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Review Essay

Accountable Judges and Their Role in Prosecuting Serious Violations of Human Rights

Prosecuting Serious Human Rights Violations, Anja Seibert-Fohr. Oxford University Press, August 2009, 350pp. ISBN: 9780199569328 – hardcover ($170).

Transitional Justice, Judicial Accountability and the Rule of Law, Hakeem O. Yusuf. Routledge, April 2010, 204pp. ISBN: 9780415575355 – hardcover (£80).

Just over a year after the end of the war in Europe, on 29 April 1946, the UN Economic and Social Council held the first meeting of its Commission on Human Rights (CHR). In his opening remarks, Assistant Secretary-General for the Department of Social Affairs Henri Laugier reminded the meeting that

> it is a new thing and it is a great thing in the history of humanity that the international community organised after a war which destroyed material wealth and spiritual wealth accumulated by human effort during centuries has constituted an international mechanism to defend the human rights in the world . . . We are only at the starting point of a very great enterprise, the volume of which and the action of which will have to grow, day after day.[1]

The objective of the CHR was to discover the basis for a fundamental declaration on human rights that would be acceptable to all who might seek admission into the 'international community.' Its specific task was to 'define the violation of human rights within a nation, which would constitute a menace to the security and peace of the world,' and, beyond this, to 'suggest the establishment of machinery of observation which will find and denounce the violations of the rights of man all over the world.'[2] The Universal Declaration of Human Rights was opened for signature in 1948.

Human rights have since become the acknowledged 'values for a godless age.'[3] One must remember the context of their creation to appreciate how far these ideas have travelled.[4] During 1945–1946, when the UN Charter and Declaration were developed and signed, the Soviet Union had its Gulag, France and Britain still had their colonies and the US its *de jure* racism.[5] In addition, human rights were

[1] UN Doc. E/HR/6 (1946), 1–2.

[2] Ibid., 3.

[3] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000).

[4] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009).

[5] Belgrade Circle, ed., *The Politics of Human Rights* (London: Verso, 2000).

grounded in international law, the same set of rules used to sanction the carving up of Africa by Europeans at the Berlin Conference in 1884. It is therefore somewhat surprising that this body of law became a powerful tool in the hands of those it initially disenfranchised and disempowered. Human rights have now become the language of liberty for the oppressed in the global North and South:

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being.[6]

The protection of human rights laid out in international law has been used to challenge and change colonial practices, prompt national civil action against racial discrimination[7] and, now, as detailed by Anja Seibert-Fohr, to secure criminal prosecutions for serious violations of human rights.

Since 1945, systems for the general protection of human rights have appeared in many regions, including Europe (the European Convention on Human Rights) and the Americas (the American Convention on Human Rights), in addition to more specific instruments at the international level.[8] The focus of *Prosecuting Serious Human Rights Violations* is the extent to which these and other instruments impose an obligation upon state parties to 'prosecute the perpetrators of serious human rights violations' (p. vii).

The use of prosecution under criminal law has never been popular in securing human rights, as they were not intended as tools for seeking retribution. For example, when the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was being developed, the use of criminal sanctions was a reason for the hesitant support from countries such as France and Britain. The draft of Article 4 was perhaps the most problematic because it required signatories to

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

This text did, however, make it into the final draft submitted for approval. The ICERD was unanimously adopted by the UN General Assembly and opened for signature on 21 December 1965. By 1969, a total of 27 states had

[6] Patricia J. Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991), 153.

[7] Iyiola Solanke, *The Evolution of Anti-Racial Discrimination Law* (London: Routledge, 2011).

[8] Such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture, the Convention to Suppress the Slave Trade and Slavery, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Apartheid Convention, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention for the Protection of All Persons from Enforced Disappearance.

ratified it, bringing it into force. Both the UK and Germany were among the initial signatories. The convention has now been ratified by 128 states. It is the oldest and most widely ratified UN human rights convention.

Yet, given the egregious violations of recent years, can human rights law retain its power without using criminal law? According to Seibert-Fohr, it is indeed racial violence, particularly ethnic cleansing, that formed the backdrop to the renaissance of the idea of criminal prosecution for international human rights violations. In the 1990s, *ad hoc* tribunals were created in Rwanda and the former Yugoslavia to deal with this cleansing as crimes. These tribunals were, she argues, driven by 'the conviction that those responsible for the most serious crimes, including crimes against humanity and genocide, should not go unpunished' (p. 1). Seibert-Fohr presents the question of criminal accountability as the common denominator linking the law of armed conflict and human rights law. In addition, she notes that the latter 'fills the gaps' in international criminal law. The two are therefore mutually empowering when used in relation to not only prosecution for torture and genocide but also any serious violation of human rights.

Prosecution of human rights violations brings into focus key questions on the nexus of international criminal law and human rights law. What is the rationale for use of criminal law in such prosecutions? If not to punish, what is its role? Equally, when is a violation serious enough for prosecution rather than immunity or some form of amnesty?[9] These are the pertinent questions addressed throughout Seibert-Fohr's study in order to clarify the justification for prosecution rather than other forms of redress. In addressing the duty to investigate and prosecute under human rights law, Seibert-Fohr of necessity also considers the related complex issues of granting amnesties, impunity, victims' rights and the right to truth. These are not just practical questions; they touch upon the core values and morals of internationalism. The book is therefore a study not only of international law and the legal rationales informing key principles but also of the sense of justice that inheres in international law and guides its enforcement.

It can be argued that enforcement has always been a challenge for international law. This may be due to the relationship between state acceptance of human rights norms and national sovereignty. As noted above, acceptance of human rights became a ticket to enter the 'international community.' Recognition of and respect for human rights also became a means by which to assert sovereignty once military aggression was discredited. Thus, respect for rights guaranteed international recognition of state legitimacy. Partial cessation of sovereignty secured recognition of state autonomy. Donation of some sovereignty became the new postwar currency to legitimate ownership of sovereign rights. Even today, only polities that submit their autonomy to external accountability are seen as fully

[9] For more on amnesty, see, Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008); Louise Mallinder, 'Global Comparison of Amnesty Laws,' in *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, ed. Cherif M. Bassiouni (Antwerp: Intersentia, 2010).

legitimate democracies and full members of the 'international community' of nations.[10]

This complex relationship between recognition and state sovereignty restricts the potency of human rights as a tool for pursuit of global justice. As respect for human rights was the price for recognition of state sovereignty, application and enforcement of human rights principles had to be a domestic affair. This restricted international oversight over national adherence and made recognition more symbolic than substantive. For example, the CHR designed machinery for 'observation,' not enforcement. This is visible in the ICERD: its enforcement provisions were not part of the main text but added in an Annex that set out the prototype for the international commission. The ICERD was to be overseen by a Good Offices and Conciliation Committee. This became the Committee on the Elimination of Racial Discrimination (CERD), the first body created by the UN to monitor and review actions by states to fulfil their obligations under a specific human rights agreement.[11] While CERD conducts regular missions to monitor compliance with the convention, its ability to address identified discrepancies remains limited. Thus, as in Rwanda and other parts of the world, international law instruments have few muscles to flex when confronted with the most flagrant violations of human rights. The establishment of the International Criminal Court (ICC) was an attempt to address this complex historical relationship. The ICC was met with resistance, most notably from the US, which is not among its 120 member states. It has still not replaced the creation of *ad hoc* courts, as in Rwanda, the former Yugoslavia and Sierra Leone.

There are many strengths to Seibert-Fohr's book. A key one is its original perspective. Instead of looking through the lens of international criminal law to human rights, Seibert-Fohr looks through the lens of human rights instruments to document the extent to which these international treaties provide a basis for the 'extension of criminal obligations' (p. 4). This focus produces an in-depth survey of a number of international human rights treaties and conventions and the case law that has arisen from them. There is no easy answer to the questions posed, but their exploration is methodical. Seibert-Fohr carefully details the strength of any duty to prosecute whatever they may contain: How should violators be dealt with? What does an instrument require states to do? If a duty to prosecute exists, does this as a corollary give individuals a right to prosecution? Each chapter has a similar structure based upon a systematic analysis of specific provisions, an exploration of their logic and discussion of the opportunities and

[10] Thus, accession by the European Union (EU) to the European Convention on Human Rights can be interpreted as a sovereign act. If the EU has sovereignty to give away then it must possess it, *per se*. The EU is in fact already acting as a sovereign: in November 2009, it signed an international human rights treaty, the UN Convention on the Rights of Persons with Disabilities.

[11] Similar committees that monitor implementation and effectiveness have been established under the International Covenant on Civil and Political Rights (Human Rights Committee), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture, the Convention on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

limitations they present to adjudication. The result is an impressive stock taking, via the body of decisions under international law, of existing standards and the salience of the idea of mandatory prosecutions for serious human rights violations. On this level alone, the book offers important information for practitioners, as it demonstrates the opportunities for more rigorous protection of human rights via prosecution under criminal law.

Yet, the book goes beyond this to consider whether the duty to prosecute can aid universal notions of justice. Seibert-Fohr's secondary objective is to consider the rationale that can inform and justify this deeper moral goal for international human rights law to make it a tool for the pursuit of global justice. She is interested not only in the past and present but also in the future. What contribution can criminal prosecution of serious human rights violations make to the pursuit of global justice, in particular 'post-conflict justice' (p. 5)? While recognizing that 'human rights is not about retribution' (p. 9), this does not mean that prosecution should not be used to pursue these larger aims. Amnesty may restore perpetrators in the eyes of the law, but it may also leave victims with some sense of dissatisfaction. Specially created tribunals may lack credibility in the eyes of victims, particularly as they encompass broader security goals of reestablishing peace, reconciliation and stability.

How possible is it, however, to seek postconflict justice in preconflict institutions, especially where these may have played a role in the conflict? The counterpart to the philosophical and doctrinal survey of criminal prosecution of serious human rights violations under international law must therefore be a consideration of the judicial institutions that will be called upon to activate this. In order to pursue the larger goal of global justice, a more critical position is required on institutions of justice themselves, namely domestic courts.

This latter challenge is taken up by Hakeem Yusuf in *Transitional Justice, Judicial Accountability and the Rule of Law*, which highlights the politics of addressing human rights abuses in Nigeria as the country attempted to transition from military to democratic civilian rule. The book revolves around the Oputa Panel, specially commissioned to address alleged human rights violations and set an agenda for the transformation of Nigeria. The Panel, more formally known as the Human Rights Violations Investigation Committee, was established by President Olusegun Obasanjo, who led the first civilian government after the end of military rule in this former British colony. It was intended to be a truth-seeking mechanism that would not only purge the country of antidemocratic practices but also cleanse its social and political infrastructure for return to democratic rule. This did not happen, however. High hopes for the Oputa Panel were deflated as its summons were ignored and its legality was successfully challenged by the generals it sought to investigate. Its recommendations became worthless when the Supreme Court of Nigeria held that 'the President lacked the powers to set up a body like the Oputa Panel with a remit that extended to the whole country to enquire into human rights violations' (p. 45).

In trying to explain the impotence of the Panel, Yusuf explores some judicial traditions, particularly deference to the judiciary. This deference is a fundamental principle in most legal and political systems, whether achieved via merit or edict. Yet, as the demise of the Oputa Panel shows, it is not only in the latter context that such deference can be abused.[12] Yusuf also critiques modern postconflict political practices, and it is here that his work dovetails with that of Seibert-Fohr. Yusuf argues that truth commissions,[13] a traditional alternative response to prosecution in transitional contexts, are flawed mechanisms, suggesting that they are, for example, too subjective and unable to address broad structural problems. He notes that they suffer from a sincerity deficit and are open to abuse by legitimacy-hungry regimes that seek to secure their own power internationally rather than justice internally. Beyond this, they have a dangerous blind spot, tending to ignore the need for the judiciary to account for its role during the period of nondemocratic rule. Yusuf argues that this was the downfall of the Oputa Panel: its enquiries were 'laudable' but 'it failed to engage with the role of the judiciary in governance in almost three decades of authoritarian rule . . . [The judiciary was] in complete abeyance, or, indeed, non-existent' (p. 46).

Following in the footsteps of David Dyzenhaus,[14] Yusuf maintains that justice sector reform needs to get personal. Blindness to the judiciary is, he warns, 'fatal to the transitional polity' because

> the fragile institutional structures that characterise societies in transition engender substantial reliance on the judiciary as the major force to stabilise and foster the democratisation process and uphold the rule of law. (p. 46)

Yusuf shows clearly why a corrupt judiciary must be included in the transition process undertaken by countries returning to popular democratic rule after conflict. He argues, and no doubt Seibert-Fohr would concur, that it is increasingly untenable and to some extent self-defeating to set the judiciary apart from other democratic institutions. He questions, therefore, why key national and international actors designing the postconflict return to democratic rule in some countries overlook the need for a fundamental review of this fourth branch of government as part of the transition process.

[12] 'Japan's Judiciary on Trial: Prosecutors or Persecutors?' *Economist*, 14 October 2010.

[13] There is a large body of literature on truth commissions. See, for example, Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions,' *Law and Contemporary Problems* 59(4) (1999): 81–92; Jonathan D. Tepperman, 'Truth and Consequences,' *Foreign Affairs* 81(2) (2002): 128–145; Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition,' *International Journal of Transitional Justice* 2(1) (2008): 23–41; Eric Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact,' *International Studies Perspectives* 8(1) (2007): 16–35; Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002); James Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa,' *Journal of Conflict Resolution* 50(3) (2006): 409–432.

[14] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

Such blindness is also catastrophic for the pursuit of any form of global justice. Nigeria is just one illustration of how complicated judicial politics can be. The story of the Oputa Panel clarifies how, with or without criminal obligations, the protection of human rights can remain illusory if it is left in the hands of compromised institutions, be they old or new. In South Africa, the Truth and Reconciliation Commission may have circumvented some of these problems of political interference, but the absence of criminal prosecutions does not always sit well with citizens. In Chile, military control of the Supreme Court was one factor that enabled dictator Augusto Pinochet to die without a single conviction in a criminal court, despite hundreds of criminal charges against him. This is a country where the judiciary is said to take a conservative stance on human rights, and civilians are still subject to the jurisdiction of military courts.[15]

Yusuf argues that it is not always necessary to establish *ad hoc* mechanisms, as a judiciary can perform a critical role if it has been transformed. New nonjudicial institutions may have speed on their side, but transformation of the judiciary need not be prolonged. Yusuf presents the Hungarian Constitutional Court (HCC) as an example of the positive results that can occur where attention is paid to an existing institution postconflict. The HCC was reconstituted after the fall of communism and quickly became the court of choice for the people in that transitional democracy. It became more trusted than the ordinary courts, which carried the blemish of the communist past in the eyes of the public. Even the introduction of elections for judges did not diminish the public memory. The HCC was, by contrast, surrounded by a 'legitimacy of hope' (p. 143). Poland is also used as an example where nonengagement with the past of the judiciary tainted its legitimacy in the present.

If international criminal law is to be useful in making international human rights effective in the pursuit of global justice, deeply held legal principles need to be made mutable. Traditional notions of judicial independence should be 'contingent' upon time and place and, in particular, be set aside in transitional societies where 'there is (as is usually the case) direct or indirect complicity on the part of the judiciary for gross violation of human rights' (p. 28). This, Yusuf argues, was the case in Nigeria, where 'justice was available for sale to the highest bidder' (p. 79) under authoritarian rule. The exemption of Nigerian judges from the 'truth and reconciliation'-style process established to inform transition precluded the Oputa Panel's success and reduced the Nigerian Supreme Court to a battleground of electoral politics.

In addition, if global justice is to be secured, the design of enforcement mechanisms in international human rights law may need to become more mainstream and less *ad hoc*. This issue has already been addressed with the creation of the ICC,

[15] Diana R. Gordon, 'Deepening Democracy through Community Dispute Resolution: Problems and Prospects in South Africa and Chile,' *Contemporary Justice Review* 14(3) (2011): 291–305.

which has so far opened cases in seven countries, all of which are in Africa.[16] However, as mentioned above, the members of the Court do not include the most powerful nation in the world, the US. The ICC's focus to date has also fallen either on countries torn apart by civil war or on politicians and political institutions. It is questionable whether the Court could address the wider agenda envisaged by Yusuf and Seibert-Fohr.

The challenge outlined by Yusuf is to find the correct balance in both stable and transitional societies, a 'publicly accessible accountability mechanism with significant potential to re-establish confidence in the judicial function as a fundamental aspect of democratic governance' (p. 187). Yusuf concludes that faith in courts not only is a question of the present but also requires an accounting for the past: 'People don't simply forgive . . . a troubled past without some form of acknowledgement or accountability' (p. 60). This idea of judicial accountability[17] is no longer oxymoronic. Like its more traditional counterpart, judicial independence, it is not of interest for its own sake[18] – it is integral to the development of global justice.

If internationalism is to be more than the re-creation of existing domestic power configurations at a global level, effective enforcement must become a priority. These two books complement each other nicely when considering this task: Seibert-Fohr focuses on the legal logic and procedures, and Yusuf on the judicial institutions. It is hard to imagine that expanding the consequences of judicial review to include prosecution for serious violations of human rights can be legitimate without heightened attention being paid to the power of the judiciary.

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[16] On limits of the ICC's jurisdiction, see, Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits,' *Journal of International Criminal Justice* 1 (2003): 618–650.

[17] Daniela Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Farnham: Ashgate, 2010).

[18] Pamela S. Karlan, 'Two Concepts of Judicial Independence,' *Southern California Law Review* 72 (1999): 535–558.