ISSUES IN INTERNATIONAL CRIMINAL JUSTICE

2008

VOLUME I - NUMBER I

Published by the International Criminal Court Student Network (ICCSN)

© 2008 – International Criminal Court Student Network. All rights reserved.

"Issues in International Criminal Justice" and the International Criminal Court Student Network do not endorse nor bear responsibility for the content of the articles contained within this publication. The views expressed in the articles and essays included are the opinions of the authors alone. Footnotes appear at the bottom of each page when necessary. No part of this publication may be reproduced in any form without permission from the ICCSN. Please contact the ICCSN for any additional information.

For more information and submission guidelines, please visit:
www.iccsn.com

Issues in International Criminal Justice

Kora Andrieu, Editor-in-Chief

Kora holds an MA in Political & Moral Philosophy from the Sorbonne University in Paris, where she is in her second year of a PhD program studying under Professor Alain Renaut. She is concurrently working towards an MSc in International Relations at The London School of Economics & Political Science, focusing on reconciliation processes in post-conflict societies. She has studied at New York University and has previously lectured in the Philosophy Department at the Sorbonne University in Paris.

Isabel Ann Pierce Carty, Assistant Editor

Isabel holds an MA in International Relations from the University of St. Andrews in Scotland. She is currently working towards her MSc in Human Rights at The London School of Economics & Political Science. She is originally from Brookline, MA in the United States.

Andrew Sanger, Assistant Editor

Andrew holds a BA in Law from Selwyn College, Cambridge University. He is currently working towards his LLM in Public International Law at The London School of Economics & Political Science. While at Cambridge, Andrew served as a research assistant and published in the Cambridge Student Law Review. He has worked with The Bar Human Rights Committee and Lawyers for Palestinian Human Rights.

Derek William Vallès, Assistant Editor

Derek is a graduate of The Gallatin School of Individualized Study at New York University where he concentrated on American Studies in Philosophy, Politics & Economics. He is currently working towards his MSc in Political Theory at The London School of Economics & Political Science. He is a Fellow of the American Institute for Economic Research and the People for the American Way Foundation, and has also lectured as an Instructor in Constitutional Law at NYU School of Law's HSLI program. He is originally from Hanover, MA in the United States.

Contents

Foreword 8
Luis Moreno-Ocampo

Introduction 10

Editor's Note 10
Kora Andrieu

The Meaning of Anniversaries 12
Derek William Vallès

Articles 14

The International Criminal Court at a Crossroads 14
Judy Fu

Political Safeguards in the International Criminal Court 20
Gustavo Arosemena

When Justice Meets Peace: Reassessing the Relationship Between the ICC and the Security Council 24
Matthias Vanhullebusch

Mind the Gap: UK Law on Genocide, War Crimes and Crimes Against Humanity, and Prospective Jurisdiction of the ICC 59
Tara O'Leary

Torture: The Myth of Universal Jurisdiction and its Failure to Provide Justice for Victims 72
Anagha Joshi

Universal Jurisdiction: A Voice for Palestinian Rights? 76
Andrew Sanger

The Cambodian Genocide: An Issue of Definition 91
Kora Andrieu

Commentary 97

Situation in the Democratic Republic of Congo 97

INTERVIEW: Human Rights Activists on Sexual Violence, the ICC and Resource Exploitation.................97
Caroline Wojtylak

Situation in Uganda 106

Wanted: Kony, Joseph 106
Sylvia Heer

BOOK REVIEW: *Purify and Destroy*..................................... 110
Kora Andrieu

BOOK REVIEW: *Peace and Justice*....................................... 113
Kora Andrieu

Epilogue...119

The International Criminal Court Student Network: Past, Present & Future 119
Caroline Wojtylak & Judy Fu

The hope of ‘never again’ became
the reality of again and again.
– Judge Richard Goldstone

I was not at all certain whether I had any advocates… Yet if it were not a law court, why was I searching for an advocate here? Because I was searching for an advocate everywhere; he is needed everywhere, if anything less in court than elsewhere, for a court, one assumes, passes judgment according to the law.
– Franz Kafka

Foreword

LUIS MORENO-OCAMPO[*]

I AM PLEASED to welcome the creation of this journal, based on the contributions of students from around the world who are interested in the implementation of the Rome Statute.

This journal's creation reflects a 21st century challenge: How to establish global governance without a global government?

Legal scholars are still mostly focused on how the law works at the national level, and are not yet fully engaged with the problem of how to integrate nation states within a truly global legal system. The Rome Statute is an example of a new paradigm designed to deal with this problem. It creates a global criminal justice system based on nation states committing to apply a common framework for "the most serious crimes of concern to the international community." They have accepted that it is their obligation to end impunity for crimes of genocide, crimes against humanity and war crimes in their own territory and to support a permanent and independent International Criminal Court whenever and wherever it decides to act. The Court selects situations to investigate based on legal criteria—not on political convenience. The States must ensure respect for and enforcement of the Court's decisions. It is a new legal model.

The students of today can play a role in developing the new legal and institutional analyses that are demanded by this new system. This is a generation that was born global. They see the problems inherent in the 20th century system and are eager to drive the changes necessary in the 21st century.

The ICCSN could be at the forefront of a new understanding, across a

[*] Prosecutor of the International Criminal Court (2003 – Present). Graduate of the University of Buenos Aires Law School. Former visiting professor at Stanford University and Harvard University.

range of disciplines, on how the law impacts societies all over the world. The law is not just for the Courtroom; it is for the global society in which we reside. It must be respected by heads of state, rebel leaders and diplomats alike. Students and young professionals understand these new realities.

My Office has to make daily decisions on the challenging legal issues that this new reality brings. Presenting these challenges to those connected with the ICCSN, and fostering a discussion among young scholars about the road ahead is important to us. The decade to come will see a shift in our legal thinking and this journal provides a forum for such new ideas.

I congratulate the ICCSN on their efforts to date and look forward to seeing their reach grow in the years to come.

Editor's Note

KORA ANDRIEU[*]

"The struggle of man against power is the struggle of memory against forgetting."
– *Milan Kundera*[†]

THIS YEAR WE CELEBRATE the tenth anniversary of the Rome Treaty, which led to the establishment of the International Criminal Court in 1998, the first permanent and potentially worldwide system of international criminal justice that aims to protect every world citizen from the horrors of war, genocide and crimes against humanity. For the first time in history, we have an institution that attempts to resolve conflict and find peace through law. Impunity for mass atrocities is no longer acceptable. The objective, in the long term, is that criminal justice will act as a deterrent for perpetrators of crime across the world.

This is not an easy task, and, while celebrating the advancement of international criminal justice during the last ten years, we should bear in mind the immensity of the task that lies ahead. The main philosophical assertion of the International Criminal Court (ICC) is that there is no peace without justice, and that the argument against impunity as a potential deterrent for the peace process is mere hypocrisy. This would certainly be true, but for the effectiveness of the objective itself, it is important that we do not limit ourselves to a purely retributive conception of justice, and see in the ICC a miracle solution for conflicts throughout the world. It is hugely important that Ali Kusheyb is now in custody and that a warrant has been launched for the arrest of al-Bashir for crimes committed in Sudan. But judging those men is certainly not enough to build long-lasting peace in

---

[*] Editor-in-Chief, *Issues in International Criminal Justice*. MSc International Relations, The London School of Economics & Political Sciences and Sciences Po Paris. Current PhD candidate in Ethics & Political Philosophy at the Sorbonne University of Paris.
[†] Milan Kundera, *The Book of Laughter and Forgetting*, New York, Knopf, 1980, p. 36

Darfur: other issues must be addressed on the ground, and there is no one-size-fits-all solution for this. Criminal justice must go hand in hand with a multidimensional approach to war-torn societies, for rebuilding the social fabric, promoting reconciliation, advancing a fair wealth distribution system, healing the victims and helping survivors. Even then, the outcome remains uncertain: there are no tidy ends to mass atrocities. Legal responses will always remain frail and insufficient, and yet they are necessary. As Hannah Arendt said about the Holocaust: "We are unable to forgive what we cannot punish and we are unable to punish what has turned out to be unforgivable."[*]

The articles selected in this journal are a reminder of the complexity, as well as the necessity, of this ambition. *Issues in International Criminal Justice* is the first multinational student-run international criminal law journal in the world – and we hope it will be a long-lasting one. When the International Criminal Court Student Network (ICCSN) launched a call for submissions last month, my mailbox was quickly flooded with contributions from students of The London School of Economics, Cambridge, Utrecht, Leiden, Madrid, and other universities around the globe. It seemed as though everyone had something to say about the ICC, whether to support it, to criticize it, or to support it while criticizing it. If, as the ICCSN believes, students are the future, then the future looks bright for the ICC. Today's students are tomorrow's policy makers: now more than ever, it is important to give them a voice.

[*] Hannah Arendt, *Condition of the Modern Man*, Chicago, Chicago University Press, p. 241

The Meaning of Anniversaries

On the Tenth Anniversary of the International Criminal Court

DEREK WILLIAM VALLÈS[*]

"Old men forget; yet all shall be forgot,
But he'll remember, with advantages,
What feats he did that day…

This story shall the good man teach his son."
– *William Shakespeare, King Henry V*

THE DESIRE FOR JUSTICE is axiomatic in our time. Crucial is the demand that we acknowledge rather than disavow the darkness surrounding us, but never before has that mission been so complex. The atrocities that we face numb us not because of their rarity, but most unfortunately because of their familiarity.

The language of justice is not marginal, nor is it a possession of any single political demography. We have forged this language and founded an institution to embody it. It concerns not only law but morality; not only morality but the personal meaning of freedom; not only freedom but also an intimate sense of personhood in a world of billions.

This year, we celebrate the tenth anniversary of the adoption of The Rome Statute of the International Criminal Court. The '*we*' that celebrate collapses the human, the national, and the international—an ode to an institution that transcends political boundaries. It is this passionate frame of reference that has set us on a course towards a

[*] Assistant Editor, *Issues in International Criminal Justice*. BA Philosophy, Politics & Economics, The Gallatin School of Individualized Study at New York University. MSc candidate in Political Theory, The London School of Economics & Political Science. Fellow, American Institute for Economic Research. Fellow, People for the American Way Foundation.

new horizon of and for international affairs.

We come together this year to celebrate a birthday, but what does that entail? The task at hand seems to be one of reflection on the past and introspection in revisiting first principles. It is never easy to look inward, contemplating the order that has been created, while also looking outward, pondering not only its relation to the world but our own understanding of that world. And so our aim is to not remain silent about that which concerns us.

It is undetermined where the path we are on will lead us, but when we look back and ahead we can see the cracks in the pavement, repair them as we go, and change our course as needed. Upon this tenth anniversary, in this dialogue and others—through acts of witness, narration and interpretation—our mission is to do what is hard to achieve what is great.

The International Criminal Court at a Crossroads

JUDY FU[*]

WE HAVE SEEN nothing short of a revolution in international criminal justice over the past two decades. Warlords who had previously escaped the rule of law are now facing independent criminal trials and under investigation for their involvement in ongoing atrocities. Heads of states, from Slobodan Milosevic to Charles Taylor, are being brought to justice for their involvement in massive campaigns of the most heinous of international crimes. There is a quiet sense of optimistic anticipation within the human rights community and beyond as the global movement to end impunity seems to edge closer to fulfillment.

Ten years after the signing of the Rome Statute of 1998, the International Criminal Court (ICC) has asserted its place as an independent, permanent administrator of global justice. As all but one of the most contentious topics in global politics, one cannot conceivably dismiss the important steps that the ICC has taken in building an international system of justice that transcends our intuitive understanding of justice. That is, where the prosecution of both international and national crime has always been perceived as an integral feature of state sovereignty, the ICC necessarily transforms conventional characteristics of national jurisdiction.[†] As the ICC continues to grab headlines around the world—most recently in its July 2008 indictment of Sudanese President Omar al-Bashir as the first sitting head of state in history charged with the crime of genocide—we as students of international law and human rights face the increasing danger of failing to remain critically reflective of the

---

[*] Chair, International Criminal Court Student Network (ICCSN) at The London School of Economics & Political Science. LLB candidate, The London School of Economics & Political Science.

[†] John Dugard, "Obstacles in the Way of an International Criminal Court," Cambridge Law Journal 56 LJ 335 (1997)

Court's activities. Following the ICC indictment of President al-Bashir, German Chancellor Angela Merkel together with UN Secretary General Ban Ki-Moon went as far as advocating that the ICC should not be spoken of critically.[*]

But it seems unsettling to suggest that the ICC would develop best with the growth of an expanding international fan club. Rather, no international institution can be expected to move forward without careful scrutiny of its operations and effectiveness, especially if such an institution is to have any international legitimacy. As the ICC continues to develop and investigate an increasing number of cases and situations, the international community would do well to critically examine the structure, procedures, and ramifications of the Court's decisions.

Consider the situation in Northern Uganda. Over the past five years, the ICC has led a commendable investigation of the crimes perpetrated by the Lords' Resistance Army (LRA), and issued arrest warrants for the top commanders of the LRA for crimes that are notable in their characterization of the nature of the conflict. In what has been described as one of the worst and most underreported humanitarian crises in the world, the ICC did what no other institution was able to do: it offered victims an objective investigation into a complex, two-decade old conflict that terrorized an entire generation.[†] The ICC provided an opportunity to administer justice in an ongoing conflict against active rebels where it had previously been conceived as impossible.

---

[*] Nora Boustany, "China Expresses 'Grave Concern' Over Indictment of Sudan's Bashir;" published in The Washington Post, 16 July 2008 <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/15/ST2008071503248.html>

[†] Medecins San Frontieres, "Top Ten most underreported humanitarian stories for 2004," published 19 January 2005, <http://www.msf.org/msfinternational/invoke.cfm?objectid=B1392C0E-7FED-4F51-AB7F7EF0D7E21A7A&component=toolkit.article&method=full_html&CFID=959097&CFTOKEN=74457796>

In real terms, whether this has actually transpired is far from clear. Aside from oft-toted accusations of bias in the seeming absence of genuine investigation of crimes perpetrated by the Ugandan armed forces (UPDF), the ICC has been criticized for everything from impeding peace negotiations between the Museveni administration and the LRA leadership to failing to conduct sufficiently detailed investigations on sexual crimes. Whilst the majority of pointed criticism of the ICC seem either uninformed or premature, it would be difficult for supporters of the ICC to convincingly contend that the ICC's role in Uganda has achieved which it was expected to. Alas, this much is clear: on 17 September 2008, the LRA launched fresh attacks on as many as 16 villages on a single day in northeastern Democratic Republic of Congo.[*]

Beyond Uganda, there are criticisms to be made of the ICC structure itself. Some have argued that the high threshold for the severity of criminality required for the ICC to launch an investigation impedes international justice.[†] Others have pointed to the turbulent relationship between the ICC and such non-cooperating countries as the United States as a claim against the Court's purported universality. All of these issues deserve critical and serious examination by both legal experts and the political community before the ICC can develop into a truly effective international administrator of justice. Until then, its operations will remain limited in their value.

When the Chief-Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, presented a public lecture at the London School of Economics in October 2008, a member of the International Criminal Court Student Network asked him to comment on the actual feasibility of a

---

[*] The International Criminal Court, "Reported LRA attacks, 17-18 September 2008" <http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-20081006-PR359-Anx1.pdf>

[†] "The International Criminal Court," published in The New York Times, 4 November 2008, <http://topics.nytimes.com/top/reference/timestopics/organizations/i/international_criminal_court/index.html?scp=1-spot&sq=icc&st=cse>

purportedly independent, politically neutral, law-based institution operating in an international system of legal anarchy. That is, how could the UN Security Council's authority to effectively suspend the ICC's investigation be reconciled with the independence of the Court? Mr. Moreno-Ocampo considered the question in the context of the al-Bashir indictment carefully and at length, but concluded with a simple assertion. "The world is changing," he said. "It's going to be tough, but I think we can do it."

It is this poignant, quiet resolve that seems to stand in stark contrast to the flurry of criticism that the ICC has attracted over the past decade. This resolve is echoed by Kasaija Phillip Apuuli in his analysis of the ICC arrest warrants for the LRA, where he concludes with a simple message:

> As the old adage goes, 'the die has been cast'. The long-awaited indictment of the top LRA leadership by the ICC has been made public. Kony and his top lieutenants are now wanted men. While the arrest warrants have been hailed as heralding the beginning of the end of the conflict, elsewhere they have been condemned. The hope for the people of northern Uganda is that the arrests will be affected soonest.[*]

And indeed, 'the die has been cast' in more ways than one. Throughout the late 20th century, a wide range of events—from the growing body of international law outlining international crimes to the atrocities of the former Yugoslavia and Rwanda—pointed to the increasing need for a permanent international criminal body.[†] At Rome in 1998, over 150 international delegations came together to build an independent institution founded in its commitment to investigate and hold accountable the perpetrators of the most heinous crimes. As the volume of international criminal law continues to develop alongside the ICC, we are faced with a growing body of jurisprudence that sharply departs from any previous body of law

---

[*] Kasaija Philip Apuuli, "The ICC Arrest Warrants for the Lord's Resistance Army Leaders and the Peace Prospects for Northern Uganda," Journal of International Criminal Justice 4 (2006) pp 179-187

[†] Dugard, "Obstacles in the Way of an International Criminal Court"

familiar to the international community. Regardless of its effectiveness in real or humanitarian terms, the ICC's involvement in Uganda and elsewhere has fundamentally changed the way we perceive rule of law and criminal accountability in humanitarian crises.

The ICC was created as a unique institution with potential to lead the global battle against impunity towards victory. It would be a mistake to allow the institution to be defeated. Amidst criticisms of the ICC, it is foremost important to remember that the ICC is a young institution by all measures, and of potentially great consequence and success in achieving universal justice. This is necessarily the foundation above which we must consider the effectiveness of the ICC's decisions. For all of its shortcomings, we as an international community simply cannot afford to forget the reasons for which the ICC was created in the first place: to address a fundamental absence of international mechanisms that hold accountable the perpetrators of the most heinous crimes, including sitting heads of states.

Through this lens, we may conclude by examining the situation in Darfur and the recent indictment of President al-Bashir. The indictment presents a landmark opportunity. It is the first time in recent history that the international community may be able to act collectively, even as a purported genocide is being perpetrated, and hold the most responsible of perpetrators to account. This is precisely the political and legal gap that the ICC was designed to fill and, indeed, it would be both distressing and tragic if the international community fails to support the ICC indictment.

How the international community, and indeed the ICC itself, chooses to reconcile the shortcomings of the ICC with the need for unfaltering, united support for the Court will be an understandably difficult dilemma. The next decade of the ICC may see incredible growth in international criminal justice alongside increasing civil society support and interest in its operations. Alternatively, it is equally likely that the shortcomings of the ICC itself and lack of international political support will lead to its demise as a credible

administrator of justice. The challenge will lie in ensuring that widespread growth in support for the ICC leads to the development of a truly effective international organ, efficient in amending its shortcomings, to continue the international, half-century-long battle against impunity.

Political Safeguards in the International Criminal Court

GUSTAVO AROSEMENA[*]

MECHANISMS FOR THE protection of justice on the international plane can be thought of as existing in a continuum from "soft" to "hard," starting with quiet diplomacy, progressing through declarative political bodies and non-binding, law-based, decision-making bodies to judicial institutions and culminating in the rare opportunities for truly coercive enforcement.

Soft mechanisms are based on negotiation, where the formal equality of states has very little influence beyond setting some minimal ground rules for the orderly development of negotiations such as the immunity of diplomatic officials. The result invariably depends on what a state can bring to the bargaining table and that depends in turn on the state's economic, political and social power. In contrast, hard mechanisms are generally based on the law and the formal equality of states has clear substantive implications on the results. An international tribunal cannot substantiate a decision on the grounds that it will benefit a powerful western state, nor can it take in consideration for ruling in favor of this country that a contrary course of action will cause fierce political opposition. Hard mechanisms create tensions between the legal basis of decision-making and the predominant role of power in international politics. This tension can discredit, weaken or even threaten to eliminate the decision-making bodies.[†]

To survive in the turbulent climate that surrounds them, hard judicial-style adjudicators in political environments generally have built into their procedures political safeguards that either prevent them from hearing cases that would put them against an insurmountable political

---

[*] LLM (Candidate) Utrecht University. LLM University of Texas at Austin. LLB Universidad Católica de Santiago de Guayaquil. Fulbright Scholar.

[†] See Nicaragua, Peru, Trinidad y Tobago

opposition, or that take the duty of making troubling decisions out of their hands, putting the issues back into the agendas of political bodies. These safeguards take numerous configurations. Although it is not judicial, the potentially coercive Security Council (SC) has had from its inception an un-egalitarian composition. The presence of five permanent member countries (P5) with their *veto* power guarantees the continuing relevance of un-egalitarian power politics. The core international judicial organ, the International Court of Justice (ICJ), has developed a set of criteria that allows it to drop a question presented to it without solving the case[*]:

1. Arguing that the question is already resolved and thus adjudication is moot (*mootness*)[†]

2. Arguing that there is no applicable law (*non liquet*)[‡]

3. Arguing lack of competence due to non-delegation[§]

4. Possible considerations of federalism and separation of powers[**]

The end result is "avoidance": a decision that would otherwise have been made in law is not made.

Adjudication by the International Criminal Court (ICC) stands on the "hard" end of the aforementioned spectrum and is subject to all the difficulties of maintaining the rule of law in an environment ripe with power politics. Thus, having safeguards to bypass the ICC seems

---

[*] See generally Antonio F. Perez, "The passive virtues and the world court: pro-dialogic abstention by the International Court of Justice" (1997) 18 *Michigan Journal of International Law* 399.

[†] Nuclear Tests Case (New Zeeland v. France), Judgment, I.C.J. Reports 1974, p. 457, 475, 477

[‡] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, 266-267

[§] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports, 1996, p. 66, 83-84

[**] *Id.*

necessary to secure its political survival. Admittedly, the ICC deals primarily with individual and not states, but the high profile individuals targeted by the ICC are generally within the purview of state interest and the situations it addresses (genocide, war crimes, crimes against humanity) are clearly of the utmost concern to the international community.[*] Furthermore, it is worth mentioning that the ICC avoiding issues may not always be a necessary evil fostered by the harsh realities of international politics. Several authors argue that in some scenarios criminalization runs counter to peacemaking and avoidance can be the only way to secure non-participation by the ICC, especially if a prosecution has already started.[†]

Consequently, the ICC has several features that allow for avoidance. First, in use of its *motu propio* triggering powers, the Office of the Prosecutor enjoys considerable discretion in selecting whom to prosecute.[‡] Although this power must be exercised in a principled manner following the guiding principles of international criminal law (such as complementarity), this does not mean that there is no room for prudential considerations for the well being of the Court.[§]

Second, Article 16 of the Rome Statute for the International Criminal Court enables the SC to stop an investigation or prosecution for one year. This power by itself is very limited, as it requires a positive resolution of the SC, which is vulnerable to veto power from ICC-supporting P5 states like France and England. Nevertheless, the SC

---

[*] Waves of political opinion have risen as the ICC prosecution attempts to issue an arrest warrant for Sudan's President, Omar al-Bashir. On the matter see *Human Rights Watch*: AU: Do not call for suspending ICC's investigation of President al-Bashir (available at http://hrw.org/english/docs/2008/09/18/sudan19848.htm).

[†] See Mark Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity" (2000) 22 *Human Rights Quarterly* 118

[‡] See Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 *American Journal of International Law* 510

[§] See Policy Paper on the Interests of Justice, which details the Office of the Prosecutor's understating of the term "Interests of Justice" set forth in Article 53 of the Rome Statute, which establishes principled guidance for prosecutorial conduct (available at http://www.icc-cpi.int/otp/otp_docs.html)

might use Article 16 to signal its disapproval to the Office of the Prosecutor and this could eventually lead to a political solution. It is especially noteworthy that the SC has already used this provision "creatively" in 2002 in order to issue a blanket protection for troops involved in peacekeeping operations, a decision which was renewed in 2003.[*†]

Third, Article 17 of the Rome Statute, which addresses issues of admissibility may—depending on how it is interpreted—be used to avoid issues: "*A prosecution is inadmissible if a State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.*" It is very difficult to assess whether a decision to not prosecute rises out of a genuine unwillingness or inability; these criteria will probably be managed on a case-by-case basis allowing for selectivity and thus avoidance.

In conclusion, the ICC's architecture allows for the possibility of issue avoidance. How the ICC should use this feature is open to debate. Is an ICC that tackles only easy cases—where in one way or another, the international community has isolated and deprived of political power the subjects of prosecution—a cowardly court subservient of Western powers? Or is it a prudent court gradually building up its influence through processes of acculturation?[‡] Maybe a more important question is, to what extent are modern states willing to put aside their narrow national interest and support an ICC that serves justice first and foremost?

---

[*] Security Council Resolution 1422 of July 12 of 2002

[†] Security Council Resolution 1487 of June 12 of 2003

[‡] See generally, Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights" (2004) 54 *Duke Law Journal* 621

When Justice Meets Peace:
Reassessing the Relationship Between the ICC and the Security Council

MATTHIAS VANHULLEBUSCH[*]

(1) Introduction

THIS PAPER AIMS to explore the different legal and political problems the International Criminal Court (ICC) and the United Nations Security Council (UNSC) are facing as well as their legal and political understandings regarding the fight against impunity. Of course, each international organization and its organs have a clear mandate given by its member states to exercise specific functions. The bounds between different organizations, here the ICC and the UN, may be institutionalized within their constituent documents.

In order to investigate and prosecute violations of the prohibition of international crimes a special coherent regime has been established within the Rome Statute to trigger the jurisdiction of the Court and to enable cooperation by its member states. Therefore, the UNSC's "mandatory Chapter VII powers will be absolutely essential to the workings of the Court—not only for enforcement but also to ensure the true universality of its jurisdiction and powers."[†] Obliging the UN member states under the UN Charter allows a broader implementation of the strategy which the Prosecutor has outlined; especially in a global criminal order whose promotion must be guaranteed over all sovereign interests.

---

[*] BA in Law (VUB), MA in Law (ULB, Humboldt, FUB), MA in International Politics (CERIS, Paris Sud-XI), LL.M. (Adv.) Public International Law with International Criminal Law Specialization (Leiden), LL.D. Candidate (SOAS, London). I would like to thank Dr. Carsten Stahn for his comments on previous work.

[†] B. Richardson, 'Statement in the Plenary Session of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 19 June 1998, cited in W.A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EJIL 701, at 714 (2004).

Bilateral immunity agreements, UNSC deferrals, UNSC referrals and their funding, and the determination of aggression are examples of such evolutions. Each actor has the power to impose its agenda but also has the responsibility to respect certain basic principles as valued by the international community as a whole. Therefore, this paper intends to examine the legal and political friendship as well as the hostility between the ICC and the UNSC and to comprehend how certain participants on the international plane might set those guidelines aside.

(2) The ICC and UNSC: Friends Forever

The well-engineered legal cooperation between the ICC and UNSC as enacted by the 1998 Rome Statute allows them to exercise their prerogatives respectively within the international criminal justice and the collective security domains. Such objectives aiming at the respect of the rule of law permits to "preserve peace, advance the protection of human rights and reduce international and transnational criminality."[*] The 1998 Rome Statute and 1945 UN Charter, the constituent treaties of the ICC and UN respectively, put forward the realization of these aims by giving their organs the necessary means to act accordingly. Besides, a Relationship Agreement coordinates the different competences within a sphere of mutual understanding and respect.[†]

(2.1) Legal Partnership Between Executive and Judicial Powers

(2.1.1) Fundamental Principles and Institutional Safeguards

From the early stages of the drafting process of the Rome Statute, the UN has taken the initiative to create a permanent international

---

[*] M.C. Bassiouni, *The Time Has Come for an International Criminal Court*, 1 Ind. Int'l & Comp. L. Rev. 1, at 1 (1991).
[†] D. Sarooshi, *The Peace and Justice Paradox: The International Criminal Court and the UN Security Council*, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), The Permanent International Criminal Court: Legal and Policy Issues, at 96 (Hart 2004).

criminal court.[*] However, issues of international criminal jurisdiction and the *delicta juris gentium* have been dealt with separately. Thus, the criminalization of those actions needs to be examined before discussing any international forum competent of judging those international crimes.[†] Because of the lack of political consensus, its developments were rather marked with denunciations and resolutions instead of concrete enforcement mechanisms.[‡] Therefore, the International Law Commission (ILC) took the lead and

> should be encouraged to continue to explore the possibility of establishing an international criminal court [with] all procedural and substantive arrangements that might guarantee both its effective operation and absolute respect for the sovereignty and the territorial and political integrity of States and the self-determination of peoples.[§]

The UN explicitly reaffirmed the Nuremberg Principles as set forward by the International Military Tribunal (IMT) in the aftermath of the Second World War. The principles include the removal of immunities and the negation of certain defences.[**] However, the ILC "declined to express any appreciation of these principles as principles of international law."[††] Still, such morally higher norms coexist with positive law and are "binding on all States irrespective of their will."[‡‡] Consequently, the punishment of international crimes must conform to customary public international law and its general principles. Not all states have contributed to such state practice or have expressed their persistent objections regarding the prosecution of those crimes.[§§] In spite of these exceptions, a general trend of "expanding

---

[*] See Bassiouni, *supra* note 2, at 12.
[†] E. Chadwick, *A Tale of Two Courts: The 'Creation' of a Jurisdiction?*, 9(1) Journal of Conflict and Security Law 71, at 81 (2004).
[‡] See Bassiouni, *supra* note 2, at 12.
[§] Report of Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/Conf. 144/28, at 193-4.
[**] Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal, U.N. Doc. A/64 add. (1946).
[††] See Chadwick, *supra* note 5, at 88.
[‡‡] G.J.H. van Hoof, Rethinking the Sources of International Law, at 106 (Kluwer Law 1983).
[§§] See Chadwick, *supra* note 5, at 92.

institutionalization of enforcement processes" is to be noticed between the ICC and the UNSC.[*] Article 2 of the Rome Statute refers to their relationship to be concluded by an agreement.[†]

This Relationship Agreement signed between both international legal personalities is more than "functionally appropriate" and shall respect the constituent treaties of both international organizations. The UN and the ICC cannot bind each other to violate the Rome Statute or the UN Charter as the "law governing internal operations of international organizations" forbids so.[‡] In this respect, according to Article 53 of the Rome Statute, the Prosecutor has the discretionary powers to decide whether there is a reasonable basis to commence investigations. This institutional independence is coupled with other procedural safeguards in the same article restricting his competence by the Pre-Trial Chamber as well as by the latter's judicial review requested by a state or the UNSC having respectively made their referral under Article 14 or 13(b) of the Rome Statute.[§] Consequently, both the triggering procedure by the UNSC and the independence of the ICC are part of those mutual checks and balances.

Within this framework of institutional safeguards, both organizations can continue to advance their shared ambitions. The Preamble of the Rome Statute, in particular, expresses the concerns of the international community regarding the past atrocities of the previous century and its determinacy to intervene where impunity must be ended. It also refers to the Purposes and Principles found in Articles 1 and 2 of the UN Charter to be respected, especially those provisions regarding the use of force and the maintenance and restoration of

[*] V. Gowlland-Debbas, *The Relationship between the Security Council and the Projected International Criminal Court*, 3 J. Armed Conflict L. 97, at 98 (1998).
[†] Rome Statute, Article 2.
[‡] K.S. Gallant, *The International Criminal Court in the System of States and International Organizations*, 16 LJIL 553, at 569-70 (2003).
[§] Rome Statute, Articles 53.1, 53.2, 53.2, 53.2(c) and 53.3; See Sarooshi, *supra* note 3, at 98.

international peace and security. Clearly, those humanitarian needs of mankind "help to establish the normative basis of an effective cooperative arrangement between the ICC and Security Council."[*] Both the ICC's and UNSC's functions are complementary because they have the responsibility to protect those populations who are at risk.[†] Consequently,

> the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned and that it is only when the state is unable or unwilling to fulfil its responsibility or is itself a perpetrator that is becomes the responsibility of the international community to act in its place.[‡] 'The most serious crimes of concern to the international community as a whole'[§] will frequently challenge international peace and security in a manner which triggers the responsibility of the Council to serve as the primary guardian of the maintenance of international peace and security.[**]

Although peoples have a right of self-determination and can exercise it independently within a nation state oriented system, some of its sovereignty is delegated through the UN Charter to the UNSC and through the Rome Statute to the ICC. Both international governmental organizations will act more or less for the purpose of protecting communitarian values, i.e. collective security and fight against impunity; meanwhile they would have to respect the member states prerogatives, i.e. respectively the collective or individual self-defence in accordance with Article 51 of the UN Charter and the

---

[*] S.C. Roach, *Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and the UN Security Council*, 6 International Studies Perspectives 431, at 437 (2005); P. Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 Fordham Int'l L. J. 292, at 295 (2004-2005).

[†] V. Gowlland-Debbas, The Role of the Security Council in the New International Criminal Court from a Systemic Perspective, in L. Boisson De Chazounes and V. Gowlland-Debbas (eds.), The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab, at 632 (Martinus Nijhoff Publishers 2001).

[‡] See Roach, *supra* note 16, at 438-9.

[§] Rome Statute, Preamble, para. 9.

[**] M. Bergsmo, *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council*, 69 Nordic J. of Int'l L. 87, at 94 (2000).

genuine domestic investigation or prosecution as acknowledged by the Rome Statute in its complementarity principle. Such limitation of powers between both international organizations and their member states made a mutual agreement possible based on those core principles of international law determining the structure of and the players on the international plane. Nevertheless, only the Preamble of the Rome Statute refers to the Purposes and Principles of the UN and not the operative clauses of the treaty and might undermine the commitment of the ICC if not legally bound to respect the former.

(2.1.2) UNSC Referral

Unlike the ad hoc UN International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the ICC is neither a subsidiary body of the UNSC nor part of the UN constellation. The constitutive structure of the Rome Statute guarantees the independence towards its member states and other international organizations such as the UN. However, a Relationship Agreement has been signed between both international legal personalities and allows them to efficiently cooperate for their common purposes.[*] Although the primacy of the UN ad hoc tribunals are rather advocating communitarian over sovereign values, the new collaboration between the UNSC and the ICC allows the UNSC to act accordingly and defend such philosophy within a complementarity regime favouring domestic initiative instead and in the last instance international action.[†] Especially, the legitimacy added by UNSC resolutions to the indictments determined by the Court creates "a mutual legitimacy push [constituting] the evolving normative benefits of mutual assistance or collaboration between institutional players"

---

[*] R. Cryer, *Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of Those Who Died in Vain?*, 3 J. Armed Conflict L. 271, at 271-2 (1998); Negotiated Relationship Agreement between the International Criminal Court and the United Nations, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. (Last visited 17 October 2008)

[†] See Cryer, *supra* note 21, at 272.

sharing those values that shape the rules considered to become legitimate as well.[*]

The horizontal extension of the ICC's jurisdiction by the UNSC referral under Article 13(b) of the Rome Statute is supplemented by the possibility of the Prosecutor to initiate *proprio motu* an investigation. This kind of triggering of the Court's jurisdiction circumvents the traditional vertical approach of public international law as only states have the privilege of the initiative. Though, a UNSC referral does not lack enforcement capacity given the binding nature of the adopted resolutions upon the UN member states, but *proprio motu* proceedings do. The fear that the Prosecutor would decide upon investigating situations outside of the control of states parties is ebbed away as technically he will always depend on the states' and the UNSC's cooperation and enforcement.[†]

States having both territorial and national jurisdiction over the international crimes can, as member states of the Rome Statute, refer a situation to the ICC in accordance with Article 13(a) and 14 of the Rome Statute or consent on an ad hoc basis to accept the jurisdiction of the Court when not party to the treaty as Article 12.3 of the Rome Statute stipulates. Consequently, such a representational exercise of jurisdiction leads indirectly to the exercise of universal jurisdiction by the ICC as the territorial or national jurisdiction must be delegated by the competent state in question, irrelevant of its membership to the ICC. However, under Article 13(b) of the Rome Statute, the referral by the UNSC of any situation circumvents the primacy of territorial or national jurisdiction, irrelevant as well of the membership to the ICC.[‡] Such referral would be adopted as an enforcement measure under Chapter VII of the UN Charter and would, in virtue of Article 25, be binding upon UN member states. Hence, all UN member states shall carry out the UNSC resolutions imposing them to accept

[*] See Roach, *supra* note 16, at 433-4.
[†] See Chadwick, *supra* note 5, at 92.
[‡] See Cryer, *supra* note 21, at 278-9; See Sarooshi, *supra* note 3, at 109.

the jurisdiction of the ICC and cooperate accordingly. Consequently, non-member states of the Rome Statute and the UN Charter would not be obliged to do so.[*]

The ICC's once "dormant jurisdiction" gets a "universal reach" through the UNSC referral.[†] Because

> the target of the universal jurisdiction is the repression of the special quality of these offences. They are seen to 'threaten to undermine the very foundations of the enlightened international community as a whole; and it is this quality that gives each one of the members of that community the right to extend the incidence of its criminal law to them.'[‡]

However, many states might feel reluctant to exercise this jurisdiction and consequently an international criminal court would have the necessary tools to judge those core international crimes. Especially the triggering mechanism of a UNSC referral indirectly acknowledges that these international crimes are violations of international peace and security and that the UNSC can act accordingly under Chapter VII of the UN Charter and Article 13(b) of the Rome Statute.

On the one hand, the ICC can exercise this delegated universal jurisdiction under the authority of the UNSC. On the other hand, the filter of the UNSC's consent can be regarded as a limit to the "residual authority [of the ICC] to enforce universal jurisdiction."[§] In spite of the UNSC adoption of such resolutions, "the binding nature of decisions could be tied up to their compliance with the Charter."[**]

---

[*] See Gallant, *supra* note 14, at 582-3, 583; See Sarooshi, *supra* note 3, at 102 and 104.
[†] H. Olasolo, *Reflections on the International Criminal Court's Jurisdictional Reach*, 16 Criminal Law Forum 279, at 292 (2005).
[‡] I. Tallgren, *Completing the "International Criminal Order" The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute of the International Criminal Court*, 67 Nordic J. of Int'l L. 107, at 112 (1998).
[§] See Cryer, *supra* note 21, at 278-9; O. Bekou, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 ICLQ 49, at 51 (2007).
[**] U.N. Charter, Article 24(2); R. Cryer, *The Security Council and Article 39: A Threat to Coherence?*, 1 J. Armed Conflict L. 161, at 167-8 (1996); N. Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16(2) EJIL 239, at 243 (2005).

This means that the UNSC must respect the Purposes and Principles of the UN Charter as well as the mandate conferred by the UN member states through the UN Charter upon the UNSC, otherwise it would have acted *ultra vires*, i.e. beyond its powers. Consequently, in first instance, the UNSC "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and then take adequate measures pursuing the maintenance and restoration of international peace and security under Chapter VI or VII of the UN Charter. A referral to the ICC takes place under Chapter VII of the latter Charter.[*]

Whenever the UNSC requests to activate the jurisdiction of the Court, such resolutions may only make reference to a situation and not to "concrete facts"[†] and should be adopted for the purpose of the maintenance and restoration of international peace and security.[‡] Only exceptional and not structural situations may be taken into consideration under Chapter VII of the UN Charter. The adoption of such resolution by the UNSC permits to avoid abusive and politicized referrals as the UNSC needs to vote affirmatively as Article 27 of the UN Charter dictates and thus without any veto of its permanent members.[§] However, "the level of specificity over the control of admissibility of situations is lower than that required for the control of admissibility of cases."[**] Rather, a *prima facie* assessment of the situation will be sufficient in first instance, and then the thorough control of the admissibility of case as found in Articles 19, 53.2, 58, 61 and 64 of the Rome Statute has to take place subsequently.

[*] U.N. Charter, Article 39; L. Condorelli and S. Villalpando, Referral and Deferral by the Security Council, in A. Cassesse, P. Gaeta and J.R.W.D. Jones (eds.), Vol. I, Rome Statute of the International Criminal Court: A Commentary, at 630 (Oxford University Press 2002).

[†] H. Olasolo, *The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor*, 5 International Criminal Law Review 121, at 125-6 (2005).

[‡] See Gallant, *supra* note 14, at 572.

[§] See Olasolo, *supra* note 32, at 125-6; See Bergsmo, *supra* note 20, at 94; See Schabas, *supra* note 1, at 716.

[**] See Olasolo, *supra* note 32, at 136; See Condorelli and Villalpando, *supra* note 31, at 637.

Moreover, in the case of a UNSC referral and its examination by the Prosecutor, as Rule 104 of the Rules of Procedure and Evidence stipulates, given that the latter decides not to initiate an investigation, the UNSC may request the Pre-Trial Chamber to judicially review this Prosecutor's decision under Article 53.3 of the Rome Statute.[*] Of course, "the Prosecutor and the judicial arm of the Court have a duty to refuse to bring charges where unsupported by the evidence."[†]

The question remains, of course, whether the UNSC remains seized of the maintenance and restoration of international peace and security of such specific circumstances that it has referred to the ICC. Evidently, it would be beneficial for the relationship between the ICC and the UNSC to continue to effectively discharge their responsibilities respectively in international criminal justice and international peace and security and to "cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interests."[‡] Only a good coordination on the exercise of the responsibilities by both organs and the respect for each others' obligations and rights under their respective constituent documents will facilitate their future cooperation on a sound constitutional basis as well as for a specific situation brought before the Court. Consequently, the UNSC could and should remain seized of the matter.

(2.1.3) International Cooperation

Because the ICC wants to protect communitarian interests within an international order, it will respond to "violations of core norms forming the substance of such an *ordre public*" and will work closely together with the UNSC, which is already experienced in "the process

[*] See Bekou, *supra* note 29, at 56.
[†] See Gallant, *supra* note 14, at 572.
[‡] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 3, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. (last visited 17 October 2008)

of institutionalizing individual criminal responsibility."[*] Cooperation with the Court is absolutely necessary in terms of executing and enforcing arrest warrants, collecting and protecting the evidence and witnesses, and exchanging information. State parties to the Rome Statute are obliged under Part 9 of the Statute to cooperate. Whereas non-state parties only have to do so when having lodged a declaration under Article 12.3 of the Rome Statute and having accepted the jurisdiction of the ICC over a *specific* crime agree to assist the ICC under the same the conditions of Part 9 of the Rome Statute. Voluntary assistance by non-state parties can also be provided to the Court "on the basis of an ad hoc agreement, an agreement with such State or any other appropriate basis."[†] Also the Office of the Prosecutor (OTP) regularly reports to the UNSC regarding its activities and especially relating to the Darfur referral by the UNSC.[‡]

However, where the state fails to cooperate, the Court can "refer the matter" back to the UNSC in those situations where the UNSC has triggered the jurisdiction of the Court before.[§] In addition, the UNSC can also oblige a third state to cooperate with the Court by adopting a UNSC resolution under Chapter VII which would bind this state if of course it is a UN member state.[**] Clear provisions within the Relationship Agreement on the cooperation between the ICC and the UN and the UNSC in particular include a strong commitment on the part of the UNSC who acts "as the *de facto* executive authority of the international system" and who is the most likely source of enforcement.[††] Regarding state failure to cooperate following self-

---

[*] See Gowlland-Debbas, *supra* note 17, at 630-1. Emphasis added by the author.

[†] See Bekou, *supra* note 29, at 61; Rome Statute, Article 87.5(a).

[‡] See First till Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005).

[§] Rome Statute, Articles 87.5 (b) and 87.7; H.-R. Zhou, *The Enforcement of Arrest Warrants by International Forces*, 4 Journal of International Criminal Justice 202, at 212 (2006).

[**] See Bekou, *supra* note 29, at 62.

[††] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Articles 16 and 17, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. (last visited 17 October 2008); B.

referrals or *proprio motu* proceedings, Articles 87.5(b) and 87.7 of the Rome Statute acknowledge that the "ultimate power to enforce cooperation lies with States acting through the Assembly of States Parties" who on their turn may be informed by the Court on such incidents or in situations of UNSC referrals by the UNSC.[*]

In terms of logistical and procedural goals, an effective exchange of evidence and information between the UNSC and the ICC is possible as Article 87.6 of the Rome Statute permits the Court to "ask any intergovernmental organization to provide information or documents." The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such organizations and which are in accordance with its competence or mandate.[†] The Relationship Agreement also refers to similar provisions.[‡] Also the Prosecutor can in accordance with Article 54.3(c) of the Rome Statute request such cooperation.[§] However, swift reaction of the ICC is not entirely guaranteed "nor does it ensure that particular permanent members will look beyond their political or national interests, especially if the permanent member states have maintained close relations with so-called rogue states."[**] Still, the UNSC being the primary creator of UN peacekeeping operations in different conflict areas over the world allows them to collect information on the ground. This could in the Relationship Agreement be subjected to further special arrangements in order to enable cooperation with the UN peacekeeping forces.[††] For example, the Memorandum of

Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, at 162 (Oxford University Press 2003).

[*] Rome Statute, Articles 87.5(b) and 87.7; See Broomhall, *supra* note 44, at 155.

[†] Rome Statute, Article 87.6.

[‡] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Articles 5, 6, 15, 16, 17, 18, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. (last visited 17 October 2008)

[§] Rome Statute, Article 54.3(c); S.C. Roach, *US Foreign Policy and the International Criminal Court: Towards a Third Way of Strategic Accommodation*, 43 International Politics 53, at 66 (2006).

[**] See Roach, *supra* note 16, at 441.

[††] M. Bothe, Peace-keeping, in B. Simma (ed.), The Charter of the United Nations. A Commentary, at 684 (Oxford University Press 2002).

Understanding between the UN and the ICC demonstrates how cooperation between the Court and the UN peacekeeping force (MONUC) in the Democratic Republic of the Congo should be done and how costs are to be repartitioned.[*] Similar duties have been carried out by NATO forces in the Balkans in the pursuit of arresting accused persons and thus enforcing the arrest warrants issued by the Prosecutor of the ICTY.

(2.2) Political Understanding in the New World Order

The creation of a permanent international criminal court guarantees the independence of its establishment supported by a large majority of state parties as opposed to the previous establishment of ad hoc tribunals primarily regarded as selective and victor's justice imposed by a small community of nations. However, "the impossibility of foreseeing the political events, there will be no guarantee against the same criticisms being raised against such a permanent jurisdiction."[†] Of course, these same member states, as shareholders of the ICC acting through the Assembly of States Parties (ASP), could control the prosecution strategies so the ICC would not "take action against states that would retaliate [...] either by commercial retaliation or by terrorism."[‡] Politics intervenes to protect national interests and thus at the cost of independent and impartial judicial proceedings. Furthermore, the UNSC already has experience in "international judicial intervention" through those ad hoc tribunals.[§] Even at its creation, five out of eighteen judges on the ICC benches were coming from the UN ad hoc tribunals and are strongly present in the new judicial institutions.[**] Also the ASP of the Rome Statute has

---

[*] See X., *Memorandum of Understanding between the United Nations and the International Criminal Court. Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court*, 3 International Organizations Law Review 403. (2006).

[†] 'Question of International Criminal Jurisdiction', document A/CN.4/20, 20(2) YILC (1950) 23, para. 38a.

[‡] J. Rabkin, *World Apart on International Justice*, 15 LJIL 835, at 846 (2002).

[§] See Bergsmo, *supra* note 20, at 88 and 91.

[**] See Kirsch, *supra* note 16, at 301.

discretionary powers regarding the appointment of judges or the prosecutor and regarding the modifications of the legal instruments used before the ICC proceedings.[*]

In this respect, the USA opposition might be artificial as the Rome Statute provides "a multi-tiered system of protections"[†] suiting the USA's foreign policy interests.[‡] *Proprio motu* proceedings initiated by the Prosecutor are to be confirmed by the Pre-Trial Chamber and the latter's decision can even be appealed. During the entire proceedings the USA could still invoke the principle of complementarity if the USA would prefer to prosecute its nationals before its own courts or prefer to seek a UNSC resolution deferring the situation.[§] Even other ad hoc tribunals such as the ICTY and ICTR have criminal jurisdiction over USA nationals.[**] Besides, the American Service Members' Protection Act is another way of diverting the ICC jurisdiction on USA nationals or USA armed forces within UN peacekeeping missions.[††] Clearly, much diversion and ambiguity have been created and could undermine the initial purposes for which this tribunal has been set up. The creation of these legal and political tensions could be seen in the light of division in order to rule.

Similar divergent perceptions regarding the deterrent and redressing functions of the Court do not cede ongoing atrocities, in particular when looking at the cases examined before the ICC. The costs to materially stop massive human rights violations might be much higher than those occurred within international criminal adjudication mechanisms whose resources might be "inferior to the exigencies of

---

[*] Rome Statute, Articles 36, 42, 121.
[†] C.C. Joyner and C.C. Posteraro, *The United States and the International Criminal Court: Rethinking the Struggle between National Interests and International Justice*, 10 Criminal Law Forum 359, at 383 (1999).
[‡] D. Rothe and C.W. Mullins, *The International Criminal Court and the United States Opposition. A Structural Contradictions Model*, 45 Crime, Law & Social Change 201, at 206 (2006).
[§] See Joyner and Posteraro, *supra* note 57, at 383.
[**] See Schabas, *supra* note 1, at 710.
[††] T.M. Franck and S.H. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 N.Y.U. J. Int'l L. & Pol. 519, at 520 (2003).

the situation."[*] Moreover, the limited number of possible accountable violators or the small concentration of particular individuals considered as key responsible before the ICC undermine the whole effect of deterrence as other protagonists can commit the same violations.[†] Little empirical evidence, however, can support these optimistic proposals that are perceived to be ineffective.[‡] Also the gravity threshold as mentioned in Articles 17 and 53 of the Rome Statute imposes a restrictive repression of only the most serious international core crimes leading to the accountability of the offenders. Although UNSC deferrals could prevent this from happening, the positive complementarity regime instead stimulates states to prosecute those responsible themselves.[§] Consequently, "retributive justice" and its "affirmative moral duty to prosecute and punish serious criminals" cannot always bring material peace or rather cause other unwanted effects in ongoing conflicts especially when imposed from the international level into domestic situations in spite of its guarantees of "ethnic neutrality."[**][††]

> Triadic rule making (what lawyers would call judicial lawmaking) is self-perpetuating and – for judges – self-aggrandizing, additional rules feed ever more litigations, which generates even more disputes, and an ever greater reliance on judicial structures, both international and domestic. The result is a 'virtuous circle' that can lead, as it has in Europe and could do so elsewhere, to the 'judicialization of politics.'[‡‡]

---

[*] G. Gallón, The International Criminal Court and the Challenge of Deterrence, in D. Shelton (ed.), International Crimes, Peace and Human Rights: The Role of the International Criminal Court, at 95-6 (Transnational Publishers 2000).

[†] Ibid., at 100 and 102.

[‡] J.R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 Law and Contemporary Problems 167, at 175-6 (2001).

[§] See Gallón, *supra* note 62, at 100 and 102

[**] E. Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 Colum. J. Transnat'l L. 801, at 834-835 (2005-2006).

[††] B. Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. Int'l L. & Pol. 679, at 687 (1999).

[‡‡] J. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex. Int'l L. J. 410, at 410 (2003).

Also the UN has contributed to these ends and has taken the initiative to create an ICC. States that have "often transformed from salutary associations of mutual protection and the promotion of the common good into instruments of terror, crime, and 'administrative massacre'" are members of the UN which itself wanted to establish such international criminal body prosecuting those violations.[*] The fact that many of these same UN member states are part of the ICC undermines the credibility of their intentions and underlines the presence of possible agendas of not pursuing any communitarian goals at all.

In this regard, the Prosecutor's assessment of the admissibility of a case does not necessarily reflect the object and purpose of the Rome Statute; in particular for requests of those states still holding possible suspects in their custody (cf. Democratic Republic of the Congo) or wanting to judge them in accordance with their own reconciliatory traditions (cf. Uganda) (i.e. self-referrals) or even for UNSC referrals. The UNSC made its first referral under Article 13(b) on 31 March 2005 regarding the crisis situation in Darfur, Sudan.[†] The institutional framework between the ICC and UNSC allows this and the UNSC would definitely take advantage of it, especially when

> member states of the Security Council will likely defer to regional authorities when their political interests are at stake, even when these authorities clearly lack the resources to stop the mass killings. Offsetting this factor will likely mean an increase in the number of developing countries on the Security Council, in order to pressure the other permanent members to refer a situation to the ICC.[‡]

Consequently, the UNSC can circumvent the search for a political or security solution as has been shown in the Darfur conflict where no real consensus could be found to extend the UN peacekeeping operations and simply refer the situation to the ICC, who has not the

[*] J.M. Czarnetzky and R.J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 Notre Dame L. Rev. 55, at 55-6 (2003-2004).
[†] U.N. Doc. S/RES/1593 (2005).
[‡] See Roach, *supra* note 16, at 432.

means to impose its jurisdiction on a country who might be quite hesitant to cooperate with the investigation. Furthermore, UNSC Resolution 1593 was "a response to Sudan repeatedly failing to live up to the promises it made."[*] Nonetheless, the public opinion would be pleased that the responsible international actors are preoccupied with this matters but concrete progress will not be made given the reluctance to find a solution not for a criminal but for a political problem where high ranking officials of a state are involved.[†] Furthermore, the inclusion of such countries within the institutional framework of collective security and criminal justice makes them subservient to the power and control of its creators and thus object of "selective enforcement of the law."[‡]

(3) The ICC and UNSC: Ever Enemies

Although the Court and its increasing amount of support from small and medium states can counter the strong opposition of powerful nations and influence their policies, the latter remain standing above the law and impose their sovereign will on the community of states through their permanent membership in the UNSC.[§] The ICC

> has an almost symbiotic relationship with the Security Council by dint of the problem surrounding who decides what constitutes aggression, the right of the Security Council to determine territorial and personal jurisdiction, as well as to initiate an investigation and prosecution, and also the rights to

[*] R. Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LJIL 195, at 220 (2006).

[†] In particular, the project of the ICC Prosecutor to indict the Sudanese President al-Bashir and to issue an arrest warrant against him. This still needs to be approved by the Pre-Trial Chamber.

[‡] Ibid., at 219; J. Allain, *Orientalism and International Law: The Middle East as the Underclass of the International Legal Order*, 17 LJIL 391, at 395 (2004); See also R. Cryer, *Prosecuting International Crimes*. Selectivity and the International Criminal Law Regime, at 57-59 (Cambridge University Press 2005).

[§] See Schabas, *supra* note 1, at 720.

suspend – and by extension terminate – a prosecution by passing a resolution do so.*

(3.1) Conflicting Legal Arguments in the Fight Against Impunity

(3.1.1) Bilateral Agreements

Article 98 of the Rome Statute permits existing international agreements between states to continue to have their legal effects, especially regarding the non-surrender of the nationals of states not party to the Rome Statute to the ICC who were found in a custodial state. Clearly, the state whose nationals are being held in a custodial state being a member state to the Rome Statute or having agreements with the ICC on a voluntary or ad hoc basis, would prefer to exercise its jurisdiction based on the nationality of the offender of the international crime within its own courts. "The power to impose criminal punishment has been seen as the central prerogative of sovereignty" and cannot be derogated from.† "The intention of Article 98 was to allow the court the attainment of waivers of immunity for prosecution prior to individuals being surrendered over to the ICC, if that individual was covered under an existing international agreement."‡

As regards to peacekeeping missions, the status-of-forces agreements (SOFAs) may include clauses requiring the consent of the sending UN member states not being member states to the Rome Statute "to surrender a person of that State to the Court" as Article 98(2) explicitly stipulates. Such conditions are to be derived as well from the "exclusive criminal jurisdiction for the sending State in status-of-forces agreements."§ Such immunities from international criminal jurisdiction exercised by the ICC do not affect the jurisdictional reach of the Court but are to be situated in the field of "cooperation and

* S. Economides, *The International Criminal Court: Reforming Politics of International Justice*, 38(1) Government and Opposition 29, at 42 (2003).

† See Rabkin, *supra* note 53, at 845.

‡ See Rothe and Mullins, *supra* note 58, at 210.

§ See Bergsmo, *supra* note 20, at 103-4.

surrender of persons to the Court."[*] More concretely, UNSC Resolution 1497 (2003) and its paragraph 7 "may be taken to represent an international agreement for the purposes of Article 98(2) between UN members, undertaken through the instrumentality of the Security Council."[†] Nevertheless, Article 98(2) of the Rome Statute only applies to existing agreements, thus before the entry into force of the Statute and not for those concluded afterwards as UNSC Resolution 1497 testifies. Unmistakably, such agreements limit the jurisdiction of the Court and reflect "the larger contradictions of sovereignty within the international society and the system of international law."[‡] Giving in to requests of surrender of such offenders violates the obligations under the SOFAs.[§]

In this regard, UNSC Resolution 1593 referring the Darfur situation to the ICC took "note of the existence of agreements referred to in Article 98(2) of the Rome Statute" in its preamble but not in its operative binding clauses. Here, a comprise has been made by the UNSC members referring for the first time a situation to the Court but simultaneously reminding the international community of the delicate establishment, recruiting and mission of UN peacekeeping forces and the need to give some jurisdictional guarantees to UN member states contributing to those forces.[**] Only the UNSC could decide whether or not those persons might become "vulnerable to investigation or prosecution by the ICC", especially in the absence of consent of those contributing states not being a party to the Rome Statute and to the jurisdiction of the Court.[††] Likewise, Article 98(2) bilateral agreements restricting the jurisdiction of the ICC can be void

---

[*] O. Elias and A. Quast, *The Relationship between the Security Council and the International Criminal Court in the Light of Resolution 1422 (2002)*, 3 Non-State Actors and International Law 165, at 178 (2003).
[†] See Jain, *supra* note 30, at 249.
[‡] See Rothe and Mullins, *supra* note 58, at 219.
[§] See Franck and Yuhan, *supra* note 61, at 540.
[**] L. Condorelli and A. Ciampi, *Comments on the Security Council Referral of the Situation in Darfur*, 3 Journal of International Criminal Justice 590, at 597-8 (2005).
[††] M. Happold, *Darfur, the Security Council, and the International Criminal Court*, 55 ICLQ 226, at 235 (2006).

when, in virtue of Articles 25 and 103 of the UN Charter, the UNSC refers under Article 13(b) of the Rome Statute a situation involving such protected persons. Of course, the latter would have to be nationals of UN member states which themselves are obliged to comply with and give precedence to the binding UNSC resolutions under Chapter VII of the UN Charter.[*]

(3.1.2) UNSC Deferral

By adopting a resolution under Chapter VII of the UN Charter, the UNSC can according to Article 16 of the Rome Statute defer an "investigation or prosecution of a particular situation" and thus prevent the exercise of jurisdiction by the Court and block its proceedings.[†] The UNSC "can renew these one-year 'stop' orders indefinitely."[‡] This was intended to allow the UNSC to deal with specific sensitive security matters avoiding possible "counterproductive interference" from the ICC.[§] The UNSC "*peut faire prévaloir des raisons notamment politiques pour empêcher le Procureur d'entreprendre des poursuites ou une enquête à propos des crimes les plus graves dont un individu peut se rendre coupable*."[**] Political intervention within a judicial process undermines the possibility of ending impunity.[††] This exemption and its *ex ante* nature accorded by the UNSC regarding situations not to be investigated or prosecuted rather refers to general

[*] D. Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 Journal of International Criminal Justice 333, at 337 (2005).
[†] See Cryer, *supra* note 21, at 279; See Chadwick, *supra* note 5, at 93.
[‡] M.S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression*, 16 Ind. Int'l & Comp. L. Rev. 1, at 6 (2005).
[§] P. Teixeira, The Security Council at the Dawn of the Twenty-First Century: To What Extent Is It Willing and Able to Maintain International Peace and Security?, at 80 (UNIDIR 2003).
[**] E. David, *La Cour Pénale Internationale: Une Cour en Liberté Surveillée?*, 1 International Law Forum 20, at 24 (1999). Free translation: The UNSC "can give reasons, in particular political ones, in order to prevent the Prosecutor to conduct prosecutions for or an investigation in those most heinous crimes an individual can be responsible for."
[††] A.M. Aref, *La Cour Pénale Internationale: Une Nouvelle Perspective pour l'Afrique*, 1 International Law Forum 30, at 33 (1999).

cases where UN peacekeeping forces are involved and not to concrete missions. However, Article 16 of the Rome Statute does not mention any reference to a situation as such, but by analogy with a UNSC referral under Article 13(b) of the Rome Statute and the drafting history one could assume that such deferrals are applicable for *specific* circumstances only.[*]

One needs to bear in mind that UNSC referrals and *propio motu* proceedings have to take into account the "over-arching geo-political considerations, and cultural and ethical relativism," whereas a state referring a situation to the ICC *de facto* takes such necessary steps.[†] Moreover, not only the UNSC has the possibility to prevent investigations or prosecutions to commence, also member states having referred a situation to the Court under Article 13(a) and 14 of the Rome Statute or states having consented on an *ad hoc* basis to the jurisdiction under Article 12.3 of the Rome Statute can withdraw their referral.[‡] Both the right of access to the Court and the right to withdraw a case or prevent a case to be investigated or prosecuted are attributed to states as well as to the UNSC. Such assimilation with states may render the UNSC envious, which preferably stands above the sovereign interests, as it would have enjoyed larger privileges regarding the "jurisdictional reach"[§] of the ICC. Furthermore, these UNSC deferral resolutions adopted under Chapter VII of the UN Charter are measures wanting to achieve the maintenance and restoration of international peace and security and "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."[**] This obligation under the UN Charter for UN member

---

[*] See Olasolo, *supra* note 32, at 126; See Elias and Quast, *supra* note 79, at 176; R. Lavalle, *A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court*, 14 Criminal Law Forum 195, at 211 (2003).
[†] See Chadwick, *supra* note 5, at 94.
[‡] A. Maged, *Withdrawal of Referrals – A Serious Challenge to the Function of the ICC*, 6 International Criminal Law Review 419, at 420 (2006).
[§] See Olasolo, *supra* note 27, at 299.
[**] U.N. Charter, Articles 48(2), 25, 103; See Sarooshi, *supra* note 3, at 107-8.

states prevails over their obligation of cooperation under the Rome Statute and thus renders the implementation of an ICC's decision ineffective.

In this respect, already two weeks after the entry into force of the Rome Statute, the UNSC has adopted resolution 1422[*] deferring the investigation into or the prosecution of UN peacekeeping forces having allegedly committed one of the core international crimes over which the Court has jurisdiction and

> should be read to request a violation of the ICC Statute. The UN Charter asserts direct UN authority to restrict or compel actions by other international organizations in the case of 'regional arrangements or agencies' for dealing with regional issues of peace and security. Such agencies shall not take enforcement action 'without the authorization of the Security Council'. [Nowhere do] UN Charter, Chapter VIII, Arts. 52, 53 [...] purport to authorize other international organizations to perform acts beyond those authorized in their own constituent documents.[†]

The overall objective of UNSC Resolution 1422 and its renewal by Resolution 1487 was to prevent "the hampering of activities of United Nations peacekeeping and other operations that may arise by discouraging contributions to such operations from Member States that are not party to the ICC Statute" in order to have sufficient troop levels able to maintain or restore international peace and security as envisaged under Chapter VII of the UN Charter.[‡§] Still, any immunity granted by the UNSC or through the exclusive jurisdiction of the sending non- member state to the Rome Statute contravenes with Article 27 of the Rome Statute which accords jurisdiction to the Court irrespective of the immunities of official capacities of the alleged offenders.[**] Although one might expect that UN peacekeepers

---

[*] U.N. Doc. S/RES/1422 (2002).

[†] See Gallant, *supra* note 14, at 570.

[‡] U.N. Doc. S/RES/1487 (2003); See Elias and Quast, *supra* note 79, at 185.

[§] See Elias and Quast, *supra* note 79, at 171; See Jain, *supra* note 30, at 245.

[**] Rome Statute, Article 27; See Elias and Quast, *supra* note 79, at 179; C. Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in*

do not commit those international crimes giving rise to peremptory obligations, the "denial of an international forum for prosecuting their commission means that the Security Council legitimizes impunity for their breach."[*]

Although Article 16 of the Rome Statute does not explicitly make reference to the deferral of existing investigations or prosecutions when the UNSC adopts a resolution under Chapter VII of the UN Charter, the UNSC has actually deferred possible future investigations or prosecutions from the jurisdiction of the ICC. This might render the deferral non-valid and consequently non-binding upon the Court. If a request for deferral had a legitimate object, the Court's independence would remain untouched as "unconstrained actions"[†] of the UNSC would make the ICC totally subservient to its partner international organization. In particular, UNSC resolutions imposing UN members not to further cooperate with the ICC, in virtue of Article 25 and 103 of the UN Charter, override the obligation for state parties to the Rome Statute to cooperate as Article 86 of the same Statute dictates.[‡] Yet, such precedence of UN Charter obligations over other treaty obligations assumed by its UN member states does not exempt the UNSC to act *ultra vires* or to ignore peremptory norms, i.e. *jus cogens*, as prescribed in Article 53 of the Vienna Convention on the Law of Treaties. Of course, both descending (*jus cogens*) and ascending (state's domestic jurisdiction) limitations upon the UNSC's actions are to be balanced especially when the internal affairs of a country have international repercussions for the world's peace and security.[§] For those reasons and in virtue of

---

Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status, 24 Berkeley J. Int'l L. 650, at 658 (2006).

[*] A. Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 Tex. Int'l L. J. 263, at 287 and 293 (2004-2005).

[†] See Gallant, *supra* note 14, at 573-5.

[‡] See Sarooshi, *supra* note 3, at 119.

[§] See Cryer, *supra* note 30, at 170-1; See more M. Koskenniemi, From Apology to Utopia. *The Structure of International Legal Argument* (Cambridge University Press 2005).

its *compétence de la compétence* the Court can review such deferral because its scope affects the jurisdiction of the Court.[*]

The UNSC can even request the International Court of Justice (ICJ) for an advisory opinion whether the UNSC has legally adopted a resolution of deferral under the UN Charter and not under Article 16 of the Rome Statute. This "system of mutual respect"[†] upholds the observation of both constituent documents by its organs. Interference within another's legal regime must be avoided for the sake of maintaining a good relationship. Article 16 of the Rome Statute provides that "the appropriate vehicle for the future balancing of interests of international peace and justice mandates, and recognises that the Security Council is the proper *forum*."[‡] However, this provision rather gives the UNSC the right to approve ICC action to start its proceedings especially regarding

> situations which present the most compelling case for international prosecution [and] are almost inevitably ones with which the Security Council is concerned because they affect international peace and security, hence the importance of recognising the Council's mandate in this area.[§]

(3.1.3) Funding of UNSC Referrals

Regarding the funding of UNSC referrals to the Court, Article 115(b) of the Rome Statute considers that those expenses should be paid by the UN in accordance with the internal institutional regulations set forward in the UN Charter where the United Nations General Assembly (UNGA) has primary responsibility in budgetary matters according to its Article 17. However, no provisions of the Rome Statute impose legal obligations upon the UN to pay the UNSC referral and the subsequent proceedings before the Court.[**]

---

[*] See Elias and Quast, *supra* note 79, at 181; See Condorelli and Villalpando, *supra* note 31, at 650..

[†] See Gallant, *supra* note 14, at 578-9.

[‡] See Sarooshi, *supra* note 3, at 105-6; See Bergsmo, *supra* note 20, at 112. (Emphasis added)

[§] See Gowlland-Debbas, *supra* note 12, at 108.

[**] See Gallant, *supra* note 14, at 575.

Furthermore, the approval of funds provided to the ICC by the UNGA "shall be subject to separate arrangements."[*] Nonetheless, it is unlikely that the UNSC "would want to see its international judicial intervention action through referral of a situation to the Court to become ineffective due to the lack of material resources."[†] Still, the UNSC Resolution 1593 adopted under Chapter VII of the UN Charter referring the Darfur situation to the ICC

> recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.[‡]

However, such determination by the UNSC regarding budgetary matters would not be in accordance with the spirit of the Rome Statute nor with the repartition of competences between the organs of the UN family. Thus, adopting such resolutions contravenes with Article 17 of the UN Charter recognizing the UNGA's responsibility regarding the costs to be borne by the UN.[§] Nonetheless, UNSC Resolution 1593 does not make any reference to Article 13(b) of the Rome Statute giving it the power to refer a situation to the ICC and might be understood to avoid to bear the costs of referrals mentioned under this article. On the contrary, the non-operative clauses of its Preamble do refer to Article 16 expressing the legal basis for wanting to exempt UN peacekeeping forces of sending states not party to the Rome Statute in its binding clause 6.[**] Although the UNSC denied financial support to the Court, it obliged "Sudan and all other parties

---

[*] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 13, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. (last visited 17 October 2008)

[†] See Bergsmo, *supra* note 20, at 109-10; See Cryer, *supra* note 72, at 206.

[‡] U.N. Doc. S/RES/1593 (2005), para. 7; See Heyder, *supra* note 100, at 656.

[§] W.M. Reisman, *On Paying the Piper: Financial Responsibility for Security Council Referral to the International Criminal Court*, 99(3) AJIL 615, at 617 (2005).

[**] U.N. Doc. S/RES/1593 (2005), para. 6; See Condorelli and Ciampi, *supra* note 83, at 592.

to the conflict in Darfur" to continue to fully cooperate with the OTP and the ICC.

(3.2) Political Disagreement on the Realisation of the Impunity Goals

(3.2.1) Competitive Prerogatives

The international adjudication of offenders within governmental circles remains a sensitive political issue. Sovereign domestic values are to be upheld and may not be undermined on the international plane. Although the UN is an international governmental organization assembling state interests and canalizing them for collective goals, its member states might be quite reluctant to give in and allow a supranational political process to influence their conduct. Though, such combined action improves "effective prosecution of international criminals"[*] on behalf of the international community. Powerful nations would not permit to subject their sovereign prerogatives of prosecuting their own nationals to an international judicial body whose constituent document sets aside the national interests for the sake of the exercise of its powers independently from its members. The ICJ's *Arrest Warrant* case has backfired on the idea of universal jurisdiction to be granted to the ICC as sovereign states are functioning in a Vattelian constellation.[†] However, as Article 27 of the Rome Statute dictates, the international immunity of state officials is only enforceable within interstate horizontal relationships whereas its invocation before international courts is irrelevant.[‡] In addition, state parties to the Rome Statute might grant immunity from prosecution of heads of states in their own national jurisdiction as customary law would proscribe them so, but they would be obliged under the Statute to surrender them to the ICC; this would automatically trigger the complementarity regime of the Court.

---

[*] See Bassiouni, *supra* note 2, at 13-4.
[†] See Bekou, *supra* note 29, at 54.
[‡] Rome Statute, Article 27; D. Akande, *International Law Immunities and the International Criminal Court*, 98 AJIL 407, at 416-7 (2004).

In addition, the precedence of international criminal justice over domestic prosecutions bypasses the principle of complementarity as the Prosecutor applies the functional test to whether domestic criminal proceedings are taking place.[*] According to Article 17 of the Rome Statute, the Court shall determine the admissibility of a case taking into consideration the unwillingness and inability of the forum state to prosecute the alleged offender.[†] Of course, the Prosecutor needs to have a reasonable basis to proceed under the Rome Statute to initiate an investigation.[‡] Still, those states having criminal jurisdiction (territorial or national) have to be notified in accordance with Article 18 of the Rome Statute and on their turn they can inform the Court that they are investigating or have investigated their nationals for those international crimes the Prosecutor initially wanted to investigate.[§] Consequently, the checks and balances exercised by the states defending their sovereign will, prevent the Prosecutor in particular to commence his *proprio motu* proceedings as “a moral duty” to punish those international crimes affecting the international community as a whole.[**] Such authority supersedes national instances and allows the Prosecutor to conduct an independent and impartial investigation and prosecution.

The Darfur referral by the UNSC also included the exclusion of the Court’s jurisdiction over UN peacekeepers from those contributing states not being member states to the Rome Statute. Such limitation of the jurisdictional reach of the ICC on the offenders of those international core crimes within its Statute, might bias the OTP as it would only be seized of such a situation where those possibly responsible are not subjected to investigations or prosecutions and *de facto* has to take side in the conflict submitted to its discretionary powers to investigate and prosecute. This would undermine the independence and impartiality of the Court as a situation minus those

[*] See Rabkin, *supra* note 53, at 846.
[†] Rome Statute, Article 17.
[‡] Rome Statute, Article 53.
[§] Rome Statute, Article 18.
[**] See Rabkin, *supra* note 53, at 846.

peacekeepers is referred and not a complete situation as Article 13(b) of the Rome Statute prescribes.[*] The exclusive criminal jurisdiction given to the sending state excludes ICC jurisdiction irrelevant from its ICC membership. Thus, potential "exercise of universal jurisdiction by the ICC as well as the courts of all other states is not merely suspended, but permanently barred."[†] Such attitude of the UNSC can be understood as the USA abstained on this referral resolution and rather stated that "the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions."[‡] Apparently, both opponents raise independence and impartiality arguments, each of them justifying their descending and ascending positions.

Moreover, the UNSC's creation of *ad hoc* tribunals advocates the *ex post facto* adjudication of international criminal responsibility whereas the ICC's ambitions not only envisage the repression functions of the court but also its preventive and deterrence effects. Such divergent approaches are part of the all inclusive objective of ending impunity. Still, their respective exercise of responsibilities may hinder the achievement of their concrete goals as each organization would like to profile itself by attributing all merits to itself.[§] Especially the intention of building an extensive (normative and cooperative) network among non-state actors (NGOs), state parties to the Rome Statute, non-state parties and other international organizations as envisaged by the OTP, is to facilitate the implementation of a positive complementarity regime capable of ending impunity and thus further atrocities emerging from the collapse of international peace and security. The UNSC might not like to accept another competitive international body to take over its primary responsibilities.[**] In this respect, the

---

[*] See Bekou, *supra* note 29, at 59.
[†] See Condorelli and Ciampi, *supra* note 83, at 596.
[‡] U.N. Doc. S/PV. 5158, at 3 (Mrs Patterson).
[§] See Olasolo, *supra* note 27, at 301.
[**] See Economides, *supra* note 75, at 43.

role of NGOs within the "future of global governance"[*] has been criticized by the realists on the topic of who may participate in the international political and legal order. The USA in particular as a persistent opponent continues to challenge the institutional and cooperative bounds between the ICC and UNSC[†] and warns about the "risk of abuse of the international constitutional authority [functioning] without the application of checks and balances that would be normally be expected."[‡]

The UNSC Resolution 1497 (2003), in contrast with the deferral resolutions 1422 and its renewal by 1487, also attributes exclusive criminal jurisdiction to the sending UN member states not party to the Rome Statute. This discriminatory distinction between the supposedly equal sovereign UN member states and the lack of linkage between the international criminal jurisdiction exemption for those UN peacekeepers and the situation "warranting the exercise of Chapter VII powers, demonstrate the *ultra vires* and unconstitutional action of the UNSC becoming "devoid of any binding force."[§] However,

> national disciplinary law and also in part national criminal law are designed to sanction violations of service obligations existing vis-à-vis the State [and which] can be used in order to enforce obligations vis-à-vis the UN. To the extent that these rules [...] serve the purpose of enforcing international legal rules and sanctioning violations of international law, they no longer deal with the international obligations of the State, but rather with the decisive international obligations of the UN. National criminal law is thus used to

---

[*] B. Maragia, *Almost There: Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics*, 2 Non-State Actors and International Law 301, at 303-4 (2002).

[†] See Roach, *supra* note 16, at 436.

[‡] M. Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78(4) International Affairs 693, at 703 (2002).

[§] S. Zappalà, *Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC*, 1 Journal of International Criminal Justice 671, at 674-5 (2003); See Lavalle, *supra* note 91 at 212; See Jain, *supra* note 30, at 252.

> implement the international obligations of the UN. This is necessary as the UN is internationally responsible for the force.[*]

Moreover, no specific reference to Article 16 of the Rome Statute "as the basis for the Security Council's termination of ICC jurisdiction" has been made in the UNSC Resolution or in its clauses for renewal.[†] This frustrates the Court and avoids the criticisms of UNSC Resolution 1422.

(3.2.2) Determination and Criminalization of Aggression

Although the Review Conference is to be held in 2009, major discussion on who should determine whether a crime of aggression has been committed, it shows how difficult it is to reconcile a possible previous political determination by the UNSC of an act of aggression and its complementary criminalization of those actions and leaderships' responsibility. The latter, however, are not justifiable yet before the ICC.[‡] Still, an Article 39 of the UN Charter determination of an act of aggression with a consecutive necessary referral to the OTP would link "the peace and security mandate of the Security Council to the justice mandate of the ICC."[§] Though, the former will examine such prior determination of an act of aggression by a political body first and the latter will look at its compliance with the law before it can justify the initiation of an investigation.[**] Nothing under the Rome Statute forbids the ICC to exercise its *competence de la compétence* in order to review the UNSC resolution having triggered the ICC's jurisdiction as was stated in the *Tadić* case before the ICTY; the latter actively verified whether the UNSC acted within its powers.[††] The Court could only do so in accordance "with the relevant provisions" of the UN Charter if an agreement would be

---

[*] See Bothe, *supra* note 50, at 691.
[†] See Abass, *supra* note 101, at 266-7 and 271-2.
[‡] See Chadwick, *supra* note 5, at 90.
[§] See Sarooshi, *supra* note 3, at 100.
[**] See Gowlland-Debbas, *supra* note 12, at 105.
[††] See Sarooshi, *supra* note 3, at 114; See Cryer, *supra* note 30, at 165.

found on the elements of the crime and on the conditions under which the Court could exercise its jurisdiction on this crime of aggression.[*]

> While it is necessary to ensure that the ICC's work does not adversely affect the exercise of the SC's Chapter VII powers, the recognition of the binding force of a SC determination in criminal proceedings would neglect the political role of the SC as well as the necessary independence of the ICC.[†]

Although such quasi-judicial role empowering the UNSC to define aggression in order to suppress it is perhaps its primary responsibility under Article 39 of the UN Charter, its immobilisation can as the UNGA's Uniting for Peace Resolution has demonstrated, enable the UNGA to convene, discuss any recommendation on those issues the UNSC could not deal with as Article 12 of the UN Charter implies and thus define those situations in order to formulate solutions.[‡] Also the ICJ can both in contentious cases binding *inter partes* as it did in some way in the *Nicaragua* case and in non-binding advisory opinions before its jurisdiction determine whether those acts have taken place in order to conclude on state responsibility.[§] Furthermore, states themselves can defend their territorial integrity when being the victim of an act of aggression by another state after having it determined accordingly. Of course, Article 51 of the UN Charter permits self-defence when attacked but remains "subject to review" by the UNSC.[**] The USA especially deploys its armed forces to defend its "national interests around the world",[††] to protect the human rights of others, "to prevent the spread of weapons of mass destruction, and to enforce international law."[‡‡] Such interventions, however, may not be

---

[*] Rome Statute, Article 5(2).
[†] J. Frowein and N. Krisch, Article 39, in B. Simma (ed.), The Charter of the United Nations. A Commentary, at 722 (Oxford University Press 2002).
[‡] See Schabas, *supra* note 1, at 717.
[§] Y. Dinstein, War, Aggression and Self-Defence, at 127 (Grotius 1995).
[**] See Stein, *supra* note 87, at 7-14.
[††] See Bolton, *supra* note 64, at 169.
[‡‡] D. Scheffer, The United States and the ICC, in D. Shelton (ed.), International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, at 206 (Transnational Publishers 2000).

defined as aggression. Clearly, those tensions between the UNSC and the rest of the world express "[*les soucis*] *des grandes puissances de conserver au Conseil de sécurité son monopole dans la qualification de l'agression et à l'obstination des États du Tiers Monde de le contester*."[*]

Moreover, the obligation under the UN Charter of the UNSC to determine whether acts of aggression have been committed contradicts with Article 66 of the Rome Statute upholding the presumption of the innocence. A preliminary binding determination infringes upon the rights of defence of the accused.[†] Until now, Chapter VII of the UN Charter "stipulates that the Security Council has predominant rights in determining what constitutes an act of aggression, which is considered an act of state (and not of an individual) by UN General Assembly Resolution 3314."[‡] Only such adoption under Chapter VII guarantees "effective action" although those "decisions in the interest of peace and security will be based exclusively on (national) political considerations" and rather reflect the fear of setting precedents which might hold the member states and their leaders responsible for future actions, especially regarding the past experiences of humanitarian intervention and the current global war on terror.[§][**] Regardless of the reasons for the inconsistent behaviour which the UNSC displays,

> the application of the selective approach that has characterised the Council's resolutions on collective security to criminal justice would be unpalatable. It

---

[*] A. Pellet, *Pour la Cour Pénale Internationale, quand même! – Quelques Remarques sur sa Compétence et sa Saisine*, 1 International Criminal Law Review 91, at 103 (2001). Free translation: Clearly, those tensions between the UNSC and the rest of the world express "the concerns of great powers to uphold the monopoly of the Security Council to determine aggression and to leave it to Third World states to contest this authority."

[†] See Chadwick, *supra* note 5, at 97.

[‡] See Economides, *supra* note 75, at 39.

[§] See Sarooshi, *supra* note 3, at 101.

[**] E. De Wet, The Chapter VII Powers of the United Nations Security Council, at 134-135 (Hart 2004); M.T. Karoubi, Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century, at 224 (Ashgate 2005).

> would make a mockery of the guarantees provided by the Rome Statute and other human rights instruments of equality before the law.[*]

Hence, the determination of aggression exclusively made by the UNSC undermines the sovereign equality of the UN member states because of the privileged treatment given by the permanent members to their leaders for those specific crimes leading to an "effective immunity" shielding them from international criminal justice in particular through deferrals under Article 16 of the Rome Statute.[†] Previously, the UNSC demonstrated it could use its prerogatives to establish international criminal tribunals responsible for their actions to the UNSC itself. This type of control both in terms of providing the legal instruments, i.e. the Statutes as the applicable law, and of appointing judges on the bench, could be undermined, as the ICC would be accountable to the international community as a whole instead. No longer international criminal justice would need to adhere to the standards of criminalization of select group of states. Even after the Second World War, when victors' justice ruled, the uniqueness of the right of aggression and its criminalization respectively leading to state and individual criminal responsibility would now be impossible to apply within a globalised world where political and military decisions for policing the world are dictated by only some states under the veil of collective security and "international morality."[‡§] Both the "controversy over the definition of aggression" and the denial of respect for the autonomy of states the same UN Charter stands for, prove that the international legal order "lacks this sovereign force" whereas the "Nuremberg Charter rests on the principle that

---

[*] C. McDougall, *When Law and Reality Clash – The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression*, 7 International Criminal Law Review 277, at 312 (2007); Y. Beigbeder, Judging Criminal Leaders: The Slow Erosion of Impunity, at 148 (Martinus Nijhoff Publishers 2002).

[†] See Stein, *supra* note 99, at 7-14.

[‡] J.P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals*, 18 EJIL 277, at 284 (2007).

[§] See Dinstein, *supra* note 141, at 117.

'individuals have international duties which transcend the national obligations of obedience imposed by individual states'."[*][†][‡]

Despite the selective nature of the International Military Tribunals, they did have some universal aspiration as they "ingested the criminality of war into general international law."[§] One could infer that the evolution and specialisation of this body of law into different branches have an unexpected result where the exclusion of individual criminal responsibility for wars of aggression overrules the general legal argumentation especially when the jurisprudence stated that

> war is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[**]

Consequently, only a defensive war would be the "legal form of aggression" which has to be determined within the framework of the UN Charter and consequently any offensive war would be illegal. Furthermore, before, the 1928 Kellogg-Briand Pact allowed "a state to determine for itself when it is being subjected to aggressive war and is entitled to defend itself by means of a defensive war."[††] Although the law on the use of force, i.e. *jus ad bellum*, refers to possible aggressions, present international criminal justice would like to criminalize those leaderships involved in those aggressions on the political, military or even economic level. Nevertheless, there are still actors on the international plane who would like to remain

---

[*] See Cryer, *supra* note 73, at 244.

[†] A. Orford, Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law, at 72 (Cambridge University Press 2003).

[‡] G.M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. Sch. J. Int'l & Comp. L. 413, at 422 (1999-2000).

[§] See Dinstein, *supra* note 141, at121.

[**] International Military Tribunal (*Nuremberg*), Judgment (1946), 1 *I.M.T.* 171, at 186.

[††] See Dawson, *supra* note 156, at 432.

unaccountable through the establishment of legal divisions among the different shareholders and stakeholders.

(4) Conclusion

From the beginning the UN took the initiative to establish a permanent international criminal court for the purpose of ending the previous impunity of individual offenders of the international core crimes. The support by many of its member states having become party to the Rome Statute demonstrates the bound between the UN and the ICC in terms of triggering jurisdiction and of cooperation between the collective security and the international criminal justice domain. Nevertheless, both legal as well as political tensions have already emerged before any real judicial practice before the Court.

The problems and understandings derived from the relationship between an enforcement body and a criminal court which depends on the former's support show the convergent or divergent visions of both organizations regarding the common concerns of the international community as a whole and their recipes to find a solution for those legal problems. Given the absence of a *lex specialis*, *i.e.* international criminal law, regarding aggression, general public international law should be used instead and provide more legal security within the existing discourses.

However, the whole creation, structure, interpretation and application of international law by the different participants on the international plane rather emphasize its limited protection. Upholding the rule of law within a global order under threat of opposing violent and terrorist actors might be set aside for the sake of protecting the status quo. In such atmosphere principles do not guide anymore and become void of any substance at the detriment of the international protection of all peoples in this world. Only by pursuing genuine universal objectives of protection for all, peace and security of mankind can be protected by criminal law and its forums as long as descending and ascending legal arguments requiring or denying its respect are not conflicting.

Mind the Gap:

UK Law on Genocide, War Crimes and Crimes Against Humanity, and Prospective Jurisdiction of the ICC

TARA O'LEARY[*]

Introduction

FOR MANY PRACTITIONERS, academics, and students, the prospective jurisdiction of the International Criminal Court (ICC) as outlined under Article 11 of its Statute is a straightforward starting point for the jurisdiction and work of the Court. However, when combined with shortcomings and territorial restrictions in domestic law, the intersection of international and domestic law with regard to prosecution of international crimes can create loopholes and exceptions. This has become a matter of particular concern in the United Kingdom in recent times, with the realization that suspected perpetrators of war crimes, genocide and crimes against humanity may escape prosecution for their acts by falling between the jurisdictional gaps of international and domestic law.

This paper aims to give a brief overview of the jurisdiction of the International Criminal Court, its limitations and the reasoning behind them, followed by a summary of the provisions of UK domestic law regarding these offences and the problems created by territorial and jurisdictional limitation. I will conclude with a comment on proposed law reform in this area.

ICC and Temporal Jurisdiction

The ICC is a purely prospective institution in that it has no retrospective powers over actions or crimes committed before the coming into force of its Statute. This was a result of the negotiations of the Rome Treaty, in which it emerged that the majority of states

---

[*] LLB in Law and European Studies, University of Limerick. LLM in Public International Law candidate at The London School of Economics & Political Science

were not willing to allow investigation into past practices. In this respect, the existing court differs from all of its predecessors in international criminal law, which were created with the prime intention of prosecuting atrocities committed prior to their establishment. For example, both the Nuremberg and Tokyo trials were purely retrospective and faced considerable criticism of creating *ex post facto* law, while the International Criminal Tribunal for the former Yugoslavia is retroactive, along with the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).[*]

The ICC does not enjoy jurisdiction over offences committed before the entry into force of the Statute of the International Criminal Court on 1 July 2002, as per Article 11(1) of that statute. This is reinforced by Article 24, which provides that no person shall be criminally liable for conduct prior to the entry into force of the Statute.

Furthermore, Article 11(2) provides that with regard to states who become a party to the Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the Statute has entered into force for that State. However, that State may make a declaration under Article 12(3), accepting the exercise of the jurisdiction of the Court, to fill this temporal gap if necessary or desired. Iain Cameron states that this provision was designed for new governments that had recently overthrown a tyrannical regime.[†] Such a declaration was made by Uganda on 27 February 2004: labeled "Declaration on Temporal Jurisdiction," the legality of which seems to have been assumed by the Court in the *Joseph Kony* case.

These conditions were upheld in the *Lubanga* case, where Pre-Trial Chamber I considered the criteria of the applicant fulfilled by falling into the temporal jurisdiction envisaged by the Statute, while Security

---

[*] Schabas, William A., *An Introduction to the International Criminal Court,* 3rd Ed, (2007: CUP, Cambridge), p. 65

[†] McGoldrick, Dominic, Rowe, Peter, and Donnelly, Eric, eds., *The Permanent International Criminal Court*, (2004: Hart, Oxford), pg70.

Council Resolution 1693 (2005) on Darfur referred explicitly to "the situation in Darfur since 1 July 2002."[*][†] This was also part of the Chief Prosecutor's reasoning in declining to proceed with investigations into crimes committed in Venezuela: "These events occurred prior to the temporal jurisdiction of the Court and cannot be considered as the basis for any investigation under the Statute."[‡]

These principles are undoubtedly derived from the maxim *nullum crimen nulla poena sine lege*—"no punishment without a law"—which embodies the general prohibition on retroactive crimes held to be a fundamental principle of international law. No such crimes can be prosecuted if they were not recognized as such at the time they were committed. However, the Nuremberg trials constituted a precedent, creating an exception to the rule in certain exceptional cases based on the sheer magnitude and heinous nature of the crimes involved. As Hans Kelsen argued, since the maxim was a principle of justice, it would be unjust to allow Nazi war criminals to go unpunished.[§] This was to be later upheld by the Eichmann trial. Similarly, Article 15(2) of the ICCPR stipulates that: '[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law recognized by the community of nations.*'

The weighty emphasis placed by international law on justice, universal jurisdiction and individual criminal liability for the most heinous of war crimes since World War II would seem to suggest the possible erosion of the *nullum crimen* maxim. It could thus be inferred that the prohibition of retroactive jurisdiction and re-affirmation of the maxim in the ICC Statute was a political concession, the result of the negotiations leading to the agreement on the Statute, taking into

---

[*] *Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 Febrary 2006, para. 26

[†] UN Doc. S/RES/1693 (2005), para. 1.

[‡] Cited in Schabas, *An Introduction to the ICC,* pg67

[§] Kelsen, Hans, "Will the Judgement in the Nuremberg Trial Consitute a Precedent in International Law?", (1947) 1 *International Law Quarterly* 153

account sensitive political issues for many of the states parties. As Schabas notes, to do otherwise "was unmarketable and [the idea] was never seriously entertained during the drafting [process]."[*]

The *nullum crimen* maxim is specifically provided for by Articles 22 and 23; Article 22(1) declares, "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Schabas sees this inclusion as providing for the situation where a State makes an *ad hoc* declaration recognizing the jurisdiction of the Court under Article 12(3) with respect to a crime committed in the past. However, he goes on to note that the standard adopted by the European Court of Human Rights is that the retroactive crime must have been reasonably foreseeable, and that this is likely to be the approach adopted by the prosecutor.[†] It is submitted that this was also, in substance, the approach adopted by the Nuremberg, Tokyo and Eichmann trials.

The United Kingdom and Humanitarian Crimes

The *nullum crimen* maxim becomes particularly relevant, however, when it is placed at the intersection between the ICC Statute and the implementation of its provisions at the domestic level. Britain's ratification of the ICC Statute led to the enactment of the *International Criminal Court Act 2001* (*ICC Act*), which as well as recognizing the authority of the ICC itself, incorporated the criminal offences of 'genocide, crimes against humanity, and war crimes' into British domestic law.

Part II of that Act provides for the procedure to be followed where there is a request for the arrest and surrender of a person alleged to have committed crimes within the jurisdiction of the ICC, and for his extradition and delivery to the court. However, the limited temporal jurisdiction of the Court under Article 11(1) of the ICC Statute means

[*] Schabas, *An Introduction to the ICC,* pg68
[†] Schabas, *ibid,* pg69-70

that the *ICC Act* cannot be applied to crimes that took place before the entry into force of the Statute in 2002.

The intersection of these principles with other British domestic legislation pertaining to international conventions and war crimes has resulted in legal shortcomings and loopholes that have become a matter of serious concern, due to the real possibility that perpetrators of international crimes living in the United Kingdom fall outside the scope of both ICC and domestic jurisdiction and cannot be prosecuted for their crimes. John Jones has referred to English law as "currently a patchwork of norms, with little rational basis underlying which crimes are the subject of universal jurisdiction and which are not."[*] Different criteria and laws apply to different branches of international crimes, including genocide, war crimes, and crimes against humanity, as a result of domestic legislation giving effect to Britain's obligations under various Conventions and treaties.

For instance, a major shortcoming in the law is that war crimes, which are offences under section 51 of the *ICC Act*, incorporating the definition of Article 8 of the ICC Statute, may only be prosecuted provided that (a) the crimes were committed after 1 July 2002—when the ICC Statute entered into force—and (b) that the accused is a UK resident or national:

> *(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.*
> *(2) This section applies to acts committed:*
>> *(a) In England or Wales, or*
>> *(b) Outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.*[†]

[*] Jones, John, Legal Opinion Provided to the Aegis Trust, October 2008 – available at http://www.aegistrust.org/images/PDFs/Opinion.pdf, p1
[†] ICC Act, Article 51.

Thus, in addition to the temporal restrictions of the Court, the ICC Act in practice severely restricts the jurisdiction of the United Kingdom to prosecute perpetrators for crimes committed after 1 July 2002. The limitations implicit in the legislation are further compounded by the lack of any definition of the term "United Kingdom resident." This ambiguity in the law could constitute a significant hurdle for a British court attempting to indict war criminals found in the UK.

The crimes listed under Article 8 of the ICC Statute fall into three distinct categories: war crimes, crimes against humanity and genocide. In addition, for the purposes of this paper I feel it is necessary to briefly treat of the international crimes that currently enjoy universal jurisdiction under British law.

(1) Universal Jurisdiction under British Law

United Kingdom legislation criminalizing acts which give rise to universal jurisdiction does not consistently comply with the strictest definitions of the crimes, principles of criminal responsibility and defenses in international law.[*] Jurisdiction to prosecute international crimes regardless of the nationality of the perpetrators or of the territory in which the crimes took place exists for a very limited number of offences under British law.

The *War Crimes Act* 1991, concerning acts of homicide committed during the Second World War, could be said to be the only substantial attempt by the legislature to provide for universal jurisdiction. However, it is limited to acts committed specifically in Germany or in German-occupied territory, during the period of the

[*] "Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law", Discussion Paper prepared for Redress, July 2008. Available at http://www.redress.org/documents/Universal%20Jurisdiction%20in%20the%20UK%20Discussion%20Paper%20Final%209July%2008.pdf, p4

war, and only by individuals who have since then become citizens or residents of the UK:

> *Art. 1. Jurisdiction over certain war crimes:*
>
> *(1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence:*
>
> *(a) Was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and*
>
> *(b) Constituted a violation of the laws and customs of war.*
>
> *(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.*

This has resulted in only two prosecutions since its introduction: *R. v. Sawoniuk* and the case of Simeon Serafanowicz.[*][†]

In addition, only two other crimes are recognized as capable of prosecution under truly universal jurisdiction in the UK: torture and hostage taking. Hence section 134 of the *Criminal Justice Act 1988*, giving effect to the 1984 Convention on Torture, applies jurisdiction to "a public official or person acting in an official capacity, whatever his nationality, [who] commits the offence of torture if in the United Kingdom or elsewhere..." This was successfully invoked in the *Pinochet* case.

Similarly, section one of *the Taking of Hostages Act 1982*, which implements the International Convention against the Taking of

[*] [2000] Crim. L.R., pp.505-509;

[†] See Jones, Legal Opinion, p. 7

Hostages of 1979, applies jurisdiction to "a person, whatever his nationality", who engages in acts of hostage taking "in the United Kingdom or elsewhere..." This was cited during the successful prosecution of the accused for acts of hostage taking in the *Zardad* case in 2005.[*]

(2) War Crimes

In addition to the treatment of war crimes under the *War Crimes Act* and under Section 51 of the *ICC Act,* British domestic law relies on the *Geneva Conventions Act 1957* to give effect to its obligations under the Geneva Convention 1949. S1(1) of that act provides that "Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence."

The Convention, in addressing crimes committed during the course of hostilities, required that universal jurisdiction be exercised only for offences committed in international armed conflict and not *internal* armed conflict. Accordingly, they do not expressly require prosecution or extradition of persons suspected of violating common Article 3, which applies solely to situations of "armed conflict not of an international character."

While Section 70 of the *ICC Act* amended the *Geneva Conventions Act* in order to align any prosecutions under the acts, it came into force on 1 September 2001 and hence "grave breaches" of the Convention committed before that date are unaffected by the introduction of *ICC Act*. The *Geneva Conventions (Amendment) Act 1995* extended universal jurisdiction to "grave breaches" of the first Additional Protocol 1977, which concerns international armed conflict, but the Act does not apply to serious violations of the second Additional Protocol, relating

[*] See http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/faryadi-sarwar_zardad_329.html

to the protection of victims of non-international armed conflicts, as that treaty did not criminalize such conduct.

The limitation of the Convention and thus the *Geneva Convention Act* to situations of "international armed conflict" mean that there is not only no obligation, but in addition no jurisdiction for the UK to prosecute perpetrators of international crimes for civil or internal conflicts which took place prior to 2002. Thus in practical terms, war crimes committed in the conflicts in Sri Lanka or Rwanda, etc, could not be prosecuted in the UK.

(3) Crimes Against Humanity

Crimes against humanity are specifically listed under the jurisdiction of the ICC under Article 7 of the ICC Statute. In addition, Article 8(2)(c) and (e) of the Statute include as 'war crimes' violations of (a) article 3 of the Geneva Conventions of 1949; and (b) article 4 of the second Protocol Additional to the Geneva Conventions, so that all of these provisions now form part of British law by virtue of the *ICC Act*.

However, despite the heavy condemnation of crimes against humanity and their central position in international law[*], there has never been a War Crimes Convention and so, correspondingly, there has never been a *War Crimes Act* in the United Kingdom to allow for jurisdiction over and prosecution of such crimes. In fact the advent of the *ICC Act* was the first instance of legislation for crimes against humanity in the UK[†]. This means that any such crimes committed anywhere by any individuals before 2002 cannot be prosecuted here. Such crimes as committed after 2002 can only be prosecuted if firstly, they were committed in Britain, or secondly, if their perpetrators are British citizens or residents.

---

[*] There are currently eleven international texts defining crimes against humanity. In recent years, in addition to the formulation of the ICC definition, the concept of crimes against humanity was developed and extended by the ICTY and ICTR.
[†] Part VII of the *ICC Act* incorporates the Article 7 definition of Crimes Against Humanity into British law, and provides for its prosecution in the jurisdiction of the United Kingdom.

(4) Genocide

Unlike crimes against humanity, genocide was regarded as so inherently horrifying that it was embodied in its own convention, the Genocide Convention 1948. This is perhaps due to its categorization by some as an aggravated form of crimes against humanity, i.e. crimes against humanity committed with the aggravated intent to destroy the group[*].

Originally, this was implemented in British law by the *Genocide Act* of 1969, but repealed by the *ICC Act*. It had provided that a person would be guilty of the offence of genocide if they commit any of the acts set out in Article II of the Genocide Convention with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The text of the Convention is also highly significant in that Article VI provides that a person may be tried by: "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." Certain states have interpreted this as allowing them to confer themselves with universal jurisdiction over crimes of genocide, and some have already recognized genocide as imposing an obligation *erga omnes* on states to exercise jurisdiction: this includes the United States, Germany, Austria, Spain and Belgium[†].

The UK did not grant itself such universal jurisdiction in the 1969 Act, but, more disappointingly, neither did it take the opportunity with the re-enactment of the law under the *ICC Act* to confer such jurisdiction. Under the 2001 Act, crimes of genocide can only be prosecuted in the UK if they occurred after 1 July 2002 and only if the accused is a UK resident or national, or if the genocide occurred in the UK. Again, this means in practice that participants in the Rwandan genocide now living in the UK cannot be prosecuted.

Conclusion

[*] Jones, Legal Opinion, pg9
[†] Redress Discussion Paper, pg7

It is clear from the above outline that the law of the United Kingdom pertaining to international crimes is currently a dissatisfactory state of affairs. As John Jones has commented, "it is patchy and full of anomalies."[*] The issues at hand are considerable and should not be underestimated. According to Aegis Trust, there are currently four suspected Rwandan *genocidaires* in the UK fighting their extradition to Rwanda to face trial. Although British magistrates approved their extradition in June 2008, the process for one suspect was blocked by the ICTR, claiming that he would not receive a fair trial. Both Human Rights Watch and Amnesty have issued reports claiming that extraditions should not take place to Rwanda because of fair trial concerns. If higher British courts block the extradition appeals, neither the ICTR nor British courts will able to prosecute these suspects[†]. In addition, the DPP has referred to the "Hundreds of people [...] screened each year by the Border Agency for suspected involvement in war crimes, crimes against humanity and genocide over the last four years."[‡]

Reform of the law in this area is a pressing concern and has become the subject of increasing pressure in recent months. Along with the Director of Public Prosecutions, legal professionals and NGOs such as Redress[§] have been advocating for reform of the law in this area, the most concrete example of which is a Draft Private Members Bill proposed by Aegis Trust.[**][††][‡‡] The main thrust of these law reform

---

[*] Jones, Legal Opinion, pg10
[†] Aegis Trust, Information pursuant to Proposed Private Member's Bill Strengthening UK Law on
Genocide, War Crimes and Crimes Against Humanity, available at
http://www.aegistrust.org/images/PDFs/Aegis_QA_on_Gaps_in_UK_Law.pdf
[‡] Sir Ken Macdonald QC, DPP, "More than just words? UK law on genocide, war crimes and crimes against humanity," Speech delivered to a meeting of the All Party Parliamentary Group on Genocide Prevention and the Parliamentary Human Rights Group, October 21st 2008
[§] See Discussion Paper, July 2008, *supra* n10
[**] See Sir Ken Macdonald, *ibid*
[††] See Jones, *supra* n9
[‡‡] *Genocide, War Crimes and Crimes Against Humanity (Accountability) Bill*, available at http://www.aegistrust.org/images/PDFs/draft_bill.pdf

proposals centre on a broad extension of jurisdiction with regard to genocide, crimes against humanity and war crimes, so that the law would make it an offence to commit any of those acts, wherever committed and irrespective of the nationality of the accused. This is provided for under Section 5 of the Draft Bill. In order to safeguard the principle of legality, however, this section limits the jurisdiction of the court to persons who are British residents, British citizens, or "a person subsequently found in the United Kingdom, irrespective of their nationality at the time of the offence." In addition, temporal jurisdiction remains somewhat restricted in order to accord with the dates upon which the international conventions entered into force in UK law. For example, only acts of genocide committed after 27 March 1969 could be prosecuted, 1969 being the date upon which the *Genocide Act 1969* entered into force, giving effect to the Genocide Convention 1948 in domestic law.

These temporal restrictions are set out in Section 7 of the Draft Bill:

> *7. No proceedings shall by virtue of this section be brought*
>
> *(a) If the conduct required for the offence of genocide occurred before 27th March 1969*
>
> *(b) If the conduct required for the offences of war crimes was committed before 31st July 1957*
>
> *(c) If the conduct required for the offences of crimes against humanity was committed before 1st January 1991.*

To return to the concept of *nullum crimen, nulla poena sine lege,* these limitations should operate to deter objections centering on the creation of *ex post facto* law or retroactive jurisdiction on the part of the legislature. While Kelsen maintained that in England the rule on retroactive laws was never interpreted as a limitation of the sovereign legislative power of Parliament, so that Parliament could always enact a retrospective statute, it is highly unlikely that any objections to the

proposed law on the basis would be upheld.[*] Given that these documents were incorporated into UK law from these dates, it could hardly be argued that offenders could not have known of the illegality of such acts even if no particular offences were provided for in the legislation at the time.

The limitations in United Kingdom law and the gaps in jurisdiction flowing from its relation to international jurisdiction demonstrate some of the hidden flaws of the ICC. While prospective jurisdiction for the Court was no doubt a necessary and realistic political concession, this problem illustrates the limitations inherent in the mandate of the Court itself. In addition, it highlights the reality that it is not, and was never intended to be, a 'cure-all' substitute for national jurisdiction, and that governments cannot delegate the responsibility of legislating for "the crime of crimes" to the Court.

---

[*] Mokhtar, Aly, "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects", 26 *Statute Law Review* 41, pg4

Torture:
The Myth of Universal Jurisdiction and its Failure to Provide Justice for Victims

ANAGHA JOSHI[*]

THIS ARTICLE SEEKS TO highlight the conflict between the prohibition of torture as a *jus cogens* norm and the law of sovereign immunity, which protects states from the jurisdiction of other states. It argues that where acts of torture have been committed by states outside particular circumstances, victims are left without a forum to seek justice. This is due to the lack of an international court or tribunal with jurisdiction to hear such cases and the unwillingness and practical inability of states to entertain such proceedings at the national level. On the one hand, states, in most instances, are unlikely to prosecute their own public officials for acts of torture. On the other, states have been reluctant to prosecute public officials of foreign states for fear of creating an exception to the law of sovereign immunity. Attempts by victims to bring civil claims have also largely failed as national courts have upheld the regime of immunities. The scope of this article does not allow for a thorough discussion of the multitude of relevant case law. Instead, the article seeks to highlight and stimulate discussion on an area where the law has failed to provide justice to victims despite the international community's robust condemnation of the crime.[†]

The prohibition on torture is an accepted *jus cogens* norm.[‡] It is also encapsulated in international human rights instruments, which

---

[*] Legal Practitioner of the Supreme Court of Queensland and previous member of the Office of International Law in the Australian Attorney-General's Department. Currently undertaking an Master of Laws at the LSE, as a research affiliate with the LSE's International Humanitarian Law Project.

[†] See for instance Lord Bingham in the House of Lords case of *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* [2004] UKHL 56 who stated: 'There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the "common enemies of mankind."'

[‡] *Celebici* ICTY T. Ch II 16.11.1998 para 454 and *Furundzija* ICTY T. Ch II 10.12.1998 para 153.

provide that no one may be subjected to torture or cruel, inhuman or degrading treatment or punishment.[*] However, torture is not punishable by international courts or tribunals unless committed under certain conditions.[†] Instead, punishment is relegated to the national level.

Pursuant to customary international law, states may exercise universal jurisdiction over acts of torture.[‡] Article 5 of the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also provides State Parties with broad jurisdiction in relation to acts of torture, including jurisdiction where the alleged offender is present in a territory under the jurisdiction of the State Party and the State Party does not extradite the alleged offender. Notably, universal jurisdiction in this context has been limited to jurisdiction where the alleged offender is in the territory of the prosecuting State.[§]

Importantly, Article 1 of the Torture Convention defines torture as a state act. It is an act performed or instigated by, or with the consent or acquiescence of, a public official or a person acting in an official capacity. As such, prosecution of foreign public officials in national courts runs into difficulty with the law relating to sovereign immunity. The debate over whether torture, as a *jus cogens* norm, trumps sovereign immunity, which is essentially a procedural rule, remains unresolved in theory. In practice, however, states are reluctant to assert jurisdiction over foreign public officials and, thereby, open the regime of sovereign immunity to exceptions.

---

[*] Article 5 of the *Universal Declaration of Human Rights* and Article 7 of the *International Covenant on Civil and Political Rights*.

[†] Cryer R, Friman H, Robinson D and Wilmshurst E, *An Introduction to International Criminal Law and Procedure*, (2007), Cambridge University Press, pp. 294-295 and p. 298 and Part 2 of the *Rome Statute of the International Criminal Court*, which gives the Court jurisdiction over acts of torture committed in the context of crimes against humanity and war crimes.

[‡] *Furundzija* ICTY T. Ch II 10.12.1998 and Cryer et al at p. 44.

[§] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Rep 3 and Cryer et al at p. 45 and pp. 48-53 for discussion on universal jurisdiction *in absentia*.

There are also likely to be practical difficulties in the prosecution of foreign public officials, such as obtaining evidence and locating witnesses from other jurisdictions in order to conduct proceedings in a state, which otherwise has no connection to the crime. Article 8 of the Torture Convention provides for the extradition of public officials to the state of origin as a practical solution to a sensitive issue. However, states infrequently prosecute their own public officials for acts of torture, particularly where there has been no change of political regime.

The International Court of Justice in the *Belgian Arrest Warrant Case* considered the question of Belgium's assertion of universal jurisdiction over the then Foreign Minister of the Democratic Republic of Congo despite the immunities attributed to him. The claims regarding universal jurisdiction were eventually dropped and the ICJ focused on issues of immunities. The ICJ found that the then Foreign Minister had immunity from the jurisdiction of foreign national courts while in office and for official actions. Importantly, it found that this immunity was not displaced in respect of international crimes.[*]

Where a state fails to prosecute its own public officials for acts of torture and where foreign states cannot prosecute the alleged offenders due to the immunities accorded to those persons or the practical impediments to prosecution, the victims of such crimes are left without justice. Attempts by victims to bring civil claims against public officials for acts of torture have failed in several jurisdictions. In *Jones v Saudi Arabia,*[†] the UK House of Lords considered whether it had jurisdiction to hear a claim against a foreign state and its officials for alleged acts of torture committed in the territory of the foreign State. The House of Lords found that the defendants held immunity under the UK *State Immunity Act 1978*. It rejected the argument that

---

[*] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Rep 3.
[†] (2006) UKHL 26.

contravention of a *jus cogens* norm did not attract immunity.[*] Other States have enacted legislation similar to the UK Act, including Australia, Canada, Pakistan, Singapore and South Africa.[†] There is also a body of case law from a number of jurisdictions following the reasoning in the *Jones* case.[‡]

Isolated cases, such as *Ferrini v Federal Republic of Germany,*[§] where breach of an international crime has been found to be an exception to the application of sovereign immunity have been strongly criticized. The UK House of Lords in *Jones* considered the decision in *Ferrini* as well as a number of US cases and found that these cases were not an accurate statement of international law and did not represent principles widely shared among States.[**]

Despite international condemnation of the act of torture, the international community has failed to find a forum in which offenders can be tried. Torture has been protected by the law of sovereign immunity as a state act. Without an international forum to hear such cases and with the reluctance of states to entertain such cases nationally, offending states have not been held accountable for their actions and victims have been left without recourse to justice.

---

[*] Lord Bingham at paras 24-27 and Lord Hoffman at paras 84 and 85.
[†] Section 9 of the Australian *Foreign States Immunities Act 1985*, section 3(1) of the Canadian *State Immunity Act 1982*, section 3(1) of the *Pakistan State Immunity Ordinance 1981*, section 3(1) of the *Singapore State Immunity Act 1979*, section 2(1) of the South African *Foreign States Immunities Act 1981*.
[‡] Examples of other cases include *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 and *Fang & Ors v Jiang & Ors* [2007] NZAR 420. Proceedings are also underway in Australia on similar issues, see *Yan Xie v Chen Shaoji* [2008] NSWSC 224.
[§] (2004) Cass sez un 5044/04.
[**] Lord Bingham at paras 20-22.

Universal Jurisdiction:
A Voice for Palestinian Rights?

ANDREW SANGER[*]

(1) INTRODUCTION

THE PRESENT ARTICLE seeks: (1) to explain the doctrine of universal jurisdiction; (2) to set out a theoretical basis for using universal jurisdiction in Palestinian cases; (3) to identify examples of Palestinian cases involving the use of universal jurisdiction and (4) to provide a evaluation of the ways in which these cases can help as *soft justice* in the pursuit of Palestinian rights.

(2) WHAT IS UNIVERSAL JURISDICTION?

Universal jurisdiction has no universally accepted definition.[†] Therefore this article will begin by distinguishing universal jurisdiction from other forms of jurisdiction and highlight the features of universal jurisdiction present in most definitions of the doctrine.

For the purposes of this paper, the term 'jurisdiction' refers to a state's "authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law. Jurisdiction may be civil or criminal."[‡] This regulation can be either civil or criminal in nature but this paper will only consider criminal jurisdiction; that is to say, the authority possessed by a state under international law to regulate the conduct of individuals. The 'authority' for such regulation—i.e. the basis of the jurisdiction—exists when there is a sufficient connection between the conduct to be criminalized and the interests of the state. As O'Keefe

---

[*] Assistant Editor, *Issues in International Criminal Justice*. BA in Law, Selwyn College, Cambridge University. LLM in Public International Law candidate, The London School of Economics & Political Science.

[†] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* 2002 I.C.J. 121 at [44] per Judge Wyngaert (dissenting)

[‡] Roger O'Keefe *Universal Jurisdiction – Clarifying the Basic Concept* J.I.C.J. 2 (2004) 735 at [736]

explains in his paper *Universal Jurisdiction: Clarifying the Basic Concept*, this means there are a number of *accepted* "heads of jurisdiction, pursuant to which, as a matter of general international law, states may assert the applicability of their criminal law":*

1. Territoriality: a state may criminalize conduct performed on its territory.

2. Active personality (or simply "nationality"): a state may criminalize conduct performed by one of its national's whist outside the state's territory.

3. Passive (or "protective") personality: a state may criminalize conduct committed abroad by a non-national against one of its own nationals.

4. Threat to a fundamental state interest: a state may criminalize conduct considered to be a threat to its fundamental national interests.†

5. An otherwise sufficient link judged by state practice: state practice indicates that states can have criminal jurisdiction over "the extraterritorial conduct of non-nationals on a range of other bases thought to evidence a sufficient link with the prescribing state's interests, e.g. on the basis of the offender's residency in that state or his or her service in that state's armed forces."‡

All of these examples demonstrate some kind of nexus between the criminalized conduct and a particular state's prevailing interest. Put very generally, "jurisdiction" breaks into a set of rules based on

---

* *Ibid*. at [738]

† *Ibid*. at [739] In addition, see: *The S.S. Lotus (France v Turkey)* 1928 PCIJ Series A, No. 10 at [20]. O'Keefe notes that in the past that this has only been used in exceptional cases; e.g. counterfeiting currency or an inchoate conspiracy to assassinate a head of State.

‡ *Ibid*. at [739]

connections that enable states to protect their sovereignty by marking out when a given state has the authority to deal with a particular individual under its legal system. Universal jurisdiction is also a head of jurisdiction but without the traditional nexus between individual and state (and therefore without the traditional emphasis on state sovereignty):

6. Universal jurisdiction: a state may criminalize conduct of specific offences without any traditional nexus (i.e. points 1-5 above) between the committed conduct and the interests of the state. The *Princeton Principles on Universal Jurisdiction* define universal jurisdiction as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or the convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[*]

As previously mentioned, this is not a universally accepted definition; one of the significant areas of controversy concerns whether any definition of universal jurisdiction must include a requirement that the perpetrator be present on state territory in order for that state to use universal jurisdiction.[†] This question will be answered by considering a theoretical distinction between universal jurisdiction to prescribe and universal jurisdiction to enforce.

(2.1) Universal jurisdiction to prescribe and universal jurisdiction to enforce

O'Keefe reminds us of the binary nature of jurisdiction: it consists of both prescriptive jurisdiction and jurisdiction to enforce.[‡] Practically this means there is a distinction between a state criminalizing conduct (prescriptive jurisdiction) and a state arresting, detaining,

---

[*] Princeton Project on Universal Jurisdiction, Princeton Principles on Universal Jurisdiction, Principal 1(1) at [28] (2001)

[†] Compare conflict opinions in the *Arrest Warrant case*: President Guillaume (at [16] (sep. op. of President Guillaume)) and Judge Van den Wyngaert (at 52-58 (dissenting opinion)).

[‡] *Supra* note *2* at [736]

prosecuting, trying, sentencing and punishing persons for said criminalized acts (jurisdiction to enforce).[*] This logical distinction has long existed in domestic criminal law: specific conduct must first be illegal (prescriptive) before the state can seek to punish an individual for performing such conduct (enforcement). Universal jurisdiction is jurisdiction to *prescribe*; the question of whether a defendant must be present in the territory is one of *enforcement*: i.e. a separate, logically distinct question. This logical distinction at least theoretically resolves the question of whether it is necessary for the alleged offender to be present on the *prescribing* state's territory for it to exercise universal jurisdiction. As O'Keefe explains,

> The fact is that prescription is logically independent of enforcement. On the one hand there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*.[†]

However, as O'Keefe rightly notes, logic and the *opinio juris* of states do not always converge and it is ultimately State practice and *opinio juris* that makes customary international law, not a sound method of reasoning. However, States are yet to unambiguously declare that it is necessary for the presence of the alleged offender on the territory of the State exercising universal jurisdiction. Unless or until such time, the logical distinction stands and for the purposes of this paper, universal jurisdiction—as prescriptive jurisdiction—does not require the defendant to be present on state territory.

(2.2) A Working Definition of Universal Jurisdiction

This very brief discussion of universal jurisdiction provides this paper with a working definition of universal jurisdiction—i.e. that universal jurisdiction is:

---

[*] *Ibid*.
[†] *Supra* note *2* at [750]

A form of prescriptive jurisdiction - recognized in customary international law – that criminalizes certain conduct by individuals (that may or may not be present in the state's territory) that have no traditional jurisdictional nexus to the prescribing state

(2.3) To What Offences Does This Definition of Universal Jurisdiction Apply?

It is generally regarded as customary international law that states may exercise universal jurisdiction over piracy, slavery, slave trading, war crimes, crimes against humanity, genocide, torture, enforced disappearances and extrajudicial executions.[*] In addition, some treaties (for example Article 146 of the Fourth Geneva Convention) require states to exercise universal jurisdiction in certain situations.[†] There is a difference between what states are *permitted* to do and what they are *obliged* to by international law. Thus, to the extent to which states provide for universal jurisdiction over crimes will vary; it is necessary to find both international law and domestic law supporting the use of universal jurisdiction.

As an example, the United Kingdom provides for universal jurisdiction[‡] over torture[§], the taking of hostages,[**] participating in the slave trade,[††] offences against United Nations personnel,[‡‡] piracy,[§§]

---

[*] Daniel Machover and Carla Ferstman *Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law* July 2008 Discussion Paper presented at Portcullis House, Westminster on 9 July 2008. Written copy of the paper held with the author.

[†] Note that the Geneva Conventions speak only – with the exception of Article 3 – of "grave breaches" committing by "High Contracting Parties": this is not true universal jurisdiction but can be overlooked since all states are party to the Conventions.

[‡] For more detail information on United Kingdom law and its provision for universal jurisdiction see *supra* note 11.

[§] Criminal Justice Act 1988, Section 134(1)

[**] Taking of Hostages Act 1982, Section 1

[††] An Act for consolidating with Amendments the Acts for carrying into effect Treaties for the more effectual Suppression of the Slave Trade, and for other purposes connected with the Slave Trade (Slave Trade Act, 1873), Section 26, as amended by the Statute Law (Repeals) Act 1998

[‡‡] United Nations Personnel Act 1997, Sections 1,2, 3 and 5(3)

[§§] R v. Keyn (1876) 2 Ex D 63, 2 bilc 701, CCR; R v. Anderson (1868)

and specific war crimes including grave breaches of the 1949 Geneva Conventions and the first additional protocol.[*] The UK also provides for a very restricted form of universal jurisdiction over the three crimes under the Rome Statute of the International Criminal Court 1998: war crimes, crimes against humanity and genocide.[†] Contrast this to Spain, which under Article 23(4) of Organic Law 6/1985[‡] provides that

> Spanish jurisdiction shall also be competent to hear facts committed by Spaniards or foreigners outside national territory susceptible to consideration according to Spanish criminal law as one of the following crimes: (a) Genocide; (b) Terrorism; (c) Piracy and illegal hijacking of aeroplanes; (d) Counterfeiting of foreign currency; (e) Crimes relating to prostitution and corruption of minors or the incapacitated; (f) Illegal trafficking of psychotropic, toxic and narcotic drugs; (g) Those relating to female gentile mutilation provided that those responsible are located in Spain; (h) [and] any other crime that according to international treaties and conventions should be pursued in Spain.[§]

Ultimately any decision to make a claim under the principle of universal jurisdiction would be advised to choose the most receptive forum for the particular complaint.

(3) UNIVERSAL JURISDICTION AND THE OCCUPIED TERRITORIES OF PALESTINE

(3.1) The Theoretical Basis for Using Universal Jurisdiction in Palestinian Cases

O'Keefe's distinction between *prescriptive* jurisdiction and *enforcement* jurisdiction also serves to remind us that jurisdiction—in this

---

[*] Geneva Conventions Act 1957 ('GCA'), Section 1(1); and the Geneva Conventions (Amendment) Act 1995, Section 1

[†] Commentators are critical as to whether this can be called "universal jurisdiction" at all: see *supra* note *11* at [4].

[‡] As amended by Organic Law 11/1999 and 3/2005

[§] Article 23(4) of Organic Law 6/1985 of 1 July, On the Judiciary. Published in the Official State Gazette number 157 of 2 July 1985, together with the subsequent modifications up until May 2007.

context—is about having the right, the power or the authority to exercise legal functions. The United Kingdom Parliament has the authority and power to criminalize conduct[*] but it does not have the authority or power to pierce through other states' sovereignty and extract their nationals for trial in the United Kingdom. In this respect, universal jurisdiction is like other forms of extraterritorial jurisdiction: it cannot be divorced from principles of state sovereignty.[†] As Becker notes, the rationale for universal jurisdiction, "as it arose in the context of piracy,"[‡] was that,

> ...the universality theory encompasses acts committed beyond *any* country's territorial jurisdiction, the paradigm offence being piracy on the high seas.[§]

The justification for universal jurisdiction being that, "without such jurisdiction, no country could prosecute the offender"[**]: i.e. the crime is committed in *terra nullius*. Therefore—as Becker notes—in theory so-called *pure* universal jurisdiction is not applicable to crimes committed within the territorial jurisdiction of a state.[††] Of course in practice this is not the situation: universal jurisdiction is used (or attempted) for a range of crimes that are almost always committed within another state's jurisdiction. This practice is regularly justified by the need to prosecute crimes that are *so heinous* that they are an affront to the entire international legal order. Becker asserts that this

---

[*] A discussion of the origins, scope and theoretical underpinning of this power is outside the scope of this paper.

[†] Steven W. Becker *Universal Jurisdiction: How Universal Is It? A Study of Competing Theories* The Palestine Yearbook of International Law, Vol. XII, 2002/2003, at p. [59] and see also Anthony Sammons *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 Berkeley J. INT'L L. 111 at [127].

[‡] *Ibid* Becker

[§] Rena Hozore Reiss *The Extradition of John Demjanjuk: War Crimes, Universal Jurisdiction and the Political Offence Doctrine* 20 Cornell INT'L L.J. 281 at [303] (citing 1 M. Cherif Bassiouni, International Extradition, United States Law and Practice ch. 6 § 6 (1983)).

[**] *Ibid* at [303] n. 161

[††] *Supra* note 13 (Becker) at [60]

reasoning "misses the mark"[*] because it ignores the *terra nullius* justification for universal jurisdiction.

It is contended that the original doctrinal jurisdiction for universal jurisdiction runs (in crude form) like this:

1. Crimes (e.g. piracy) were committed outside state territory that affected the interests of states.

2. States wanted (i.e. it was in their interest) to prosecute the alleged offenders (e.g. pirates) but this requires jurisdiction.

3. Since the crimes were committed outside state territory, no state had jurisdiction so no state could prosecute the alleged offenders.

4. Thus, the doctrine of universal jurisdiction was developed in order to prosecute crimes occurring in *terra nullis*: crimes beyond the reach of any state.

Thus the basis for universal jurisdiction has two elements: (1) the need to prosecute crimes outside state jurisdiction and (2) the need to prosecute those crimes that affect states generally. This theoretical basis supports the use of universal jurisdiction in the occupied Palestinian territories (hereinafter "OPT") because the Palestinian people are effectively in *legal terra nullis*: their land exists (and has been recognized to exist by the United Nations[†]) but is currently not recognized as being land which can be attributed to a state since it is illegally occupied by the state of Israel.[‡] In other words, Israel is not

---

[*] *Ibid* Becker at [61]
[†] United Nations General Assembly Resolution 181(III) - Future government of Palestine - on 29 November 1947 and Security Council Resolution 1397, 12 March 2002
[‡] See (amongst others) Security Council Resolution 242, 22 Nov 1967; Security Council Resolution 446, 22 March 1979 and Security Council Resolution 1397, 12 March 2002.

occupying another state's territory; it is illegally occupying land that is designated for a state of Palestine that has yet to come into existence.

The consequence of this is that the Palestinian people do not have their own effective state mechanisms to try offenders for war crimes and crimes against humanity resulting in a *legal jurisdictional lacuna*: crimes committed against the Palestinian people cannot be effectively tried in either Israeli courts or Palestinian courts. In addition, states arguably have a vested interest—and in some situations, an obligation[*]—to investigate and if necessary prosecute and try individuals for war crimes and crimes against humanity. This is especially true if the victims are unable to access adequate legal mechanisms.

Universal jurisdiction can be the procedural mechanism that fills the lacuna; like piracy these crimes are committed outside effective jurisdiction and they involve crimes that states collectively recognize to be damaging to the international order. This is undoubtedly a development from the original justification for universal jurisdiction but it does follow the same principles and is proposed as a sound theoretical basis for using universal jurisdiction to hear Palestinian claims in third-party national courts.

(3.2) Palestinian Cases

To the author's knowledge, there are five recent examples of universal jurisdiction (outside the U.S.) exercised by national courts over conduct committed in the occupied Palestinian territories:

1. The exercise of universal jurisdiction by a Belgium Court in the case against Ariel Sharon, Amos Yaron and others charged with

[*] See for example Article 146 of the Fourth Geneva Convention.

war crimes, crimes against humanity and genocide in relation to the Sabra and Shatila Massacare on 18 June 2001.[*]

2. The exercise of universal jurisdiction by a Court in the United Kingdom in the case against Major General Doron Almog charged with war crimes in relation to *inter alia* series house demolitions, which the IDF carried out in Rafah in January 2002.[†]

3. The exercise of universal jurisdiction by a Court in New Zealand in the case against Lieutenant General Mosche Ya'alon charged with war crimes for his role in the dropping of a one-ton bomb in Gaza in July 2002.[‡]

4. On 24 June 2008, six Palestinian survivors – aided by the Palestinian Centre for Human Rights – filed a lawsuit at the National Court of Spain against seven former senior Israeli military officials suspected of committing the war crime of extrajudicial execution in the Gaza Strip in July 2002.[§] The National Court of Spain accepted the case for examination;[**] at the time of writing no further developments have taken place.

5. In October 2008, lawyers for Khalid a-Shami (who alleges that the former head of Shin Bet Ami Ayalon tortured him during imprisonment) have filed an application for (1) an international arrest warrant for Ayalon and (2) an investigation into a Dutch

---

[*] Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, opened for signature 12 August 1949, 75 UNTS 287, Article 146 (entered into force 21 October 1950).

[†] For more details on this case, see Daniel Machover and Kate Maynard *Prosecuting Alleged Israeli War Criminals in England and Wales* 20 Denning Law Journal 2006 at [95].

[‡] District Court at Auckland, decisions of 27 and 29 November 2006 in the case between Janfrie Julia Wakim and Lieutenant General Mosche Ya'alon as cited in Elna Sondergaard *For the Sake of Dignity: Seeking Justice for International Crimes: Emerging Universal Jurisdiction Space in Spain* Al-Majdal 35 (Autumn 2007) at p. [47] and n.36.

[§] See press release by the Palestinian Centre for Human Rights (hereinafter "PCHR"): http://www.pchrgaza.org/files/PressR/English/2008/60-2008.html (accessed on 26 October 2008)

[**] *Ibid*.

> prosecutor's decision not to investigate and arrest Ayalon whilst he was in the Netherlands in May 2008 despite a *prima facie* case against him.[*]

Although (4) and (5) are still in their preliminary stages, (1), (2) or (3) failed to achieve even an arrest of the accused let alone his trial:[†] a perverse success for universal jurisdiction (insofar as it only takes the form of jurisdiction to prescribe) coupled with a complete failure of enforcement.

(3.3) Palestinian Cases of Universal Jurisdiction: a Voice for Palestinian Rights

These cases may not have been successful in traditional legal terms (i.e. no arrest, no trial) but they have had several positive impacts—so-called "soft justice"—in the Palestinian plight for human rights: (i) the acceptance of a *prime facie* case; (ii) the application of political pressure and (iii) some attempt at fulfillment of a victim's right to an effective remedy for fundamental human rights violations.

(3.3.1) A prima facie Case

Sondergaard notes in her article *For the Sake of Dignity*[‡] that,

> ...the Brussels Court of Cassation *did* admit the case in relation to *Amos Yaron and others* and concluded that prosecution against these should proceed; in the Almog case, the Bow Street Magistrates' court *did* issue a warrant for the arrest of Almog; and, finally, in the case from New Zealand, the Court in Auckland *did* issue an arrest warrant against Ya'alon...

Sondergaard's point is this: not only was there a *prima facie* case but judges were willing to entertain that case and exercise—despite potential political fallout—universal jurisdiction over the alleged

---

[*] See PCHR press release: http://www.pchrgaza.org/files/PressR/English/2008/92-2008.html (accessed on 26 October 2008).
[†] Elna Sondergaard *For the Sake of Dignity: Seeking Justice for International Crimes: Emerging Universal Jurisdiction Space in Spain* Al-Majdal 35 (Autumn 2007).
[‡] *Ibid*. at [47]

conduct. Part of the project of human rights is visibility:[*] enabling individuals—who otherwise are marginalized and pushed to the fringes of society—to be seen and heard. When a third-party court acknowledges that individuals have a *prima facie* case—i.e. that the alleged perpetrator must answer the accusations made against him—it switches on the light and turns up the sound: in this sense, universal jurisdiction provides the necessary light and speaker equipment.

(3.3.2) Political Pressure

When third-party courts do switch on the legal light and declare there is a *prima facie* case that must be answered, it generates a relatively significant amount of political pressure. On the one hand, one might argue that defendants rarely take notice: after all, no state is going to extract him from Israeli territory for a national trial. However, on the other hand, the restrictions on travel, the political embarrassment and the media attention are inconvenient reminders of conduct that is still taking place today. Indeed, what perhaps distinguishes the Palestinian situation from other cases of universal jurisdiction is that the conflict and occupation is currently ongoing. Those perpetrating violations of international human rights and humanitarian law need to keep the spotlight off their actions in order to continue. There is even some evidence that the State of Israel feels this pressure. In response to the case filed at the National Court of Spain, the Israeli government—specifically Tzipi Livni—has been quietly putting pressure on Spain to reconsider its decision to issue warrants of the arrest of the high ranking Israeli army officers.[†] In addition, the Foreign Ministry has reportedly instructed these Israeli officials not to visit Spain for fear of

---

[*] For a further discussion on human right as a 'visual project' see Conor Gearty *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006).
[†] See http://www.thepeoplesvoice.org/cgi-bin/blogs/voices.php/2008/10/05/p29210 (accessed 26 October 2008)

arrest and prosecution.[*] If nothing else, the use of universal jurisdiction is making life difficult.

(3.3.3) Victim's Right to an Effective Remedy for Fundamental Human Rights Violations

Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political rights, Article 14 of the Convention against Torture and other Cruel, Inhumane and Degrading Treatment and Article 39 of the Convention on the Rights of the Child all (amongst others) establish that victims have the right to an effective remedy by competent national tribunals for acts violating the fundamental rights.[†] The inability for Palestinians to obtain remedies in either Palestinian or Israeli Courts means that their only hope of seeking a remedy is through third-party courts willing to hear their complaints on the basis of universal jurisdiction. Indeed, the use of States' national courts is likely to be more effective than recourse to the International Criminal Court (hereinafter "ICC") (the only international institution that could potentially hear Palestinian cases), for at least three reasons:

1. The ICC only has jurisdiction with respect to crimes committed after entry into force of the Rome Statute: i.e. 1 July 2002 or the date the Rome Statue enters into force for a particular state.[‡] All crimes committed prior to this date are immune from the ICC's jurisdiction.

2. The State of Israel has signed the Rome Statute but it has made it clear that it does not intend to ratify the document. Therefore, without acceptance of its jurisdiction, the ICC must rely on the Security Council to refer the situation to the Court

---

[*] See http://www.ynetnews.com/articles/0,7340,L-3562097,00.html (accessed 26 October 2008)

[†] This is not an exhaustive list of legal instruments providing for a victim's rights to an effective remedy.

[‡] Rome Statute of the International Criminal Court, 17 July 2008, Article 11 – "Jurisdiction ratione temporis"

for an investigation. Even if this is successful, and the Prosecutor convinces judges to issue an arrest warrant, the Court is no better position than if national courts exercised universal jurisdiction: there is no enforcement mechanism unless the individuals in question travel to a State that is a party to the Rome Statute and willing to refer the individual to the Court's jurisdiction.

3. The Security Council is unlikely—in the present political climate—to agree to refer to Israel or Israeli officers to the ICC because (a) it has only done so once (Darfur, Sudan); (b) this referral was politically controversial; Israel is likely to be even more controversial *and* (c) it is likely that the United States of America will veto any resolution to refer.

In addition to attempting to fulfill the victim's right to an effective remedy, in certain situations States have treaty-based *obligations* under international law to prosecute or extradite individuals who have violated those treaties—for example, Article 146 of the Fourth Geneva Convention reads:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention…
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts…[*]

The use of universal jurisdiction (whether successfully or otherwise)—even if it is only treaty-based universal jurisdiction—to bring individuals who have committed crimes against the Palestinian population goes some way to both fulfilling the victim's right to an effective remedy and state obligations under international law.

---

[*] Supra note 34

(4) CONCLUSION

Universal jurisdiction is not the answer to Middle East peace but it is one of the many tools that can be engaged on the long journey towards peace. It provides a mechanism for trying war crimes and crimes against humanity committed against a people that have no state and have no recourse to justice without the assistance of third-party national courts. The arguments for the potential of universal jurisdiction have been well rehearsed in academic literature but in reality it has failed to honor these arguments of utopian universal justice. Despite this, it is a powerful mechanism for applying pressure, for acknowledging breaches of international law and for taking victims of gross injustice out of the darkness and into the light.

The Cambodian "Genocide":

An Issue of Definition for International Criminal Justice

KORA ANDRIEU[*]

Translated from French by Juan Angel Jeannet Arce[†]

THE DEFINITION OF "GENOCIDE" is inseparable from the context in which it was born: the Shoah, certainly, but also the entire sociopolitical context of the post-World War II period and of the beginning of the Cold War. Since it is a historically marked notion, it is in constant evolution. Thus, at the end of the Cold War, with the resurgence of the issue of minorities and ethnic conflicts in Europe, the question of the uniqueness of the phenomenon of the Shoah was asked: can one make comparisons, and in so diminish the specificity of the phenomenon by broadening the application of the term of "genocide?" It is in the framework of this definitional revival that jurists re-intervened in a terminological debate that for a long time was reserved for philosophers, historians, and politicians.

The word "genocide" was coined by Raphael Lemkin in 1994, in his book *Axis Rule in Occupied Europe*. Lemkin defines genocide more explicitly as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves… Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[‡]

---

[*] Editor-in-Chief, *Issues in International Criminal Justice*. MSc International Relations, The London School of Economics & Political Sciences and Sciences Po Paris. Second year PhD student in Ethics & Political Philosophy at the Sorbonne University of Paris.

[†] BA, Georgetown University, Edmund A. Walsh School of Foreign Service. MSc International Relations, London School of Economics & Political Science and Sciences Po Paris.

[‡] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress,* Washington, Carnegie Endowment for International Peace, 1944, p. 35.

This term quickly received juridical recognition, firstly in the indictments of the Nuremberg Tribunal and later in the United Nations General Assembly Resolution 96 (1) of 11 December 1946, which defines genocide as "a denial of the right of existence to entire human groups, as homicide is the denial of the right to live to individuals human beings." Immediately, the word acquires a strong moral connotation, which is a testament of the emotional shock following the Shoah: acts of genocide, says the Resolution, "shocks the conscience of mankind," it is "a crime under international law which the civilized world condemns." Finally, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 truly expounds the notion in its Article 2, identically echoed in Article 4 of the Statute of the ICTY, Article 2 of the International Criminal Tribunal for Rwanda (ICTR), and Article 6 of the Rome Treaty for the International Criminal Court (ICC).[*]

A few elements are designated as constituting the notion of genocide throughout these definitions. At the level of the *actus reus*, one can note that, contrary to the conception often advanced by the media, there is no quantitative ceiling to genocide: the number of deaths is not an element taken into account since the criterion for defining genocide is exclusively qualitative. Acts of genocide are not committed against individuals but against the existence of a group as such. As the indictment in *Israel v. Eichmann* notes: "It is the people, as a part or as a whole, which is the victim of extermination."[†] The notion of intentionality is therefore at the heart of the definition of genocide. It is necessary that the criminal have not wanted to

---

[*] In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

[†] *State of Israel v. Adolf Eichmann*, 15 December 1961

accomplish the criminal act, but also the final consequence of the act, be it the total or partial destruction of the defined group. Therefore, it is juridically very difficult to qualify an act as genocide, since it is necessary to prove this intention (the existence of a genocidal policy, a concerted plan of extermination, incitement of violence through propaganda, etc.)

The ambiguous character of certain key terms of the definition of the crime of genocide, together with its frequent confusion with crimes against humanity, have rendered the notion of genocide quite controversial from the start. Even though the 1948 Convention was certainly able to establish a large consensus, notably due to the emotion and general sense of guilt tied to the Shoah, it is nonetheless situated in the context of the first few years of the Cold War, and was thus the result of a difficult political compromise. This political context played a significant role in defining the different types of groups to be protected by the Genocide Convention. As noted above, one of the characteristics of genocide is that it does not target individuals as such but rather members of a "national, ethnic, racial, or religious" group.[*] Political and cultural criteria are excluded from the definition of genocide, notably upon the request –we can see why- of the USSR.

The problems presented by this list are numerous, firstly because the criteria used to establish membership of such a group do not have for the large part any exact juridical or scientific definition. Only 'nationality' is defined by the *Nottebohm* decision of the International Court of Justice. But the word "race" does not exist scientifically or juridically: the margin of interpretation is thus wide. Is it necessary that such groups exist objectively, previously to the crime committed against it as predefined entity (*a* Jew, *an* Armenian?) Or rather do the subjective criteria of stigmatization and identification by the executioner suffice to create a group? For example, sociopolitical

[*] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, article 2.

groups can be "racialized" in the genocidal madness. Racism is the essentialization of a group: denoting a difference, regardless of what it may be (a mental illness, for example), and fixing it as a race. The sociologist Jacques Sémelin underlines this subjectivity by defining genocide as "the particular process of the destruction of civilians which aims at the total eradication of a collectivity, the criteria of which are defined precisely by those who undertake to annihilate it."[*]

The Justices of the International Criminal Tribunal for Rwanda had to face such difficulties of terminology, "Hutus" and "Tutsis" strictly speaking not being races but sociological groups arbitrarily established by Belgian colonizers. The Justices concluded, in the *Akayesu* affair, that Tutsis and Hutus were distinct ethnic groups, even if it was not an issue of ethnicities in the strict sense of the word: "a common criterion of the four types of groups protected by the Genocide Convention is that membership in such a group seems to not be able to be challenged by its members, who belong to it unquestionably, by birth, and in a continual and interminable manner."[†] Genocide therefore cannot target any groups other than stable and permanent ones, to which one belongs by birth – which excludes, once again, "flexible" groups which one can join by an individual voluntary engagement or external circumstances, such as political or economic groups.

According to the *Akayesu* affair, the crimes of the Khmer Rouge in Cambodia could therefore not constitute genocide. This radical communist regime was strongly impregnated by the Leninist theory of political purity, and considered that all that was impure must be cleaned. The enemy was therefore not a distinct "other" identified nationally or racially, nor was it a "stable and permanent group." It was an enemy that was undefined, constantly changing, diffuse, and omnipresent: a "microbe" that gnaws at the Organization (*Angkar*)

---

[*] Jacques Sémelin, *Purify and Destroy. The Political Uses of Massacres and Genocides,* New York, Columbia University Press, 2007, p. 374

[†] ICTR 96-4-A, *Akayesu*, Appeal Chamber Judgment, 274-309

from inside. This explains the paranoia of the regime: everybody was potentially guilty of being a spy or a traitor. The goal of the *Angkar* was the construction of an entirely new society, in which the ancient Khmer people (uneducated peasants, in other words) would be the true base. Some ethnic or religious groups were targeted, such as the Cham or the Chinese, but the majority of the victims of the Khmer were other Khmer. In total this "enemy" represented close to two million people (or 25-30% of the population), exterminated in fewer than four years.[*] Should the fact that targeted groups were clearly artificially fabricated and changing prevent us from defining the whole as a "genocide" in the juridical sense of the word?

Many researchers have examined the question. Jean-Michel Chaumont, for instance, talks of "unqualified genocide," in contrast to "qualified genocide" which strikes at objectively defined collectivities that recognize themselves as such.[†] "Good revolutionary" and "traitor" are not "national, ethnic, racial or religious" groups, or even "stable and permanent" ones. The categories of the victims of the Cambodian "genocide" are clearly artificial, but one could say the same about all genocides: not all of Hitler's victims shared the collective conscience of belonging to a "Jewish" group before they started being stigmatized as such. The majority of them were well integrated and sometimes even non-practicing.

What one would need, then, to establish that genocide legally occurred in Cambodia, is to recognize that from Pol Pot's view the urban intellectuals were just as "other" as the Jews were for Hitler or the Tutsis were for the *Interahamwe*. His vision of the "good people" was a racially restrictive one, obsessed by purity, similar to Hitler's notion of "*Volk*". All genocide would thus be a "self-genocide" because it always targets kin, and ends up being more or less suicidal.

---

[*] Ben Kiernan, *Blood and Soil. A World History of Genocide and Extermination from Sparta to Darfur,* New Haven, Yale University Press, 2007, pp 539-554.

[†] Chaumont, Jean-Michel, *La concurrence des victimes. Génocide, identité, reconnaissance,* Paris, La Découverte, 1997.

What the subtleties of definition show us is that it is high time for international law to emerge from the unique definitional context of the Shoah and to accept the possibility of other intentional extermination policies of groups that are not necessarily defined objectively, stably, or permanently. The hybrid tribunal opened in Phnom Penh to try the former Khmer Rouge will have to face this difficulty and turn in the direction of a greater definitional malleability with the aim of being able to accuse these individuals of genocide. That would be a progressive step not only for the law, but also for the analysis of conflicts themselves, in taking account of the artificial and fantastical conception of "races" in the imagination of the executioners. As Sartre rightly pointed out: "the Jew is one whom other men consider a Jew… It is the anti-Semite who creates the Jew."[*]

[*] Jean-Paul Sartre, *La Question Juive*, Paris, Gallimard, 1985, p. 39 (my translation).

Situation in the Democratic Republic of Congo:

An Interview with Human Rights Activists from the DRC on Questions of Sexual Violence, the International Criminal Court, and Resource Exploitation – 24 February 2008

CAROLINE WOJTYLAK[*]

SINCE FEBRUARY 2008 the situation in the DRC has significantly deteriorated, with the region of Goma affected by recent clashes between rebels of General Nkunda and the Government army. With one in six people displaced, Eastern DRC—a region that was once felt to be a safe haven—has escalated in violence and is edging closer to another humanitarian catastrophe. The interview was conducted in February 2008 when the humanitarian situation was much more stable. At the time of writing, NGOs are reporting a significant increase in mass rapes, a fear of mass starvation and complete instability in the region with more than 200,000 people displaced according to UN estimates. The repercussions of the recent rebel and Government troop clashes in a region that was previously felt to be a stronghold and support base for the Congolese Government will undoubtedly destabilize the whole of DRC further, with civilians bearing the brunt of the atrocities.

What is your name and which region in DRC are you from?

- Marie-Claire Faray-Kele (MC); Northeast Kisangani & Maniema region; raised in Kinshasa
- Marie-Louise Pambu (MCP); Southwest DRC, Bandundu region; Kikwit
- Marie Claire Ram (MCR); East DRC, South Kivu region; Burhale

[*] Founder and Director of the International Criminal Court Student Network (ICCSN). Chair, ICCSN at Cambridge. LLB, The London School of Economics & Political Science. LLM candidate, Cambridge University.

How was your region affected by the conflict years?

MCR: The attacks in Kivu were terrible, very acute and very violent. The war came with a sudden brutality, yet remains now—less violent, but still causing permanent insecurity. Sporadic attacks are occurring all year round, with towns such as Bukavu and Goma suffering from killings as recently as last week.

MC: The war started in 1996 in the pretext to topple the 30 years dictatorship regime of President Mobutu—the country was infiltrated through South, North and then Kisangani region. The epicenter is the Kivu. The conflict is very complex. Rebels are coming in from Rwanda. There was an invasion of the Congo. The country then was attacked by Uganda and Rwanda. Up until now these countries exert influence and support rebels in the East of Congo, who use the genocide that occurred in Rwanda as an excuse to enter under the guise of rooting out rebels. Mostly they are keen on exploiting the minerals.

The town of Kisangani and the region of Maniema have both been terribly affected by war. Although Kisangani is far from the respective borders of Rwanda and Uganda, their troops as well as their supported rebel groups reach as far as there, and are fighting a terrible battle that has a devastating effect on the population and infrastructure of the town.

How are women suffering in the conflict? What forms of violence were/are being used against women?

MC: All forms of violence and discrimination: rape, mutilation, intrusion of instruments in the vagina, breast mutilation, gang rapes, rape with bayonets and rape in front of their family or members of their community. Women have been used as a battleground and a weapon of destabilization. Some Congolese women have been buried alive and others burnt. Many women suffer from the condition of "*obstetric fistula*" where women can no longer control their feces and

urine. Although, in the DRC, it is possible for women to get reconstructive surgery, this is not always successful or not often available due to lack of hospitals. To make matters worse, women are often raped again afterwards. Furthermore, reconstructive surgery means women have to give birth with a Caesarean cut—something that is unimaginable in remote villages or towns in the DRC.

Although there is a retrograde patriarchal mentality in the DRC, rape is often perceived as a taboo by the community and traditionally, a man who commits rape is excluded from the community. In some tribal traditions, it was forbidden for men to have sex with women before going to war. Women are perceived as the pillar of the community. Rape means women are no longer pure and sacred. Now some communities are beginning to expel women who have been raped. This forces many women to hide their condition to prevent being ostracized by the community.

Congolese women constitute up to 53% of the population; their contribution to the survival of their community, food security and informal economy is vital. However, at the moment, women are discriminated against as well as being excluded from participation in peace building, politics and governance of the DRC.

Is anything done to stop violence against women?

MC: Nothing. How can sexual violence against women stop when there is nothing done to stop the war; the support of rebels, illegal traffic of arms, multinational irresponsibility and corruption of Congolese officials? On 15 May 2005, the UN Security Council adopted Resolution 1756 recognizing the specific link between illicit exploitation and trade of natural resources and the proliferation of arms trafficking in the DRC. Resolutions 1649 and 1698 asked the DRC Group of Experts to propose measures to prevent the illegal exploitation of natural resources financing armed groups in the eastern part of the DRC. However, neighboring countries—in particular Uganda and Rwanda—continue to threaten Congo's peace

and continue to arm groups loyal to them; and the illegal exploitation of natural resources continues to provide funding for those opposed to peace.

None of the two front runner candidates of the 2006 presidential elections made a strong commitment to address sexual violence in the East of the DRC. Furthermore, no one strongly spoke or publicly campaigned to end this tragedy affecting hundreds of thousands of women in the East of the DRC. Even the newly elected president, Joseph Kabila, has used the word “taboo” during an interview when referring to this phenomenon in the east of the country, where ironically he has his strongest supporters. The president does not condemn it strongly and publicly enough. Where is his leadership or power in condemning the sexual violence and ending the conflict in the east? There is an anarchy that is fuelled by arms supplied by Multinationals to protect their mines. Once the war is stopped, all sexual violence against women could be controlled.

Special Reporter to the UN on Violence against Women found that “violence against women in DRC seems to be perceived by large sectors of society to be normal.” Is this true?

MCR: Sexual violence is an umbrella term, which is used to hide the real reason for war. Women are raped wherever there is conflict. Rape is not a culture in Congolese society. It is only widespread where there is a gun.

Ensler calls the violence against women "femicide"—the attempted destruction of women. In an article he stated, “some 78 members of the military battalion were accused of having raped nearly 120 women.” With the support of the international community and the UN mission in the DRC (MONUC) human rights branch, “we managed to get some 12 of them brought before military justice where about six were convicted,”—yet were soon released due to state of prisons. Has anything been done to do justice to the victims?

MC: Ensler is campaigning to stop the sexual violence yet there is a much more pressing need to stop the war. They should stop covering up the real cause of war, which is multinationals supporting rebels to exploit resources. In every country where there is war and insecurity, women have been raped; and this is the real cause of sexual violence.

What could be done?

MC: To publicly demonstrate real political will to end the war and to penalize multinationals who breach the standards of Corporate Social Responsibility, including labor rights, the Universal Declaration of Human Rights, the OECD Guidelines and the Voluntary Principles on Business and Human Rights. To stop the influx of guns and the illegal arms traffic and trade. To stop the support for rebels groups; whether Congolese, Rwanda's Hutu and Tutsis or Ugandan's and Angola's rebels. To stop Hutu rebels from controlling remote areas such as Niangezi. To facilitate the return of Rwanda's Hutu population to Rwanda or their resettlement outside of the DRC or the Great Lakes regions. To impose an Inter-Rwandan dialogue between Hutus and Tutsis in Rwanda.

Furthermore, there must be support for the National Action Plan for United Nations Security Council Resolution 1325, which the DRC Ministry of Gender Affairs has launched for development on the 19 September 2007. The National Action Plan should not remain dormant and simply symbolic but be used to strengthen, apply and monitor international and national legal frameworks, to protect women and reform the DRC's electoral code and allow more women to be a part of the negotiations and governance of the country. All that DRC women want is to reach some of the objectives of the Millennium Development Goals, which call for the empowerment, protection and inclusion of women, to be achieved.

How has MONUC responded? Has the response been adequate?

MC: In 2000, the Congolese people lined the streets cheering and dancing as the first contingent of blue helmets drove down one of Kinshasa's main boulevards, hoping that the arrival of U.N. peacekeepers would bring peace and an end to the horrific atrocities that have been occurring since 1996/1997.

Although MONUC presence in the Congo produced some positive impact, the general feeling is that the population is fed up with MONUC. The population feels that when most needed, MONUC is not fulfilling its Chapter 6 and 7 Mandates; i.e. their responsibility to protect. For example, when in 2004 the renegade General Nkunda and Mutebusi attacked Bukavu, MONUC withdrew its protection of the local population by not intervening to stop Nkunda's troops. Hence, there is a feeling among the population in Ituri, Bukavu, Goma and Kinshasa that MONUC is not protecting them.

ML: What is worse is that there is a feeling that MONUC has a secret agenda in DRC; primarily protecting and facilitating resource exploitation rather than protecting the people. MONUC has all the resources and tools available to them, but is not using them. UNIFEM has also been in operation in the DRC but it appears that the agency has also not done much to empower grassroots Congolese women in the long term. During the 2006 presidential elections, there were even some conflicts of interest between UNIFEM and UNDP RDC, about funds allocation for women, which affected their support for Congolese female electorates and candidates.

In 1963 UN Peacekeepers were sent into the Congo to pacify the ML Natal region of Bandundu just after there had been a rebellion from Mulelistes backed by the Communists. It took them only six months to stop the conflict. Considering the situation now, MONUC has been in Congo for eight years with more sophisticated resources than in 1963 and the conflict still continues. It appears that the population is fed up of MONUC and hopes for a similar scenario to what happened in Angola. When UN Peacekeepers left Angola there was a possibility for peace in Angola. Thus, many Congolese also cannot

wait for MONUC to leave the DRC.

MCR: MONUC has no interest in pacifying the region. Many of their officials live in luxury and many are implicated in abuses of women, many having mistresses. The UN mission in the DRC is a "non-family" mission, so most male project coordinators and peacekeepers are there without their wives. Although many are aware of the fact that Congolese women are already suffering from abuse and discrimination, MONUC officials and peacekeepers take opportunities to further exploit Congolese women. There is increasingly an institution of prostitution where even children are abused.

How is the ICC and what it is doing viewed in Congo?

MC: Is the ICC trying everyone or only Africans? If the Americans are not signatories to the Court, there is no effective justice. The US is clearly setting the UN agenda. The Rome Statute of the ICC authorizes the Court to take jurisdiction over cases referred to it by the Security Council. There is a strong connection and financial support of the ICC from UN member states influenced by the US as well as the US own financial support to the ICC. Thus the Court is not as independent as it should be.

We want Nkunda, Mutebusi, Bemba, Kony, Museveni, Kabarebe, Kagame, Kabila, Mayi-Mayi, MLC and RCD rebels leaders to face justice for atrocities committed in the DRC, if possible by appearing before the ICC. The impartiality of the court is threatened if it does not investigate these men. The multinational corporate officials, Tony Blair and Bush should also stand trial.

Would you like to talk about the ethnic dimension to the conflicts since 1997?

MC: There is no ethnic dimension. It is the killing of everyone—with arms groups being supported by multinationals in order to displace

the population from various resource-rich lands. There are 450 different tribes in the DRC yet there is no sense of ethnicity. Ethnicity is a myth; tribalism is the reality in the DRC. Tribes are used to identify and limit ownership of lands or population. This is not an ethnic war between the populations in Congo. Ethnicity is a colonialist term used to divide the African population. Why do we not talk about ethnic conflict between the Scottish and English population or Nordic Vikings and the English? Although they were all white, they had some morphological differences. Was it tribal or ethnic conflict between these warriors?

MC: Genocide is a deliberate and systematic extermination of a national, racial, political, or cultural group. The Holocaust is the term generally used to describe the genocide of the Jews; even though many were ethnically similar, they all shared the same religion, which was the reason behind the genocide. Genocide is not just about ethnicity—it is about killing or displacing and exterminating a population for a purpose. If we have to talk about genocide, then I believe that there is genocide against the black Congolese people. There is an ongoing genocide in the Congo right now by corporate multinationals operating in the DRC. The war has occurred due to an invasion by rebels supported by foreign countries and multinationals, which want access to Congo's mineral resources. This fuels the war and conflicts that kill or displace the black Congolese population from their lands.

After centuries of slavery and colonialism, DRC's population has lived under dictatorships for 30 years, which has been supported by international community institutions such as the World Bank and IMF with a US CIA agenda. There was no chance for democracy or infrastructure development, only ongoing conflict since Mobutu's overthrow and the death of Kabila's father. The Congolese population suffers from neo-colonialism, natural resource exploitation—both of which fuel displacement and tribal conflicts. The DRC is made up of provinces, which have many tribes. The local populations still believe that their land is owned by their tribes not by the DRC states as such.

The recent war has increased local hostility against the Congolese Tutsi population, seen by other groups as the main supporters of Nkunda. But Tutsi civilians have also suffered displacement and abuse, including from those who claim to be protecting them. The international community is really missing and disregarding the Batwa ethnic minority, the autochthonous population of the region of the great lakes/forests of central Africa. There was an ethnic genocide against the Batwa during the war in the DRC. They were cannibalized during the war. However, the international community is only advocating the protection of the Tutsi, ignoring other ethnicities. This has caused much anger, as people feel this is promoting unjust ethnic division which breed problems and discrimination.

MCR: Renegade General Nkunda has alleged a Tutsi ethnic dimension to the conflict—this is however only used to conceal the real reason of his dealing in the war. As a result of the international community not being able to stop the genocide in Rwanda, there is a tendency to term every conflict in Africa as ethnic genocide.

Situation in Uganda:

Wanted: Kony, Joseph[*]

SYLVIA HEER[†]

"The family is the natural and basic unit of society and is entitled to protection by society and the State."
– *National Objective XIX of the Ugandan Constitution, 1995*

EACH NIGHT, ABOUT 40,000 children in Northern Uganda leave their home to seek safety shelter facilities in the nearest urban centre.[‡] These "night-commuters" flee from the soldiers of the Lord's Resistance Army (LRA) searching homes for children recruits. Since the beginning of the conflict in 1986, over 25,000 children in Northern Uganda have been abducted and forced to become combatants or sex slaves for the LRA.[§]

This "army," a self-proclaimed rebel group founded in 1987 by Joseph Kony, operates mainly in Northern Uganda, Southern Sudan and the Democratic Republic of Congo (DRC). The political agenda of the movement remains unclear, claiming only a vague defence of the Acholi people, the ethnic group living in Northern Uganda, against the government of President Yoweri Museveni. But while several popular resistance movements against Museveni's Resistance Movement (NRM) formed after he took power in 1986, Kony's movement was not one of them.[**] On the contrary, many people in the combat zone and ex-combatants themselves were "profoundly confused about the fact that Kony claimed to be fighting for them, yet

---

[*] http://www.interpol.int/public/data/wanted/notices/data/2006/20/2006_26230.asp?HM=1
[†] MSc candidate at The Centre for Human Rights at The London School of Economics & Political Science.
[‡] http://www.unicef.org/protection/uganda_25704.html (stating 30,000); http://www.unicef.org/infobycountry/uganda_background.html (stating 40,000)
[§] http://www.unicef.org/infobycountry/uganda_background.html
[**] "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda", *Refugee Law Project*, Makerere University, p. 1

was killing and abducting them at the same time."[*] In the war fought since then between the Ugandan Army and the LRA, tens of thousands of people have been murdered by soldiers on both sides of the conflict and over 2 million have been forcibly displaced.[†]

In December 2003, the Ugandan government referred the case to the newly established International Criminal Court (ICC), making it the second case investigated by the ICC after the Democratic Republic of Congo (DRC). Article 14 of the Rome Statute of the ICC states that "a State Party may refer to the Prosecutor a situation [...]," causing some to question whether a self-referral to the ICC was possible,[‡] as such a self-referral might be used by government to seek intervention by the Court against its own political opponents.[§] In a letter attached to the Presidency Decision to assign the situation in Uganda to the Pre-Trial Chamber, the Prosecutor therefore underlined that the referral would cover "crimes within the situation of northern Uganda by whoever committed."[**]

Therefore, after a thorough investigation by the ICC Prosecution, five arrest warrants against Joseph Kony and four leading members of the LRA where issued in July 2005 and made public on 24 October 2005 (two of those fugitives have since then died, one is rumoured to have died in April 2008). The warrant stated that the LRA "has established a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; that abducted civilians, including children, are said to have been forcibly recruited as fighters,

---

[*] *Ibid*, pp. 14-15
[†] http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1069166.stm
[‡] Cryer, Friman, Robinson, Wilmhurst, 8.5.3, p. 130
[§] Cryer, Friman, Robinson, Wilmhurst, 8.6.2, p.134
[**] http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision_on_Assignment_Uganda-OTP_Annex.pdf

porters and sex slaves and to take part in attacks against the Ugandan army (UPDF) and civilian communities."[*]

In July 2006, one year after the arrest warrants were issued by the ICC, a series of peace negotiations between the Ugandan government and the LRA, the Juba peace talks, were started under the mediation of the South-Sudanese Vice President Riek Machar. In July 2006, the government offered amnesty to the LRA leaders "if it abandoned terrorism," but the offer was rejected by the rebel leaders as "amnesty would presuppose surrender."[†] The talks advanced slowly and were interrupted several times by the LRA, whose leaders were feared the ICC arrest warrants. An agreement was reached in June 2007 about how justice and reconciliation in the case should be handled. According to Integrated Regional Information Network (IRIN, part of the United Nations Office of Humanitarian Affairs), the LRA and the government agreed that both formal procedures and the traditional-Northern Ugandan reconciliation ceremony, the *Mato Oput*, were to be part of the solution.[‡] On 9 February 2008, BBC News announced that the Ugandan government and the LRA had reached an agreement to establish a "Ugandan High Court" for the trial of war crimes committed in Northern Uganda.[§] The alleged goal for the creation of this Court was to use the complementarity principle—which states that the ICC is to assume jurisdiction only when States fail to do so—in order to circumvent the jurisdiction of the ICC and try the leaders of the LRA on a national level. The final version of the peace treaty was to be signed on 10 April 2008, but Joseph Kony failed to turn up, allegedly claiming "to have been misled" on possible punishments he would face.[**]

---

[*] WARRANT OF ARREST FOR JOSEPH KONY ISSUED ON 8 JULY 2005 AS AMENDED ON 27 SEPTEMBER 2005, p. 23

[†] http://news.bbc.co.uk/1/hi/world/africa/5157220.stm

[‡] "Uganda: LRA Talks Reach Agreement on Accountability", 30 June 2007: http://irinnews.org/Report.aspx?ReportId=73010.

[§] http://news.bbc.co.uk/1/hi/world/africa/7252774.stm

[**] "Ugandan Rebels Suspend Peace Talks, Appoint New Team, *The Sudanese Tribune:* http://www.sudantribune.com/spip.php?article26715

Since the failure of the peace talks, the LRA has been rearming and abducting children again to prepare a new offensive against the Ugandan government.[*] According to Human Rights Watch, the new wave of abductions and killings began in February 2008, just as the Juba Peace talks between the LRA and the Ugandan government seemed successful in reaching an agreement.[†] The UN Mission in the DRC (MONUC) declared that "during the period from mid-September to the beginning of October, elements from the Ugandan rebel LRA have conducted attacks on 16 localities in the DRC's eastern territory of Dungu, Province Oriental, killing at least 52 people, and abducting another 159 children and ten adults."[‡] The Prosecution collected information "indicating that at the end of 2007, Kony issued orders to abduct 1,000 persons to expand the ranks of the LRA. Kony is now implementing this plan."[§]

On 6 October 2008, the International Criminal Court (ICC) issued a press release, calling for renewed efforts to arrest the LRA leader Joseph Kony in the wake of new attacks against civilians.[**] On 21 October 2008, Pre-Trial Chamber II requested the Democratic Republic of the Congo (where the LRA is reputed to have been based for the last three years) to provide the Chamber with detailed information on the measures taken for the execution of the warrants of arrest issued in 2005.[††] Hopefully, the government of the DRC will hear these demands by the ICC. Otherwise, more civilians will be drawn into the never-ending conflict between the LRA and the Ugandan government.

---

[*] "Ugandan Rebels 'Prepare for War'", BBC News: http://news.bbc.co.uk/1/hi/world/africa/7440790.stm
[†] "Uganda: LRA Regional Atrocities Demand Action": http://hrw.org/english/docs/2008/05/19/uganda18863.htm
[‡] http://www.monuc.org/News.aspx?newsID=18389
[§] http://www.icc-cpi.int/press/pressreleases/427.html
[**] ICC-OTP-20081006-PR359-ENG: http://www.icc-cpi.int/pressrelease_details&id=427&l=en.html
[††] ICC Press Release, ICC-CPI-20081021-PR363-ENG: http://www.icc-cpi.int/press/pressreleases/434.html

BOOK REVIEW: *Purify and Destroy*

Review by KORA ANDRIEU[*]

Purify and Destroy: The Political Uses of Massacres and Genocides
Jacques Sémelin, Columbia University Press, 2007

"HIER IST KEIN WARUM" Primo Levi was told by a kapo upon his arrival to Auschwitz. Here, there is no why. It is precisely the refusal of this fatal absurdity that fascinates Jacques Sémelin, socio-psychologist and researcher at the Center for International Studies of Sciences-Po in Paris in his latest book *Purify and Destroy*. For Sémelin, understanding is a moral duty, but it is certainly not an easy one. When facing cases of extreme violence, our thought is often overwhelmed with emotions, and thinking reasonably seems almost impossible. We tend to qualify those acts as absolute Evil, thereby refusing to understand their reasons. But, says Sémelin, genocides are *thinkable* – maybe even too thinkable. His aim in this book is to accurately understand the mechanism of the acting out: how do "ordinary men" fall into the genocidal abyss?

Why ought we understand such horror? By decoding their logic, are we not justifying the perpetrators through rationalization? For Sémelin, understanding does not mean forgiving or sharing. His research is mainly empirical. In focusing on case studies in Bosnia, Rwanda and the Holocaust, he offers a multidisciplinary approach based on sociological, political, juridical, anthropological and philosophical analysis. His originality is that instead of focusing solely on the emotional effects of mass violence on the victims, he turns the problem around and looks into the reasons of the executioners. What meaning do they give to their actions? Massacres are, first and foremost, mental operations based on the mental construction of an absolute "other" that ought to be destroyed. Propaganda is therefore

---

[*] Editor-in-Chief, *Issues in International Criminal Justice*. MSc International Relations, The London School of Economics & Political Sciences and Sciences Po Paris. Current PhD candidate in Ethics & Political Philosophy at the Sorbonne University of Paris.

central: it catalyzes a collective anger against a concrete enemy, affirming that it is only through the annihilation of this "other" that the "us" will be purified and exist. But from thought to action, there is no direct linkage. One of the problems with the juridical definition of "genocide" is that it is based on the concept of intention, thus implying a linear unfolding of the action that leaves aside the complexity of the process itself. As Larry Langer wrote, "the logic of law will never make sense of the illogic of genocide."[*]

Semelin's analysis of the mentality of the executioners is therefore central: What do they think when they kill? Do they realize they are wrong? Do they regret their actions? And most importantly, why do they do it? These are difficult questions, but Jacques Sémelin answers them with a remarkable sense of humanity in all their disturbing normality. He reads the diaries of SS members, the confessions of Hutus Interhamwe, and discovers that the sadists are in fact a minority. The will to see those perpetrators as the incarnation of pure evil is a way for us to escape trying to comprehend their reality and understand their actions; it is a denial of their existence. To some extent, the work of Sémelin can recall that of Hannah Arendt on the "banality of evil," which she observed in Jerusalem during the trial of Adolf Eichmann.[†] According to Sémelin, the main flaw of Arendt's thesis is that it only applies to "bureaucratic" or "administrative" genocides like the Holocaust, conducted from the top down by zealous statesmen who, like Eichmann, remained far away from the concentration camps. It does not apply to direct violence such as the massacres in Rwanda, Bosnia, or today's Darfur, which are committed door-to-door and barehanded. For Arendt, evil is not a devil force, but only the result of the "absence of thinking" which characterizes totalitarian regimes and can also happen to us in our everyday lives. Then again, how do we explain why some become

---

[*] Lawrence Langer, *Admitting the Holocaust,* New York, Oxford University Press, 1995, p. 171

[†] Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil,* London, Penguin Classic, 1992.

perpetrators and others do not? How do we understand the acting out itself? Hannah Arendt does not address this question of wanton violence. The banality of evil does not explain the tortures of the Tutsis, nor does it explain the rapes of Muslim women in Bosnia. Evil is more ambiguous than that.

But is there an explanation? Should there be one? No explanation will ever be exhaustive, and Sémelin is only giving us some hints. For instance, he refers to Emmanuel Levinas' concept of face as an incarnation of the proscription of murder. We are, says Levinas, hostages of this face, which carries its own moral imperative. Sémelin observes that very few perpetrators are able to kill while looking their victim in the eyes: this might explain why so many are eager to dehumanize this evil "other," so that they cannot identify with the victim anymore. This might explain why the Jews were packed in cargo trains, in a huge mass where none could be individualized; why the Hutus cut their victims' noses and ears, and kept on disfiguring them even after they were dead. Cruelty might just be the attempt of the perpetrator to protect himself from guilt, thereby convincing himself that his victims are not humans but rather "cockroaches," "microbes" or "rats."

This of course is only one possible explanation among many other theories. Jacques Sémelin never claims to give exhaustive answers to these complex questions. Each is constructed so that new questions and new interpretations keep arising. The historian Leo Poliakov used to say about the Holocaust: "the event has so many different causes, that it is impossible to know the cause of the event." Our responsibility is therefore not only to protect and prevent genocides, but also to understand them and to make them understood by others.[*]

---

[*] It is this necessity of knowledge that characterizes Sémelin's latest project to create the first online encyclopedia of mass violence—a scientific database about genocides throughout history that hopes that in-depth knowledge about mass atrocities will lead to their total eradication (http://www.massviolence.org).

BOOK REVIEW: *Peace and Justice*

Review by KORA ANDRIEU[*]
Translated from French by Alecsandra Vlaicu[†]

Peace and Justice: Seeking Accountability After War
Rachel Kerr and Erin Mobekk, Polity Press, Cambridge, 2007

FROM THE TIME OF the Nuremberg trials until the creation of the International Criminal Court, the history of international justice has developed as a triumph of morality. The history of international justice, from the time of the Nuremberg trials to the creation of the International Criminal Court, developed as the triumph of morality. The fight against impunity has been seen not just as a necessary precondition for peace, but also as a tool to render international relations more ethical. Thus, international criminal justice is not just the blind application of the law; it has become an essential step in an almost ritual process of purification, designed to reinstate a lost social order. Because justice allows societies to retie broken social connections, it can also help recreate a political community and sustainable peace.

Rachel Kerr and Erin Mobbek's research explores this tension between the quest for civil peace and the desire for justice. They attempt to go beyond the debate on the ideal of justice and political realism in order to make a precise, well-documented analysis of the different types of transitional justice.

Several arguments are traditionally brought up to defend the link between justice and peace. Firstly, criminal justice attributes individual responsibility and takes the blame away from the collective

[*] Editor-in-Chief, *Issues in International Criminal Justice*. MSc International Relations, The London School of Economics & Political Sciences and Sciences Po Paris. Current PhD candidate in Ethics & Political Philosophy at the Sorbonne University of Paris.
[†] Msc International Relations, London School of Economics and Sciences Po Paris.

people, which helps national reconciliation.[*] Secondly, it has the potential to deter future generations because it ends a culture of impunity[†]. Thirdly, through its precise analysis of the facts, criminal justice also contributes to creating a historical record that can become a guarantee against future rewritings of history.[‡] Additionally, by stigmatizing those responsible, justice prevents them from taking part in peace processes and in the future transition of societies. Finally, and for the longer term, justice guarantees national and individual reconciliation, since crimes are officially recognized, rendering revenge useless. The creation of a culture of justice is also beneficial for the political and judicial infrastructure of transitioning societies and can contribute to building a lawful state.[§]

This overly idealist vision sees justice as the only tool necessary to reconstruct societies after a conflict. But is it so easy to achieve? Supporters of amnesty are not all criminals trying to save themselves. Those who are more realistic and pragmatic consider criminal justice to run the risk of destabilizing the peace process, of rekindling inter-group tensions by stirring up the past and re-traumatizing the victims. These critics believe that one must bury the past and move on.[**]

Amnesty, however, is not amnesia. The Truth and Reconciliation Commissions often become forums where the spoken word is completely liberated: they help to remember, reconstruct, accuse, forgive and grant amnesty. *Revealing is healing* was the motto of the Truth and Reconciliation Commission in South Africa. According to this alternative stream of thought about reconciliation, individual

---

[*] Kerr and Mobbekk, p. 4. See also Meron, Theodor, "The Case for War Crimes Trials in Yugoslavia", *Foreign Affairs,* 72/3 (1993), p. 129: "It was the great hope of tribunal advocates that the individualization and decollectivisation of guilt… would help bring about peace and reconciliation."

[†] Ibid, p. 5

[‡] Ibid, ,p. 5

[§] Ibid, pp. 5-7.

[**] Ibid, p. 8. See also Cassese, Antonio, "Reflections on International Criminal Justice", *The Modern Law Review,* 61:1 (January 1998), p. 10: "The pursuit of criminals is one thing. Making peace is another"

healing can lead to national-level healing. Forgiveness is strategic in this context and can be seen as a tool of nation building. This is a pragmatic vision opposed to the strictly legal approach taken by international criminal law, which could be seen as counterproductive.

Are we then doomed to choose between a society's immediate survival and the principles it is founded upon? Kerr and Mobekk admit that transitional justice works on a very fine line and must constantly balance between the short and long term demands of peace and the imperatives of justice.[*] In order to overcome this dilemma without taking sides in the debate, the authors of *Peace and Justice* insist upon the crucial role of context. According to them, there is no perfect, one-size-fits-all model of transitional justice that one can apply in any given situation. Rather, one must always account for several factors: social and cultural norms, the existence and nature of a peace agreement and local infrastructures and financing. Although commendable, the wish to end impunity must always be reevaluated according to realistic constraints if we are to avoid instability. This connection between justice, peace, and security was recognized even in the statute of the ICC. Indeed, Article 53 states that the Prosecutor can suspend an investigation or delay a trial if he finds that continuing it may go against the interests of peace and international security. This seems to herald the end of judicial fiction, but Kerr and Mobekk refuse to give up the idea of a strong correlation between peace and justice.

Consequently, the two authors analyze very precisely the different types of transitional justice since Nuremberg. This first form of transitional justice made responsibility for crimes individual, transferring the power of the state towards the individuals: the latter are the only ones that can stand trial for genocide. Later, the two ad-hoc tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY, respectively) are evidence of the rise of this purifying vision of international justice. These tribunals were created by Security

---

[*] Ibid, p. 180

Council resolutions under Chapter VII of the United Nations Charter and they defend the idea of a judicial institution as a guarantee for international peace and security.

Nevertheless, Kerr and Mobekk admit that these grandiose aims for international justice have not all been realized. Firstly, they did not have a deterrent effect: the ICTY, founded in 1993, could not prevent the massacre at Srebrenica in 1995, just as well as the ICTR could do nothing against the outbursts of violence in the Democratic Republic of Congo, in Uganda or in Sierra Leone. Additionally, people have not reached reconciliation solely as a result of the indictment of high-level suspects. On the contrary, mass violence and genocide tend to entirely destroy social ties and studies have shown that societies that have lived through such phenomena continue to stay ethnically divided for a long time, in spite of political progress they might make. It is hard to imagine how an international institution whose seat is far away from the conflict zone could achieve such an intimate and complex target as forgiveness. Indeed, in 2002, 87% of Rwandans did not know that the ICTR even existed.[*]

These mixed results have led to the recent development of alternative justice mechanisms, which take advantage of the local context and engage the affected population. Amnesty initiatives, for instance, have had a strong stabilizing effect in particular cases such as South Africa, largely because they were closer to local traditions. “There is no future without forgiveness”—are the words of Desmond Tutu. Still, Kerr and Mobekk remain divided over the efficiency of these amnesty initiatives. It is true that amnesty can encourage personal vengeance projects and thus foster instability. It can also be politically manipulated, as in the case of Morocco, where the Truth and Reconciliation Tribunal established by Mohammed VI to judge crimes committed under Hassan II was used primarily to mobilize the population behind the king’s reforms and create a new national myth.

---

[*] Stoyer, Eric and Weinstein, Harvey, ed. *My Neighbor, My Enemy. Justice and Community after Mass Atrocity*, Cambridge, Cambridge University Press, 2004, p. 276.

Eichmann's trial in Jerusalem performed a similar function for the state of Israel, and was also judicially problematic. Consequently, these policies should not be seen as an alternative to justice but, rather, as a complement to justice. However heterogeneous the desire for justice, it is still permanent in transitioning societies.

Kerr and Mobekk's main argument is that one must avoid any technocratic approach to peace, justice, and reconciliation. One danger would be to reduce transitional justice to a purely instrumental vision of crimes against humanity, as if these could be "managed" in a purely administrative fashion. Whatever shape it may take, transitional justice is not a magic wand, a tool kit for the reconstruction of conflict-ridden society; it is the product of generations.

Thus, one can deplore the fact that Kerr and Mobekk's analysis remains quite abstract in spite of its ambition to approach the issue in context. The two authors dwell too little on the actual impact of justice in reconciliation processes at the local level. The greatest mistake of this new wave of thinking about reconciliation through justice is to believe that there is only one truth about the conflict among the affected populations, and therefore only one way to achieve justice. Rather, surveys on the ground show that truth is not just the reproduction of facts for the victims; it also lies in the peoples' moral perception of these facts. Should justice, as beauty, be in the eye of the beholder?

In any case, it goes beyond the formal interpretation given to it by judges in The Hague and Arusha. When asked what justice meant to her, an old Muslim Bosnian lady showed her grandson and said: "I will teach him to remember and to hate. I will teach him to kill."[*] To her, justice meant revenge. But to others, justice may be going home again, having a job, getting reparations, forgetting the past, rebuilding old lives, being a witness in court against those who killed family

---

[*] Ibid, p. 87.

members, being able to look those people in the eye and to hear their excuses, or even just knowing the truth about their disappeared loved ones, finding their bodies so they can bury them in dignity. The meaning of reconciliation will depend, for each of us, on the meanings we give to justice.

The International Criminal Court Student Network: Past, Present and Future

CAROLINE WOJTYLAK[*] *AND JUDY FU*[†]

WITH FOUR SITUATIONS before the International Criminal Court, including an indictment for genocide against a sitting head of state, there has never been a more important time to engage in frank, open dialogue about the future of the Court. As the tenth anniversary of the Rome Statute is duly celebrated this year, the International Criminal Court Student Network celebrates its first anniversary, reflecting on its mandate to give voice to students invested in international criminal justice.

Over the past year, we have seen our network grow within the London School of Economics and Cambridge University, throughout the UK and beyond with like-minded students from the Netherlands, Canada, and the United States. With the launch of the first multinational student journal on international criminal law in the world, our intent was to provide a platform for individual student voices and their thoughts on and in the global battle against impunity. We wanted the journal to reflect the voices of all those who are involved in shaping international criminal justice: from future international lawyers to Congolese human rights activists; from those exploring the nuances of statute law to those who pause to reflect on the meaning of anniversaries. This was and remains the mission of Issues in International Criminal Justice.

We cannot help but be reminded of the old adage: "justice is not what goes on in a courtroom, but what comes out of it." To merely discuss the past, present and future of international criminal law would be a

---

[*] Founder and Director of the International Criminal Court Student Network (ICCSN). Chair, ICCSN at Cambridge. LLB, The London School of Economics & Political Science. LLM candidate, Cambridge University.
[†] Chair, International Criminal Court Student Network (ICCSN) at The London School of Economics & Political Science. LLB candidate, The London School of Economics & Political Science.

failure to reach towards our fullest potential. With this in mind, over the past year our stride has been bold. We organized the first UK-based international criminal law moot competition. We traveled to The Hague as a team to engage representatives of international institutions. We have convened and continue to support research teams on gender-based violence, resource exploitation, victims' rights, the UK ICC Incorporation Act, the Great Lakes Pact, with more topics on the way. We are campaigning to establish a bursary to support a student affected by ongoing humanitarian crises and genocide with a scholarship to attend The London School of Economics. We foster and encourage a membership of active students that have expressed their devotion to a timely investigation of Sudanese President Omar al-Bashir with both word and deed.

Over the past year, our band of students has come a great distance. But while 2008 brings change for the better and hope on our horizons, it also brings obstacles to face and darkness to overcome. As the United States names Barack Obama its President-Elect, the possibility of reconciling America's turbulent relationship with the ICC seems within reach. As Radovan Karadzic stands trial before the International Criminal Tribunal for the former Yugoslavia, it is increasingly clear that the battle against impunity edges closer to victory. And yet, political and economic interests in the Democratic Republic of Congo have deteriorated a once fragile calm. And before our eyes, peace talks collapse as the Lord's Resistance Army once again takes up arms against the children of Northern Uganda, Sudan, and the Democratic Republic of Congo.

Though we live in a changing world in turbulent times, this much is clear: the future and survival of international criminal justice relies on the awareness and support of youth. As that generation—and as those who will live by its authority—we answer a calling as active delegates, constituting the very spirit in the letters of law. As we debate, challenge and teach one another, we earn the ownership we seek.

Our most sincere thanks are extended to those who have helped realize our vision for an international network of students and a channel for their voices. With two dedicated, highly skilled, and formidable teams at Cambridge and LSE, we are infinitely indebted to our peers who have challenged and taught us as colleagues and friends. Special thanks must go to Kora Andrieu, Editor-in-Chief of this journal, and the extraordinary Editorial Team – Andrew Sanger, Isabel Carty, and Derek Valles. Together, we have created something truly exciting. And for now, forza!

Sincerely,

Caroline Wojtylak and Judy Fu

Notes

Notes

Notes

Notes