

Is the International Community Abandoning the Fight Against Impunity?



In recent years the world has seen no respite in conflict where civilians are being particularly targeted with increased brutality. Reports of the devastation wrought by conflict and terror seem to overtake one another with civilian casualties soaring in Syria, Central African Republic, Gaza, Nigeria, Pakistan, South Sudan, Ukraine, and more.

Especially worrying is that, increasingly, impunity reigns for the perpetrators of these atrocities, and political will

and cooperation in upholding the interests of justice seem to have faltered: African governments have vowed to shield sitting heads of state from judicial oversight, and in Guatemala, despite huge efforts by victims and civil society, political forces continue to derail the trial of a former dictator accused of genocide. Meanwhile, the UN Security Council failed to refer the violence in Syria to the ICC, and the ICC Chief Prosecutor, citing a UN Security Council stalemate that can “only embolden perpetrators”, announced the suspension of the Court’s investigation of the genocide in Darfur, Sudan.

These developments have recently prompted ICTJ President David Tolbert to [sound a warning](#) that the international community is backsliding on its obligations to protect human rights. To continue this conversation, in this ICTJ Online Debate we ask: Is the international community abandoning the fight against impunity?

Is the International Community Abandoning the Fight Against Impunity?

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ICTJ President

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International Justice Possible Only When in the Interest of Powerful States



YES

Michael Ignatieff

Professor and Human Rights Scholar

When the chief prosecutor of the International Criminal Court dropped charges against the President of Kenya in December 2014, she [said](#) it was a “dark day for international criminal justice.” It was more than that. It signaled a clear retreat in the fight against impunity, at least as it relates to heads of state.

Let's be clear: without political backing at the highest level, no international prosecutor can secure a conviction against a sitting head of state. The international community we are talking about here means the leaders of the African states as well as the permanent members of the Security Council. Unless the Security Council stands behind the ICC prosecutor and affords her intelligence and arrest capabilities, unless heads of state in other African countries support her efforts politically, she stands no chance of forcing a state to deliver the witnesses and documents she needs to mount a successful prosecution.

Such external support, especially from the region, is essential if international justice is to win the battle inside a country to align public opinion behind international prosecution. Lacking such support, the prosecutor proved to be no match for her Kenyan defendants, who did a masterful job of turning domestic opinion against international prosecution. This might not have happened had the international community not let her twist in the wind.

The collapse of the Kenyan prosecution is only the most dramatic sign of a more general retreat from the battle against impunity by the international community. Five years after his indictment by the ICC for crimes in Darfur, President Bashir of Sudan is still at large, [feted by his fellow African leaders](#). The terrorist murder of Lebanese Prime Minister Rafic Hariri still goes unsolved despite the existence of an international tribunal that is supposed to indict and punish his murderers. In Egypt, Hosni Mubarak and his sons have been freed by the military. In Libya, Muammar Gadhafi's son and the dictator's intelligence chief are in the custody of militias, and the justice the international community promised Libyans when NATO intervened has vanished, along with all semblance of peace and order.

In Spain, where magistrates pioneered the use of international arrest warrants against Augusto Pinochet in London in 1998, the Parliament [passed a law](#) in 2014 to substantially curtail their universal jurisdiction statute. Spanish legislators apparently did so because the Chinese were furious that Spanish judges were considering an indictment of Chinese officials for repression in Tibet. Spain's actions follow those in Belgium a decade earlier, where universal jurisdiction statutes were also weakened by Parliament.

In Syria, the regime uses chemical weapons and barrel bombs against its own people and there is [no hint of a reference](#) of these crimes to the ICC. Beheading follows beheading in the areas of Syria occupied by the so-called Islamic State and the only justice visible in the caliphate is a grotesque and violent parody of Sharia law.

In the United States, a Senate report has documented in gruesome detail, crimes of torture, degradation, and abuse committed by CIA agents after 9/11. Rogue freelancers did not commit these crimes. They were given authorization and legal protection at the highest levels of government. Despite irrefutable documentation and widespread dismay in the United States, no prosecution for these offenses is likely.

In July 2014, an international airliner was downed over the Ukraine and hundreds of passengers died, their bodies dishonored on the ground by the Russian-backed insurgents. In any sane world, state authorities—in Russia, Ukraine, and Western Europe—would join together to insist on an international commission of inquiry, with criminal prosecution for those responsible to follow in the ICC. It is more than likely, on the contrary, that those who committed this crime will escape judgment.

The examples of the retreat from impunity could be multiplied, but the question that cannot be avoided is: why? The red thread running through these cases is the implacable reluctance of political authorities—whether they be in China, Kenya, Lebanon, Russia, Syria, or the United States—to allow international justice to hold them to account. There has been an increasingly systematic push back by political leaders against the very idea that justice should

step in and assert jurisdiction over politics where crimes against humanity have been committed.

In Kenya, Western powers were reluctant to back the ICC, because they needed the full backing of Kenya and its renegade president, Uhuru Kenyatta, in the battle against al Shabab militants in Somalia. In Lebanon, political factions sheltered the murderers of Hariri because it was in no one's political interest for the truth to come out. In Syria, the Russians have shielded the regime from justice; and the Americans now connive in the impunity of President Bashar al-Assad because they do not want to lose Syria to the jihadi forces of the Islamic State. Spain caved in to the Chinese, because the Chinese hold Spanish debt. In the United States, no one is punished for torture or for approving it because the president, Congress, and the Department of Justice all believe that they depend, hourly, on the CIA to keep the homeland safe.

International justice survives only where it does not threaten the vital interests of powerful states. Successful prosecutions occur in those instances where members of the Security Council agree that their interests are furthered by prosecutions and where states also find it in their interest to hand over delinquents to international prosecutors. Slobodan Milošević, Ratko Mladić, and Radovan Karadžić went to The Hague because Serbian politicians decided that surrendering these figures to justice was a price worth paying for eventual EU membership. Only friendless killers—the Lord's Resistance Army for example—face justice. Charles Taylor of Sierra Leone discovered the price to be paid once he lost state patrons. Killers with friends in high places benefit from impunity, the most obvious example being the leader of North Korea, a mass murderer who benefits from the unwilling, yet unstinting protection of the Chinese.

So this is where we are—with politics and power prevailing over international justice and likely to do so in the future. It may be necessary to say, bluntly, that justice when it is done in the international arena is always victor's justice: impunity will be punished only when it is in the interest of a powerful state that it should be so.

Yes, this is a depressing view, but friends of international justice—and I count myself as one—do ourselves no favors when we comfort ourselves with illusions. We keep repeating our own self-generated historical narrative: namely, that from the Nuremberg trials onwards international justice has been steadily gaining power over the prerogative of states, that state immunity doctrines are steadily weakening, and that a global consensus is gradually—miraculously!—emerging in support of international punishment for crimes that shock the conscience of mankind.

Those who fight impunity would do well to shed this innocent belief that history is on our side and accept the harder truth, that every victory won by international justice since Nuremberg has been won

when the state interests of the powerful aligned momentarily with the interests of justice. Campaigns for international justice, by international civil society organizations, are more likely to succeed when they shed comforting illusions, face up to the enduring reality of state power, and figure out how to enlist states in support of justice.

We also need to be realistic about what international justice can and cannot be expected to accomplish. Let us admit, for example, that where justice and truth processes have been most successful—Argentina, Chile, South Africa—it has been their national character—citizens of the same country, perpetrators, and victims, facing each other under the gaze of a justice that has national legitimacy—that has produced the most enduring peace and reconciliation afterwards. If reconciliation is ever to make progress in Sri Lanka—and the new government may be edging cautiously in that direction—outsiders can help as facilitators, but the real work will be done by Sri Lankans on both sides who realize, essentially, that their island will never be governable and will never make economic progress until reconciliation—and some national justice for crimes by security forces and insurgents alike—take place.

The ICC remains an essential instrument in those instances where national justice is impossible, but these instances will be rare, and successful trials will depend, critically, on whether permanent members of the Security Council and their allies are prepared to assist the international prosecutor with intelligence and arrest capacities.

International justice is necessarily and inextricably political, and it increases its jurisdictional reach only when it increases political support from states. Its legitimacy, just like domestic justice, depends on the wisdom and restraint of those charged with making the discretionary judgments that are at the heart of the decision to prosecute or to forebear in the face of offenses.

Consolidating international justice in the future will require supreme exercises of restraint and judgment on the part of the ICC itself and those in the NGO community and the international system who support it.

We also need to be honest about past mistakes. How did it come about that all of the ongoing ICC prosecutions are defendants from one continent? How did the ICC manage to alienate so many leaders in Africa? Was it wise for the prosecutor to issue indictments in Libya while the NATO operation was still underway? The former ICC prosecutor, who defined his mission as promoting “the empire of law” against “the law of empire,” could be accused in the Libyan instance of having compromised in the service of the latter.

Looking to the future, those who support the ICC will have to ask difficult questions: will it strengthen or weaken the court if it takes [jurisdiction over the crime of aggression](#), as it is supposed to do in

2017? The question of what counts as aggression only becomes clear when a victor is presiding over the vanquished, as at Nuremberg. Any other time, it may just be a non-justiciable crime. Will the court's international legitimacy be strengthened if it is asked to rule on questions like whether Russia's annexation of Crimea, the NATO operation in Kosovo, or US President George W. Bush's invasion of Iraq—and the senior officials responsible— should be prosecuted for aggression? Giving the court jurisdiction over aggression seems like a good idea until one reasons out the possible consequence, namely that the world's major powers—who also happen to be the major aggressors as well as the court's paymasters—ignore the court's findings and withdraw all support for its work in battling impunity.

Similarly, is it wise for the ICC and the prosecutors to launch themselves into the Israeli-Palestinian dispute now that Palestine has been [granted status](#) as a state party to the ICC? Will the pursuit of justice—the attempt to prosecute either side for war crimes and crimes against humanity—actually bring peace any closer or will it merely turn the court into a venomous forum for the exchange of political recrimination?

How judges and prosecutors manage their own discretion and how the friends of the court in international society answer such questions will determine whether the court gains legitimacy in the years ahead or becomes an empty shell, a ruined monument to lost illusions.

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