

LESSONS LEARNED: BUILDING ON THE SUCCESS OF THE CURRENT INTERNATIONAL TRIBUNAL FRAMEWORK TO DEVELOP THE NEXT ERA OF WAR CRIMES TRIBUNALS

ARYEH NEIER*

INTRODUCTION	517
I. HYBRID TRIBUNALS	519
II. REGIONAL TRIBUNALS	519
III. COMPLEMENTARITY	521
IV. THE ROLE OF THE PLEA BARGAIN.....	521
V. FUNDING MECHANISMS.....	522
CONCLUSION	523

INTRODUCTION

The Washington College of Law has played a central role in efforts on behalf of human rights internationally and, therefore, it is the venue in which I feel it is most appropriate to be discussing the issues that will concern us today.

I have been asked to talk about the next era in war crimes tribunals, but I really cannot do so without reflecting briefly on the past era. The era that has passed really lasted a very short period. It has not been very long since even the question of accountability for great crimes became an issue; it was only a little over twenty years ago that it became an issue for the first time. At that moment there

* President, Open Society Institute. This article is an expanded version of remarks presented at a conference on “International Criminal Tribunals in the 21st Century” hosted by the War Crimes Research Office of the Washington College of Law, American University, on September 30, 2005.

was no thought of international criminal tribunals. It was still the Cold War era and one could not have created such a tribunal in that era. Discussion was focused on national remedies for great abuses of human rights. It was the period in which both criminal trials and what became known as truth commissions were launched in the immediate aftermath of the end of military dictatorships to try to address the abuses that had taken place during those dictatorships.

I recall issuing a call for the establishment of what became the Yugoslav Tribunal.¹ The call was issued in July 1992, and none of us who were involved in that early effort could have imagined the development that has taken place since then. We now have ad hoc tribunals that are beginning to map out the conclusion of their work, we have hybrid tribunals, and we have an International Criminal Court.² Even though those institutions have sometimes been frustrating because they have seemed to proceed very slowly, as in the conduct of the Milosevic trial, from a historical standpoint this has all transpired in the blink of an eye. This was unimaginable to those of us who were involved just a short time ago in trying to invent this way of proceeding.

When one thinks of the next era, I believe that the most important task confronting those who are concerned with international justice is to make certain that the current tribunals conclude their work properly. That is a very difficult and a very expensive task. There are many matters that were not thought of at the moment that the tribunals were created which one has to think of now: What happens to the evidence? What happens to the archives? What happens to the prisoners? What happens to the witnesses? Those matters now must be addressed. The assessment of how well the tribunals have performed will have a great deal to do with the manner in which they conclude their work. That assessment is crucial if the next era in war crimes tribunals is to get off to an appropriate start.

1. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), on the establishment of the ICTY.

2. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) (establishing the International Criminal Court and defining its jurisdiction).

I. HYBRID TRIBUNALS

I think that the next era has to proceed along the lines of the current era. We will need more hybrid tribunals³ in different parts of the world to address the particular crimes that have taken place in given countries. It is not possible for the International Criminal Court to be a panacea in addressing the range and the severity of such crimes. It will not have the capacity to go into the depth in particular countries that is required to make those countries whole and to restore a sense of justice within them. Therefore, hybrid tribunals will continue to be needed.

II. REGIONAL TRIBUNALS

An additional development that we need to start thinking about is the establishment of regional tribunals under the auspices of various regional international bodies.⁴ Unfortunately, there are not such bodies in all parts of the world. There are such bodies in Europe, Latin America and Africa, but there really is nothing in Asia. The Association for Southeast Asian Nations (“ASEAN”), a regional body in Asia, has no human rights mechanism whatsoever.⁵ Though there have been a few suggestions for the establishment of a human rights mechanism within ASEAN, the prospect of creating such a body seems remote because a majority of the countries within that

3. See generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 295 (2003) (explaining that hybrid tribunals are ones in which the tribunal itself and the applied law have both domestic and international elements). For instance, a hybrid tribunal could be composed of foreign and domestic judges, where the judges apply domestic law that has been supplemented with or altered by international law principles. *Id.*

4. Accord William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 730 (2003) (advocating a move towards the regional enforcement of international law, which would “strike a balance” between the costs and benefits of domestic and supranational enforcement).

5. See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: ‘Promises to Keep and Miles to Go Before I Sleep,’* 2 YALE HUM. RTS. & DEV. L.J. 1 (1999) (asserting that the primary objective of ASEAN is promoting trade and economic development, and that ASEAN effectively marginalizes human rights by failing to include human rights reform in its agenda).

regional body are abusers of human rights rather than defenders of human rights.

ASEAN covers about ten countries of Asia⁶ but there are many countries of Asia that are not part of any regional body. China, which is a world unto itself, is not part of any such regional body. The Middle East is also an area where it would be virtually impossible to establish such a body.⁷ So there is a limit to what can be achieved by creating tribunals under the auspices of regional bodies.

I do not believe that difficulties in the future should deter one from thinking in these terms. At this moment, the cases on which the International Criminal Court is focusing are all African cases.⁸ The prosecutor for the International Criminal Court is very sensitive about this. He does not want—and I think he is right on this—he does not want the court to appear as a court for Africa.⁹ In dealing with leaders of the African Union, this is one of the major problems that he encounters. If there were an African court, that would be most valuable because, in fact, there are many other circumstances in Africa besides those that are now under consideration by the International Criminal Court which require the attention of an

6. Indonesia, Malaysia, Philippines, Singapore, and Thailand founded ASEAN in 1967; Brunei Darussalam, Vietnam, Laos and Myanmar, and Cambodia have since joined. See Association of Southeast Asian Nations, Overview, <http://www.aseansec.org/64.htm> (last visited Mar. 3, 2006).

7. For an analysis of whether Islamic principles of *Shari'a* in Muslim state jurisprudence can be reconciled with international human rights norms, see Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2006).

8. See, e.g., S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the Darfur situation to the International Criminal Court). In addition to Darfur, several other cases involving African countries have been directly referred to the ICC by States parties. For various documentation associated with the cases involving the Democratic Republic of Congo, the Republic of Uganda, and the Central African Republic, see International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Mar. 6, 2006); and see generally Ruth Wedgwood, *Address to the Cornell International Law Journal Symposium: Milosevic & Hussein on Trial*, 38 CORNELL INT'L L.J. 779 (2005).

9. See generally Luis Moreno-Ocampo, *Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT'L L. REV. 497, 498 (2006) (referring to the gravity of the harm as the current basis for pursuing the current situations in Africa).

international criminal tribunal. The establishment of an African court would indicate that Africa is willing to deal with its own gross abuses for human rights.¹⁰ The International Criminal Court could genuinely be international by dealing with other parts of the world—such countries as Colombia and Afghanistan.

III. COMPLEMENTARITY

As the International Criminal Court develops, one aspect of the next era in war crimes tribunals will develop on its own. That is, complementarity will become a more significant factor. As prosecutions are actually brought, I believe more governments will decide that it is better for them to put their own houses in order by addressing abuses of human rights within their own domestic criminal justice systems rather than have the matters taken over by the International Criminal Court. This would be a very healthy development.

IV. THE ROLE OF THE PLEA BARGAIN

It is going to be necessary for the international tribunals to consider seriously jurisprudential matters that will expedite their efforts. The question of plea bargaining has to be considered more seriously by all of the international criminal tribunals to cope with the volume of cases.¹¹ We know that the American system of criminal justice would simply collapse if it were not for plea bargaining. The international criminal justice system also faces, because of the complexity of its cases, the possibility of becoming bogged down. Plea bargaining would enhance the capacity of the

10. The Protocol to the African Charter on Human and Peoples' Rights Regarding the Establishment of an African Court of Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT.1.rev. 2, came into force in 2004. However, its implementation has been delayed by another proposal for the establishment of a more generalized African Court of Justice. See Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 140-41 (2004).

11. Cf. Julian A. Cook, III, *Plea Bargaining at The Hague*, 30 YALE J. INT'L L. 473 (2005).

tribunals to reach a larger number of those cases that should be brought before them.

V. FUNDING MECHANISMS

The final point I want to make about the future of international criminal tribunals is that we need a better funding mechanism. Fortunately, we have a model which is working right now that we can consider. It is the Global Fund to Fight AIDS, Tuberculosis and Malaria (“Global Fund”),¹² which is funded by governments. Its funding decisions are made by a technical review panel that examines applications coming from different countries around the world. It not only funds governmental efforts to address the diseases that are within its mandate, but where it thinks that such efforts are not the appropriate mechanism, it will either go to an international agency such as the United Nations Development Program or—for example in the case of Russia—the Global Fund has provided funding through non-governmental institutions.

The decisions of the technical review panel, an expert committee, are reviewed by the board of the Global Fund, which represents the donors. So far, the board of the Global Fund has always endorsed the decisions of the technical review panel. There have been no incidents so far in which political decisionmaking has interfered with funding by the Global Fund. It is emerging as an extremely effective international instrument. The Global Fund’s budget for the coming year is \$3.6 billion. It aspires to spend a much larger amount of money per year going forward. The funding formula that had been conceived some time ago was that one-third of the funding would come from the United States, one-third from the countries of the European Union, and one-third from all other donors.

In practice, it is more like one-third from the United States, fifty percent from the countries of the European Union, and the remainder from other countries. It insulates the donor governments from a

12. See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, A PARTNERSHIP TO PREVENT AND TREAT AIDS, TUBERCULOSIS AND MALARIA 1, <http://www.theglobalfund.org/en/files/publications/qaen.pdf> (explaining that the Global Fund was established in 2002 “as a partnership between governments, civil society, the private sector and affected communities” to combat these diseases through international health financing).

direct relationship to the expenditure, and that helps to depoliticize the funding. Also, it creates a sense of responsibility by the donor governments to deal with the diseases which are within the mandate of the Global Fund.

I do not think we can start work now on a global fund for justice, but that is what I believe the next era of war crimes tribunals requires. It could be much smaller than the Global Fund to Fight AIDS, Tuberculosis and Malaria. If \$1 billion a year were available to a global fund for justice, that would be more than adequate to cover the needs in this field as they will develop for some time ahead. That would be a way to remove this from the always pinched budgets of the United Nations, the political issues that enter into the decisionmaking there, and the need for the officials of the different international criminal tribunals to spend some of their time going around hat in hand, trying to raise the funds that are needed for the operation of these tribunals. If three or four or five years from now we get to the point of establishing such a global fund for justice, I think that we would make a significant advance in this field.

CONCLUSION

It is appropriate now to think in these terms even though we did not think matters through at the time that the international criminal tribunals were being launched. We can think ambitiously. We have seen that the reality of what has been achieved so far has far exceeded the ambitions of those who were involved in creating the current era of international criminal tribunals. Hence, I believe there is no reason to hold back in thinking about what might be done in the future.