The Case for the International Criminal Court (ICC)

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For someone who is not a professional jurist, but a professional diplomat, the focus of an evaluation of the meaning of the International Criminal Court is not its significance as a fundamental turning point in the development of international criminal law, but rather its impact on the evolution of the system of international relations.
Indeed, the establishment of ICC affects many different aspects of international relations, and – as those who oppose it are correctly aware of – will entail deep and numerous consequences.

1. Putting Teeth into Humanitarian Law

For all its unquestionable development, both in terms of doctrine and of actual norms (be they customary or based on treaties), humanitarian law has been confronted, especially after the end of the Cold War, with a radical challenge threatening a radical crisis. As every other branch of international law, humanitarian law has been created by, and for, nation-states. Unable to put war outside the law (as pacifists would desire), nation-states have opted for putting law into war in order to introduce limitations both as to means and to targets of armed violence.
No one would doubt the legal nature of this complex of norms – norms that were put to the test in numerous international conflicts and basically proved their validity and effectiveness.
The last decade of the 20th century confronted us with a different type of conflict. One in which the warring sides were not states, but more or less organized armed groups, from those led by Balkan warlords to Somali clans. Such groups, and their leaders, showed not only no knowledge of international

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humanitarian law, but no intention of abiding by it even when they were invited to do so by the international community.
Facing these new, internal conflicts, humanitarian law showed its limitations, inevitable when confronted with combatants who recognized no obligation *vis-à-vis* laws made by nation-states and for nation-states.
The setting up of an International Criminal Court addresses this problem, fills this gap. As the President of the International Committee of the Red Cross has written: «In a groundbreaking development, the Court's Statute unequivocally lists acts considered war crimes when committed in non-international armed conflict»[1].
The distinction between international and internal conflict is now virtually blurred from the point of view that should be central for humanitarian law: not the nature of the perpetrator, but the essence of the human value we must protect.
The significance of ICC for humanitarian law is, however, even deeper than the overcoming of the international/internal divide. By including the crime of aggression, the Statute of the Court reverts to the original ambition of the law of war: that of addressing not only *ius in bello* but also *ius ad bellum*. In spite of all the difficulties in reaching consensus on the definition of aggression (and of the even more evident difficulties in applying the concept) there is something extremely significant in this shift, something that it would be a mistake to dismiss as unrealistic.

2. The Inclusion of Human Rights

The debate on the difference, but also the links, between humanitarian law and human rights law is a well-known and very interesting one. The basic difference is that, whereas humanitarian law addresses the relationship between nation-states, human rights law is concerned with the treatment that nation-states give their own citizens, or subjects.
«The law of armed conflict had the purpose of restricting the uses of violence between states and (in the case of civil wars) between governments and rebels. Human rights law had (among other things) the purpose of averting and restricting the uses of violence by governments towards their subjects whether

[1] J. Kellenberger, *Humanitarian Law. More Effective 25 Years Later*, in «International Herald Tribune», 8-9 June 2002.

formally in rebellion or not; a field of conflict for which international law by definition brought no remedies»[2].

This is so true that at Nuremberg the Holocaust did not – could not – be addressed for what it was, a crime against humanity coincident with but not necessarily related to war (it is enough to think of the extermination of German Jews). The international community, and in particular the victorious allies, were not ready – in their concern for preserving sovereignty against outside questioning and interference – to qualify those crimes in terms of human rights. Thus, «Crimes against humanity were a canny, cautious half-way house to human rights. They were so to speak invented [...] in order to make possible the prosecution of Axis leaders for the dreadful things they had done distant from battle-fronts and in time of peace as well as war [...]»[3]. But «the four great powers involved in shaping the Nuremberg indictment were not about to set a precedent that could immediately be used to their own disadvantage. To "crimes against humanity" was therefore tacked the qualification that such crimes had to have been committed during the war or as a part of the alleged criminal conspiracy to launch the war»[4].

The definition, in the ICC Statute, of crimes falling within the jurisdiction of the Court finally sets aside this limitation, so that the birth of the International Criminal Court can be considered a major turning point not only for humanitarian law but also for human rights law, revealing their substantial coincidence and showing also that the only difference between these two branches of the legal protection of the human being consists in the earlier, faster development of the law of war, given the priority attributed to it by nation-states in their prolonged era of monopolistic, unquestioned control of international society. Thanks to the ICC, human rights law takes one more step, and a very significant one, in its «catching up» with humanitarian law. The international protection of human beings against the horror of violence will now be able to advance on two more balanced legs.

For the human rights discourse, moreover, this will entail a major shift, allowing it to move from standard-setting and denunciation of violation to implementation.

The day that the worst human rights violations are not denounced in Geneva but tried in The Hague, even «realist»

[2] G. Best, *War and Law Since 1945*, Oxford, Clarendon Press, 1994, p. 69.

[3] *Ibidem*, p. 67.

[4] *Ibidem*, p. 68.

sceptics – who, in spite of the existence of international human rights norms, insist in describing human rights as the realm of idealistic wishful-thinking – will be forced to take human rights seriously.

3. The ICC and the Prevention of Conflicts

Although we must be aware that universal, perpetual peace is an inspiring goal rather than a concrete targets, it has become evident (see also what remarked above on the crime of aggression) that the international community is today trying to move beyond the mere regulation of conflict and starts, more ambitiously, to aim at its prevention. The fact that we will never be able to prevent all conflicts should not discourage us from trying to avert all those that we can prevent.

Conflict prevention is today a «growth industry» within international relations. The UN and its agencies, the World Bank, the EU, OSCE and OECD as well as regional organizations, in particular the OAU, are all trying to devise strategies for the prevention of conflict.

Given the fact that conflicts are produced by a plurality of causes, conflict prevention necessarily embraces a plurality of tools and approaches: from preventive peacekeeping to economic development; from preventive diplomacy to governance issues. Yet, though the causes are many, they are but «raw material» in the hands of human agents, i.e. of those political and military leaders who foment, lead and carry out conflict. Abandoning all «naturalistic» approaches, which are both fatalistic and inevitably racist (as if it were more natural for certain groups of human beings to slaughter one another than to coexist) we should focus our attention on the promoters and the purveyors of organized violence, on the way they originate conflict and on the way they conduct it.

The ICC Statute does exactly that, thus introducing a powerful deterrent to conflict. It does so by shifting the focus on the roots of conflict from causality (the mode that lends itself to justification, in the light of history, of just about any possible human horror) to imputation. It stops asking: What? And starts asking: Who?

This appears especially promising as far as internal conflicts are

concerned. Indeed, in many if not most so called «ethnic» conflicts, the dividing line between political violence and common on criminality is difficult to ascertain. Especially in these cases we can be hopeful that the deterrent effect of the functioning of an International Criminal Court will be powerful on warlords and other local leaders who promote conflict not in the pursuit of national or political causes but rather trying opportunistically to achieve personal gain through organized violence.
Such characters, not being motivated by high ideals or political causes, have a tendency to operate on the basis of a cost/benefit analysis: raising the possible cost of their action would definitely make them ponder about the advisability of promoting and performing large-scale criminal acts.

4. Answering Objections

The birth of the ICC has been marked – I would say marred – by strong opposition on the part of some countries (especially the United States) as well as doubts and objections formulated by some international experts and commentators. Let us try to briefly address them.

4.1. A Threat to Sovereignty

If we replace the loaded term «threat» with the more neutral term «limitation», then there is nothing to argue about this definition. Indeed, the ICC entails a limitation of national sovereignty. But where is the scandal here? Unless we deny the obligatory nature of international law (a rather radical position) we must admit that nation-states do not operate in a Hobbesian state of nature, but exercise their sovereignty within certain bounds and according to certain rules. How can we posit a boundless exercise of national sovereignty in the presence not only of the myriad of norms deriving from general international law, both customary and treaty, and from the UN Charter?
Indeed, sovereignty should be seen not in absolute, idolatric terms, but rather in view of its double function: a) a safeguard of independent action by individual states as subjects of international law, and b) a governing principle assuring the functioning of the international system. In other words, there is

a «dysfunctional sovereignty» (sovereignty that translates itself into international aggression or internal extermination) and a «functional sovereignty». The distinction between the two is determined by international norms and principles. We believe that in the complex relationship between international law and sovereignty (two terms that are not incompatible, but are joined in variable bipolar tension) the international community is gradually coming to the point of switching from the principle: «All the international law compatible with sovereignty» to another one: «All the sovereignty compatible with international law».

For all practical (and political) purposes, however, the issue should not be put in terms such as «ICC versus sovereignty», but with a focus on the search for a guarantee that the mechanism set up by the Court does not sacrifice, in terms of the needs of the international system, the legitimate sovereign prerogatives of the states that form it.

To say that the ICC abolishes state sovereignty is a gross exaggeration. Its most salient feature, indeed, is its complementary nature. It is a «court of last resort» which will come into play only in cases in which national courts prove themselves unable or unwilling to prosecute the crimes falling within its mandate. To mention one specific case, Captain Medina and Lieutenant Calley would not have been indicted by the ICC – had it existed at the time – for the Mi Lai massacre, since they were tried in a US military court.

It is, moreover, important to point out that the Statute of the ICC, while being radically innovative, is not as «revolutionary» as its critics maintain it to be, insofar as it simply identifies – but does not introduce for the first time[5] – the crimes that fall within its mandate (from genocide to crimes against humanity, to war crimes). The only exception is the crime of aggression: one, however, which is kept in abeyance until an agreed definition is reached. Besides, opponents of the Court are disingenuous when they decry the breach, by the ICC, of the monopoly of criminal action traditionally vested in nation-states while we are all aware of the fact that the concept of universal jurisdiction for the worst crimes (genocide, torture, grave breaches of humanitarian law) has been a legal reality for quite a while.

5 It is not true, in other words, that «le Tribunal veut ériger la loi naturelle en loi positive»: C. Delsol, *Le TPI est-il légitime?*, in «Le Figaro», 5 September 2001. There is a lot of *loi positive* in the Statute.

4.2. Vulnerability to Political Manipulation

An objection that is just as strong as that referring to a «threat to sovereignty» is that which is centered on the danger that the ICC could be utilized for pretextuous and politically instrumental purposes. Indeed, this is perhaps the less theoretical, more concrete reason for present US enmity to the Court.

From the point of view of theory, we cannot but agree on the existence of such a danger, adding immediately, however, that this happens to be a constant possibility for both criminal and civil law.

We did not need the coming into being of an International Criminal Court to know that tribunals can be, and have been, influenced and distorted in their functioning and their pronouncements by the more or less hidden particular agendas of parties or by the orientation, social or political allegiance or interest of judges. The whole point is not, of course, opposing the existence of tribunals or delegitimizing them *ex ante* because of their possible hijacking by spurious interests and goals, but rather setting up a functioning system of checks and guarantees. The Court does possess such checks and guarantees, and, besides, the Statute includes (something which many of its supporters have considered a painful concession to doubters and *souverainistes*) the possibility for the UN Security Council to stop it in its tracks when it so decides (Article 16: «Deferral of investigation or prosecution»). Even imagining – with some effort – that the high-level, reputable judges that will be appointed to the Court could show themselves prone to acceding to an instrumental, political use of its proceedings, this seems to be a very powerful safeguard against such a theoretical possibility becoming a real problem.

To sum up, I will quote Adam Roberts of Oxford University, an authority on humanitarian law: «The Rome Statute, establishing the ICC, contains numerous safeguards to ensure that the ICC will not shoot from the hip. Under Article 8 war crimes would generally not be prosecuted unless committed as part of a plan or policy or part of a large-scale commission of such crimes. Article 16 enables the UN Security Council to defer an ICC investigation or prosecution. Article 17 provides that a case is inadmissible where a state is genuinely carrying out an investigation or prosecution itself»[6].

[6] A. Roberts, *War Law*, in «The Guardian», 4 April 2001.

And if this is not considered sufficient, one should remember that according to the Statute the Prosecutor can be removed for misconduct by a simple majority of the governments that ratify the ICC Treaty, and a two-thirds vote can remove a judge.

The fact is that international criminal courts already have existed (Nuremberg; Tokyo) and exist today (ICFY and the International Court for Rwanda), and that, compared to them, the ICC *increases* the guarantees that proceedings will not be distorted by political pressure or passion.

To this very day, Nuremberg is dismissed by pseudo-realist critics as having sentences just been the embodiment of «victors' justice»[7] – a dismissal that is echoed today with arrogance and contempt by Milosevic in his trial at The Hague. It seems evident that a court that is set up independently from and prior to any specific conflict is infinitely less open to such doubts and criticism.

It seems indeed hardly logical or sustainable for those who are supporting present-day *ad hoc* international criminal tribunals to oppose the ICC, a court which is born with more guarantees of objectivity, since its setting up is not contingent on any specific political situation. Or, conversely, they should be careful in disqualifying the ICC, since their line of reasoning could be applied, with relatively more credibility, to the *ad hoc* tribunals they are in favor of.

A very specific objection to the mandate of the Court – an objection that has caused the most acute political problems, especially in relation to missions in former Yugoslavia – is the alleged inadmissibility that members of the armed forces of Western countries participating in peacekeeping missions could be incriminated in front of the ICC. If the fear, also here, is that of politically-inspired travesties of justice, one cannot but restate the guarantees that exist in the ICC Statute against the possibility of such distortion. If, on the contrary, what is hinted is an alleged exemption of peacekeepers from the mandate of the ICC, it becomes necessary to restate the irrelevance of *ius ad bellum* to *ius in bello*. As internationalists know very well, the doctrine of belligerent equality demands that we prescind, in matters relating to humanitarian law, from the legitimacy or illegitimacy of the recourse to military action[8].

[7] An American author, though defending the Nuremberg trials by affirming that «the contemporary world is not entitled to sneer at the imperfections of justice delivered at Nuremberg», identifies those imperfections as follows: «The moral limitation of the trials reflected their dominant purpose, which was the vindication of Allied war aims. Putting an end to Nazi genocide was not a distinct war aim or even a prominent theme of Allied war propaganda, so it did not become a central theme of the postwar trials. The tribunal of Allied judges carefully disclaimed any authority to judge the way a government treats its own people – an authority that could have never been accepted by the Russian judges»: J. Rabkin, *Nuremberg Misremembered*, in «SAIS Review», Summer-Fall 1999, pp. 93, 91.

[8] G. Best, *War and Law Since 1945*, cit., p. 236. Interestingly, Best quotes the US Air Force's 1976 Manual: «The law of armed conflict applies equally to all parties of an armed conflict, whether or not the international community regards any participant as the "aggressor" or "victim"».

4.3. International Justice versus National Reconciliation

A third objection moves from the area of international relations (threats to sovereignty; danger of politicisation of the Court) to internal situations. The concern that it voices has to do with the danger that criminal-court proceedings might have a polarizing effect, rendering impossible, in post-conflict situations, the possibility of healing, of reconciliation, of the reconstruction of community: «Once the permanent ICC is established, it will be far more difficult, perhaps impossible, for members of war-torn societies to embark on any reconciliation process that might, like the South African process, concede amnesty to former rights abusers in order to pursue broad communal goals»[9].

The author applies this reasoning to post-genocide Rwanda, maintaining that the real solution – if our goal is not abstract justice, but the reconstruction of a torn society – should be found in a process of reconciliation focused on local traditions, such as *Gacaca*, a Rwandan quasi-judicial village procedure of recognition of guilt entailing, instead of punishment through incarceration, restitution that is both symbolic and monetary.

The objection is apparently a sound one, since we should not be inspired by the merciless logic embodied in the Roman saying: *fiat justitia, pereat mundus* (let justice be made, though the world should perish). Yet, it is valid only if it is perceived as a legitimate criticism against a pan-judicial view of society and politics. Definitely, justice and tribunals are not the only answer to crisis and conflict, but they are necessary though not sufficient. Definitely, neither present-day *ad hoc* tribunals, nor the ICC, are designed to try – and before that, to deter – rank-and-file perpetrators of major crimes, just like in Nuremberg we did not see SS sergeants or Gestapo agents. For those, «Truth-and-Reconciliation» or *Gacaca*-type mechanisms might indeed by the best solution in view of attaining the goal of a truly pacified and reconstructed society. Incidentally, it is not so clear that such procedures can be defined as alternative to a judicial path, insofar as that they seem to be a form of judicial plea-bargain.

As for the main responsible for those crimes, the problem that is stressed by critics of the ICC is the fact that the exclusion of impunity will increase their reluctance to accept compromise and especially the abandonment of power. If they will go down fighting, then it will be worse for everyone: this is the way this sort of reasoning goes. Taken to its extreme consequences, the

[9] H. Cobban, *The Legacies of Collective Violence*, in «Boston Review», April-May 2002, at http: bostonreview.mit.edu/BR27.2/cobban.html.

reluctance to corner criminals – since in this case they become desperate and more dangerous – could imply that at the beginning of 1945 Hitler and his henchmen should have been offered immunity (and exile), so that the war would have lasted less, with evident benefits in terms of reduced casualties and destruction. One is of course allowed to hold such views, but their moral and political implications should not be hidden.

Moreover, if the real goal of the ICC is not punishment but prevention, then why should we give priority – when judging the merits of institutions and norms – on the way in which we can exit from conflict, instead of focusing on how we could avoid entering into it? Doesn't this reveal, politically and psychologically, a sort of fatalism on the inevitability not only of conflict, but also of conflict carried out through criminal action?

Punishment and reconciliation, actually, are not as antithetical as they are sometimes made to appear. The «Truth and Reconciliation» mechanism, in South Africa, would not have worked without the threat, as an explicit alternative, of the application of standard criminal procedures. Likewise, the existence of an external, international court will work, given its complementary nature, not in substitution, but in support, of internal judicial mechanisms. It will work, that is, as an important stimulus to apply internal judicial procedures[10], possibly with a plea-bargain logic aiming, if the ethic of responsibility will prevail over the ethic of conviction, at having both justice and reconciliation.

4.4. The ICC Does Not Address the Most Dramatic Problem of Our Time: Terrorism

The paradox of a Court that might involve dangers for those fighting terrorism while not addressing terrorism itself, is denounced by critics of the ICC, especially in the US and Israel. A not superficial look at the Statute, however, should be sufficient to refute this interpretation. Article 7 (Crimes against humanity) is indeed extremely clear in including «widespread or systematic attack directed against any civilian population». Who can have a doubt that, to give one example, the use of nuclear, chemical or bacteriological means for terrorism falls squarely within this definition?

If anyone had any doubts, the definition contained in the same

[10] Speaking on 12 April 2002, in front of the Human Rights Commission, on the positive effects of the ICC, Kofi Annan especially stressed the «strong incentive to states to improve their standards» (SG/G/02/2).

article should be enough to dispel them: «Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in para. 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such an attack». «Organizational policy»: it does cover Al Quaida and similar terrorist organizations.

Terrorism can also be prosecuted, under the Statute, under Article 8 (War crimes), since the article covers also «armed conflict not of an international character» and since it refers in general to «acts committed against persons taking no active part in hostilities». The mastermind of a suicide bombing campaign could definitely be brought to The Hague.

5. The ICC and Globalization

As a final consideration, I will briefly try to assess the meaning of the ICC for globalization.

Indeed, what makes the objections of *souverainistes* less sustainable, both logically and politically, is that when opposing the setting up of the ICC they omit to inscribe their reasoning within the concrete aspects of contemporary international reality.

The Court is definitely not responsible for the «relativization of sovereignty» that is taking place because of the overall effects of globalization: from the repercussions of financial problems from one side of the planet to the other to the spread of AIDS and other epidemic diseases; from the global reach of organized crime to the new brand of «postmodern» terrorism; from environmental problems to the irrepressible movement of people in search of more security and better economic conditions.

If there are some who think that we can put the *jinn* back into the bottle, reality will definitely disabuse them. There is no possible option consisting in re-establishing borders in their previous meaning, or trying to reconstruct hypothetical water-tight borders against unwarranted «interference» and «contagion».

But taking stock of globalization does not mean accepting passively its downside, its threats. We cannot just adjust to a

«theory of chaos» in international relations where universal interconnectedness of phenomena turns into universal helplessness.

If we turn to conflict, and especially to its more unacceptable, more inhuman ways of conducting it, we must turn fatalist acceptance into consistent preventive and repressive action. In order to do that, we must shift from causality to imputation. Move from history and sociology to law. We must, in other words, ask «Who?» and not only «Why?». We must refer crimes not to history, not to countries, not to political movements, but to individuals.

The International Criminal Court that originates from the Rome Treaty of 1998 will allow us to take a very significant step in this direction.

Accepting the risk of being accused of «utopian silliness»[11], I will conclude by saying that I believe that there is a very firm, very realistic, case in favor of the International Criminal Court, and that – though welcoming all doubts and debates, perfectly legitimate – we should not only focus only on the inevitabile problems that its creation and functioning will entail, but also to its momentous contribution to the growth of a world where the law can help us not only to limit and regulate conflict, but perhaps also to prevent it.

[11] Robert Kagan (*Europe Should Be More Sensitive to American Concerns*, in «International Herald Tribune», 1 July 2002) writes about «the utopian silliness that animates too many Europeans these days».