Future Perspectives of International Criminal Justice

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Introduction

Let me start by thanking you Thomas for inviting me. It is a huge honour. You are one of my legal heroes. It is hard to find new words to praise you. So, I'll stick with the words Professor Kremnitzer used to characterize you: generosity, modesty, openness and moderation. Thomas, your influence in the area of also international criminal law (ICL) cannot be overstated; a criminal law expert, legal comparatist who can truly transcend national law roots; you *understand* other legal cultures and systems. One of the highlights of my career was co-authoring an article with you (and Jens Ohlin). The colour-coding that Elisa mentioned was very much part of the drafts we circulated. This in fact felt very familiar. My Doktorvater Prof. Nico Keijzer had the same habit. Happy, made text better. I realize I have taken over the habit when reading texts of my PhD researchers, and Elisa probably also has.

I would also like to extend my to Professors Elisa Hoven and Michael Kubiciel. Thanks for co-organizing this wonderful event for Thomas and for allowing me to engage with such a learned audience -- in English.

Now, talking about the future of ICJ requires reflecting on its current state. We are in a turbulent times, and this no doubt informs how we look at the future. So, I will start my talk on the *current* state of international criminal justice. In the 2nd section I will share some thoughts on the future of international criminal justice and in the 3rd and last section I will focus on the discipline of ICL.

Obviously brushing with broad strokes.....I am happy to answer any questions in the Q&A - assuming we have time for that - and no doubt some more detail can be expected in the response to the commentators.

1. Current State of International Criminal Justice

a. International

It is no exaggeration to describe the current mood around International Criminal Justice as one of disappointment and possibly even scepticism. This has to do with the lack of progress at the ICC in prosecuting and adjudicating international crimes.

(And this is from an outsider's perspective; Eleni will give an insider's perspective in her paper, which I think – and hope - is probably more upbeat).

The court is bogged down by lack of cooperation and lack of support. This is not helped by the current state of international relations, marked by a lack of comity and the dominance of national agendas. This was so clearly reflected earlier in the week at the UNSC where states could barely agree on condemning sexual violence in conflict through a UN resolution put forward by Germany. This is where international criminal law meets the harsh reality of international politics. It is atrocities in Syria and Myanmar and the paralysis to address these atrocities that test the viability and credibility of a criminal justice system at the international level.

Increasingly we realize expectations have been too high with regard to the ICC. Its enforcement powers are weak and powerful States are not signed up to it with some even actively undermining. The ICC is *not* a world court. Jurisdiction is circumscribed: only crimes committed on the territory of a MS or by a national of a MS can come before the ICC when there is no ability or will to prosecute these crimes domestically.

This is all rather depressing but recently we have witnessed creative attempts to trigger jurisdiction of the ICC to find way around some of the restrictions. On 18 September 2018, an ICC PTC allowed a preliminary examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh. Deportation occurred on the territory of Myanmar, a Non-Member State, to Bangladesh, which *i*s a State party; deportation is a continuing crime and since part of it took place on the territory of a MS the ICC has jurisdiction. The same jurisdictional getaway has been used recently by Rodney Dixon QC when he requested the ICC prosecutor in March

this year to open an investigation into the regime of President Bashar Al-Assad on allegations of deportation from Syria, a Non-MS, to Jordan, a MS. The case is being brought on behalf of 28 Syrians currently in refugee camps in Jordan.

b. Domestic

On the domestic front, the situation is arguably more optimistic. As a result of the complementarity principle underlying the ICC Statute (ICC is a last resort court, domestic states have primary jurisdiction) there is more activity in prosecuting and adjudicating international crimes domestically. There are, however, obstacles. Often crimes have been committed a long time ago. Prescription (Verjährung), retroactive application of universal jurisdiction and the sheer complexity of investigating crimes committed a long time ago, sometimes abroad by non-nationals, comes with challenges. Some of these issues point towards gaps in the international law framework, which hampers mutual legal assistance because crimes have no statutory basis. These issues are being addressed *in tandem* in two initiatives: CAH Convention and MLA Treaty for International Crimes.

Recent issues in ICL at the domestic level relate to the interplay with international refugee law. Broad and controversial concepts of liability such as JCE - developed at the Yugoslav Tribunal - have been relied upon countries like NL and Canada to exclude whole categories of people from refugee protection. States can lawfully do so. Article 1F(a) of the Refugee Convention of 1951 stipulates that the provisions of the treaty do not apply to those against whom there are serious reasons for considering that they committed international crimes, the idea being that such crimes render them *hostis humanis*: enemies of humanity. Membership of security forces or certain political parties associated with a criminal regime, even if involuntary or on the margins, is sufficient to withhold refugee protection (1F Refugee Convention (1951)). And even those who have been acquitted or have served a sentence for international crimes can be excluded; after all, serious reasons for considering is a lower test than "beyond reasonable doubt". It leaves people in a legal limbo; often there is insufficient evidence to actually prosecute them and they cannot be returned to country of origin for risk of human rights abuse. In the Netherlands: Afghan community. Rwandan Hutus in Canada and UK.

The enemy of mankind narrative that comes with ICL is reflected in debates around foreign fighters and their brides. These people are regarded as having forfeited their right of protection via citizenship. The link with ICL via war crimes, enables lawmakers and politicians to argue in favour of an international justice system outside the regular court system, preferably outside the country; in a jurisdictional bubble – a space beyond sovereignty (I will come back to that).

I now come to section 2: future perspectives.

2. Beyond the Current Situation: Future Perspectives

The cost of international tribunals and courts, its slow pace, and as a result the increased scrutiny by states re budgets, prompts us to think differently about international courts. More recent courts have been set up according to a 'justice on call-system' of the MICT that was set up after the closure of the ad hoc tribunals dealing with their residual function. They only kick into force once a defendant who is still at large is arrested. Judges are not in permanent function; there is a list of judges from which a president chooses to compose a chamber. So, Judges sit for one particular case, freeing them up to do other things at home, sitting as a Judge or teaching law at university.

Aside from the financial advantage, a justice on call-system reduces the risk of empire-building and maybe even institutional infighting, which I'm afraid has recently come to the fore at the ICC; is visible even for outsiders. There is the benefit of a focusing of minds and the interplay between national and international legal practice to my mind benefits the system. I would go as far as to argue in favour of eventually changing the ICC to an on call-mechanism. We could start with the Appeals Chamber.

The 'on call-system' also aligns with recent developments in investigating international crimes, which is detached from a prosecutorial entity embedded in an international court system. Think of fact-finding missions like the one in Myanmar or the Standing Investigative Mechanism for Syria, based in Geneva. The idea of both is

that evidence is collected, eventually to be used by the ICC or any other future tribunal or court.

The future of ICL is not necessarily international. It is domestic and mabe even regional.

In 2014, a Protocol to the African Charter on Human and People's Rights ('Malabo Protocol') was adopted to establish a criminal chamber within the African Court, which is seen by many as the African response to the ICC. It can be understood as an initiative out of dissatisfaction with the ICC, with the purpose of shielding senior African public officials by endorsing immunity of incumbent HoS of the AU. It can, more broadly, be understood as a response that fits a post-globalised context where domestic justice and arrangements closer to home are preferred over global law and governance.

The initiative is interesting and promising on 2 points:

- It allows for discussing what is currently lacking in the tool box of international prosecutors: corporate criminal liability. Corporate liability in the area of ICL has the potential to radically change the international criminal law 'ball game'. Where the focus of ICL has been on individuals from relatively weak states, corporate liability could shift focus to corporate players from powerful and wealthy states. In Africa, for instance, companies involved in 'risk industries', i.e. industries that come with a risk of complicity in human rights violations - the oil industry, mining business, diamond and timber trade - come from the UK, the Netherlands, the United States, and China.

- The African court-initiative is also interesting for providing jurisdiction over international crimes *and* transnational crimes. This should be welcomed. It comports with the increased recognition that the two categories of crime are often committed together. The intersection between international crimes and illicit exploitation of natural resources is well documented. It is no coincidence that three out of four convictions (Lubanga, Katanga, Bemba) at the ICC concern individuals commanding rebel groups in the mineral rich area of Ituri. As the UN special rapporteur on HR in the Democratic Republic of Congo

(DRC) reported in 2003, 'despite the ethnic appearance of the conflict, its root causes are of an economic nature'.

I now move to the 3rd and last section: the discipline. What has been said on future of ICL has consequences for the way we study ICL.

3. The Discipline

In 2012, in a review of Neil Boister's book on Transnational Criminal law, Robert Currie accuses ICL of overshadowing TCL, an area of law which in his view presents features and issues that are worthy and in pressing need of in-depth study. The attention for international criminal law, he writes, is unjustified. As an academic discipline it is saturated; each article, paragraph and subparagraph of the ICC Statute has been pulled apart and dissected.

I agree with Currie. ICL as a discipline has overshadowed transnational criminal law. If only for its practical value, in terms of 'usefulness' in practice, transnational criminal law deserves much more attention than international criminal law. Currie's words are an invitation to reflect on ICL scholarship and its future, especially bearing in mind the developments I just mentioned. I think there are a number of lessons to be drawn here.

First of all, as a discipline ICL should not be studied in isolation. While this may have been necessary in the first 10-15 years after the establishment of first ad hoc (ICTY), the era of dissecting the substantive and procedural framework and the doctrines underlying it, is largely over. Intersection with other areas of law is important. For instance, societal demands require us to study the overlap and parallels with TCL. Moreover, real-life consequences of ICL's rhetoric leading to refugee exclusion, should encourage us to test and critically examine the narrative around 'ending impunity' and 'enemies of mankind'.

This brings me to a *second related point*. There needs to be more non-doctrinal research in ICL. We already have a healthy discipline of criminology of international crimes and victimology (one of early protagonists: Prof Marc Groenhuijsen). Next step is socio-legal approaches to ICL. There is a need to empirically examine and theorise

the interaction between the law, legal insitutions, non-legal institutions and social factors.

Let's take the example of regional criminal justice that I mentioned earlier in the context of Africa. What does 'regional or local justice' really mean? Is justice regional when it reflects regional or local values? Or is it sufficient that justice or any process of reconciliation, is geographically close? And if there is a turn to 'regionalism' in international criminal law, is this supported by the victim communities and societies affected? These are all questions doctrinal research cannot answer. We need a combination of criminological, anthropological and socio-legal research. Recent empirical research, for instance, demystifies local justice in Africa; this is critical for assessing the reconciliatory effect of, for instance, the Gacaca process.

This brings me to my *third point*, which concerns the aims of ICJ. In November 2017, my colleagues Prof. Jessberger and Dr Julia Geneuss organized a conference around the question: why do we punish perpetrators of international crimes? It's a simple question to which there is no simple answer.

When it comes to sentencing purposes in ICL, retribution and deterrence lie at the heart of international criminal justice. Punishment, that's what international courts do best. But what about reconciliation? Restoring peace, bringing divided communities together, of 'peace through justice' - here the record of international courts is less positive. And what about reintgration and rehabilitation? After almost 25 years of international criminal practice, sentenced persons are being released having served their sentence. As a result, questions arise over their reintegration into society. International courts largely leave that up to the state of citizenship, this can be problematic in divided societies where when the former defendant does not belong to the dominant group.

The post-trial phase of ICL is hugely problematic. It is the back-story of ICL or maybe even the afterthought. Reintegration and reconciliation show the fundamental flaw of ICL: that it largely operates in a vacuum. International criminal justice is not embedded in a political community and relies heavily on States cooperation to perform basic functions such as arresting accused persons, evidence-gathering, and imprisonment. On the other hand, the ICC and the ad hoc Tribunals, are said to represent the interests of the international *community* when prosecuting and

punishing those who commit international crimes. This is an elusive and abstract notion. The best that can be said of this 'communitarianism' is that by setting up international justice, the UN and other multinational bodies such as the ICC, side with victims who have no government or judicial authority to turn to when it comes to punishing their perpetrators. International courts temporarily replace and take over from a malfunctioning domestic justice system. This does not necessarily mean that the interests of an international court or tribunal align with those of the State or region whose justice systems(s) is replaced. Marina Tripkovic has convincingly argued that the ICTY will never be able to achieve reconciliation in the former Yugoslavia because of a lack of shared perception that it acts in the name and for the sake of the ex-Yugoslav community. International prosecutions can only be a substitute for domestic processes if the aim of the international court to achieve justice is shared with the local community. Moreover, reconciliation via criminal justice is not possible when a common morality is affirmed for internally divided communities.

The fact that international criminal justice operates in a vacuum hampers its ability to achieve reconciliation on the ground. There is work to be done here. The afterthought should become a centrepiece of research.

Fourth and last lesson for the discipline we should explore alternative strategies. I think by now ICL experts, practitioners and scholars agree - what domestic criminal lawyers knew all along - criminal trials and individual criminal responsibility are not the panacea. We should explore corporate liability, as well civil liability and State resposibility. As we saw in the Netherlands with regard to the Srebrenica massacre, after failed attempts to prosecute the Dutch commander, prosecuting authorities changed tack and decided to charge the Dutch State. Judges found the Netherlands responsible – civil liability – for failing to protect those who had found refuge in the safe area protected by Dutchbat.

Other alternative strategy, is to shift attention to transnational crimes: most dictators are brought down by corruption charged not international rimes. And we should look into corporate liability. That really is an area ripe for development and further study.

To conclude, the future of ICL is not necessarily international. If anything, an international mechanism of adjudication is likely to be an 'on call/pop-up system'. The discipline itself must become less insulated. It should be studied more in context and scrutinize its aims and ambitions, to recalibrate its added value. This requires research on the interface with other legal disciplines, with other areas of law, using non-doctrinal research methods. ICJ should not remain what it is now: criminal justice in a bubble