CHAPTER 27

Reflections on International Criminal Justice
Twenty Years Later

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In 1993 the Security Council of the United Nations adopted a historical resolution by establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). By that resolution, as well as by the resolution establishing one year later the International Criminal Tribunal for Rwanda (ICTR), the Security Council initiated the current phase of international criminal justice, following the experience of Nuremberg and Tokyo at the end of WW II. Twenty years have elapsed since then, achievements and pitfalls have been largely discussed in legal and political circles, and it looks appropriate to reflect – in this book in honour of judge Flavia Lattanzi, who has served for a long time as a judge in the two ad hoc Tribunals – on the current scenario of international criminal justice and its possible future developments. This is the more appropriate as the current scenario is rapidly changing, and will change even more dramatically during the coming years.

The essential feature of the current scenario is the existence of numerous criminal courts and tribunals, which have been entrusted with the task of exercising jurisdiction over international crimes – war crimes, crimes against humanity and genocide – with the support of the international community. Irrespective of their different nature, denomination and legal basis, whether proper international courts, or hybrid and mixed courts and tribunals, the establishment of international criminal judicial bodies has radically changed an earlier approach of the international community, which seemed previously inclined – after the experience of the Nuremberg and Tokyo trials – to leave to individual States the task of repressing international crimes committed by their nationals or on their territory, as evidenced by the approach taken on the matter in the Geneva Conventions of 12 April 1949.

This change has led to what has been called a “proliferation” of criminal courts, which, however, does not appear to have been guided by any planned or coordinated strategy, as far as its judicial and legal dimensions are concerned. Indeed, the first step was taken by the Security Council of the United Nations by establishing the two ad hoc International Tribunals composed of international judges meant to apply essentially international customary law and international rules of procedure and evidence, adopted by them in
plenary session. Subsequently, however, the Security Council promoted the creation of mixed or hybrid courts and tribunals by decisions of United Nations bodies or by treaties concluded by the United Nations with the countries concerned – like the Special Court for Sierra Leone (SCSL), the Special Chamber of the Supreme Court in Kosovo, the Panels for Serious Criminal Offences in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon. Such courts are composed of internationally appointed as well as of national judges, and form part of the domestic judiciary or operate alongside the national judicial system in the country concerned or in a different location. They apply customary and treaty law as well as domestic law, or primarily domestic law, and follow rules of procedure and evidence, which are either international or the domestic rules in force in the system to which they belong. Other mixed courts – like the War Crimes Chamber of the State Court in Bosnia and Herzegovina – have been established with the involvement of international authorities other than the United Nations. Lastly, but before the establishment of most of the above mentioned special jurisdictions, an ad hoc approach has been set aside in favour of the creation – through a multilateral treaty, the Rome Statute – of a permanent International Criminal Court (ICC), which is composed of international judges mandated to apply primarily treaty law as set forth in the Court’s statute and its annexed documents, including elements of crimes and rules of procedure and evidence adopted by the Assembly of States Parties (ASP), without prejudice to the application of customary international law where appropriate.

The variety of models adopted in the establishment and operation of these courts and tribunals manifestly shows the absence of any clear strategy of the international community in shaping their legal and judicial framework. Rather, it confirms that the only common denominator underlying the creation of these judicial bodies lies merely in an effort to fight impunity, though without a definite vision as to the most appropriate means for achieving such a goal, and without a clear perception of the far reaching scope of the jurisdiction of the judicial bodies that were established. The absence of a clear strategy is further confirmed by the attribution to these courts of additional tasks, besides the prosecution of the persons allegedly responsible for the commission of international crimes – such as to foster peace in regions where conflicts were still going on, to establish the truth about tragic events in the countries concerned, to contribute to reconciliation of populations torn by a conflict, and to make a positive impact on transitional justice. It is self-evident that at least some of these tasks cannot be assigned entirely to a court of justice, but require additional measures.