

Human Rights & Human Welfare

Volume 9

Issue 5 *May Roundtable: An Annotation of
"Case Closed: A Prosecutor Without Borders"* by
Julie Flint and Alex de Waal

Article 6

5-1-2009

International Criminal Justice Must Not Only Be Done, It Must Be Seen to Be Done

Rhona Smith

Northumbria University, Newcastle, UK

Follow this and additional works at: <https://digitalcommons.du.edu/hrhw>



Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [International Relations Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Smith, Rhona (2009) "International Criminal Justice Must Not Only Be Done, It Must Be Seen to Be Done," *Human Rights & Human Welfare*: Vol. 9: Iss. 5, Article 6.

Available at: <https://digitalcommons.du.edu/hrhw/vol9/iss5/6>



All Rights Reserved.

This Roundtable is brought to you for free and open access by the Josef Korbel School of International Studies at Digital Commons @ DU. It has been accepted for inclusion in Human Rights & Human Welfare by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

International Criminal Justice Must Not Only Be Done, It Must Be Seen to Be Done

Abstract

"[U]ntil a time in which the global governance structure is not reliant on states, humanity will continue to fail in its attempt to protect global human rights" (Eric Leonard, June 2008 Roundtable). Discourse across a range of disciplines (e.g. Roundtable comments by Landman in October 2008, and Thomson-Jensen and co-panelists in May 2007), irrespective of the methods of evaluation, conclude that the existing system of "human rights protection" fails those whose rights are heinously violated: millions die annually as a direct result of violations of basic human rights (food, clean water, adequate health); gross and systematic violations of human rights within certain states fail to attract international criticism; perpetrators go unpunished.

Keywords

Human rights, International Criminal Court (ICC), United Nations (UN), Management, Leadership

Copyright Statement / License for Reuse



All Rights Reserved.

Publication Statement

Copyright is held by the Josef Korbel School of International Studies, University of Denver. User is responsible for all copyright compliance.

International Criminal Justice Must Not Only Be Done, It Must Be Seen To Be Done

by Rhona Smith

“[\[U\]ntil a time in which the global governance structure is not reliant on states, humanity will continue to fail in its attempt to protect global human rights](#)” (Eric Leonard, June 2008 Roundtable). Discourse across a range of disciplines (e.g. Roundtable comments by Landman in [October 2008](#), and Thomson-Jensen and co-panellists in [May 2007](#)), irrespective of the methods of evaluation, conclude that the existing system of “human rights protection” fails those whose rights are heinously violated: millions die annually as a direct result of violations of basic human rights (food, clean water, adequate health); gross and systematic violations of human rights within certain states fail to attract international criticism; perpetrators go unpunished. The International Criminal Court (albeit reliant on states) was initially hailed as providing a “voice” for those whose lives have been decimated by systematic violations of human rights, establishing a fair mechanism for dispensing international justice, though as Flint and de Waal explain, it seems itself to be courting controversy and undermining the very concept of justice on which it was founded. While arguably in its early days, questions including what is the role of the International Criminal Court (ICC) in administering justice, what is seen to be happening, and is justice actually being done, are appropriate.

The preamble to the [Rome Statute of the International Criminal Court](#) emphasizes that contracting states are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” This encapsulates a traditional concept of justice—attribution of guilt and holding the perpetrator to account for her/his crimes—and is an integral step towards post-conflict reconciliation and nation-rebuilding. Although technically the International Criminal Court’s jurisdiction is derived purely from the Rome Statute, the crimes listed therein generally attract universal jurisdiction and can be tried any (and every) where: national courts (e.g. Iraq, Indonesia); ad hoc international bodies (Rwanda and the former Yugoslavia, Sierra Leone); and hybrid bodies (e.g. Cambodia). International criminal justice is thus not the exclusive domain of the ICC. Rather the ICC acts in situations where the state is unwilling or unable to effect adequate prosecution and those situations referred by the [international community](#) ([Article 17 Rome Statute](#)). The role of the ICC is made clear in the Statute, but what is happening now?

To date, as no trials have been completed, evaluations can only be made on preliminary and procedural stages. At the ICC, although in reality the Prosecutor enjoys considerable autonomy in decision-making, as a construct, the role has long been criticized by many commentators (e.g. see the 2001 essays on universal jurisdiction and the ICC by [Kissinger](#) and [Roth](#) in Foreign Affairs) including Flint and de Waal’s cogent indictment of the public and private persona of Ocampo. Indisputably the ICC, including its prosecutor, must uphold the highest standards of judicial integrity and process to ensure justice is adequately served. While in law Ocampo has been exonerated, whether justice is served by the continuing whirl of rumors, anecdotes and indeed resignations is debatable.

Focussing on Ocampo’s professional decisions, who to prosecute and on what grounds is not purely a legal question; they are decisions broaching difficult legal, political, economical and moral issues. Central to the rule of law is the right to a fair trial; the decision who to subject to

that trial rests primarily with the ICC prosecutor. Such decisions must be correct in law though arguably also acceptable to the states to whom the ICC is answerable (raising the spectre of state interference as alluded to at the beginning of this comment). Initially focussed on pursuing those highest up the command structure, Thomas Lubanga was an unusual first choice, selected by default rather than design, from an all-too-crowded global “rogue’s gallery.” Indicting President al-Bashir responds partly to political and popular demands, rather than pure law (evidentiary issues abound). Although mere indictments do not serve justice, they are an indication of the possible direction justice may take and provide ready fodder for detractors arguing the futility of international justice.

The ICC is not a political body which works with rhetoric alone; rather it is a court of law applying internationally agreed-upon standards. It will be judged on the basis of the trials it conducts, its rigor of process and the quality of its decisions. No international court should be beyond reproach, but while politics cannot be dissociated, every effort must be made to attain the highest standards possible to maintain legal credibility (and garner political respect). The old adage is prescient, “it is insufficient that justice is done, it must be seen to be done”—to date, unfortunately, little justice is being seen to be done by the ICC.

Rhona K.M. Smith is Professor of International Human Rights at [Northumbria University](#), Newcastle, UK. She is also the [Raoul Wallenberg Institute of Human Rights and Humanitarian Law](#) (RWI) Visiting Professor in Human Rights at [Peking University Law School, Beijing University, PR China](#). She has authored various texts on International Human Rights Law and worked on human rights education capacity building projects particularly in China and Indonesia through RWI and the Norwegian Centre for Human Rights. She has taught human rights at universities in Canada, China, England and Scotland.