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Introductory Note

INTERNATIONAL CRIMINAL JUSTICE: A DIALOG BETWEEN TWO CULTURES

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The framework of International Criminal Justice

The implementation of the idea that individuals, wherever they are and regardless of their official status, may be accountable for crimes against humanity breaks away from the Westphalian paradigm that each State is responsible for trying (or not) its citizens. After the Cold War, several international criminal courts were created, namely the *ad hoc* courts for the former Yugoslavia and for Rwanda and a permanent criminal court, the International Criminal Court (ICC). Power no longer serves as a means for impunity. Those leaders involved in conflicts have learned to fear international criminal justice as a "sword of Damocles". On the other hand, the creation of international criminal jurisdictions has become a means to consolidate peace in post-conflict situations so as to restore justice.

The foundation of the ICC in 2002 - and the preference for permanent jurisdiction rather than *ad hoc* courts - represents the pinnacle of international criminal justice. The Court is even referred to as a prime institution in terms of the universalistic perspective of International Law, which aims at a reinforced international public order and is part of the wider liberal framework currently predominant in both International Law and in

International Relations. As Bogdandy and Dellavalle state, "in the global context, the development of a truly international public order and of true International Law is now largely dependent on the development of International Criminal Law" (2008: 2). The creation of the ICC should be viewed not simply as an innovation but, above all, as a civilizational conquest for the defense of human dignity and the promotion of peace.

However, its universalism is criticized, namely in terms of global imposition on institutions and of liberal legal standards. Thus, hard criticism has been made against the ICC regarding its bases which reflects a concern concerning the imposition of "Western" liberal ethical and legal solutions. These mainly focus its Statutes and facts. A set of core criticism has been made, including that it is dependent on the Security Council for the United Nations, which suggests political intrusion in a criminal body, and that up to now only situations related to Africa have been submitted, which leads to suspicion on its selection criteria. This criticism raises questions as to the bases of the ICC.

The ICC is still in a state of grace. However, the risk of marginalization is increasing (Kowalski, 2011). The Kampala Review Conference in 2010 was a warning: the sun had not yet set on Lake Victoria on the last day of the conference and already there were differences regarding how to apply what had been approved. Up to the present, 14 States have committed themselves to the amendments[1], including those referring to the typification of the crime of aggression.[2] In 2012, 10 years after the ICC Statute came into force, the Court has delivered its first conviction: Thomas Lubanga Dyilo was sentenced to 14 years in prison for the crimes of recruiting and enlisting children under 15 and have them participate in the hostilities in the Ituri region, Congo Democratic Republic. The ICC's first conviction was greeted with the comment "finally"; yet, it also fueled the debate around the delay in trials and ultimately on the efficacy of slow criminal justice.

At the same time criminal justice is becoming universal, alternative forms of justice are being promoted in situations in which serious international crimes have been committed. In Rwanda, justice was a core element for reconciliation. The evidence is that considering the limited role the International Criminal Court played in the case of Rwanda and the limitations of the Rwandan legal system, traditional collective structures were used to enforce justice after the genocide (Gacaca courts). In the case of Rwanda is, therefore, a good example of how traditional collective structure may be mobilize for justice, namely in terms of their restorative though pragmatically imperfect features (Kowalski, 2009). This must also fuel the debate on international criminal justice and its complementary jurisdictional role.

Reflecting on the ideals at the basis of international criminal justice should be permanent so as to lead to ethical legitimacy and an effective ability to resist and change. Yet, for there to be legitimacy, criticism, deconstruction and revelation must take place. This is also why the hope in international criminal justice -and in particular in the International Criminal Court - may be linked to the hope for critical thought and in the will of all international participants.

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1 Mauritius, Norway, San Marino, Trinidad and Tobago, Estonia, Liechtenstein, Luxembourg, Samoa, Germany, Botswana, Andorra, Cyprus, Slovenia and Uruguay.

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International Criminal Justice between two cultures

Peace and Law are ancient theoretical and social construction concepts. Becoming scientifically independent, developing in terms of concept and their academic acceptance and practice have never been and will never be simultaneous. Yet, their aims are similar: human beings' material and emotional well-being. In the last hundred years, the debates between realism and idealism/liberalism have influenced both International Relations (Richmond, 2008) and International Law (Koskenniemi, 1992), including in the field of theoretical concept of peace. In terms of "peace", this is a structured and extraordinarily multilayered material concept. In terms of International Law, its wide material and personal scope, as well as the imperative nature of some of its rules pave the way to a "Law of Humanity" (Pureza, 2002). Peace is a concept that has evolved from the idea of negative peace to the present idea of positive and structured peace (Galtung, 1975; Richmond, 2008). This peace is composed of several elements from different fields which evidences a desire for a holistic well-being in a non-violent environment. International Law may play a role in standardizing the elements of peace and ensuring their effective and fair implementation.

"Academic isolation" of International Relations and International Law (Beck, 1996) leads to what Yound (1992: 174) described as the "syndrome of two cultures". These scientific fields are not in synchrony as a result of the different discourse by their authors as well as due to political and diplomatic practice which tends to have a (moderate) Cartesian perspective of diplomatic legal and political discourses. International Relations authors tend to view International Law as marginal or as a dangerous myth (Kewenig, 1973), especially in relation to peace theory. State supremacy and the lack of legal Statutes in view of the impossibility to enforce sanctions would make legal regulation irrelevant. Other question the true contribution of Law for peace (Boasson, 1968), namely in what concerns the activity of international criminal courts (Meernik, 2005) or the conventions on human rights (Hafner-Burton & Tsutsui, 2007).

There are those who believe the opposite: that international order will only truly be order and international society will be a community when international social relations are regulated by Law (Tomuschat, 1993; Fassbender, 1998). Abbott (2005) even describes legal nationalists as "architects of global government". International Law scholar often view International Relations as theoretical rather than a active and changing political discourse, limited to analysis of relations between States *ad nauseum* as well as of power relations States have to be part of. Moreover, it is sometimes referred that, considering that the history of Law can be dated to Roman Law and that of International Law in particular to the "legal theologians" and to Grotius in the 16th and 17th centuries, International Relations are still a young and immature scientific field of the 1950s. From a more subjective perspective, this discourse adds to the corporate pressure of International Law scholars over International Relations. This then fuels the reactions of International Relations' scholars who declare the irrelevance of International Law. In any case, and as Pureza points out, this "syndrome of two cultures" " is grounded on the different perspective each field has: International Relations has an explaining and analytical point of view, International Law a prescriptive and regulating one" (1998: 79-80).

"International criminal justice" has been widely analyzed. This is, in fact, an issue that requires a wide and encompassing approach which includes themes belonging to different fields, as the typification of serious crimes against the international community; the functioning of the courts; the contribution to the development of International Law; the promotion and protection of human rights; the relevance of the individual in international scenario; impact in conflict prevention / resolution; or States' external policy towards the ICC. This is usually an analysis carried out separately by different scientific fields, and "international criminal justice" has drawn more attention from International Law than from International Relations.

There is, however, space and relevance for a discourse on a multilayered approach to the theme. Firstly, several of the current issues in International Law and International Relations consider "international criminal justice" a case study. Afterwards, "international criminal justice" may become a discourse element that combines these two fields, which have stubbornly kept separate, suffering from the "syndrome of two cultures". Yet, "international criminal justice" may benefit from an integrated approach by International Law and International Relations, thus enriching them and providing them with new perspectives.

The project "International Criminal Justice"

The project "International Criminal Justice", developed within the scope of Observatório das Relações Exteriores at Universidade Autónoma de Lisboa, aims to be a space of research that brings together researchers, experiences and methodologies in one of these scientific fields. Whenever deemed relevant, researchers from International Law may be asked to step out of their comfort area and that, though keeping their scientific background, deal with issues usually analyzed within the scope of International Relations (and vice-versa). The research center will invite authors, national and foreign, with different scientific backgrounds and who have either an academic point of view or practical experience within the scope of international criminal justice.

This research project has four objectives. The first is to design a discourse on "international criminal justice" that combines International Law and International Relations texts on common themes, contributing to more creative and well-founded responses. The second is to identify approach convergence /divergence (and their consequences) on common themes by the referred scientific fields. The third objective is to find new proposals for some of the current issues in international criminal justice. Finally, this project aims to provide research results that evidence a wide perspective of international criminal justice that may benefit researchers, diplomatic agents, international justice agents or students.

Considering these objectives, the project is divided into themes so as to allow coherent multidisciplinary approach, thus generating complementary ideas. Therefore, limitation of each theme is designed in accordance to the following criteria: (i) each theme includes common concerns of International Law and International Relations in terms of international criminal justice; (ii) each theme can benefit from contributions of researchers from different scientific fields; (iii) each theme has potential to show convergence / divergence in the the approach by International Law and International Relations to international criminal justice. Thus, four major themes were selected:

"Conceptual Issues"; "International Criminal Courts"; "International Criminal Justice, Human Rights and Conflict Resolution"; and "Justice, Power and External Politics".

Contributions to the project (scientific papers) will be published in Portuguese (or in any other language) and in English at JANUS.NET *e-Journal of International Relations*. Once the project is concluded, we aim to publish a monograph that gathers these papers.

"Conceptual Issues"

The first two contributions being published now are a good example of the "dialog between two cultures" that the project "International Criminal Justice" aims to promote. The first, entitled "International criminal justice and the erosion of sovereignty" was written by Miguel Serpa Soares, a lawyer and former Director of the Department of Legal Affairs of the Ministry of Foreign Affairs, having represented Portugal at the Kampala Conference and at the States Parties Assembly of the ICC and recently appointed Secretary-General for Legal Affairs and Legal Counselor at the United Nations. The second, entitled "Serious violence (crimes) relevant for international community" was written by Maria Francisca Saraiva, an expert on International Relations and university lecturer who has worked not only in the area of human rights but also on conflict resolution, strategy, geo-strategy and public policies on security. Both contributions analyze the impact the creation of the ICC, from a conceptual point of view, has on international legal and political order in relation to State sovereignty and the geo-politics of great powers.

In his paper, Miguel de Serpa Soares emphasizes the fact that the ICC is still "in its teens" in world legal order but that, as it affects institutional balance and the powers in force since 1945, it evidences the tensions between supranationalism and the erosion of State sovereignty, which the author views differently depending of being big or small/medium-sized States in terms of "judicial sovereignty". The text analyzes in detail the process that led to the inclusion of the definition of crime of aggression, the most serious international crime, as well as the conditions to exercise jurisdiction in the Rome Statute (the jurisdiction on crime already included in 1998) at the Kampala Conference in 2010, concluding that the compromise obtained evidences the differences in position between, on the one hand, the five permanent members of the Security Council, whose objective was maintaining the prerogatives the United Nations Charter assigned to them in determining situations of aggression and, on the other hand, a set of different alliances between groups of countries whose common element was the defense of ICC independence before the Security Council, as well as autonomy of legal determination that a crime of aggression was committed. The author considers that the compromised attained at Kampala represents a defeat for the five permanent members of the Security Council and, just like the Rome Statute, it has created gaps in the punishing monopoly of States and the Security Council. The paper concludes that the existence of an international criminal justice is in opposition with the idea of state sovereignty. Yet, the relation between the two should not be viewed as antagonistic but rather complementary and changing the concept of sovereignty itself. However, so that the ICC may assert itself, especially before more powerful States, Miguel de Serpa Soares contends that it must consolidate impeccable jurisprudence, as did the

European Union Court of Justice or the International Court of Justice and, as such, time must be given to this new institution.

In her paper, Francisca Saraiva argues that the ICC has allowed to provide the international community with a permanent legal mechanism to dissuade and repress barbarous and extremely cruel acts. Yet, the result attained by the Rome Statute in 1998 and by the definition of the crime of aggression at the Kampala Conference in 2010, was nevertheless influenced, in the author's point of view, by the negotiation strategies of the great powers, organized considering their long term interests, which led to selective multilateralism, i.e., with a possible political control. In particular, the author contends that the ICC's hostility towards the United States of America is not due to American power vitality but is a political survival strategy so as to delay the rise of new hegemonic powers which will take the USA's place in the international system. The negotiation of the crime of aggression showed that what was in question in the ICC was great powers' right to maintain their freedom in strategic (and warfare) action and to protect their humanitarian agenda.

Analyzing both paper papers from a *neopolitik* perspective, they coincide in their assessment of the fact that, from the point of view of the great powers, the definition of the crime of aggression was not up to expectations in terms of the Security Council role in this matter because its five permanent members advocated the need for prior authorization by the Security Council for a process to be submitted by a Party State or by the Prosecutor *proprio motu*.

The solution was one of compromise in which the international community was able to defend the integrity of the Court, yet the Security Council maintained the power to suspend criminal procedure, including in the case of aggression. If, on the one hand, as Francisca Saraiva declares, it will be difficult for the ICC to try crimes of aggression involving the great powers, the encompassing definition of the crime allows for adequate trying of cases that reach the Court.

We must now wait to see how the ICC continues to function as the list of crimes under its jurisdiction is complete and a full judicial cycle is over. Only then is it possible to take stock of its role in world legal and political order. Other analyses fostered within the scope of the research project by OBSERVARE, "International Criminal Justice", will undoubtedly contribute to that end.

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