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Law, Anthropology, and the Global Village

Dianna J. Shandy

My country is the world, and my religion is to do good.

Thomas Paine in *Rights of Man*, 1791

Resolved to guarantee lasting respect for and the enforcement of international justice.

Rome Statute of the International Criminal Court, 1998

I. Introduction

Globalization is characterized by crosscutting flows and networks of people, goods, ideas, and capital across the globe. These processes are both facilitated and constrained by yet emerging infrastructures and institutions. Within this shifting context, it has been observed that while we live in a global village, there is no rule of law. Here, I reflect upon this observation in relation to the unfolding development of the International Criminal Court (ICC), with particular consideration of African contexts.

This reflective essay is situated at the crosscurrents of recent developments in theoretical and empirical approaches to the study of the anthropology of crime, the anthropology of international law, and the anthropology of Africa. The ideas and questions advanced here build on work by anthropologists Kamari Maxine Clarke and Mahmood Mamdani in contributing to a critical approach to the intertwined growth of the rule of law and the human rights movements, particularly as applied to Africa.¹ With respect to the topic at hand, anthropologist Sally Engle Merry observes, “Law’s internationalization is a product of transnational movements such as colonialism, contemporary transnational activism, the creation of a new world order of negotiated contracts and agreements linking together diverse states, the expansion of human rights activism and institutions, and the transplanting of legal institutions themselves.”² She goes on to point out, “Given the ambiguity and novelty of these developments, anthropological research plays a critical role in examining how international law works in practice, mapping the circulation of ideas and procedures as well as examining the array of small sites in which international law operates, whether in Geneva, a local office of a human rights NGO, or the International Criminal Court.”³

II. Methodological Considerations

This essay picks up Merry’s charge to explore these “small sites in which international law operates” to better grasp the underlying infrastructure that facilitates globalizing processes. It is informed by document review and exploratory participant-observational and interview-based fieldwork in The Hague in the Netherlands during May and June 2010. I visited the International Criminal Tribunal for the former Yugoslavia (ICTY)

twice, listened to informational talks, conducted open-ended interviews with key personnel, reviewed informational documents available to the public in hard copy format and on the web, and spent several hours conducting participant observation at two different trials. I also visited the International Criminal Court three times, listened to informational talks, reviewed informational documents and the website, conducted open-ended interviews with key personnel, and sat in on hearings. In addition, I visited the Special Court for Sierra Leone (SCSL) once in its location within the International Tribunal for Lebanon, reviewed hard copy and web-based public information documents, sat in on the defense phase of the Charles Taylor trial, and interviewed personnel previously involved with SCSL.⁴ I was also able to interview key personnel currently or previously involved in the International Criminal Tribunal for Rwanda (ICTR). I listened to informational talks about, and reviewed documents pertaining to, the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ). Exposure to these multiple sites was useful for framing the work of the ICC in a comparative manner. Moreover, personnel involved with one legal body frequently had experiences relating to other legal bodies. In this way, for example, a person who had worked at ICTY might now be employed by the ICC. Defense attorneys may be involved with more than one case at different courts at the same time. Even states may be involved with more than one of these international legal bodies simultaneously.

As an illustration, in 2009, Sudan was the subject of an arbitration case regarding the boundary of its disputed Abyei Area through the Permanent Court of Arbitration at the same time as its President, Omar al-Bashir, was under indictment for crimes against humanity at the International Criminal Court. This gave rise to the curious situation whereby PCA representatives were visiting Sudan on multiple occasions at the same time as representatives from the ICC were banned from visiting the Darfur region of Sudan to investigate their own case. While appealing to the authority of one court, Sudan simultaneously rejected the authority of another, signaling a “consumerist” approach to engagement with international legal institutions. I attempted to contextualize these admittedly snapshot-like experiences through engagement with recent literature on the globalization of law,⁵ anthropology and international law,⁶ and the anthropology of crime,⁷ among other related bodies of literature.

These sites, to be sure, represent a selective and partial view of a much more complex system that merits systematic investigation. Nonetheless, I will suggest that not only do they constitute a vital space for those interested in the internationalization of law, but that these sites are important areas of inquiry and need to be incorporated within the analytic social field for studies of Africa. This essay begins with an overview of the International Criminal Court. Next, it considers the ICC in relation to the process of “spectacularization of the law.”⁸ Finally, it concludes by raising critical questions engendered by the emergence of the Court.

III. The International Criminal Court

The International Criminal Court is a treaty-based permanent court established to investigate, prosecute, and try individuals accused of committing the most serious crimes of concern to the international community, namely, the crime of genocide, crimes against humanity, and war crimes.⁹ Officially coming into being in 2002, but conceived in the

aftermath of the Nuremberg Tribunal and the Tokyo Tribunal, the ICC was established with the adoption of the Rome Statute on July 17, 1998, through ratification by the minimum threshold of sixty states. In the words of one staff member I interviewed, “the ICC is newly born, but it is part of a long, unfolding process.” The ICC, therefore, should be understood against a backdrop of these earlier trials, as well as the ongoing former Yugoslavia Trials and the Rwanda Trials.¹⁰

The seat of the court is located at The Hague in the Netherlands. The ICC differs from ad hoc tribunals, such as Rwanda, and other courts established by the United Nations, such as the Special Court for Sierra Leone, because, among other reasons, it is a permanent and independent court. As of this writing, 111 states are parties to the statute, thirty of which are African states.

IV. Spectacularization of the Law

Kamari Clarke refers to what she describes as the “spectacularization of the law.”¹¹ Thus, it is useful to consider briefly the physical embodiment of international “justice-making,” as it were. Currently housed in a jutting white office tower that was formerly the KPN telephone company headquarters, the ICC is slated for new quarters in 2015. A Danish architectural firm was selected through an international competition to complete the project. In the words of a representative of the architectural firm: “To the victims, to their families and to the world, the ICC building must communicate respect, trust and hope. This building cannot be anonymous; it must have the courage to express the values and the credibility of the ICC... This way, it becomes a backdrop for the ICC to communicate trust, hope, and most importantly, faith in justice and fairness.”¹² The new site, located next to the North Sea, will also be in close proximity to the Dutch prison in Scheveningen that holds suspects on trial, but not those convicted. Once convicted by the ICC, prisoners fulfill their sentences in one of five countries (Denmark, Finland, Belgium, Austria, or the United Kingdom) that have signed cooperation agreements with the ICC to provide incarceration facilities.¹³

For a visitor from the United States, habituated to the spectacular ritual of state power as enacted through elaborate security screening measures, security for visitors to the ICC seems muted. Upon entering through the visitors’ door to observe court proceedings in the public gallery, belongings are scanned on a single x-ray conveyor belt and individuals pass through a metal detector. When I visited (both prearranged encounters), no one asked to see my identification (unlike my experience at the International Criminal Tribunal for the former Yugoslavia or the Special Court for Sierra Leone). Once past security, staffed by one male uniformed security guard and one female who scanned my belongings, there were two doors. The one to the left was for visitors and the one to the right was for staff or “people who belonged there.” The visitors’ entrance opened onto a long room with a reception desk staffed by someone wearing headphones who seemed engaged by other work-related tasks. I was instructed to leave my belongings—especially any photographic or recording devices—in a locker with a glass door before proceeding upstairs to any of the public viewing galleries. The public galleries themselves are monitored by a uniformed security guard.

The interior of the building itself is sleekly European, almost clinical, with modern clean lines. The visitors’ area is converted from what was once a parking area, with large

structural pillars remaining. The walls are adorned with photos of the President (Mr. Sang-Hyun Song from Korea), Prosecutor (Mr. Luis Moreno-Ocampo from Argentina), the Deputy Prosecutor (Ms. Fatou Bensouda from the Gambia), and the Registrar (Ms. Silvana Arbia from Italy).¹⁴ In addition, there are portraits of the eighteen judges (nine women and nine men), who serve a three-year renewable term.

Similar to what one finds at ICTY, tall display spinners are stocked with case information sheets for each of the current cases. For example, one folding sheet says “The Prosecutor v. Omar Hassan Ahmad al Bashir (“Omar Al Bashir”) Case no. ICC-02/05-01/09.” It lists date and place of birth, nationality, tribe, current status (i.e., President of the Republic of Sudan since 16 October 1993), warrant of arrest, surrender to the court, charges, alleged crimes, and key judicial developments, including referral and opening of the investigation, warrant of arrest, and participation of victims. It concludes with a list of legal and judicial personnel affiliated with the case. All documents for the court, including these public information case information sheets, are translated into English and French. For Darfur (Sudan), all documents are also translated into Arabic.¹⁵

There are three courtrooms in the ICC, each (as with ICTY and SCSL) with a public gallery, in which a bulletproof glass wall separates the public from the courtroom itself. The court is arranged with the prosecutorial team on stage left, the defense on stage right, and the judges, attired in their distinctive blue robes, on center stage. (In French, the judges are even referenced by their attire—*les robes bleus*.) Legal personnel are differentiated from others in the courtroom by their black robes and white jabots. The witness box is positioned in the center facing the judges.

It is difficult to position oneself in the public gallery in such a way as to take in the panoramic view of the entire courtroom. Each of the courts, however, has a televised screen in addition to the simultaneous interpretation of the proceedings into English and French (at a minimum) that is broadcast onto monitors in the public gallery. Most of the work of the ICC proceedings is posted on the website, once they redact the names of witnesses. For sensitive or confidential matters, usually pertaining to a victim’s testimony, an automated screen descends to obscure the courtroom from public view, the viewing monitors stop transmitting proceedings, and proceedings cease being posted on the website.

The ICC does not permit trials in absentia. Therefore, the physical space of the ICC emerges as a highly significant localized “site in which international law operates.”¹⁶ The manner in which the ICC presents itself to the public is an important component in the spectacularization of justice. The physical space endeavors to convey a sense of openness, which is congruent with the ICC’s claim of promoting a policy of transparency. Toward this end, they reportedly strive to make the process clear, predictable, and, according to one staff member I interviewed, “deliberately don’t try to surprise.” One of the lessons the ICC took from the experiences of ICTY and ICTR is that there “needs to be an awareness of the ICC for there to be a deterrent effect.” Thus, outreach and the public presentation of the court become important facets of its attempt to establish itself, and, ultimately, to build support for its activities.

V. Critical Questions Surrounding the Emergence of the ICC

The court is characterized by an ambitious mission. In its effort to realize its lofty goals, the court encounters numerous obstacles. While a veritable cottage industry of critique regarding the ICC is emerging,¹⁷ this section highlights three critical areas engendered by the emergence of the court: the role of politics, the quest for legitimacy, and the gap between legal principles and the “messiness” of human experience.

Picking up on an argument put forward by Mamdani, it is relevant to ask: how should the ICC prosecutor decide, among the tens of thousands of crimes and perpetrators within the ICC’s jurisdiction, which ones to charge? In the words of a defense attorney I interviewed, “It’s a laudable goal to end impunity, BUT in practice, there are political considerations that come into play.” This issue of prosecutorial discretion has come under fire, given the ICC’s exclusive focus on African cases (Sudan, Uganda, Central African Republic, and Democratic Republic of the Congo) during its first years of existence. This perception of the ICC as a highly politicized entity is fueled by claims, according to one individual interviewed, that it is “an instrument for white man’s justice” because of the failure of the United States to sign the ICC Charter (and thereby avoid prosecution) and the role of powerful states who can use the Security Council to block indictments. As the ICC will presumably expand the geographic scope of the cases it pursues, some of the intensity of this line of critique will likely diminish. It is unlikely, however, to dissipate entirely as long as powerful states, such as the United States, remain beyond the reach of the rule of law in the purported global village in which we live.

The second and related theme can be seen in the question of the legitimacy of the court. This was an issue that pervaded my interviews regarding the ICC. What does it mean to gain legitimacy? If the ICC’s legitimacy is linked to its effectiveness in serving as a deterrent, how does one measure deterrence? What are the obstacles to legitimacy? Does what constitutes legitimacy differ across time and space? Let us take Sudan as a case in point. Does issuing an arrest warrant for President Omar al-Bashir represent a “disjunctural encounter”¹⁷ in terms of what his arrest means to the global community versus what it means in Sudan? And from there the questions multiply, contingent upon one’s identity within Sudan. Clearly, this is but a brief engagement with a thorny set of issues that need to be explored more systematically. At a fundamental level, however, the ICC is dogged by the glaringly obvious asymmetry in having the seat of justice located in the Global North trying cases, exclusively to date, from the Global South.

The final realm of critique I explore is the gap between the messiness of human experience, most particularly during war, and the attempt to apply legal principles to these situations. This critique operates on multiple levels. In a fundamental sense, it is difficult for the observer to reconcile the image of the relaxed, even smiling, business-attire-clad defendant, looking more like a corporate CEO than the mastermind of criminally depraved acts. It is all the more jarring when one’s mind flashes to the distant settings where the on-the-ground violence occurred.

On another level, the contrast between the magnitude of the alleged crimes and the procedural aspects of actual cases presents a deep disconnect. The following excerpt from the defense phase of the Charles Taylor (former president of Liberia) trial illustrates the cadence of a trial of a man charged with crimes against humanity. Here, the prosecutor questions a witness regarding events that took place eighteen years previously:¹⁹

Excerpt 1:

Q. When he was in Gbarnga, were you able to communicate with him? Was he able to stay in contact with the RUF commanders?

A. There was no communication, sir.

Q. Well, didn't he speak over the radio to you?

A. He spoke us, but we have no radio communication at that time. We've been cut. If he had the time, he gave the ultimatum. We had no radio at that time. Maybe he had his own special phone or maybe mobile phone.

Q. First, sir, we are going now to 1992 — or actually, from the time you entered Koindu in March 19 — in April 1991 through 1992, didn't the RUF have radios that you had captured?

A. In Koindu we had no radio. We only received radios when Kono was attacked. They brought in radios, communications from the military, the ones that they got. They brought it and they were all installed, and we started using that.

Q. When was Kono attacked?

A. It was 1994, something like that. Really, your Honour, this dates business is a little bit — I didn't do history, sorry if I told him — but I can just give you circulations, something that can circle my answer, please.

Excerpt 2:

PRESIDING JUDGE: Please pause. Please pause.

MR MUNYARD: Sorry to interrupt. Before - it has now gone off my screen. The witness gave a distance and he said, "From here to your position over there." Mr Koumjian then said, "About 20 metres?" Well — and that's what's gone on to the — that's what's gone on to here, that's what he said. I'm sure that the distance from where the witness is to where Mr Koumjian is is not 60 plus feet, which is what 20 metres is in feet. I just thought we ought to correct that while we can.

PRESIDING JUDGE: You are absolutely right, Mr Munyard. What would be your estimation of that distance?

MR MUNYARD: Well, it wouldn't be 20 feet. It would be probably about 12 feet, I suppose. It's about two of me lying down, because I'm 6 foot.

PRESIDING JUDGE: Mr Munyard, I don't think that is only two of you lying down. There's a whole lot more of you lying down.

MR MUNYARD: Maybe it's three. I think it's less than 20 feet, but something between perhaps 15 and 20.

PRESIDING JUDGE: It's between 15 and 20 feet.

MR KOUMJIAN: Thank you. I'm happy with that. Thank you:

Q. Sir, what kind of weapon did the bodyguard have who shot Sheik Fofana?

A. AK-47, my Lord.

The trial transcript continues much in the manner of these two excerpts, attempting to hammer out a narrative version of events in the distant past, one contested detail at a time, as it strives to build support for the case of the prosecution or the defense.

One final level of disjuncture can be seen in the unit of analysis used in justice-making. One of the considerations in international criminal justice is the focus on individual culpability. The ICC prosecutes individuals, not groups or states. In the words of one ICC representative, “The ICC doesn't go after the trigger man in crimes. It goes higher up to prevent future crimes.” In this manner the emphasis is on a localized space of violence (site of violence) instead of international systems that feed violence. Carolyn Nordstrom looks at this in terms of global networks of corruption.²⁰ Clarke raises questions about culpability in terms of who sold the machetes to the Rwandans and who on the international stage failed to act/intervene? In international criminal proceedings, law gets lifted out of larger historical context. Thus, the court’s focus is on an abstracted reality as legal principles are applied to the messiness of human existence.

VI. Conclusion

This essay has considered the emergence of the International Criminal Court in an attempt to grapple with the notion of living in a global village that lacks the rule of law. One individual who spoke about the work of the ICC described it as “limping along.” He went on to note that “international criminal prosecution tribunals are fragile; they need broad support. This ignores the reality of international criminal law.” Donor states get impatient, and there is a demand for results. As the trial transcript hints, there is a notable gap between the *process* of justice-making and the lofty goal of “*guarantee[ing] lasting respect for and the enforcement of international justice.*”²¹

Mamdani, Clarke, and Merry, among others, have all observed that the spread of the rule of law movement is closely related to the concomitant expansion of the human rights movement. In this essay, I have focused on the International Criminal Court as a yet-evolving institution that represents an important site in the globalization of international law. I have explored the ICC as both a physical space and an important symbol in the “spectacularization of the law,” while also raising critical themes associated with its development. At the same time, this essay has tried to illustrate the significance of what is happening in legal settings like The Hague for scholars of Africa. Reminiscent of earlier colonial processes, The Hague, known as the “legal capital of the world,” emerges as a centralizing nexus for processes that take place half a world away.

Notes

1. Kamari Maxine Clarke 2009 and Mahmood Mamdani 2009.
2. Sally Engle Merry 2006, p. 110.
3. Ibid., p. 111.

4. SCSL had recently relocated from the ICC. I was variously told that relocation was due to the high cost of rent at the ICC and that the ICC anticipated needing all of its available courtroom space as it continued to take on more cases.
5. Halliday and Osinsky 2006.
6. Merry 2006.
7. Nordstrom 2007; Schneider and Schneider 2008.
8. Clarke 2009.
9. ICC 2009, p. 3. According to the Rome Statute, genocide is defined as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. Crimes against humanity include any of the following acts committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination; enslavement; deportation or forcible transfer of population; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury. War crimes include grave breaches of the Geneva conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts 'not of an international character; listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale. Examples of war crimes include: murder; mutilation, cruel treatment, and torture; taking of hostages; intentionally directing attacks against the civilian population; intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historical monuments or hospitals; pillaging (robbing of goods by force); rape, sexual slavery, forced pregnancy or any other form of sexual violence; conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. (ICC n.d., pp. 11–12).
10. See Glasius article, this volume.
11. Clarke 2009, p. 6.

12. *World Architecture News* (8 March 2010), accessed online on 21 July 2010 at worldarchitecturenews.com/index.php?fuseaction=wanappln.projectview&upload_id=13624.
13. Denmark, Finland, and Belgium signed cooperation agreements with the ICC in 2010. They joined Austria and the United Kingdom, who committed to provide prison facilities in 2005 and 2007, respectively.
14. The role of the prosecutorial staff is self-explanatory. The Registrar is in charge of matters in relation to defense, security, finances, communication, and the administration of the court.
15. For a current case, it was requested that everything be translated into Swahili. This issue was not yet resolved when I did my fieldwork.
16. Merry 2006, p. 111.
17. See Allen 2006; Clarke 2009; Mamdani 2009; Schabas 2010; and Schiff 2008.
18. Clarke 2009, p. 7.
19. The June 2, 2010 full text transcript can be accessed online at sc-sl.org/CASES/ProsecutorvsCharlesTaylor/Transcripts/tabid/160/Default.aspx.
20. Carolyn Nordstrom 2007.
21. Rome Statute of the International Criminal Court, 1998.

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