GIURISPRUDENZA PENALE

THE INTERNATIONAL CRIMINAL COURT

15 YEARS AGAINST INTERNATIONAL CRIMES

Taking stock of the past, looking at the future

Interview with Cuno Tarfusser *

edited by

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1. The origin of the International Criminal Court

The International Criminal Court, created by the Rome Statute in 1998, has jurisdiction over the most egregious and violent crimes concerning the whole international community. It is based in The Hague, The Netherlands, where also other international courts, such as the International Criminal Tribunal for the former Yugoslavia and the Special Tribunal for Lebanon, are placed. The Court does not substitute the national criminal jurisdictions, but functions on the basis of the complementarity principle. It only steps in if the competent national authorities are unable or unwilling to prosecute the international crimes committed in their territory or by their citizens. Even if the Court was established only in 1998, the idea of international criminal justice has its roots in the Second World War, when the first two international military tribunals (Tokyo and Nuremberg) were established and called to prosecute the war crimes of Nazi hierarchs.

(questions by Rossella Pulvirenti)

a) Almost 70 years have passed since the first International criminal trial in Nuremberg, what progress has been made by international criminal justice since then?

Firstly, it is beyond doubt that in temporal terms 70 years have passed since the first experience of International criminal trials. However, such experience is actually much shorter. We only have to consider that from 1947 - marking the end of Nuremberg trials -

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until 1993 - when the International Tribunal for the former Yugoslavia (ICTY) was established by the UN Security Council - 45 years have passed during which international criminal justice had a substantial halt. Therefore, the development of international criminal justice needs to be assessed, keeping Nuremberg into account, starting from 1992, and namely considering the ICTY, the ICTR, as well as the ECCC, the STL and Sierra Leone, besides the International Criminal Court as the first permanent international institution. In the light of this, we are talking about an experience of 25 years and not of 70.
Despite the only 25 years of experience, there is no doubt that criminal justice has contributed, also with its extensive case-law, to build a system of substantial and procedural dispositions and principles cohesive enough to become an autonomous branch of law out of what, half a century ago, was just a fragmented jumble of rules, scattered inconsistently among legal instruments different by source and nature.

b) Based on your experience, which are the limits the Court has to deal with nowadays?

The limits of such a young institution are obviously many and of different nature. They are both external to the Court and internal. The external ones are of political, structural and normative nature; the internal, partially connected to the normative ones, concern staff recruiting and are hence related to the people populating the Court at any level. Restricting my comments to the limits of political nature, it is beyond doubt that the functioning of the Court depends in the first place on the boost and acceptation coming from its institutional point of reference. In the case of the ICC, the institutional core is the International Community, formed mainly by the countries which have ratified the Rome Statute – currently 124 out of 193, but also by other countries exerting a strong political influence on the "mood" of the International Community, a concept which is extremely unstable and difficult to concretise. When comparing the political climate perceived in the years of Rome Statute's signature (1998) and entry into force (2002) to the political climate characterising the most recent period, it becomes evident that the propulsion of the current International Community towards a serious and effective international criminal justice has considerably weakened. This factor strongly affects the Court: just consider that one of the crucial element for its functioning is the States' cooperation in the execution of its judgments.

2. The functioning of the Court. Issues of substantial law

Besides formally establishing the Court, the Statute acts as an actual criminal code, constituting its source of substantive law. In fact, it enshrines all crimes upon which the Court is called to judge (art. 5). In particular, they are: Genocide (art. 6); Crimes against humanity (art. 7); War crimes (art.8); Crime of aggression (art. 8-bis, not entered into force yet). Furthermore, the criminal responsibility for these conducts requires, on one hand, the subjective elements of intent and knowledge (art. 30) and, on the other, the personality principle (art. 25), to the extent that the individual only incurs criminal liability, when he/she materially commits the crime, or orders, solicits or induces its commission by others. The same responsibility arises in cases of attempts or complicity in the crime.

(questions by Lorenzo Roccatagliata and Rossella Pulvirenti)

a) Despite the criminal conducts are meticulously described in the legal texts, and considering the small amount of international case-law, how difficult is for the judge to carry out its role of interpreter?

Actually, I do not completely agree with the assertion that the dispositions, the criminal conducts, are meticulously described. For example, taking into consideration Article 7 of the Statute (regulating the crime against humanity), one can note that such disposition, once defined as the so-called "contextual element" *("widespread or systematic attack directed against any civilian population, with knowledge of the attack")*, lists a series of conducts which are absolutely not described in details. On the contrary, they are simply listed with their *nomen juris*, and namely: *(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender (…) or other grounds (…); (i) Enforced disappearance of persons; (j) The crime of apartheid.* None of these dispositions would achieve constitutional legitimacy in a national law system. Furthermore, the list of the not-so-defined conducts ends with a final rule which is possibly even more generic. This is provided in letter k) of Article 7, which includes among crimes against humanity "*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*" Talking about a "meticulous description" sounds really stretched to me.

Anyway, it is precisely the vagueness of substantial norms which makes the work of "creative interpretation" of the international criminal judge so difficult, but at the same time so interesting, and – in my opinion – delicate and stimulating.

I shall refer to a concrete example. In the case *The Prosecutor vs. Dominic Ongwen* deriving from Uganda's situation, in my quality as Judge for the preliminary investigations, I have indicted the accused for the crime of "forced marriage" as a crime against humanity, even if such conduct – the forced marriage, is not foreseen nor regulated by the Statute. I have done this resorting to letter k) of article 7, stating, inter alia, that: *[…] The Statute does not explicitly include "forced marriage" as a crime within the jurisdiction of the Court. The question before the Chamber is therefore whether the conduct attributed to Dominic Ongwen[…] constitutes an other inhumane act of a character similar to the acts set out in article 7(1)(a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health. This is largely a question of fact, but the application of the gravity threshold of article 7(1)(k) of the Statute is also a question of law, as is the question of whether the conduct described as "forced marriage" is not otherwise subsumed by the crime of sexual slavery as argued by the Defence. […] Indeed, the Chamber considers that forced marriage as another inhumane act differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests. It may be stated that forced marriage will generally be committed in circumstances in which the victim is also sexually or otherwise enslaved by the perpetrator. Moreover, restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labor, in particular the forced performance of domestic duties, are all factors which indicate a situation of "forced marriage". In the view of the Chamber, however, such facts, in addition to indeed being incriminated under other provisions of article 7(1) of the Statute, are not in*

themselvessufficient to establish forced marriage. According to the Chamber, the central element of forced marriage is the imposition of "marriage" on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator's "wife". The fact that such "marriage" is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so-called "marriage" is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. […]. Also, the Chamber recognizes […] that the victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery, or other crimes under the Statute. Indeed, forced marriage as defined above violates the independently recognised basic right to consensually marry and establish a family. This basic right is indeed the value (distinct from e.g. physical or sexual integrity, or personal liberty) that demands protection through the appropriate interpretation of article 7(1) (k) of the Statute. In conclusion, the conduct under consideration, insofar as sufficiently demonstrated by the available evidence, constitutes the crime of another inhumane act within the meaning of article 7(1)(k) of the Statute in the form of forced marriage, which differs from the other crimes with which Dominic Ongwen is charged […].

I now answer the question by saying that is surely difficult to be an International judge because of the lack of case-law to make reference to, but for the same reason it is also exciting. By issuing every days new judgments, the international judge "creates" the law and by doing so he or she contributes to the development of international criminal law.

b) In your opinion, is the punitive arsenal available to the Court able to cover all the criminal conducts threatening peace among states and the integrity of populations?

If the terms "punitive arsenal" refer to the applicable penalties – that is to say imprisonment up to 30 years, or life sentence, the answer is positive. Despite this, I acknowledge that any punishment inflicted in a concrete case would always consist in an inadequate sanction: a penalty of symbolic nature and totally out of proportion, compared to the incredible and, in our latitudes, unimaginable brutalities and cruelties we need to deal with. Having saying that, I have never given great importance to the quantity of the penalty, but I have rather valued the assertion of criminal liability.

c) In particular, can you explain which benefits could derive from the implementation of the crime of aggression? How important would its entry into force be?

It is unquestionable that the crime of aggression is the most political crime among the so-called international crimes. This is because it deals with the aggression of a State towards another State. Therefore, the liability for the crime of aggression cannot but be placed upon the heads of the aggressor State. This is also the reason why the International Community, after having struggled to reach an agreement on the definition of the conduct of the crime (I remember that back in 1998 in Rome the crime of aggression had been inserted in Article 5 of the treaty just with its *nomen juris*, and only 12 years later, during the first conference for the Statute's revision taking place in Kampala, Uganda, the agreement on an extremely complex text was found), has not decided on its entry into force yet.

Personally, I will not be a judge of the Court anymore when and if the crime will enter into force and, I must say, I do not regret this at all. This crime, far from solving any problem, will on the contrary certainly create both political problems within the International Community at its first implementation, and interpretative problems within the Court.

3. The functioning of the Court. Issues of procedural law

As mentioned above, the Court is inter alia *governed by the principle of 'complementary jurisdiction', according to which the Court is competent, as long as the criminal proceedings cannot be or is not exercised by the national authorities of the State where the facts occurred (Articles 1, 17 and 18). In addition, prosecution is not mandatory, its exercise being subject to a Prosecutor's assessment, based on the reliability of the information received and the seriousness of the facts (Articles 15, 17 and 53). Lastly, the International Criminal Court does not have its own police force, but must necessarily work with the help of national authorities. This aspect triggers sharp criticism on the Court's functioning, because it requires the investigative collaboration of those states, where local courts do not carry out trials for the same facts.*

(questions Lorenzo Roccatagliata)

a) Based on your practical experience, how do you assess the complementarity principle? Has the Court managed to strike a balance between self-determination of the States and guarantees against impunity?

I will say that, in practice, the complementarily principle has proved to be certainly less problematic in its implementation, compared to what was deemed at the time of the Court's establishment. It is enough to consider on one hand that situations have reached the Court partly because of the initiative of the states involved, and partly as a consequence of a UN Security Council's resolution, and on the other that, except for the case of Libya, the challenges to the Court's jurisdiction have been an exception rather than a rule. Having said that, I am not sure whether it is possible to affirm that this constitutes a balancing between self-determination and guarantees against impunity, or it is rather the simple consequence of the fact that every situation has its own peculiarities and that the national dynamics are often inscrutable. I believe it is too early to come to conclusions, both in a positive or negative direction.

b) As far as concerns the quality and the completeness of investigations, what could you say, as a Preliminary Judge, about the cooperation between national authorities and the Court? Has it proved to be effective over the years?

In the first place it is necessary to say that the Court, lacking its own police force with executive powers, needs to rely on the cooperation of the different states where it operates. In other words – and making a comparison with the domestic jurisdiction – any investigative activity, as well as the implementation of any judgment, both in the investigative and jurisdictional stage, follows the rules of the international rogatory. Obviously some States are more collaborative than others, and some of them do not cooperate at all. It is beyond doubt that very often the extent of cooperation is determined by the underlying political interests, rather than by the genuine willingness to assess the facts and make justice. And I say this as a mere fact, without implying any negative

judgment, given that even among the countries with an "advanced justice" the collaboration in criminal investigations is often determined by political reasons. I am therefore not surprised by the fact that countries with "a less developed jurisdiction" collaborate with the ICC often only in view of the underlying political interest. It is up to the Court to carefully avoid to be instrumentalised.

4. Critical aspects

One of the most common criticism raised against the ICC is the excessive length of its proceedings. Thomas Lubanga Dyilo was arrested in 2006 and judged 6 years later, Jean-Pierre Bemba was arrested in 2008 and convicted in 2016. The reasonable length of proceedings is a fundamental right of the accused, enshrined in Article 67(1)(c) of the Rome Statute, and in all the main legal texts on human rights, at the national and international level. There are some factors which objectively have an impact on the well-known length of ICC proceedings, among which: (i.) the complexity to conduct investigations on widespread crimes, in contexts where evidence is not immediately available; (ii.) the necessity to interpret and translate into a language comprehensible for the accused; (iii.) the necessity to grant fair and impartial proceedings.

(questions by Valentina Rainò)

a) Which measures could be adopted to deal with these problems?

Before becoming judge at the Court, I have exercised jurisdiction in Italy first as Deputy Prosecutor and later as Chief Prosecutor, for almost 25 years. Therefore I come from a national experience in which lengthy procedures are, let us say, rather familiar. Nonetheless, I find the length of ICC proceedings outrageous.

In my opinion the underlying reasons, at least the main ones, are not those indicated in the abstract, and hence neither is *(i.) the complexity to conduct investigations on widespread crimes, in contexts where evidence is not immediately available*, for the simple reason that in the moment when the trial starts the investigations should already be mostly completed. In fact, the jurisdiction starts with the warrant of arrest which, once executed, is followed by the appearance of the arrested before the judge and by the scheduling of the opening of the trial within a time-limit of a few months. Nor is *(ii.) the necessity to interpret and translate into a language comprehensible for the accused*, given that our proceedings are by law conducted in two languages: English and French; and that for other languages such as Swahili, Dioula, Lingala, Acholi, Zugawha etc., which people are by law entitled to use before the Court, we have interpreters and translators. Even less so is, finally, *(iii.) the necessity to grant a fair and impartial proceeding*. It would really be a nonsense, a contradiction in terms, if a proceeding, in order to be fair and impartial, needed to be necessarily long. The Statute expressly wants the proceedings to be fair and expeditious, leaving to the interpreters the concrete definition of these concepts. Ever since I am at the Court, I have been insisting in saying that we need to give meaning to words, then to give content to this concept of fair and expeditious trial which us, the judges, should guarantee, and that is instead almost a slogan raging our judgments, clashing with ideological walls.

In my opinion the real and serious problems at the base of lengthy procedures are, on the one hand, the lack of determination of many normative instruments, mainly procedural, or their poor and contradictory regulation; on the other hand, the conflict between legal systems, and namely between the Romanic-continental civil law and Anglo-Saxon common law, or among legal professionals, judges but also, I would say, among legal officers coming from different legal cultures.

b) Do you believe that there is a more efficient way to manage the so called *big data* - as is usually defined the evidentiary material presented in these trials - without compromising the rights of the accused?

I do not have any doubt about this. I believe it is time to stop considering the proceedings before the ICC as something "more" (in terms of dimension, complexity, importance, etc.) compared to domestic proceedings which can also have these characteristics. Or do we truly think that proceedings of major organised crime in Italy (but not just those) are less complicated and require a less complex and burdensome management of "big data"?
The proceeding before the ICC complies with the same principles any other proceeding does in any other State ruled by law, namely the fact-finding process carried out through the evidentiary material collected in the investigative stage, and presented in cross-examination before the judge of the criminal responsibility of the accused, with respect to the charges as precisely formulated by the Prosecutor. Full stop. Only if we lose sight of these simple conceptual terms of reference, overloading the proceeding with historical and political meaning, as it is usually done at the ICC, the rights of the accused are undermined.
In the era of a constantly evolving IT, and in an institution with an annual budget of ca. 140 million Euros, "big data" cannot but be managed in an effective and efficient way without any negative impact on the rights of the accused. Any other statement would be an insult.

5. Future perspectives and personal considerations

The ICC was the last international institution founded in the XX century, as an expression of the common wish of States to finally see law prevailing over force. The jurisdiction of the Court covered 60 nations in 2002, today 124 are counted. With just fifteen years of activities, the ICC is a rather young institution and is still evolving. For the first time in 2013, investigations have been opened for war crimes related to the destruction of sites of a religious and historic character. The first final judgement was issued in 2014, while in 2016 we had the first verdict for sexual violence as war crimes and crime against humanity. In short, this nine-year term has been a really intense period of your career, lived within an absolutely innovative institution, having a very ambitious mission, and founded on the dialogue among different legal cultures.

(questions by Stefania Carrer)

a) These and other recent goals give us a glimpse of further growth for the Court: in your opinion, in which direction will this happen?

The development (or lack thereof) of the Court will depend, in my opinion, on two factors: on the one side, the evolution of the international scenario and the attitude of the

States towards the Court, and on the other the capacity of the Court to satisfy in a balanced and independent way the expectations placed on it. Whereas the first of these factors is independent from the willingness of the Court, the latter is entirely in its powers. If I were now asked if the Court in its daily activity is coming closer to these expectations, my answer would unfortunately be negative, for the aforementioned reasons.

b) On the basis of your experience as Prosecutor at the national level, which you undertook before serving as a judge at the ICC, which suggestions would you give to the OTP in terms of investigative and procedural strategies to pursue?

Here as well I cannot but recall what mentioned above. I have the feeling that the OTP is, rather than an efficient investigative machine, a bureaucratic pachyderm in which other interests are prevailing on the mere investigation aimed at the discovery of international crimes and of their authors. I shall stop here because my evaluation comes from the perspective of a judge, and from the study and assessment of the legal files, not from a deep knowledge of the OTP. Surely a more thorough work on the quality rather than on the quantity of human and material resources would be useful.

c) To sum up, what is your view on the work of the Court in this last term? Which has been your greatest satisfaction as an ICC Judge? And, at a personal level, what will you most treasure of this experience?

I would be a fool and ingrate towards those who put their trust in me, if I evaluated my work and my experience at the Court over these nine years in which I served as a judge – just one out of eighteen – less than positively. It has been, and it is still being – since I will stay at the Court also after the natural expiry of my mandate, to conclude the trial I am presiding – a fantastic, unique and onetime experience. Through thick and thin. Under the jurisdictional aspect, as Preliminary Judge, I had the opportunity to deal in different ways with all the cases handled by the Court over all these years. As President of the Trial Chamber, I have been presiding for almost two years now the case which is surely the most difficult and controversial: I am talking about the trial to former President of Ivory Coast and of his Minister of Labour and Youth.

Under the administrative and managerial profile, as Vice-president of the Court and as President of the Pre-trial Division, I had the chance to acquire also a wide managerial experience in this institution which, besides being a criminal court, is also an international organisation of extreme complexity. Suffice it to think that just under one thousand people work here with different qualifications and that the annual budget is around 140 million Euros. Could I ever complain about anything? Of course not. I am completely aware of the fact that I am privileged and, as far as possible to me, I try not only to represent my country and its legal culture in the best way, but also to return to society my knowledge and experiences, answering to the many requests coming from schools, universities and civil society.

Among lots of satisfaction, and specially the constant awareness of the great responsibility implied in contributing to making the history of international criminal law, I want to mention two in particular: the first one is the authorisation – absolutely the first in the history of international criminal law – on the use of phone tapping in the case *The*

Prosecutor vs Bemba et al., later confirmed at trial. The second one is the decision, also first in history, of confirmation of charges against Al Mahdi, for the war crime of attacking religious, historical and cultural buildings in Mali, during the siege of the city of Timbuktu started in 2012.

At the personal level my experience being fantastic, I cannot state the same when looking at the Court from the institutional perspective. It is beyond doubt that the Court is really far from taking the role which the International Community gathered in Rome in 1998 wanted for this institution: being an important actor in the peace processes through the establishment of individual responsibilities for international crimes. Whose fault is that? Undoubtedly the fault of this situation is, on the one side, of the States, as their support to the Court often does not go beyond a merely formal support. On the other, it is of the Court itself: within the institution the prevailing components consider it as an International Organisation rather than a criminal tribunal with all the consequences in cultural, political, and organisational terms. Hence my disappointment deriving from the fact that the Court has developed only a minimal part of its enormous potential.

Yet the bitterness is even greater for me as an Italian judge who – together with many other Italians working in different positions and covering different functions at the Court – tried to give his utmost to represent at best and proudly his country, in consideration of the little or almost nonexistent consideration for the work of the Court which I perceived coming from my country. Just consider that in nine years nobody – and I mean nobody at the institutional level – has ever asked me not even what I am doing, and that the many political and institutional authorities which for any reason have been to The Hague have carefully refrained from visiting the Court. A Court which, I want here to recall, is based on the Rome Statute. Not on the Berlin, Paris or London Statute, but on the Rome one! Teamwork is totally lacking in Italy, being the system enveloped by local issues and conflict. A serious lack of political, institutional and international vision.