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Panel 6 : Politique(s) de la Cour

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Introduction

Marina Eudes

§1 Bienvenue dans ce dernier panel. Merci à tous d'avoir tenu le coup jusqu'au bout parce que cette salle est extrêmement chaude et les débats sont approfondis. Quelques mots en français, puis je passerai à l'anglais puisque les panélistes sont essentiellement anglophones. Juste quelques mots en français parce que je soutiens aussi la langue française, j'ai compris que cette manifestation assumait le bilinguisme et j'en suis très contente. Je tenais à remercier les professeurs Scalia et Koutroulis de m'avoir invitée à cette belle manifestation. J'ai constaté que j'étais la seule modératrice qui ne soit ni rattachée à l'ULB, ni complètement défaitiste sur la justice pénale internationale. J'avoue que je suis isolée. Je suis sans doute naïve, mais je continue à croire que la justice pénale internationale a une utilité. Je l'assume. En tout cas, le fait que vous m'ayez demandé d'être la modératrice de ce panel me montre d'une part votre amitié, je vous en remercie infiniment, et d'autre part, c'est aussi un signe des liens entre l'Université libre de Bruxelles et l'Université de Nanterre, les liens entre les centres de droit international et les centres de droit pénal. J'espère que ces liens continueront à s'approfondir dans les prochaines années. On en a parlé au dîner hier soir et ça a été évoqué tout au long des discussions de cet après-midi et de ce matin, il y a beaucoup de sujets qui restent à approfondir. So now let me switch to English because I know you love the famous French accent. So, this last panel is quite exciting. Politics and policies of the court, actually we have already heard many, many things about politics and policies of the court since yesterday, but we will now focus on four topics.

Global Constitutionalism and the ICC: A Relational View

Marina Eudes

§2 Our first panellist, our first speaker is Alain Zysset, who is assistant professor at Durham Law School in the UK. His main research topics are human rights law, international criminal law and political theory. You propose to talk about the links between constitutionalism and the ICC or more precisely between global constitutionalism and the Court.

Alain Zysset

§3 OK, juste un mot en français pour remercier les organisateurs and then I'll switch to English for my presentation. So, this is an article that I've just just finished and if you're interested in it, I can send a full version of it to you later on. This article is a basically a conceptual experiment. I am trying to rethink the ICL system and the functioning of the International Criminal Court in global constitutional terms. In contrast to the social scientific perspectives that or to the humanity's perspective we've seen earlier today, I'm taking the perspective of political theory, to some extent criminal law theory, to rethink, to reconceptualise the system of the ICC. I have basically three steps in the 10 minutes I have.

§4 I cannot of course talk so much about the global constitutionalism as a normative and conceptual framework, so the first step will be to say two things about it and then test this framework against the system of the ICC and again some specific aspects of the system of the ICC. The second step is precisely to distinguish what has been done so far in the literature in using global constitutionalism as a conceptual and normative framework to rethink the International Criminal Court and I would present two, which are the separation of powers and the protection of human rights. And then I would ask the question: is that all? Is that everything that we could say using global constitutionalism to rethink international criminal law and international criminal tribunals? The first thing is how we understand the international criminal trial through a global constitutionalist lens. Is there anything that global constitutionalism can bring us to make sense of the international criminal trial? If I have time, I will move to the second half point which is to understand the coercive dimension of international criminal law, and criminal law tout court in fact. Global constitutions don't have the same coercive dimension principally, but the criminal law, because it is the criminal, has it. How can we make sense, how can we reconcile the two? Finally, I will present my contribution to these two aspects can be understood: the question of the role of the trial and to the question of the coercive dimension.

§5 So, very quickly, how I understand global constitutionalism? I understand global constitutionalism as a dual descriptive and normative framework. In other words, what global constitutionalism is doing is both to reconstruct existing legal and political processes at the international level but also to justify it from a normative perspective, and for that normative perspective to come in it usually relies on what I call a blend of republicanism and liberalism. The second thing I want to mention about the theory of global constitutionalism is the dual enabling and limiting function of international courts and institutions more globally. International courts and institutions are empowered and newly empowered by international law. So, echoing what was said this morning, if you take the principle of complementarity in international criminal law but also the concept of subsidiarity international human rights law, you have both a limiting and an enabling power simultaneously created. States still hold primacy in some cases in international criminal law in the same way states hold primacy in international human rights law. That is an empowerment. But then of course you have in the last resort international courts and tribunals. So, initially, global constitutionalism conducts a descriptive and analytical analysis. But as we shall see, the normative is also an essential part of the agenda.

§6 In the current literature with respect to the International Criminal Court specifically, so in one of the last handbooks on global constitutionalism, you have one chapter on global constitutionalism and the International Criminal Court, and in that chapter the authors take the normative principle of the separation of powers, that is one of these normative principles that is used in liberalism and republicanism and try to see how this principle plays out in the context of the ICC, and they rely on the relationship between the office of the Prosecutor and the Pre-Trial chamber to exemplify this principle with particular reference to the *Lubanga* case. This is typically an example of the dual constraining and enabling function and I just quote: “by both limiting the power of one particular actor within the system, while at the same time enabling power, that power is channelled towards productive and useful ends”.

§7 The second global constitutional principle that was applied to the ICC system is the protection of human rights. Here the idea is that there is a jurisdictional overlap between human rights law and international criminal law to the extent that they both focus on entities exercising large-scale authority. Of course, in international human rights law, it is about States primarily, while in international criminal law it is about individuals, but it is in most cases the most responsible persons in positions of authority. That can be used I think to ground the basis for a global constitutional account of the ICC in global constitutional terms. Now, is that all? Well, as I said in the introduction, something that distinguishes international human rights or international criminal law is this particular institutional process of the trial. Can we think of the trial in global constitutional terms? I think we can.

§8 Based on this idea of the overlap of human rights on international criminal law, given this focus on persons of political authority, we can think of the trial along the lines of one prominent theorist of the trial in domestic criminal law, Antony Duff, for whom the trial doesn't have only an instrumental value. In other words, it is not only seeking truth and pursuing punishment but also an institutionalized setting to call wrongdoers to account. Along these lines, you can then think that the ICC is calling persons that exercised a position of political authority that enables the crimes, while the Prosecutor of the ICC represent and acts on behalf of States and state-like authorities. So, it is crucial for the Duffian argument to work that there's an identity between the person calling to account and the person being called to account.

§9 So how can this authority be legitimate? Well, only where there's an identity between the person calling to account and the person being called to account, and I think that that can apply to the ICC in a constitutional way, so as opposed to the domestic criminal law system where the status of citizenship grounds this identity. If I get arrested on the street, the prosecutor is going to represent the people, the citizenship. In international criminal law, my argument is to say that it is basically a community of State or state like leaders and individuals in position of authority, and that is the community of international criminal law and that grounds the legitimacy of the ICC in global constitutional terms.

§10 In this last minute, I will go straight to the second task that I had set to myself, basically to explain the coercive dimension of international criminal law in comparison to human rights law, which is the main branch of international use by global constitutionalism to apply. Basically, the point is that if international criminal can also be conceptualised in global constitutional terms, we have to explain how it differs from human rights law. If you look at the practice of human rights courts, states are usually pursuing a public good, and that may potentially justify interfering with human rights through the proportionality test. In the international criminal case, you do not have this principled emphasis on the possibility of a legitimate aim (that's the word that is used in human rights law). You don't have that precisely because the assumption is that the wrongdoer has perverted the role of the political authority. And that justifies that there are two systems. I'll stop here. Thank you very much.

The Dual-Status Defendant: An Inscrutable Actor Before International Criminal Tribunals

Marina Eudes

§11 We can now move on the second presentation: Emma Bielschowsky and Shan Patel. So, Emma, among the many, many activities, many, many things, you've worked in Utrecht University on your thesis about the mental defences available to the dual-status defendants before international criminal proceedings, and Shan, you're currently working at the London School of Economics and at the Max Planck Institute, in particular on defence issues. You both wanted to address the situation of particular actors of international criminal proceedings, I mean, people who are victims and perpetrators of crime, and the title of your presentation is "The Dual-Status Defendant: An Inscrutable Actor Before International Criminal Tribunals". You have the floor.

Emma Bielschowsky

§12 Ladies and gents, we would first like to thank our host very much for such a fantastic event and for giving us the opportunity to speak with you here today and participate among such distinguished speakers. My colleague Shan Patel and myself will be discussing our joint paper which is still very much a work in progress so we will be welcoming some feedback on that. And just to repeat the title: "The Dual-Status Defendant: An Inscrutable Actor Before International Criminal Tribunals". For the most part, I will provide some context to our discussion and provide an outline for some legal and some moral considerations that ICC may have in dealing with the dual-status defendants and focusing on the context of child soldiers in light of the Dominic Ongwen case currently before the ICC. For clarity, the facts of this case surround a former child soldier abducted by a Northern Ugandan rebel group, the Lord's Resistance Army, who rose the ranks to commander. The ICC case against him commenced in 2016, 10 years after an arrest warrant was issued for him. It is our aim to generate discussion on the complexity of the dual-status defendants which it may be argued should not be limited to being considered a mitigating factor during the sentencing alone. It may be argued that the extreme mental and physical suffering of child soldiers during formative years may complicate and ultimately compromise the *mens rea* element necessary for establishing criminal responsibility. Shan will then go on to discuss the notion of diminished responsibility and its applicability to the situation of the dual status defendants.

§13 The dual-status defendant has not been subject to much discussion within the criminal law sphere. At the national level we see some success of the battered

woman syndrome defence, noting common law legal systems appear in the early 1990s as some of the first examples of the jewel states defendant receiving legal recognition for the effects that continuous and brutal mental and physical abuse can have on a perpetrator's mental states and therefore upon their agency. A different example may be seen in the rotten social background arguments. Although rotten social background has not yet been successful as a defence, it has gained some attention in cases particularly in the United States where the defendant's background and experience correlates directly with the defendant's criminal behaviour. Now it is quite understandable that such defence has stirred controversy and quite possibly fear for breeding defendant impunity. These fears would become even stronger and even more relevant perhaps when placed within that ICL context. This may pose a threat to the ICC's mission.

§14 The scale of the crimes that have been committed and the number of victims that have suffered harm and the absence of their playing any part in the defendant's rotten moral development. However, there are various factors which the dual status of a former child soldier requires some further contemplation by ICL. In the context of extreme violence, coercive indoctrination and lack of moral choice but to name a few, there may also be a need to scrutinise the failure by both international and domestic legislative mechanisms to protect the basic rights of children in conflict areas. We wonder whether such an analogical example may be able to provide some guidance in dealing with the dual status defendant brought before international criminal law. The battered woman syndrome defence has provided women that have suffered from long-term physical and psychological abuse at the hands of their partners a criminal defence to full liability. The reflection of the severe psychological trauma endured by the child soldiers requires at least equal consideration. The International Criminal Court is the manifestation of an international aspiration to condemn the impunity of individuals responsible for the most heinous violations of international law. However, as the ICC develops its jurisprudence, new legal challenges may require further contemplation of the court's tools and approaches. Mark Drumbl describes the international criminal law as "domestic criminal law does in many cases derive its energy from an intern disseminate polarities of guilt or innocence, capacity or incapacity, adult or child, and victim or perpetrator". It has already been mentioned by various panels and different speakers at this event that the perfect victim or the perfect defendant is not as common as one would like or maybe even expects. However, as Drumbl suggests, criminal proceedings are sometimes known to rely on a simplified and harshly clear-cut division arguably denies a just response to a difficult legal question. In the context of this conversation, the novelty and dichotomy of the former child soldier turned commander of the rebel group that abducted him becomes defendant is a good example of the difficulties the court faces in reaching a balanced and fair approach.

§15 The case of Dominic Ongwen before that ICC provides a number of first

instances for the international criminal system. It is the first instance of a former child soldier to appear before an international tribunal and until now it has been suggested that his former status as a child soldier should be considered as a mitigating factor. This will mean that his former status as a child victim will only come into play during sentencing. This may lead some to consider whether the failure to affect the vast amounts of international and domestic legislation protecting the rights of children, a basic human right of development being recognised repeatedly throughout these. Shan.

Shan Patel

§16 Especially in the context of mass atrocities, we appreciate the complexity of duality of child soldiers as Emma has said. Many competing interests are at stake in international criminal justice, victims, perpetrators society at large. The continuous balancing thereof only becomes more difficult when lines blur, so when victims are perpetrators. What does this mean in terms of participatory rights? To make the situation even more complex, an interesting aspect of the *Ongwen* case to be attentive to, what will the bench do? International criminal tribunals, research has shown, focus asymmetrically on victim justice in the fulfilment of their mandate to end impunity. An occurrence that has been coined: the impartiality deficit. But what happens if a defendant is also a victim, and the established dogma of victimhood is challenged? Something to remain mindful of when the *Ongwen* trial comes to a close.

§17 Today, before the ICC, one is either criminally responsible for one's actions or one is not, there is no in-between. That being the case, it does not come as a surprise that the *Ongwen* Defence will attempt to avail itself of any exclusionary ground it deems possible to substantiate. The Prosecutor on notice of the Defence's intention to bring an article 31(1). A challenge in an attempt to exclude criminal responsibility on the basis of mental incapacity has introduced several expert witnesses to the contrary already. Mental incapacity, one of several full defences provided for in Article 31 Rome Statute, tainting the *mens rea* element is just one of the arguments the Defence has notified the Court of. Here it's important to note the absence of partial defences under the statute, once more revealing the archaically dichotomous nature of the statute.

§18 Criminal responsibility however is a scale. Recall what Emma just told you about some discussion of dual status defence in national context, rotten social background, battered woman syndrome. Each is far from universally accepted or even consistently successful, notwithstanding their existence alone does evidence the realisation that responsibility for action is not a clear-cut yes or no. The ambiguity of both however we realise arguably does not allow one to raise either to a state of general principles of law in any shape or form. If that had been the case and this would be argued, a combination of Article 31(3) and Article 21(1)© would

have allowed the court to consider them as ground for exclusion of criminal responsibility, that Emma has also highlighted before, would possibly advance fears of the offender impunity. This to us simply underscores the need for a middle ground, for an option that is not exclusionary but takes note of varying degrees of criminal responsibility before a guilty verdict is rendered; mitigation, after all, premised on circumstances that lie outside of the individual, mental circumstances lie within the individual and even if not successful for full exclusion of responsibility ought to be given due regard.

§19 As you will undoubtedly noticed with this discussion, we are neither attempting to provide nor proclaiming to have any concrete answer to the increasingly complex and pertinent problem. The point quite simply was to call attention to the matter. We in fact raise more questions than we provide clarification. The duality captured in *Ongwen* in terms of the current ICC caseload and indeed of victim perpetrators in a broader sense is an opportunity for legal progression. It's a chance for the advancement of international criminal law, bring international criminal justice project up to speed with the changing landscape of criminal adjudication. Though perhaps originating more in youthful naivety than grounded in realism, the ASP commencing tomorrow as Patryck notified us of at the beginning of the day would be a timely place to at minimum open a door to those procedural and substantive amendments needed to ensure that those who do not readily fall within dichotomy that is international criminal law today are indeed also awarded consideration of the highest and most progressive calibre. In that regard, the diminished responsibility option available in many national legal systems and as alluded to a little earlier could certainly offer a solution. That however would break with what is 20 years of Rome Statute. Some would call the international criminal law tradition. But let us not forget the essence of tradition is that it's transgenerational. It is after all as defined as a transmission of customs or beliefs from generation to generation. That being the case one cannot but conclude that ICC is still in its infancy, it has still to mature. There is precedent yes, but there is no tradition, not just yet. Hence if not now, then when are the project that is in apex Criminal Court to undergo realignment to the reality that is the complexity of human criminality? When, when else and how else should the inscrutable become scrutable? Thank you.

Marina Eudes

§20 Thank you both for an informative presentation, even if you exceeded your speaking time. So rather than a question, I would like to share reading advice with you regarding another dual-status sector. If you can read French, the defence lawyer Ghislain Mabanga has written a book about *Le témoin assisté*, before the ICC, and it's very interesting to see how this actor that wasn't in the founding text of the ICC was finally given many rights even with the complexity of his dual status.

The ICC, the Principle of Legality and the Retroactive Application of the Rome Statute : What the Court and its Critics Might Have Missed Out in 20 Years Gone By

Marina Eudes

§21 Our next speaker is Talita De Souza Dias, from Brazil. You currently work at Oxford University and your thesis regards the principle of legality in international criminal law. And today you're going to address this topic and the retroactive application of the Rome Statute. So that was already mentioned yesterday in the discussion, but I am sure that you are going to give another point of view regarding this principle.

Talita De Souza Dias

§22 Thank you, Marina. Thank you everyone, thank you for the organisers for this wonderful conference. And good afternoon everyone. As Marina said today I will be talking about the ICC, the principle of legality and retroactive application of the Rome Statute and in particular certain issues of retroactivity that might have been overlooked by the ICC itself, its drafters and some of its critics in 20 years since the adoption of the Rome Statute. And this is partly based on my PhD at Oxford University.

§23 So just to give you some background; as you might know one of the reasons why the ICC was created as a permanent and prospective institution was to address some of the criticisms of the prior international criminal tribunal such as the ICTY, the ICTR, Nuremberg and Tokyo. And, in particular, these tribunals, they were criticised for exercising retrospective jurisdiction, so they were *ex post facto* tribunals and in some circumstances, they were also accused of applying international criminal law retroactively. For example, you all know the crime of aggression did not exist before World War II. Also, as Rogier mentioned, the expansion of war crimes to non-international conflict, so that's another example of an instance of retroactive application of criminal law. These are some of the accusations toward the prior international criminal tribunals. It was to counter some of those criticisms that the Rome Statute was adopted 20 years ago granting the ICC a generally prospective jurisdiction. The ICC can only exercise jurisdiction after 1 July 2002 or at a later date of entry into force of the Statute if the State joined the Court at a later point in time, and this is also the reason why the Statute recognises a strong version of the principle of legality, contemplating non-retroactivity as well as strict construction, so strict interpretation. And this is also

the reason why the Rome Statute incorporates or embodies the principle of specificity which is reflected in the detailed definitions of crimes as well as in the Elements of crime which further specified those definitions. One of the things that the drafters of the Statute and the ICC itself seem to have neglected is that, by simply requiring that the conduct constitutes a crime within the ICC itself, regardless of whether or not the ICC Statute applies to the individual accused at the time of the conduct, the version of the principle of legality within the Rome Statute fails to avoid certain instances of retroactive application of the criminal law for individuals that were not subject to the Rome Statute at the time of the conduct. This might happen in at least five different scenarios.

§24 First of all when the Security Council refers a case to the ICC involving non-States Parties to the Statute, it can do so retroactively, retrospectively. For example, the situations in Darfur and in Libya are partly retroactive. This also might happen when a State Party or not makes an *ad hoc* declaration under Article 12(3) of the Rome Statute, accepting the jurisdiction of the Court for a retrospective situation. So that's the case for example of Uganda and also Côte d'Ivoire partly and this might also happen when a State withdraws with retroactive effect a declaration which excluded the jurisdiction of the Court for its nationals or on its territory. Same thing for retrospective withdrawals of opt-out declarations for the crime of aggression. This might also happen if the ICC extensively interprets the Rome Statute to cover conduct that was not subject to it at the time when it took place.

§25 Retroactivity in those cases happens due to a combination of three different factors. The first one is retrospective jurisdiction which in itself is not enough to breach the principle of legality which is about substantive criminal law. But then the second reason why there might be retroactive application of the Statute is, as I said, that the Statute could not have been applicable to some of those individuals at the time of the conduct. And thirdly, and this is very important, there might be a breach of the principle of non-retroactivity to the extent that the Statute goes beyond applicable sources of law. For example, customary international or treaty law, or domestic law. So just to give you an idea, before 1 July 2002, there is no retrospective jurisdiction so no problem of retroactivity. However, before the date of a Security Council referral, an *ad hoc* declaration, or the withdrawal of the opt-out declaration, or the extensive interpretation, going back to 1 July 2002, in that timeframe, we can have retrospective jurisdiction and retroactive application of the Statute, if the Statute was not applicable to the individual to the extent that the Statute goes beyond custom, treaty or domestic law. And the question also arises in relation to Security Council referrals and *ad hoc* declarations as to whether these mechanisms can prescribe or apply the Rome Statute in the first place, in which case there can be an issue of retroactive application of the statute prospectively. So, this is not right but anyway.

§26 Some scholars have already identified some of those issues, in particular in relation to Security Council referrals, and *ad hoc* declarations to a lesser extent. And some have even proposed to address those issues by checking whether the crimes within the Rome Statute find analogues in customary international law, applicable treaties or domestic law and only then applying the Rome Statute. But the problem with this kind of solution of simply checking whether the Rome Statute has an analogue in custom, for example, without really looking at all the essential elements for criminal liability, is that this might lead to a phenomenon that has been referred to as retroactive recharacterization of criminal law. That's not really the same as what Jennifer referred to this morning under Regulation 55, that's a different thing, that's when the prior criminal law, the applicable law, is replaced by a subsequent source of law that was not applicable to the accused at the time of the conduct. And the danger with this phenomenon is that it might lead to an inadvertent extension of criminal liability which might happen for example if the subsequent law, so in our case the Rome Statute, has less elements. This happens for example with torture as a crime against humanity which does not require a specific purpose. It also happens if the subsequent law has more acts, including acts or omissions, or if it contains more severe modes of liability. For example, indirect co-perpetration through an organisation. Command responsibility is more severe to the extent it has a lower mental element in the Rome Statute than in custom. Also, the Statute may have less defences and more severe penalties if it excludes conditions of prosecution. The same is true if it contains more severe labels which is the case for some sexual war crimes.

§27 So my way to address these issues is a more intricate and more elaborate solution and I ground the solution in Article 21(3) of the Statute which some of you have already referred to today which is a clause recognising internationally recognised human rights, including the principle of legality under general international law and international human rights law. And I believe that full compliance with this principle requires one to rely on custom or applicable treaties as such or directly, without re-characterising them into the Rome Statute. The idea is that, similar to what the ICTY and ICTR did, we should separate the jurisdiction, the subject matter jurisdiction of the Court from its applicable law, and to follow directly custom for the purposes of substantive criminal law. Or another way would be to follow custom and applicable treaties for the purposes of establishing the subject matter jurisdiction of the court as well, which I think is less complicated. This is why I think that the ICC would probably benefit from having separate chambers for situations arising from Security Council referrals and ad hoc declarations bringing together experts in customary international law and treaty law. For instances of extensive interpretation, the solution is quite simple because the Statute already precludes extensive interpretation by providing for strict construction. And for withdrawals of opt out declarations, the solution is for the ASP or maybe the ICC to make a decision clarifying that these cannot be withdrawn with retrospective effect. Thank you and sorry for rushing and, if you

have any more questions, I’m happy to answer the Q&A. Just the image credits, if you’re wondering what’s the image on the first slide, that’s one of the paintings in the Campiglio which was the venue of the Rome Conference 20 years ago and that’s just to remind us that the promise of universal justice that Kofi Annan referred to when mentioning the ICC and the Rome Statute cannot be achieved at the expense of international human rights. Thank you.

Marina Eudes

§28 Thank you Talita. You’ve mainly spoken about the principle of legality and the principle of non-retroactivity regarding problems concerning substantial criminal law. Do you think that there is also a problem regarding procedural criminal law even if Article 21(3) only addresses substantial law?

Talita De Souza Dias

§29 I do think, although this is not captured by the principle of legality as it exists today and the (customary) international, I do think that there are issues so for example we can have rules of procedure that are more detrimental to the accused and so for example prosecutorial bars and all of those things, and these things that are captured by retrospective exercise of jurisdiction might lead to a substantial or even a substantive aggravation of the situation of the accused, so I think that in the future maybe the principle will evolve to cover those merely procedural, purely procedural issues as well.

Regional Distribution as a Distinct Criterion in International Criminal Court Prosecution

Marina Eudes

§30 The last speaker today is Jiewuh Song, who is assistant professor in Seoul National University. Thank you for coming today. After Harvard University, you currently work, teach and do research at the intersection of law, philosophy and politics, and your presentation is quite relevant in this last panel as you offer regional criterion for the ICC Office of the Prosecutor as a way to address criticism regarding its geographical bias.

Jiewuh Song

§31 Thank you and thank you also to the organisers for the conference and this terrific opportunity to test my ideas with you. So, the title of my talk summarises its main claim. The idea is that the ICC's Office of the Prosecutor can justifiably and should take regional distribution as a role of criterion in deciding which situations to examine and investigate. The background condition to all of this is that in general the OTP cannot hope for global coverage of ICC non-violations, and indeed it has consistently said so itself. For example, in its 2016 Policy Paper on Preliminary Examinations, this is what it says: "Complete coverage would be both practically unfeasible and run counter to the notion of complementary action at the international and national level". The second point about complementarity, we've had a whole conversation about, that's not so much my concern here. My concern is with the first of these reasons, the reason of practical feasibility or unfeasibility as it were.

§32 So, if among the potential situations that passed the complementarity test as it were, the OTP outed things like limitations on resources or political constraints must choose the situations that it will pursue, that it will continue to pursue, then we potentially run into what some people criticise as the ICC's selectivity. I think here though that it's helpful to distinguish between two different kinds of selectivity. So, one is a situation of what we may call generally incomplete enforcement, and I'm using enforcement here in a fairly abstract way, of (there) being first detection of legal violations, second a response to those violations, and then third and finally a response that happens in a way that complies with the norms of rule of law, including requirements of substantive and procedural fairness.

§33 So, the ICC self-acknowledged default situation is one of generally incomplete enforcement, so it can't take on all the potential situations or all the potential

cases that arise from those situations. If you're a certain kind of very pure restributivist about legal punishment, so if you think that the point of legal punishment is to bring onto people what they morally deserve, then this will be deeply troubling to you because it means that some people will not get what they morally deserve. I'm not as worried because I'm not a retributivist but compare now this current graph here with the graph that I'll show you in a minute, so suppose just for simplicity that there are three regions in the world, complete enforcement is at some level, and we're nowhere near that in any place but we're kind of comparably low everywhere. So that's one kind of unfortunate selectivity. But then compare this with this graph. So here there is again generally incomplete enforcement, but the enforcement levels are uneven across the regions. So, whenever there is enforcement, it happens much more frequently in one region. And this I think creates a distinct, a different kind of worry, one that's not wholly explained by the fact that there is generally low enforcement. So, to take an analogy from the domestic context, suppose there is a country where law enforcement is shaky, so a lot of criminals go uncaught. But whenever they do get caught, they tend overwhelmingly to be from one kind of geographic locale, say the racialised inner-city ghettos. Now suppose next that the country's conditions improve so that law enforcement becomes better, so you get some generally adequate levels, but it's still the case that the overwhelming number of people who are caught, who are brought under the law are still from these racialised inner-city ghettos, then I think the problem of inadequate general enforcement disappears, but the distinct worry remains and it's a worry, it's a certain kind of concern about the unfairness of how the law is applied. So, you have two different kinds of selectivity here to track to different kinds of worries, I think.

§34 Returning to the ICC, this is a map that I put together a few days ago, so I believe I hope it's current. I don't know if we can see everything, the black parts mark out preliminary examinations that are closed, the green parts mark out ongoing preliminary examinations and then the red parts are where the OTP has decided to go ahead with a full investigation. It's maps like these that lead people to argue that the ICC is for instance an Africa court, that it exhibits a regional bias and so forth. We should note that some of the OTP's very recent activities have made this map more regionally diverse, so you have for example the Philippines, at least for now, you have Bangladesh, Myanmar, Iraq, the UK, etc., but you see that even with all of that there still is a tilt, especially if you want to distinguish between the red and green parts. So where is it that the most advanced as it were ICC activity is happening? Did you flash the time sign? OK, not yet. The OTP's position on this has been clear, so it'll take situations according to Article 53 which means that it will look at jurisdiction in this ability and then do mostly a gravity centred analysis, although after the facts interests of justice might kick in as a countervailing consideration, but in particular so this is the official position, again in the 2016 Paper, geopolitical implications or geographical balance between situations are not relevant criteria for determining whether to open an

investigation into a situation. And if you read the surrounding text to statements like these, there seem to be broadly two reasons behind the position, our first there is the very good point that insofar as there is a regional imbalance that's troubling, it has roots that often require other actors not be OTP to act. For example, many more states need to ratify the Rome Statute and participate in the practice. There is that consideration. But then second, there also seems to be this worry that adding considerations of geographical balance would be unprincipled, that it would be results oriented in a very *ad hoc* kind of way. I see the first point. I wholeheartedly endorse it. So, everything I say here assumes that whatever the OTP should do, this should be in addition to rather than instead of what extra ICC actors like non-ratifying countries or the U.N. Security Council should do. I don't think that the OTP would be acting in an unprincipled *ad hoc* arbitrary way by considering regions. So, take for example on this policy that among situations that are of sufficient gravity, the OTP would take the fact that a situation involves a region or regions where it has relatively less current or previous activity as a consideration in favour of pursuing that situation. I don't know why this would be unprincipled or *ad hoc*. The important part of this is that beyond a certain level of gravity, concerns about fairness that are prompted by for example the map that I showed you earlier, would justify thinking about regional distributions, so regional considerations don't replace a gravity analysis but rather supplement it, especially when the gravity analysis can't by itself precisely determine which situation to pursue since all candidates seem in their own way to be at least sufficiently grave. So that's the thought. And this last point I think is not so controversial, so especially in light of the fact the OTP has a multivariable flexible account of gravity that includes not only scale but also things like impact and nature and violations, it would be extremely difficult to get a precise gravity ordering among potential situations. So, it's not just about counting bodies, for example. And it probably shouldn't be if we think about what makes atrocities atrocious. Further, if we take seriously the point about the fact that uneven enforcement creates a different distinct qualitatively different kind of worry about unfairness, then considerations of regional distribution wouldn't it be unprincipled or ad hoc, rather they'd be trying to forestall a certain kind of unfairness in the practically necessary enforcement of ICC norms. So that's the gist of it.

§35 I've glossed over a lot of things but just to conclude with two remaining questions that I haven't been able to talk about so much. One is I've so far talked about regions as if it's clear to all of us where they begin and end, but of course this isn't clear, it's contested. So, the problem with delineating the various regions is a question, I talk about this in the paper on which are this talk is based, I'd be happy to share it with you. And then finally there is a more kind of radical worry about gravity, such that gravity comparisons perhaps aren't possible at all because they are so contextual wise and involve so many variables. So, I've been working with this idea that we can at least set out a threshold of sufficient gravity. Is that necessary or is it even possible, that's another worry. So, that's the talk. Thank

you.

Discussion

Charles A. Khamala

§36 Thank you all the presenters. My name is Charles Khamala. I was interested and fascinated by all of them, so I just wanted to choose one maybe to intervene with, but they have interesting questions I could raise about all of them, but for now… So, let me speak to Emma Bielschowsky and Shan Patel. There is a distinct difference between child soldiers and battered women, very distinct. Battered women is defensible on the principle of self-defence. Self-defence is a complete defence in criminal law, so that she's saying: I have been abused. Now my batterer is asleep or is going to abuse me in a few minutes, or after an hour when he recovers from drunkenness, so she defends herself in advance because of her condition. To that extent I know many courts have started recognising that but that becomes a complete defence. A child soldier is not in that category because he is not retaliating against someone who is going to abuse him in the future. He has been abused, yes, his mind has been spoilt but he is not qualified for a self-defence defence. So, to that extent I don't see how the ICC is going to adopt that parallel. Battered women have at least self-defence. Many courts don't anyway because they are patriarchal, so they don't even favour the battered women's approach. What they do do is they invoke diminished responsibility like you said, but diminished responsibility is a mitigating factor like you said, so that, at best Ongwen is qualified for diminished responsibility to the extent that he has been traumatized and his mental capacity cannot prevent him from abusing people because it happened to him, but I just wanted to raise that aspect to your paper, when I think you publish it or something, you can go further and maybe qualify it to that extent. I'd like to hear your comment on that. Thank you.

Marie-Laurence Hébert-Dolbec

§37 My question is also for Shan and Emma. I was wondering if you had drawn some parallels between Ongwen and the *Kwoyelo* case before the Ugandese national tribunals, and if maybe the approach of the court in Uganda could be different from the one before the ICC? Thank you.

Rogier Bartels

§38 I have a question for Talita. So you indicated that you would favour an approach like the ICTY and customary law and you know that at least in part I agree with you that that would be a good approach to follow the (inaudible) conditions but then you said that there should be a separate chamber, and I wasn't really understanding why that would be necessary because then it would have more knowledge of customary law, but that's because you then assume that a

regular chamber would not be able to do it, because at the ICTY it was the regular Chambers who were doing it. Obviously, they were criticised for how they identified customary law quite a lot but still, if you can clarify on that because once we start favouring your approach where there would be specialised chambers, we can identify a lot more different specialised chambers, specialised in reparations for example, but then you need a different profile for the judges and not just A and B lists.

Patryck Labuda

§39 So just three quick questions. So maybe I'll start with Talita, just to follow up on this. I don't know what you think about this but there is this proposal for a hybrid tribunal for Syria. And one of the fascinating things in that blueprint was that the drafters said when discussing retroactivity that the issue of retroactivity does not apply in the context of international criminal justice at all. And so therefore they said genocide, war crimes, crimes against humanity, we can prosecute them in Syria because there is no issue. You know, I think that's going very far. But I'm just curious what you think about the Security Council's powers, let's assume that the Security Council does set up an *ad hoc* tribunal, like they did in the former Yugoslavia, Rwanda, do you think they still have these powers or has international criminal justice moved on from the 1990s?

§40 Second question to the last panellist, sorry I can't pronounce your name, so if you're talking about regionalism, yeah, I mean it's an interesting (inaudible) experiment and I really enjoyed your presentation but I'd just be curious to hear your ideas about delineating regions because that is for me the key issue. You know we can start talking about West Africa, East Africa, North Africa and you know it just becomes very complex then, what are we talking about? Just an opportunity for you to maybe expand on that.

§41 For Alain, I really enjoyed your presentation and of course it's difficult to cover all this in 10 minutes so I'm just curious, if we confront political theory with the empirical reality, the fact that the ICC is prosecuting primarily non-state actors, not state actors, not because it doesn't want to but it's just a fact that those are the only people who are on trial because we can get custody of them. How does that affect your theory? Maybe it doesn't at all, but I just be curious to hear your thoughts. Thank you.

Emma Bielschowksy

§42 Charles, thank you very much for your insight and your concern. I'd really love to talk about it more with you afterwards. I tried to make it kind of clear that I'm not trying to make a complete… like compare the situations for them being exactly

the same because of course I understand that they're not. But I do believe that they share some commonalities between them which could inspire… as it's the very first situation that ICC has had to face like this, the first dual-status defendant, that maybe it can be inspired to some degree by a sort of similar situation, a sense that a battered woman has been manipulated indoctrinated even, physically abused, mentally abused and that the training processes that child soldiers go through within the Lord's Resistance Army is taking it to complete extreme and a complete different context may be understandable within different settings. So, in that sense like the fear of a woman suffering from battered woman syndrome to leave her husband might to some degree be comparable to the fear of a child soldier leave the bush and escape from his captors. Of course, I really must emphasise it's not the same but the only example that maybe is out there that we have dealt with to some degree within the legal system. But yes, I would really love to talk about it more with you, so thank you very much.

Shan Patel

§43 As regards to the comparison with the case in Uganda, we have not drawn any comparison just yet as we also mentioned is very much still a work in progress. So, I can be very brief. We'll look into it.

Talita De Souza Dias

§44 So in response to Rogier, I don't think it's really necessary to have separate chambers, it is just an idea to facilitate the work. So, for example if people were more used with dealing with custom or treaties, then it would probably be easier to have a separate thing, also for the purposes of charging, so charges only in the custom and then strictly separate from charges under the statute. So, it's basically just for administrative purposes but it's not strictly necessary, and also questions of immunities might also arise that are different from those that might arise in cases involving State Parties, but it's not strictly necessary. Another thing that could facilitate the work which I didn't mention in my presentation is a study on customer international criminal law which hasn't been conducted yet. So, they have done a study on customary IHL but only covering war crimes and there are some parts of it that are questionable, but something that the ICC could benefit from is a study on customary international criminal law.

§45 On Patryck's question about the Syria tribunal, I haven't really looked into the issue of retroactivity there, I agree with you that it's going too far. Obviously, we know that the international crimes are part of custom but it's not as simplistic as just saying: oh, they're part of customs so let's apply all of it. My point is that you need to check each and every element that's essential for criminal liability and check if that existed at the time of the conduct. So, that's the idea, I think that the

analysis of labels should also be, criminal labels, should also be included. On Security Council's powers, this is a very controversial question, people disagree on this, but I do think that the Security Council has powers to prescribe criminal law and to apply it. And so basically acting as a legislator, I don't think that the Security Council could breach a fundamental principle of criminal law. But if it is then clearly the Security Council could not apply criminal law retroactively, but even assuming that the principle was not part of international law then there is the strong presumption that the Security Council cannot or does not intend to breach human rights. Technically, even if it's possible for the Security Council to breach human rights, then it would have to do so explicitly and clearly and that's it. Thank you.

Alain Zysset

§46 Okay so I'm going to try to answer both Marina's question that you asked a moment ago and at the same time I'll try to answer Patryck's question because they both relate to the scope of my arguments. So, to the question of whether the ICC is the only institution I'm looking at. No, but I think that the ICC particularly illustrates the argument that I want to make. Independently of the ICC context, the argument remains the same which is that ICL is primarily focusing on persons holding what I call or operating a function of public authority, and so by that I mean not only recognise state officials, I also mean any individual that has the capacity to play a function similar to the ones of states. So that could concern not only the gravest acts but also let's say let's take Al Mahdi case, the destruction of a cultural property. What matters is that this kind of action, these kinds of resources, these kinds of institutional structures that are enabling the crimes themselves are typical of States. The argument is basically relying on that, it is not a formal argument, it is not because it's a formally recognised state, it's because of the functions and the resources that the perpetrator has. Now that I think argument has particular salience in the ICC context. So, I am referring here to the contextual element of the category of crimes against humanity, where you must have some widespread and systematic attack and an organisational policy. That in fact pretty much captures what I want to say. Now I don't want to make my argument contingent upon that formal legal rule. I want to extend that because I want to have a more inclusive theory. So, in other words yes, the argument can particularly be illustrated in the ICC context specifically because of some legal specification but I think that the broader argument is that the argument concerns the jurisdiction in terms of what kind of persons can international criminal tribunals focus on.

Jiewuh Song

§47 Thanks for the question. So delineating regions, it's really difficult. I don't

have a complete answer that satisfies me. As far as I can tell, even the UN system doesn't have a unified way of carving out the different regions, so the subagencies will have different understandings. So, in the paper I kind of discuss sort of the nature of the problem which I take to be that, on the one hand, you don't want to kind of gloss over or ignore historical dynamics, political experiences, like certain patterns of colonisation that are common across certain countries. That's on the one hand, on the other hand, you also don't want to impose any kind of a false or oppressive or exclusionary sense or idea of shared commitments or common values, or the way that you see for example in this outdated debate about the Asian values. So, this is what it is to be Asian for instance. So, that I take it as is the difficulty. In the paper I kind of end up with this suggestion where you have a variety of considerations that come into play at the same time. So, on the one hand if you have self-definitions, for example or the African Union, or the European Union then you'll privilege that for the sake of regional self-determination in order to prevent international paternalism, so that's one idea, and then you also have regions, places that are commonly grouped as regions where you don't have such self-definitions, for instance in Asia. There I think the prosecutor, the best that they can do, the best that the OTP can do is to come up with those revisable, open-ended, a working definition of why they've grouped the world into these different parts, and then the important thing is that they would make transparent an explanation of why they did that. What are the sort of more abstract values or principles that were guiding this sort of grouping? And there already is an ideal venue through which to communicate these explanations, which is that the OTP now has its practice of publishing annual activities reports about what it's been doing. So, it would have like an updated regional classification that it works with that's guided by things like self-determination, not paternalism but also this overarching goal of filling holes in enforcement across the world, so filling enforcement gaps as I like to put it, so that would be the kind of working solution that I would propose for now. Any thoughts would be welcome. Thank you. We still have some time for several questions.

Charles A. Khamala

§48 Thank you. Professor Song, I want to ask about that assumption that the international court is not supposed to be selective. I think it's supposed to be. In other words, okay, all common law systems the prosecution principle is an opportunity principle, in other words, not all cases are going to be prosecuted simply because there's sufficient evidence. It depends on public interest as well. So, it's civil law systems, like in the whole of Europe, where as long as there's sufficient evidence, there's a legality principle, you must prosecute. But ICC is a combination of the two. So, there is latitude to determine if there is international public interest, but the Prosecutor does not have to prosecute just because there's enough evidence. There are other factors that are taken into account. So, the compulsion to balance and prosecute it, it seems to impose what you don't like a

retributive approach that you must punish in every case. So, I just noticed that and like Patryck I'm not fascinated by regions because those regions are not comparable. Theoretically, the United States opposing the criminal law works there. So why prosecute there? If anybody does atrocities there, the U.S. Supreme Court will prosecute and convict, theoretically. In Africa the criminal justice system is prosecuting poor people and it is leaving impunity for other classes of people. So that becomes an area which has some anomaly about it and therefore it should be told straight to the face that we don't like this kind of activity where the state is a tyrannical institution. So, the problem is there, you go there. There is no justification in just balancing the regions because it looks good on the map.

Public

§49 Thank you. This is a question for Alain. You raised the question: can we think of the trial in terms of global constitutionalist rights? I think in the case of the accused it is a fact that we are thinking in those terms, there is a progressive recognition of the rights of the accused directly drawing often from Article 21(3), drawing from human rights directly. So am I am being provocative here. Can we apply this notion of global constitutional rights to these themes? Because this may have far-reaching implications as to the way we conceive or think of international criminal law. Thank you.

Vaios Koutroulis

§50 Merci. Thank you. So that's a question for Talita. I basically have two questions about the presentation. One is a legal one and one is a policy argument. My legal question would be that I think the premise of your argument is formalist in the sense that you seem to presume that it will be possible at all cases and at all stages to be able to unanimously and with precision identify what the state of customary international law is with respect to each of the elements, of each of the crimes of the ICC statute and of each of the modes of criminal responsibility. And I don't think that this is the case. I mean scholars can disagree on what custom is, on what are its elements, how they are to be applied, etc. So, in other words, legally speaking I don't think that it is possible to do the comparison between which elements where in May 2003 part of customary international law. Moving over to the policy argument, the principle of legality has been consistently raised by almost all defences, before almost every international tribunal, and each and every time it has been rejected. And when we look to the Extraordinary African Chambers, Hissène Habré was convicted among others for war crimes committed in the 1980s in the context of a non international armed conflict, which – given the absence of explicit war crimes provisions in the relevant international treaties –

can be seen as a confirmation that customary international law already criminalized the relevant conduct back in the 1980s, that is more than ten years before the conclusion of the ICC Statute. In view of this, I don't think that it will be a problem for any tribunal to use customary international law as a basis for conviction, based on a more generous view as to how opinio juris can be established or as to what consistent and generalised practice may be. So, in other words, hasn't this ship sailed already?

Jiewuh Song

§51 Thanks for the question. On the first point that the ICC is not supposed to go after every situation, but it's supposed to be selective. Right, I agree with that and I totally support the very good point that you made that I actually forgot to make in my presentation because I was panicking and trying to be on time, which is that you're absolutely right that in a lot of domestic societies, most modern domestic societies, there will be a fair amount of prosecutorial discretion, certainly in common law systems. But from my limited understanding, even in civil law systems, there are ways in which the prosecutor can kind of throw out cases. So, my complaint which I was trying to draw out with the distinction between the two different kinds of selectivity is that that in itself need not be a problem. That may just be unless you are this pure retributivist that thinks that every uncaught criminal is something to regret morally. That may not in itself be a problem. But then when you have generally low enforcement plus uneven enforcement on top of that, then creates a new sort of problem. Then your worry was well then are you going to balance things out just so that it looks better on the map so that you have a more evenly coloured map. No, so the proposal is to build in various kinds of screening stages that would rule out that sort of result-oriented way of doing things. For instance, for example, the U.S. that you mentioned is a little tricky because I mean the U.S. first of all needs to ratify the Rome Statute, but I'll take a country in Europe that experiences something that would rise to the level of an ICC violation. But it's the national processes are working. And that would be ruled out by the admissibility test, so it wouldn't come up with something to choose between for the prosecutor at the level that I'm talking about, and also the important thing is that this consideration about regions is supposed to kick in among situations that are given the evidence that the OTP has at the preliminary examination stage, seems to be sufficiently great. We're already talking about really serious situations here, so that just start going just on gravity, it wouldn't be strange for the OTP to go for either of those potential situations. So, it's only then at that stage that I think regions kick in, and then I think it becomes much more principle rather than just trying to colour the map. That's a thought. Thank you.

Alain Zysset

§52 Okay thanks very much for the question. In a nutshell, when it comes to human rights and global constitutionalism, the problem for me as a political theorist is that human rights in international criminal law play different roles and these roles are in tension. So international crimes are very routinely framed as violations of basic human rights, and it seems that the fact we frame international crimes that way is a reason for where we should have a system of international criminal justice. But as you rightly mentioned, at the trial, in the judicial process properly speaking, we also make reference to human rights but not to actually go after, to prosecute the perpetrators but to protect the accused from abusers, from the courts and other institutions. I think it is a very deep paradox that I think hasn't yet been resolved. But I could try to give an answer to that, but for the purpose of your question what I would say is the following. If human rights play such an important role in international criminal justice, then we have I think, as a theorist I would say, we have the problem of explaining why we have two systems: human rights law and international criminal law. That's exactly the question that I am interested in, and I think global constitutionalism can try to explain that. The first thing is to take a descriptive standpoint, it is to say well in international criminal law, international criminal justice, you have the trial, someone is being called to account as I tried to explain. How can we justify that? How can you justify this process? How can you justify that someone, let's say Mr Al Mahdi can perceive the authority of the ICC as legitimate? Well, then my answer again is to say that this person played a particular role, he held an authority that is close to the one of state, and that triggers the legitimate authority of the court. I would like to say much more but I'll limit my answer to that.

Talita De Souza Dias

§53 I know that we're almost out of time, so I'll be quick. So, on your first point. Thank you for your question. Interesting remarks. On your first point, legally speaking, theoretically if you look at how the principle is recognised, the principle of legality is recognised in general international law. It requires us to check whether the conduct constituted a crime under some law at the time it took place. So legally speaking you have to check all of those elements that make up the crime, right? Obviously, there's room for interpretation and clarification that's just part of law in general, and the principle captures this, and I'm not saying that for now there is no room for a little bit of creativity in interpreting crimes. So, my understanding is that only those parts of the statute, those crimes and those elements that are blatantly beyond custom would be covered or would be caught by a breach of legality, so for example those modes of liability that command responsibility which I mentioned of military superiors which has a lower mental element and direct co-perpetration, so those are the things that I'm talking about, so I'm not talking about things that are sort of in that grey area of uncertainty. So that's my understanding which I don't think it's formalistic. On your second point, realistically, politically I do think that there is a new sort of like mindset at the

court in terms of looking at customary international law, trying to integrate ICL with other areas of international law, and you can see that with human rights law, and you can see that with immunities. So, for example there is much more willingness to rather than just say: oh the statute applies worldwide, the Court is really looking for answers in (a general international), so I think that realistically there is room for a less fragmented approach to international law and international criminal law. Thank you.