

UNIVERSITY OF NEBRASKA

Reflecting through the Art of Samuel Bak on the Current State of International Criminal Justice:

Introduction

I have been fortunate in having appreciated and enjoyed the art of Samuel Bak for over two decades. This came about from my close friendship with Bernie and Sue Pucker. At their impressive gallery on Newbury Street, in Boston, they have consistently recognized, displayed and promoted Bak's art and published outstanding books about it. I was delighted to receive an invitation from the University of Nebraska at Omaha to deliver a lecture on the occasion of this symposium on Human Rights and Art that coincides with and celebrates an exhibition of the work of Samuel Bak.

I have spoken many times about international criminal justice. However, this is the first time I have attempted to approach the topic through the works of an artist. I was encouraged when I read that Samuel Bak said of his paintings: "Far from offering ideologies, beliefs or answers, they ask questions. Any inquiry into their meanings must be understood in this spirit." And it is in that spirit that I will make reference to some of his works during the course of this address. I propose to discuss what appear to me to be the crucial issues that are presently facing international criminal justice and to relate some of them to works of Samuel Bak.

At the outset I would like to thank the University of Nebraska at Omaha for organizing an important seminar of Arts and Human Rights. It is not surprising that there has always been a close relationship between Art and Human Rights. This is the inevitable consequence of the graphic representation of human rights violations throughout the ages and, in particular, the suffering of

the victims. Artists have too frequently been attacked by autocratic leaders who invariably perceive art as a threat to their own narrow vision. The response to such attacks are well represented in the work of Samuel Bak. In his foreword to Bak's Memoir entitled *Painted in Words*, Amos Oz, the Israeli writer, novelist, journalist, and intellectual wrote of Bak that "There are few artists who have so successfully represented the mad cruelty of our era - its horrors, its desolation, its sadness and vacuity."

The universality of art demonstrates the universality of human rights as well as their violation throughout the ages. In 1948, the Universal Declaration of Human Rights was adopted unanimously by the General Assembly of the United Nations. It was supported by nations on all continents. It was not, as some Asian autocrats have claimed, a Western concept. The Declaration was adopted by nations from all continents. Human beings, throughout the world, react to the violation of their fundamental rights in the same way - with the same pain and suffering and with the same cries for justice.

That universality is captured in Bak's painting *Eye for an Eye*. Opposing sides, that could come from any continent, are hiding behind fragmented stone faces. The painting references the use of corporal punishment but any serious human rights abuse could be substituted. What is important is that the people are the same on both sides.

War Crimes

The 20th Century witnessed massive war crimes on a scale that could not have been imagined by earlier generations. The murder of hundreds of thousands of Armenians in the genocide in 1915, the murder of many millions in the Holocaust of the 1940s, more millions in the Cambodian Genocide in the 1970s, the genocide and ethnic cleansing of tens of thousands in the former

Yugoslavia in the early 1990s, almost one million murders in the genocide in Rwanda in 1994, and the massive number of civilian deaths in so many civil wars in Africa and Asia. And still today, the horrendous number of deaths in Syria.

The laws of armed conflict are designed and have been developed to protect innocent civilians and non-combatants during times of war. In modern times they are reflected in customary international law and in international conventions - the 1948 Genocide Convention, the 1949 Geneva Conventions and their 1977 Additional Protocols, and, in the not too-distant future, the Crimes Against Humanity Convention that is presently under consideration by the United Nations. Fundamental to these laws are two principles. The first is called "distinction". It obliges those in command of military operations to distinguish between civilian and military targets. The second principle is "proportionality". It requires that civilian casualties must not be disproportionate to a justifiable military objective.

In June of this year, the principle of proportionality was invoked by President Trump to halt an imminent attack on targets in Iran. He stated that the destruction by Iran of an unmanned drone did not justify a military response that would cause the estimated deaths of 150 civilians. Whether or not that was indeed the reason for abandoning the military response against Iran, the explanation was an unusually direct recognition of the principle of proportionality in the laws of armed conflict. This would not likely have happened absent the modern international criminal courts. One reads and hears almost daily references to civilian casualties of war in just too many countries around the world.

International Criminal Tribunals

At the end of World War 2, it was demonstrated at Nuremberg that a multi-national criminal tribunal could dispense justice with substantial fairness. It is significant in this regard that some of the defendants were acquitted. It took almost half a century after Nuremberg for the United Nations Security Council to establish the first ever truly international tribunals - the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. They were sufficiently successful to garner critical support for the establishment of the International Criminal Court (the ICC) in the 1998 Rome Statute. The ICC began its operations when the Statute came into operation on July 1, 2002.

International criminal courts have substantially advanced the laws of armed conflict. Perhaps the most important advance was the recognition of gender-related crimes. In 1994, when the ICTY began to operate, the horrendous war crime of systematic mass rape had not been recognized in the laws of armed conflict. The laws of war had been conceived by men who traditionally regarded gender crimes, like plunder, as inevitable consequences of war. It was with the encouragement of women judges in the ICTY and ICTR, and pressure from civil society, that gender-related crimes began to receive the recognition to which they are entitled. These advances are now reflected in the wide definitions of gender-related crimes that are contained in the Rome Statute where they are defined to include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

In June 2019, a trial court of the ICC found a war lord from the Democratic Republic of the Congo, Bosco Ntaganda, to be a direct perpetrator of murder and persecution, while also being responsible for atrocities committed by

forces under his command, including ordering attacks against civilian populations, forcibly displacing civilians, and using child soldiers. The trial is also an important victory for victims of sexual violence, including men, and marks the first time the ICC has held a commander responsible for sexual crimes perpetrated by his troops against members of their own forces.

The protection of civilians has also advanced. During World War II, both the Axis and Allied powers intentionally bombed huge cities - London, Coventry, Berlin, Dresden, Cologne, and remarkably Hiroshima and Nagasaki. Today, the intentional carpet bombing of densely populated cities would not likely be tolerated.

That the laws relating to war have progressed cannot be doubted. The question is whether they have brought meaningful protection to potential victims. That is the question raised by Bak in *Evidence*. We see towering stacks of evidence of injustice against the Jewish people. The tablets of testimony are prominently placed in the middle of these stacks. A home in the background features two chimneys that resemble the chimneys of crematoriums. Are these stacks of evidence of persecution sufficient for meaningful progress and enlightenment? That is the question and I must concede that finding convincing evidence of real progress is difficult. The recent conduct of war directed at civilian populations in Syria and Yemen are hardly encouraging.

A question I have frequently been asked is why the laws of armed conflict do not outlaw war itself. The answer is that war is in fact outlawed by international law unless in self-defense or with the authorization of the Security Council. The laws of armed conflict are designed to protect innocent civilians while the war is waged.

Powerful states have sometimes resorted to military force in violation of international law. One such case was the 1999 bombing by NATO of Serb targets in order to protect the lives of Albanian citizens who lived in Kosovo. Less moral illustrations of the unlawful use of military force can be found in the 2003 invasion by the US led coalition in Iraq and the 2014 Russian invasion of Ukraine and its annexation of the Crimean Peninsula.

The laws of armed conflict were originally devised to apply to international armed conflict in which national armies faced each other on the battlefield. Indeed, the four Geneva Conventions of 1947 are devoted, save for one article, to international armed conflict. Since World War 2, armed conflicts have almost entirely been restricted to civil wars which are non-international in nature. According to Wikipedia, since World War 2, there been some 250 major wars in which over 50 million people have been killed and countless millions injured and made homeless. The judges in the ICTY pushed the envelope when they decided that under customary international law the war crimes defined in the Geneva Conventions also apply to civil wars.

Adding to the complexity of modern war crimes investigations is the development of modern technology. For the most part, having regard to the enormity of war crimes committed, it is the commanders and political leaders who are primarily investigated. For a military commander to be held responsible for war crimes committed by his or her troops, the prosecution has to establish, beyond a reasonable doubt, that the crimes were ordered by such commander or that their likely commission was known to the commander who failed to take reasonable steps to prevent them from being committed. The jurisprudence of the ICTY and ICC is to the affect that where the commander is at a distance from the battlefield it is difficult to pin that responsibility on the

commander. Such distance has resulted in the acquittal of some commanders. However, with modern communications technology, distance from the scene of war crimes has become less and less relevant.

I trust that I have said sufficient to demonstrate why the laws relating to war crimes appears to be both complex and bewildering. This complexity is illustrated in Samuel Bak's painting *Dress Rehearsal*. It is a scene of chaos and confusion. At the top we see an angel appearing to intervene at what looks like the beginning of a gruesome execution. To the left of the executioner another angel seems to be applauding. It is not clear whether the applause is directed at the executioner or the effort to stop him. Even the executioner and the victims appear to be confused. The confusion and mixed emotions reflect the nuances and confusion that attach to the laws of armed conflict in the present day.

Complementarity

The legal architecture of international criminal courts determines the way in which they function. The United Nations tribunals for the former Yugoslavia and Rwanda were granted "primacy". This meant that, under the powers conferred on them by the Security Council under Chapter VII of the UN Charter, they could decide which cases came before them and which might come before relevant domestic courts. An illustration is the dispute I had, as chief prosecutor of the Rwanda Tribunal, with the Government of Rwanda. The man most responsible for the 1994 genocide was Theoneste Bagasora. He was the Director in the Ministry of Defense and established the *Interahamwe*, the paramilitary units that perpetrated the genocidal killings in every commune in the country. He was responsible for the distribution of arms and machetes throughout Rwanda.

Bagasora fled to Cameroon where he was arrested. His extradition was sought by Belgium and Rwanda. I insisted that he be surrendered to the ICTR. After all, our mission was to prosecute those most responsible for the genocide. At a difficult and tense meeting with the Rwanda Cabinet, during 1996, I was not prepared to agree to Bagasora's extradition to Rwanda. Apart from the politics, there were no courts operating in Rwanda and he was likely to be assassinated if he was sent home. With much reluctance, the Rwanda Government agreed to defer to the ICTR and Bagasora was delivered by the Cameroonian authorities to the Tribunal. He was found guilty of genocide and war crimes and, on appeal, his sentence was reduced from life in prison to a term of 35 years.

I would refer to Samuel Bak's painting that he calls *Portrait with Eyes*. In this work Bak has introduced three stone carved eyes and the peeking eye of a contemporary Lady Justice. With all of these eyes of Justice looking over the process, justice can succeed. It did in Bagasora's case where the deferral by the Government of Rwanda, in a case of great significance to them, is much to their credit. If they had dug their heels in, it could have been the end of the ICTR. The powerful governments who deride international criminal justice and the ICC could well learn from the approach taken by Rwanda.

A key principle of the Rome Statute for the ICC is known as complementarity. The ICC's jurisdiction is complementary to that of domestic courts. Unlike the ICTY and ICTR, the ICC is a court of last resort. Domestic courts have primacy. The ICC has no jurisdiction in any case if the national authorities of the suspect's domicile wish to investigate and prosecute the crimes alleged. If that principle had applied to the ICTR, the Rwanda Government would not have been obliged to defer in the case of Bagasora.

When the Rome Statute was negotiated it was hoped that this principle of complementarity would be sufficient to entice the United States to come on board. The crucial role that the US had played in the successes of the ICTY and ICTR were well known. Indeed I can personally testify to the fact that the two UN tribunals would not have been established and, once established, would not have succeeded without the active support and assistance of the United States.

On the urging of the Pentagon, the Clinton Administration was not prepared to leave it to international judges to decide whether United States investigations and prosecutions were bona fide. However, President Clinton signed the Rome Statute but did not refer it to the Senate for approval. In one of his first acts, President George W. Bush instructed John Bolton, then a senior member his administration, to inform the United Nations Secretariat that the US was withdrawing its signature from the Rome Statute. More recently, the current Secretary of State, Mike Pompeo, stated that the US would revoke or deny visas to members of the ICC involved in investigating the actions of US troops in Afghanistan or other countries. He went on to threaten the Court with economic sanctions. Bolton, as President Trump's National Security Adviser, threatened to prosecute ICC officials if the Court opened an investigation into alleged war crimes committed by by US military staff in Afghanistan or pursued an investigation into Israel or other US allies.

The ICC has been experiencing its own problems. Cases presented by the Office of the Prosecutor have been dismissed by the judges, some at the stage of refusing to allow the charges to go forward and some at the close of the prosecution case. The ICC judges have also not distinguished themselves with their efficiency. Some judgments have taken more than eighteen

months after final arguments for delivery. One of those decisions was the refusal by three pre-trial judges to allow the case to go forward relating to alleged war crimes in Afghanistan that had led to the outbursts from Pompeo and Bolton. That decision was handed down about three weeks after the threats by Pompeo and Bolton. Some commentators interpreted this decision as capitulating to those threats. In my view, they were more probably the result of the judges wishing to prevent yet another failure by the Prosecutor to bring convincing cases before them. It should be noted that this decision was taken notwithstanding that the judges held that evidence had been presented by the Office of the Prosecutor that established the jurisdiction of the Court and that war crimes falling within that jurisdiction appear to have been committed. One has deep sympathy for victims in that kind of situation. They must feel deep frustration and even anger at the seeming impotence of the ICC. I would refer in this context to Bak's *Deposition* where the testimony clearly arrived too late to save the young boy. Indeed, he is no longer human or whole and leaves behind only his clothing and his story. It is the victims who are too frequently forgotten in discussions of justice and especially at the international level.

There are presently 123 nations that are party to the Rome Statute. The largest group come from Africa and the second-largest from Western Europe. The four most populous nations remain outside the ICC, namely China, India, Russia and the United States. If any of those nations are to be persuaded to join the ICC, the Court will have to improve its efficiency.

In the meantime, those who suffer from the inefficiency of the ICC, on the one hand, and the non-cooperation from important States, on the other, are the many hundreds of thousands of victims of war crimes. Their cries for justice

were the motivating force for the establishment of international war crimes tribunals. And their cries, unfortunately, are still heard loudly today.

Those unanswered calls for justice and acknowledgment are represented in Bak's *Collective Memory*. The victims of human rights violations and war crimes have appeared to turn to stone waiting for justice. Copies of this painting could well be hung in the chambers of judges and prosecutors as a reminder that justice delayed is justice denied.

Other tribulations of the ICC have been the consequence of criticisms from the African Union and some African States. Fortunately, a campaign by the African Union to have African States withdraw en masse from the Rome Statute has fizzled out. Only one State, Burundi, withdrew.

Some of the negativity in recent years to international criminal law and international law in general, is a consequence of the rise of nationalism and populism. Democracy has been in retreat in parts of Europe, Latin America and even the the United States. At the international level this manifests itself as a push against multilateralism and the willingness of States to submit to any form of international judicial mechanisms.

Even-Handed was painted by Samuel Bak just four years ago. It clearly reflects the lack of true justice in contemporary society. Lady Justice, who should be blindfolded has her blindfold pulled away from one eye. Her scales are not even. We see behind her the remains of a Grecian column that symbolises the crumbling of democracy itself.

Samuel Bak has spent a productive artistic life representing in moving ways the tribulations of mankind and especially during the past almost eight decades since the outbreak of World War 2.

I remain an optimist. The pendulum of history has never stopped oscillating. In the worst days of World War 2 there were many who despaired for the future of civilized society. But the pendulum swung. The Nazis and their axis collaborators suffered an ignominious defeat; and In 1989 the crumbling of the Berlin Wall brought the Communist empire to an end. Of course. we should never forget and stop empathizing with victims that those evil regimes. Yet we should rejoice in the fact that, in the end, those evil empires failed. I hope that in the coming years there will be cause to celebrate through art the advances and not only the tribulations of humankind.