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INTERNATIONAL CRIMINAL JUSTICE IN THE GREY ZONE BETWEEN LAW AND POLITICS

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In republican systems where the rule of law prevails, the purpose of criminal justice is *prevention*, not *retribution* or revenge. In a domestic context, this can be achieved through a robust separation of powers and judicial procedures that provide for several stages of appeal. In relations between sovereign states at the global level, there are no checks and balances in the strict legal sense. The United Nations Charter merely mimics the terminology of such a system.

In any context, whether domestic or international, the prosecution of what today are called "international crimes " – war crimes, crimes against humanity, the crime of aggression, and genocide – is a challenge for the rule of law insofar as it requires the exclusion of arbitrariness and revenge in criminal justice, or political expediency in general.

Domestic bias

There is the problem of "domestic bias" when crimes are committed in connection with acts of state, as in the case of war. The separation of powers becomes dysfunctional when, under the pressure of public opinion, judicial functionaries lose their mental independence or feel intimidated – in situations in which the emotions of patriotism take the place of rational analysis, and the tendency to glorify the perpetrators is overwhelming. Under conditions of war, states, their office-holders and populations, tend to apply double standards according to the maxim, "One man's war criminal (terrorist) is another man's war hero (freedom fighter)."

Examples of "moral schizophrenia" in matters of war and peace are numerous, also in recent history. The Commander of USS Vincennes – responsible for shooting down Iran Air

Flight 655 on 3 July 1988, with 290 innocent victims – less than one year after the incident was awarded by the President of the United States with the Legion of Merit "for exceptionally meritorious conduct in the performance of outstanding services as commanding officer."[1] In 2019, the U.S. President pardoned two Army officers accused of war crimes in Afghanistan and restored the rank of a Navy SEAL platoon commander who was accused of shooting civilians in Iraq.[2] Also, there are numerous cases of non-prosecution of war crimes and crimes against humanity in former Yugoslavia, Afghanistan, Iraq and Syria committed by personnel of Western countries since the 1990s. The decision of the Arnhem-Leeuwarden Court of Appeal of 29 April 2015,[3] upholding the Dutch Prosecutor's decision not to investigate the Dutch military commanders in Srebrenica for murder, war crimes and genocide, is particularly illustrative of the problem of domestic bias. (That the European Court of Human Rights rejected a complaint against this decision does nothing to improve confidence in criminal justice under conditions of war.)[4] In 2024, we do not need to look further than Ukraine-Russia or Gaza-Israel.

In analogy, one can also point to the practice of the International Court of Justice (ICJ) in the arbitration of disputes between states. Although Judges of the ICJ are legally independent, in many instances a Judge will not vote against the interests of the state of which he or she is a national; and almost as a rule, a judge ad hoc will vote in favor of the nominating state. Thus, the "domestic bias" can indirectly also affect the international domain.

International challenges / compromises with power politics

For these and other reasons, an *international* institutional framework might be more in conformity with the need for prosecutors and judges to act *sine ira et studio*. An unbiased judiciary requires proper distance, and not merely in the geographical sense, between judicial official and suspect, which, as we have seen, "domestic proximity" prevents in the charged atmosphere of war. Apart from a better chance of impartiality, there is another potential advantage of international criminal justice over the domestic prosecution of war crimes. An intergovernmental arrangement ensures a certain cohesiveness and consistency of standards

[1] *The Washington Post*, 22 April 1990, at https://www.washingtonpost.com/archive/politics/1990/04/23/2-vincennes-officers-get-medals/cf383f02-05ce-435b-9086-5d61de569ed8/, accessed 15 March 2024.

[2] "Trump pardons Army officers, restores Navy SEAL's rank in war crimes cases." *Reuters*, Washington, DC, 15 November 2019, published by *Daily Mail*, London, 16 November 2019, at https://www.dailymail.co.uk/wires/reuters/article-7691839/Trump-pardons-Army-officers-restores-Navy-SEALs-rank-war-crimes-cases.html.

[3] Netherlands, Gerechtshof Arnhem-Leeuwarden, *Uitspraken*, Doc. ECLI:NL:GHARL:2015:2968, 29 April 2015.

[4] European Court of Human Rights, "Dismissal of claim that Netherlands peacekeepers should have been prosecuted for their conduct at Srebrenica," *Press Release*, ECHR 299 (2016), 22 September 2016.

and procedures whereas vastly different criteria, depending on each country's legal culture and political circumstances, may be applied in domestic jurisdictions. "Equal justice" can be better secured in a global setting. The International Covenant on Civil and Political Rights is not a sufficient guarantee for judicial uniformity.

As far as the only permanent body – the International Criminal Court (ICC) – is concerned, the ratification status of the Rome Statute may constitute an almost insurmountable hurdle to the realization of the ideal of equal justice. Of the 124 States Parties (at the time of this writing), only a few are major global players. Top military and/or nuclear powers such as the United States, Russia, China, India, Turkey, Pakistan or Israel have preferred to stay away from the Court. As long as this does not change, there is virtually no chance – at global level – of unified criminal jurisdiction through a court that operates on the basis of such sporadic ratification.[5] Article 13(b) of the Rome Statute is no remedy. As practice has demonstrated (e.g. in the cases of Sudan or Libya), the "expansion" of jurisdiction by virtue of a Chapter VII resolution of the United Nations Security Council is more a matter of power politics than of principle; also, no situations in the Council's permanent member states can and will ever be referred to the Court by that body.

Most problems and dilemmata of international criminal justice stem from the compromises with power politics that – all along since the supposed new beginning after World War II – have shaped institutional arrangements for world order. In view of the UN Charter's provisions on collective security, these compromises seem to have been structurally unavoidable. The problems are most obvious in the statutes and practice of the post-Cold War tribunals for the former Yugoslavia and Rwanda, established by the UN Security Council. They were "unconstitutional" in a strict legal sense, having been established by executive fiat instead of by intergovernmental treaty,[6] and, consequently, their decisions were politically tainted as the erstwhile Prosecutor of both tribunals, Carla Del Ponte, frankly admitted in her memoirs.[7] In these tribunals, there was no real judicial independence as judges were elected from a list submitted by the Security Council and the Prosecutor was directly appointed by the

[5] The adjective "international" in the name of the ICC is indeed misleading when compared to the adjective's meaning in the designation of the International Court of Justice (ICJ) that comprises all UN member states.

[6] For details, see Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law*. Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011, pp. 20ff.

[7] "I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. (...) And my advisors warned me that investigating NATO would be impossible." (Carla del Ponte with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir*. New York: Other Press, 2009, p. 60 [in remarks about the Yugoslavia tribunal].)

Council, i.e. by a predominantly political body that cannot act against the national interests of its permanent members.

In a partially similar way, the statute of the ICC ("Rome Statute") also violates basic principles of justice and negates the independence of the judiciary. The referral right of the Security Council institutionalizes direct interference of power politics into the Court's exercise of jurisdiction, potentially enabling non-State Parties (namely the three most [militarily] powerful members of the Security Council) to give the court jurisdiction on the territory or over the nationals of states that have not ratified the Rome Statute. Also, Article 117 openly undermines the independence of the Court by allowing "voluntary contributions" to the expenses of the Court "from Governments, international organizations, individuals, corporations and other entities." The detrimental impact of this provision on the rule of law, indeed the Court's legitimacy, has become more than obvious in the Prosecutor's selective approach to the situations e.g. in Afghanistan, Ukraine and Palestine.[8] The Prosecutor stated budgetary reasons for de-prioritizing the investigation of NATO personnel in Afghanistan in favor of investigating the Taliban. At the same time, the Court accepted special support from the UK and other countries and entities for investigations in Ukraine. (The lack of independence has also become obvious in the Prosecutor's accepting to investigate under conditions of the ongoing war on the territory of Ukraine. However, "embedded investigators" are as problematic as "embedded journalists"; their findings or reports cannot be trusted.) Reporting on her conversation with the Prosecutor in The Hague, South Africa's Foreign Minister Naledi Pandor was quite frank in addressing the problem of selective prosecution.[9]

As far as the exercise of "universal jurisdiction" by individual states is concerned, the practice, so far, has been inherently political, at times self-righteous, and in most cases

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[8] For details, see Köchler, "The Dilemma of International Criminal Justice," in: *Srpski Godišnjak za Međunarodno Pravo / Serbian Yearbook of International Law* (SYIL). Belgrade: Serbian International Law Association, 2023, pp. 52-63. – See also, Triestino Mariniello, *The ICC Prosecutor's Double Standards in the Time of an Unfolding Genocide* at opiniojuris.org, 3 January 2024.

[9] "… I asked him why he was able to issue an arrest warrant for Mr. Putin while he is unable to do so for the Prime Minister of Israel. He couldn't answer and didn't answer that question." (Gerald Imray and Sebabatso Mosamo, "South Africa says Israel is already ignoring UN court ruling ordering it to prevent deaths in Gaza." *Associated Press*, 31 January 2024.) – In the meantime, at the time of this writing, the ICC has issued additional arrest warrants for two Russian commanders while no action has yet been taken concerning the situation in Gaza/Palestine except for the appointment, by the Prosecutor, of a former UK military prosecutor, Mr. Andrew Cayley, "to oversee ICC investigation into alleged war crimes in Palestinian territories." (*The Guardian*, 11 March 2024) Concerning the situation in Palestine, see also the *State Party referral in accordance with Article 14 of the Rome Statute to the International Criminal Court* of 17 November 2023 by South Africa, Bangladesh, Bolivia, the Comoros and Djibouti, and the *Communiqué to the Office of the Prosecutor of the ICC under Article 15 of the Rome Statute* submitted by a team of Australian lawyers ("Conduct of members of the Parliament of Australia, in relation to the situation in Gaza, Palestine: Accessorial Liability for genocide," Birchgrove Legal, Sydney, Australia, 4 March 2024).

opportunistic. The fate of Belgium's war crimes law of 1993 is a case in point.[10] After Belgium had encountered serious repercussions in the conduct of its foreign policy, the parliament a decade later modified the law by removing its "universality," limiting the law's application to cases that directly relate to Belgium.[11] Thus, the question remains whether the average state can withstand foreign pressure – in particular from the most powerful actors – when aspiring to investigate and prosecute international crimes. From the outset, the ideal has been compromised by realpolitik.

For all these reasons, the prosecution of international crimes is condemned to operate between the Scylla of domestic opportunism and the Charybdis of international power politics. In both frameworks, domestic and international, a climate of arbitrariness and a practice of double standards are the inevitable result. As we have explained earlier, there are both, *structural* and *practical*, obstacles. At the international level, the statutes not only of ad hoc courts, but also of the permanent ICC, reflect compromises with the realpolitik of the major global actors. Domestically, the constitutional provisions of judicial independence are often not sufficient when the supreme interests of the state (e.g., in matters of terrorism and/or foreign policy) are at stake. The experience with the Scottish Court in the Netherlands (2000-2002) – an extraterritorial domestic court that operated on the basis of a special royal decree[12] issued in reference to a Chapter VII resolution of the UN Security Council – is a case in point.[13]

Especially in the period since the end of the Cold War, the gap between idea and reality of criminal justice has had a demoralizing effect on international society (which must not be confused, as is often the case, with the Western community). It has emboldened perpetrators.

Dilemmata due to power politics

After more than a century of advocacy for the prosecution of war crimes, particularly in the wake of the two World Wars, we are still faced with *judicial* □*πορ*□*α* as regards fundamental – statutory, institutional and procedural – requirements. The vacuum cannot be compensated by propaganda stunts such as a public arrest warrant for the head of state of a nuclear power for "unlawful deportation and transfer of children" while those responsible for atrocity crimes

[10] *Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions, 16 juin 1993.*

[11] Decision of the Belgian Senate of 30 January 2003.

[12] *The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998*, 16 September 1998. UK Statutory Instruments, 1998 No. 2251 / UNITED NATIONS.

[13] For details, see the author's observer reports on the trial and appeal in the Netherlands: Hans Köchler and Jason Subler (eds.), *The Lockerbie Trial: Documents Related to the I.P.O. Observer Mission*. Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002.

on the other side of the same conflict are still not publicly wanted – or serious international crimes, including genocide, in other conflicts are not even investigated, in spite of obvious ICC jurisdiction.

The dilemma, embodied first and foremost in the *politicization* of proceedings (whether in ad hoc arrangements or at the ICC), could only be resolved in a *comprehensive* international framework. This would require a court the statute of which all UN member states have ratified, without reservations, and whose provisions and procedural rules are in conformity with judicial independence. The *jurisdictional scope* of a permanent institution of criminal justice must in no way be co-determined by the Security Council (as is now the case with the ICC)[14] or interfered with by any other council of power or "holy alliance."

Particularly, ICC jurisdiction over aggression makes no sense if citizens of countries with the largest military potential (i.e. capability of aggression), namely the P5,[15] are effectively shielded from prosecution while those same countries nonetheless are given the statutory power to confer jurisdictional authority on the court over crimes of aggression related to States that are not Party to the Rome Statute, and also in cases where a State Party, by virtue of Article 15 *bis* Paragraph 4 of the Rome Statute,[16] has opted out of the provisions on the crime of aggression. The latter rule is a particularly poignant example of the doctrinal contortions dictated by realpolitik. Ironically, any State Party of the Rome Statute is given the opportunity, prior to ratifying the amendments on aggression, to opt out from the Court's nationality jurisdiction[17] while still preserving the "protection" of territorial jurisdiction. This means: The responsible political or military officials of a country that has ratified the amendments on aggression but has opted out according to Article 15 *bis* Paragraph 4 will not be subjected to the Court's jurisdiction if the country is the aggressor (except in the case of a Security Council referral) – while responsible officials of other States Parties will be subjected to the Court's territorial jurisdiction if that same country is a victim of aggression.

Furthermore, in spite of the court's long-anticipated jurisdiction over the crime of aggression, nationals of the two nuclear powers that are party to the Rome Statute will

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[14] Cf. Articles 13(b), 15 *ter*, and 16 of the Rome Statute.

[15] The five permanent members of the UN Security Council.

[16] "The Court may (…) exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar." So far, Kenya and Guatemala have made use of this special "opt-out clause."

[17] Cf. operative paragraph 1 of Resolution No. 6 of the Review Conference of the Rome Statute in Kampala, Uganda: "Resolution RC/Res.6, adopted at the 13th plenary meeting, on 11 June 2010, by consensus," *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010: Official Records*, RC/11, p. 17, 11-E-011110.

effectively not be accountable because (a) those two countries have not ratified the respective amendments on the crime of aggression,[18] and (b), by virtue of Article 27(3) of the UN Charter, they can escape from their situations ever being referred to the Court – according to Articles 13(b)[19] and 15 *ter* of the Rome Statute – for the commission of this crime. The three other permanent members of the Council are anyway not States Parties to the Rome Statute, and will not refer their own acts of aggression to the Court.

Also, for international criminal justice to make sense, not only investigation and the process of adjudication, but *enforcement* of judgments would need to be independent of the national interests of the most powerful players. Similar to the predicament of the International Court of Justice that depends on the goodwill of the five permanent members of the Security Council to give effect to its rulings, criminal courts – whether ad hoc or permanent – can only assert their authority within the realm of realpolitik. This has proven to be the case for the exercise of so-called universal jurisdiction at the domestic level (e.g. Belgium), as it has been obvious in the operation of the Security Council's tribunals.

Political expediency vs. judicial integrity

Within the UN system, no courts will and can be created that judge acts committed by officials or personnel of the P5; *outside* of it, the statutory independence and moral integrity of judicial functionaries is often in jeopardy due to (unavoidable?) compromises with power politics. A striking example was the insertion of Article 13(b) into the Rome Statute, supported also by the most powerful permanent member of the Security Council, irrespective of that country's never having ratified the Statute. Other examples are the forms of pressure, legal as well as

[18] Adopted by the Review Conference in Kampala on 11 June 2010, entered into force on 17 July 2018. – There are conflicting views, however, as to whether or not the amendments on the crime of aggression only enter into force for those States Parties that have ratified the amendments. Considerable ambiguity exists regarding interpretation of the respective Paragraph 5 of Article 121 of the Rome Statute in connection with the Review Conference's reference to Article 15 *bis*, Paragraph 4 (Resolution RC/Res.6 of 11 June 2010). The issue is whether States Parties that have not ratified the amendments on aggression are nonetheless bound by the provisions unless they make an opt-out declaration under Article 15 *bis*, Paragraph 5 (to which the Review Conference referred). A number of influential countries – such as e.g. New Zealand – follow the interpretation published on the web site of the ICC according to which "the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted the amendment." (International Criminal Court, "Jurisdiction," at https://icc-cpi.int/about/, accessed 15 March 2024) For New Zealand's position, see New Zealand Treaties Online, *Amendments on the crime of aggression to the Rome Statute of the International Criminal Court*, https://reaties.mfat.govt.nz/search/details/p/60/800, accessed 14 March 2024.

[19] "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (…) (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

moral, on ICC officials in relation to the exercise of their mandate.[20] Circumstances of investigation and prosecution or non-prosecution of cases in Afghanistan, Ukraine, Palestine (Gaza), have made this more than obvious. This has brought about situations where the Prosecutor is acting more like a politician.

In the present system of inter-state relations where there are no guarantees for a separation of powers that could give meaning to the idea of the "international rule of law," creating a genuine system of criminal justice would indeed be squaring the circle. If the most powerful cannot be held to account, what is the purpose of the law? Such a state of affairs – of *normative inconsistency* – will gradually *delegitimize* the project of international criminal justice; it will not prevent, but demoralize. Prosecution of war crimes that is meant to be more than an act of political expediency – or a version of victor's justice dictated by realpolitik – will remain an illusion, whether noble or tactical, in the absence of a world state.

[20] Concerning ICC investigations in Afghanistan, see United States, Executive Office of the President (06-15-2020), *Executive Order 13928 of June 11, 2020*: "Blocking Property of Certain Persons Associated With the International Criminal Court."