Review by Natalie Bryce, UCLA, and Leslie Johns, UCLA

"Secrecy, Information, and Power in International Criminal Tribunals"

As early as May 1994, the US State Department had concerns about atrocities committed by Rwandan Patriotic Front Commander Paul Kagame and his troops during the Rwandan genocide (chapter 6, footnotes 167-169). US intelligence had incriminating satellite images, radio signals, and information about the whereabouts of suspected criminals serving in Kagame's forces. Yet the US government chose not to share this information with the International Criminal Tribunal for Rwanda (ICTR), which was created by the UN Security Council to prosecute serious international crimes, including those against humanity, genocide, and war crimes, that took place in Rwanda in 1994.[1]

In their book, Allison Carnegie and Austin Carson describe how states face disclosure dilemmas when deciding whether to share this type of sensitive information with international organizations (IOs). Sharing information can create incrimination benefits for states by increasing international cooperation and helping states to achieve their political goals. However, sharing information can also create adaptation costs, such as the exposure of confidential sources and methods. Carnegie and Carson argue that states are more likely to reveal their secret information—thereby overcoming their disclosure dilemmas—when an IO has a confidentiality system that allows it to keep sensitive information private. Yet confidentiality systems are not a cure-all. While states may share secrets that implicate their enemies, they will still hide information that incriminates their allies.

Carnegie and Carson support their argument using detailed case studies of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR. As the first international criminal tribunal created since World War II, the ICTY was a major legal innovation and experiment. The ICTY initially did not include strict confidentiality procedures because of concerns about due process. Carnegie and Carson argue that the US accordingly refused to share valuable intelligence about perpetrators because it feared that the ICTY would reveal information about intelligence sources and methods. States subsequently reformed the ICTY's confidentiality policies, prompting the US to provide a trove of fresh intelligence that helped the ICTY to increase convictions of high-level suspects (chapter 6, pages 227-228). These reforms were then implemented at the ICTR (chapter 6, page 241). These case studies illustrate Carnegie and Carson's argument that if proper confidentiality policies are in place, international criminal tribunals will receive more tips from states and thus will be more likely to conduct successful prosecutions.

The authors also analyze how the US selectively provided and withheld evidence to both tribunals based on whether crimes were committed by perceived international allies or enemies. When political conditions changed, for example, when former president of Serbia Slobodan Miloŝević was no longer perceived as a

[1] Specifically, the ICTR was granted jurisdiction to prosecute crimes against humanity, genocide, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II committed in the territory of Rwanda or by Rwandan citizens in neighboring states.

trustworthy ally in international peace negotiations, so too did US strategy for cooperating with the ICTY. At the ICTR, the US only provided evidence against defendants from the former Habyarimana regime. In contrast, the alleged crimes of US ally Paul Kagame and his troops were systematically overlooked. Carnegie and Carson thus illustrate that even when disclosure dilemmas are overcome, states will only share information if doing so aligns with their political interests.

While Carnegie and Carson focus on the Yugoslavia and Rwanda tribunals, their arguments can be applied to all international criminal tribunals (ICTs). The full set of ICTs includes the International Criminal Court (ICC), which is a permanent institution with 123 member-states. ICTs also include numerous mixed criminal tribunals, which prosecute individuals using a blend of domestic and international law, personnel, and/or procedures, such as the Special Court for Sierra Leone.[2] Given the broad scope of Carnegie and Carson's argument, we wish to highlight one major implication and two key assumptions of their work. These points are important for the application and generalizability of Carnegie and Carson's claims about secrecy, information, and power in international criminal tribunals.

First, an important implication of Carnegie and Carson's argument is that information about serious international crimes is inherently a form of political power that can be used to challenge international rivals and protect international allies, as shown by the examples of Miloŝević and Kagame. Yet Carnegie and Carson's argument can be pushed further; information about serious international crimes can also allow leaders to use ICTs as tools for confronting domestic political rivals.[3] Dictators have particularly strong incentives to adopt these tactics when they face strong political competition.[4] Additionally, dictators control the military and police agencies that collect information needed by international prosecutors who are without administrative and judicial restrictions that might limit disclosure. In contrast, domestic political opponents who challenge sitting dictators will not have the same access to information about crimes committed by governments.

This pattern is apparent in the ICC trial of Dominic Ongwen, a mid-level commander in the Lord's Resistance Army (LRA), a rebel group in Uganda. In Ongwen's trial, the ICC Prosecutor relied extensively on recordings and logbooks of LRA radio communications. These communications were intercepted, screened, recorded, and translated by the Ugandan military and intelligence agency, as well as by local police forces.[5] The Ugandan government then provided edited recordings and selected logbook entries to ICC investigators, who used these materials as evidence against Ongwen. In contrast, the LRA lacked the capacity to collect evidence about the activities and communications of the Ugandan military. Just as the

[2] For an overview of international court typologies, see Leslie Johns, *Politics and International Law: Making, Breaking, and Upholding Global Rules* (Cambridge: Cambridge University Press, 2022) 402-403.

[3] Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge: Cambridge University Press, 2020).

[4] Leslie Johns and Francesca Parente, "The Politics of Punishment: Why Dictators Join the International Criminal Court," *International Studies Quarterly* (forthcoming).

[5] The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 at section IV.3 (ICC 2021).

US used its superior intelligence capabilities to punish its international opponents and reward its allies at the ICTY and ICTR, Yoweri Museveni, the incumbent President of Uganda, used his absolute control over the Ugandan military and intelligence services to punish his domestic political opponents at the ICC.

Second, an important assumption is that international prosecutors cannot collect information themselves. They rely on states to provide evidence that is necessary for a successful prosecution. However, international organizations often collect sensitive information independently of states.[6] For example, the UN Human Rights Council has increasingly created fact-finding inquiries to investigate alleged violations of international law.[7] The evidence collected by these inquiries may then be used in later international criminal prosecutions. For instance, the ICC has used inquiry reports for criminal prosecutions involving individuals from Côte d'Ivoire, Guinea, Kenya, Libya, and Sudan.[8] Non-governmental organizations (NGOs) also collect and provide information to international criminal tribunals. Human Rights Watch led a major campaign to collect evidence and push for the prosecution of former Chadian dictator Hissène Habré. The group spent 15 years and millions of dollars gathering documentary evidence and witness testimony, lobbying governments, and helping to craft the legal strategy that ultimately culminated in Habré's trial at the Extraordinary African Chambers, a mixed criminal tribunal that was created by the African Union and Senegal specifically to prosecute Habré.[9] Similarly, NGOs can file complaints and request consultations with the ICC's Office of the Prosecutor. These documents and meetings often form the basis for the ICC's preliminary examinations, like the ICC's recent operations in Nigeria, Palestine, the Philippines, and Ukraine.[10] Observers have even credited the eventual opening of a formal investigation in Palestine to the concerted efforts of a coalition of NGOs.[11]

Third, another important assumption is that states always truthfully reveal their private information. That is, Carnegie and Carson do not consider the possibility that states might knowingly provide false evidence to a criminal prosecutor, thereby resulting in a false prosecution or conviction. For example, several states have recently been credibly accused of abusing the Interpol Red Notice system. When states experience

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[6] United Nations Human Rights Office of the High Commissioner, "Who's Responsible?" 2018, https://www.ohchr.org/sites/default/files/Documents/Publications/AttributingIndividualResponsibility.pdf.

[7] See Leslie Johns, "A Servant of Two Masters: Communication and the Selection of International Bureaucrats," *International Organization* 61:2 (2007): 245-275. See also Julia C. Morse, *The Banker's Blacklist: Unofficial Market Enforcement and the Global Fight against Illicit Financing* (Ithaca: Cornell University Press, 2022).

[8] These inquiries are called by a variety of names, including Fact-Finding Missions and Commission of Inquiry. See Catherine Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (Leiden: Brill Nijhoff, 2020).

[9] Reed Brody, *To Catch a Dictator: The Pursuit and Trial of Hissène Habré* (New York: Columbia University Press, 2022).

[10] The Office of the Prosecutor, "Report on Preliminary Examination Activities (2018)," ICC, 5 December 2018, https://www.icc-cpi.int/sites/default/files/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

[11] NGO Monitor, "The Role of NGOs in Supporting the International Criminal Court (ICC) Investigation," NGO Monitor (blog), 2 February 2023, https://www.ngo-monitor.org/reports/ngos-supporting-icc-investigation/.

regime change or civil war, opponents of the regime may flee in order to avoid being subject to dubious justice systems in their home state. Similarly, members of the regime who find themselves on the wrong side of a dictator or who have a change of heart often try to escape to democracies where they can seek asylum.[12] In these situations, home states may try to locate and arrest these individuals by filing an Interpol Red Notice, which functions as a request for law enforcement authorities worldwide to locate and arrest a wanted individual pending extradition. Prosecutors in the states that host these wanted refugees often have no way to verify whether these requests are genuine or whether they are an attempt to target political opponents. Many notable examples have come to light in recent years in which dictatorships have been discovered filing false information with law enforcement authorities to try to extradite political opponents.[13] States that have been credibly accused of abusing the Interpol Red Notice system include Algeria, Azerbaijan, Bolivia, China, Egypt, India, Iran, Kazakhstan, Russia, Tajikistan, Turkey, Ukraine, and Uzbekistan.[14]

In 1994, the US chose not to disclose secrets that could incriminate Kagame and his troops. Carnegie and Carson's book highlights the importance of this kind of strategic information sharing for international criminal tribunals. Yet choosing to withhold information is not the only choice available to states – they can also allow investigators selective access to information in order to target domestic political opponents or share false information to ensure that these opponents are extradited back to the state's realm of control. However, international organizations and NGOs can counterbalance these activities by conducting their own investigations and working to thoroughly verify intelligence provided by states. Indeed, our present understanding of the actions of Kagame and his supporters is in many ways due to the documentation efforts of these groups. As Carnegie and Carson rightly point out, secrets, information, and power are key determinants of who faces justice in international criminal tribunals.

[12] Natalie Bryce, Leslie Johns, and Máximo Langer, "Living with Impunity Versus Living in Fear: Universal Jurisdiction Defendants, Due Process, and the Use of Democracies by Autocracies to Prosecute Their Opponents," working paper (2023).

[13] Edward Lemon, "Weaponizing Interpol," *Journal of Democracy* 30:2 (2019): 15-29.

[14] See European Parliament, "Ensuring the Rights of EU Citizens against Politically Motivated Red Notices," Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, Report #: PE 708.135, February 2022, 77-85, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/708135/IPOL_STU(2022)708135_EN.pdf.

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