

Analysis No. 246, May 2014

IN THE FRAMEWORK OF THE HISTORY OF INTERNATIONAL CRIMINAL JUSTICE: A BRIEF SURVEY

Marco Pedrazzi

The huge problems facing the ICC, and international criminal justice in general, encompass but are much broader than the question of geopolitical imbalance in the situations considered by the Court. To be assessed in an appropriated way, they must be settled in the wider framework of international criminal justice development. By analyzing the ICC from this perspective, two important concerns arise: first of all, the difficulty in reaching a universal and equal system of international criminal justice, until the Court is opposed by important countries and by States potentially or actually involved in the commission of serious crimes; secondly, the fact that the jurisdiction of the Court risks being totally inefficient as far as it does not meet an adequate cooperation by its member States, especially when it is prosecuting the highest political authorities of a country. The process of establishing a universal and effective system of international criminal justice is far from being accomplished.

Marco Pedrazzi, professor, International Law, Università degli Studi di Milano

The ICC is currently acting on eight different situations, all of them relating to African countries: Lybia, Darfur (Sudan), Mali, Central African Republic, Cote d'Ivoire, DRC, Uganda and Kenya. This state of affairs is clearly imbalanced. However, the roots of this imbalance are complex: in order to understand them better, it is useful to recall briefly the origins and the developments of international criminal justice. I will not concentrate in these few pages on another issue, which is probably at the moment the first bone of contention between Africa and the ICC, and which relates to the trials pending against the acting political leaders of some countries (in particular, Sudan and Kenya): a question involving highly delicate aspects regarding political opportunity, the appropriateness of prosecutorial policies, immunity of senior officials, the respective roles of the ICC, the Security Council, the African Union, other States, and that would deserve in and of itself an autonomous analysis.

The first step was the birth of international crimes, i.e. serious violations of international law committed by individuals, the punishment for which is directly imposed by international law. The first such crimes were war crimes, i.e. serious violations of international humanitarian law or *jus in bello*, which is the law governing the conduct of wars or armed conflicts. Those crimes were already born, under international customary law, in the second half of the XIXth century at the latest. During the XXth century it was the time of crimes against humanity, the crime of genocide and the crime of aggression. Crimes against humanity and the crime of aggression were clearly introduced for the first time within the Charter of the Nuremberg International Military Tribunal, established with the London Agreement of 8 August 1945. The crime of genocide was born a few years later, with the Genocide Convention of 9 December 1948, as a consequence of elaboration on the horrifying experience of the Holocaust.

Crimes against humanity were created in order to fill the gaps of war crimes: these, in fact, can only be committed during war (in the past during an international war, today also in a non-international armed conflict) and against the enemy, or the population of the enemy. On the contrary, crimes against humanity are serious and widespread or systematic violations of fundamental human rights committed at any time against any civilian population.

Genocide is a sort of crime against humanity that has become autonomous, consisting in the commission of certain acts against other persons identified as belonging to a specific ethnical, racial, national or religious group, with the specific intent to destroy such a group.

Aggression is the behavior of the political or military leaders of a country who decide to start, and wage an aggressive war against another country. This crime is the most difficult one to become firmly established in

The ICC is currently acting on eight different situations, all of them relating to African countries: Lybia, Darfur (Sudan), Mali, Central African Republic, Cote d'Ivoire, DRC, Uganda and Kenya. This state of affairs is clearly imbalanced

Crimes against humanity were created in order to fill the gaps of war crimes: these, in fact, can only be committed during war (in the past during an international war, today also in a non-international armed conflict) and against the enemy, or the population of the enemy

customary international law, because various States, especially the big powers, are resisting full recognition of such a crime. Even if it was established and punished in Nuremberg (as “crimes against peace”), and it is included in the Rome Statute of the International Criminal Court (17 July 1998), it is extremely unlikely that this crime could be punished in the near future. That is due to the heavy limits to the activation of ICC jurisdiction introduced by the amendment to the Rome Statute adopted in Kampala on 11 June 2010, which has also defined the crime of aggression, and to the obstacles facing entry into force of this amendment.

As it is known, international law lacks a central authority to enforce its rules, in particular it lacks judges and policemen, at least in the sense we give to these words in national legal systems. Thus, even the rules on international crimes had to be enforced by States, within their domestic legal orders. The problem with international crimes is that they are generally committed by State organs: militaries, political leaders, etc. Moreover, they are generally not committed in a random way, but rather in pursuance of a State or governmental policy. So, in many situations, it is unlikely that these crimes would be pursued by the (most) interested State, unless there is a change of regime: and even then, the new regime may decide to apply an amnesty, or in any case it may be lenient in pursuing its own agents. Furthermore, in various cases, the States in whose territory such crimes are committed are ravaged by war or under a severe dictatorship, and therefore they are lacking an independent and working judiciary system able to repress these crimes. Nor could this state of things be remedied by the exercise of jurisdiction, when possible, by States other than the territorial one: these might be less interested in pursuing crimes committed elsewhere and may encounter serious difficulties in investigating, in getting hold of the accused, and in collecting evidence. That is why the need was felt to establish international criminal tribunals.

The history of international criminal tribunals starts with the Nuremberg Tribunal, established, as previously mentioned, under the London Charter immediately after the 2nd World War . The Nuremberg Tribunal was a step of extreme significance in the development of international criminal law: as we have already seen, in particular, its Statute was instrumental in enlarging the spectrum of international crimes. At the same time, Nuremberg was criticized by many as a clear example of a tendency that had already been experienced earlier: that of victor’s justice (i.e., the tendency of States winning a war to undertake the repression of the crimes committed by the vanquished, while paying little or no attention to their own crimes). The IMT was in fact created by the victorious powers of 2nd World War in order to punish the vanquished, specifically the highest authorities of the German Nazis: the Japanese

international law lacks a central authority to enforce its rules, in particular it lacks judges and policemen, at least in the sense we give to these words in national legal systems. Thus, even the rules on international crimes had to be enforced by States, within their domestic legal orders

leaders being subject to a parallel trial before the Tokyo Tribunal, established under the Executive Order of General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, of 19 January 1946.

Nonetheless, already at the beginning of the United Nations, in the immediate aftermath of Nuremberg, the need was felt to establish a permanent international criminal court, potentially entrusted with the competence to pursue and try persons accused of international crimes committed at any time in any part of the world. It was maintained that only a universal system of criminal justice, not substituting but integrating national judiciaries, inasmuch as those would not be capable of adequately pursuing and punishing the worst international crimes, would guarantee a fair international criminal justice system, able to prevent impunity for international criminals.

The time was not ripe for that, though, because the work of the International Law Commission, the subsidiary expert body of the UN General Assembly entrusted with the task of elaborating a draft code of international crimes and a draft statute of an international criminal court, was paralyzed by the Cold War's divisions. That is why the UN Security Council took the initiative, already in a modified international situation, to intervene, in 1993, in the conflict ravaging the Former Yugoslavia, by establishing (under resolutions 808 and 827) the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in 1994, during the genocide taking place in Rwanda, by creating (under resolution 955), the International Criminal Tribunal for Rwanda (ICTR). Interestingly, this was the first time that international criminal justice was established in Africa, and apparently one of the main motivations inducing the SC to create this tribunal was that the UN body was criticized for getting involved only when awful crimes were committed in Europe while being totally inactive in face of a horrific genocide taking place in the midst of the African continent. Thus, the SC created an international tribunal to deal with crimes committed in Africa, *inter alia*, in order to avoid the accusation of double standards.

The two *ad hoc* tribunals gave a further fundamental contribution to the development of international criminal law. But it was clear that the Security Council, a political organ dominated by the permanent members, could not promote international criminal justice in a fair and impartial way in all situations, as the developments of the last years testify rather clearly. Therefore, after the end of the Cold War, the need to establish a permanent international criminal court continued to be felt as an urgent goal, and this time it led first, in 1994, to the approval of a draft Statute by the International Law Commission, and later to the convening of an international conference in Rome in 1998, which finally adopted the

It was maintained that only a universal system of criminal justice, not substituting but integrating national judiciaries, inasmuch as those would not be capable of adequately pursuing and punishing the worst international crimes, would guarantee a fair international criminal justice system, able to prevent impunity for international criminals

The two ad hoc tribunals gave a further fundamental contribution to the development of international criminal law. But it was clear that the Security Council, a political organ dominated by the permanent members, could not promote international criminal justice in a fair and impartial way in all situations

Statute of the ICC, entered into force on July the 1st, 2002.

The problem was how to build a universal criminal jurisdiction. The best way, from a certain point of view, would have been to have it established by the UN, in order that it could be binding on all States. But if already the competence of the SC to establish *ad hoc* criminal jurisdictions had been questioned by some observers, especially in the beginning, it was much more doubtful that this body could create a permanent international criminal jurisdiction. Furthermore, a court created by the SC would have risked being totally subordinate to this political body. As for the General Assembly, it surely had no competence to impose an international jurisdiction on States. Therefore, the only way to proceed was by means of an international treaty.

Many States would have liked the Court to be totally independent from the Security Council, but others, and among them the US, would have preferred that only the Security Council could activate the Court. A compromise solution was found, in opting for an independent Court, but in providing the SC, at the same time, with the relevant powers, on one side, to activate the Court, and, on the other side, to prevent it temporarily from acting, in cases in which its action would be felt to put an obstacle to the maintenance of peace and security.

The problem with a Court established by a treaty is that, in order to become universal, the Statute needs to be ratified by all States. The need for universality is particularly strong in relation to the ICC Statute, as it was decided that the jurisdiction of the Court would only cover crimes committed on the territory of States parties or by nationals of States parties (or having otherwise accepted its jurisdiction). The Court would only enjoy universal jurisdiction when it is activated by the SC. What happened is that the Statute has met a growing success, being now ratified by 122 States; but that the most important powers, in terms of military and economic strength, and of population, and some States that might particularly fear accusations of crimes, have remained outside: suffice it to mention, among the absents, the US, Russia, China, India, Indonesia, Iran, Israel, Pakistan. Furthermore, the US in particular has undertaken a series of actions to avoid its nationals being subject to the risk of being prosecuted before the Court, when operating abroad.

In such a situation, and here is the core of the problem, it will never be possible to have a universal jurisdiction doing justice for all, all over the world, in an impartial way. This situation could theoretically be remedied by the SC's power of activating the Court. And the SC has acted, referring to the Court the situations of Darfur and Libya. However it has not acted in relation to Syria or other situations, demonstrating that its actions are necessarily tainted by double standards.

A court created by the SC would have risked being totally subordinate to this political body. As for the General Assembly, it surely had no competence to impose an international jurisdiction on States

It will never be possible to have a universal jurisdiction doing justice for all, all over the world, in an impartial way. This situation could theoretically be remedied by the SC's power of activating the Court. And the SC has acted, referring to the Court the situations of Darfur and Libya

It is also necessary to recall that the ICC has jurisdiction only over crimes committed after the entry into force of the Statute. Therefore, it could not deal with some of the most serious crimes that had been committed in various regions of the world before entry into force. That is why the UN decided to establish some other so called internationalized or mixed criminal tribunals, by way of agreements with the interested States: this has been the case in particular in some areas of the Former Yugoslavia, in East Timor, in Cambodia and in Sierra Leone, where a special court (SCSL) was established in 2002 with a mixed composition (national and international), and has rendered some important judgments. Therefore, the picture of international criminal justice in Africa is enriched by the ICTR and the SCSL, not to mention the more recent African attempts to establish African criminal courts or chambers, such as the Extraordinary African Chambers in the Court of Senegal created by the Dakar agreement between this country and the African Union of 22 August 2012, while the attempt to establish a criminal chamber within the African Court of Justice has not produced any result up till now.

Coming back to the original question, why is the ICC dealing at the moment only with eight African situations, and not with crimes committed in other parts of the world? The answer is complex, as various reasons concur in determining this outcome: the fact that the Statute has been ratified by a high number of African States (34); the fact that many armed conflicts have ravaged the continent during these years, with the consequent implementation of serious international crimes; the fact that four African countries (Uganda, DRC, Central African Republic and Mali) have enacted a self-referral to the Court, meaning that they have decided to request the Court to deal with situations within their territories; the fact that many African national jurisdictions do not possess the adequate capacities to deal with international crimes, which is one of the preconditions triggering the exercise of the Court's jurisdiction (the ICC is complementary to national jurisdictions, i.e. it is able to intervene only where national jurisdictions are unwilling or unable to repress the crimes); and finally, because many other potentially "relevant" States have not ratified the Statute. On the other hand, it is true that the Court is dealing with eight African situations, but it has produced limited results up till now, having only convicted and sentenced one accused for enlisting and conscripting children in armed conflict, and acquitted another accused, both judgments being currently under appeal.

One also has to add that the Prosecutor, currently the African lawyer Mrs. Fatou Bensouda, is preliminarily considering other situations in other parts of the world: for example, one can mention the case of Colombia. The fact is that the Prosecutor is not sure at the moment that she can act over Colombia, because Colombian judges are prosecuting and punishing by

It is also necessary to recall that the ICC has jurisdiction only over crimes committed after the entry into force of the Statute. Therefore, it could not deal with some of the most serious crimes that had been committed in various regions of the world before entry into force

It is true that the Court is dealing with eight African situations, but it has produced limited results up till now, having only convicted and sentenced one accused for enlisting and conscripting children in armed conflict, and acquitted another accused, both judgments being currently under appeal

themselves international crimes committed by both sides during the civil war: the point that needs to be ascertained is whether such national proceedings can be considered to be adequate.

To conclude, the huge problems facing the ICC, and international criminal justice in general, encompass but are much broader than the question of geopolitical imbalance in the situations considered by the Court, although it is undeniable that a loss of support from African countries would represent a major setback: they concern, first of all, the difficulty in reaching a universal and equal system of international criminal justice, until the Court is opposed by important countries and by States potentially or actually involved in the commission of serious crimes; secondly, the fact that the jurisdiction of the Court risks being totally inefficient as far as it does not meet an adequate cooperation by its member States, especially when it is prosecuting or trying the highest political authorities of a country. The road towards a universal and effective system of international criminal justice is still very long, and serious obstacles will need to be overcome to approach that goal.

the huge problems facing the ICC, and international criminal justice in general, encompass but are much broader than the question of geopolitical imbalance in the situations considered by the Court, although it is undeniable that a loss of support from African countries would represent a major setback