

## **Global justice, local courts**

### **Rethinking the International Crime Court**

#### **Interview Michael Th. Johnson**

by Wojtek KALINOWSKI,

**The international community places high hopes on the International Criminal Court. In punishing leaders responsible for mass atrocities, it is thought to stabilize the post-conflict society and reconcile the divided population. But the outcome often proves unsatisfactory, and criticism is growing, among local populations and international experts alike. According to Michael Th. Johnson, the ICC must assume a different role than it plays today: rather than “going in and coming out”, it should commit to a long-term effort or restoring the local justice sector’s capacity to judge the crimes itself.**

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Michael Th. Johnson recently completed a Senior Fellowship at the United States Institute of Peace. He was the Registrar for the War Crimes Chamber of the Court of Bosnia and Herzegovina since 2004 where he established the first national court to accept jurisdiction over the transfer of indictments from the UN Tribunal for the former Yugoslavia. In 2001–2004, he was the chief of prosecutions for the UN International Criminal Tribunal for the former Yugoslavia and served as the Acting Deputy Prosecutor for the UN International Criminal Tribunal for Rwanda. He is the executive director of the Institute for Justice Sector Development in the United States and the Netherlands. He currently lives in Kabul in Afghanistan, where he is engaged in the reform of the Afghan national criminal justice sector.

**Wojtek Kalinowski: Compared to the 1990s, the ideal of a universal criminal justice system seems to have lost some of its original impetus. Criticism is growing, while we witness a return to “Realpolitik” in international relations. How confident are you about the future of the International Crime Court?**

**Michael Th. Johnson :** Viewing it in respect to its influence on the evolution of national justice systems, I am quite confident. However, in the international arena, there is still a conflict between

sovereignty and justice, diplomacy and the rule of law that is not new; it has been at the heart of the history of the Western world from the universe of feudal States to the more egalitarian civilization of today. As the proliferation of democratic States gained momentum after the fall of the Soviet Union and the number of international declarations grew in the shadow of continuing abuses, people across the globe began to believe that the language of human rights might actually apply to them. Unfortunately, they have been deeply disappointed in their expectations, time and again. In truth, it will require decades if not centuries to perfect a system to truly implement the rule of law globally. However, we are heading in the right direction.

In the early 1990s, the international community was still not ready to confront the question of which takes precedence: justice or sovereignty. Neither the United Nations, nor the diplomatic community supporting it were equipped with the skills or the tools to address the first principle of the rule of law, the “duty to protect”. Much less were they prepared to establish and support transparent and independent judicial institutions to interpret and apply the “rules” of an international legal system against a sovereign government?

But remember that the International Criminal Court<sup>1</sup> (ICC) is the first permanent court with the authority to adjudicate national conduct of international concern. In a sense, it is thus not surprising that after its initial operations, it is confronting the question of its mission and ultimate value to the world. One of its predecessor, the International Criminal Tribunal for the former Yugoslavia<sup>2</sup> (ICTY), is in many respects a model for “lessons to be learned” in delivering justice on the international level. At the outset, the ICTY defined its role quite broadly. In November 1995, after the conclusion of the Dayton peace agreement, the Tribunal’s then President Antonio Cassese remarked, that “justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand.” That task is quite a daunting one.

After more than ten years of operations (including indictments and trials of accused persons from all ethnic groups and regions of the former Yugoslavia) the Tribunal’s then Prosecutor unfortunately held a different view. On October 11, 2006, the prosecutors of all of the international tribunals gathered in The Hague for a round-table conference dedicated to the “impact of justice” on national reconciliation. Speaking as the Prosecutor for the ICTY, Carla Del Ponte was quoted as saying in reference to the Balkans, “I have seen no sign of national reconciliation... But this is not

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1 Established by the Rome Statute, adopted by United Nations in 1998. The Rome Statute is an international treaty, binding only on those States (105 to this date) which formally express their consent to be bound by its provisions.

2 The International Criminal Tribunal for the former Yugoslavia was established by Security Council of the United Nations resolution in 1993.

our task, even if we hope to contribute.”

What happened during these ten years? It is not surprising that those dedicated to providing justice for the most heinous of crimes might feel frustrated at the limited contribution their work has made to reconciliation in the regions of conflict. It is not surprising in light of the fact that contributing to “peace and reconciliation” in the region of the conflicts is specifically part of their internationally funded and supported mandate. In many respects, it should not even be expected of legal practitioners alone. Without wider support, they and their judicial institutions alone are not capable of providing for the restoration of the rule of law in post-conflict nations, which is the essential pre-requisite of reconciliation.

This has been, in large measure, the history of the ICTY and Bosnia and Herzegovina. Unless its policy is reformulated and expanded, the current ICC missions will lead to the same frustration in other parts of the world. The failure to obtain the extradition of accused in Sudan presents a substantial challenge to the credibility of the ICC. The conflict between peace negotiations and ICC jurisdiction in Uganda highlights the need for compatibility between the international mandates and the national legal obligations. The massive chaos in Congo highlights the need for extensive intervention by the international community to make the work of the ICC meaningful in the region. Congo is also complicated by the tension between diplomatic objectives in Rwanda, Uganda and other interests in the region and the demands for justice for massive crimes committed by all sides in that unfortunate and protracted conflict.

**W. K. : How should we explain these difficulties?**

**M. J. :** The problem lies in the very definition of the ICC mission. If we want to address and eventually prevent genocide, we must first understand the dynamics and the context within which these most heinous and destructive of crimes are committed. It must be clearly understood that they ordinarily result in the almost complete destruction of public trust in the major institutions governing a civilized society. These same religious, educational, legal, and political institutions are the bedrock upon which a society relies for stability and lawful order. Restoration of stability in the aftermath of such chaos as these crimes produce requires that the trust in local institutions be restored. This restoration or rather stabilization process should be understood precisely to be the establishment or re-establishment of the “rule of law.” The rule of law must encompass both security and fair and equitable resolution of disputes with civil society.

Widespread and systematic atrocities can only be committed by organizations, institutions

and/or government agencies working in concert with the political process. The criminal responsibility of those in leadership roles is not as clearly apparent as is that of those who commit individual crimes of violence. It is not as obvious to either the direct victims themselves or the outside world observing the conduct of an armed conflict. The individual crimes of personal violence are far more obvious to the war correspondent, who can photograph the mass graves, than is the political intrigue that facilitated such violence from executive offices far from the killing fields. Thus the concentration camp can be quickly condemned, but the political infrastructure that fed and empowered it with rhetoric and clandestine political, logistical, and material resources is hidden in the shadows.

The evidence necessary to prosecute the crimes of the camp guards is film from a camera and the interviews of surviving victims. The evidence required for the trials of the political leaders must be the fruit of more sophisticated investigations such as that gleaned from the review of thousands of hours of intercepted communications; the analysis of complex international financial transactions; the interpretation of intelligence reports from multiple foreign agencies; the interrogation of highly-placed and often confidential informants; and the detailed reconstruction of the parallel command structures in political, military, and paramilitary organizations.

The legal principles governing the prosecution of both levels of criminal conduct are the same in theory. The ability to produce compelling evidence at trial, however, is quite a different challenge. Evidence of intent and actual criminal conduct for the trials of the leadership of corrupted institutions (or in other words the “head of the beast”) is quite difficult to develop. To start with, the leadership cases must prove that the “body of the beast” (i.e. mid- and lower-level actors) actually committed individual crimes in a widespread and systematic fashion for which the “head” can then be held criminally responsible. An example of the difficulty in proving the responsibility of political leaders in cases of genocide and crimes against humanity is the recent outcome of the Bosnia and Herzegovina lawsuit against Serbia in the International Court of Justice. Essentially the International Court of Justice found that although atrocities occurred in Bosnia during the conflict in the early 1990s, it was unable to find sufficient proof that the aggressive acts of the Serbian (Yugoslavia) government made it liable for such crimes. They reached this result in spite of the broad appreciation of the general public in the region that the Belgrade regime of Slobodan Milosevic collaborated closely with the Bosnian Serb political and military forces during the war and afterwards. Long after Dayton brought the war to an end, the genocidal Bosnian Serb General, Ratko Mladic, continued to receive financial support as an officer in the Yugoslav Peoples Army (JNA).

Prosecuting “those most responsible for the atrocities” is a complex, expensive and time-consuming process. It requires very specialized and technical skills and organizational resources at all stages of the criminal justice process. It also necessitates international political will to bring the powerful criminal elements to justice. It is for these cases that the “international tribunals” were created and must be maintained. International judicial institutions like the ICTY and the ICC are therefore specifically designed and capable of beheading the institutional beast by providing a justice response specifically for the leadership of the criminal enterprise capable of organizing and executing widespread and systematic crimes. As designed, however, the international institutions are not able to also provide efficiently the necessary accountability for the “body” of the beast.

Nevertheless, accountability must be provided for the multitude of other, lesser perpetrators and accomplices if trust is to be restored in the fundamental local governing institutions of a post-conflict society. The question is: how and by whom? The ultimate obligation again lies in the first instance with the state. But again as in the leadership cases, it is often not prepared to do so without substantial assistance. That assistance must come from the international community as part of its obligation to enforce its commitment to universal human rights and the rule of law globally. As with the leadership cases, the international community must provide a mechanism for enabling a justice response if the national system is unwilling or unable to do so without international intervention. Such “inability” or “unwillingness” is often the result of precisely the same influences that were responsible for the conflict itself. The lesser perpetrators are often still in positions of power at all levels in the post conflict environment. The people of these regions upon who the hope of reconciliation lies are fully aware of the presence and culpability of these foot soldiers of genocide. The removal of their leaders to The Hague by the ICC does not change this dynamic.

The first step to a solution for impunity was the Ad hoc Tribunals and the Special Courts, imperfect and inefficient as they have been. The second step was the creation of a permanent Tribunal, the ICC. The third step must be a rebuilding of robust, national justice sector institutions possessed with a commitment and a capacity to provide accountability for past crimes in the regions where they were committed. The multitude of development projects currently operating in the justice sectors of countries in transition combined with the work of international tribunals are evidence of progress towards delivering on the promise of accountability and justice. However, the real hope lies in the ICC and its ability to learn the lessons of the Ad Hoc Tribunals. And the most significant lesson is that it must be the catalyst for coordinating the justice response at all levels, both international and national.

**W. K. : This brings us to the notion of complementarity: you claim that the ICC has to**

**cooperate and support the national justice sector of the countries where it intervenes. What do you mean by complementarity?**

**M.J. :** Scholars, lawyers, and diplomats use this notion to describe the relationship between the ICC jurisdiction and the right of a sovereign State to govern its own justice system. In that sense, complementarity is a limiting mechanism on the authority and discretion of the ICC – the ICC has no authority to intervene if the State responds on its own in an appropriate manner. If the State cannot or does not respond, the ICC may intervene, but even then only to a limited degree. As I said before, its mission is to investigate and prosecute only a very limited number of individuals, those most responsible for crimes such as genocide, aggression, crimes against humanity, and war crimes. It is a very precise, surgical device in the enforcement of international humanitarian law.

I, and others, like Professor William Burke-White, propose to extend the principle of complementarity and to apply it at two levels: first, determine whether the ICC should intervene depending on the capacity and willingness of the national system. Second, when and where the ICC does intervene, it must work in close collaboration with the international community and national systems to restore the capacity of national justice sector institutions to enable them to work in complement with the ICC. In this way, a holistic and global justice response can be provided to the crimes committed at all levels within the region. As it is now applied, the principle of complementarity ends with the determination of whether the ICC should intervene. But the next step is essential if the IC's commitment to the protection of human rights and ending impunity is genuine. As it is, international tribunals receive substantial resources to prosecute the criminal leadership, but the international community provides little if any *effective* support to restore the national judicial systems in the arena of accountability for gross violations of international humanitarian law. Such disparity, if it continues, will only aggravate and not end the perception of impunity.

Complementarity as I see it is thus closely linked to what you call in Europe subsidiarity. Subsidiarity requires critical decisions of governance to be made at the lowest possible level and thus at that point closest to the people affected. Combined with the current definition of complementarity, subsidiarity would dictate that the participants in a justice response to grave violations of human rights commit themselves to a broad, multi-level, and global strategy designed to produce the restoration of law and the reconciliation of the society harmed by such violations through primary reliance on local justice systems. But this is not what ICC is about today. Its mission is much more shortsighted: coming into a country, putting the principle leaders on trial, and getting out.

If real and long-term democratic stability under the rule of law is expected from the enforcement of international law in post-conflict regions, we must establish an affirmative duty on the part of the ICC and the international community to proactively assist post-conflict states in re-establishing their own local capacity to enforce the rule of law generally and international law specifically. This assistance must be real, substantial, and immediate in the aftermath of conflict. Otherwise the ultimate impact of the ICC as an institution of international justice will always remain minimal.

**W. K. : But how should this principle be implemented concretely?**

**M. J. :** In one sense, the strategy for complementarity, that I, and others suggest, must focus on the allocate resources. If implemented effectively the distribution of authority and jurisdiction between international and national courts will utilize the scarce resources available to delivery justice holistically. If the international actors (both the ICC and the international development agencies) develop that strategy in coordination with national legal professionals and reform minded political leaders, the interests of justice in the broadest sense will be served. There are numerous advantages to holding trials in the State on whose territory the alleged crimes were committed: evidence is easier to collect, trial costs are substantially reduced, resources are conserved for local capacity building and the truth is revealed directly to those most affected. The local judicial process (governed by international standards) is transparent and accessible to the people who are directly obligated to reconcile and rebuild their country after the chaos of armed conflict. The results of these local proceedings could be integrated into truth commission initiatives and other lesser sanctions, which could produce the greatest potential for reconciliation and sustainable social restoration after conflict. These local institutions are permanent assets in the national justice sector. The investment in local justice institutions can thus be a long-term contribution to rebuilding the infrastructure of the entire country.

Only a unified and global response, coordinating the ICC and the reformed local justice system, will have any meaningful effect. Unfortunately, only recently have constructive bridges been built with the national courts in the regions of the Tribunals' mandates. Had such relationships developed in the early stages of the "Ad Hoc" Tribunals' work, substantial resources would have been spared because investigations could have been undertaken with the help of (or in complement with) national judicial counterparts. For instance, the ICTY and ICTR<sup>3</sup> could have avoided the pressure from international donors to "complete" their work in an artificially short time frame had

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3 International Criminal Tribunal for Rwanda, established by UN in 1994.

they been able to show that they had indeed contributed to reconciliation in partnership with the reconstructed national justice systems. This and the more limited use of their resources for actual “leadership” cases would have conserved their political and fiscal capital for a much longer tenure than is now being allowed by the donor states supporting them.

The ICC and other international tribunals then are more suited for the role of the catalyst, facilitating the longer-range strategies for the restoration of the rule of law under international standards in the post-conflict regions. If they fail to do this, they place themselves in the position of being held directly responsible for fulfilling all of the expectations of all of the constituents of justice in the post conflict environment. As has been seen with the ICTY, this is a formula for failure of justice in the most fundamental sense. This is the lesson that the ICC must learn now.

**W.K. : Is there any empirical evidence in favor of that the complementarity strategy?**

**M. J. :** Let us go back to the ex-Yugoslavia case. While the ICTY is the example of the higher supranational judicial body, the War Crimes Chamber (WCC) of the Court of Bosnia and Herzegovina, established in 2005 as a national judicial institution, is the counterpart for the national complement. The war in Bosnia and Herzegovina (BiH) ended in 1995. The international community engaged in Bosnia had, prior to the establishment of the WCC, discouraged national initiatives for prosecution of war crimes in local courts. The fear of politically motivated cases and disruption of the implementation of the provisions of the Dayton Peace Accords lay behind this policy. By imbedding international legal and administrative experts into the WCC over an initial establishment and transitional period, those concerns were removed. The WCC is the first of its kind. It is a national court that operates under both national law and procedure yet fully meets international standards of fair trials and the delivery of a legal process equal to that of the ICTY for crimes of the most complex criminal nature. Its success should provide an example of complementarity easily replicated elsewhere.

Even if it was a decade delayed, this experiment can serve as an excellent model for managing policy for the allocation of resources between the national and international options. At current budgets, the three ICTY courtrooms consume over \$135 million dollars a year compared to less than \$10 million a year for six courtrooms in the Court of Bosnia and Herzegovina to which the ICTY has transferred a number of its cases for adjudication. According to the ICTY itself, both courts conduct their operations under the same international standards of fair trials. The WCC will also exist as an integral part of the national justice system of BiH in perpetuity.



The lessons learned from examining the inter-relationship between the ICTY and the local judicial system in Bosnia reveals why complementarity should be redefined to include a broader commitment to rebuild the national justice sector. And it provides evidence of the effectiveness and limitations of collaboration between the international community and national legal, political and judicial institutions. The failure of the IC to build a national capacity in Bosnia in the ten years between Dayton and the establishment of the WCC is a fundamental mistake from which an important lesson is to be learned. During those ten years, a substantial number of serious actors, culpable for the crimes that destroyed the fabric of Bosnia and Herzegovina have been free and engaged in the reconstruction of that country. The continuing ethnic divide and the residue of nationalistic political division is testament to the folly of that policy.

With the creation of the WCC, the people of Bosnia and Herzegovina now have a better context in which they can judge the effectiveness of the ICTY. In the coming years the work of both institutions, in complement, will best serve the interests of justice demanded by the people of that region and expected by the international community.

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