

The International Criminal Court: Challenges and Strategies in Ending Global Impunity

Author- Chitra Devi. R

INTRODUCTION

In November 2018, a coalition of Afghan and US forces carried out an airstrike in Helmand Province, Afghanistan, targeting Taliban forces. Tragically, twelve innocent civilians, including five women and twelve children, lost their lives. The primary target, Akhtar Mohammad, a local farmer with no ties to the Taliban, was mistakenly attacked. Mohammad had no ties to the Taliban, but he was nevertheless hit at his home. In response to a question regarding civilian casualties caused by the strike, NATO coalition representative in Afghanistan Sergeant First Class Debra Richardson stated, "At the time of the strike... the ground force was unaware of any civilians present in or near the compound; they were only aware that the Taliban was utilising the building as a combat position." The fact that Mr. Mohammad's story has become so famous since America's first invasion of Afghanistan is regrettable.¹

During American interventions in Afghanistan, there was a disturbing pattern of disregarding civilian casualties in military operations. The number of civilian deaths caused by airstrikes in Afghanistan increased by a factor of 330 after the US military loosened its regulations of engagement. Also, pre-coordinated airstrikes in Iraq, Syria, and Afghanistan were rarely carried out by the United States of America. Rather, they were underinformed and frequently relied on incorrect intelligence. In many cases, the military significantly underreported civilian casualties. Out of 1,311 reports, the Pentagon identified only one possible violation of the rules of engagement. We did not find any instances of misconduct or disciplinary actions.

By not taking all reasonable precautions to avoid killing innocent civilians and by attacking military targets in a way that would result in more civilian deaths than military ones, American airstrikes in Afghanistan and the Middle East have broken numerous principles of international law. When asked about the US military's repeated use of torture and airstrikes in Afghanistan in 2017, Fatou Bensouda—a former prosecutor for the ICC—announced that her office would launch an investigation. In retaliation, the Trump administration revoked Prosecutor Fatou

¹ 7 Ferenez B. , "Know the Truth about the International Criminal Court" <http://www.derechos.org/nizkor/> (accessed on 3rd February 2011)

Bensouda's visa and threatened financial sanctions against the ICC, should the investigation proceed. The ICC Pre-Trial Chamber denied Prosecutor Bensouda's request to begin an investigation into Afghanistan, citing the lack of cooperation received by the Office of the Prosecutor and the general instability surrounding the proposed inquiry.

The decision to prioritise certain aspects of the investigation and focus on crimes allegedly committed by the Taliban and the Islamic State - Khorasan Province (IS-K) was announced by Prosecutor Khan in September 2021. Other aspects of the investigation would be deemphasized. The decision was later reversed. What happened was this, even though Prosecutor Bensouda had successfully appealed the decision. Some saw the International Criminal Court (ICC) as caving in to US pressure, and they were right. Prosecutors from the Office of the Prosecutor (OTP) and the International Criminal Court (ICC) have either failed or struggled to bring charges against powerful individuals. This investigation into Afghanistan is far from new. Among these people you will find members of the political class and residents of powerful states. Since its inception, the International Criminal Court (ICC) has been determined to bring to justice all individuals guilty of crimes, including "unimaginable atrocities that profoundly disturb the conscience of humanity." However, it has failed to carry out its mission so far, particularly with regard to the impunity of those in power. The ICC has already conceded to powerful figures, as demonstrated by Prosecutor Khan's announcement regarding Afghanistan, suggesting that further concessions will soon be forthcoming. Consolidating on his September announcement, Prosecutor Khan stated that the Office of the Prosecutor will give cases with a "high probability of conviction" more priority and drop those with a low likelihood of successful prosecution.²

In 2022, if Russia invades Ukraine, it might derail Prosecutor Khan's planned prosecution approach. Russia seized the Crimean Peninsula from Ukraine in 2014 without suffering any repercussions, and in 2022 it was given the green light to invade Ukraine in its entirety. The lack of accountability in this situation is reminiscent of the United States' refusal to admit guilt for its war crimes in Afghanistan. Along with their aggressive actions and invasion of Ukraine, Russian soldiers have violated the human rights of civilians in Ukraine. Extrajudicial killings, torture, and rape are all part of these transgressions. Despite the growing body of evidence linking Russia to war crimes, the chances of any individual being fairly and adequately tried by the International Criminal Court (ICC) are extremely low. Since Russia has not ratified the

² 2 N. A. Inegbedion, "The Evolution of International Criminal Jurisdiction – The International Criminal Court in View", Benin Journal of Public Law, Vol. 2, No. 1. (2004) p. 20

Rome Statute, it is not required to cooperate with the ICC. In addition, Russia is protected from international community actions, such as those of the International Criminal Court (ICC), thanks to its veto power as a permanent member of the UN Security Council (UNSC). Like in Afghanistan, prominent Russian figures, like Vladimir Putin, will likely avoid punishment for their crimes if Prosecutor Khan continues to prioritise a "winnable case" strategy.

The International Criminal Court (ICC) must confront the crimes committed by powerful entities, such as Russia and the United States, if it is to fulfil its mission of addressing and ending severe human rights violations. Despite the significant obstacles, the International Criminal Court (ICC) should give these crimes priority in its investigations and prosecutions.

There are no long-term strategic benefits for the International Criminal Court from Prosecutor Khan's prosecution approach, according to this note. The crimes committed by powerful individuals, such as members of political elites and citizens of strong nations, should be given priority by the Office of the Prosecutor (OTP) when using its prosecutorial discretion. Despite the enormous obstacles and the low likelihood that the International Criminal Court will be able to carry out the arrest warrants and sentences against these individuals, it is of normative importance to address their impunity. To aid the Office of the Prosecutor in this endeavour, the International Criminal Court should increase its use of in absentia trials, particularly those involving citizens of states that refuse to cooperate with the ICC. In absentia trials could hold prominent individuals accountable, spark social movements, and strengthen civil society³

An Empirical Concept of Impunity: Where to Start?

The term "impunity" is not entirely defined. The subtle conflict between its implications and its opacity gives rise to its meaninglessness. The term "impunity" being used to describe "crimes against creation or permitting thousands of individuals to lose their employment due to their inability to compete in the free market" gives rise to a much more ambiguous interpretation. Although it would be far more challenging to ascertain how most observers would interpret a pardon given to a torturer as impunity, it is clear that this is the case. Because of the obvious value judgements involved, these two cases illustrate the difficulty of trying to pin down a definition of impunity.

When discussing "impunity," ambiguity is common and, in some cases, perfectly reasonable. Imagine a military officer who has been given the order to torture a terrorist in order to acquire

³Williams A. Schabas, *Criminal Responsibility Violations of Human Rights*, (Aldershot: Ashgate Publishing Ltd., 2003) p. 293.

information regarding the whereabouts of a bomb that is supposed to go off in a school in the city. Compiling this data is the officer's responsibility. Additionally, it is assumed that this officer is responsible for carrying out the order and that the information obtained is critical for avoiding the deaths of many children. Should we punish this kind of police officer, and if so, how severe should the punishment be? If this hypothetical terrorist or their loved ones were to receive compensation, how would it be distributed? Can we infer the likelihood of impunity from this pattern of facts? Unfortunately, this example shows a problem that might not be purely based on speculation. No nation can legitimately claim to be above the law if it does not adhere to the universally recognised ban on torture. But the circumstances surrounding the case might make politicians' and the public's reactions more manageable. Even when there is less room for interpretation, similar conflicts may arise. The brutality of the Chilean and Argentine dictatorships in their fight against communist subversion may have seemed justifiable to some Latin Americans. Those who believe in impunity would find it hard to understand Pinochet or Videla's cases. On the other hand, almost all non-governmental organisations (NGOs) fighting impunity rallied behind the Pinochet affair and its subsequent multiplier effect, which had widespread support from many parts of the world's public.⁴

In this short analysis, we will try to argue that "impunity" is not a word that is easily defined. In addition, one must acknowledge that when trying to define impunity through self-reflection, one may be too ideologically biased to offer a solid foundation for the concept. An additional strategy that could be useful is to examine many cases that are partially or entirely classified as impunity cases. The objective is to develop a notion of impunity that is more based on empirical evidence by combining and condensing existing ideas. Such cases should be selected from a pool that is as inclusive and objective as possible, covering most of the "legitimate" or "appropriate" uses of the word "impunity." Therefore, using the vast amount of information that AI had collected seemed like a reasonable first step.

Out of more than 3,000 documents, including 1,000 reports tagged as "Impunity" in the open-source AI library, the team selected 98 reports to serve as project representatives. At first, these reports were sorted according to region in order to find out if the central idea that AI used to guide his advocacy and research varied by region. Disparities between these areas would have originated in the unique political, social, and cultural contexts of the countries that make them up. It is usually feasible to come up with a single definition of impunity that is flexible enough

⁴ Rome Statute, Art. 12(2). See Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, 583 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002)

to accommodate particular details while also being general enough to address current issues across different regions. Examining the meeting point of two dimensions is crucial for grasping this idea. The relevant dimensions are the author's status, which stands to gain from impunity, and the circumstances that either grant or maintain this impunity. Therefore, in reality, the term "impunity" is more accurately described as a loosely bound collection of practices involving various actors than as a final, unchangeable concept.

When Impunity is Ignored, History Tends to Repeat Itself

Serious and persistent breaches of international law could be perpetuated by a prosecution approach that fails to hold powerful individuals accountable for their crimes. The US's policies and actions in the Middle East are a prime illustration of this. Throughout the War on Terror, the international community has looked the other way as the US repeatedly disregarded human rights and humanitarian law norms. This has led to the deaths of 22,679 civilians in Afghanistan, Yemen, Syria, and Iraq, with estimates ranging as high as 48,308. People are regularly tortured at facilities that are owned and operated by the US. The Abu Ghraib prison in Iraq, the Bagram Air Force Base in Afghanistan, Guantanamo Bay, and the CIA's secret sites in Poland are all under investigation. The jus cogens doctrine holds that these facilities are illegal on a global scale. Given the lack of accountability measures for violations of international law, the United States has no reason to reconsider its decision to continue with these violations. Because the prosecutor has chosen to ignore these crimes, victims will have a harder time getting justice, and powerful nations like the US will feel more confident acting without fear of repercussions.⁵

Silences the Voices of Victims

Victims of crimes committed by powerful offenders have their voices muted because individuals from powerful states are ultimately evaded in investigations and prosecutions. It is imperative that the International Criminal Court (ICC) address cases involving "victims of unspeakable atrocities that deeply disturb the conscience of humanity." But when the Office of the Prosecutor (OTP) doesn't bring charges against powerful state officials, a lot of people are left out of the spotlight. The Pre-Trial Chamber turned down Prosecutor Bensouda's request to look into American war crimes in Afghanistan, as Human Rights Watch put it succinctly.

⁵ Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67, 110 (2001).

Decades of impunity in Afghanistan show how the interests of the powerful often take precedence over those of victims and their families of grave crimes. It is absolutely clear that they have the right to hold the guilty accountable for the crimes. After the judges decided not to investigate possible war crimes and crimes against humanity in Afghanistan, the International Criminal Court officially informed the victims that it would not represent them. This message is extremely harmful and has the potential to reach far beyond Afghanistan.

Victims who are citizens of powerful states must not be overlooked if the Office of the Prosecutor wants to strengthen its credibility among impacted communities. A commentator raised the question of why the International Criminal Court seems to be ignoring the victims of Darfur, considering President al-Bashir's ability to evade justice.^{18.1} Similarly, just because US forces were involved in the torture in Afghanistan doesn't mean the ICC should ignore the victims of that crime.

The important question is: what should be done if the International Criminal Court (ICC) is hurt in the long run by a prosecutorial strategy that focusses on "winnable" cases, given the huge hurdles to effective investigations and trials against powerful nations and political elites? An inventive approach to addressing the issue of powerful individuals enjoying impunity is the growing use of in absentia trials, as demonstrated by the Russell Tribunal's proceedings. Achieving long-term success for the International Criminal Court (ICC) will require creative responses to the issue of impunity.⁶

Replication of the Benefits of the Russell Tribunal at the ICC

To achieve its aim of ending impunity for serious human rights abuses, the International Criminal Court (ICC) should be able to hold trials while its members are not present. Although the International Criminal Court (ICC) may encounter typical obstacles in achieving favourable results using this approach, like the execution of rulings and the acquisition of effective arrest warrants, the indictments against notable persons are of great significance. The Russell Tribunal proved that local civil societies are strengthened and that global leaders are increased pressured to comply with international law when powerful individuals are tried in a legitimate and fair manner. The establishment of the Russell Tribunal serves as an example of this.

The case of Al-Bashir highlights the difficulties encountered by the International Criminal Court (ICC) in carrying out its decisions and the significance of bolstering local civil society.

⁶ John T. Holmes, *Complementarity: National Courts versus the ICC*, 607–16 (Antonio Cassese, Paolo Gaeta & John R.W.D. Joneseds., 2002).

Indicting a head of state for the first time, the International Criminal Court (ICC) established a precedent with the charges against Al-Bashir. Due to this event marking the beginning of the principle, the law applies to everyone, even political elites. In response to multiple state parties' refusal to comply with the court's orders to arrest Al-Bashir, the International Criminal Court came under fire for rejecting the Head of State Immunity Doctrine. On the 201 Despite Al-Bashir's ten-year evasion of arrest, the Sudanese government announced in 2021 its intention to extradite him to the International Criminal Court. The 202nd According to Sudan's prime minister Abdalla Hamdok, "Sudan's commitment to justice is not merely a reflection of its international obligations; it is also a response to the populace's demands." This statement explains the change in policy. The Sudanese people had reached a breaking point; they would no longer put up with those who avoided responsibility because of their social status. In order to ensure that Al-Bashir was brought before the International Criminal Court, they pushed the Sudanese government to extradite him. Although the Al-Bashir case did not involve an absentee trial, it does show how local civil society can be empowered to achieve great things. It is probable that local civil society will be fortified and significant global social movements will arise if the International Criminal Court (ICC) increases its utilisation of in absentia trials against non-compliant world leaders and nations. This is due to the fact that powerful individuals will be held accountable for justifiable war crimes and crimes against humanity.⁷

International community cooperation with the International Criminal Court (ICC) could be prompted if indictments against high-profile individuals inspire and strengthen social movements around the world. This is related to the idea that states should follow international rules and regulations because doing so is in their best interest. There are a number of ways in which international social movements can put pressure on states to respect the ICC. When public pressure mounts, state leaders may cave to domestic political pressure and ally with the International Criminal Court (ICC), as happened in the US during the Vietnam War. Global social movements, such as the anti-war movement that arose in response to the Vietnam War, may force the leadership of third states to resort to coercive measures against noncompliant states in order to guarantee compliance (205). Possible measures include travel bans and asset freezes. One example is Al-Bashir, who was impeded in his ability to effectively conduct multilateral diplomacy because "diplomats from third countries undermined [Al-Bashir's] planned visits by cancelling, rescheduling, or relocating meetings." Two hundred and seven

⁷ Jakob Katz Cogan, International Criminal Courts and Fair Trials—Difficulties and Prospects, 27 YALE J. INT'L L. 111, 119 (2002).

The Security Council of the United Nations has called on member states to seize the assets of persons and entities that provided assistance to those facing charges before international tribunals and courts, particularly the ICTY. By coordinating their sanctions to guarantee compliance, the states party to the Rome Statute increase the effectiveness of coercive measures in compelling non-compliant states to adhere to the statute.

In the event that international social movements do not succeed in pressuring governments to take action against non-compliant nations, the accused could suffer reputational damage from in absentia trials. If a state's reputation takes a hit due to this kind of image damage, other states may be less inclined to seek diplomatic or cooperative relations with it. According to scholars and practitioners of international law and international relations, states continue to fulfil their obligations even when the results are less than expected. This is because states are afraid that if they show signs of being unreliable, it will damage their cooperative relationships and make other states less willing to enter into future agreements. It can be inferred from this that states are inclined to fulfil their responsibilities regardless of the outcome. Although "the reputational consequences of a state's noncompliance with a specific treaty are... limited by the history of its cooperative relations with other member states," states may be impacted to varying degrees by their reputation, according to the statement. However, when a state's reputation takes a hit, it can hurt its interests and force compliance requirements. U.S. prestige took a hit due to the Russell Tribunal and negative press surrounding the My Lai massacre. The tarnished American image was one reason the administration was under pressure to pull out of Vietnam. If a U.S. leader were to be indicted for war crimes connected to the country's engagement in Afghanistan, the international community's pressure on the US to end its violations of international norms during wartime would certainly increase.

The increasing number of trials conducted in absentia is controversial for valid reasons. The perfect world would be one in which the ICC and the OTP have all the money they need and every state cooperates so that they can hear every case that falls under their purview. To the best of their abilities, states would cooperate with the ICC. Unfortunately, this is not the case right now, so we must find another way to end the impunity issue. There are some problems with in absentia trials, but overall, they are a good way to make powerful people pay for their crimes. The following section will address the criticisms levelled against the idea of expanding the use of in absentia trials. The advantages of expansion in fighting impunity, we argue, outweigh these concerns.

CONCLUSION

The prosecution of serious human rights violations is currently at a crossroads between the Office of the Prosecutor (OTP) and the International Criminal Court (ICC). Initial case prioritisation will be based on what the International Criminal Court and the Office of the Prosecutor perceive as being "winnable." Despite the apparent logic of this approach, the International Criminal Court (ICC) will confront long-term problems with legitimacy and state compliance if it follows through with it. If powerful people can avoid being held accountable for their actions, impunity will persist. Further, individuals that the Office of the Prosecutor (OTP) deems to be prosecutable may imitate the actions of more prominent human rights violators in order to thwart the ICC. Because they were victims of such terrible crimes, Akhtar Mohammad and his family will always have low expectations that justice will be served.

Alternatively, instead of trying to sidestep powerful people at first, the prosecution could take a stance that goes after their crimes head-on. Powerful individuals are likely to resist this prosecution strategy. Therefore, it is crucial for the OTP and ICC to develop innovative approaches to ensure justice is served for even the most influential offenders. It is exemplified by the proliferation of trials where the defendant is not present. Although there are some challenges, such as the increasing number of trials conducted in absentia and the focus on crimes committed by powerful individuals, the benefits of these initiatives outweigh the problems in the long run. To achieve its goal of ending impunity for serious human rights violations, the ICC must prioritize holding powerful states and individuals accountable. Only by confronting these challenges head-on can the Court restore faith in international justice.