tribunals, a central theme of his campaign was a narrow vision of U.S. global engagement hostile to international law, multilateralism, respect for basic human dignity, and even the rule of law. He has been dismissive of Russian President Vladimir Putin's alleged extrajudicial killings¹⁰ and has even reportedly spoken fawningly of death squads organized by Philippine President Rodrigo Duterte.¹¹ The foreign policy views of his secretary of state nominee, Rex Tillerson, remain mostly unknown, but during his confirmation hearing earlier this month, Tillerson appeared skeptical of the value of criticizing foreign governments for human rights violations.¹² Of particular concern, President Trump has flirted with appointing John Bolton to a senior diplomatic role—a man who has asserted that the ICC is “illegitimate,” that the ICTY “seems to be about score settling rather than a more disinterested search for justice,” and that the ICTR was so plagued with corruption and mismanagement that many were hoping that “it expires quietly before doing more damage.”¹³

That an individual with such views could play an influential role in U.S. foreign relations should be dispiriting to anyone who believes in the universal value of human life. Yet supporters of international justice should not despair for at least two reasons: First, the ICC continues to enjoy the support of a large segment of the international community, including the European Union and a strong majority of the U.N. General Assembly.¹⁴ A freeze on U.S. cooperation with the ICC, while a serious setback, would be unlikely to cripple the institution. Second, the broader principle of international accountability for heinous acts still has wide acceptance, even among the ICC's most entrenched critics. Over the past three years, for example, the African Union has sponsored a number of international justice initiatives, including the creation of a special tribunal to try former Chadian dictator Hissène Habré on charges of crimes against humanity.¹⁵ Closer to home, Republican members of the U.S. House of Representatives—along with Democrats—have expressed overwhelming support for the creation of a U.N. tribunal to try war crimes committed during the Syrian civil war.¹⁶ Proposals for similar tribunals focused on atrocities in South Sudan and the Central African Republic have also received strong support from the United States and other influential global actors.¹⁷

There are, in other words, grounds for cautious optimism even if the Trump administration cedes the nation's longstanding moral leadership in this area. But if international criminal justice is to remain a viable project in the age of President Trump, it will need to adapt to a global environment in which a growing number of actors are questioning the legitimacy of the ICC and other tribunals. Above all, this means a more strategic approach to fighting impunity that is less centralized in the ICC, more engaged with regional stakeholders, and more focused on the crimes for which there is broad consensus among nations that international intervention is required. Such an approach does not, of course, require that the entire international community be united behind every tribunal or prosecution. Rather, this strategy seeks to avoid situations in which perpetrators of heinous crimes are allowed to go unpunished because the institutions that seek to hold them accountable are perceived as aloof, unfair, or feckless.

The way forward

One step in this direction would be for the international community to invest more in regional justice initiatives. Former Chadian President Habré's trial in an African Union-backed court in Senegal, which was widely regarded as professional and fair, marked the first time a court of one country has prosecuted the leader of another country for human rights crimes. That such a watershed moment occurred in Africa shows that accountability for war crimes on the continent does not flow exclusively from the imprimatur of the five permanent members of the U.N. Security Council. The African Union has signaled its intent to create a similar tribunal for South Sudan and has sent human rights observers to several other countries. Advocates for international justice should encourage these efforts by mobilizing financial and technical support for their implementation, while also maintaining diplomatic pressure on African governments to ensure that they do not attempt to hamstring or improperly influence the outcome of judicial processes.

Members of the international community should also push for the creation of regional criminal courts in other regions. One potential location could be Latin America, which is plagued by high levels of impunity but also possesses a strong regional architecture and a long history of human rights prosecutions in national courts.

Another step would be for the United Nations, particularly the Secretariat and General Assembly, to buttress the legitimacy of international justice by encouraging and sponsoring the creation of new hybrid tribunals that combine traditional law enforcement activities with capacity building. Such tribunals have the potential to strike a serious blow against impunity while retaining the support of local stakeholders. Among the most successful international justice experiments of the past decade has been an anti-impunity commission in Guatemala, the International Commission against Impunity in Guatemala, known by its Spanish acronym CICIG.¹⁸ CICIG in many respects resembles a traditional international justice body: Its head is appointed by the U.N. secretary-general, its staff members are a blend of international and domestic personnel, and its funding comes from voluntary donations by the international community. But the commission is unique in that it operates inside the Guatemalan judicial system with the assistance of Guatemalan officials and, at the same time, is charged with seeking legal and institutional reforms of that system. In addition to being effective, CICIG is also wildly popular within Guatemala—according to one poll, it is the most respected institution in the country.¹⁹ Although CICIG is solely an investigative and prosecutorial body, its success in blending punitive and reformist agendas could serve as a model for future tribunals.

In addition to exploring new forms of international criminal justice, the international community should take every step possible to ensure the preservation of evidence relating to recent or ongoing atrocities. Although speedy justice is desirable, in the international realm, it is not always feasible. Diplomatic gridlock, concerns for the safety of jurists and investigators, and fugitive or politically protected indictees can delay prosecution for years. Yet as demonstrated by the conviction in March of Bosnian war criminal Radovan Karadzic for war crimes committed in 1995, justice delayed is not always justice denied. This is true even if the evidence relates to crimes over which no existing tribunal has competence. The U.N. General Assembly's creation of a body to probe war crimes committed during the Syrian civil war is a positive step in this direction, one which even ICC skeptics in the U.S. government should support.

The ICC should also revisit its current enforcement strategy in order to consolidate political support for its activities and emphasize its role as a court of last resort for only the most serious crimes. At a minimum, this means expanding its current docket beyond Africa. Although the ICC has initiated investigations in other regions, to date, the court has only indicted and prosecuted Africans. Going forward, the ICC cannot continue to operate as if it is a domestic justice ministry prosecuting cases in a geopolitical vacuum. If it is to survive, the institution must exercise greater discretion and sensitivity to political mood in its case selection and outreach to state parties.

This may require delaying action on future referrals out of Africa and instead focusing resources on investigations in other regions. It may also require avoiding confrontation with influential state actors if it would jeopardize the broader mission of the court. For example, the ICC prosecutor may wish to defer her inquiry into whether alleged crimes by U.S. personnel in Afghanistan have been adequately investigated and punished.²⁰ Although this matter deserves the ICC's attention, pursuing it during the Trump administration could provoke unprecedented retaliation from the United States, such as pressuring other governments to withdraw from the court. Although such tactics on the part of the ICC would admittedly fall short of the ideal of blind and apolitical justice, they may be necessary to save the court from a slow-motion collapse in its international support.

Likewise, the ICC must be a careful steward of its moral authority by seeking justice for crimes that no observer could argue are anything short of truly conscience-shocking. The court's recent decision to prosecute crimes of "cultural destruction" such as the desecration of shrines in Timbuktu and its announcement that it plans to expand its remit to environmental crimes and forced evictions, while admirable in intention, threaten to undermine the clarity and coherence of its mission.²¹ These additional categories of crime, while no doubt offensive to many, do not occupy the same plane of immorality as the murder, rape, and torture of innocent civilians. The ICC, as an unelected body imposing its will on sovereign states, will always face accusations of illegitimacy and elitism. It cannot afford to be perceived as a roving judicial force empowered to intervene whenever local law enforcement is not up to the task of punishing wrongdoing. It must conserve its legitimacy for truly egregious violations of widely accepted and longstanding human rights norms.

Finally, the increasingly adversarial attitudes in Washington toward international justice also mean that the court must do a far better job than it has to date at avoiding periodically shooting itself in the foot by tolerating unprofessional behavior by its personnel. While it is understandable that the growth and professionalization of the ICC's various components have been uneven, the court over its life span has too often made simple, fundamental, unforced errors that have derailed or delayed prosecutions or called into question the competence of its leadership. For example, the court has appointed wholly unqualified individuals to act as judges at the court, as in the case of the appointment of a Japanese judge who did not even have a law degree or any other legal qualifications after Japan provided the court with financial support.²² The future of international justice will be badly undermined if the court itself gives its most vociferous critics such easy ammunition with which to criticize it.

Conclusion

In a world where powerful actors are questioning the value of bedrock principles of international law, it is more important than ever that international criminal tribunals be effective and respected. A disproportionate focus on the U.N. Security Council and the ICC is unlikely to secure a future for international criminal justice. Instead, proponents of human rights should seek to create a global order where punishing wrongs is seen as a responsibility shared by all nations rather than a tool of the strong foisted on the weak.

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