Upholding and Shaping: International Criminal Law through Regional Initiatives

by **Alvin Tan**

Abstract:

International and national judicial institutions are not necessarily the best or only way to address core international crimes. A regional approach may in certain situations not only better suit the theoretical objectives of international criminal justice, but in practice also allow small states to uphold, shape, and enforce international criminal law. It not only affords the inclusiveness of local value systems and notions of justice, but is sensitive to the practical needs and conditions on the ground. A regional approach to international criminal law may therefore not only promote accountability and the rule of law, but better navigate the unique peace-justice divide in every conflict.

Keywords: International Criminal Law; Military Tribunals; Peacekeeping; War Crimes

INTRODUCTION

There has been much research and study of substantive crimes, the formation and independence of various international criminal justice institutions, and the related impact on transitional and restorative justice. However, only cursory and isolated analysis exists concerning regional options for preventing impunity and ensuring international (and regional) peace and security.[1] A regional approach may in certain situations not only better suit the theoretical objectives of international criminal justice, but in practice also allow small states to uphold, shape, and enforce international criminal law. Regional solutions not only afford the inclusiveness of local value systems and notions of justice, but are also sensitive to the practical needs and conditions on the ground.

THE BENEFITS OF REGIONALIZING INTERNATIONAL CRIMINAL JUSTICE

The current system of international criminal justice and the criminal responsibility of individuals is a result of the Second World War (WWII), where various acts were considered not only crimes against the victims, but also the whole of mankind.[2] This led to the establishment of the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo and broke the monopoly of domestic jurisdictions over the prosecution of international crimes.[3] Now considered part of customary international

Chief American prosecutor Justice Robert Jackson at the International Military Tribunal trial of war criminals at Nuremberg

Defendants at the International Military Tribunal for the Far East in Ichigaya Court

law, the so-called "core crimes" prosecuted by the WWII tribunals include war crimes, genocide and crimes against humanity.

Although it has been internationalized and practiced around the world, various commentators contend that international criminal law is culturally specific and not inherently universal or value-neutral. For example, Shklar points out that the "law of nature" argument used by the American prosecution at the IMTFE was a foreign ideology that was applied "to a group of people who neither knew nor cared about this doctrine" and the assumption of universal agreement thus imposed "an ethnocentric vision of international order."[4] Chuter highlights that "international criminal law's vocabulary and concepts are not neutral. They are culturally specific, constructed and manipulated by a very small number of countries."[5] Mani similarly notes that a major hurdle for the international criminal justice system is "the predominance of Western-generated theories and the absence of non-Western philosophical discourse." This causes problems in addressing issues in post-conflict developing societies because "Western philosophers are inadequately attuned to the conditions found in non-Western societies," such as the importance of social cohesion over individual liberty.[6]

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Even if such claims of cultural specificity are rejected, it is important to recognize the danger of neglecting other regional norms, values, and legal precepts (such as the purpose of justice, criminal liability and appropriate sanctions). There are therefore several benefits in localizing the international criminal justice process within the region. One, it reduces the theoretical and physical gap between the victims of atrocities and those who are indirectly affected by the disruption of regional peace and stability. Two, it makes the accountability process better attuned to serving justice and winning local acceptance by injecting regional norms, values and views on individual liability and criminal sanctions. Three, it removes damaging neo-colonialist criticisms and misperceptions of international criminal law by giving ownership of the international criminal justice project to regional members, thereby ensuring that they all serve as a checks-and-balances for the collective interests of securing regional peace and justice. Four, it is more effective as regional solutions will be better at understanding and navigating the peace-justice divide that is unique to every post-conflict situation. Five, it is able to expand the definitions of the universally accepted core crimes to better suit regional needs, as well as including other crimes that may be particularly relevant in the

Detainees in the Manjaca Camp, Bosnia and Herzegovina

regional context. Six, it overcomes the "principle of unanimity" that haunts international treaty law, allowing interested, willing and able states to proceed on a more localized basis. Last but not least, it spurs advances in international criminal justice in other regions and states.

The histories of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) crucially illustrate that generating sufficient interest amongst third-party states to respond and gathering enough global consensus to act are both inherent drawbacks of intervention at the international level.[7] The failure to prevent or stop the atrocities that occurred in the former Yugoslavia and Rwanda was clearly not because the international community had no knowledge of the atrocities.[8] In Rwanda, despite having information about what was transpiring,[9] the international community similarly failed to take action that could have prevented or reduced the magnitude of the genocide and only established the ICTR to prosecute and punish individuals after the fact.[10] Similarly, cynics claim the ICTY was a fig leaf for the inaction by the major powers to stop the conflict in the former Yugoslavia,[11] and argue that the tribunal was essentially a cost-effective alternative to military intervention.[12]

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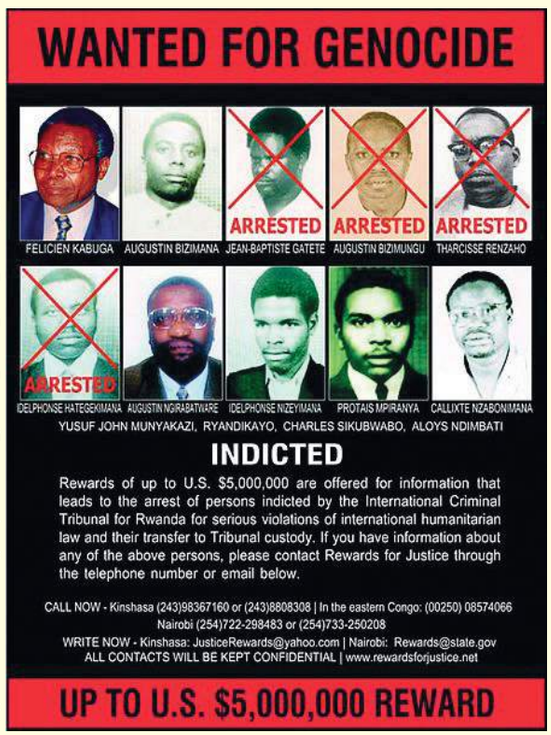
Although Cassese notes that the atrocities that occurred in the former Yugoslavia and Rwanda "served to rekindle the sense of outrage felt at the closing stage of WWII,"[13] and Akhavan argues that the "ethnic cleansing" in the former Yugoslavia and genocide in Rwanda "have assumed a similar role in the post Cold War era as the twin pillars of moral outrage upon which the beginnings of an international criminal jurisdiction can be discerned,"[14] the cause for inaction could be traced back to a lack of political will amongst third-party states with little or no interests in these countries.[15] It must be acknowledged that the states forming the international community are unlikely to intervene in external conflicts (and sacrifice resources or possibly even lives) unless it is sufficiently in their interests to do so.[16]

As such, a regional approach may sometimes be more capable than international initiative in achieving the goals of international criminal justice for several reasons. One, regional states are more (directly and indirectly) affected by international crimes committed in neighboring countries and substantial investment of political effort can be expected in finding a solution. Two, legitimacy



http://commons.wikimedia.org/wiki/File:Rwanda_genocide_wanted_poster_2-20-03.jpg

Wanted poster made by the US Government for the Rewards for Justice program to assist the International Criminal Tribunal for Rwanda

UN Peacekeepers collecting bodies from Ahmici, Bosnia and Herzegovina, April 1993

and incentives for regional action are also arguably greater given the direct and stronger effects suffered by neighboring states. Three, the financial cost of regional enforcement is substantially lower due to the physical proximity to any alleged international crime. Four, neighboring states can better understand and prioritize needs of the situation as they are more politically attuned and culturally sensitive. Five, regional solutions address concerns about selectivity and bias that have been argued to exist at the international level, and also deal with the problem of disconnect from the situation and the victims. Six, regional approaches are likely to be more effective at securing the cooperation of the state concerned because they reduce concerns of exposure to external political influences and lessen sovereignty costs.

Similarly, a regional approach may sometimes be better than enforcing international criminal justice at the domestic level for several reasons. One, if enforcement of international criminal law is allowed to remain primarily in state hands, the most critical and worrisome situation for international criminal justice occurs when international crimes are perpetrated on behalf of or with the complicity of the state itself. Alternatively, states may be most willing to enforce international criminal law when it is in their own interests—such as "where prior regimes, 'rogue' or disfavored elements of government, scapegoats, or non-state actors are under investigation,"[17] or when "new regimes may seek to use accountability as a weapon to ... stigmatize large classes of the population."[18] Three, the pursuit of accountability may be a comparatively low priority for a transitional state trying to reconcile and rebuild itself after a national tragedy because it may cause societal instability or break the fragile peace. Four, a post-conflict state may not be able to hold perpetrators of international crimes accountable because it does not have the required financial and human capital, and its domestic judicial and legal infrastructure has been destroyed by war. Five, domestic systems in the affected states will inherently have biases regarding the guilt or innocence of an individual, and the likelihood of impartial and proper proceedings are low. Six, regional political pressure could be used to isolate and force the hand of reluctant state(s) and ensure that neighboring states apprehend and prosecute or extradite suspects that have fled across the border into their territory. Finally, the onerous and costly exercise can be shared amongst neighboring states and would be amply justified by the maintenance of regional peace and economic stability. While the intervention of non-regional states

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presents an option for upholding international criminal justice, most third-party states will find situations in a faraway part of the world too onerous and costly to justify involvement.

CONCLUSION

International and national judicial institutions are not always the best or only way to address core international crimes. A regional solution may be an alternative for small states to not only uphold but also shape international criminal law according to the unique needs of each situation. Regional interpretations of the substantive elements of international crimes could possibly exist based on "local customs" regarding issues like criteria for prosecution and grounds for excluding responsibility.[19] The formation of local and regional customs would require the particular act by one state to be accepted by another state (or states) as an expression of a legal obligation or right.[20] As long as it does not contravene an existing *jus cogens* norm, concerns about regional interpretations of international crimes or regional recognition of other crimes can be addressed and remedied with codification in a regional instrument.[21] Separately, it is noteworthy that an act cannot be considered an international crime even if all the states in only one region of the world deem it as such.[22] This presents the argument for a category of regional crimes,[23] which would resemble international crimes in doctrinal terms within a regional context but are not accepted as such by the entire international community.[24] Such an approach to international criminal law could thus be seen as a form of "respect for regional legal traditions."[25] Taken together, it may be said that a regional approach to international criminal law may therefore not only promote accountability and the rule of law, but better navigate the peace-justice divide that is different in every conflict situation.

ENDNOTES

1. For example, see William Burke-White, "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration," *Texas International Law Journal* 38 (2003): 729-761; and Matiangai Sirleaf, "Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia," *Florida Journal of International Law* 21 (2009): 209-284.
2. Bass notes that arguments about the need to prosecute war criminals existed at least since the First World War, and that the legalist approach was thus not born but "came of age" at Nuremberg. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 280.
3. The creation of the Nuremberg and Tokyo tribunals represented the end of the state-centric international law that had been dominant since the 18th century and was primarily focused on the actions by the government or agents of the state against the nationals of other states that were considered "an affront to those states." Prior to this, prosecutions of individuals for misconduct in international armed conflict were thus mostly conducted by their own states in domestic courts or military court-martials. Cassesse points out that this was largely due to the fact that the prohibition of certain acts under international law were essentially addressed to states, which were then legally obliged to prevent their citizens from committing the prohibited acts and to punish the offenders. Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 3rd edition (Oxford: Oxford University Press, 2009), 5; and Antonio Cassese, *International Criminal Law*, 2nd edition (Oxford: Oxford University Press, 2008), 5.
4. Judith Shklar, *Legalism: Law, Morals and Political Trials* (Massachusetts: Harvard University Press, 1986), 128.
5. David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (London: Lynne Rienner Publishers, 2003), 94-95.

6. Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 47-48.

7. The UNSC passed resolution 827 on 25 May 1993 and established the ICTY to prosecute individuals suspected of committing war crimes, genocide, and crimes against humanity. The tribunal was justified on the basis that the criminality taking place in the region constituted "a threat to international peace and security" and putting an end to such serious violations of international law would "contribute to the restoration and maintenance of peace." See UN Security Council resolution 827 of 25 May 1993, S/Res/827 (1993), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement. On 8 November 1994, the UNSC adopted Resolution 955 and created the ICTR to prosecute individuals responsible for genocide and other serious violations of international humanitarian law committed in Rwanda and neighboring states. The UNSC had similarly determined that the situation in Rwanda constituted "a threat to international peace and security" and that prosecuting violators of international crimes "would contribute to the process of national reconciliation and to the restoration and maintenance of peace." See UN Security Council resolution 955 of 8 November 1994, S/Res/955 (1994), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement. ICL is undoubtedly affected by international *realpolitik*. Discretion and selectivity ultimately mean that only a select number of sufficiently important but uncontroversial situations are examined. These limitations will similarly apply to the "independent" ICC, which has limited resources and is also not immune to political influence because it depends largely on state funding.

8. Several commentators note that such failure to deal with conduct "very worthy of censure" under ICL may inadvertently provide some form of legitimacy for it. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 30.

9. Force Commander of the UN Assistance Mission for Rwanda (UNAMIR), Canadian Lieutenant General Romeo Dallaire, had on 11 January 1994 notified the UN of four major weapons caches and Hutu plans to murder the Tutsi population and Belgian UNAMIR soldiers. Despite emphatic requests before and during the genocide, authorization for UNAMIR to intervene was refused. Malvern also notes that "[c]onclusive proof that a genocide was taking place was provided to the Security Council in May and June while it was happening." See Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000), 227.

10. It is however noted that the French government had launched Opération Turquoise in June 1994 to establish and maintain a "safe zone" in the south-west of Rwanda. Its objectives were to contribute to the security and protection of civilians and displaced persons in danger in Rwanda, but its effectiveness has been questioned.

11. Goldstone even argues that it is highly unlikely that UNSC action would have been taken if the violations were not being perpetrated in Europe and had not shocked the conscience of many people in the Western democracies. As such, some governments "felt compelled by public opinion to take action to stop the carnage", but "were not prepared to commit to military action and settled for the establishment of the ICTY." Richard Goldstone, *South-East Asia and International Criminal Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011), 7.

12. That said, it should be acknowledged that there was a UN peacekeeping force, the UN Protection Force (UNPROFOR), on the ground in Croatia and in Bosnia and Herzegovina between February 1992 and March 1995.

13. Antonio Cassese, *International Law*, 2nd edition (Oxford: Oxford University Press, 2005), 455.

14. Payam Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond," *Human Rights Quarterly* 18 (1996):259-285, 269.

15. Political imperatives and context will determine the degree of support and the kind of cooperation that states are prepared to give in the name of international criminal justice. These include the nature and cultural setting of the conflict, whether it is still ongoing and who is in power. Although the key determinants will vary between states, and most likely between regions, it will essentially be evaluated by self-interested states in terms of costs and benefits to themselves. For example, Broomhall notes that states would generally be more willing to undertake meaningful action on enforcement when "risks are reduced, public pressure and political will high, and other factors favorable." Bruce Broomhall, *International Justice and the International Criminal Court – Between Sovereignty and the Rule of Law* (Oxford University Press, 2003), 153-154.

16. Although the cost-benefit structure had changed significantly since the end of the Cold War, self-interested states continued to base their actions on calculations of the political, strategic, financial and economic costs and benefits to themselves. The Yugoslav civil wars of the early 1990s did not affect the vital interests of any of the powerful states (like the United States, Russia, the United Kingdom and the European countries), which sought more to avoid clashing with each other. In Rwanda case, there was no also clear threat to international security or national interests of the major powers. Even under the concept of the "Responsibility to Protect," it is doubtful whether states would bother to overcome the issue of state sovereignty, risk the lives of their own soldiers and send an intervention force at their own cost to a faraway country that has little value or importance to them. For a general discussion, see Paul Williams and Michael Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Rowman and Littlefield, 2002); and Melvern, *A People Betrayed*.

17. Broomhall, *International Justice and the International Criminal Court*, 162.

18. Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), 136.

19. In the *Asylum Case (Colombia v Peru)*, the ICJ discussed the Colombian claim of a local/regional custom peculiar to the Latin American states, and held that different local and regional customs must be taken into account when deciding on the position of international law. Indeed, it was accepted in the *El Salvador/Honduras* case that a "trilateral local custom of the nature of a convention" could establish a condominium arrangement between three successor states, which jointly acquired the historic waters formerly under a single state's sovereignty by reason of the succession. See *Colombian-Peruvian asylum case*, Judgment of 20 November 1950: ICJ Rep 1950, 266, http://www.icj-cij.org/docket/files/7/1849.pdf; and *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992: ICJ Rep 1992, 597-600, http://www.icj-cij.org/docket/files/75/6671.pdf. For example, intoxication may not be accepted as a legal defense to exclude or reduce criminal liability for a crime in the Arab region comprising of Islamic societies, where the consumption of alcohol is itself not permitted.

20. In the *Case Concerning Right of Passage over Indian Territory*, the ICJ found it difficult to see why a local/regional custom should only be established on the basis of long practice between more than two states, and held that there was "no reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between two states." See *Case Concerning Right of Passage Over the Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Rep 1960, 39, http://www.icj-cij.org/docket/files/32/4521.pdf.

21. This is reflective of how international treaties are in reality established and more importantly enforced between states. It is noteworthy that multilateral (or even bilateral) treaties can affect the course of action pursued against the national of another state. It is most clearly illustrated by the "Article 98 Agreements" linked to the American Service-Members' Protection Act (ASPA), whereby signatory states agreed not to hand over US nationals to the ICC. Separately, treaty-based internationalized hybrid courts then showed how conduct pertinent to a situation, like the recruitment and use in armed conflict of child soldiers, could be used to better interpret and expand on existing international crimes. For a discussion on the treatment of the crime of child recruitment by the SCSL, see Alison Smith, "Child Recruitment and the Special Court for Sierra Leone," *Journal of International Criminal Justice* 2 (2004):1141-1153.

22. According to Ago unanimity was necessary as the concept of an international crime would otherwise divide the international community. See *Yearbook of the International Law Commission*, 1976, vol. I, para 41, 251-252, http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1976_v1_e.pdf.

23. Any conception of a regional crime would however necessarily include the four core international crimes, which were beyond any doubt part of customary international law and thus cloaked by the *opinio juris* of the international community as a whole. As pointed out by the UN Secretary General, the four "core" international crimes (genocide, crimes against humanity, war crimes and aggression) were part of customary international law, and do not face "the problem of adherence of some but not all states to specific conventions." See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para 34, http://www.icty.org/x/file/Legal%20Library/Statute/statute_ re808_1993_en.pdf.

24. The International Law Commission (ILC) stated that the reference to the international community as a whole "certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an 'international crime,' not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community." See *Yearbook of the international Law Commission*, 1976, vol. II (Part Two), para 61, 119, http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1976_v2_p2_e.pdf.

25. See the *Eritrea/Yemen Arbitration (Phase Two: Maritime Delimitation)*, 119 ILR, 448.

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