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THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

TWAILR: Reflections #34/2021

(Not) a curtain call: UK/Iraq after the lights go out at the ICC

Alice Panepinto

If courtrooms are stages,¹ lawyers are actors and judges are storytellers. In trials, characters in literal and metaphorical legal garb narrate, interpret, twist and immortalise events. There is a rich, interdisciplinary literature on the ambivalence of justice as performance, the court as a stage, and trials as shows.² As Julie Stone Peters notes, ‘we live in a world in which law is constantly on view in our living rooms, acted and re-enacted, multiplied and refracted through its fictional and real instantiations’.³ In other words, law is performed *inside* the courtroom, and performances of the law occur also *outside* the courtroom. Some, like Hannah Arendt in *Eichmann in Jerusalem*, are uneasy about the theatrical dimension of courts;⁴ but for others, the ‘dramatizing’ dimension of trials on a legal stage is key,⁵ calling for greater recognition of the ‘productive theatricality and performative force’ of international legal events.⁶ Outside the courtroom, non-lawyers can participate in artistic endeavours (including theatrical initiatives) that seek to normatively correct well-known injustices. Augusto Boal’s [theatre of the oppressed](#) and legislative theatre offer well-known experiments of how

¹ Many have discussed the courtroom as a stage, including Awol Allo - see LSE, ‘Gearty Grilling: [Awol Allo on The Courtroom as Political Theatre](#)’ (11 December 2015); and Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (Routledge, 1997) 2-3, discussing the poetics of legal storytelling as a narrative device employed by judges in the ‘theatrical’ genres of the courtroom, described as a ‘theatre of ideas’.

² Julie Stone Peters, ‘Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction’ in Simon Stern (et al) (eds.), *The Oxford Handbook of Law and Humanities* (OUP, 2019).

³ Julie Stone Peters, ‘Legal Performance Good and Bad’ (2008) 4 *Law, Culture & Human* 179, at 200.

⁴ Analysed inter alia in Peter Sinclair, ‘Drama and Narrative in Hannah Arendt’s *Eichmann in Jerusalem*’ (2013) 43:1 *Journal of Narrative Theory* 41.

⁵ Shoshana Feldman, ‘Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust’ (2000) 1:2 *Theoretical Inquiries in Law* 465, at 495.

⁶ Rachel Hughes, ‘Ordinary theatre and extraordinary law at the Khmer Rouge Tribunal’ (2015) 33:4 *Environment and Planning D: Society and Space* 714.

performance can be used to not only make political interventions, but enact legislative change when the odds are against a certain group.⁷ Thinking about the International Criminal Court (ICC), described by Oumar Ba as 'a lieu of staged performance where actors deploy their political narratives', both the 'performative dimension of trials, and trials as performative sites' emerge.⁸ As such, enactments of law on the stage of justice are only part of the story: the life-cycle of how law is applied to the facts transcends the courtroom and can continue to fascinate non-legal audiences over time.

Shows of justice that stop before justice is seen as being done exemplify how the theatrics of trials are performed in courts and potentially live on out-of-court. In The Hague, when the Office of the Prosecutor at the ICC (OTP) ended the preliminary examination of the situation in Iraq/UK, legal professionals left the stage and the official show of justice came to a halt – but that will not be the end of the story. Instead, when the curtain falls, off-stage actors and other audiences can become protagonists of renewed (and possibly more just) interpretations of the law applied to the facts. In the documentation trail left by courts there is a wealth of information that can be repurposed for other stages, where stories are re-enacted more truthfully through other media. When historical events are dramatized they often produce an official record for the public imagination; like any form of story-telling, that account is shaped by the narrator and their agenda, which is why they must be understood in context. So even when villains are let off lightly on the stage of justice, moral lessons might still emerge from the proceedings and be translated into more accurate storytelling outside the theatrics of law.

This piece reflects on the decision by ICC Prosecutor Fatou Bensouda of 9 December 2020 to conclude her preliminary examination of the situation in Iraq/UK, without opening an investigation. It attempts to process strong feelings of disappointment after this poor show of international criminal justice in The Hague by focusing on the 'take-home' messages. Firstly, the report stated, clearly, that there is a reasonable basis to believe that members of the British armed forces committed war crimes, including murder, torture and rape (para. 69). Secondly, it probed the extent to which there is a formal accountability gap in the UK for serious violations committed by members of the armed forces, shining a light on the problems of the draft Overseas Operations (Service Personnel and Veterans) Bill, which included a statutory presumption against

⁷ Augusto Boal, *Legislative Theatre: Using Performance to Make Politics* (Routledge, 1998).

⁸ Oumar Ba, 'The Court Is the Political Arena: Performance and Political Narratives at the International Criminal Court' (2015) 1:2 *African Journal of International Criminal Justice* 174.

prosecution (cited at para. 322, 465 and elsewhere). More significantly, however, the Prosecutor, as the authoritative narrative voice on the stage in The Hague, focuses her narrative on policies and practices of the British state, not on specific conduct of individuals. She directly challenged the narrative espoused by the British state in relation to the allegations of war crimes, and exposed the deceitful intentions behind some of the most damning ministerial statements directed against the victims and their lawyers. The performance and the report, therefore, offer a wealth information for off-stage actors to repurpose in other media to represent the story of British war crimes in Iraq more faithfully for other audiences.

Reviewing the performance in The Hague

Like theatre, when international criminal trials deliver poor performances, audiences may experience strong emotions. In the recent Iraq/UK decision to end preliminary examination activities, the ICC Prosecutor herself noted: 'While this decision might be met with dismay and disappointment by some stakeholders or perceived as an endorsement of the UK's approach by others, the technical reasons set out in the accompanying report should temper both impressions'. Yet, the technical aspects of international criminal law fail to engage what Kamari Maxine Clarke describes as 'feelings about inequality and injustice that shape how international law is perceived and how justice is experienced affectively'.⁹ Repeated poor performances contribute to the lukewarm reviews of the entire stage of international criminal law by Third World peoples and their allies.

For victims unlikely to obtain redress through national or international law, fiasco performances of international courts such as the ICC are a tragedy. Exclusion from the main stage of international criminal justice for whatever reason denies victim status and rights to people who have perished under, or endured, horrific violence.¹⁰ In addition to the denial of justice, the process of 'de-victimisation' strips the protagonists of their central place in the storyline. The fact that often those who are 'de-victimised' are from the Global South, places the stage of the ICC firmly on the agenda of

⁹ Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press, 2019) 226, discussed in James Thuo Gathii, 'Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)' (March 2020) 114th *American Society of International Law Annual Meeting Proceedings* 165.

¹⁰ The theme of 'differential treatment of similarly situated victims' on the 'basis of their group identity or affiliations within particular situations' emerges in Asad Kiyani's work on selectivity: Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14:4 *Journal of International Criminal Justice* 939, 940; and the issue of 'victims of non-prosecuted crimes [who] have their dignity and security attacked by the failure to prosecute, and afforded neither the status or rights of victims' in Asad Kiyani, 'The Three Dimensions of Selectivity in International Criminal Law' (2017) 15 *Journal of International Criminal Justice* 624, 634–635.

TWAILers.¹¹ Moreover, this also reveals the pervasiveness of what Ardi Imseis (in the context of Palestine, as an example of the global South) terms 'international legal subalternity'. In essence he argues that 'the promise of justice through international law has been repeatedly proffered under a cloak of political legitimacy', but in practice 'its realization [is] interminably withheld'. In Iraq/UK this proposition manifests itself clearly.

The off-stage prologue of the Iraq proceedings is well-known: the illegality of the war on Iraq, and the well-documented abuses carried out by British forces (and their allies) during the occupation¹². The Prosecutor's decision to conclude the preliminary examination was procedural and based on a particular assessment of complementarity between the domestic (British) investigations and the Court's residual jurisdiction. The end of the preliminary examination gives the impression that British investigations as well as the ICC provides a stage for farcical justice, in contempt of victims and their families' suffering, offering further evidence of the Court's hesitance in holding Western leaders to account.¹³ From a TWAIL angle, evaluating the premature end of this much anticipated show of justice reveals two fundamental problems. First, drawing on Imseis' notion of international legal subalternity, it confirms that the ICC is situated firmly within the standard infrastructure of international law (including international criminal justice) in promising and in the same breath withholding justice to people in the global South. Secondly, it strips the Iraqi victims and their families from the agency to tell the story as they were subjected to it; this enables the British state to control the narrative domestically and internationally of what happened during its occupation of Iraq, staging its abridged version of recent legal histories of the colonised.

The legal moral lesson: specific war crimes are linked to British armed forces

The show of justice in The Hague has ended, but its revelations will haunt audiences for a long time. While nobody has been indicted for abuses against Iraqi civilians, the

¹¹ See inter alia: Wilfried Zoungrana, 'Au-delà de la critique... Approches tiers-mondistes et scènes internationales d'exercice du droit pénal' (2016) XIII *Champ pénal / Penal field* [En ligne]; Obiora Chinedu Okafor, 'Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy' (2016) 33:3 *Windsor Yearbook Access to Justice* 1; Asad Kiyani, John Reynolds & Sujith Xavier, 'Foreword: Third world approaches to international criminal law' (2016) 14:4 *Journal of International Criminal Justice* 915; Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' 14:4 *Journal of International Criminal Justice* 915; Vasuki Nesiiah, 'Local Ownership of Global Governance' 14:4 *Journal of International Criminal Justice* 985.

¹² See for instance A.T. Williams, *A Very British Killing: The Death of Baba Mousa* (Vintage, 2013).

¹³ See discussion pertaining to the ICC proceedings in Afghanistan by Asad G. Kiyani, 'Afghanistan & the Surrender of International Criminal Justice' (2019) *TWAILR: Reflections* #10/2019. And more broadly, John Reynolds & Sujith Xavier, 'The Dark Corners of the World': TWAIL and International Criminal Justice' (2016) 14 *Journal of International Criminal Justice* 959.

184-page long report systematises details of the involvement of British forces. The legal and moral lesson emerging from this show of justice is the 'reasonable basis to believe that members of the British armed forces committed the war crimes of wilful killing, torture, inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence' (para. 71). This declaration is monumental, and should not be overshadowed by the OTP's closure of the file for procedural reasons based on the application of a (debatable) particularly high threshold for finding 'unwillingness' to carry out genuine investigations in the UK. Substantively, however, British forces and institutions have not been cleared from the charges of war crimes. Instead, procedurally, the OTP placed the investigative onus back on the British legal system and made it clear that it will continue to monitor the situation closely (paras. 479 and 505). The procedural nature of the end of the investigations therefore does not absolve British forces.

There is further evidence in the report corroborating the distinction between procedural matters in the domestic UK investigations and the material, substantive matter of war crimes that occurred in Iraq. On the fact that nobody has been held accountable for war crimes in the UK, the OTP stated clearly that this 'does not mean that these claims were all vexatious' (para. 7). Moreover, the OTP chose to engage directly with the controversies surrounding the conduct of the law firms who brought the bulk of the claims (para. 313), rebutting the suggestion that any professional misconduct would invalidate allegations of war crimes (para. 337 and ff). The deaths, torture and mistreatment of many Iraqi detainees at the hands of the British forces is a fact that, in absolute terms, does not solely depend on the quality or findings of UK investigations, or indeed the conduct of British lawyers. Any stage of justice can only provide a second-hand representation of reality, and the abuses committed in Iraq remain the tragic, silenced, lived experience of many families, and Iraqi society at large.

The political moral lesson: the UK is on a slippery slope towards formalising impunity

The conclusion of the performance in The Hague does not put an end to this story. The closing para. of the report states clearly that the Prosecutor is not precluded from considering 'the same situation in light of new facts and evidence', including 'intentional and improper interference with the conduct of genuine domestic inquiries' and 'new legislation on the ability of the competent domestic authorities to consider new allegations arising from the conduct of UK armed forces in Iraq' (para. 505). This is the political moral lesson emerging from the show of justice in The Hague: the UK should make sure it does not formalise a system of impunity for alleged war crimes.

The report critically scrutinises the Overseas Operations (Service Personnel and Veterans) Bill which includes a statutory presumption against prosecution of current or former personnel for alleged offences committed in the course of duty outside the UK more than five years ago (cited at paras. 322, 465 and elsewhere). Thus, the OTP made it clear that 'The effect of applying a statute of limitations to block further investigations and prosecution of crimes alleged committed by British service members in Iraq would be to render such cases admissible before the ICC as a result of State inaction or alternatively State unwillingness or inability to proceed genuinely under articles 17(1)(a)-(c)' (para. 479). Attempts to shield personnel including 'civilian and military leaders at the top of the chain of command' from criminal accountability, described by Andreas Schueller as a British practice spanning from 'Britain's colonial wars to the Troubles in Northern Ireland and, most recently, Iraq', is thus not permitted. And as restated in the final paragraph of the report and subsequent exchanges with British officials, the Prosecutor is monitoring political attempts to pass legislation shielding armed forces from accountability for atrocities overseas very closely (despite protestations of the UK Secretary of State for Defence), while engaging constructively with the preoccupations of the UK Joint Committee on Human Rights.

Centre stage: shining a light on the state, not (just) individuals

The ICC is a stage for individuals, not states. Nonetheless, the state features prominently in the Rome Statute, as the Court's jurisdiction is contingent on the principle of complementarity contained in Articles 1 and 17. In ending proceedings in Iraq/UK, the OTP engaged in a lengthy discussion of domestic proceedings (pages 55-179), placing the UK itself centre stage. In the end, based on the information available, the OTP did not 'conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b))'. Commentators have questioned the legal requirement to apply such a particularly "high threshold" for finding the UK to have shielded British soldiers from justice'. This is worrying for other scenarios, as Milena Sterio cautions, because it might enable 'other powerful states to evade the ICC's reach by launching their own "genuine" investigations which result in zero prosecutions', allowing them to discharge complementarity requirements with very little effort of means, let alone of result. Nonetheless, in addressing 'genuineness as the primary focus of its complementarity assessment' (para. 293), the OTP brought to light and systematised valuable information 'much of which is not publicly accessible' (para. 302 and ff). As an authoritative narrator, the Prosecutor

presented this chapter of British justice in one coherent recital, placing the UK at the centre of the stage and shining a light on the borderline un/willingness and in/ability of its legal system to hold its armed forces to account for war crimes.

There is further evidence that the OTP is telling an important story about the state, and not about individuals: the report draws on international humanitarian law (IHL) for which states, not individuals, are legally accountable. Based on the 1949 Fourth Geneva Convention, as an occupying power British forces in Iraq had specific duties to protect civilians and individuals not actively engaged in combat (paras. 72-73). Moreover, as an original signatory of the 1899 Hague Regulations (Convention II and Annex – Art 4), at the time of dealing with prisoners of war in Iraq, the UK should have known that ‘They must be humanely treated.’ The same provision also reaffirms a fundamental principle of IHL: ‘prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.’ Invoking IHL on the principal stage of international criminal justice speaks to the subconscious of all international lawyers in the audience: states are responsible for violations of IHL attributable to them, including (and especially) by their armed forces. So, the audience knows that technically the ICC is concerned with individual criminal responsibility, but the Prosecutor, as narrator, convincingly (and accurately) steers the focus onto the state for allegedly violating the laws of war.

Repeat performance: Iraq/UK and the selective tradition of international criminal law

The performance of justice in Iraq/UK is situated in the long tradition of international criminal law’s selectivity in deciding whom to place on its stage. For the most part, international criminal courts have not pursued ‘big fish’.¹⁴ At the International Military Tribunal at Nuremberg, despite holding some perpetrators to account, most perpetrators remained outside the scope of accountability (for instance, industrialists and corporate actors enabling Nazi horrors¹⁵). The selectivity of international criminal justice from Nuremberg onwards suggests that all shows are repeat performances of partial accountability with different actors and scenography. When North-South

¹⁴ See inter alia discussion in Hitomi Takemura, ‘Big Fish and Small Fish Debate—An Examination of the Prosecutorial Discretion’ (2007) 7:4 *International Criminal Law Review* 677.

¹⁵ See, in particular, discussion of individual criminal responsibility for prominent industrialists at Nuremberg and later as discussed in Grietje Baars, ‘Capitalism’s victor’s justice? The hidden story of the prosecution of industrialists post-WWII’ in K.J. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013); Doreen Lustig, ‘The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Franz Neumann’s Behemoth at the Industrialist Trials’ (2011) 43 *NYU Journal of International Law & Politics* 965; Franziska Oehm, ‘From Nuremberg to Malabo: A Re-evaluation of the Tradition of Impunity of Economic Actors in International Criminal Law’ in Joanna Nicholson (ed.), *Strengthening the Validity of International Criminal Tribunals* (Brill, 2018).

dynamics come into play, the asymmetry of the stage of justice becomes a theatre of the grotesque: contradictions between the performance and substance of justice are the essence of the story.

The multiple forms of selectivity identified in Asad Kiyani's work uncover the twin dimensions of inter-state (i.e. the 'classic' North-South TWAIL critique) and intra-state (i.e. the further TWAIL critique of internal oppressions within the 'decolonised' state) barriers to international criminal accountability for certain categories of perpetrators.¹⁶ His conceptualisation of group-based selectivity of perpetrators to prosecute within the de/colonised state can inform, *mutatis mutandis*, the context of the de/coloniser state (e.g. the UK). It is not a coincidence that the Secretary of State for Defence and a Conservative member of parliament who lobbied the Prosecutor to essentially 'back off' the UK have been members of the armed forces – a strong, enduring and politically-powerful 'group-based' identity in British society. In two separate letters to the OTP they sought assurances that UK armed forces (including a named individual) should be spared scrutiny – reciting a script for domestic audiences and a particular electorate. Nonetheless, as the narrating voice in this not-quite-ended performance, the Prosecutor's response has been clear: 'any gap between the scope of coverage in the excludable offences under the proposed [Overseas Operations Bill] and conduct which might otherwise constitute a crime within the jurisdiction of the Court would risk the persistence of the prospect (...) of rendering relevant cases concerning such conduct admissible before the ICC'.

There is light outside the courtroom-stage

Despite the end of the preliminary examination into Iraq/UK, this lengthy report provides plenty of information to digest on British forces' conduct in Iraq. This material can, and indeed should, be put to good use outside the courtroom-stage to ensure social and political consciousness of war crimes committed by British forces in Iraq is not forgotten. Where can we go from here? Shoshana Felman's reflections on 'slippage between law and art' explores how art might fill the gaps left by the theatre of justice.¹⁷ On the one hand, as the 'discipline of limits and consciousness', law 'totalize(s) the evidence' in order to 'start to apprehend its contours and magnitude' but also distances us from the past event; on the other, 'art brings it closer' and its 'language of infinity' helps 'mourn the losses and to face up to what in traumatic memory is not closed and cannot be closed'.¹⁸ Art must also be scrutinised, however,

¹⁶ Kiyani, 'Group-Based Differentiation and Local Repression' 939.

¹⁷ Felman, 'Theaters of Justice' 467.

¹⁸ Ibid.

to ensure it does not reinforce injustice or cement bias. The failed attribution of individual and state responsibility for war crimes in Iraq is not the end of the story: art and dramatisation can 'start to apprehend and to retrieve what the totalization [of law] left out'.¹⁹

When the curtain falls on the stage of law, the official programme might be overshadowed by more cutting-edge 'fringe' performances, an example of which is the reading of the Chilcot Report at the Edinburgh Festival in 2016. The UK/Iraq report is also high value: despite the Court claiming (correctly) that it is not a human rights court, the OTP went to great lengths to identify, analyse and publish important information not previously systematised. That material can – and must – be read closely and translated for non-legal audiences through other forms of cultural expression that contribute to the collective memories of the war on Iraq. Nobody might be held legally responsible for the UK's treatment of Iraqi civilians during its occupation of their country, but the OTP's painstaking research can be given renewed life through other (non-legal) productions.

The gaps left by courts have been filled by non-lawyers before. An example is provided in the Italian Court of Cassation's 21,000 word judgment describing seven-time Prime Minister Christian Democrat Giulio Andreotti's dealings with organised crime and prominent mafia bosses. The statute of limitations (prescription) meant that charges were dropped, and the lifetime senator retained his seat in Parliament until his death. Nevertheless, the detailed exposition of the Court of Cassation inspired others to tell the story to much wider audiences. Among them is acclaimed filmmaker Paolo Sorrentino, whose 2008 *Il Divo* presented a dramatised – and much more accessible – version of the story of corruption at the highest levels. I would not be surprised if the subject-matter of the Prosecutor's decision to conclude the preliminary examination of the situation in Iraq/UK without opening an investigation found its way to other storytellers, like the recent Official Secrets film starring Keira Knightley on the UK's role in the murky run-up to the war in Iraq, which also resulted in a high-profile court case that ended abruptly. Important questions may be raised on the stage of a courtroom; but judges as storytellers cannot always provide the happy endings we need. That is when the rest of society might take up the metaphorical baton, fill the gaps with art, journalism and other forms of human expression, and make sure the villains and the system that enables them are written into the storyline as they should be.

¹⁹ Ibid.

Epilogue

Since writing these reflections, the Overseas Operations (Service Personnel and Veterans) Act became law on 29th April 2021 – but not in its initial proposed form. The provision shielding soldiers from charges of torture, genocide, crimes against humanity, war crimes and grave breaches of the Geneva Conventions was successfully challenged in the House of Lords, (although this does not necessarily mean that “soldiers and ex-soldiers will be prosecuted” domestically). The debate in the House of Lords on 27th - 28th April 2021 (and previously) offers a glimpse into the absurd: proponents of the bill’s original formulation and even some of its critics seemed more preoccupied with minimising scrutiny over the actions of British forces – not preventing violations of international law in the first place. Formally, these amendments ensure the UK satisfies the complementarity requirements of the Rome Statute, and is in principle willing and able to investigate domestically – thus shielding members of its forces from scrutiny in The Hague.

Commentators have attributed this significant change to relentless human rights advocacy shaming Britain’s laissez-faire attitude towards violations of the laws of war. Even the UN High Commissioner for Human Rights urged the UK Parliament to amend the proposed law limiting accountability for torture and crimes within the jurisdiction of the ICC. This chorus of institutional and civil society actors adds to the ICC Prosecutor’s admonishments in the aftermath of the closure of the Iraq proceedings (discussed in the main text of these reflections). So, despite the Iraq/UK proceedings in The Hague ending, the legal issue at the heart of the case-that-never-was will continue to fascinate audiences off the stage of international criminal justice.

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