

THE STORMY WATERS OF THE INTERNATIONAL CRIMINAL COURT: UNIVERSAL FIGHT AGAINST IMPUNITY OR LIBERAL UNIVERSALIZATION?¹

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Abstract

The universalistic dimension of the International Criminal Court's (ICC) nature and function is clear. Yet, this dimension must be thoroughly defined. We must ask 'what universalism'? A rational approach to international social relations is different from an ethical one. While the rational approach may lead to universalization of localized specific moral models (e.g. the liberal Western model) promoting its hegemony, the ethical approach promotes diversity through considering non-reducible differences and common human phenomena in which only a minimal common ethics is universal. This paper argues that the answer to this structural question is crucial to understand if the ICC is essentially a hegemonic tool to expand the predominant Western liberal model or rather a mechanism to fight impunity acknowledging diversity and rooted on an ethical concern.

We contend that the ICC is immersed in troubled waters where it is not always possible to separate a universalizing Western liberal approach from an ethical universal approach. Nevertheless, we conclude that the Court, even if partially and at times serves as tool for hegemony, is essentially defined by the universalization of the fight against impunity through reference to a minimal common ethics.

Keywords:

International Criminal Court; Universalism; Ethics

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1. Introduction

The Rome Statute which creates the International Criminal Court² starts with a very meaningful statement by which States Parties to the Statute³ affirm that they are “conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and [are] concerned that this delicate mosaic may be shattered at any time”⁴. The preamble to the Rome Statute also appeals to “the conscience of humanity” and to “the peace, security and well-being of the world”⁵. These lines evidence the universalistic perspective of an ethics common to all humanity which must be protected, disseminated and fostered. It is in this spirit that the President of the International Criminal Court, the South Korean judge Sang-Hyun Song, refers to the Court as a “moral imperative for humankind” (2013: 4).

The universalistic dimension of the International Criminal Court's (ICC) nature and function is, therefore, clear. Yet, this dimension must be thoroughly defined. We must ask “what universalism”? A rational approach to international social relations is different from an ethical one. The rational approach is based on a unique rational process and its prioritization - a universal process which can be extended to all human beings. Therefore, it would be possible to identify a wide range of interests and objectives common to the global community and usually universal and self-evident when deriving from a correct deductive rational process which leads to unique and universal truths. An ethical approach, on the other hand, resorts to a more subjective analysis based on a minimum common ethical ground reached through dialog: diversity, plurality and locality are considered more relevant. While the rational approach may lead to universalization of localized specific moral models (e.g. the liberal Western model) promoting its hegemony, the ethical approach promotes diversity through considering non-reducible differences and common human phenomena in which only a minimal common ethics is universal. This explains the relevance of understanding which of these approaches is that of the ICC.

² Formally it is designate Statute of the International Criminal Court, adopted in Rome on 17 July 1998.

³ Currently, 122 States are Parties to the Rome Statute.

⁴ See paragraph 1 of the preamble of the Rome Statute.

⁵ See paragraphs 2 and 3 of the preamble of the Rome Statute.



This paper argues that the reply to this structural issue is crucial to understand if the ICC is essentially a hegemonic tool to expand the predominant Western liberal model or rather a mechanism to fight impunity regarding diversity and rooted on an axiological concern. If the former, the ICC must become irrelevant and we must be glad that it has been rarely successful⁶. If the latter, the ICC must be preserved and improved so as to make it one of the guardians of international criminal justice in the fight against impunity and in the protection and promotion of human being's fundamental rights.

Therefore, this paper will firstly analyze the two universalistic approaches - the rational and the ethical. Secondly, we aim to integrate the ICC in the analysis considering the Court's nature in the international legal order as well as some of the institution's features such as, possible selectivity, its relation with the United Nations Security Council, its legal-criminal design as well as its complementarity.

The universal fight against impunity does not imply universalization of a western liberal model and an artificial and hegemonic blurring of what is socially and axiologically different. The ICC is immersed in these stormy waters.

2. Which Universalism?

2.1. Rational Universalism and Universal Ethics

Any narrative on universalism will always include a universal ethical-legal dimension. Therefore, we may distinguish two lines of thinking on universalism: that of tradition, which affirms there is universal reasoning common to all human beings; that of post-positivism, which rejects the concept of universal reasoning and whose concept of universality is rather based on the acknowledgment of non-reducible differences from which it derives⁷. This means that universality cannot question these non-reducible differences but is rather guided by the following joint proportions: non-reducible differences and phenomena common to all humanity that require a collective and potentially universal response (e.g. climate change). The issue of knowing whether different social communities are forced to be part of a universal discourse is less

⁶ In the past 12 years since the ICC was founded, it has only issued sentencing on the case *Prosecutor v. Thomas Lubanga Dyilo* (case ICC-01/04-01/06) e *Prosecutor v. Germain Katanga* (case ICC-01/04-01/07). At this time, both sentences are still subject to appeal.

⁷ The debates on universalism - its defense, refusal or mitigation - derive from different epistemological attitudes. The differences are striking in positivist discourses (also defined as 'tradition' or 'orthodox') and in post-positivist ones, whose criticism to the predominant liberal approaches is at the bases of their narrative. 'Positivism' is the name given to the school of thought that advocates that knowledge of the world is based on experience, observation and verification - a method very similar to that of natural sciences - this providing theoretical thought focused on problem resolution, its bases being supposedly objective and justified by repeatedly registered facts. This is the predominant scientific approach today and the most appealing (because it deals with power at the proclaimed end of history) - in International Law and in International Relations as well - that post-positivists usually designate as 'positivism'. Positivism involves a cartesian separation between mind and matter, between subject and object. The positivist researchers aim that values and interests do not interfere in their observation, reading and analysis of empirical data - neutral objectivity - thus searching for the one solution - the 'truth' - deduced using reason supposedly universal.

On the other hand, post-positivism searches new models that overcome the shortcomings of the positivist approach. Positivists advocate a research model that acknowledges the gap between subject and object; post-positivists, on the other hand, claim that all knowledge is contextual and that subjectivity cannot and should not be banned. The post-positivist approach therefore refuses dichotomies' empiricism (true/false, good/bad, war/peace) and proposes a less naive and more sophisticated general approach, where there are no truths solely guided by reason. All this has led 'tradition' theories being questioned by post-positivist approaches, mainly through critical theory.



important than the debates on the nature of real dialog and its subjective scope (Linklater, 1998).

Universalism is, therefore, 'all that separates us and all that unites us'. The question is, then, 'universalism regarding what'? Tradition answers indicating truths found through reason. Critical theory, introducing the subjective element, advocates universalism based on moral principles that can be operationalized through human being's ability to communicate, including within the framework of an institutional architecture that may be universal. Reason, according to this perspective, is not the only human feature that influences human thought and action - others should be considered such as social, cultural, political and economic context as well as other personality-related features. Within the framework of post-positivist attitudes, critical theory uses deconstruction of hegemonic discourse, program and action. For this approach, reason-based universalistic perspective may kill diversity and foster hegemony. Therefore, this perspective is cautious in what concerns rules proclaimed as universal which may be nothing more than a means of imposing interests and domination by those more powerful. Universalism could, then, lead to an expanding hegemony based on a national hegemony established by those in power and that would become a pattern to be replicated by others. Cox, when discussing the economic aspect of production relations, defines hegemony as "an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production" (1993: 62). Such expansionism has less resistance from peripheral States as if it was a passive revolution.

As Hoffman (1988) indicates, critical theory resists universalism as means of hegemony and rather tries to find a path for a more representative type of universalism. The issue is, therefore, not universalism itself but in how the concept is used by power structures, in particular the ones based on the liberal Western model.

Yet, the issue can have a positive reading: that there is a true common ethical basis which must be acknowledged so that the limits of diversity can be identified and preserved. This common basis exists, therefore, in its own limits which cannot be hegemonically expanded beyond diversity and social plurality. However, plural reality does coexist with universalistic trends regarding the so-called minimal common ethics and cross-cutting issues to all humanity arising in the same historical time. In that regard, Kung states that "for today's pluralistic society, ethical consensus means the necessary agreement in fundamental, ethical standards which [...] can serve as the smallest possible basis for humans living and acting together" (1997: 97).

Linklater (1998) highly contributes to understanding this, as the author refers that non-ethical concept is only satisfactory if based on systematic exclusion of any member of the human community who can potentially become universal. Universality is neither the essence of Natural Law perspectives nor the teleology of speculative philosophies associated to the Enlightenment. Universality becomes a responsibility to address others, regardless of their race, nationality or other features, in an open dialog on matters regarding their well-being. In fact, there is moral discourse that is cross-culturally valid. Examples of this are the discourses against slavery, genocide or the prevalence of justice and environmental sustainability even in situations of conflict. We must also find procedures that tend to be universal and allow peaceful living.



A common ethics is visible in legal principles and rights that are present in cultural communities where they are accepted with the possible exception of an individual anomaly. Their denomination, their content, as well as their interpretation and application may vary. Yet these principles' legal and philosophical essence is shared. As Kartashkin declares, "*toutes les cultures et civilisations partagent, dans leurs traditions, coutumes, religions et croyances, un ensemble commun de valeurs traditionnelles qui appartient à l'humanité dans son ensemble*" (2011: 7). The fact that these ethical principles are crucial to communities justifies the need for those principles to originate at the local level, in a horizontal as well as a vertical bottom-up dialog.

Justice, in its legal and philosophical dimension, is one of the principles of common ethics. International Law aims to apply justice, though it may not do so. Thus, justice precedes Law. Rawls enthusiastically states that "justice is the first virtue of social institutions, as truth is of systems of thought" (1999: 3). Yet, we must not confuse liberal precedence of the fair over the good (system of values) mentioned by Rawls with precedence of justice over Law. Fairness is defined based on a society's system of values in a given time. The dynamics of justice thus reflect the constant social and cultural development which is not fully reflected in Law - i.e. in legal regulation. Hence, justice is a determining factor in social change via International Law: its dynamics is transferred to the legal international *corpus juris*, which will only be perfect when in line with the moral or cultural social context it is supposed to protect. From a legal-philosophical point of view, justice corresponds to the demand and to the application of what is fair according to axiological regulatory principles of a specific society.

2.2. The International 'Moral Community'

The concept of an international community linked by universal ethics (not to be confused with an international society diplomatically disguised as international 'community') puts in practice the ethically based approach to universalism, what Linklater (1996) describes as 'moral community'. A community that, though subject to change, allows the individual to build his own history and to induce progress in the social system.

Within the context of an international order in a process of globalization, building a 'moral community' may serve as a means to affirm the ethical element in a universal International Law undergoing an institutionalization, socialization and humanization process (Carrillo Salcedo, 1984) and whose potential for change is huge. This process finds echo in the International Law regarding human beings and objectives referred to by Bedjaoui (1991), in Simma's Law of communitarian intention (1994) or in the Humanity Law suggested by Abi-Saab (1991). However, this process - potentially positive - should be carefully conducted and assessed so as to avoid "the return to anarchy under the disguise of community"⁸ (Pureza, 2005: 1180).

Morality is the social glue and must be historically and socially translated in an axiological and legal understanding at a given moment. The issue here is how this can be done without there being a rupture with modernity. Critical theoreticians claim it can be done (Richmond, 2011); post-structuralists say it is not possible (Hawley, 2001).

⁸ Translation from the original in Spanish "el regreso a la anarquía bajo el disfraz de la comunidad" (Pureza, 2005: 1180).



The concept of 'moral community' may help to solve the problem from a plural yet not sectarian perspective; in a rising (plural) perspective rather than from an imposing one (universalism without legitimacy). The issue lies also in determining how legitimacy is possible without a World State arising and simultaneously denying the particularistic perspective that legitimacy only derives from the State. Two possibilities immediately arise: either you trust reformed international organizations (although deep reforms are not feasible in the near future); or international society is kept loose, unstructured and thus legitimacy is given to ethnically and culturally based communities without a State system being again implemented. However, from another perspective, the plural multi-level system may provide yet other solutions.

Within this theoretical context, we must therefore understand what unites plural legal scenarios. Global issues cannot be contained and regulated within State borders. Thus, considering that issues related to shared assets are at stake, regional or global solution must be found. However, that solution may be expressed plurally or asymmetrically (for different starting points) and distributively. This suggests the need for a regulation through directives (principles and objectives). A multi-level approach could make sense here. Far from any World State idea, this would aim to join solidarity responses in one system, considering that the items in that system would meet in contexts of different needs, capacities and identities. Legitimacy must no longer be a prerogative exclusive to the sovereign State. Therefore, and using Habermas's (2008) ideas on this matter, supra-state institutions may provide legitimacy without resorting to the World State concept - which would otherwise be the only means of providing legitimacy at international level. On the other hand, this means accepting that plurality or opposition of legal regimes is the current legal and political platform. The biggest issue may be homogeneity of knowledge, perception and methodology regarding this plurality (Koskenniemi, 2005), which is exactly what critical theory approaches aim to overcome.

Ethical and legal plurality poses several challenges to contemporary International Law, considering that the latter imposes values to local communities which they do not share. The concept of a plural world contends that there are sets of different and unchangeable values; these values may conflict in certain circumstances; the response to these conflicts cannot be assessed as good or bad; at individual and collective levels there are different ways to act according to values and those actions may conflict. Thus, there is not one ideal means of social interaction. Thus a universal public order would become an imposition on the others (and would inevitably impose global values, currently mostly Western liberal values). While the liberal approach fosters respect for moral or religious convictions either through tolerance or by ignoring them, from a post-positivist perspective, respect for those convictions is carried out through compromise (Sandel, 2005). This means paying attention to them, listening to them and challenging them. Respect based on communication does not ensure (and does not aim to achieve) a consensus regarding those convictions. Rather, in the context of a plural society, it is an assumption that allows differences in terms of values, thought and legal regimes to coexist.

Plurality, though, should not mean the denial of universalism. Shaffer says that "the normative vision of legal pluralism rather aims to foster transnational and global legal



order out of the plural”⁹ (2012: 673). Universalism evidences the relevance of mechanisms being found to provide common answers regarding common issues. This may even imply the foundation of a universal public order, but only as an exception - better, as a complement - to plurality, which preserves non-reducible differences. As such, a multilevel legal system should be built which, within a plural framework, allows non-hierarchical dialog and non-hegemonic relations among several social contexts - the moral community. This plural universalistic approach organized in a multilevel system allows for a leveled approach - the opposite of a totalizing approach - dependent on the level of the need for common action. Sousa Santos's statement is here relevant: “global occurs locally. One must make local counter-hegemonic to occur globally as well” (2001: 79). The most difficult level is the global level because of the risk of universal dissemination of hegemonic power relations. In any case, there are global legal assets, (e.g. the environment, justice or peace), a (universal) common ethics, a (translocal) group ethics and a (local) cultural ethics, all sharing the global level ethics and many sharing translocal ethics. This assumption implies the need for communicative structures for emancipation that clear the risk of hegemony. Organizing pluralism does not imply imposing a homogeneous or even hegemonic universal public order but to provide conditions for political legitimacy to create order and respect pluralism (Delmas-Marty, 2009).

3. The ICC and the Universal Public Order

3.1. A Body of Universal Sovereignty

Building and developing a public and global legal order - nowadays dominant in the thinking on the global system - is based on a liberal perspective of universality founded on human reason. The subjective mental process led by the mind of each individual becomes the shared element on which universalism is based. Kant's (2009) ideals of a cosmopolitan Law and a world republic based on reason are at the starting point of universalistic thought regarding predominant public order and influence liberal thinking greatly. An element that characterizes modern universalistic concepts is, therefore, the existence of a universal reason that allows to see reality objectively and identify a single rational perception of the same facts.

Unlike what occurs with conservative and particularistic¹⁰ views of International Law, schools focused on universalism claim that universal public order is possible and advisable, even if not built on reason (Dellavalle, 2010). These schools share a universal concept of public order with a legal core common to international actors and institutions towards collective actions for universal goals. According to Tomuschat, International Law is a “comprehensive blueprint for social life” (1999: 42).

The mechanisms used to organize global reality go far beyond State in its individual perspective. For universalism, International Law must, therefore, comprehensively regulate international society in terms of human actions within the jurisdiction of the

⁹ Translation from the original in Portuguese “o global acontece localmente. É preciso fazer com que o local contra-hegemónico também aconteça globalmente” (Sousa Santos, 2001: 79).

¹⁰ Particularistic concepts advocate that politics is nothing more than a struggle for power, a phenomenon different from and not subject to Law. Considering the need to link internal political process with globalization, particularistic concepts arose to refocus the State as a predominant actor in international space, thus denying the existence of true international order and preserving its sovereign self-sufficiency. On this matter, see, among others, Rabkin (2004), Kagan (2004) or Goldsmith and Posner (2005).



State and regarding its actors, namely, the individual. The development of International Law and consequently the reinforcement of universal public order are viewed as boosters of civilizations because it allows regulation of global phenomena depending on universal principles and values defined by reason.

Incorporating in global public order natural and inalienable rights of the individual is an example of this: an individual's situation is no longer viewed as limited to State jurisdiction but becomes relevant to the global community. The development of a human rights system represents the application of a classic principle in State constitution at global level - promotion and protection of fundamental rights of individuals within a community. Therefore, it is not a mere constitutionalization process of an international human rights system - and subsequent laying down of international constitutional rights - but this process also promotes global constitutionalism (Gardbaum, 2008), an apologetic version of rational objective universalism (Kowalski, 2012). This conclusion derives from the predominant liberal perspective on human rights focus on the universal individual. However, we must stress that other perspectives on human rights may not lead to the same conclusion, namely those who believe the individual can only be seen within his or her social and cultural context. Therefore, the approach that focuses on collective rights and peoples' rights questions the liberal assumption of human universal rights claiming that certain groups (among others, religious, social and ethnic groups) may invoke specific rights or specific interpretations of those rights, which then do not apply universally but to that group alone (Jones, 1999). On the other hand, other approaches question the validity of 'Western' universalized human rights in other social and cultural contexts (Freeman, 2011).

International judicialization is a feature of liberal approaches to universal legal order (Kingsbury, 2012). The ICC is evidently part of this universalistic liberal concept (Kowalski, 2011). In the context of universal public order, from an institutional point of view, 'sovereign bodies' tend to be created. The ICC criminal action illustrates it assuming typically State functions at the level of global governance. Criminal prosecution is a power typical of a State's sovereignty. The creation of the ICC represents a break: criminal prosecution can now be exercised in an order beyond the State when serious crimes that affect the international community as a whole are involved. This international criminal power does not require State authorization. The investigation, the arrest warrant or the trial may be initiated by a Court decision and they may even be against the will of those States that have primary jurisdiction on the case at hand. This occurs in situations where the ICC Prosecutor or the United Nations Security Council, pursuant to article 13 of the Rome Statute, have established jurisdiction; this may even imply taking on jurisdiction regarding States that are not Parties to the Statute.

The rational universalistic approach to universal public order is not without concerns or challenges. Zolo (1997) identifies in his thesis on 'legal cosmopolitanism' a set of assumptions that, according to the author, pose a series of difficulties and have several shortcomings: firstly, the definition of the primacy of International Law and of formal equality of States is only apparent because, in practical terms, the differences between rich and poor countries necessarily imply a hierarchy in international public order and inequality among individuals; secondly, trusting a centralized international jurisdictional system is not compatible with the fact that jurisdictional decisions are highly dependent



on a small number of powerful States which have excluded themselves from international jurisdiction as in an absolutist system; thirdly, it rejects contemporary International Law ability to eradicate war; finally, the individual is a subject of International Law with limited capacity because there are no jurisdictional mechanisms at the international level that ensure them acknowledged human rights. These difficulties and shortcomings evidence the weaknesses of the liberal universalistic approach.

In fact, in the current framework of international social relations, the project of universal public order, present also in 'sovereignty bodies' such as the ICC, runs the risk of fostering power dynamics which already influence more or less institutionalized, more or less informal mechanisms in international social relations. In this case, the idea to limit power and create an international dynamics based on Law may be - more or less naively - coopted by other predominant power interactions unduly pursued in the name of justice. It would become a Leviathan under a veil of apparent legitimacy provided by International Law.

3.2. A Universalizing Liberal Discourse

Currently, hard criticism has been made against the ICC regarding its fundamentals which to a certain extent reflects a concern regarding the imposition of 'Western' liberal ethical-normative solutions (Kowalski, 2011). Two major types of criticism are possible here: one regarding the selectivity of situations for assessment by the ICC, in which the 'liberal West' is always the prosecutor and never the defendant; another regarding the relation between the (prevailing) political and the legal domains.

In terms of the first type of criticism, a serious accusation heard mostly at political and diplomatic levels has given origin to some hostility by the African States towards the ICC, in what regards a factual aspect: up to the present all eight situations submitted for ICC assessment are related to Africa¹¹. This evidences selectivity in the Court's action. The conclusion, based on undeniable facts, has fostered the accusation that the ICC is biased in establishing its jurisdiction, and has given rise to at least implicit accusations of neo-colonialism^{12 13}. The argument is that the accusation and the issuing of arrest warrants regarding African leaders poses greater threat to international peace and security, thus implicitly claiming this is a conflict between peace and justice.

The reasons behind this criticism are essentially political. Discourse based on liberal universalism responds through strict observance of the ICC Statute, which includes thirty-four African States, making this the most represented group. Thus, if the Court opened criminal procedures on the situations in those African States, that is due to

¹¹ Situations in Uganda, in the Democratic Republic of Congo, in the Central African Republic, in Sudan (Darfur), in Kenya, in Libya, in the Ivory Coast and in Mali.

¹² These accusations have been heard from several African States that, more or less united in a common claim, mostly through the African Union. For example, after an arrest warrant by the ICC against Omar Al Bashir there was harsh reaction against the Court's attempt to try African leaders, namely by States that are not Parties of the ICC Statute. Another example is the reaction by the African Union in 2011 after an arrest warrant was issued by the ICC against Libyan leader Muammar Gaddafi, which asked its Member-States to ignore the referred warrant.

¹³ As if summarizing the concerns of several African States, the then President of the African Union Commission, Jean Ping, referred that the ICC discriminates because it is only concerned with crimes committed in Africa and ignores those committed by the "Western powers" in Iraq, Afghanistan and Pakistan - see Associated Press "African Union calls on Member States to Disregard ICC Arrest Warrant Against Libya's Gadhafi", 2 July 2011.



either the States reporting the situation - which is the most common reason¹⁴ - or because there was strong evidence of serious crimes of relevance to the international community as a whole and the States with primary jurisdiction did not want or could not able try the case. Thus, more than the relevance of the cases under assessment being related to situations in Africa, what is at stake here is rather the injustice regarding the fact that some situations remaining unpunished¹⁵.

The second type of criticism focuses on the relation between jurisdictional action and politics, as a perversion of the function and independence of the ICC. Several non-governmental human rights organizations have denounced 'promiscuity' between jurisdictional action and politics with negative effects in international criminal justice (Bourdon, 2000). Criticism is evident on the fact that ICC action is excessively dependent on the Security Council and therefore that the attribution of jurisdiction it is largely determined by political criteria rather than legal criteria. This is a concern related to the Statute. In fact, the power of the Security Council on ICC action is laid down in the Court's Statute, namely in articles 13 and 16.

Article 13 b) lays down that the Security Council may submit a situation to the Prosecutor in which there is evidence of serious crimes having been committed and which are under the ICC competence. Therefore, of the eight situations under analysis, two were submitted by the Security Council¹⁶. This power awarded to the Security Council has received much criticism since the preparatory work on the ICC Statute: this includes criticism on the fact that the Court thus loses independence and credibility to those claiming that the Security Council has no competence in international criminal law under the Charter of the United Nations or even others stating that this leads to selectivity in establishing jurisdiction (Yee, 1999).

This criticism is based on the fact that submission of cases to the ICC is dependent on political decision criteria different than admission criteria typical of a jurisdictional body as the ICC. Moreover, of the five permanent members of the United Nations Security Council three are not Parties in the Rome Statute: China, the United States of America, and Russia. Considering that they have veto power¹⁷, any situation that takes place within their territory or involves their nationals would certainly never be submitted to the Court via the Security Council. This reinforces the idea that the Court jurisdiction may be selective, and in accordance with the dynamics of the Security Council.

The power of the Security Council laid down in article 16 of the Statute is, however, the one that has been pointed out as representing the most serious political interference. According to that article, the Security Council may decide to suspend an ongoing ICC criminal inquiry or procedure for a renewable period of twelve months. The Security

¹⁴ The situations in Uganda, the Democratic Republic of Congo, the Central African Republic, the Ivory Coast and Mali.

¹⁵ The existence of armed conflict is a good indicator that serious internationally relevant crimes may occur. Therefore, in 2012 there were 32 armed conflicts, most of which in Africa, Asia and the Middle East; six of these 32 were war-like (over 1000 casualties a year). Afghanistan, Yemen, Pakistan, Syria, Somalia and Sudan (Themnér e Wallensteen, 2013). Noteworthy is also the fact the Office of the Prosecutor of the ICC is preliminarily analyzing the following situations: Afghanistan, Georgia, Guinea, Honduras, North Korea and Nigeria. These situations under preliminary assessment include facts allegedly committed by official and pro-governmental forces, opposition forces and foreign forces (OTP, 2013). Moreover, of the five permanent members of the United Nations Security Council three are not Parties to the Rome Statute: China, the United States of America, and Russia. According to 2012 data, these three States are exactly those which have the highest annual expenditure on the military (Perlo-Freeman et al., 2012).

¹⁶ The situations in Sudan (Darfur) and in Libya.

¹⁷ See articles 27, n.º 3 of the Charter of the United Nations Charter and 13 b) of the ICC Statute.



Council has even approved resolutions awarding immunity to people involved in peace operations at the service of a State that is not a Party to the ICC Statute¹⁸. We may even argue that this is an amendment to the Rome Statute by the Security Council (Jain, 2005). This, on the one hand, clashes with the objective of the fight against impunity on serious international crimes and, on the other hand, it evidences the degree of interference that the Security Council is willing to undertake¹⁹.

In the case of the crime of aggression, the role of the Security Council is even more relevant. The conference to revise the ICC Statute, which was held in Kampala in 2010, introduced the crime of aggression - not initially defined in the Statute - laying down that the Court's jurisdiction would depend on previous establishment by the Security Council that an act of aggression has been committed²⁰.

Underlying this criticism of the role of the Security Council towards the ICC is a concern with the performance of functions by an executive body that is focused on the restricted circle of its permanent members and which has no real political or jurisdictional control mechanisms (Kowalski, 2010). The liberal discourse does not provide any other argument for this concern except that the intervention of the Security Council in the ICC was the result of a necessary consensus to create the Court.

3.3. Elements of Pluralism

The Rome Statute reflects an understanding that, at least from a formalistic point of view, is one that puts at center the protection and promotion of a minimal common ethics for humanity. The mission to fight impunity and promote justice is awarded to the ICC by the Statute from an *ultima ratio* perspective and aiming to ensure diversity of legal systems and of participating social actors.

Firstly, there is a universal ethical and legal consensus on the crimes under the jurisdiction of the ICC, considered unacceptable according to any community's ethical code, genocide²¹, crimes against humanity²² and crimes of war²³ ²⁴. These are the crimes under ICC jurisdiction that the Rome Statute describes as "the most serious crimes of concern to the international community as a whole"²⁵. This is also why the Rome Statute rejects any immunity regime that prevents the ICC from exercising

¹⁸ See, for example, Resolutions S/RES/1422, of 12 July 2002, and S/RES/1487, of 12 June 2003.

¹⁹ The ICC is analyzing the post-electoral violence in Kenya in 2007-2008 in which several crimes against humanity were allegedly committed. Among those accused are Uhuru Kenyatta and William Ruto, President and Vice-President of Kenya, respectively. Kenya, upon a decision by the African Union, requested that the Security Council delayed any procedure by the ICC regarding the situation in Kenya for 12 months, under article 16 of the ICC Statute. In a meeting on 15 November 2013, the Security Council decided not to delay by one vote.

²⁰ See UN Depository Notification C.N.651.2010.TREATIES-8, 29 November 2010. The Court may exercise jurisdiction if the Security Council does not pronounce any decision within six months after being informed by the Prosecutor of intention to open inquiry regarding an act of aggression.

²¹ This corresponds to the actions aimed at destroying, in whole or in part, a national, ethnical, racial or religious group (article 6 of the Rome Statute).

²² This corresponds to the crimes committed within a widespread or systematic attack against any civilian population, which results in a violation of International Law on Human Rights (article 7 of the Rome Statute).

²³ This corresponds to violations of Humanitarian International Law, in particular when committed as part of a plan or policy or as part of a large scale commission of such acts (article 8 of the Rome Statute).

²⁴ Although the crime of aggression is included in article 5 of the Rome Statute, its definition and inclusion in the ICC jurisdiction has not been concluded. A definition and the jurisdiction criteria for the crime of aggression were reached in the 2010 Kampala conference to revise the Statute. Those amendments are not yet in force.

²⁵ See paragraph 9 of the preamble to the Rome Statute.



jurisdiction regarding these crimes²⁶. This is an exception (that is not unanimous) when compared to other international criminal immunity regimes²⁷.

The last legitimizing source of the legal criminal order must be searched in the social system, in its axiological order(s) (Figueiredo Dias, 1996). As Saraiva refers on the crimes typified in the Rome Statute, "violence and cruelty are universal and timeless" (2013: 48). The list of crimes under the ICC jurisdiction does, therefore, derive from consensus on minimal common ethics, allowing for identification of 'interests of the global community' which legitimize universal action to protect them²⁸ - dignity, fundamental rights and justice for the individual and his or her community.

Secondly, the Rome Statute claims the precedence of all States to exercise their criminal jurisdiction on those responsible for international crimes. This means that the ICC is a last resort court that only exercises jurisdiction subsidiarily.

Complementarity is thus a relevant principle of the ICC jurisdiction, which means that, pursuant to article 1 of the Rome Statute, the ICC complements national criminal jurisdictions - which have the main competence - and exercises its jurisdiction only when these choose not to or have no ability to try²⁹ ³⁰. This subsidiary position regarding national jurisdictions aims also to foster States to open criminal procedures in case of extremely serious crimes (Kleffner, 2008). Complementariness of the ICC ensures its subsidiarity to local jurisdictional systems and, therefore, its non-hegemonic position.

Thirdly, we must not neglect the fact that there is a concern regarding representation of different legal and judicial systems in the ICC. In fact, one of the criteria for electing the 18 Court judges is the need to ensure that the main legal systems in the world are represented there³¹. However, it is also true that this is a criminal jurisdictional system essentially accusatory, closer to the Anglo-Saxon judicial system. Other criteria, such as equitable geographic representation³² and equitable representation of female and male judges³³ evidence the diversity in terms of perspectives within the Court.

Organizations and individuals have made a mark in the Court and contributed to the ICC more independent functioning concerning simplistic power considerations and State political interests. Referring to the creation of the ICC, it is noteworthy that in the diplomatic conference which adopted in 1998 the Rome Statute, two hundred and thirty-seven non-governmental organizations from all over the world were accredited³⁴. Those organizations had a direct influence in the writing of some of the Statute preamble through their participation in the conference (Struett, 2008). Moreover, non-governmental organizations were always in close contact with serious human rights' violations, documenting and denouncing those situations. Their contribution may be decisive for reporting and investigating some cases (HRF, 2004).

²⁶ Article 27 of the Rome Statute.

²⁷ For example, the regime laid down in the Convention on Diplomatic Relations adopted in Vienna, on 18 April 1961.

²⁸ For example, the International Court of Justice, in its decision on the Reserves towards the Convention on Genocide, stated that the Convention on Genocide expressed community's common interest rather than States' individual interests (ICJ, 1951).

²⁹ The principle of complementarity is opposed to the primacy that ad hoc courts for the former Yugoslavia and for Rwanda have towards national criminal jurisdictions.

³⁰ We must also stress that "not being able to try" which can determine complementary intervention by the ICC includes cases in which the suspects have been covered by amnesty (Cassese, 2008).

³¹ Article 36, paragraph 8 i) of the Rome Statute.

³² Article 36, paragraph 8 ii) of the Rome Statute.

³³ Article 36, paragraph 8 iii) of the Rome Statute.

³⁴ See UN Document A/CONF.183/INF/3, 5 June 1998.



4. Conclusion

Focusing on the organization ethics of international society necessarily implies criticizing and overcoming rational universalism. Building the universal based on a purely rational process is an epistemological error - it neglects the subjective dimension that is typical of any human phenomenon. This error easily leads to a dispute on who has the competence to define true axioms. A dispute that, in turn, is inevitably won by those (States, organizations, universities, individuals, companies, networks, etc.) with power to export their vision and impose their interests, more or less coercively. The term is 'hegemony'. Hegemony not only in ethical terms, but also as a moral divide which sees peripheries as the only pariahs and the developed center as the moral beacon which behaves in the correct manner.

Thus, basing concerted international action on minimal common ethics - a rather more complex and indeterminate process, not very immediate-solution-friendly (these being potentially simplistic solutions) frequently required in everyday life - is a counter-hegemonic antidote. The concept is based on two assumptions: non-reducible differences; common phenomena that require collective potentially universal response dependent on the scope of that phenomenon. Universalism respects a common ethics that may be operationalized through human communication ability, including within the framework of a multilevel architecture that includes a universal level. At its core it is an ethical pluralist system with pluralist traits regarding a common ethics - socially identified and not hegemonically imposed or disseminated - and phenomena common to all humanity at a given time: human being's spirit of cooperation and solidarity may imply, in certain circumstances, a universal common action. The fight against impunity when serious internationally relevant crimes are at stake, such as genocide, crimes against humanity or crimes of war, effectively requires criminal action at universal level. An action that is based on the acknowledgment that human dignity and justice are part of the minimal common ethics.

The ICC is immersed in stormy waters where it is not always possible to separate a universalizing liberal approach from an ethical universal approach. On the one hand, its quality as a *quasi* constitutional body that easily becomes part of the 'universal legal order', as well as its excessive dependency regarding the United Nations Security Council and other powers (whose cooperation it depends on) integrate the Court in a rational universal liberal approach. The still few successful cases have contributed to the distrust regarding the Court ever fulfilling its role or even to the idea that this was created as a means of soothing consciences but allowing gaps that ensure impunity of the most powerful. On the other hand, the order of fundamental and (apparently) universally shared values visible in the typified crimes, the fact that it is a last resort court or even the search for guaranteeing that diversification of legal traditions and actors is maintained, all include the ICC in an approach closer to ethical universalism.

Now, going back to our initial question, whether we can claim that the ICC - even if partially and at times serving as a tool for hegemony - is essentially defined by the universalization of the fight against impunity by reference to a minimal common ethics. Universal application of certain values and principles can be positive. However, for it to have legitimacy beyond a political and economic hegemony apparently ethical, it must be based on other paradigms. The ICC must be seen as a (good) path towards the defense and promotion of human dignity and justice, which will always require caution against its instrumentalization.



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