

# Double Standards in International Criminal Justice: A Long Road Ahead Towards Universal Justice

By Wolfgang Kaleck

FICHL Policy Brief Series No. 37 (2015)

Whether international criminal justice can help overcome core international crimes and heal traumas depends largely on its legitimacy. Sadly, international criminal justice has increasingly become the subject of criticisms for political selectivity and for being a tool of Western domination whose claim to universality is just an empty ideological superstructure. This policy brief assesses double standards in the application of international criminal law, especially concerning accountability for core international crimes committed by Western states.<sup>1</sup>

## 1. The Nuremberg and Tokyo Trials

The trials before the International Military Tribunal at Nuremberg ('IMT') and the subsequent trials held by the Nuremberg Military Tribunal ('NMT') established the idea that anyone involved in the commission of genocide, crimes against humanity, war crimes and crimes of aggression should be held accountable.

From one perspective, the vertical balance of defendants during the successor trials before the NMT was exemplary. The defendants included members of the Nazi elite from military, industry, law and medicine. Despite this, many see the successor trials partly as a failure: at the beginning of the Cold War, senior functionaries managed to avoid prosecution, proceedings were shelved for political reasons, and many convicts subsequently received amnesties. Similar dynamics were unfolding in Japan. Ultimately, vertical selectivity held sway.

In contrast, the allegation that the trials constituted 'victor's justice' is mostly ill-founded. There is now almost unanimous agreement that the establishment of the

IMT and the proceedings met accepted legal standards of the time.<sup>2</sup> Furthermore, the Allies were by no means guilty of crimes of a scale similar to those committed by the Nazis. It would have been a distortion if "a tribunal for 24 leading Nazis and then a tribunal for 24 leading Americans and later a tribunal for 24 English leaders" had been established.<sup>3</sup>

## 2. Impunity for Western Crimes Post-1945: The Colonial Wars and Vietnam

The struggles for independence in Indochina, Southeast Asia and Africa against the colonial powers after the end of the Second World War were met with tactics of counter-insurgency, including the bombing of civilian populations, mass imprisonment and torture. During the Mau Mau Uprising in Kenya, British internment camps became sites of systematic torture. Large areas were indiscriminately bombarded and millions were forcibly resettled, some 20,000 to 100,000 died. No international court proceedings were ever initiated in relation to these colonial crimes or in similar situations such as Algeria. No prosecution took place in the domestic courts of the colonial powers.

During the Vietnam War, United States ('US') forces were involved in a string of war crimes: bombing South and North Vietnam, Laos and Cambodia, using prohibited weapons, the killing and rape of civilians, the widespread torture and killing of prisoners. Around 20,000 Viet Cong suspects were extra-judicially executed.<sup>4</sup> US military

<sup>1</sup> For more details, please consult Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015 (<https://www.legal-tools.org/doc/971c3c/>). The author thanks Simon Rau for his work on this policy brief.

<sup>2</sup> M. Cherif Bassiouni, "Das Vermächtnis von Nürnberg: eine historische Bewertung fünfzig Jahre danach", in Gerd Hankel and Gerhard Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, Hamburger Edition, Hamburg, 1995, p. 19.

<sup>3</sup> Victor Tsilonis, "International Protection of Human Rights and Politics: An Inescapable Reality (Interview with Professor William Schabas)", in *Intellectum*, 2010, vol. 7, pp. 46–60.

<sup>4</sup> Alfred W. McCoy, *Foltern und foltern lassen*, Zweitausendeins

courts convicted only about 20 members of the US armed forces of war crimes. In the case of the My Lai massacre on 16 March 1968, where about 504 civilians were murdered by US troops, Lieutenant William Calley was the only person convicted. No higher ranking military members were tried or investigated under the doctrine of command responsibility, although the massacre was the result of a systematic practice.<sup>5</sup>

The impunity for Western crimes in colonial wars and Vietnam continues to be a serious obstacle to a universal criminal justice system.

### 3. Yugoslavia, Rwanda and Co.:

#### The Legacies of the Tribunals

The International Criminal Tribunal for the Former Yugoslavia ('ICTY') has been controversial since its establishment. All the former Yugoslav republics attempted to undermine prosecutions of their nationals by accusing the court of bias. International lawyers and human rights activists joined the criticism after the NATO airstrikes on Serbia in 1999, where war crimes may have been committed. In a 2008 book, Carla Del Ponte, the former Prosecutor of the ICTY, agrees that some NATO strikes would have merited legal action, but says that such an attempt would not only have ended in failure, but would have made it impossible to continue prosecuting local actors.<sup>6</sup>

The International Criminal Tribunal for Rwanda ('ICTR') has only investigated and tried those involved in the genocide against the Tutsis. Allegations have been made of war crimes committed by the Rwandan army in Rwanda and eastern Democratic Republic of the Congo ('DRC') after the genocide. Del Ponte, originally chief prosecutor for both tribunals, lost her ICTR mandate after she suggested that her office should step up efforts to pursue Tutsi suspects.

The ICTY and ICTR can be justly criticized for not investigating or prosecuting certain groups and senior figures, but they should be credited with having proven that international criminal justice is possible even under adverse political circumstances.

The record of the various *ad hoc* hybrid tribunals is often problematic: the chances of a tribunal being set up are higher the more the power-balance favours the former victims of state repression and the smaller the possibility that they themselves will face prosecution. This easily invites

selective prosecutions divided along winner-loser lines.<sup>7</sup> It appears that the compromises reached between the UN and the affected states regarding the establishment of hybrid tribunals has led to a degree of horizontal and vertical selectivity in prosecution.

### 4. Universal Jurisdiction: Last Hope?

It was mainly human rights organizations and associations of victims who were instrumental in advancing national prosecutions for core international crimes since the 1990s. When effective local remedies were inaccessible, these movements turned to other transnational or international bodies.<sup>8</sup>

Spanish cases in the mid-1990s concerning crimes of the military dictatorships in Argentina and Chile are exemplary.<sup>9</sup> In 2005, a Madrid court convicted Argentine officer Adolfo Scilingo of crimes against humanity. On the basis of a Spanish arrest warrant, Chilean ex-dictator Augusto Pinochet was arrested in London on 16 October 1998. The case came before the British House of Lords, which held that in cases concerning torture, former heads of state did not enjoy immunity. The efforts of European prosecutors and courts increased the willingness in South America to deal with these crimes. Some scholars would describe this as 'Pinochet-Effect' or 'Videla-Effect'. Chile has completed numerous criminal cases. In Argentina, amnesty laws were finally lifted. Since 2006, investigations have been launched into approximately 2,600 accused of dictatorship crimes, with some 550 convictions secured to date. In Guatemala, the former dictator Rios Montt was sentenced by a domestic court in 2013.

However, the political difficulty of pursuing prosecutions against officials of powerful states has often become apparent. For example, following criminal complaints against General Tommy Franks, the US commander overseeing the invasion of Iraq, Belgium largely restricted the scope of its universal jurisdiction laws. The US had exerted pressure, threatening to move NATO headquarters from Brussels. Surely opposition to the use of universal jurisdiction has also come from the Israeli and Chinese governments and the African Union.

Lawyers and human rights activists (including the present author) continue to push for accountability for crimes committed by US officials (for example, at Guantánamo) and representatives of other powerful states before domes-

Verlag, Frankfurt a.M., 2005, pp. 79 *et seq.*, 184.

<sup>5</sup> Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 180 *et seq.*

<sup>6</sup> Carla Del Ponte, *Madame Prosecutor*, Other Press, New York, 2009, p. 60.

<sup>7</sup> Anja Jetschke, "Der Kaiser hat ja gar keine Kleider an! – Strafverfolgung durch hybride Tribunale", in *Friedenswarte*, 2011, vol. 86, no. 1–2, pp. 103 *et seq.*, 125.

<sup>8</sup> Sidney Tarrow, *The New Transnational Activism*, Cambridge University Press, Cambridge, 2006.

<sup>9</sup> See Wolfgang Kaleck, *Kampf gegen die Straflosigkeit. Argentiniens Militärs vor Gericht*, Verlag Klaus Wagenbach, Berlin, 2010.

tic courts on the basis of universal jurisdiction. In our eyes, universal jurisdiction is not a concept worth defending if it does not enable that perpetrators from powerful states are brought to justice. Most criminal complaints were dismissed on legally spurious bases and it became clear that the US government was engaged in efforts to influence the course of justice in European courts. The proceedings have, however, ensured that the actions of the US and its allies are extensively discussed and measured against the applicable law. Groups of US suspects have cancelled their trips to Europe to avoid arrest.

Of the estimated 1,051 proceedings undertaken in Europe during the last 15 years, only 32 proceeded to trial. While criminal complaints have been directed against suspects from all over the world, the trials that took place involved only suspects from Afghanistan, Argentina, DRC, the former Yugoslavia, Mauritania, Rwanda, Tunisia and a small number of Nazi criminals.<sup>10</sup> Problems such as limited access to overseas evidence go some way to explain this outcome. The greatest obstacle, however, is a lack of political will.

### **5. Selective Corporate Accountability for International Crimes**

Political selectivity also plays a role in respect of prosecutions of national and transnational economic actors that are often part of the power structures.

Various successor trials at Nuremberg were directed against German firms, such as the trials of industrialists Flick and Krupp and the managers of I.G. Farben. But since Nuremberg very few prosecutions in respect of corporate involvement in international crimes have been carried out. The two most significant cases in Europe were heard in the Netherlands. Businessman Frans van Anraat was convicted for aiding and abetting the selling of chemical weapons components to Saddam Hussein who used them in the massacres of the Kurds in northern Iraq. Arms dealer Gus Kouwenhoven was charged with aiding and abetting war crimes and crimes against humanity in Liberia, with no final decision reached at the time of writing.

An alternative to pursuing accountability is civil claims based on the US Aliens Tort Claims Act, which establishes US tort jurisdiction over violations of international law committed against aliens, even if outside the US. Although some suits concerning corporate human rights abuses have led to settlements favourable to the claimants, in 2013, the US Supreme Court held in *Kiobel v. Shell* that US courts only have tort jurisdiction in cases of grave human rights

violations where there is a tangible link to the US.

Economic power structures tend to persist after political transitions and the global economic elite may well be using its leverage to stifle accountability efforts. Hence, corporate impunity remains rife, although the existing legal framework is able to address it effectively, for example, via aiding and abetting liability.

### **6. Selectivity in the Practice of the International Criminal Court**

The refusal of many states, such as China, Russia, India and the US, to subject themselves to the International Criminal Court's ('ICC') jurisdiction goes some way to explain why the court's investigations to date have been limited to African states. This regional imbalance has led to widespread criticism of the ICC, especially its Office of the Prosecutor ('OTP'), for pursuing a neo-colonialist, anti-African agenda.

The situation in the Eastern DRC was referred to the court by the DRC's government. The court has targeted only rebel leaders while not prosecuting suspects from the Congolese, Rwandan and Ugandan governments and armed forces who intervened in the Eastern DRC conflict. Due to this horizontal selectivity of prosecutions, Human Rights Watch and a UN expert panel<sup>11</sup> have accused the OTP of failing to prosecute those bearing the greatest responsibility. A further criticism focuses on the fact that the first convict Thomas Lubanga was charged only with conscripting and enlisting child soldiers and not other more grave crimes. The OTP's investigations into the situation in the DRC are widely perceived to be inadequate and selective which has led to a growing local belief that the ICC lacks impartiality.<sup>12</sup> The DRC cases have revealed how the selectivity of prosecutions can have a negative impact on the local legitimacy of the ICC.

This assessment is confirmed by the investigations concerning Uganda, a party to the ICC Statute and one of the court's most important supporters in Africa. In 2004, Uganda referred the armed conflict in northern Uganda to the ICC. Following investigations, the ICC issued arrest warrants against leaders of the Lord's Resistance Army. The court is rightly criticised for ignoring state crimes committed by the Ugandan army.<sup>13</sup>

The OTP has been monitoring the situation in Colombia as part of its preliminary examinations programme since 2006. There is a consensus that war crimes and crimes against humanity were committed in Colombia af-

<sup>10</sup> Máximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", in *American Journal of International Law*, 2011, vol. 105, no. 1, p. 8.

<sup>11</sup> UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC.

<sup>12</sup> Human Rights Watch ('HRW'), "Unfinished Business: Closing Gaps in the Selection of ICC Cases", pp. 9 *et seq.*

<sup>13</sup> *Ibid.*, pp. 23 *et seq.*



ter the coming into force of the ICC Statute in 2002. The ICC could therefore take up proceedings, but only as long as Colombian authorities are unwilling or unable to investigate and prosecute themselves, as stipulated by Article 17 of the ICC Statute.

Colombia's lack of requisite will to pursue proceedings is indicated by widespread attempts to protect suspects from prosecution, undue delays and a lack of independence of the prosecution authorities. Proceedings have been launched against only around 10 percent of the estimated 30,000 paramilitary suspects. Since 2009, 83 proceedings have been opened against members of Congress and state officials, and 55 officials have been convicted on account of their links with the paramilitaries. But these minor successes do not justify the ICC's failure to act.

There has been much criticism of the OTP's approach to allegations of war crimes committed in Iraq. In 2006, the OTP said prosecutions had not been initiated as the crimes concerned were not of sufficient gravity. In January 2014, the British law firm Public Interest Lawyers and the European Center for Constitutional and Human Rights ('ECCHR') submitted a dossier to the OTP on the systematic abuse of Iraqi prisoners under British control. The complaint focuses on 85 representative cases encompassing more than 2,000 individual claims of abuse. In May 2014, the OTP opened a preliminary examination in response to the submission.

The first three situations before the ICC concerning the DRC, Darfur and Uganda involved human rights violations on a massive scale that clearly warranted the court's intervention. The issue becomes less clear with regard to Kenya, the Ivory Coast and Libya. Since the beginning of the ICC's temporal jurisdiction in July 2002, situations of comparable gravity have occurred in Burma, Chechnya, Colombia, Iran, Syria, Palestine and Sri Lanka. None of these countries, with the exception of Colombia and, since early 2015, Palestine, have signed the ICC Statute, and none of these situations have been referred by the UN Security Council. The ICC's failure to move forward in the situation in Colombia – the most important ally of the US in Latin America – is its greatest shortcoming. The criticism of political selectivity in connection with British war crimes in Iraq seems warranted as well.

Two of the investigations into African countries were

referred to the court by the UN Security Council and four others were referred by the states in question. It seems that allegations of neo-colonialism against the ICC have frequently been used by African elites trying to deflect pressure to pursue perpetrators of international crimes.

## 7. Conclusion

The ICC, other international tribunals and national courts are increasingly assessed on the basis of their claim to universality. It can be concluded that this test is hardly met in any of the contexts considered in this policy brief. Horizontal and vertical selectivity abounds as a matter of fact.

However, international criminal justice should not be declared defective because some perpetrators enjoy impunity. The idea that even the most powerful persons are equal before the law and will be held accountable for their crimes has the potential to make a difference to victims of core international crimes, affected societies, and world public opinion more widely. The claim to universality opens up space to expose existing double standards and to push for accountability for the powerful.

Even those who argue in principle for accountability for Western actors responsible for core international crimes acknowledge that their prosecution may not be politically feasible, and that the ensuing backlash could undermine the fledgling system of criminal justice for core international crimes. Nevertheless, the aims of developing international criminal justice and eliminating double standards are not mutually exclusive in this author's view. Scepticism triggered by accusations of selectivity and bias has grown, especially in the Global South. The practice of double standards will have to be addressed to protect this project against erosion of legitimacy and global endorsement. This policy brief therefore advocates an approach that is not restrained by considerations of *Realpolitik*, but aims for a universal justice that deserves its name.

*Wolfgang Kaleck is the Secretary-General of the Berlin-based European Center for Constitutional and Human Rights. The ECCHR engages in innovative strategic litigation, using European, international, and national law to hold state and non-state actors accountable for egregious abuses.*

ISBN: 978-82-8348-006-1

PURL: <https://www.legal-tools.org/doc/f61f70/>



Torkel Opsahl Academic EPublisher

E-mail: [info@toaep.org](mailto:info@toaep.org)

[www.toaep.org](http://www.toaep.org)

All rights reserved by the Torkel Opsahl Academic EPublisher (TOAEP).