Chapter 4

Investigating International Crimes: A Review of International Law Enforcement Strategies

Expediency v Effectiveness

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This paper seeks to raise questions about the objectives or goals of international criminal justice, and whether recent trends are inhibiting the ability of investigators and prosecutors to achieve those objectives or goals through the application of carefully considered prosecutorial policies. It considers whether investigators and prosecutors are being allowed sufficient independence to fulfil their mandates efficiently and effectively, or whether international prosecutions are being hindered by efforts designed to promote expedience.

I Prosecuting International Crimes

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Judgment of the International Military Tribunal at Nuremberg

While international law has, in the past, been primarily concerned with the harmful acts of nation states, the emergence of international criminal law as a distinct branch of international law since the Nuremberg Trial has been accompanied by a shift towards holding individuals responsible for mass atrocities.

The attribution of individual criminal responsibility for mass atrocities by international courts and tribunals represents an extraordinary and unparalleled exercise in the enforcement of international law. International crimes that come before such courts and tribunals will constitute the gravest of offences, and will typically involve hundreds of perpetrators and an even higher number of victims


and witnesses. The crimes will often have occurred during an armed conflict or in situations where law and order has broken down. Furthermore, the individual criminal acts which occur in this context can not be treated as isolated or sporadic events, as they often represent a concerted effort that extends over a number of years or across an entire region.

As Allison Danner and Jenny Martinez describe, the type of crime that comes before such courts and tribunals differs significantly from ordinary domestic crimes. International criminal law addresses crimes of a gravity and scope that dwarf most domestic prosecutions. Even the most wide-ranging conspiracy prosecution involving a sprawling narcotics ring cannot match the scale of destruction and legal complexity encompassed by the typical international criminal trial.

As a significant proportion of the population may be somehow implicated in the atrocities, individual responsibility for international crimes will therefore manifest itself in a variety of ways and to varying degrees. The international criminal justice system requires, however, that responsibility for atrocities be allocated or calibrated amongst those individuals involved; individuals who have:

- orchestrated mass crimes (e.g. military or political leaders);
- perpetrated mass crimes directly (e.g. foot soldiers or prison guards);
- incited violence (e.g. media or religious leaders); or
- supported the crimes of the regime through passive acquiescence.

An international tribunal established in the wake of widespread atrocities will thus have jurisdiction over potentially thousands of cases (particularly in situations where the domestic criminal justice system is no longer functioning at all, as was the case in the former Yugoslavia). Yet the international criminal justice system is characterised by finite financial and human resources, making the trial of all individuals suspected of committing atrocities a practical impossibility. While this is true for domestic and international criminal justice systems alike, the problem of resources is magnified in the international criminal law setting as

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2 For example, the Rwandan genocide has been estimated to involve thousands of perpetrators. In 2000, a Special Representative of the United Nations Commission on Human Rights reported that around 120,000 genocide suspects were still being detained (many without charge) in Rwandan jails: *Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative, Mr. Michel Moussalli*, UN Doc E/CN.4/2000/41, 25 February 2000, paras 92–7.