

Advocates of Humanity: Human Rights NGOs in International Criminal Justice

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1. Global Civil Society and the International Criminal Court

The development of international criminal justice is considered part of the advancement towards a more ‘people-empowering’ international rule of law – the emergence of a global criminal order created by and for ‘the people’ rather than States.¹ Indeed, the creation of the International Criminal Court (‘ICC’) is widely referred to as a “global civil society achievement”.² According to Benedetti, Bonneau and Washburn, the emergence of the Coalition for the International Criminal Court (‘CICC’) as “the most advanced and sophisticated organization thus far created collectively by civil society to influence and shape multilateral treaty-making is an irresistibly compelling feature of the story of the Rome Statute”.³

But how can we understand the relationship between ‘global civil society’ and global criminal justice-making? Whom is global civil society comprised of? And what does this relationship tell us about the social meaning of criminal justice and punishment on a global scale?

2. A Sociology of International Criminal Justice

International non-governmental organisations (‘NGOs’) fulfil a number of functions at the international level

¹ See, e.g., Ruti G. Teitel, *Humanity’s Law*, Oxford University Press, 2011.

² Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, 2006; see also Kristie Barrow, “The Role of NGOs in the Establishment of the International Criminal Court”, in *Dialogue*, 2004, vol. 2, no. 1; Z. Pearson, “Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law”, in *Cornell International Law Journal*, 2006, vol. 39; Cenap Cakmak, “Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the NGO Coalition for an International Criminal Court”, in *The International Journal of Human Rights*, 2008, vol. 12, no. 3.

³ Fanny Benedetti, Karine Bonneau and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, Nijhoff, 2014, p. 68.

that are yet unheard of within Western domestic systems of criminal justice. In addition to their traditional roles of advocacy and agenda-setting, they identify and represent victims at the Court, provide evidence and *amicus curia* briefs, draft penal codes and lobby for their implementation in domestic systems of criminal justice. However, rather than focusing exclusively on mapping the extent of their activities, a sociological approach to international criminal justice seeks to view it ‘from the outside’; that is, to understand the relationship between global civil society and global criminal justice-making as a social process situated within the broader social configurations of global society. What are the material aspects of global social organisation that enable NGOs to ‘connect’ for international criminal justice? How do imaginations of justice travel? To explore these issues, I have conducted an empirical analysis of transnational advocacy networks in their mobilisation for global justice through the ICC.

3. Approaching International Criminal Justice through Global Ethnography

I have approached the transnational networks of NGOs advocating for the ICC as an ‘ethnographic object’, involving multi-sited fieldwork and interviews primarily in The Hague and Uganda, as well as in Belgium, Norway, Rwanda and the United Kingdom. Methodologically, such a move involves an analytical shift from the traditional ethnographic focus on bounded, territorial sites, to the study of international criminal justice-making as a *field*. Here, attention can be given to the relation between sites in order to “build a montage that lends greater insight into the whole, into the connections, disconnections and reconnections”.⁴

Taking the CICC as a point of departure, my empirical focus has been on the office of the Secretariat as well

⁴ Michael Burawoy, “Manufacturing the Global”, in *Ethnography*, 2001, vol. 2, no. 2, p. 156.

as the core group of human rights NGOs working on the ICC in The Hague (most of which are steering committee members of the Coalition). In addition, I have followed the CICC's networks from its 'centre' in The Hague to the 'periphery', tracing one of its regional networks to Africa, to its national network to Uganda, and finally to its local network in Gulu in Northern Uganda, one of the sites of mass violence subject to adjudication by the ICC in The Hague.

4. Materialities and Imaginaries of Global Criminal Justice-Making

In dealing with questions of political communities in global justice-making, a "core normative issue involves asking who is the 'we' that is to be at the centre of the attempt to create a practically more viable and morally acceptable form of global political order?"⁵ In an attempt to contribute to this enterprise by examining those involved in seeking to create a global *criminal* order, we should first examine *materialities* by probing the 'where', 'how', and 'who' of global criminal justice-making.

From the perspective of space, we should "highlight those spaces less visible, to identify the lived spaces of international law, the contexts of where international law 'happens', and identify the voices that are able to participate in the 'where'".⁶ For example, while The Hague can be understood as a 'global city'⁷ – a 'hub' in the global networks of global justice-making – it is related to and dependent on other spaces, notably those places where international crimes have allegedly taken place. As an ICC situation country, Uganda is one of those sites. There, however, international criminal justice is almost invisible: the ICC has no permanent presence in the North, and the NGOs working on post-conflict issues are largely disconnected from The Hague. Transnational advocacy networks are therefore situated as part of the geography of power of international criminal justice, which provides a conceptual and empirical backdrop for exploring how they navigate within the transnational and global space of international criminal justice-making.

While NGOs played a significant role in how global justice-making materialised in the ICC, the role of NGOs has developed in tandem with the ICC's institutionalisation. They have become mediators between different geographical sites, notably between the global and the local. At the same time, international NGOs have managed to stimulate the idea of the 'transnational' as a particular space for political engagement and the CICC

has managed to become *the* global civil society *vis-à-vis* the ICC. As such, they play an important role as providers of moral authority through which they can represent humanity in global criminal justice-making. However, against the backdrop of the Ugandan case, there is a discrepancy within the NGOs between the 'Global North and South' in the making of the global. A question may thus be asked about which individuals have access to the global justice-making processes. The social positions of the agents involved in global justice advocacy belong to a class of transnational Western professionals, making it difficult for non-EU citizens to work in the dominant parts of this field. At the same time, while using humanitarian discourse to promote criminal global justice-making through law, the advocates of international criminal justice have to navigate between being 'insiders' as experts and 'outsiders' that can claim moral authority.⁸

In recognition that the making of the global "is not just the production of (dis)connections, but simultaneously [...] the production of a *convincing ideology* that obscures the source of those (dis)connections and presents them as something natural and eternal",⁹ we should turn to *imaginings* of global criminal justice.

Through outlining the emergence of a 'cosmopolitan penal imaginary', international criminal justice is imagined and promoted as a form of global social justice. Through fieldwork in Uganda and Rwanda, asymmetries in international criminal justice between the international and national criminal justice systems are identified. My fieldwork also shows how international criminal justice circulates transnationally between different geographical sites via human rights NGOs and is closely linked to human rights expertise. In comparison with Western domestic penal policies, international criminal justice both echoes 'the national' and departs from it. For example, while international criminal justice relies upon retributive and expressive undertones, it makes no appeal to punitive sensibilities, a fact which is understood in light of the close relationship between international criminal justice and human rights NGOs. Moreover, while the centrality of victims is an important feature of both domestic and international criminal justice, the proliferation of groups speaking on their behalf demonstrates not only their powerful motives but also their continued politicization.¹⁰ The ICC – unlike ordinary courts – incorporates what can be thought of as both 'punitive' and 'reparative' arms, representing a form of

⁵ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, Oxford University Press, 2007, p. 12.

⁶ Zoe Pearson, "Spaces of International Law", in *Griffith Law Review*, 2008, vol. 17, no. 2, p. 497.

⁷ Saskia Sassen, *The Global City: New York, London, Tokyo*, Princeton University Press, 2001.

⁸ Kjersti Lohne, "Global Civil Society, the ICC, and Legitimacy in International Criminal Justice", in Nobuo Hayashi and Cecilie Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, 2017.

⁹ Burawoy, 2001, p. 150, see *supra* note 4 (italics in original).

¹⁰ Sandra Walklate, "Imagining the Crime Victim: The Rhetoric of Victimhood as a Source of Oppression", in *Social Justice*, 2005, vol. 32, no. 1.

hybrid justice by incorporating ‘restorative’ and ‘transformative’ rationales for justice.¹¹

However, a closer look at how these processes of providing justice for victims are implemented reveals a conspicuous discrepancy between ideologies and realities in international criminal justice. Victims are nonetheless a source of moral authority, and one that is claimed in representational practices by both human rights NGOs and international criminal justice generally. My analysis thus shows how the victim is culturally represented through imaginations from the Global North and becomes universalised as a symbol of humanity, of which the gendered and racialized victim of sexual and gender-based violence provides particularly powerful victim imagery.

Having explored the cultural authority of the ICC, the NGO’s claim for advocacy of humanity and the moral authority of victims, one may still ask who ‘we’ are that do the punishing. To what extent can international criminal justice be understood as reflecting *cultural* authority: to reflect bonds of common values and beliefs, tradition and interest on the global scale? My research therefore shows how the agents of international criminal justice argue their cases and punish in the name of humanity. I argue that ‘humanity’ reflects a dominant global moral order and that global justice-making through international criminal law is intertwined with the promotion of rule of law and penal aid in contexts of ‘failed’ justice. Cosmopolitan values, particularly the cosmopolitan penal imaginary, are supposed to spread through the notion of ‘positive complementarity’, using the Rome Statute as a ‘crowbar’ for ‘penal aid’ in the global south. Global justice-making through international criminal justice is thus a multi-scalar project, and one which, albeit solidarist, is coercively and deliberatively implemented.

5. What it Means for Understanding Current Pushback against International Criminal Justice

A sociological approach to punishment, and in this case international criminal justice, enables attention to the norms, morals and values at play in the motivational dynamics of penal reforms. My research has taken seriously the humanitarian sensibilities embedded in human rights, and the imperative to ‘do something’ about the suffering of others, and has therefore paid attention to both the punitive and non-punitive forces involved in the shaping of global justice, and the merging of humanitarian and penal sensibilities. At the same time, these cultural forces have been analysed against the background of materialities – of social organization and structure – that have enabled people to “think and feel in these ways and

to promote policies in accordance with their feelings”. As is shown, “sentiments and sensibilities sometimes neatly coincide with interests of a political, economic, or ideological kind”.¹² In spite of international criminal law’s claim to be cosmopolitan, global and universal, my analysis of materialities has revealed it to be a situated practice. Indeed, given the nature of the spaces in which global justice-making takes place, the networks by which sites and ideas are connected and the individuals positioned to advocate their views, as the analysis put forward casts doubt on the use of ‘global’ to describe the type of criminal justice expressed through the international criminal justice project.

However, the point of departure for my empirical analysis is global justice-making as it developed in the post-Cold War 1990s with *ad hoc* tribunals, the creation of the Rome Statute system of justice, and the parallel transnational justice movement founded upon notions of universal human rights. According to Fukuyama’s prophecy, this period was “not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the endpoint of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government”.¹³ In the newfound unipolar world order, ideology was replaced with universalism, and human rights went from being David’s weapon against Goliath to becoming the *lingua franca* of the new world order – “the ideology at the end of history”.¹⁴ In doing so, human rights “were subsumed by the politics of American power and market-based democratic liberalism. Secular religiosity, the European legacy, was the cornerstone of an active effort to construct a plausible metanarrative of impartiality”.¹⁵ This was the ‘golden age’ of international humanism, international law-making and institutionalization.

Yet while contestation and resistance to international criminal justice and in particular to the ICC are far from new, recently there has been a considerable growth of this resistance and the perception of an ICC ‘legitimacy crisis’. This pushback against global justice, however, must be seen in tandem with a changing geopolitical landscape where the “transformationist rhetoric about ‘post-Westphalia’”¹⁶ is losing traction in the face of the emergence of a multipolar world order, that is, “a world of renewed sovereignty, resurgent religion, globalized

¹¹ See also Carolyn Hoyle and Leila Ullrich, “New Court, New Justice? The Evolution of ‘Justice for Victims’ at Domestic Courts and at the International Criminal Court”, in *Journal of International Criminal Justice*, 2014, vol. 12, no. 4, pp. 681–703.

¹² David Garland, *Punishment and Modern Society: A Study in Social Theory*, University of Chicago Press, 1990, pp. 197–98.

¹³ Francis Fukuyama, “The End of History”, in *The National Interest*, 1989, vol. 16, no. 4.

¹⁴ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, Routledge-Cavendish, 2007, p. 33.

¹⁵ Stephen Hopgood, *The Endtimes of Human Rights*, Cornell University Press, 2013, p. 171.

¹⁶ Hurrell, 2007, p. 9, see *supra* note 5.

markets, and the stagnation or rollback of universal norms about human rights”.¹⁷ With the rise of great powers such as China and India and the renewed cooling of relations between Russia and the West, global justice-making appears increasingly impotent, the lack of intervention in Syria being the paradigmatic example.

The current resistance and legitimacy crisis of the ICC can therefore be seen as reflective of this contemporary disconnect between the idea of a global (criminal) order based on the notion of liberal cosmopolitan solidarity, and the emerging conversation about contestation and resistance. This is a result of the move towards a multipolar, or multi-regional, system of international relations – not necessarily because oppositional states such as Burundi, Kenya and now Uganda represent particularly strong states, but because there is a deeper lack of authority at the level of global justice-making. Notwithstanding the interest heads of states have in granting themselves immunity and dodging prosecutions, it seems that “fundamental tensions have appeared in the relationship between those representing and advocating at the political level the ideas of [international criminal law], the institutions of international criminal justice, and states or civil society in the regions most directly concerned by these political and institutional practices”.¹⁸

The author therefore suggests that the ‘situatedness’ of global criminal justice-making as identified must be seen alongside the pushback against international criminal justice. As a result of geopolitical shifts, ‘universality’ is starting to break apart, along with international criminal justice and its supporting structure of the human rights NGOs claiming to represent it.

6. Where do ‘We’ Go from Here?

In moving forward, there are grounds for reiterating the common mantra of NGOs that work in international criminal justice advocacy: justice must not only be done but it must also be *seen* to be done. While it is generally used when advocating for outreach and communications with a court constituency,¹⁹ this watchword recalls the

¹⁷ Hopgood, 2013, p. 166, see *supra* note 15.

¹⁸ Immi Tallgren, “The Voice of the International: Who is Speaking?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 138–39.

¹⁹ See, e.g., Human Rights Watch, “The International Criminal Court Trial of Thomas Lubanga”, 2009.

importance of appearances.²⁰ Representations and images matter. This means that the legitimacy of the ICC cannot just be assessed in terms of rationally defensible principles, such as those justifying the ICC’s selective ‘targeting’ of Africa as a result of African states’ self-referrals to the Court, or the Court’s limited jurisdiction over violence committed in other territories, such as Palestine, Syria and so forth.

Legitimacy is also contingent on the Court being “*acknowledged as rightful*” by relevant social agents, which include power-holders and their staff, those subject to the power and third parties whose support or recognition may help confirm it”.²¹ In this sense, legitimacy is as an ‘ongoing dialogue’ between power-holders’ claims to legitimacy, audience response, and – if they are receptive – power-holders’ adjustment of their legitimacy claims.²² This means that, like “all transnational law, transnational criminal law has to find secure grounding in populations that can culturally ‘own’ this law”,²³ thereby underscoring the need to further sociological understanding of international criminal law, not least to add food for thought to one of the more pressing normative issues of our time, namely that of who is to be at the centre of crafting global justice.

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²⁰ It originates from the English case *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256.

²¹ David Beetham, “Revisiting Legitimacy, Twenty Years On”, in *Legitimacy and Criminal Justice*, Justice Tankebe and Alison Liebong (eds.), Oxford University Press, 2013, p. 19 (italics in original).

²² Anthony Bottoms and Justice Tankebe, “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice”, in *Journal of Criminal Law and Criminology*, 2012, vol. 102, no. 1.

²³ Roger Cotterrell, “The Concept of Crime and Transnational Networks of Community”, in P. Alldridge, L. K. Cheliotis, and V. Mitsilegas (eds.), *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives*, Hart, 2015, p. 22.