



The Future of International
Criminal Justice:
A Cautionary Vision

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Preview

1. Strategy & leadership
2. Current milieu & mechanisms
3. Standards & principles (wide v. narrow)
4. Costs & implications
5. The adversary -- “extra-rule organizations”
6. Predictions = challenges



More minefield than pasture

a political science perspective ...

- ▶ Idealism is just that...
- ▶ Justice and fairness are intrinsically normative
- ▶ Practical issues are inhibiting, constraining
- ▶ On balance,
DESIRABLE but may be UNWORKABLE.



The search for a consensual code of justice could create more conflict and even more victimization

- ▶ Will demonstrate real value differences
- ▶ Will appear threatening (US example)
- ▶ One man's hero is another man's villain
- ▶ Will threaten sovereignty
- ▶ Will force standardization in violation of cultural/religious differences



Fighting Crime – *Big Picture*

- ▶ Reduce opportunity for crime
- ▶ Change motivation for those considering crime
- ▶ Alter values to de-legitimize criminal behavior
- ▶ Use Technology: *surveillance, biometrics, DNA analysis, radio frequency ID microchips, data bases*
- ▶ More policy capacity used to warn & educate



Choice of the West: **culturally modify notions or retain arrogance?**

- ▶ In either event, likely to be perceived as a normative role
 - The “powerful” prescribing rules for the others
- ▶ Inescapable differences in:
 - Cultural norms
 - Expectations of government
 - Roles of lawyers, judges, prosecutors, centralized authority



Globalization

- ▶ Brings shared culture via mobility, diversity, consumerism, but
 - May not enhance common sense of fairness, equity or respect
 - Increases amount of “transnational crime”*
 - Extends the damage

Motivates states to address crime -- incentive to collaborate



*Drug trafficking, people smuggling, sea piracy, corruption, money laundering, terrorism

1943 Article

70 years ago ...

“Anyone who, from his knowledge of international law and his study of international society, believes that law has important and even indispensable functions must be perturbed today concerning the fate of international law...”

Problems: war, administration & enforcement



G.L.I.N.

Global Legal Information Network

► POSITIVE:

- Forces homogenization/standardization
- Enables policy-makers to determine where interventions are most needed
- Informs them on the causes of crime

► NEGATIVE:

- By demonstrating the disparities -- often relatively irresolvable



Positive Examples:

Letter of Rogatory; extradition; transferred sentenced person; rendition; mutual legal assistance in criminal matters; INTERPOL; EUROPOL; ASEANPOL (“interoperability”)

However, states show strong propensity to prefer bilateral agreements to multilateral ones



Broader or Narrower International Rules?

- ▶ Current range of issues from migratory birds to homicide
- ▶ Simple idea: ***future international law must reflect and manage the behavioral challenges of the FUTURE***
- ▶ Examine the imposing realities... predictions



Rethinking “standards & principles”

- ▶ Is there a core consensus?
- ▶ Varying state interests, agendas, budgets, levels of stability of state authorities
- ▶ Could there be consensus if the normative projections were shrunk? Narrowed?
- ▶ Is too much sacrificed if the range of rules is limited?



Costs could be unworkable and unsustainable

- ▶ Track records of trials...
- ▶ Cost of trial; cost of enforcement
- ▶ Source of financing costs?
- ▶ Uneven cost-sharing (rich v. others)
- ▶ Justice delayed = justice?



More on COSTS

- ▶ Studied ICC since 1993
 - Yugo, Rwanda, Sierra Leone, Cambodia
- ▶ By 2015 **\$6.3B**; 2009 alone \$560M
- ▶ Declining to 2015 when \$167M / down 2/3
- ▶ Lead funding shifting US → EU
- ▶ US single greatest contributor over whole period, but declining steadily since '04
- ▶ US in 2015 = **0** Europe in 2015 = 60%



ICTY Example

- ▶ Average case prosecution = 12 months
- ▶ Add 10 month pre-trial preparation
- ▶ “Reforms” to hasten:
 - Reduce offences
 - Limit testimony
 - Reduce “delaying” tactics
- ▶ Sum to JUSTICE?
Do these things advance or inhibit
the delivery of justice?



The Power of “extra-rule” organizations

- ▶ Major reason to be skeptical about effectiveness of international law to control these operations
- ▶ “monumental”/exponential rise in global smuggling networks (networks of networks)
- ▶ Live in space between states – “stateless”
 - “Simultaneously everywhere & nowhere”
- ▶ Make money by arbitraging difference in legal systems
 - (desire & ability to prosecute)



The Power of “extra-rule” organizations

- ▶ States become isolated islands of sovereignty
- ▶ Use corruption to take over segments of otherwise functional states (unnecessary in failed states)

“In fact, there is no government in the world that can claim success, not in eradicating them, but even containing the growth.”



How Big? What?

- ▶ “Immense”
- ▶ “Black global supply chain”
 - GDP = \$1.3T or 10% world’s economy
- ▶ Growing 7X faster than legal trade
- ▶ **Usual suspects:** drugs (rec & pharm), undocumented workers, weapons, intellectual property, laundered money



How they avoid legal entanglements?

- ▶ Not vertically integrated
- ▶ Highly de-centralized, horizontal, fluid
- ▶ Specialize in cross-border activity & diversification
- ▶ Rely on modern technology
- ▶ Buy and operate legal companies
- ▶ Networks are optimized for “melting the map”



Link with Violent Terrorism

Controversy: *literature of two minds...*

- ▶ Smugglers see terrorists as a means to free areas from state control
- ▶ Violence disrupts the market: therefore undesirable for smugglers



Major significance & impact on:

- ▶ Democracy
- ▶ Functioning markets
- ▶ International law

- ▶ However, the requisite movement of cash for illicit operations through the global financial system may be a key vulnerability !



Internationalization of “sovereign” justice

- ▶ *“The common thread, and the largest problem in the development of international law, is the problem of sovereignty.”*
- ▶ *“While some people may dream of a truly international body that can enforce international law, perhaps it may be time to give that dream up.”*
- ▶ The UN has little leverage and its use of “inducements” work best among like-minded countries or groups like, EU, NATO or the WTO



Counterpoint...

“International law is a source of innovation and flexibility... the tide of progress that has been and continues to be progressive international legal thinking.”



Re-conceptualizing the Context for International Criminal Justice

- ▶ All real predictions:

World Future Society, FUTURE

- ▶ Premise:

***the future of the law must reflect the nature
of the future world !***



Dilemma of New States

- ▶ Compelling hunger for economic “activity” – often choose to make bargain with the “devil”
- ▶ Create sovereign laws” to accommodate
- ▶ Sell internet domains
- ▶ Create “investment havens”
- ▶ Induce corruption
- ▶ Proliferation of micro-states pre-ordains these policies



Failed or Failing states

- ▶ Whose responsibility?
- ▶ International Organizations can bring rules but...
- ▶ Complementarity principle?



Privacy LAW

- ▶ Future citizens and organizations will accept severe redefinition of “privacy”
(technology stimulated change)
- ▶ Millennials will change their attitudes about privacy



Environmental LAW

- ▶ Environmental law will move out of conventional categories and become a legal realm of its own dominated by natural scientists
- ▶ Drought, deforestation, water supplies will become dramatic venues of controversy



Financial LAW

- ▶ The volume of financial activity will put the adjudication beyond capacity of lawyers
 - Digital fund transfers become \$6T daily
 - Results in globalization of crime!
- ▶ Counterfeiting proliferates
 - Cashless societies/security of monetary system
- ▶ FDI requires a multilateral investment agreement
 - Investment disputes
 - ◆ Host governments v. private investors
 - ◆ More arbitration than legal assessment



More **Financial** Challenges

- ▶ Massive global pattern of government debt
- ▶ Online gambling
- ▶ Proliferation of micro multinationals
- ▶ Economic depression



LAW & Cyberspace

- ▶ Problems – intellectual property rights, portfolios, futures and investments without a physical presence
- ▶ Proliferation of data transfers in “zettabytes”
= 250B DVDs
- ▶ “M2M” communications: 2012- 50B M2M
Increasing by 40% every 4 years
- ▶ Global internet:
2015: 3B users; 15B networked devices
- ▶ Video dominance of communication (60%)
- ▶ *defines our inability to monitor, manage or control !*



NEW Behaviors to Control

- ▶ Aggression takes non-military forms
 - How to handle such techniques?
- ▶ Inability to determine source
- ▶ Cyber-warfare:
 - “cyber attacks ARE the future of warfare”*
- ▶ **Stuxnet** attacked Siemens software: Iran & more
- ▶ **Operation Shady Rat**: 5 year; most massive, indiscriminant



More NEW Behaviors to Control

- ▶ Space:
 - Commercial space tourism
 - 2021: \$650M business with 13K pax
 - Lunar-based solar power creation & distribution
- ▶ Drones: use of surveillance and assertiveness will double every decade



Demographics

- ▶ Populations become OLDER
 - More victims... more solutions... E supporting
- ▶ 15-29 age group declines by 2040 –
most prone to criminal activity
- ▶ “*synthetic biology*” by 2035 creation of
unknown life forms from non-living chemicals



Diversity

POSITIVE:

- Professional culture spreading
- Bilateral transfer of information
- Multi-lateral innovation
- Global dissemination of “justice” products
 - ◆ Hollywood reinforces

NEGATIVE:

Multiple languages =
problem



The Central Contest...

- ▶ Co-evolution of Crime & Justice ...
Which is more adaptive?
- ▶ Crime is like a virus – evolves & adapts to “remedies”
- ▶ Conventional wisdom =
 - Effective response = reduce opportunity, change/impact motives, alter values
- ▶ **ENOUGH?**



Prediction: National courts supported by international expertise

“unlikely to see ad hoc international tribunals or elaborate hybrid courts in the future” WHY?

- ▶ In spite of progress embodied in the Rome Statute of the ICC, courts have had *“significant shortcomings and failures”*
- ▶ Time: 12-14 years (Rwanda)
- ▶ Costs: donor fatigue/combined lifetime \$1B
 - Special court for Sierra Leone- \$250M, 9 accused

“Nationally-based courts which utilize the support and expertise of international experts, as well as integrate skills transfer and capacity-building have a potential future.”



Rome Statute

- ▶ “complementarity principle”
 - “...the primary responsibility for the investigation and prosecution of Rome Statute crimes rests with states.”*
- ▶ ICC = courts of last resorts/exhaust all domestic avenues
- ▶ Design will not work unless international legal development bodies and actors... remain actively involved in pushing the international justice agenda...



In Sum...

- ▶ On balance, the challenges for the administration of international justice grow exponentially while resources and expertise are increasingly problematic.
- ▶ Narrowing the focus and decentralizing the effort may advantage the Establishment in the short run. (long run?)
- ▶ A subset of professionals with professional expert degrees will replace judges and courts – alternatively persons with expertise in a professional realm first will then get a super advanced degree in international “law.”

▶ On balance, international law is

DESIRABLE but may be UNWORKABLE ...

without extraordinary provision of resources – energy, authority, commitment and money

