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DISCUSSION KICK-OFF

Victor's Justice in Disguise?

UN Security Council Referrals and the International Criminal Court

GABRIEL M. LENTNER — 19 December, 2016

The UN Security Council has the power to refer situations to the International Criminal Court (ICC) against the will of the territorial state, even if that state is not a party to the ICC. 05 in the case of the atrocities committed in the brutal civil war in Darfur, Sudan. That referral resulted *inter alia* in two open arrest warrants issued against Sudan's sitting President, Omar Al-Bashir (on the question of Al-Bashir's immunity see e.g. here, here and here). The second referral was directed at the atrocities committed in Libya in 2011, but has gone nowhere so far.

Influence of Powerful States

While these referrals were celebrated as important steps towards ending impunity for international crimes, it is important to recognize that the referral mechanism ensures the influence of powerful states. In practice, the permanent members of the Security Council ("P5," including those that are not members of the ICC, namely China, Russia and the U.S.) are given the power to veto or otherwise influence any referral. In other words, the referral power gives the permanent members of the Security Council the power to refer situations to the ICC without themselves being effectively subjected to its jurisdiction. Also, the Council is under no obligation to refer a situation in which crimes under the statute appear to be committed. And while the ICC claims to carry out its work in the name of the 'international community' (on this see here), the Court's selective geography of intervention (Libya but not Syria or North Korea) has offered support for its critics that prosecuting international crimes is an inherently political undertaking (see on this here).

Victor's Justice without Victors?

With all this in mind, it is difficult to see how that situation is effectively different from the historical practice of victor's justice. The Council continues a practice of double standards. Major powers represented in the Council may effectively tailor the referrals to secure their interests, as the U.S. has done in practice in the referrals of Darfur and Libya, explicitly excluding the ICC's jurisdiction over certain categories of nationals of non-States Parties (see operative paragraph 6 of the referrals to that effect and the discussions here and here). The only major difference appears to be that

the major powers represented in the Council do not have to win a war to impose victor's justice.

This makes sense when it is understood that "law consolidates winnings, translating victory into right" (David Kennedy, *A World of Struggle* 11). Viewed in that light, Kennedy argues, the UN Security Council was established to institutionalize the outcome of the Second World War and perpetuate the P5's victory (ibid., 259). It follows that by giving the Council the power to bring situations under the jurisdiction of the ICC, international law is providing the legal means to impose victor's justice in the name of what is commonly called the "international community." Through law, not all wars need to be fought to be won (ibid., 259). The Security Council referral makes this legally possible. This also means that, in a sense, the ICC contributes to the legitimization and reproduction of victor's justice.

Such victor's justice in disguise is, of course, not new. As Thrasymachus already says in Plato's Republic, "everywhere justice is the same thing, the advantage of the stronger." Yet, the ideal of a permanent international criminal court was conceived as a departure from such a double standard. Its very *raison d'être* lies in the fact that a permanent international institution is the only way to depart from such practice. And yet, the Security Council referral as included in the Rome Statute defeats this ideal. This is not acceptable. As Hans Kelsen wrote in 1944 in *Peace through Law*:

"[i]t is not compatible with the idea of international justice that only the vanquished States should be obliged to surrender their subjects to the jurisdiction of international tribunal for the punishment of war crimes. The victorious States, too, should be willing to transfer jurisdiction over

their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal. Only if the victors submit themselves to the same law which they wish to impose upon the vanquished States will the idea of international justice be preserved." (pp. 114-115)

To be sure, the Security Council refers situations to the ICC under its mandate to secure international peace and security (as it has done when establishing the ICTY and ICTR, which has also been accused of victor's justice, see, eg. here). But it would be difficult to argue that victor's justice is necessary for the maintenance of peace and security (on the problem of the collision of the regimes of the Security Council and the ICC see here).

So what?

Why does all this even matter? Of course, we do not live in an ideal world and international law generally is not ideal – but such complacency underestimates the role of legal expertise in shaping exactly that non-ideal world and non-ideal international law we lament. David Kennedy's book makes one thing clear: It is our expertise that shapes the world. Thus, we should not excuse ourselves from the responsibility for the outcomes of our expertise: If we accept the world as it is, we are complicit in its inequalities and injustices.

Where does this leave us as experts? In the words of Donna Haraway, the responsibility of scholars lies in producing "knowledge potent for constructing worlds less organized by axes of domination." (*Simians, Cyborgs, and Women: The Reinvention of Nature* 192)

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