A CRITIQUE OF THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE "INTERNATIONAL COMMUNITY" THROUGH INTERNATIONAL CRIMINAL PROSECUTIONS

A Ph.D. Dissertation

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ABSTRACT

A CRITIQUE OF THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE "INTERNATIONAL COMMUNITY" THROUGH INTERNATIONAL CRIMINAL PROSECUTIONS

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It is not "the state" but a more diffuse and amorphous power which revitalizes the twin legacies of the state of containment and disciplinary supervision of problematic populations at the global level. The International Criminal Court (ICC) as the current leading institution of both formulating and disseminating the international criminal law discourse is not only part and parcel of this progressively evolving global power but also a constituent agent as well as a product of the so-called international community. One aim of this study is to understand how international crimes become salient in the public sphere and what sort of techniques and procedures are applied to prevent and punish them. The effort of creating and developing more detailed and organized webs and networks to deal with the supposedly rising problem of global insecurity in connection to international crimes is subsequently associated with conditions of global political economy facilitating the establishment and operation of the ICC. Notwithstanding the complicated nature of discursive power enabling resistance besides subjectification, the invasive and deepening support given to the ICC within the framework of the current neoliberal discourse brings about a detrimental vision with regard to the international criminal law discourse. A critique of the ICC drawing on both Foucauldian and Gramscian thought projects the intensifying inequalities through the lenses of the international criminal law discourse embedded in a broader neoliberal discourse.

Keywords: critique, Foucault, Gramsci, international criminal law,international crimes, International Criminal Court, international community, discursive power

ÖZET

ULUSLARARASI CEZA MAHKEMESİNİN ELEŞTİRİSİ: ULUSLARARASI TOPLUMUN ULUSLARARASI CEZA YARGILAMARI YOLUYLA İNŞAASI

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Devletin geçmişten gelen başlıca iki misyonu olan çevreleme ve sorunlu toplulukları disiplin altına alma işlevi küresel boyutta artık çok daha ayrıntılı ve sınırları belirsiz bir iktidar tarafından hayata geçirilmektedir. Uluslararası ceza hukuku söylemini sadece belirlemekte değil, aynı zamanda yaymakta da başlıca kurum olan Uluslararası Ceza Mahkemesi, gelişmekte olan bu yeni iktidarın bir parçası olmakla kalmayıp, uluslararası toplumun önemli bir ögesi ve de bir sonucudur. Bu çalışmanın başlıca amacı uluslararası suçların kamusal alanda nasıl ön plana çıkarıldığını, bu suçların önlenmesi ve cezalandırılmasında ne tür teknik ve prosedürlerin kullanıldığını anlamaktır.Uluslararası suçlarla bağlantılı olarak artan uluslararası güvenlik sorunuyla başedebilmek için geliştirilen küresel ağ ve örgütlenmeler küresel ekonomi politikle de ilişkilidir. Bu durum UCM'nin kurulması ve işleyişi için gerekli zemini de meydana getirmiştir.Söylemsel iktidarın, öznelleştirmenin yanısıra direnişi de mümkün kılmasına ragmen, UCM'ye verilen desteğin neoliberal söylemlerle birlikte giderek artması tehlikeli bir sonucu da beraberinde getirmektedir.Foucault ve Gramsci'nin düşüncelerinden desteklenerek yürütülen bir eleştiri, yaygın neoliberal söylem çerçevesinde gelişen uluslararası ceza hukuku söyleminin derinleştirdiği eşitsizlikleri gün yüzüne çıkaracaktır.

Anahtar sözcükler: eleştiri, Foucault, Gramsci, uluslararası ceza hukuku, Uluslararası Ceza Mahkemesi, uluslararası suçlar, uluslararası toplum, söylemsel iktidar

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This study would not reach to a successful conclusion without the support of a *veileder* who not only guided from the start a confused and hesitant student but also walked, stood by, listened to and believed in the student while making the latter believe as well.

The student also gives her thanks to the friendship and support of those whose very presence has made this experience meaningful and precious. Amongst these people who have been very generous in sharing their friendship with me come: Neslihan, Sezgi, Toygar, Minenur, Buğra, Gonca, Özlem, Ebru, Uluç and Nigarhan.

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CHAPTER 1

INTRODUCTION: TOWARDS A CRITIQUE OF THE ICC

Every civilization rises up on the idea of justice yet the type of justice claimed and uttered by the international community is a more implicit and subtly designed projection of its local counterpart. The asymmetryin achieving justice in different temporal and spatial domains reveals itself not only through an entity defined and contructed under the rubric of the international community in place of tangible though forgotten victors of a conventional warfare, but also through a highly complex and intricate set of procedures and techniques to this end. For Benjamin (1986: 283, 295), law making is above all else "power making, and to that extent, an immediate manifestation of violence". International law, and international criminal law in particular, is not an exception to the power making aspect of law making. Developing a critical insight on law making with regards to international crimes in order to break through as well as to attend to the power relations embedded in and

through this law is, first of all, in need of an initial thinking on “critique” itself. This thinking comprises of the subject of the critique, which is followed by inextricable interrogations of what is the underlying logic and necessary means to conduct acritique of the International Criminal Law (ICC or “the Court”). Each of the three milestones standing out on the path of critique starts with “what”, “why”, and then “how” questions respectively. Though it is not the aim of this study to provide a template of critique, it is a certain necessity to clarify the subject matter, the rationale, and finally the methodology of the current critique.

1.1. What is the Subject of the Critique?

Many scholars from various disciplines such as Law, Criminology, and International Relations, have defined international law as differing from the municipal law of the modern states. One of the main reasons for the differentiation has been argued to be the lack of three institutions, namely a judiciary, an executive, and a legislature at the international level. The lack has engendered a body of norms and rules for an undeveloped and not fully integrated community (Carr, 1946: 170). While the lack of a judiciary might be claimed to have been overcome particularly in recent decades through the establishment of several international tribunals for diverse fields and goals, there still exists a sound argument that this does not correspond to the domestic type of judiciary as it does not have binding power for all the members of the community it addresses. The limited scope of jurisdiction at the international

level has induced distinguishing between “traditional” international law, such as the law of the sea, diplomatic immunity, and “modern” law, which covers human rights, and international criminal law. In accordance with the usual lament that international law lacks enforcement mechanisms in general,what has been classified as traditionalcounts as real international law as far as the more recent and modern codifications including international criminal law are devoid of such mechanisms. If the citizens and leaders are taken as the decisive actors determining which rules have binding power and how they are to be counted as such, the expectation is that only a certain group of rules would meet the criteria to have binding power . The prevailing opinion about the determination of the binding rules has been that problems directly related to economic and security concerns have priority to be codified as rules with sanction power (Goldsmith and Posner, 1999; 2005).

The history of international law with respect to the protection of human rights and humanitarian law seems to follow a progressive line gradually encompassing a larger quantity of acts to be recognized as international crimes with much more specification. Nevertheless, the very challenge against the “soft” nature of humanitarian law norms and rules does not arise from the recent extension of the scope and depth of humanitarian law. The establishment of a permanent international criminal court, with unprecedented jurisdiction, is what really challenges the foregoing debate on the nature and power of international law, most particularly the international criminal law[1]. It is not only the criminalization of certain acts in

[1]There are mainly two distinct answers to the question what international criminal law is that also reflect two different explanations why there is such a phenomenon as international criminal law.

international law but also the evolution of institutions holding various forms of power enabling sanctioning, prosecuting and punishing such acts that might be claimed to fill the gap of a judiciary that evokes critical discussions.

The codification of international criminal law, in other words the homogenization of criminal norms and rules, takes its final stage with the establishment of a permanent International Criminal Court (ICC). The Rome Statute establishing the ICC was adopted on 17 July 1998. The Statute entered into force on 1 July 2002 after receiving the 60 required ratifications. As of April 2015 there are 123 states parties to the Statute.

The four categories of crimes that are under the jurisdiction of the Court are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Prosecutor of the ICC may commence an investigation in three ways: (s)he may act upon referral by states parties, upon referral by the Security Council, or upon his/her personal conviction.

There is also the possibility that the Rome Statute may be applicable for non-party states if the Security Council decides that there exists a situation threatening

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One of the definitions on “international criminal law”, which is also called as “transnational criminal law” or “horizontal international criminal law”, refers to international aspects of national criminal law. The underlying reason of this type of international criminal law is the problems arising partially from state sovereignty in arresting criminals who operate outside of national borders. Some of the main topics of this type of international criminal law are: extraterritorial jurisdiction, extradition, police and judicial cooperation, transfer of criminal proceedings, and transfer and execution of foreign judicial decisions. The second definition of “international criminal law” can be defined as a sub-category of international law. This second type covers basically the “criminal” law aspects of international law, and is sometimes called as “supranational criminal law” or “vertical international criminal law”(Van Sliedregt and Stoitchkova, 2010).For the present study, the term “international criminal law” is used to refer to this second type while the first type will be referred as “transnational criminal law”.

international peace and security. The Prosecutor may commence an investigation under such circumstances in the territories of a state, which has not signed and ratified the Rome Statute. This possibility, in addition to the Prosecutor's right to commence an investigation upon personal convictions, is a clear step beyond the traditional international law, which takes "sovereignty" and "non-interference" in the domestic affairs of states as core principles. Another significant feature of the ICC is the principle of complementarity that gives authorization to the court only when national courts are unable or unwilling to judge and punish the accused persons for the enumerated crimes in the Statute.

What we experience today is the transformation of international criminal law that has been defined as part of "modern" international law into "traditional" international law through a permanent international criminal court with extensive jurisdiction. The ICC, in addition to a representation of a transformation from "soft" to "traditional" law of a newly emerging and developing discipline of international criminal law, also signifies the extension of, or change related to, security and economic concerns. The ICC discourse rationalizes and legitimizes its legal intervention through a constant emphasis on the security of the international community, therefore connecting mass-scale atrocities with a comprehensive security understanding. So, the ICC, rather than standing as a representation of international law that is moving beyond security concerns to cover secondary issues, might indicate a significant and radical change in what has been counted as concerns of security and economics. The newly evolving discourse on security, in an explicit

way, and economics, in a much more implicit way, begins to cover humanitarian issues with the ICC representing one of the most significant actors. Still, these two explanations, first, the expansion of traditional international law in a way to cover international criminal law, and second, the change in the security and economics discourse, do not fully explain what has enabled such expansion or the change in discourse. How is it possible to explain the expansion of judicial power while this expansion does limit the power-holders as well as the subjects impotent and disadvantaged in comparison to political, economic and legal power-holders?

It is not a unique view that "judicial power is an integral part and an important manifestation of the concrete social, political, and economic struggles that shape a given political system and cannot be understood in isolation from them" (Hirschl, 2009: 11). Accordingy, some of the most plausible explanations for self-imposed and voluntary judicial empowerment are the estimation of the power-holders that such a design would serve their interests (Hirschl, 2009: 11), the pragmatic search for effective, efficient and good governance (Elkin and Soltan, 1993), or the increase of cross-border commercial activities and the rise of globalization (Benedict et al., 2005; Stone Sweet, 2006). Yet, none of these explanations provide a satisfactory portrait of why and how it became possible that a permanent international criminal court was established with unprecedented jurisdiction as part of the expansion of judicial power at the international level. The explanation that power-holders estimate the benefits they would gain with judicial empowerment despite a decay in their direct power is not satisfactory in the sense

that it does not relate the reasoning of the power-holders with structural dimensions, which would show why the power-holders happen to follow such a conviction. Relating the expansion of judicial power with globalization or a search for efficiency or good governance also fall short of explaining the need of self-limitation in such a structure. In other words, connecting the expansion of judicial power with globalization do not explain why self-limitation, efficacy or accountability is an indispensable element in this structural setting.

At this point, the crucial question we should ask is whether the developments in international criminal law leading to the establishment of the ICC are due to merely an extension of the scope of international law that used to cover only hard core and direct problems, or if they represent a discursive transformation about the security and economic concerns. The question is, "What change in the principles of legitimacy, in the system of beliefs, in our estimation of security, democracy, or humanity concerns, enabled such a representation of power as embodied by the ICC to emerge?" But, before that, it should be clarified what makes an analysis of international criminal law's transformation towards "traditional" law meaningful and necessary. Is it the peculiarities of the ICC to be addressed as the main motivation of such analysis, or is it a striking similarity with the domestic politics where national criminal legal system and its courts play a particular role in providing order and security?

1.1.1. The ICC- a *Universal* Jurisdiction?

It has been a conventional practice in the history of legal jurisdiction to link jurisdictional rights with territorial or nationality rights. The linkage derives from the power of the authority to decide whom to punish on what grounds and with what kind of penalties. The right and power of the authority to impose legal jurisdiction on its subjects is not directly related to the regime type as far as the legitimacy of the regime does not come to a standstill. In other words, the legal jurisdiction may emanate from any kind of regime, democratic or authoritarian, the only problem arising from the capability of the regime to sustain its legitimacy. What's more, the legitimacy to impose legal jurisdiction may transcend the conventional relation of the subject with the authority. In this latter form of relationship, legal jurisdiction takes its cause through natural law doctrine which bases its roots in the essence of being a human being with non-derogable rights, or through postmodern interpretations of human rights surpassing modern practices. Whether the legitimacy of this seemingly borderless idea of implementing legal jurisdiction depends on a natural order perspective or a postmodern thinking, it is obvious that the practice of the idea is a recent one.

To date, universal jurisdiction was one of the myths or utopias some had dreamed of establishing in order to finalise or supplement their dream of an idealised world order. Some others may refer to the trials at Nuremberg, Tokyo, Yugoslavia and Rwanda as early examples –pioneers in a way – of international criminal

jurisdictions with some nucleus of the principle of universal jurisdiction. It may well be argued that these tribunals paved the way for the recent ICC, which is according to many the sign that we, as civilised communities of the world, have reached to the threshold of a world society, or even moved beyond it.

Is the ICC the latest stage of an ongoing evolution towards an international society or world state, or does it represent instead a striking deviation? If one takes the process as an evolution towards universal jurisdiction over certain crimes, the ICC symbolises a great success. It does not matter whether the international criminal tribunals reflect pure power politics and the ideas they carry through all over the world are only illusions to be manipulated in the hands of powerful groups or states as hardcore realists would suggest, or whether they still reflect sacrosanct, divine goals even carried through power-oriented mechanisms like some liberals would suggest. As long as the focus is on the outcome of institutionalising an international, or as some would suggest a supranational authority, the motives or causalities of the process remain of secondary importance.

The ideals the previous *ad hoc* criminal tribunals and the recent ICC carry across the world might be argued to resemble the practices of western powers in the early globalization waves. Some might interpret the abolishment of human sacrificing among the natives of conquered lands or the *sati* tradition in India as a mask of the real motive of exploiting the rich resources of these civilisations. Some, on the other hand, may appreciate such a *mission civilisatrice* even if there is another story concerning the political, economic, social, and cultural motives at the same

time. The common feature of both approaches is that they accept the relationship between the change societies experience when faced with modernity and the power practice of the bearers of this modernity. It is possible to observe a deterministic kind of relationship between the power certain states, groups, companies , or individuals impose on others and the consequences of this practice. Likewise, the developments in the field of international criminal prosecutions can be analysed in terms of a novel power mechanism's use of old methods with the objective being to explore the repercussions these practices and discourses impose on the social, economic, political, and cultural world of the parties.

Alternatively, the ICC may be interpreted as a radical deviation point from the conventional international system characterized by the role of states as main actors towards an international society, world society, or even a world state. If we take the ICC definitely as an unprecedented institution transcending any form of conventionel power relationship in international affairs, we can argue that we are about to experience not only a novel institution, but also a novel type of governance. A useful way of understanding whether there is a significant change at the international level might be to question the difference of the ICC from its predecessors. As some would argue, the ICC represents a long desired stage for universal jurisdiction (Bassiouni, 2004; Scheffer, 1999). But is it not also the case that the *ad hoc* international criminal tribunals are reflections of universal jurisdiction to some extent in that they are exceptional initiatives representing a different kind of jurisdiction transcending the national and conventional practice? It

might be that the similarities between *ad hoc* criminal tribunals and the ICC are even more than their differences.

The two military tribunals of Nuremberg and Tokyo were established by the victors of the Second World War and they predicated their legitimacy on the authority they had over the territories they invaded. The post Cold War tribunal of Yugoslavia and Rwanda were not directly linked to invasion forces of western powers. Still, these two *ad hoc* tribunals had a close relationship with the Security Council and the peace operations the UN had initiated. It would not be wrong to assume that there is an apparent power relationship between the Yugoslavian and Rwandan tribunals and the discretionary power of the Security Council members.

One of the motives of establishing a permanent international criminal court has been to eliminate the linkage between international criminal prosecutions and the Security Council, thus emancipating the process from the detrimental effects of *realpolitik*. But one could get frustrated looking at the legal procedure how the current cases have been brought before the ICC. Amongst thenine situations before the ICC, two have been referred to the Court by the Security Council: the situation in Darfur, Sudan, and the situation in Libyan Arab *Jamahiriya*. Both Sudan and Libya are non-state parties to the Statute. Four states parties to the Statute – Uganda, the Democratic Republic of Congo, the Central African Republic (CAR)[2] and Mali– have referred situations occurring on their territories to the Court. And there are two

[2] The Prosecutor has decided to open a second investigation in the Central African Republic on 24 September 2014 shortly before the Central African authorities also made a referral to the Court on 30 May 2014.

cases issued by the Presidency of the ICC on the situation in the Republic of Kenya and the situation in *Cote d'Ivoire*. It might seem easier to argue at first sight that the criminal prosecutions issued through the Security Councilare but another sign of age-old *realpolitik*. On the other hand, it is also possible to argue that realist power relations exist even for the cases either referred by the states parties or by the Presidency of the ICC despite the lack of a Security Council resolution as these self-referrals are but the signs of the influence of the powerful states in the international system.

If the ICC does not deviate in substantial terms from earlier practices of international criminal prosecutions in terms of power relations, then what makes the ICC so distinct or special? The question alerts the researcher to reflect not only on the diverse characteristics of the ICC but also on different concepts of power as long as the ICC is taken as part of a transformation in global governance.

Power, as Gramsci (1971) has noted, operates not only through coercion, but also through compromises and consent. The ICC stands as a striking example of how power operates both through coercion and consent. The ICC also reflects a higher level of implementing international criminal justice which we cannot observe for the war tribunals or the *ad hoc* tribunals. Both the war tribunals and the *ad hoc* tribunals emerged in extraordinary times as responses to emergency situations. On the contrary, the ICC is the materialization of such practices in a systematic and usual manner. What has been regarded as unusual, exceptional, and extraordinary is becoming part of our daily lives. What has been unconventional is becoming

conventional. Though it is not the civil conflicts, massacres, or genocides that are being transformed as normal in our perceptions; the prosecution of such crimes before a permanent international criminal court is normalized and necessitated.

So, why the ICC has emerged as such just at this stage of history? Is it that the age long imagination of a permanent international criminal court has become a reality because of the enormous intensity and brutality of conflicts in our age? Put differently, is this unprecedented international criminal court a result of another unprecedented course of events? Taking into account millions of lives lost in international or internal conflicts, and the pain and sufferings caused by ferocious wars invented by humanity in the past centuries, an affirmative answer to the former question would be hard to claim. The question in a revised form would be like that: do globalization and its governing techniques have something to do with the recent developments in international criminal law? Is it merely the dissemination and realization of human rights and humanitarian law throughout the globe that entails an international criminal court, or is there another story behind this post-modern *mission civilisatrice*?

1.1.2. The Constitution of Certain Acts as "International Crimes"

There is not only one way of classifying crimes in Penal Codes in national criminal law systems. Crimes have traditionally been classified in terms of the harms they

cause or the kinds of victims they affect. A tripartite division is very common in criminal law systems: “harms or offences against property”, “harms or offences against individuals”, and “harms or offences against groups, communities, or to the state”. But we can also classify crimes in terms of the kinds of wrongfulness they entail, such as grouping together offences that require some form of deception, or the kinds of *mens rea* they require or do not require, such as grouping together all of the strict liability offences. Alternatively, there is always the possibility of distinguishing crimes within each group by reference to the sub-category of the harm involved, or to the causal contribution the conduct makes to the relevant harm. By following such a sub-categorization, we are able to distinguish homicide from wounding though both crimes are counted under the overall category of bodily injury. Distinguishing crimes according to the degree of harm also paves the path for making a classification of more serious and less serious types of crimes. Possible ways of causal contribution the conduct makes to the occurrence of the relevant harm enable differentiating actual and direct harms from crimes of incitement, conspiracy, or complicity (Duff and Green, 2005: 1- 20; Geary, 1995).

International criminal law can be argued to follow a very similar pattern for the classification of crimes the only exception being the relatively narrow scope of criminalization at the international level. By limiting criminalization to a certain group of conducts and prosecuting only these conducts through defining them as “atrocities” or “grave breaches”, international criminal law at the very outset of the process initiates its own classification of “more serious” as against “less serious”

harms. The striking difference for the international criminalization, however, is the fact that the harms regarded as “less serious” are not taken into account to be criminalized at all.

The classification of crimes under criminal law systems has both practical and ideological reasons. Classification enables clarification both for the rule maker and the subjects that are expected to obey the rules as well as easing the implementation process. But a more often disregarded dimension of classification is its ideological power. Offences against property and individuals have been criminilazed as these offences are presented as giving harm not only to the property or individual they are directed to, but also to the very foundations of living as a society. At this point, what is protected through law goes beyond the concrete body of property or individuals towards a more abstract ideal of “civilization”. The moral relation of law with the subject matter being protected becomes more obvious for the crimes defined as “harms or offences against groups, communities, or to the state”. The category of “public wrongs”, in other words “wrongs” defined as being directed against the security and wellbeing of the “public”, reflect richly normative terms that are at least closely connected to the pre- or extra- legal normative structure of the citizens. Here, a fictive bridge is being built between legal morality and pre- or extra- legal morality. Such an approach presupposes that there exists a widely recognized and shared set of norms and values outside the legal terrain, and that the citizens can draw on, intrepret and apply the law by reference to this ‘other’ terrain. Herein a different kind of relationship flourishes between law and the citizens. Law no longer presents itself as

the law of the ruler, the government or the state, it is rather the common law of the polity that embodies our values as citizens. Law no longer speaks in the voice of the sovereign, instead the law speaks as our law. It is now our collective voice declaring and reminding our own values to ourselves (Duff and Green, 2005: 14,15).

It is not only the sovereign whose identity as well as the power is blurred when the international crimes are at issue. The eradication of borders between crimes directed against property, individuals, and the wider society goes in parallel with the indistinct relation of power with the subject(s). Crimes against property and individuals are embedded under the overall category of international crimes that is described as a group of crimes directed against the very foundations of our civilization, our humanity, and our common values and norms. It is the international community, together with its institutions and organizations, that will fight against the threat. The threatened subject at some point turns into the executive power who speaks our voice, the voice of our law, which is now embodied under the Rome Statute of the ICC with unprecedented power in the history of international law.

It is not a coincidence that the third category of "harms or offences against groups, communities, or the state" turns into "harms or offences against international community" when we speak of international crimes. The absence of the wording "state" in the latter does not simply signify that the state disappears altogether as one of the protected entities. It neither means that a world state, or a world government, in the form we used to know at the national level, has emerged bringing with it a novel legal form.

The ideological aspect of the third category of crimes against groups, communities, or the state bears a political concern, which goes beyond practical concerns. The primary concern here shifts from harm to property or individuals to a disciplinary one revealing itself through prohibiting conducts that are interpreted as disobedince to the state. A very similar logic prevails at the global level. Though there is not a world state identical to nation-states, or any other kind of governance resembling to what we have witnessed so far, international criminal law introduces its own category of crimes against a *fictious* international community with a prospect of preventing disobedience to global governance. That the notion of international criminal law excludes illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, smuggling of nuclear and other potentially deadly materials, or money laundering, all of which are recognized as offences committed against states (Cassese, 2003: 24), the term *international* obviously refers to something going beyond the states system. International crimes are not the crimes committed against the states; these are the crimes committed against the international community. The question here is, "Who are the ones posing a threat to the international community? Who are they to challenge current global governance? From whom we are trying to protect our order?"

1.1.3. A Post-modern *Homo Sacer*?

Giorgio Agamben reminds us an archaic Roman tradition of excluding people who commit certain types of crimes from society, and whose rights as citizens are also revoked according to the law. The once full Roman citizen, now criminal, is called a *homo sacer* who can be killed by anybody as he has no rights anymore including the right for life, yet not sacrificed in a ritual ceremony as he is now deemed as "sacred" at the same time. Though the *homo sacer* practice has been relinquished in modern legal systems, Agamben argues a parallel application in juridical orders where human life is included in the form of its exclusion. Human life is included in juridical orders as being sacred and issued by law but also excluded through its capacity to be killed. The figure of *homo sacer* is the mirror image of the sovereign as a king, emperor or president who stands on the one hand within law as a natural person and who can be condemned, punished, toppled or impeached as a natural person, yet who stands also outside of the law through his power to suspend law in exceptional terms (Agamben, 1998).

Despite the differences between Agamben's notion of biopolitics, which he traces back to ancient times refusing its historicity, and Foucault's biopolitics with more specific origins and mechanisms, both has the potential to converge on the politics of international law. It is not an individual or group(s) of individuals as *homo sacers* anymore, but an extended entity defined as international community who stands both within and outside the borders of law, both included and excluded. Included as some

members or components of this community can be condemned, interrogated, prosecuted or even punished at times under certain circumstances. Constructing "others" through the language of international crimes does not indicate a pure exclusion as this is a process comprised of a paradoxical simultaneity of internalization and externalization. Accepting, defining problems that are first of all the problems of the others as common problems of the international community, therefore imposing solutions and directing the crises rather than staying away and distancing, reflect an internalization process. On the other hand, others' problems are accepted to the borders of the globe while a parallel bordering within these borders between the other and the self is on play. Inclusion and exclusion, internalization and externalization are concomitant processes with a crucial difference that the conventional distancing and spacing is now replaced by a post-modern non-geographical spacing. On the ambivalent borders of inclusion and exclusion, the international community holds the indefinite power to suspend law when it seems necessary in state of emergency.

1.1.4. "Something" to Tell to "Whom"?

If international crimes are the crimes committed against the international community, then the primary goal of prosecuting these crimes is supposedly to protect the international community and to prevent their reoccurrance. Is it simply the "outlaws" as we define them, or the "others" in a more general albeit more dubious term that

international prosecutions target? Criminal law has a function to delegitimize "some" acts and "some" actors who commit these acts. But, it has another, mostly overlooked, function of legitimization. The most intriguing part of such a legitimization process is its influence back and forward in time, here and there in space.

"The law appears retrospectively merely to have been followed" (Edkins, 1999: 5). As a "living force", law is not static but subject to change when new interests evolve on behalf of a significant part of the society. This change might occur through (r)evolution (Turner and Factor, 1994: 107). The past political struggles, however brual, violent, or even disgusting they are, come to an end when victory is achieved and law subsequently operates to legitimize this past. Once the order is sustained and its legitimacy is crowned through the legal system, something even more startling than the retrospective efficacy of law appears: the function of legitimization becomes active for the present and the future. Law legitimizes both what has already been done in the past and what is to be done at present as well as in the future(Edkins, 1999: 5).

Law and its legitimizing function not only travels through time but also through space. International criminal prosecutions legitimize humanitarian interventions, and the governments from which those interventions arise. Just like the category of crimes against groups, communities, or the state has a *policing* concern now implemented through modern techniques on the *self*; international criminal law reflects a *policing* concern for the *international*. Legitimization is in harness about

what is being donewithin the conventional borders in addition to, and even more than, what is being done on the projected subject abroad.

Obviously, the ICC represents a different phase at the international level though the international criminal law that the ICC embodies has enourmous similarities with how national law functions in local societies and polities. Besides the question whether or not the ICC and the international criminal law the ICC substantially contributes to its codification and practice have more similarities or differences in comparison to national law, the crucial inquiry is why it matters to understand and explain this phenomenon? The subject of the critique being the ICC, why it should be necessary to conduct a critique of this recently established institution and what should be understood by the concept of "critique"?

1.2. Why a Critique of the ICC?

The establishment of the ICC can be regarded as part of a global regime on human rights, whichhas evolved gaining power through international institutions and covenants in the 20th century. Philosophical reflections on human rights confirmed and reinforced these developments.[3] The main trend has been to take human rights and humanitarian law as "natural" categories instead of underlining their illusionary as well as constructed dimensions. The so-called "natural" feature of the legal

[3]For critiques on the unproductive nature of philosophy of rights discourse, see Gill (1995), Vincent (1986), Evans (2003), Raphael (1966), and Carver (1998).

discourse has led to a "law-like necessity" of international criminal prosecutions. It might be argued that, manifold criticisms on the rights and breaches have been critical with a legal discourse perspective but not critical on *this* legal discourse, the latter pointing to the conduct of a critique rather than engaging in mere criticism.

On the other hand, political discourse on rights, which seeks to question power relations and interests, has often been seen as a value-laden and a marginalized form of inquiry leading to it being treated with suspicion. Both the barrenness of the philosophical discourse and suspicions towards any political discourse on rights has led to the legal discourse being taken for granted.[4] The legal discourse, as accepted and confirmed without any questioning,is complicit in disregarding and even impeding a thorough analysis on its social and political effects, including the influences on minds and thoughts of its addressees. In this way, the main focus is limited to find out the best means for redressing crises while covering the root causes (Evans, 2005: 1049-1054). Contemporary legal and social studies on human rights and humanitarian law, rather than representing an intellectual failure to understand the connections between international legal discourse and the current global system, have practical outcomes of reifying and reproducing the system. Bearing in mind that the interaction between the theoretical thinking and the system is bidirectional, it should be noted that particular conjunctures gives rise to conventional theories or approaches that in turn have a negative effect of blurring the connections between the social and the theoretical.

[4] Hunt (1993) demonstrates how an institutionalized discourse reinforces the status of its "experts" through a specialized language, images, and concepts.

The most significant and straightforward outcome of this bidirectional relationship is that the supposedly objective and natural, and universal technicalities of the theory and practice of the discipline of law impede political interferences.

Yet, the problems are not confined solely to conventional approaches or theories. An active interference and politics remains as problematic amongst some Critical Legal Studies (CLS) writers as well. The postmodernist branch of CLS supporting radical indeterminacy and nondeterminacy of law engenders a difficult and controversial conclusion that all we can tell at the end is the assumption that there is nothing to unravel, or nothing to apprehend with regards to the field of law. Radical indeterminacy and nondeterminacy theses have further outcomes of frustrating attempts to question the determinacy of the findings of the CLS approach as well as yielding certain moral problems. If the claim is that there is not, and cannot be, any explainable relationship between society and law, there cannot be any evaluation on the righteousness or wrongfulness of law either. As law emanates from society where values arise, no normative judgment can be made as long as law is totally divorced from society. This version of CLS, through rejecting relationality between structure and discourse, maintains that law's indeterminacy and nondeterminacy precludes the possibility to infer any "truth" claim, despairs all relevant assessments and evaluations about law itself, and frustrates emancipatory perspectives alternative to the liberal project (Whitehead, 1998: 718-720). Therefore, postmodernist CLS converges with conventional approaches in cutting the linkage between structure and practice, thus overlooking the connection between particular *rationalities* being used

with contingent and historical *realities* being experienced. This, in fact, is some sort of a janus-faced view consisting of two opposing stances: "there is *the* truth" and "there is *no* truth", which is yet another faulty dualism like some other misguiding and illusionary dualisms of knowledge to power, state to economy, subject to repression (Lemke, 2002: 54). Likewise, constructed dualisms such as sovereignty to international, state to non-state or local to transnational are relationalities that the critical scholar has to bridge in order to analyse and bring immanent power relations to the fore.

1.3. How to Conduct the Critique?

Besides designating borders as to what constitutes legitimate and illegitimate, or identifying duties and responsibilities for its subjects, law – in particular criminal law – represents a particular sort of criticism. A judgement is not only a technical or procedural event, but it is also a critical engagement which becomes straightforward and the most direct when an accused stands before a court to be prosecuted. The relationship between a criminal and a judicial authority bears ethical and moral meanings as well as any other judgmental features that can be connected to political, economic or social concerns when the former's acts and intentions are identified as wrong and detrimental by the latter. The conventional claim is that a prosecutor or judge does not necessarily "disapprove" the "act" of the "criminal". It is a common linguistic jargon for legal practitioners such as prosecutors or lawyers to claim that

they are just doing their “job”. But what is this “job”? This is a “job”, a “duty” or a “responsibility”, which has an immanent dimension of “criticism”. This is a particular type of criticism being carried out in the form of a different type of power which pervades through the discursive practices of the prosecutions. Through international criminal prosecutions, there is also an ongoing criticism by “some” projected onto “others” that has been overlooked often in the name of implementing justice. “Some” are criticizing “others” due to their acts which are defined and labelled as “great atrocities”.

Yet, there are various ways of criticising a subject matter with different ontological and epistemological assumptions that vary depending on the type of relationship supposed to take place between the agent and the subject matter. An act of criticism gains a totally different perspective depending on whether or not the researcher has a belief in the probability and in fact desirability of objectivity between the observer – the critic – and the object being criticised. Though the act of criticising a subject matter refers to three main components in general, which are the agent or the subject, the target agent or the object, and the act of criticizing, in some cases the agent and the target agent, in other words, subject and object of the act of criticism, coincide. For example, in some religious systems, subject and object of criticism may collapse into one giving the result of a self-criticism. Yet, the act of criticism is not exclusive to these two different forms, and one may well develop a critical perspective on the act of “criticizing” itself whether this act of criticizing has

a subject and object separate from each other or not. In this case, what is at issue is "criticising another act of criticizing".

"Criticising former or ongoing criticism(s)" sounds like a meta-analysis transcending or going beyond the former data or analysis. Still, a "meta-criticism", if we may call it as such, does neither have to be a transcendental criticism which in Kantian terms seeks for the way(s) validating knowledge and experiences on a subject matter, nor a nihilistic despair which rejects legislation[5] at all for any kind of legislation would damage the "autonomy" that critical studies intend to achieve. Discourse analysts conducting mainly a descriptive type of analysis contend that Critical Discourse Analysis (CDA) disrupts the autonomy of data because of interpreting this data with political concerns. It is not only conversation analysis (CA) trying to avoid from analysing data with the latter's power dimensions and making any judgments on the findings. Conventional approaches to discourse analysis, whether they take discourse as a "product" or a "process", whether they take it as a homogeneous entity or take into account immanent contradictions or pressures, are insufficient for drawing connections to the larger societal level. Critical linguistics reject two prevalent dualisms in linguistic theory which are the separation of language systems from the "use" of the language, and the separation of "meaning" from "style" or "expression" (or "content" from "form"). Still, little attention is given to the problem of interpretation which might arise either from the analyst-interpreter or participant-interpreter. Critical linguistics also lacks an

[5]Legislation, herein, is taken as any initiative of globalizing theory or totalizing history that is believed to pose an obstacle before individual emancipation.

emphasis on the potential for social and cultural change, and rather prioritizes reproduction of existing social relations and structures. The main problem here is the overlook of what lies beyond discourses (Fairclough, 1992: 12-36).

Discourse is not just an entire set of spoken dialogue or written texts as the term has been referred sometimes in linguistics. Neither does discourse analysis indicate a certain type of linguistic analysis focusing upon sentences or grammatical structuring or organizational properties of dialogue (Fairclough, 1992: 3). Foucault's discourse analysis underlines the "role of history" in generating discourses, the "relationship between discourse and knowledge", and complements the picture with reference to "materiality" that most of the other discourse analyses overlook. In fact, the connection of discourses to the material world is a direct consequence of the former principle of "discourse-as-knowledge". As long as discourses are taken as instruments of power, it would be an incoherent and incomplete analysis without the former's effects on the material world.

Discourses have a productive dimension making up ways of being intelligible while operationalizing a particular "regime of truth". It is not only a social space that is constructed through discourses. In this social space, *subjects* who are vested with power to organize and control *objects* are constructed while the legitimacy of such organization and controlling is substantiated simultaneously by the objects in return (Milliken, 2001: 138, 139). Likewise the international criminal law discourse produces subjects authorized to determine, criminalize and punish such as legal scholars, prosecutors, lawyers and officials acting on behalf of related institutions

and organizations as well as an audience identified as the international community. This social world with its subjects and objects, not only enables and defines certain rights and fields, but also silences some others through processes of exclusion, limitation and restriction (Milliken, 2001: 139).

1.3.1. Bringing Together CDA and Genealogy

Disregarding the productive and practical dimensions of discourses has outright repercussions on politics. If people's common sense of the world is taken for granted instead of being regarded as a product and construction of discourses, there seems to be no point of studying the politics of hegemony (Milliken, 2001: 154). Taking international criminal law and judicial practices as *a priori*, natural and necessary is the same thing with granting them a universal character which would mean there is nothing political about it. If international criminal prosecutions are treated as merely an issue of apolitical formulation and a choice followed by elites, and if the political dimension of developing definitions and shaping their operationalization is ignored, resistance becomes extremely difficult to imagine. This is exactly what a critical discourse analysis would avoid inspiring. Quite the contrary, a CDA shall,

> deal primarily with the discourse dimensions of power abuse and the injustice and inequality that result from it. […] It is primarily interested and motivated by pressing social issues, which it hopes to better understand through discourse analysis. […] Central to [the] theoretical endeavour is the analysis of the complex relationships between dominance and discourse. Unlike other discourse analysts, critical discourse analysts (should) take an explicit socio-

> political stance; they spell out their point of view, perspective, principles and aims […]. Their hope […] is change through critical understanding. Their perspective […] that of those who suffer most from dominance and inequality. Their critical targets are the power elites that enact, sustain, legitimate, condone or ignore social inequality and injustice. […] Their critique of discourse implies a political critique of those responsible for its perversion in the reproduction of dominance and inequality (Van Dijk, 1993: 252-253).

While the concern is not key agents' meaning creation *per se*, CDA takes root from theories in which actors are agents of social change. Interaction between groups and institutions and the target populations, in other words audiences of these groups and institutions, is carried on through discourses (Van Dijk, 2001). Thus, there always is a linkage between texts and power relations which CDA aims to reveal the particular social conditions for their production (Van Dijk, 2003; 2006). As the actors become agents with their capabilities of exerting social power and controlling a particular discourse, there is room for change through agency. The indeterminate and flexible nature of law also signifies a dynamic content and meaning for actors to challenge both the legal and societal aspects of relationships of injustice and inequality (Whitehead, 1998: 736-739). While the multidimensional aspect of the current ICC regime implies the multi-layered structure transcending conventional borders, the dynamic dimension of its discourse with indeterminacy and "partial" determinacy implies the role of agency within this order.

Genealogical research converges with CDA in that it also has an explicit political stance holding a conviction on the coexistence of oppression and resistance which at the end introduces everlasting possibility of change rather than a static and unconditional relationship to "truth" (Hook, 2005: 8). Genealogy chooses to

challenge the "centralizing *power-effects* of institutional knowledge and scientific discourse" (Hook, 2005: 6). It is carried out through bringing to the surface the neglected, masked or buried historical contents and "subjugated knowledges". Criticism, which mainly aims at transforming or amending the subject matter, turns into a critique problematizing that very subject matter. For the latter's concern is not to contribute to the sustainment or maintenance of the problematized subject, it stands as a more radical form of approaching the issue and comes closer to meta-criticism. A Genealogical approach, in its attempt to reveal and unmask how institutions obscurely exercise political violence through their orders of discourses, and to enable fighting against these supposedly neutral and independent power-centres, fits well into the category of "critique" rather than the more conventional forms of criticising (Hook, 2005: 5,6). After all, "knowledge is not made for understanding; it is made for cutting" (Foucault, 1977a: 154).

A genealogical critique has the potential of keeping its ultimate prospect for autonomy while recognizing no ground for legislation that replace the present one being criticized. Genealogy, through reflecting on the present, and interpreting what the "present" "shows" and "says", is a way of conducting an exemplary critique (Owen, 1995). Transcendental thinking involves heteronomy, which constitutes one of the drawbacks before autonomy, and overcoming the transcendental/empirical double is an attempt to think of "[m]an as both lawgiver and subject of law" (Owen, 1995: 494). Ironically, though the illustration of "[m]an as both lawgiver and subject of law" intends to depict the individual as constituting the phenomenal world while

being constituted as phenomenon through laws of both the natural and social world, the very same illustration can be used to depict the individual's role regarding the laws of the legal world. Members of the international community are also both lawgivers and subjects of law, being simultaneously authors and subjects whether they come into the picture as practitioners, suspects or witnesses.

1.3.2. The Course to be Followed

It is significant to quest for an answer to the question "what is the type of 'rationality' dominating of a particular period in time through a hegemonic discourse?" as hegemonic discourses' structuring of meanings are decisive on how practices should be implemented and how these practices become intelligible and legitimate. Discourses, while fixing "regime of truth(s)" in a given time period under certain circumstances, are historically contingent and open to change (Milliken, 2001: 139). Law is but one of many discourses, and like other discourses it has an overflowing and incomplete nature, which at the end opens up spaces for change, discontinuity, and variation. Just as "rationality" should be inquired with the term's instrumental and relative meanings floating in time instead of an intrinsic notion of "rationalization" (Foucault, 1991: 79), the type of connection between law and society should be analysed with its historicity and conditionality.

In Chapter 3, Gramscian and Foucauldian understandings on law will accompany the discussion whether law has determinacy, or in other words responsiveness and stability, and to what extent if any. Rejecting determinist theories as well as radical indeterminacy and nondeterminacy theses does not imply that there is no meaningful connection between law and society. Discussion on a Gramscian perspective on law and a Foucauldian perspective on law in connection to an argument that law is both determinate and indeterminate is akin to a dialectical perspective, which considers the contradictions as well as the negatives helping to explain how and why contradictory facts could occur simultaneously in a society. Such an approach frees the analyst to make a choice between determinist theories which render law merely as an instrument of one powerful group or the other, and radical indeterminacy and nondeterminacy theses, which reject both a consistent, predictable legal structure and the possibility of a relationship between the structure and the observable world. A dialectical critical theory on law, instead, shows how the liberal notion of 'rule of law' supports a liberal form of economy and society, and how law's inconsistency in terms of not being subordinate to a group or groups yields a systematic consistency for the sake of liberalism.

In order to address all these aspects of the discursive power of the ICC, the analysis chapters are organized on a tripartite basis. Chapter 4, as the initial stage of the analysis, looks at the history of international criminal law with an aim of discerning different discourses embraced by this law. One of the crucial questions posed at this stage is that how human groups have embraced a particular group of

acts defined as core crimes. The first stage of analysis, while looking through a genealogy inspired perspective, aims to show the change, discontinuity, and variation in humanitarian law that evolved in time towards international criminal law. Genealogical perspective unavoidably brings to mind a follow-up question as to what changed in the broader context concerning a different international criminal law discourse. However, it is necessary to see the change *within* discourse in the first place in order to proceed onwards to see the change in the broader context.

The second stage of analysis complements the genealogy inspired perspective of the first stage by focusing on the particularity of the international criminal law discourse. At this point, the analysis directs the attention to the discourse of practices which is covered in Chapter 5 and Chapter 6 in a bifurcated fashion. Chapter 5 is designated to introduce the rules of the ICC in determining issues such as to intervene or not in a situation or to conclude whether a crime has been committed. Discursive practice, as a particular form of social practice rather than posing an incompatibility with the latter, focuses on processes of text production, distribution and consumption (Fairclough, 1992: 71). Yet, analysis of discursive practice involves a combination of "micro-analysis" and "macro-analysis" which are interdependent as the former's focus on the ways of participants' interpretation of texts cannot be fully grasped without the latter's concern on such interpretations' connection to the nature of the participants' resources and orders of discourse (Fairclough, 1992: 85). Thus, the micro-analysis of interpretations of the texts in Chapter 5 leads to the macro-analysis stage of the analysis of discursive practices in Chapter 6 to see the

procedures of exclusion and inclusion; what is permitted and/or rejected;what is privileged and what is disregarded; who are constituted as the addressees, hearers and overhearers.

With its focus on governmentality and disciplinary practices of the discourse in Chapter 6, the purpose is to show that prosecutions are not merely prosecutions as such. Defining an act as an international crime brings with it the result that there are certain ways to deal with such a crime, and these pre-determined solutions should be put into force in order to handle the situation. Problematization and rendering technical are two inextricable processes that one entails the other in a circular way. Defining certain cases of violence as international crimes to be prosecuted and punished is also a way for defining international criminal law as a technical domain which will unavoidably introduce its own boundaries and experts. Such a technicality suggests at first sight a false impression of de-politicization, as the so-called apolitical criminal law defines boundaries, constructs particular groups, and leads to mobilization of certain forces and entities both above and below the domestic level. On the other hand, introducing law as an apolitical field is itself a political approach as de-politicization is a way of excluding and preventing challenges from outside.

As the final stage of the analysis, Chapter 7 combines the governmentality of the ICC with the broader social, political and economic context. Particular perceptions on what constitutes an international crime, as outlined at the first and second stages of the analysis, and the governmentality aspect as shown at the third stage, have direct or indirect linkages with wider political, social and economic

concerns. The multidimensional nature of the ICC regime is one of the layers of late capitalist and postmodern world order with multifarious institutions, representing various ideologies, functioning at multiple layers. The wide spectrum of legal orders embodied in the form of subnational, national, regional, and transnational institutions, or organizations operate as sites for producing both the material and ideological bases for preserving and supporting liberal capitalist world order. Such a multidimensional and diversified order represents the postmodern aspect of the current system with the prospect of supporting and sustaining capitalism (Cutler, 2006: 140, 141).

While the initial stage of the analysis points out the dramatic change regarding our perceptions about rights and justice as well as efficient solutions to what we define as offenses against these rights, the second stage of the analysis underlines the particular components of the altering perception. The third stage of analysis connects this altering perception to the particular economic, social and political settings.The purpose is not only to bring to the fore the fact that international crimes and mechanisms to prosecute these crimes do merely reflect a constructed ideal with historicity or that the values embedded into these processes are contingent as well as partial and subjective. A further purpose is to show that the international community, which allegedly defines, codifies, and actualizes international criminal law and prosecutions through the ICC, is itself a constructed entity. What is more, construction of neither the ICC nor international community

predates the other; rather this is an interactive process wherein a pervasive legal discourse and the international community reciprocally generates the other.

Yet, before presenting an alternative analysis, it is necessary to look at the existing analyses of international criminal law and the ICC, this, to clarify in detail what is problematic about the literature at the outset, and then, to put forward possible outlets to transcend what is conducive to totalizing and universalist perspectives. To cut the way of thinking, which leads toward abstraction and closure, it is argued that the story of the ICC might have been told on different grounds. This alternative thinking attempts to merge Foucault's approach on law and Gramsci's approach on law although there is not a single way of interpreting how the two thinkers approached law. The significance of the convergence between Foucault and Gramsci is the indeterminacy attributed to law in both thoughts. The scale and scope of law's determinacy forms the backbone of the analysis that aims to demonstrate how international criminal law in general, and the ICC in particular, develops a particular discourse, and how this particular discourse is compatible with the current global neoliberal system.

CHAPTER 2

HOW THE STORY HAS BEEN TOLD

Looking at the literature on the ICC is essential to see; first, how this recently established unique institution is perceived by scholars, and second, why there is a need to look from an alternative perspective. Yet, there exist two challenges for a literature review on the ICC. First, it appears at many points very hard to isolate literature on the ICC from the wider literature on international human rights, humanitarian law, and international criminal law that entails certain convergence points. Moreover, all these different albeit close legal disciplines have further connections with various disciplines such as Political Science, International Relations, Sociology, Psychology, or Criminology. Despite convergences both within legal disciplines and between legal and other disciplines, a further problem arises due to different and most often contrary approaches all these vast amount of disciplines embrace. As it seems not to be a plausible and feasible initiative to separate literature as descriptive, normative, political, analytical, or critical, the review is structured to cover first the establishment process, the particular features of the court, and the outcomes of establishing such a court as the last point. The primary

concern is to conduct a review of the literature on the ICC in a selective manner without disregarding or losing the most significant contributions from the vast range of related disciplines.

The first section covers the literature focusing on various research questions/problems and scholarly debates related to the establishment of the ICC. The section is structured according to how scholars from diverse disciplines have tried to explain the (f)actors and dynamics leading to the establishment of the ICC. While some writers focus on the structure, some others tend to develop their explanations depending on actors such as particular states or coalitions of states, civil society actors, and experts. The following section covers the literature on the ICC's institutional design or the provisions found in the Rome Statute that govern the ICC's operation. The focus in this section is the outstanding features of the ICC, namely, the court's functioning as an *ex ante* court, with universal jurisdiction, and with the principle of complementarity as envisaged in the Rome Statute. Finally, the third section covers literature on the implications of the ICC. The implications are addressed by scholars in relation to at least three separate issues: First, what (if any) are the implications of the establishment and existence of the ICC for the nature of world politics and/or the character of world order at large? Second, what (if any) are the implications of the establishment and existence of the ICC for international criminal conduct/behaviour? Third, what (if any) are the implications of the establishment of the ICC for the specific states and/or societies in which it is/gets involved?

As it has been the case for any review ofthe literature on a particular subject, the main purpose of reviewing the literature on the ICC is to have a general yet competent insight on how the ICC has been studied so far. Developing a comprehensive insight inspires the concomitant purpose which is to consider the need and prospect of an alternative perspective given the limited nature of current literature.

2.1. The Establishment of the ICC

2.1.1. The Role of the Structure

Various theories and approaches with different levels of analyses and perspectives undertake to relate the establishment of the ICC with structure, the latter understood in various ways. The remark on different locations and levels is noteworthy in terms of what we understand by the term structure and how it is related to the ICC. If structure is taken more in materialistic terms with the focus turned towards the new violence methods enabling mass-scale atrocities, then the establishment of the ICC is part of a process defined with the ultimate level of modernization and technological developments.The two world wars had introduced not only new violence methods, but revealed at the same time the transgression of the then norms and rules, which required a redefinition and recodification process as against modern violence

methods. What we experience regarding recent conflicts and the prosecutions of the ICTY, ICTR, and finally the ICC, are repercussions of the pre- and post- world wars era (Horne, 2006). The end of the Cold War has presented a very critical *opportunity structure* to the once dropped off international criminal prosecutions (Hagan, 2003: 29, 30).

Constructivist accounts on the establishment of institutions, which regard actors as embedded in social structures (Finnemore, 1993; Finnemore and Sikkink, 1998; March and Olsen, 1998; Risse, Ropp and Sikkink, 1999), tend to understand institutions as a set of norms, with a norm representing a "standard of appropriate behaviour for actors with a given identity" (Finnemore and Sikkink, 1998: 891).[6] Finnemore (1996), having viewed that humanitarian law emerged and developed as an outcome of private political actors' efforts, contends that national interests and strategic considerations have little to do with human rights and humanitarian law initiatives, thus, she replaces the realist "interest" and liberalist "regime type" variables with that of "persuasion".[7] Accordingly, the seemingly contradictory

[6]Various types of constructivist approaches focusing on the constitutive dimension of the norms evaluate how the logic of appropriateness affects actors' behaviours in different and even challenging ways. Since a state's reaction in relation to legal or normative pressures is connected with its regime type or traditions, states with liberal, law-based traditions struggle in resisting such pressures even if they are currently under an authoritarian rule (Keck and Sikkink, 1998: 207-209). From this point of view, states not having liberal traditions are prone to resist normative pressures with much more ease (Abbott, 1999: 373). Another significant observation is that certain forms of violence involving bodily harm to vulnerable individuals, torture and disappearances, or systematic sexual atrocities, have more potent repercussions (Keck and Sikkink, 1998: 27). Thus, Keck and Sikkink, beyond demonstrating the close connection between the governing norms and rules with reactions to breaches of humanitarian atrocities, underline the significance of the degree of the severity of these reactions as the latter has something to do with the socially constructed classifications as well.

[7]Here, Finnemore (1996: 69-88) in fact challenges mainstream liberal explanations stressing the fact that even authoritarian states like Prussia or Japan strongly supported the first humanitarian law

attitudes of states in the first half of the 20th century might be argued to be due to the insufficient degree of persuasion about the norm on the international criminal law. Thus, the support of the main actors towards the codification of international criminal law in recent decades is directly related to the deepening of persuasion and credence, and the ICC is an obvious indicator that related norms and rules of the international criminal law have been internalized by a substantial part of the international society (Birdsall, 2009: 113, 114).

Human rights norms and humanitarian law have gradually evolved introducing a threshold to become a member of the community of civilized, liberal, and democratic states (Risse, Ropp and Sikkink, 1999; Finnemore, 1996). The changing nature of contemporary international relations and the increasing role of international institutions stand as the leading explanations for the establishment of the ICC. With the growing number of democratic and pluralistic societies in the post Cold War era, neither political leaders nor governments of these societies can face up to reactions which might arise due to their disregard of demands coming through the victims of mass atrocities or their publics for prosecuting perpetrators of these crimes (Scheffer, 2002: 51, 52). The worldwide acceptance of human rights norms that contributed to the establishment of the *ad hoc* tribunals and ultimately to the ICC had started even before the end of the Cold War (Rudolph, 2001). Danner (2006) contributes to this perspective by illustrating how post-Cold War institutions – the

conventions. More interestingly, some advanced democracies of the time such as Britain opposed these conventions while Japan, Prussia, and other states unilaterally decided to apply the new rules.

ICTY in particular – have affected the road to the ICC through extensive and efficient judicial lawmaking.

Struett's study on the contribution and intervention of NGOs to the ICC process attempts to explain the role of the NGOs in the establishment of the court and the influential power of the NGOs in shaping the ICC's particular discourse. For Struett, the intersubjectively constructed discourse in the post-Cold War era enabled a great number of states being persuaded to ratify and become party to the Rome Statute, and the NGOs had a crucial role through their communicatively rational arguments in this process. The constructive process, rather than coming to an end with the ratification and entering into force of the Rome Statute, continues to shape actors' choices particularly regarding the use of force (Struett, 2008).

Lamont (2010) counters the aforementioned constructivist arguments showing adeptly how Serbia and Croatia have rationalized their non-compliance acts against the ICTY through their own ideational structures consisting of countervailing norms. Lamont's is a challenging, albeit still constructivist, approach, to suggest alternative perspectives in understanding countervailing and non-compliant acts before international criminal courts.

2.1.2. The Role Played by Particular States or Coalitions of States

Despite intense efforts at Rome, Sadat and Carden (2000) argue that the conventional conduct of international affairs as one between the conservative groups that insisted on preserving the role of states and the ones challenging this conservative stance describes the negotiations during the Rome Conference. Spyros Economides (2001: 122) notes that the potential for revolution succumbed to the conventional conduct of international relations at Rome just because of the fact that such a revolution is extremely hard to be achieved in the hands of the leaders of the old order.

Still, it is not easy to tell precisely whether the leaders of the old order had prevailed during the Rome Conference, or whether they had to surrender to a recently emerging group of states challenging the *status quo* powers. For some writers (Posner and Goldsmith, 2005; Goldsmith, 2003: 100, 101), who emphasize power concerns from a realist perspective, it looks very likely that the real motive of the middle powers, especially the European powers, had been to inhibit and control militarily powerful nations while preventing mass atrocities and prosecuting human rights abuses remained of secondary importance. The states carrying an antagonistic stance against the establishment of the ICC had concerns that such a court would appear as another particularistic Western institution, representing the deepening constitutionalism of the liberal project that was in fact concealing the "real" purposes and dangers. Ironically, the main cause why the United States did not become a party

to the Statute can be viewed as a complaint that the ICC was not designed as particularistic enough (Simpson, 2004: 7, 8).

Particularistic enough or not, the recent developments of international criminal law are argued to lead to an increase of power on behalf of the Western States through definitions of new crimes and establishment of new courts (Laughland, 2002). Disagreements on how these crimes should have been defined and what kind of an enforcement procedure was going to be followed would certainly result in negative votes for the ratification of the Statute. Still, the question of the main motivation of the states, including the ones that rejected to become party to the Statute later on, to consent to the idea of a permanent international criminal court remains not fully answered.

Rationalist explanations bring forward two main arguments for a common approval of the idea for a permanent international criminal court. One argument depends on the enforcement problem in international criminal justice. For Abbott (1999: 366, 367), it is not only governments and state officials who take a role in the process of norm-creation and norm-enforcement. Punishment and deterrence of certain crimes constitute public goods for all the members of the international community, but there are also incentives for states not to prosecute a perpetrator of an international crime. Thus, establishing a centralized and permanent international criminal court appears to be the most apposite and pertinent solution to the difficulties and possible costs of prosecuting these perpetrators at national courts and

ad hoc international courts (Abbott, 1999: 374, 375; Mayerfeld, 2003: 111-114; Scheffer, 1999: 13).

Yet, the positive approach in support of a permanent international criminal court at the start was not sufficient for some states to become party to the Rome Statute. The possibility of US military personnel in overseas missions to be prosecuted for committing international crimes on the territory of an ICC member state (Scheffer, 1999: 18), the politization by rogue states or a biased prosecutor (Ball, 1999: 206; Sewall and Kaysen, 2000), the critical stance of the Pentagon (Ball, 1999: 188-193) or individual Congress leaders (Pace, 1999: 196, Slaughter, 1999: 12) are amongst the reasons for the US refusal to become party to the Rome Statute.[8]

The democratic legitimacy of the ICC has been another controversial issue. Objections center on the so-called democratic nature of the process at the Rome Conferrence and the features of the Court as envisaged in the Statute. Some critics intrepret the Rome conference as a quasi-legislative mechanism which led to the establishment of the ICC by non-unanimous vote (Sadat and Carden, 2000), and underline that there is no liberal democracy or an international multilateral organization preconditioning unanimity as the basis for democratic legitimacy(Moghalu, 2006: 135).

[8]For critics against the US arguments, see Chibueze (2003)and England (2001).

2.1.3. The Role Played by Civil Society Actors

Glasius (2006) depicts the story written at the Rome Conference as a great success of global civil society. For Glasius, the achievements of the Statute could not be established unless it had been supported by the global civil society that has been more active since a while. Which actors or groups form this global civil society and to what extent they have influenced and shaped the establishment process can be answered through looking closer to the establishment process, which might be divided into two phases taking the mid-1990s as the turning point. There seems to be significant differences on the part of the NGOs before and after the decision for the establishment of a permanent international criminal court was taken in the mid-1990s.

Despite clear signs of effective and inspiring NGO participation at Rome, the role of the NGOs was less active before the Rome conference. Though it would be easier to argue that the lawyers' organizations were slightly more active, there are few signs of contributing to the establishment process such as monitoring and influencing the discussions about a permanent international criminal court at the UN till the 1990s. It was only in February 1995 that the NGO Coalition for an International Criminal Court (CICC) was founded. This NGO Coalition appeared to be surprisingly influential in the later negotiation process during the Rome Conference though it has been primarily the states as the main actors initiating and undertaking the establishment process of the ICC (Fehl, 2004: 374).

The Rome Conference tells a different story about the role of the NGOs. Besides states, there were 236 NGOs participating in the Rome conference, which has emerged as a very significant example of a norm construction process. The NGOs not only contributed to the content of the particular discourse of the Statute, but also continues to influence states' choices and behaviours through persuasion by this very discourse even after the entry into force of the Statute (Struett, 2008) as well as providing the Office of the Prosecutor with evidence and information for the crimes entitled in the Statute (Danner, 2003: 519-522; Struett, 2008).

The women groups amongst the NGOs played an influential role during the conference. Though the terminology to define the crimes against women became a cause of contention during the Rome Conference, the Women's Caucus succeeded in the end to include the terms of "gender" and "gender crimes" in the Statute (Bedont and Martinez, 1999). It is noteworthy that feminists from different theoretical positions have moved in a coalitional style with an overwhelming consensus and without showing any significant internal disagreement (Halley, 2008). Despite the positive appreciation of the establishment of the ICC in the feminist literature (Askin, 2000;Bedont and Hall-Martinez, 1999; Boon, 2001; Chappell, 2011; 2014; Charlesworth and Chinkin, 2000; Copelon, 2000; Steains, 1999), the narrow and particular interpretation of the term "gender" itself causes difficulties from a feminist perspective while the goal is to provide a wider, more encompassing and flexible definition (Hagay-Frey, 2001; Oosterveld, 2005).

2.1.4. The Role Played by (Legal) Experts

The influence of the international lawyers and judges on the establishment of the ICC may be classified as direct and indirect, with the former indicating the type of contribution through speeches, declarations, addresses, writings, or participation in person in the negotiation process of the Rome Conference. Louise Arbour, prosecutor of the ICTY and ICTR, has to be mentioned as having made a significant impact on many delegations by her address to the Fifth Preparatory Committee (Hall, 1998: 339). International lawyers are characteristically optimistic for the most part about the establishment of the ICC, and being closely involvement with international criminal tribunals, they credit these institutions being the only mechanisms capable of responding to international crimes (Akhavan, 2001; Scheffer, 2002).

Besides the exterior support from international lawyers and legal scholars, it is very probable to say that the earlier examples of the ICTY and the ICTR with courageous and reformist jurisprudence of the judges supported the ICC whose recognition happened to be relatively easy and widespread than its predecessors. International law making, a field which has been conventionally dominated by states, has transformed into a common area shared by states, international institutions, and judges of international tribunals (Danner, 2006).Meanwhile, the progress and development in war crimes trials have been faster since Nuremberg (Meron, 1998), which is a development owing much to the judges of the two post-Cold War criminal tribunals (Danner, 2006).

However, it seems not only to be the extent and scope of the crimes codified by the ICTY and ICTR paving a novel path for the crimes defined in the Rome Statute. For some writers, judges' personal interventions in the prosecutions at the ICTY and ICTR also resulted in significant changes both in the framing and the discourse of the international crimes, which later on had reflections in the Rome Statute. Particularly some feminist writers point out the significance of the role of female judges at the international criminal tribunals. Justice Pillay's willingness and personal efforts to listen to women in a secret session in the *Akayesu* case is argued to lead to the intrepretation of rape as a form of genocide (MacKinnon, 2006). Chappell has considerations on the influence of individual efforts such as Justice Pillay's, but also thinks that feminist judges in the ICC do have great advantages owing to "the gender justice architecture built into the Rome Statute" (Chappell, 2010: 490). In fact, Chappell's argument is supportive of the idea that it is not the judges but the structure of the courts and the legal designs that is determinant on the crucial outcome of achieving gender justice.

It has been a controversial issue whether the increse in the number of women holding active positions at crucial posts makes a real difference regarding women interests. Recent research about female judges has confirmed the findings of similar research on legislatures. Accordingly, there is not a meaningful relationship between the number of women in legislative or judiciary mechanisms unless these women represent a feminist perspective (Mackay, 2008). A further point which might be

derived from this logic is that women having feminist orientations would be determinant not only in the codification, but also in interpreting the codified rules.

2.2. Features of the ICC

2.2.1. An *Ex Ante* Tribunal

Criminal tribunals might be divided into two groups as "ex post" and "ex ante" ones depending on whether they are established before or after the crimes in question are committed. Accordingly, all the international criminal tribunals before the ICC can be considered as *ex post* tribunals, being launched after either a military victory or a political settlement, and after the alleged crimes occurred. The ICC is the archetypal of the *ex ante* tribunals, established before an international security problem manifests itself or comes to a resolution. The *ex post* tribunals do not affect the international security concerns as the security problem in question has already been resolved before the tribunals' establishment (Arsanjani and Reisman, 2005). But such a categorization is not an easy one especially for the ICTY, which was established before the conflict had ended, and which may have had more to do with pushing the parties to the conflict to sign a peace agreement, in this case the Dayton Agreement (Dunoff and Trachtman, 1999: 401).

Likewise, the ICC, though it has been established as an *ex ante* tribunal, enables the Prosecutor to evaluate the situation taking into consideration geopolitical imperatives. Article 53 (1) (c) gives the authority to the Prosecutor of the Court to assess the gravity of the crime as well as the interests of the victims and justice in general. If the Prosecutor concludes that an investigation would not serve the interests of justice, then (s)he may decide not to initiate such an investigation. The Prosecutor's power to evaluate the situation and take a negative decision to initiate an investigation on the grounds of "interests of justice", even though (s)he needs a confirmation through the Pre-Trial chamber if such a decision has been made solely on the basis of Article 53 (1) (c), leaves the Court closely in relation to political considerations (Arsanjani and Reisman, 2005:386.) Such considerations may also arise due to an oncoming election or the prospect of a peace agreement. The investigation on the Central African Republic was opened five years after the initial request for an investigation in 2003. The delay is attributed to the Prosecutor's desire not to upset the elections in the Democratic Republic of Congo, where one of the main candidates was a suspect in the Central African Republic case (Glasius, 2008). Glasius (2006: 47-60) considers the flexibility endowed to the Prosecutor of the ICC to choose his or her 'own' cases as one of the greatest achievements of the Rome Statute, even the most prominent one.

2.2.2. Towards Universal Jurisdiction?

Universal jurisdiction is the legal doctrine cutting the linkage between the country and the place where the crime was committed, or the nationality of the offender or the victim. The universal jurisdiction doctrine is presumed to be effective for a certain group of crimes mainly because only these specific crimes have been counted as shocking for the whole humanity which therefore should be prosecuted regardless of the location of the crime, and the nationality of the offender or the victim.

The argument against the universality of the ICC's jurisdiction is grounded on the fact that the Court's jurisdiction is limited to the nationals of state parties, offences committed on the territory of state parties, or a decision taken by the Security Council (Hafner et al., 1999; Glasius, 2006; Kaul, 2008: 555, 556). On the other hand, writers, who qualify the ICC as an important step towards the achievement of universal jurisdiction, underline that this universality does not arise due to the right of referral by a state party or a non-state party to the Statute, but due to the power of the Security Council to make a referral in order to protect international security and peace (Bassiouni, 2004). The core of the nuance between the jurisdiction of the two *ad hoc* tribunals and the ICC is that the jurisdiction of the latter does not require an external trigger. Scheffer's (1999: 19, 20) focus is rather on Article 12 of the Statute, which he argues is introducing a dangerous drift towards universal jurisdiction through enabling prosecution of nationals of non-party states.

2.2.3. Complementarity: A Further Step or a Throwback?

The complementarity principle, introduced in the Rome Statute as one of the basic features of the ICC, simply refers to the exercise of jurisdiction of the Court not as a first degree court, but as the court of last resort when no state proceeds genuinely with the case in question on the condition that the ICC interference will serve the interests of justice.[9]

The complementarity principle brings about a dispute in the legal field about the relationship between states and the so-called international community. The crux of the problem is whether the international criminal law embodied under the Statute forms an independent legal system apart from states or there still exists a need to rely on the "good will" of states to implement the ICC law. According to the latter approach, the sovereignty of state parties are only partially transferred to the Court so that states remain as the ultimate actors for the international criminal law to function (Benzing, 2003; Gioia, 2006).

On the other hand, if we agree that the international criminal law is part of the law of nations, in other words, if it is a sub-system functioning under the general international legal system, then this system has both the capacity and right to enforce the rules it envisages. Thus, the ICC has the power to say the final word in two respects. First of all, the ICC has the power to prosecute international crimes or not to prosecute even though there exists real evidence that such crimes are committed.

[9]For a detailed overview on the complementarity principle of the ICC, see Stigen (2008).

There are serious doubts whether the ICC will be a determining power even for cases falling out of the jurisdictional scope of states parties and in the absence of a Security Council decision. For Trifferer (2008), the suspects of international crimes will eventually lose their political power when faced with pressures through every means, and the process will lead to their surrender to the Court, which means that the Court will be effective not only for cases falling into its jurisdiction, but also for the ones out of its jurisdiction. While the first will be a direct effect, the latter will have indirect repercussions. A second aspect focuses on the ICC's discretionary power to follow decisions taken by states on amnesties and alternative forms of justice. The general approach on amnesties, pardons, or other alternative forms of justice for international crimes is that the ICC could confirm and follow their implementation only in exceptional cases as the denial of impunity for these crimes is the core aim of the Court. But it is apparent that even such an exceptional and extreme option is not outside chance (Gavron,2002; Goldstone and Fritz, 2000; Robinson, 2003; Stahn,2005).[10] The question on amnesties and other alternative forms of justice is directly related to the complementarity issue as the Court's non-recognition of these alternative ways will lead to interference in the administrative and judicial decision-making of the state in question.

Whether the principle of complementarity means that it is, after all, states enabling the operation of international criminal system, and that the ICC has a secondary power, or the ICC has real autonomy and discretionary power beyond states, it brings into the picture totally a novel mechanism of complementing and

[10]For a counter view denying any possibility of the ICC respect for amnesties, see Hafner et al. (1999).

consolidating the failures of domestic legal systems, which at the end strengthens the international justice mechanism. The fact that the ICC has jurisdiction only to the extent that the Statute envisages does not obviate international criminal law to be effective, but will have repecussions quite the contrary that is to give rise to more effective national jurisdictions. The national legal systems, through the complementarity principle, will have more responsibility to prevent impunity when the ICC is precluded to intervene (Dicker and Duffy, 1999). The Colombian case stands as an important example in support of the argument that this principle contributes to nation-wide efforts to prosecute perpetrators of international crimes committed during an internal conflict.[11]

Beyond pushing the states to prosecute their nationals who are accused of committing international crimes, the ICC may eventually lead to a division of tasks. While it remains highly improbable to expect states to prosecute their political leaders in power, the ICC may fulfilll this gap through concentrating on the criminal liability of state leaders (Del Ponte, 2004). The complementarity principle, thus, will decrease the burden both for the national and international courts. Yet, the role assigned to the ICC to prosecute state leaders for international crimes poses the problem of "dual responsibility" that will in the end complicate the issue and

[11]Ambos (2010) investigates the Colombian case under the law of "Justice and Peace" of 25 July 2005, so-called Law 975, which aims at disarmament, demobilization and reintegration of irregular armed groups in order to restore peace in the country. The question whether Colombia, a state party to the Rome Statute, has complied with its obligations under Article 17 of the Statute is at the center of the investigation. The case of Colombia has been monitored by the Office of the Prosecutor and the conclusion has been that the situation in Colombia does not require the ICC to initiate an investigation process according to therules for admissibility. Ambos's reearch concludes that while the complementarity principle may contribute to national legal procedures, it also poses certain ambiguities and indeterminate points in terms of the evaluation of the Office of the Prosecutor and the Pre-Trial Chamber on related cases and situations.

redouble legal and political debates (Bonafe, 2009; Dupuy, 2002). Moreover, restricting the ICC prosecutions to only a few individuals, who allegedly bear the greatest responsibility for the most serious crimes, leads to another impunity gap by eliminating the crucial linkages between commanders-in-chief and mid-level commanders that might pose difficulties to evidence crimes committed by the former (Cattin, 2011: 375).

There is also the degenerative potential of a criminal system which has one foot in the national terrain, and one in the international. The aim of the complementarity principle devised in the Rome Statute is to fill the gap between the national and the international, and to resolve the complications of the *ad hoc* tribunals. However, the gap might be too deep to compensate, and the legal procedure introduced by a complementary criminal regime might have substantial deficiencies to tolerate and digest. The view that *ad hoc* tribunals and the ICC complement what national authorities cannot achieve seems to be problematic as the process demonstrates there are so many incidences of corruption and unfairness due to the dual functioning of an international criminal tribunal with domestic courts.[12] Instead of functioning as a complementary mechanism, an international criminal court, just like in the case of

[12] The dual mechanism has the potential for some suspects to provide a choice between the courts with jurisdiction over the case. These suspects may make an estimation and evaluation on the conditions of the courts in question. Such an option engenders question about the legitimacy of the accountability regime of international crimes. It is common knowledge that in Rwanda some of the accused have prefered to be prosecuted before the ICTR owing primarily to the fact that the ICTR Statute does not provide for death penalty. In addition, the custody as well as imprisonment conditions are far better when compared to the Rwandan national system. The system yields to undesired consequences such that the accused who are presumed to devise and organize the genocide could escape capital punishment if tried by the ICTR while those who simply carried out the orders could not if tried by Rwandan courts (Manzi, 1995).

Rwanda, might serve as a corruption mechanism and yield to unfair and unequal consequences, which in the end damage the legitimacy of the ICC system overall.

2.3. Implications of the ICC

2.3.1. Implications on the Nature of World Politics and the Character of World Order

The ICC, regarded as part of the evolutionary process towards a world society (Cassesse, 2002: 18; Ralph, 2005), signifies a further step beyond an international society that is characterized by still-sovereign states as the main actors. The Court is believed to overcome the deficiencies of its precursors paving the path for a better world without unpunished mass murderers even if it is not possible to create a world without mass-scale crimes (Bassiouni, 1999). Yet, this is a different world where new institutions and identities transcend conventional ones constrained within territorial borders.

From a constructivist perspective, the new rules in international criminal law permitting a higher authority to intervene in a state's judicial mechanism may not be interpreted as a challenge to state sovereignty as long as sovereignty is reconstructed and redefined in a way to include duties of the state to enforce universal human rights and humanitarian law norms. Thus, the establishment of the ICC does not in

fact conflict with the principle of sovereignty (Birdsall, 2009). The norms and rules of the current international criminal law have reached to the third level Finnemore and Sikkink describe in their norm life cycle (Finnemore and Sikkink, 1998: 895, 901; Birdsall, 2009: 113, 114), andeven the most prominent states' refusal to become parties to the Rome Statute cannot corrupt the process towards a world society (Ralph, 2003).[13]

On the other hand, rather than territorial boundaries bringing forward diversity, it might be diversity inherent in the human condition giving rise to such boundaries. With the globalization process which now transcends once glorified state borders, it is quite possible and even inevitable that we, as human beings, create novel ways of expressing diversity. Thus, we cannot be certain that institutions such as the ICC will inevitably go along with a solidarist world society, because such a development can also introduce a pluralist world society where identities and diversity eventually compete with each other and where some may dominate over others.[14] This is an alternative position against the view that world society is characterized by cosmopolitan features overcoming conflictual diversity either through Habermasian

[13] For Ralph(2003: 196, 197), the main reason for the US opposition to the ICC is the conservative perspective that aspires the internationalization of democracy in the form of an international society composed by sovereign states, not in the form of a world society with a Prosecutor holding enormous power.

[14]The English School of International Relations Theory maintains that there is society of states at the international level despite the anarchical order, yet with an internal division amongst its prominent theoreticians: the solidarists versus the pluralists. While the differing cultures and traditions do not stand as an obstacle in the pluralist tradition, political independence and non-intervention are still primary principles though the solidarists argue that intervention – particularly humanitarian intervention – should not be outlawed as certain common principles and rights constitute the very basis for the society of states. See Buzan (2004), Neumann (2001), Williams (2005).

type of dialogue or through a Gadamerian basic solidarist values approach (Williams, 2005).

2.3.2. Implications on International Criminal Behaviour

> [O]nce we reach the trial stage we have already failed.
>
> Telford Taylor[15]

One of the fundamental goals of legal systems has been deterrence, in general, of potential future public order violations. The goal of deterrence has been widely recognized and endorsed in international criminal law as in domestic legal systems (Andenaes, 1974; Hawkins, 1969). The important difference between domestic and international criminal regimes is that the latter concentrates on "general deterrence" while "specific deterrence" is also a complementary aspect of the idea of deterrence in domestic legal systems.[16] Yet, to what extent this goal has been achieved internationally constitutes even a more complicated problem than it does for the domestic systems. There is no satisfactory empirical evidence that individuals who

[15]Cited in Bloxham (2006: 466).

[16]The purpose of general deterrence is to dissuade others from committing the same crimes in the future while specific deterrence aims at deterring the offender currently prosecuted and punished from reoffending in the future. The *ad hoc* tribunals of ICTY and ICTR have clarified that the goal of deterrence in international criminal tribunals is confined with "general deterrence" as it seems almost impossible for the offenders before these tribunals "to ever again face with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches." (*See*, *e.g.*, *Prosecutor v. Kunarac*, Case No. IT-96-23-T, *par.*840; *TheProsecutor v. Niyitegeka*, Case No. ICTR-96-14-T, *par.*484.)

are about to commit mass-scale atrocities are deterred through the knowledge that they are going to be prosecuted (Meron, 1995). Recent surveys support a contradictory argument that not only the mere knowledge of a prospective prosecution but even the internalization of related norms fails to prevent mass atrocities.[17]

The history of criminology discloses a competition between two abstract images of humanity, one of them demonstrating the human actor with free will, rationality, and unfettered moral choice while the other image is characterized with non-rational, sick, pathological behaviors. Through developments in modern criminology and punishment systems, the pathological ones have been separated from the so-called rational, willful actors. Nevertheless, Reisman (1996: 75-77) argues that a great number of individuals committing international crimes operate within a cultural universe, which shapes their morality and most of the time leaves little space for an alternative path. The restricting nature of the cultural universe is a significant flaw in the liberal doctrine that raises questions aboutthe dubious nature of free moral choice in societies where mass-scale atrocities occur. This issue damages also the legitimacy of international prosecutions which remains unresolved and even inadequately discussed as of yet.

Against concerns on the structure of morality in societies where international crimes take place, Ehrlich (1996) suggests that even for wilful engagement in most

[17] Survey conducted by the International Committee of the Red Cross (ICRC) shows that the vast majority of perpetrators of international crimes during the Yugoslavian conflict accepted and believed in the legitimacy of humanitarian law norms (Wippman, 2000: 477, 486).

heinous crimes, there is still room for making self-serving choices. Long-term political viability and recognition by the international community stand as crucial considerations for leaders who are almost always indispensable actors in international crimes (Akhavan, 2001: 12). Gilligan (2006) introduces a more optimistic model to demonstrate that an institution such as the ICC is capable of deterring "some" atrocities at the margin.

Dissident voices against the deterrence argument focus on the very particular nature of the atrocities constituting international crimes, which they believe to forestall the effectiveness of enforcement mechanisms such as the ICC. Drumbl (2007) diversifies crimes in a dichotomous fashion and sets international crimes apart from other crimes, which he classifies as "ordinary". For Drumbl, international crimes fall under the group of extraordinary crimes and efforts to achieve the goal of deterrence for these crimes through conventional punishment mechanisms, which have been developed and organized originally for ordinary crimes, would inevitably be doomed to failure. One of the basic reasons of this failure is that extraordinary crimes depend on individual membership in groups in which the behaviours defined as criminal in liberal criminal law regimes are not regarded as maladaptive or deviant, but rather adaptive and conformist. Even though international tribunals follow a very basic rule of criminal law and prosecute the perpetrators of international crimes on the basis of individual responsibility, these crimes have a collective nature.

Drumbl's prescription to overcome the incompatibility of prosecuting international crimes and ordinary punishment mechanisms is to develop a pluralist perspective transcending the narrowness of ordinary criminal law. Here, the ICC is not condemned as an all-out failure, but may operate as a complementary[18] institution supporting the accountability regime for mass atrocities in case it operates within the framework of a multilayered and diverse array of initiatives – political as well as legal (Drumbl, 2007). Even though what Drumbl refers to with his complimentary model is a comprehensive set of means and goals including imprisonment, reparations, community service, lustration, declaratory relief, restitution, affirmative duties to promote human rights, and institutional and constitutional reforms to diminish the likelihood that perpetrators of the concerning crimes (re)assume power, he concurs with the ones claiming that criminal prosecutions fall short of deterring crimes unless supported by political and military means. For this latter group of writers, in the absence of a strict commitments' regime enforced by military mechanisms, it would be too naïve to expect criminal law to deter international crimes (Fearon, 1998; Goldsmith, 2003; Harvey, 1998; Kaufmann, 1996; Rudolph, 2001). And, in fact, recent surveys demonstrate that perpetrators subject to international criminal prosecutions mostly belong to weak and undeveloped states where the local scale sanctions are much more rigorous and

[18]The reader should not confuse the "principle of complementarity" defined under the Rome Statute with what Drumbl (2007) means by referring to a "complementary institution". While the first is a legal principle regarding when and on what conditions the ICC accepts a case, the latter refers to a combination of diversive initiatives beyond the legal processes.

brutal in comparison to the international ones whose likelihood of deterrence remains weak (Ku and Jide, 2006).

There is a third stance regarding the power of international criminal tribunals in terms of deterrence argues that even when supported by political and military mechanisms such initiatives eventually cause more harm than good. Snyder and Vinjamuri (2003) contend that among the three kind of logics that ultimately aim at deterring international crimes, the logic of consequences is more likely to prevent their reoccurrence. Both the logic of appropriateness, which is taken as playing a crucial role in shaping the choices and actions through norms, and the logic of emotions aiming to eliminate the conditions that breed atrocities through achieving an emotional catharsis, fail to deter potential atrocities as the first logic overlooks that ideas do not lead but follow behaviors while the latter cannot fully satisfy the emotions of the victims. The logic of consequences, on the other hand, represents an overall strategy of political bargaining for all parties to the conflict including perpetrators of the international crimes, and serves the best for the majority if not the whole while trials have detrimental effects interfering the bargaining and compromising processes.

One also has to take into account that leaving justice concerns aside may trigger discontent and cause serious security problems due to deep and wide distress among populations who become aware of what had happened. That is why forgetting the past and forgiving perpetrators in order to enable the most comprehensive political bargaining process might be counterproductive for the goal of deterrence.

From this perspective, the ICC, instead of preventing peace and political settlements, might be a significant supportive instrument for national reconciliation (Mendez, 2001).

The issue of deterrence for international crimes does not only concern individual perpetrators. The ICC may be an instrument for deterrence albeit in a totally converse way. The ICC may deter not the perpetrators of atrocities, but the democracies who might have taken the initiative to intervene in order to stop them. Tyrants who do not ratify the Rome Statute will remain free if they restrict their murderous policies to their territories while a democratic state who is a state party to the Statute will be subject to monitoring and a possible prosecutionary process. The symbolic hope the ICC carries as a monument institution for a better world in fact disguises and averts political, strategic and even rational thinking (Rabkin, 2007). Goldsmith (2003) thinks that the ICC is a self-defeating initiative at the outset by deterring the United States to become a party to the Rome Statute which stands as the only great power to intervene in mass-scale atrocities worldwide.

2.3.3. Implications on States and Societies

Implications of the ICC on states and societies might be evaluated with respect to becoming party to the Rome Statute or consenting to the authority of the Court in specific cases, or their rejection to be a party or give consent. An alternative

evaluation might be to look at the implications on states and societies before, during and after prosecutions proceed.

According to the model developed by Simmons and Danner (2010) depending on "credible commitments" theory, the ICC may have positive effects even without prosecuting a single individual. Danner and Simmons aim at explaining why states voluntarily tie their hands giving consent to a permanent international criminal court that would have the opportunity and right to judge and punish their own rulers in case of a breach of the agreed rules. Survey shows that unaccountable autocracies that have endured recent internal conflict have decided to become party to the ICC in surprising numbers. Another group of states with strong support to the ICC are those having sound accountability regimes and experiencing no recent internal conflict. The model explains why states like Afghanistan, Peru, and the Democratic Republic of Congo, which have a recent history of civil conflict, and which at the same time suffer a bad record of accountability due to weak domestic institutions, ratify the Court's jurisdiction. These states have much more to gain by persuading other actors such as rebels and publics through a self-binding initiative than the sovereignty costs by becoming party to the ICC. The message given to the actual or potential rebels as well as to the publics is that the government has voluntarily abandoned the option of engaging in unlimited violence. The expectation is that these other actors will also alter their behaviour in the face of the governments' self-binding commitment. The sovereignty costs for the regimes which have also recent conflict experience, but which can be claimed to have relatively

more developed domestic accountability mechanisms, will be higher. Bangladesh, India, Indonesia as countries who have recently experienced domestic violence, and the United States, who has reasons to refrain from the ICC because of its international activies, belong to this second group. The significance of the credible commitments model is its conclusion that the ICC is very prone to bring in positive effects of reducing the likelihood of violence.

The literature on the implications of the ICC as a consequence of ratification is much more comprehensive than potential implications on a state or society before becoming party to the ICC. The primary focus on the implications of becoming party to the Statute and consenting to prosecutions is the impact of the principle of "individual criminal responsibility" that is assumed to support the peace process as it enables the individualization and decollectivization of guilt**.** Individual criminal responsibility as one of the basic principle of modern criminal legal systems is a prerequisite for reconciliation in conflict-torn societies (Meron, 1997; Pejic, 1998). Individualization and decollectivization is assumed to be a necessary condition for the reconciliation and peace for the groups experiencing either as perpetrators or victims of the mass-scale violence. Yet, it is a thorny issue with great difficulties to clarify whether individualization and decollectivization of the guilt prevent former constituencies to get mentally involved with the political leaders, who now stand as the accused before international courts. The Nuremberg and Tokyo trials may be counted as successful precursors in giving the message to the outer world that the international community does not let wartime criminals have any immunity. On the

other hand, it is highly evident that these trials traumatized German and Japanese people, who felt that they had volunteered even if not taken a direct part in what had happened (Bloxham, 2006).

The relationship between criminal proceedings and aid operations might be taken as contradictory or consistent depending on how peace and justice are positioned against each other. Criminal proceedings and trials are mostly taken as connected to justice while aid operations whether aimed at minimizing suffering of victims in the field in a narrow sense, or supporting the security of the international community in a wider sense, are regarded as part of sustaining order and peace. As aid personnel supply information for the prosecutions, political authorities tend to banish activities of these people who are part of international peace operations. The Sudanese government's reaction to the aid workers is an outstanding example supporting the contradictory relationship between security and justice. Sudan sent aid workers out of the country to prevent transfer of knowledge that would be evidence for indictments before the ICC, thus cut the connection of foreign aid with the victims of the ongoing conflict (Barnett and Finnemore, 2004; Barnett and Weiss, 2008; 2011; Barnett 2010; 2011). Yet, the effect of the ICC may fluctuate case by case, and we may not be sure in beforehand whether the Court will have positive or negative outcomes for an ongoing conflict. For example, Joseph Kony, the leader of the Lord's Resistance Army (LRA), refused to sign a peace accord unless the ICC arrest warrants against the LRA were removed. Likewise, there are concerns about the impact of the ICC prosecutions on the situation in Sudan. On the other hand, the

effects of the ICC in the Democratic Republic of Congo and the Central African Republic are hard to be labelled directly as negative (Sriram et al., 2010).

For the delicate relationship between the ICC and the situation in the conflict zone, there are others who maintain a deep belief that efforts of humanitarian aid workers will be successful only if supported by security forces, no matter the support comes through the UN, multinational forces, or some regional arrangements. Equally, investigators of the Office of the Prosecutor of the ICC will not gain access to conflict zones to conduct investigations and will not be able to collect evidence without the agreement and support of these security forces (Arsanjani and Reisman, 2005: 399).

The "threat of prosecution" is deemed as less costly than economic sanctions or military intervention. International criminal proceedings also disguise more straightforward and abrupt policies. They seem to be apolitical acts achieving a common goal of restoring and maintaining peace and justice. For realists particularly, these acts have another advantage of thwarting "some" politicians and leaders (Akhavan, 2001: 7).

There are debates on how an international tribunal affects the emotional disturbances of the victims in the conflict zone. The common idea is that prosecutions will appease to a significant degree the feelings of vengeance and revenge, and thus decrease the likelihood of future conflicts and counter attacks initiated by the victims. Stopping the prospective vicious circle of such violence is counted as one of the greatest achievements of international criminal tribunals.

The ICC is a significant development in the history of international criminal tribunals as it stands as the very first international criminal tribunal addressing the needs of the victims of conflict to an extent never-before-seen. It diverges from the *ad hoc* tribunals, which for many observers and writers failed to concern itself with the needs of victims. The ICC, as an addition to its punishment mechanism, included a redress mechanism for victims, a mechanism which will cover restitution, compensation, and rehabilitation. A victim trust fund, established by the Assembly of States Parties in 2002, and which began its operations in early 2007, is the means for the redress mechanism (Sriram et al., 2010: 221).

One of the noticeable pieces of criticism on the perspective of an international criminal court to block reprisals, reciprocity, and rehabilitate the victims is that the legal process, regardless of its intentions, may bring in a totally different kind of outcome. Bringing suspects of mass-scale atrocities before courts might reduce the scale of historical crimes to the scale of a courtroom triggering a focus on the punishment of the perpetrators and diverting the attention from thinking on why and how such atrocities occur (Anderson, 2009: 337). The so-called appeasement, and the so-called justice in force, is a preventive force for the "real" challenge of what had occurred. Appeasing victim groups or individual feelings of anger is a way to restore and rehabilitate the *status quo* orienting the attention and focus of these victims to legal proceedings instead of the "real" causes and conditions of the events.

2.4. Whereon Do We Stand Now?

It has been mainly the Liberal perspective attributing the central motive of establishing cooperative and interdependent regimes among nations and states to the idea that there will be at the end some mutual benefit for the highest possible number of participants, if not for all (Bass, 2000).[19]Despite arguments to the contrary, this kind of a perspective might seem attractive especially when there is accessible numerical data such as the gains from trade or other economic relations. Nevertheless, causal relations and consequences are hard to assess on a material basis whenone takes into account various other aspects which do not represent explicit and immediate material repercussions either on economic or social terrains as well as the political sphere. Still, some writers follow the liberal, liberal institutionalist, or certain versions of realist interpretations focusing on mutual benefits leading to cooperative and interdependent regimes in the international arena on the grounds of a hypothetical motive pushing international agents to act together even if this motive is hard to evaluate on crude material and objective basis.

Criminal law is a particulary difficult discipline constraining and complicating an outlookwith evaluations on the long-term outcomes both for the individuals directly involved in the legal case in question and the society this case

[19]For a counter view stressing that it is not only liberal states creating and supporting international criminal tribunals, see Moghalu (2006: 9, 10). The Soviet support for the Nuremberg Tribunal stands as a falsifying fact for the liberal thesis. For Moghalu, the motives of the allied forces in Nuremberg were not altruistic in any case.

takes place. There is no obvious mutual benefit in international criminal law for the observer at least in a strict material sense. Nonetheless, supporters of the idea that we can at any rate speak of a more abstract kind of mutual benefit in international criminal law ground their approach on notions such as “collective security”, “stability”, “justice” or “the global rule of law”.

There are two basic problems with studies on the ICC with an attempt to bring forward explanations through notions of justice and security. The first problem is that such explanations most often tend to take one as a compensation for the other. The shortcoming of taking “justice” and “security” as if they indicate a zero-sum game is that it prevents to apprehend the linkage of security, order, and peace with justice concerns. In fact all these notions are intertwined with each other. The ICC, though an *ex ante* tribunal as some writers argue, is closely linked to security concerns when we take into account both the direct parties to a particular conflict and the world wide audience of the crimes committed during that conflict. Writers from diversive fields challenging thedichotomous understanding on concepts of justice and security go beyond the parochialism this structure poses. These writers present an alternative perspective with studies analyzing security, order, peace, and justice matters together through a more holistic approach. Still, the picture remains not fully grasped even if these concepts are taken into consideration in a holistic way as long as the meaning and content attributed to them are subject to change over time and place which refers to the second problem. As notions of security, stability, and the global rule of law do not depend on objective, or indisputable criteria, we are at the

threshold of moving from a fallacious ground to make further claims about the positive results of establishing international criminal courts whether they are *ad hoc* in nature or permanent as the ICC. The very trouble applies also to the analyses focusing on the features or the implications of the ICC.

The ICC might be viewed as a fine solution to reduce transaction costs inherent in *ad hoc* criminal tribunals established as part of the UN system. But still it is not clear what kind of material interests drive states for such a development, and what is the relationship between the Court's discourse and these interests. Moreover it has to be questioned whether a state-based analysis is satisfactory to understand how individuals and NGOs all over the world embrace a permanent international criminal court with a firm belief that this institution will shape the legitimate behaviour of both states and non-state actors including individuals. While the contribution of constructivist writers remains extremely significant in explaining how fidelity to internal values and rhetorical practices and thick acceptance of reasons enable law and assures respect for law, their overwhelmingly optimistic perception on international law blurs the negative and constraining dimension of this very law.

It is highly probable that international criminal proceedings impede political activity of war-time leaders in present and future settings. Criminal law has an effect of overthrowing the ones who challenge and damage the *status quo*. International criminal proceedings, through *ad hoc* tribunals and now through the ICC, are believed to serve to the common goal of repairing the corrupted and damaged order of things. At the same time, these tribunals disseminate the message to other actual

or potential challengers that they are to be prosecuted equally in a similar case. What these writers overlook is the relationship between the *status quo* and its beneficiaries.

Deterrence theory grounds its claims on the belief that individuals are basically rational and free actors who are able to make evaluations and choices. On the other hand,we cannot be certain if there is space for such moral choice or freedom on the part of the perpetrator of an international crime as liberal theory suggests. Even if we accept that individuals are competent to make rational evaluations of the legal consequences of their acts, what constitutes rationality is not a fixed, timeless and context-free perception. A well-established sanctions system might work in one society while it may fail to deter individuals from committing certain types of acts in another society.After all, it is extremely difficult to make evaluations on the degree of deterrence especially for the ICC which has so few cases fraught with many different variables to make generalizations. One of the counter arguments is that individuals are not atomistic entities as rationalist approaches suggest, but rather live in intersubjective social networks shaping and constraining their moral structures that is linked to a common morality. What is missing in the literature at this point is a consideration on this particular rationality on deterrence? What is our interest of deterring mass-scale atrocities in remote parts of the worldthat we once ignored as foreign lands? In other words, why international criminal law is invoked against mass-scale atrocities?

Technocracy is an accomplished way for challenges being excluded from and limited in the terrain of “political”. Like many scientific fields and

disciplines,criminal law is paradoxically a “policy” to “depoliticize”. Accordingly, the discussion on the deterrence aspect of criminal law reaches to a further stage. As long as we comprehend that the failure of the penitentiary system in its aim of rehabilitation is not a failure at all but a guarantee for institutional continuation, it becomes evident that the failure of international criminal law in its aim of deterring mass atrocities worldwide is a success in itself. Then, we come to realize that the above enumerated questions on deterrence lose much of its meaning without posing a primary one: is it indeed deterrence that is the sole goal and rationality of criminal law?

When law is taken only as a field concept, it becomes too difficult, if not impossible, to see the interaction between law and what is left out of law, in other words “non-law”. It is noteworthy that “democracy”, “human rights”, and “humanitarian norms” are not considered as problematicwhile their desirability and utility are taken for granted though it is hardly the case that law can be all-inclusive and equal for all in its purest sense. And, if the deterrence aspirations of international criminal law does not work given the continuity in mass-scale atrocities, then how it happens that international prosecutions have become an indispensable feature of our thinking?

At this point, it is crucial to think on the relation of the ICC with the “self”. This “self” does not have to be the “individual self”; it may well be the “national self”, the “global/international community/society self”. For the prosecutions before the ICC, it has been mainly the Africans and African states becoming subjects of

criminal investigation procedures and prosecutions till date (See, Anderson, 2009: 333). The current situation suggests that the pretentious claim of the advocates of the ICC that the law implemented by this so-called independent and permanent court represents a universal understanding might be a deceptiveperspective. The ongoing investigations and casesbefore the Court give the impression of a developed, modern, western world judging and punishing the "other", under-developed, and non-western ones as the latter cannot cope with the conditions of modernism. The secure world judges the insecure; the stable judges the unstable; and the world with the rule of law judges the other world, which experiences the unlawfulness.

Concerns usually regarded as "external" to the state defines, constructs, and gives meaning to what has been also regarded as "internal" that enables the state to exist as the way it has been. What is "external", through the (re)construction of the state shapes and affects the "internal" in turn as what seems "external" at the outset has something to do with the image of the polity inside. The mass-scale atrocities such as genocide, war crimes, crimes against humanity, and the crime of agression have been distant and improbable images for the societies living within the borders of western, democratic, liberal nation-states. These polities are presumed to have accomplished what the "others" failed to do. What happens to "other" people in "other" countries do not happen to the citizens of these western states. The interaction between the western success and the non-western failure that has been maintained through a novel mechanism of international criminal prosecutions represents an effort to legitimize what is happening "inside". It is the primary aim of

this study to avoid the limits and problems of the current perspectives, and to develop an alternative way to tell the story of the ICC. It is, thus, to initiate a deconstruction process against the continuously built-in binaries and boundaries between what has been taken as Western or Global North discourses and the rest.

CHAPTER 3

HOW THE STORY MIGHT HAVE BEEN TOLD

The ICC literature, focusing on the establishment process, the features of the Court, or the implications it brings in as a result of the negotiations at Rome, share to a great extent an optimistic and progressive perception. This is the case both for the writers with a focus on the positive law structure and the writers with a critical insight on the discourse of the judges, rules and crimes envisaged in the Rome Statute. Even though the latter critical perspective problematizes the role of the judges, the nature of the crimes, or broader concepts such as culture, or identity, and even though these critical writers from time to time propose alternative perspectives suggesting to move beyond the parochial perspectives of conventional thinking, the proposed alternatives in an inextricable manner have the potential of introducing and (re) producing another particular perspective.[20]Thus, any alternative proposal would correspond to taking sides with the ICC and thwart discerning the deep partiality and the insidious nature of the Court's discourse. To avoid this obstacle, the chapter aims to develop

[20]For example, Hobson (2007) points out the danger of critical theory's construction of "another superiority", and cautions against a possible myth of "white women's burden".

an alternative perspective, rather than a proposal, drawing inspiration from the work of Foucault and Gramsci on law.

Before looking at Gramscian and Foucauldian understandings on law, the chapter addresses the question of impartiality of legal systems in general, and courts in particular. Then, the discussion continues with the question of the centrality of states both at the domestic and the international levels. The state's role as the central power is directly related to the former impartiality question as any legal system cannot be absolutely impartial and in essence courts have to take sides with order and public good though these concepts do not indicate any fixed content and meaning. Pointing at law's organic relationship with order, and state's compliance and responsiveness to the changes in the global system is a significant introduction to further discussions on Gramscian and Foucauldian approaches on law. The chapter does not only deal with discussions on both Gramscian and Foucauldian approaches on law, but also attempt to combine the two with an aim to develop a more comprehensive perspective on international criminal law and the ICC.

3.1. Impartiality of a Court: a Utopia or a Modern Reality?

Impartiality takes on different meanings according to the context in which the term is used. It may refer to taking decisions based on objective criteria or it may refer to taking decisions not for the benefit of one person or another for improper reasons. Even an imprecise glance to this general definition leads the reader to two different

paths: one path, towards questioning what these objective criteria or improper reasons are – if there is a general belief on notions such as objectivity, properness or improperness; and the other, towards questioning the relationship between the specified criteria for so-called objectivity or (im)properness. In the latter case, the definition of impartiality ineluctably has a paradoxical meaning bringing together seemingly coherent notions which latently have the potential of possessing contradictory aspects. Nevertheless, despite its contradictory nature, the term impartiality has pervaded almost all legal systems all over the world as a basic legal principle to be followed.

Even if it is accepted that objectivity is possible, a second question comes on the scene as to what extent courts can be impartial or is it indeed a *sine qua non* requisite for the courts to be so. In other words, a possible questioning on the likelihood and exigency of the principle of impartiality should follow a prior questioning on the likelihood and exigency of the term "impartiality" as such.

Different answers to the above questions stem from individual positions on philosophy of science in general, and on terms such as objectivity or impartiality in particular. In any case, the so-called objective criteria and the principle of disapproval of benefiting one over another for improper reasons are connected with parties of a legal conflict exclusive of the state which is represented by the court in question. To be more precise, there is no question of impartiality between the judicial body and the party or parties of the legal case. In liberal legal systems, norm-makers and practitioners, including the courts implementing and interpreting norms, hold the

principle that all parties of the legal dispute, except the state, are equal regardless of certain characteristics they hold such as their origin, race, sex, or class. The state, on the other hand, is the ultimate body of governance at the national level whose benefit is equalled with that of the public and therefore preferred over any other party. Courts function on behalf of the state; judges who are also employed by the state decide on behalf of the state; suspects or accused ones are prosecuted due to their breaches against the rights of others, but first of all against the public good that is represented by the state. There is nothing as absolute impartiality in any legal system and it is inevitable as well as natural for courts to take sides with the "public good" not only when the state is a direct party of the case before a court.

We should not be mistaken to think that the impartiality question of legal systems and courts is a modern issue formulated as an antinomy between the state and its subjects. Law's taking sides with the governing authority has been an age-long practice regardless of the type of regime the authority represents. The classification and denomination of legal cases in modern states follow a very similar path of pre-modern polities, only the second part of the case titles indicating the parties to the dispute being subject to change. In modern judicial systems case titles are mostly formulated as binary structures, first part indicating the claimant whereas the latter indicating the defendant – i.e. claimant v. defendant. Thus, the case may refer to a legal dispute between real or legal persons forming the parties of the dispute – e.g. Arkell v. Pressdram, Miranda v. Arizona, or Jackson v. Commonwealth. Though these are some examples for case titles in modern legal

systems, the rationale of the designation is not new. A similar formulation would not be surprising in Middle Ages as long as the claimant is named under the title of a king, prince, or any legitimate authority representing the monarch. So, we may well entertain ourselves by forming case titles such as The King v. Damiens, Chancellor v. John Ball, or Bishop Cauchon v. Jeanne d'Arc etc. Foucault (2003) reminds us that law has a discourse and law's discourse has historicity.

What is more, law's discourse is open to profound tactical innovation and metamorphosis concealing the antecedent social clash. Once the clash is over, theories of sovereignty are introduced so as to proclaim purportedly universal and rational rights (Foucault, 2003: 50). Hobbes had successfully replaced the Norman Conquest, which represented a long-standing division within English society, with ideal origins of British monarchy (Foucault, 2003: 98, 99). Similar to this replacement is the French nation-building that came through a compromise between aristocrats and the rising bourgeoisie; the former being threatened economically by state taxes and politically by the legal regulations, two significant factors that were being realized by the latter group represented under the "Third Estate"[21]. The story of the French revolution was written not as a protest of losing groups against centralising monarchies but as a total uprising in pursuit of just and universal demands (Foucault, 2003: 141-144, 236). Law, in contrast to traditional beliefs, does

[21] The political pamphlet "Qu'est-ce que le tiers-etat?", written by thinker and clergyman Abbé Emmanuel Joseph Sieyès just before the outbreak of the Revolution, is a capital document signifying the aim and self-perception of the "nations" which would become "the nation" later on. Three questions posed and the corresponding answers in the pamphlet are: "What is the Third Estate? Everything, What has it been until now in the political order? Nothing, What does it ask? To become something."

not give an end to total war, which submits at the end to civil codes (Foucault, 1977a: 150, 151). For Foucault, "law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence" (1977a: 150, 151). And, it would be a total illusion if history is taken as gradually progressing from combat to combat till the rule of law replaces this circle of violence. One has to take into account the warning against "blood that has dried in the codes" (Foucault, 2003: 56) and that "humanity installs each of its violences in a system of rules and thus proceeds from domination to domination" (Foucault, 1977a: 151).

Thus, law's discourse cannot be separated from other political discourses, which all at the end can be inverted into something else. There is no such thing as ahistorical and universal legal discourse. The players of the game are replaced by other players from time to time, discourses supplant one after another, but the quest for "equality" and "justice" mirrors the age-long wars and struggles. For Derrida (1992: 39, 40), the pursuit of justice at the international, whether it is justice for the state or another entity, requires an infinite vigilance even more than at the domestic level. Violence and law has an organic relationship where a new law is established in ceremonies of peace.

As a matter of fact, the linguistic setting of the phrase "equal before law" gives the implicit meaning that people are not indeed equal in other terms. Law functions as a supplementary mechanism to redress and refine the existing state or maybe to deflect the reality. While efforts for redressement or refinement can be

genuine initiatives, deflection of the reality adds a much more insidious dimension to the practice of the principle of "equality before law". If the principle of "equality before law" is assumed to correct what is in fact the otherwise, then it reflects the confirmation, and even the approval, of "inequality" in real life. Besides, such a legal design with an illusionary "equality", rather than correcting the disadvantaged position of some in society through legal means, might result in the deception of unequal individuals in order to maintain a certain degree of reconciliation and compromise.[22]

In the light of the above arguments, what the thinker should deal with is the nature of governance that international law represents and takes side with at the global level. As long as there is and always will be a "state" whose power speaks through the courts within given borders, there is also one at the international level that international law reflects. The question that has to be answered is what that "state" at the international level is.

3.2. A State is a State is a State, or Is It Indeed?

The statement that any law and therefore any court represents some sort of a state and cannot be genuinely impartial, which is quite contrary to the intended message of

[22] Balbus (1977) touches on the illusionary principle of "equality before law" in his work "Commodity form and legal form: an essay on the 'relative autonomy' of the law" where he relates liberal law's legal equality with uniform commodities in capitalism. Balbus's reflections on "legal equality" will play a significant role later on when law being autonomous to a certain extent is connected with a particular structure.

the term impartiality, gives the inherent conclusion that there *is* already or there *will be* a state type of organization at the international level in the process as long as there is a corresponding international legal system. That a state structure similar to what we observe at the domestic level cannot be observed at the international level does not mean that there is not a political entity for the latter. And, it does not really matter what kind of a state regime we are talking about, to what extent the borders of this state expand, or what its founding principles are. *A state is a state is a state*.

When the international legal system reaches to the required stage perfecting the indispensable linkages with governance in a state form, the process at the international level will be completed introducing a state structure very similar to its domestic predecessors. For English School scholars, the international system as constituting some sort of an international society[23] still remains state-centric. Even if an international society evolves and this society rests on a common value system, there are still ongoing differences between the actors ensuring the perpetuation of individual states. With states, and societies continuing to live under the rule of their states, there remains more or less some degree of heterogeneity while a world state or government would impose a more homogeneous structure.

[23] Throughout the study, I will follow the common usage of "international community" instead of "international society" mainly because the former is the preferred terminology in most political and legal texts. The concept of "international society" is referred only in instances when particular writers from the English School tradition are cited. Though it is not clear whether the preference to use the term "international community" instead of "international society" in political or legal texts is due to an avoidance of any relation to the English School and its conception of a society of states, or to a specific intention of referring to a "community" (Gemeinschaft) as an organic, traditional and ahistorical conception transcending states with an emphasis on common norms and mores against the contractual and constructed nature of "society" (Gesellschaft), a distinction developed by Ferdinand Tonnies (1988), my approach to the concept is that not only the "international community" but also the common norms and mores believed to represent this community are constructed as well as historically contingent.

Aside from the debate whether the international system is evolving towards an international society or a world government, a different reflection similar to the aforementioned question on the notion of impartiality might be helpful in order to understand the meaning of change, if there is indeed one, at the international level. This further reflection concerns whether there really is anything "international" about "international society". Kegley (1993; 1995), through a domestic analogy, interprets the increasing international cooperation between states particularly in the post-Cold War era as a march towards an international society like the one Woodrow Wilson dreamed of years ago. If there is society within states, and if there is a certain type of social relations web in these societies, then there should be nothing preventing us to expect a similar pattern regarding the international space. On the other hand, the international society might be just the extension of one state's domestic society, and what we observe may not be a domestic analogy but a domestication process of international space (Weber, 2010: 38-58). The same question can be posed for the world government argument: is this really a world government consisting of independent governance mechanisms – namely an executive body, a legislative body and a judiciary body – separate from domestic counterparts, or is it just the extension of one state's government in the system? The question is actually a simple one: is there anything "international" for the "international society", and is the world government indeed separate and independent from one state's government? Is it a supra-national government above all states and nations, or is it just another hegemonic practice that is being reflected by the so-called world government? The

latter question requires further thinking on what we understand by "hegemony" as well.

The answers to these questions are crucial to understand whether there is more or less some sort of a tendency towards homogeneity in international relations. If what we have been experiencing with increasing cooperation after the Cold War is the enlargement and/or deepening of an international society, then there should remain some degree of heterogeneity even if harmony and cooperation in certain fields is on the rise. On the other hand, if the system is evolving towards a world government or world state, the scope and degree of homogeneity should be expected to eventually transcend heterogeneity. There is common sense and shared values in an international society but the room for difference is wider in comparison to a world-wide government. Though there have been and will be international covenants, norms, tribunals that inspire an international society, state sovereignty is still one of the basic tenets. There is not one court, one executive or legislative body in such a system whereas a world government or state will most likely hold these main bodies of governance.

Not the lack of bodies of governance, namely legislative, executive and judicial bodies, but probably the lack of their organization in a centralist fashion, has convinced many IR scholars that there cannot be any talk of a world state or government at the moment. Discussions on the issue have focused not on the presence of a world state or government but on its possibility in the future. Even if we recognize the claim that there exists a close relationship between a particular

legal system and a particular type of state, current international law and global governance will fall short of demonstrating these connections due to the lack of a global state –if state is taken in its traditional form as a Westphalian state with its ultimate goal of controlling a certain territory and people drawing clear lines between the ruling strata and the rest. But when we move beyond the borders of the Westphalian state system through a different perspective in order to recognize different state/society complexes, a different picture shows itself for us to grasp different power mechanisms and relations.

3.3. Turning to a Neo-Gramscian Approach for Novel Perspectives

Gramsci's legacy has regenerated Marxism through incorporating the theory compromising ties between various groups in a modern society. Gramsci's illustrative modelling was a situation orthodox Marxism had failed to explain especially for modern western societies. Gramsci's "hegemony" applies to society as whole; it is not an outcome a particular class wins over the proletariat. While structure is not totally disregarded, a new term "historical bloc" is introduced in order to explain the interaction of structures and superstructures (Gramsci, 1971: 366).

What is significant for the notion of "hegemony" at the international level is the inexpediency of one state or a particular group of states to dominate the world order. A coherent conjunction or fit between material capabilities, institutions, and

ideas referring to a "prevalent collective image of world order" will imply a condition of "hegemony" (Cox, 1981: 139), which means that we do not need a hegemonic actor or a combination of actors in state forms to speak of "hegemony". If a coherent and sound relationship between material power, institutions, and ideas exists, it is very likely that what we are dealing with is "hegemony" in neo-Gramscian terms even though certain disagreements or conflicts arise between the prevailing actors in the world order.

This is a theoretical perspective moving beyond mainstream approaches that are strictly actor-centred like realist or liberalist schools, and beyond the original Gramscian perspective and even Coxian neo-Gramscians. In this respect, it is comprehensible why a certain group of neo-Gramscians have felt the need to revise the theory especially for the international realm where the connection between actors and hegemony seems even more blurred than the national level.

3.3.1. Gramscians v. Neo-Gramscians and Neo-Gramscians v. Neo-Gramscians

Cox's neo-Gramscian approach evidently falls short of explaining the power of discourses when such discourses apparently counter particular forms of political power practiced by the most dominant actors in a given world order. Gramscian hegemony can be a form of dominance, but it refers to a more consensual type of order. Cox correctly expresses that dominance is only one element of hegemony and

dominance by a powerful state is not sufficient to speak of a hegemonic type of order (1981:139, 153, n.27). Hegemony is a form of dominance which is in force through the acquiescence by other actors and functions in a relatively indirect and obscure way (Cox, 1994: 366). However, through this Coxian explanation we still cannot grasp how discursive power is effective in a particular structure while the obvious practice of such power structures through institutions – such as the ICC – is resisted by various actors, not excepting the predominant ones. The difficulty of explaining such a hegemonic discourse that is influential over the states including the leading ones emanates from the fact that Coxian Gramscian approach, even though his "world order" is an attempt to display the social, economic, and cultural dimensions, still remains highly state-centric (Worth, 2011).

Hegemony, for Cox, is more than simply class rule that comes into being through social forces occupying a leading position within a state where the latter is the requisite playground for the formulation and development of the ideas, supported by material resources and institutions initially at the national level, and then projecting this hegemonic structure outward on a world scale. So, the national context will not be the only place for the foundation of a historical bloc, but will also be the locus where new historical blocs as the basis of counter-hegemony will flourish whether this historical bloc will remain at the national level or will move on towards the international (Cox, 1983: 168-171). Also for Gill (1995: 422), planning, legitimation and the essential coercive means without which capital cannot function can only be provided by a state even though the trend is towards the universal.

Despite these scholarly initiatives to scale up Gramscian theory to the international level while preserving the crucial role of the state, criticisms arise due to concerns of denuding the original Gramscian concepts when they are "internationalized". Germain and Kenny (1998) remain highly sceptical about the explanatory power of hegemony at the international level and maintain their rigid position that concepts such as hegemony, civil society and historical bloc were developed by Gramsci for the national context in itself. Burnham (2006) points at the lack of a concrete form of hierarchy at the international level which at the end complicates how and where hegemony functions. Morton (2003), while stressing the historicity of the original approach and the need to develop a wider theoretical and practical reading of Gramsci, maintains the national point of departure. Though there is "a constant and dialectical juxtaposition between the national and international realms", the notion of historical bloc is limited to "relations within a society" which can only be substantiated within a state (Morton, 2003: 170).

The primary problem for most of the neo-Gramscians and in effect the source of criticism by writers such as Germain, Kenny or Burnham, is the difficulty of connecting a global civil society to a concrete form of transnational or supranational political authority in the absence of the latter. Cox tries to explain the phenomenon of global civil society with the "internationalization of the state" in accordance with the "globalization of production". It may still be too soon to speak of an international state but it is not a direct impediment to speak of an evolving state structure at the international through central governmental agencies of industrialized economies

together with international/multilateral agencies. That we do not encounter with a concrete form of political authority does not negate the fact that all these central governmental agencies operate within a coherent ideological consensus despite certain disagreements or internal conflicts (Cox, 1992). As Cox underlines a consensual voice deriving from national departure points, and explains global hegemony practiced mainly by leading governmental agencies, it is uneasy to explain governance when such governance is performed through institutions that leading states do not invest in significant amount of resources and authority. There are drawbacks in the world Cox depicts which do not contribute in our understanding how a hegemonic legal discourse pervades while not being carried by the seemingly leading state actors. Criticisms to neo-Gramscians focusing on the inadequate emphasis on the class struggle and the ineptitude trial of scaling up the national realm to the international also fail to explain the complex relations between actors and agents both within and beyond the state.

A possible way out of the problem may come through both questioning Coxian neo-Gramscians and its critics while contemplating alternative interpretations of Gramsci and hegemony. Yet these alternative interpretations derive mainly from writers who have been inspired to a great extent from Gramsci's works. Robinson (2005: 559, 560) argues that it is possible to approach hegemony in four different ways: as a realist model of leadership; as a state within the core; as ideological or consensual forms of control; or as the inspiration and leadership for a specific form of world order within a historical bloc. Like the first one, the second and the fourth

interpretations maintain the state-centric perspective though there are strong references to a transnational capitalist class in the last one. Worth (2011: 382) argues that it is the third approach which remains the most Gramscian despite neo-Gramscian focus has pretty much concentrated on the other two interpretations.

Capitalist societies are much more complex in comparison to pre-modern ones as there is no clear cut distinction between the dominant and the subordinated classes. Instead, there are different and sometimes conflicting fractions within these classes. The state, instead of representing the power of one of these classes, becomes a major site for the mediation of conflicting interests. Having such an internal heterogeneity, the capitalist state and society maintains a mediator role between conflicting interests, which at the end supports the reproduction of the existing order (Poulantzas, 1978; Jessop, 2007). Thus, the state clearly is in need of a certain degree of relative autonomy, which represents a condition confronting with the conventional approaches taking it as a monolithic entity. There is not a monolithic state-centre being held by a specific class, and there is not a single hegemonic centre from which all forms of oppression derive. Laclau and Mouffe (2001) point to the fact that it is time to discuss the hegemony of a *code* instead of hegemony of a *class* which we might take as a warning on the plurality of power-centres.

In addition to the problem of a concrete political entity at the international level, a further problem is the inadequate argument of the material element in account of the structure though Cox defines historical structure as a combination of ideas, material capacities and institutions (Joseph, 2012: 62). To solve the problem,

Joseph tries to do justice to the structure by carrying the ideological or consensual forms of control to another level borrowing from Roy Bhaskar's form of critical realism. Joseph's approach challenges the other two Gramscian-inspired ones setting aside the state-centric and actor-centric approaches and inserting the theory an "unconscious" practice of hegemony. Whereas we conceive of ideas as belonging to a level of "consciousness", there is also a structural level which enables the embedment and securing the unity of contradictions arising from different practices of ideas. Hegemony cannot be explained solely through interactions between different actors. Agency is involved, but a hegemonic project should be seen not only through the relations between these agents but also through the relations between agents and the structure. Agents have conscious intentions while this is not to say that reproduction of particular structures is dependent on agents' conscious intentions to reproduce these structures (Joseph, 2000; 2002; 2008). Accordingly, hegemonic implementations do not have to be carried through conscious acts, and certain groups or classes may gain or lose due to unconscious, yet structural applications.

Thus, we have two challenging stances on the mainstream Gramscian and neo-Gramscian interpretations on the concepts of historical bloc and hegemony. First, an international historical bloc does not have to derive from social forces which take start from a corresponding state structure. The absence of a concrete hierarchical polity at the international level does neither corrupt the Gramscian theory while scaling it up to the international level nor refute neo-Gramscian understandings which are not grounded on Gramsci's plain equation of "state= political society +

civil society" (Gramsci, 1971: 263). A simple but mistaken attitude would be to scale up the theory to the international level in the form of "international state= international political society + international civil society". The error here is not only that there is no "international state" in the current international order, but also that the more or less clear-cut distinction between political society and civil society for the national order is even harder to support at the international level.

The second challenge comes through the way transnational social forces operate. Besides the faulty tendency to take the state as a monolithic entity representing the dominance of a group of social forces or a class, it would be another great error to look for a concrete state structure at the international to speak of hegemonic practices of a group of social forces. The lack of a global state does not impede transnational social forces to operate in order to carry a particular hegemonic discourse. Quite the contrary, such an absence facilitates the dissemination and deployment of the hegemonic discourse due to the lack of a power centre to resist against. Plus, hegemonic practice does not necessitate always absolute consciousness as unconscious habits or spontaneous consent which dominate the internal world of actors also benefit some of these actors more than the others.

3.3.2. International Law and (Neo)Gramscians

Just as a state no longer corresponds to an instrumental position while maintaining a certain functional role in connection with the structure, a particular legal and political framework operates in consistence with this structure. Therefore, law is not an instrumental means of power manipulated by certain groups in society. Liberal law functions autonomously and still yields outcomes for the benefit of the liberal order. Agents, acting consciously in order to achieve certain goals, do not necessarily have to possess the specific intention of reproducing a certain structure since the system in a sense reproduces itself.

The situation at the international level is even more puzzling as it is the case that not all of the actors recognize, approve or follow every rule under international law. Still, there is a growing and pervading hegemonic discourse of international law against clear disobediences coming from certain actors that can be explained neither through a Gramscian perspective stuck in the nation-state form nor through a Coxian neo-Gramscianism carrying the theory to the international while reserving the national perspective.

While hegemony in its international form functions in a distinctive way, it holds significant common features with hegemony in domestic societies defined in the Gramscian sense. It may not coincide with the interests of even the most prominent, powerful states at first sight; still it neither refutes the Gramscian premises developed to explain the domestic society and its organization, nor totally

rules out the interests of the prominent actors at the international level. Cox paves the way for a Gramscian approach in international affairs when he analyses the international order with a Gramscian understanding. The fallacy of the Coxian approach might be that he continues to perceive the international still with the national lenses, tracing the global hegemonic forces through a national departure point. However, the premise that international hegemony has its roots at the national level, and that we need a national point of departure is misguiding in a postmodern world. Such a perception might result in overlooking novel types of hegemony at the international level when the hegemonic discourses are not followed explicitly by some prominent actors such as the most powerful states.

While Cox and some other neo-Gramscians introduce illustrative points about the international, there are certain problems in their approach. In fact, it is the unique, particular nature of the current international structure that frees us from the original Gramscian perspective while holding some of its fundamental assumptions. Some would argue that there is no need of any kind of neo-Gramscian approach as Gramsci already has covered anything that has to be said about social structure, hegemony, and the role of the institutions. Still there are significant differences at the international level which cannot fully be covered through the original approach in general and through some of the neo-Gramscians in particular.

What is elucidating for the international order through Gramscian lenses is that there are global actors exempt states contributing to the construction of a particular hegemonic order through consent and reconciliation while the hegemonic

discourse is in force not for everyone. States are not the only sites of contestation between rival groups. Different from the conventional organization of polities at the domestic level, social forces do not function only within the confines of states and a clear hierarchical type of relation between actors and agents cannot be said to be the case at the international level.

Without a state-type organization's mediation –here, "state" taken in conventional terms– at the top, we can still follow hegemonic relations in the Gramscian sense. International legal order is one of such relations. Putting aside state actors does not mean that international organizations, institutions, and legal regulations come out of nowhere, or have nothing to do with state actors. States remain as the primary actors with other international actors of the current international order in constructing and institutionalizing such bodies. But the relations these bodies set up and develop within the system are not under the direct disposal of the states anymore. Gramscian perspective enables the observer to grasp the hegemonic relations these bodies impose through inducing communities without the threat of physical force. That means, hegemony is in action internationally not due to the expansion of a hegemonic state-led power but due to the expansion of power coming from different sources exempt state organization at the international level. It is the heyday of international organizations and institutions through which hegemonic discourses function partially free from the state organization.[24]

[24] Chimni (2004) interprets the enlarging and deepening role of international institutions as part of a nascent global state which has an imperialistic project in accordance with interests of transnational capitalist class and to the disadvantage of subaltern classes.

Power functions at two levels for Gramsci in order to sustain a long-lasting social control. But there are further problems in such a dichotomous approach holding classifications and examples on a twofold power understanding. Gramsci (1971: 170) diversifies force against consent; authority against hegemony; and violence against civilization as different forms of power. The distinction between authority and hegemony seems problematic since the notion authority itself indicates something beyond pure force or violence.[25] In addition, Gramsci overlooks the potential of the state to be replaced by different power mechanisms at different levels including the international as well as national level. There are forms of violence and force embedded and obscured in consent whether it be in civilization or hegemonic forms. They are not two distinct, independent bodies being in relation with each other. Gramsci initially typifies state action by the courts, the police, the army, or the national guard as practices fulfilled through force, authority, and violence. These practices set opposite examples for consent, hegemony, and civilization.[26]

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[25]The word "authority", origined in Latin *auctoritas*, means both physical power and persuasive, consent-based power. It has meaning for "invention, advice, opinion, influence, command".

[26] Althusser shares with Gramsci the idea of a dichotomous structure distinguishing institutions as coercive ones and as consent-based ones that police, courts, prisons, army areexamples for repressive state apparatuses. On the other hand, schools, churches, trade unions, media, and law are examples for ideological state apparatuses (Althusser and Balibar, 1979). And it was Poulantzas (1973; 1978) who developed a fully critique of reductionist Marxist approaches following Althusser (Tomlins, 2007: 51). One has to take care that there has to be a significant degree of consent and persuasion for the repressive apparatuses as well. After all, these repressive apparatuses do not work totally disconnected from the society by third persons who are totally estranged or isolated. Ideological apparatuses provide the legitimacy for the relevant repressive bodies. For example, in medieval Europe, religion provided legitimacy of a religious class and institutions, which at the end formed a particular type of legal system comprising courts in the form of Inquisition, or armies in the form of Crusade armies. In a similar way, secular and liberal law engenders its own courts, armies, prisons and police forces. What is repressed and how it is repressed is shaped by ideology. As one

Acknowledging the mutual relationship between hegemony and physical force, Gramsci explains that courts carry out hegemonic relations beyond serving merely as a punitive, coercive state institution. Law, in general, has an educative and positive dimension through which the state creates a social conformism useful to a particular group while it fulfils its negative role of disciplining society through courts (Gramsci, 1971:195, 242, 246, 267). At the same time, the disciplinary role of the courts is supported by hegemony just like hegemony is supported by coercive acts of the state. Gramsci has reason to underline the significance of the symbolic dimension of physical force. An arrest is not only a reflection of physical force carried out by state authorities, but it also symbolizes what is acceptable, what is "legal in the eyes of the state"(Gramsci, 1971: 246, 247; Litowitz, 2000: 525-528). Likewise, certain international organizations take coercive measures to back the hegemony of a particular type of international order. NATO, UN Security Council, and punitive deeds of international criminal tribunals are some of the most prominent examples having the capacity and will to use physical force. The symbolic dimension of power of these institutions has roots in a particular form of international law.

What Gramsci overlooks is that criminal law implemented and interpreted by courts does not only reflect what is "legitimate in the eyes of the state", because the source of legitimacy is not something confined with state mechanisms anymore. The legitimacy of the state and state-like organizations are subject to questioning, leaving ground for a supposedly superior, more respectable body of norms and rules to

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cannot exist without the other, it would be misguiding to talk about a total autonomy of these apparatuses.

replace the state as the basis of legitimacy. We should note that the convergence of rules and governance is not particular to the nation-states. In a distant past when it was inconceivable to separate the rules from the ruling strata or the ruler, the ruling classes had represented, and in some cases directly personified, the rules that govern and regulate relations. That the source of legitimacy of the rules varied did not pose any problem in terms of conformity between that legitimate source and the ostensible governance. The tangible nature and form of governance both strengthened and weakened its power. Power gathered in the hands of "some" made it much more easy and probable to be practiced while the same availability and accessibility of the rulers facilitated countering and attacking to these power centres.

The kind of coherence and convergence between legitimacy and rulers gradually differentiated in time. It might be a strong counter-argument that there always had been such a differentiation and when the authorities did not adjust to the effective legitimacy discourse of the day, social and political unrest did arise. But one should take notice of the rising degree of such a differentiation. Pre-modern and modern administrations could use legitimacy basis in a more direct and authoritarian manner. The space between the governing body and the legitimacy basis deepened and widened in such a way that the former has become subordinate to the latter. Thus, neither the institutions such as police forces nor the courts representing the coercive type of power, nor the intellectual means of production such as schools, media, and entertainment representing the hegemonic type of power, are at the

disposal of a dominant group as described in the mainstream Gramscian approach. The change is much more striking and radical at the international level.

The relationship between the subject(s) –or we may call actor(s) – and the outcomes differ at this new, postmodern level of international order, but still we can observe significant common grounds with the Gramscian insight. Gramsci describes the configuration and dissemination of a ruling worldview through three main mechanisms. Universalism enables to present particular type of interests and obsessions as the common interests of all people. Naturalism convinces people that the current "culture" is in fact a reflection of the "nature", which prevents fighting as it would mean confronting the nature itself. As a third point, rationalization is carried out by a group of intellectuals who perpetuate the existing way of life through theorization (Litowitz, 2000: 525, 526).

A similar diversification on the hegemony concept, which Robinson and Joseph have represented the most, belong to the field of Critical Legal Studies (CLS). Just like the differences on Gramscian interpretations on the role of structure and actors, CLS writers distinguish two interpretations on hegemony. Some CLS writers have borrowed directly from Gramsci's class-based approach and claimed that law carries a hegemonic dimension functioning in the interest of a dominant class. Other CLS writers approach hegemony as a structural phenomenon without making direct references to a particular dominant class (Litowitz, 2000: 532). Owing to the dramatic change which has been taking place both at domestic and international level, and the invisible power economies which are becoming more effective

progressively, the hegemony of international criminal law dissociates from actor-based hegemonic relations though still evolving through and supported by certain international institutions. Such institutions and the legal discourse they introduce have an autonomous character which challenges the mainstream Gramscian approach on one hand, but which at the same time paves a novel path on the other.

3.4. How Autonomous Can Law Be?

As there are different approaches on the notion of hegemony, there are discrepancies and disagreements also within Critical Legal Studies on the nature of law and its relation with the social structure. Critical Legal Studies (CLS) can be divided roughly into two groups according to the writers' position towards "modernity" and "postmodernity". Writers close to the modernist stance are inspired from Marxism, Freudianism, and the Frankfurt School while the postmodern branch has inspired from the works of Foucault, Jacques Lacan, Jean-Francois Lyotard, Jacques Derrida etc. Despite their differences, both strands have implications stemming from the indeterminacy thesis and the ideology thesis of law (Whitehead, 1998: 705-708).

The indeterminacy thesis, as opposed to any kind of deterministic approaches, represents the claim that law is internally and externally inconsistent. The wording "internally inconsistent" implies that legal reasoning consists of manipulative techniques, not a distinct method for reaching particular results. A judge's decisions

are somehow arbitrary decisions, and (s)he is free to choose among different, even contradictory, choices that point to different values. External inconsistency means that legal decisions are not predictable or objectively correct (Whitehead, 1998: 708-710).

"Limited indeterminacy", which argues that even the most basic, seemingly indisputable, explicit legal rule can be interpreted in relatively distinct ways while legal material still constitutes a framework and it is this framework introducing a limited set of answers to a legal question, should not be confused with "relative autonomy", which attributes law some degree of autonomy from the material bases (Scheuerman, 1999: 6). A counter argument to limited indeterminacy thesis is "undeterminacy thesis" which disagrees with the idea that the legal framework supplies a general, definite guidance to the legal decision-maker. Accordingly, legal materials such as concrete rules, statutes, and precedents, allow decision-makers to act in a surprising diversity of ways (Dworkin, 1978; 1986; Posner, 1987). To figure out the difference between these two theses, we may describe the limited indeterminacy thesis with the assumption that "most cases are *easy*, though the legal system inevitably contains some set of *hard* cases", and the undeterminacy thesis with that "most cases are *hard,* and only a few are *easy*". Legal realists such as Richard Posner and Ronald Dworkin can be accounted under the group of writers following the undeterminacy thesis. As a third approach "radical indeterminacy" claims the rule of law is a myth because legal materials are empty vessels to be filled

by the judges and administrators. The best way to describe radical indeterminacy thesis would be that "all cases are *hard*" (Scheuerman, 1999: 7, 8).

Different approaches on the degree of indeterminacy are all concerned with the content looking from within the legal body. Legal non-determinism, on the other hand, means rejecting any kind of functional connection between social and economic structure and the legal rules of the society. Legal non-determinism is just the opposite of deterministic approaches on law. In order to give examples to deterministic approaches on law, we can recall orthodox Marxism or liberalism. Orthodox Marxist explanations take law as a direct reflection of economic and social structure while liberal pluralist explanations see law as a reflection of the strongest political interest group. Not all CLS writers reject any possible connection between structure and law. Postmodern CLS writers argue against the claim that any specific form of law could have connections with a specific form of socio-economic organization, and that we can deduce the sort of legal construction from the socio-economic structure. On the other hand, some critical modern CLS writers support the view that law has "relative autonomy" (Whitehead, 1998: 705-713).

It might be argued that the postmodern CLS approach corresponds to "radical indeterminacy" and "radical nondeterminacy" theses. On the other hand, critical modern CLS writers agree that it is too difficult to prove a direct and determinate connection of law with socio-economic organization. But this latter group also stresses that a specific form of law, even indirectly and functioning autonomously, strengthens a specific organization of the society.

It was Weber, who first marked the relation between a particular legal system and capitalism. By doing this he must have inspired many later structuralists, including Marxist structuralists though in a different direction of dialectics; and instrumentalists, including Marxist instrumentalists. The dialectics work in an adverse way for Weber, but the logic is the same: there is a close connection between capitalism which was developing in Europe and the changing legal system of the era. What shows the substantial notion of this particular legal system is its "self-determination" characteristic. In a capitalist production system, legal rules, lawyers, and judgments have to be independent of political determinations and concerns (Trubek, 1972: 724; Tomlins, 2007: 47-49). Balbus follows Pashukanis in comparing capitalist products and citizens before courts and argues that both commodities in a capitalist system and citizens are abstracted from real, specific substances. It is only an illusion that such commodities and persons are "equal" and "exchangeable" (Balbus, 1977: 585). Thus, the constitution of individuals as political subjects having equal rights does not only introduce a formal equality as economic agents, which is necessary for capitalism, but it is a way of estranging these individuals from their class affiliation and disguising the inequalities in political rule through atomization and individuation (Poulantzas, 1973).

Predictability, which ensures continuous production and safeguards against potential risks, is a vital element in a capitalist system. Balbus (1977) and Pashukanis (1980) underline this organic relationship between self-determinant, autonomous law and the need of "predictability" for safe production. A producer, entrepreneur or

manager is in need of being able to evaluate, calculate the costs and benefits of his acts, what the punishment or award will be both in the market and before the law. In fact what happens before the courts affects to a great extent what happens in the markets and vice versa. This is the primary reason why cost-benefit analyses have to be independent of any political intervention. A merchant or producer in the capitalist era cannot take the risks of being punished directly or indirectly according to the whims or interests of the rulers.

At this point, one may ask why we spare the predictable nature of law to the capitalist system. Was it not predictable, or was it less predictable in the Middle Ages or in the ancient era? No system, whether it is autocracy, theocracy, or any other one, is able to survive if it is not equipped with a coherent, stable body of rules reflecting and complementing the underlying logic of social forces. The difference in the agrarian age is that everyone's role was predetermined in the system. A farmer, a warrior or a cleric was bound by the rules and norms in interaction with his role and could move only within these limits. He would not dare to transcend those limits. There is not so much risk to take in this system, or we may say there is not a deep incentive to take such a risk. Political, religious, or any other identity was not open to challenge.[27] In addition, the ruling strata still had the power to take exceptional, or

[27] Gellner (1992) explains the connection between stable roles, identities and economic structure of the agrarian age where the state did not have any intention and interest in providing and strengthening the homogeneity among people, as strong diversification and insurmountable borders did work for the safety and security of the ruling class. In contrast to the orthodox Marxist claim that industrialization intensified vertical differences and conflicts between classes, Gellner (1992: 8-12) points out that it was the pre-industrial age which relied on sharp differences while industrialization targeted "homogeneity"in many aspects.

what might be called as “extreme” decisions. The word “extreme” may not be the most appropriate one to depict the picture, because nothing would be counted as “extreme” if it is ordered and performed by the ruler/monarch in this era. In other words, what was “predictable”, or what had to be “predictable” in the eyes of the ruled was the fact that there could be divergent or contradictory decisions on occasions.

It sounds contradictory as things tend to be highly stable and predictable in the agrarian age which contrasts with modernity. It is a common point of view that social mobilization and flexibility has intensified with modernity bringing about risks and unpredictability. But mobility and flexibility of socio-economic systems should not be confused with that of legal systems. The seemingly fixed and rigidly defined rules can introduce a high-level of flexibility to the rulers who have the power both to define and practice them. On the other hand, the so-called flexible and liberal rules might pose few alternatives and room for manoeuvring despite the power to define and practice them is not openly in the hands of any particular group any more.

The “unpredictable” was in a way “predictable” in pre-modernity. The legitimacy of divergent, incompatible rules lied not within the logic of law itself, but in the logic of another rationale that granted the ruler his power. It was not a self-legitimization process granting the law its legality and validity. A belief system, which law was the reflection of, whether it is a religious or another kind of belonging, legitimized the body of rules and practices of the legal system.

The production system in the capitalist age cannot endure such "predictability of the unpredictable". The costs of political intervention would be too high to tolerate. In addition, there are now many who would take greater risks in the name of launching new, large-scale entrepreneurships. The rationale evolved and changed leaving the ground of religion or any other belonging system for a modern industrial society, which mainly depends on cognitive and economic progress. Cognitive progress means that no element is connected to another in a permanent, stable, *a priori* way. The old world used to rely on constant principles of a given, *a priori* vision, that is why there had been too few to get afraid of. Every member of the society had a permanent, precisely defined role and status. However, in the new world where rational principles predominated, the individual is freed from old barriers of religion, race, ethnicity or any other identity that is hard to substitute. What lies beneath economic progress is the fact that roles and status are optional and dynamic. But this dynamism has brought with its costs. Though the individual is able to act rationally, (s)he is now left alone confused and lost. What seem to be unnoticed for most of the time are the limitations of rationalism on the human mind as powerful as its former correspondents.[28] Authority embodied as "God", "king" or "father" might be dead; nevertheless, it restricts human mind in modern forms which law proves to be only one of them.

[28] Feyerabend (1987, 1993) calls attention to the dangers of modern science that once was an instrument of liberation and enlightenment in 17th and 18th centuries. Now, it has turned into a similar ideology to what religion used to be in previous centuries.

In this new era, what the capitalist man needs is some kind of "predictability of the predictable despite great risks in prospect". Not an exterior, exogenous affiliation would legitimize law, but law would legitimize itself endogenously. Rather than a mediator in the form of "God", "king" or "father", power moves substantially on its own without the concrete body representing the "authority". It moves through the minds and hearts of the very agents that it practices and strengthens its influence.

If we interpret this relationship between law and a particular production system – namely capitalism – as instrumental, and if we claim that law is used as a means for a particular end, we also have to prioritize a certain group of actors. Law, if understood in instrumentalist terms, has to serve to the interests of, be favourable and more beneficial for, "some". But, according to a structuralist interpretation of law's autonomy in the capitalist era, the actors who would benefit at the end are not fixed. There is, and there has to be, a certain degree of mobility for the actors to climb the ladders of social status, and law has to provide the "opportunity" –even if this is an illusion instead of being a real opportunity – for the losers to become the winners in another game, in another day. Law does not (or should not or could not) privilege a class, a group in an instrumentalist sense in capitalism because it has to legitimize itself through so-called equal, universal and democratic principles, norms and rules. There is no other, exogenous belief system in this era to support law if law was to benefit only "some". It has to be a "self-legitimizing" body comprising so-called "modern" ideals.

Gramsci is one of the leading theoreticians re-establishing the "indissoluble link between theory and practice" recognizing the long overlooked role of ideas as one of the historical forces. Law, for Gramsci, cements society and economy together, just like ideas; and binds subordinate groups to the interests, purposes and beliefs of the dominant class (Cutler, 2006: 136). Gramsci's historical bloc concept is a totalizing conception bringing together economic, social, political, cultural and other ideological forces to form a single, indivisible whole (Kennedy, 1982: 34). Foucault, though being impressed by the structuralist environment he had experienced, has also a reputation of being strictly against any deterministic explanation and theorizing. A reading on Foucault's writings on law enables one to see how closer he gets to some of the CLS writers in relating indeterminacy and determinacy of law, and in interpreting modern power economies through this organic relationship.

3.5. Foucault's "Other" Law

Foucault notoriously has no interest in explaining major events or major figures. For him the supposedly "ultimate truth" notion is false and illusionary. Truth of knowledge is wedded to discourses and social disciplines which are also wedded to power relations. Foucault's archaeology aims to demonstrate how discourses and knowledges are formulated and transformed whereas his genealogy tries to reveal the relation of power to these discourses and knowledges. In his archaeology, Foucault takes up a series of documents as it has already been defined such as

psychopathology or codes of correction and punishment. Neither the truth of these series nor the causes which led these series to emerge and develop as they are have caught Foucault's attention. The lack of interest in any general truth claim or causalities is related to the effects of the *Annales* School which also rejected to concentrate on major events and major figures in history, and structuralist approaches which problematized the primacy of the subject or consciousness are obvious in Foucault's works. But, unlike the prospect of the *Annales* School's search for stable structures and continuity, aiming to explore the discontinuities in and between the series, Foucault shows the distinctive nature of the object which he problematizes – for example madness, the clinic or the prison, comparing the particular series of these objects with others in history (Ward, 1996: 63-66). The object in question does not exist constantly and essentially in its own right. There are rules enabling the social and intellectual space in which this object can emerge, locate itself in relation to other objects in the field, be transformed, and sometimes forgotten and replaced (Foucault, 1972: 45-48; Ward, 1996: 66).

The main task of genealogy, on the other hand, is to show modern forms of power operating through mechanisms of "normalization". Foucault's claim is that power is a fluid source of both oppression and resistance and it is not particular to only a group of people in society but attached to various agents. Moreover, power is constitutive; it creates objects of knowledge that emerge in discourses and gathers attention on these objects while neglecting or disregarding others (Ward, 1996: 68, 69). Such a power conception has effects on every social agent rather than being a

commodity to be wielded merely by a privileged group. How Foucault understands law, and what sort of power law has in this understanding have given rise to contending approaches making it clear that there is no single way to interpret his legacy in the field of law andlegal theory.

3.5.1. The Expulsion Thesis

The conventional and widespread conviction is that Foucault takes law as a pre-modern way of imposing power through rulers or governments on the subjects of the state. Owing to the fact that Foucault's main concern is how power has evolved in a way to function more subtly and implicitly in modern techniques, the conventional approach which is widely recognized as "the expulsion thesis" faults Foucault for not taking proper account of law's constitutive role besides its repressive role. Foucault was searching for modern forms of power which were not visible in the first instance and which were effective on the human body through mechanisms other than the government. Thus, law, which is a direct expression and exercise of power, would remain as one of the pre-modern government tools (Fine, 1984; Hirst, 1986; Hunt 1992; Hunt and Wickham, 1994; Munro, 2001; Wickham, 2006).

According to Foucault, the content and exercise of the rules which supposedly constitute and maintain the substructure of the idea of "justice" are conditioned and differ according to social structures. All law is then particular which

strives for being recognized as universal, which is of course an illusionary conviction, in order to enhance and consolidate its justification. The idea of justice is put to work either by the rulers as an instrument of power, or by the opponents to that power as an instrument of resistance (Rabinow, 1984: 6). However, this negative, repressive form of power is progressively overtaken by disciplinary power technologies, which are more productive and effective in comparison to the repressive power practices of the sovereign body. Disciplinary power techniques have rendered law merely as an instrumental site in modern societies.

Foucault's remarks in *Society Must Be Defended* on the difference between disciplinary power and sovereign-legal power seem to confirm the expulsion thesis (2003: 38):

> The discourse of discipline is alien to that of the law; it is alien to the discourse that makes rules a product of the will of the sovereign. The discourse of disciplines is about a rule: not a juridical rule derived from sovereignty, but a discourse about a natural rule, or in other words a norm. Disciplines will define not a code of law, but a code of normalization, and they will necessarily refer to a theoretical horizon that is not the edifice of law, but the field of the human sciences. And the jurisprudence of these disciplines will be that of a clinical knowledge.

In a lecture on governmentality dated 1978, Foucault underlines once more that law belonged to sovereignty and that the new definition of government that developed starting from 16th century and intensified particularly in the 18th century demanded new tactics other than law (2007: 99):

> [T]he objective of government will be a series of specific finalities. And one will arrange (disposer) things to achieve these different ends. This word 'disposer' is important because, what enabled sovereignty to achieve its aim of obedience to the laws, was the law itself; law and sovereignty were absolutely united. Here, on the contrary, it is not a matter of imposing a law on men, but of the disposition of things, that is to say, of employing tactics rather than laws, or, of as far as possible employing laws as tactics; arranging things so that this or that end may be achieved through a certain number of means.

In the same lecture, he continues "the instruments of government will become diverse tactics rather than laws. Consequently, law recedes, or rather; law is certainly not the major instrument in the perspective of what government should be" (Foucault, 2007: 99). Such statements have entailed an impression that Foucault equated law with the traditional notion of law as rules being imposed on the subject group by a governing body to command a certain type of behaviour. The juridical power of law, then, is an out-of-date phenomenon which has been replaced by modern techniques. What is more to the point, Foucault seems to give confused explanations on the relationship between law and disciplinary power. In *Society Must Be Defended*, the reader first gets the impression that Foucault draws a clear distinction between disciplinary power and sovereign-legal power. But in the same piece, Foucault continues (2003: 39):

> Sovereignty and discipline, legislation, the right of sovereignty and disciplinary mechanics are in fact two things that constitute –in an absolute sense – the general mechanisms of power in our society.

The alleged confusion of Foucault's approach on law[29] seems to be shared also with the writers supporting the expulsion thesis. For example, while Fine (1984: 200) and Hirst (1980: 91; 1986: 49) argue that Foucault completely subjugates law to discipline or bio-power, for Hunt and Wickham (1994: 51) Foucault makes a clear-cut distinction between law and disciplinary power at some points but blurs this distinction at some other points.

3.5.2. Critics to the Expulsion Thesis

The main outlet of critics against the expulsion thesis is a rejection that Foucault counterposes law and disciplinary power. Foucault states at many points that law and disciplinary power coexist and complement each other.[30] Reading Foucault as if the whole set of his ideas, understandings and thoughts represent a uniform and constant entirety would be unfair and even some sort of a betrayal to the very meaning and purpose of his work. A deeper insight of his studies, especially after the 1976 lectures, indicates a novel approach – or "correction" as some would argue[31] – on the

[29] Goldstein (1993) depicts a confused Foucault on law and asserts that evaluations on Foucault's stance are misleading as most of them fail to cover all of his writings. Still, there is room for law both to be repressive and emancipatory even in liberal western democracies and it is up to the historian to explain this problematic.

[30] As one of the critics of the expulsion thesis, Valverde argues that it is highly possible that misinterpretations of Foucault's approach to law derive from his 1976 College de France lectures having been published at a relatively late date (2011: 136).

[31] For Valverde (2011), "correction" might come from outside through reading the totality of Foucault's work. However, for Lemke (2002: 52), such a "correction" might be a "self-correction" as Foucault himself has revised and corrected some of his older work in process.

interaction between different forms of government techniques as well as the relations between the self and technologies of domination (Foucault, 1988a, 1993).

Beck (1996) disagrees with Hunt and Wickham's expulsion thesis arguing that Foucault never developed such an antinomy positioning law against disciplinary power. For Foucault, democratic law plays a crucial role masking the control of the populace through disciplines, so law should not and cannot be excluded from modern economies of power, as it not only masks disciplinary power but represents a real source of power besides its disciplinary variant. Rose and Valverde (1998) also identify some sort of a "coexistence, hybridization and mutual interdependence of law and norm" while Ivison (1998) urges that separating, not collapsing, these two economies of power will enable analysing the role of law in modern societies.

Besides, it is not only disciplinary power which has the very potential and possibility – and even necessity – of coexistence with legal power. Governmentality is another power dimension completing the triangulation of modalities of power in a Foucauldian perspective. Foucault underlines in *Security, Territory, Population* that governmentality operates alongside the disciplines (2007: 143):

> [W]e should not see things as the replacement of a society of sovereignty by a society of discipline, and then as a society of a discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism.

Let alone the critic developed by Rosenow (2009: 501) that such a triangulation of sovereignty, disciplinary power and governmental management as three main power modalities would evoke a false impression that all relations of power would be limited within these borders,[32] law's relationship with disciplinary and governmental power modalities remains highly controversial. It is not quite clear whether law has reintegrated to modern power economies or it has been assimilated to governmental or administrative imperatives.[33] If the latter is the case, then it might be confirming the expulsion thesis which contends that law is subjugated to disciplinary power or bio-power (Golder and Fitzpatrick, 2009: 34). However, the main argument of the expulsion thesis, which remains to be an overall disregard of law, differs from the above interpretations no matter the final point is integration or assimilation to modern power economies. The critics, on the other hand, decline the expulsion thesis propounding the claim that Foucault never totally outlawed law. Whether legal power integrates to or is assimilated by governmental or administrative techniques, it

[32] Rosenow might be wrong in that even if we approve that all power modalities are contained within such a triangle, it does not necessarily end up with fixed and stable axes of power in a closed system. Foucault has never stressed that sovereignty, disciplinary power and governmental management form an exhaustive list of power modalities. Quite the contrary, his purpose was to introduce modern and alternative ways of powers that also gives the inspiration that there always is the potential of newcomers in the future. So, instead of constraining power modalities within a closed system, Foucault was making way for others. Besides, diversification on power modalities provides much more opportunities for resistance as well as governance.

[33] Engelstein (1993) quotes Foucault describing the "colonization" of the procedures of law by disciplinary mechanisms under the bourgeois regime. For Engelstein (1993), the colonization depicted by Foucault resembles very much a "parasitic encroachment" where disciplinary mechanisms are the colonizers/parasites, and law the "nutritive host". Nevertheless, Engelstein criticizes Foucault's approach, as law, according to her, besides being a repressive force, has become a liberal mechanism limiting discipline and repression. Pavlich (2001) carries the colonizer/parasite metaphor one step further borrowing from Readings (1996) his argument for a "post-disciplinary ethos" colonizing early disciplinary power-knowledge formations. For Pavlich (2001), governmentalities emerge "parasitically" simultaneously with social governance forms.

continues to be part of Foucault's account of modernity while the scope and depth of this association is the cause of contention.[34]

In addition to writers supporting the association of disciplinary power or governmentality with legal power, the focus of a third group of critics is that Foucault might have excluded only the juridical dimension of law rather than completely ruling it out. That Foucault correlates the diminishing power of juridical sphere with the rise of bio-power should not imply law's renouncement of its power totally in favour of out-law means since law is not merely juridical and can reveal itself beyond the judicial field. So, any differentiation should be made not between legal, disciplinary and bio-political power, but between juridical law and normative law. If Foucault entirely excluded law from modern power economies, there would be little room to grasp his normative forms of power which now becomes disciplinary and bio-political. For Ewald (1991), what Foucault had disregarded in this respect is the juridical aspect of law and not the normative one. The juridical branch, becoming gradually incapable of coding and representing power, has been replaced by legislative activities. Tadros (1998) agrees with Ewald in that there is a significant change regarding the disciplinary techniques in modern society, which carries legal discourse beyond the courtroom or beyond the use of a ruling class, and

[34] Walby (2007) points to the risk of not fully grasping the genuine relation of law with modern power economies. For him, the disagreement between the critics to the expulsion thesis on the nature of law's relation to governmentality might well prevent us to see the "constitutive" nature of law in societies. If law is perceived as only a supplementary component of new power modalities, it will be impossible to understand how law (re)generates itself concerning legal governance.

the right distinction is one between juridical and legal, not between legal and other power economies.

3.5.3. An Alternative Reading of Foucault's Law

A third stance on Foucault's approach to law reinterprets both the expulsion thesis and its critics not in order to refute them all, but in order to relate them through a different perspective. The departure point of this alternative approach is that both the expulsion thesis and its critics have failed to grasp Foucault's understanding of law in general. Foucault's aim was to "cut off the head of the king" (1979: 89) in order to focus on the modern techniques of disciplinary power which mainly derive through micro practices. But this "cutting off" does not necessarily mean there is no coercive or consensual forms of governance at macro levels.[35] The question should not be "how power operates without a central body", but rather, "how power operates with a headless body?" and "how is it possible that this headless body behaves as if it indeed had a head?" (Dean, 1994: 156)

According to this alternative interpretation, Foucault's law is both receptive and determinate. In being flexible, law is susceptible to domination by dominant powers whether they derive from a sovereign or in a disciplinary or bio-political form. Still the argument should not be confused with the expulsion thesis which

[35] For an elaborate discussion on why we should not take Foucault's call to cut off the king's head as a rejection of sovereignty discourse, see, Neal, 2004.

reduces law solely to an instrument of power, not despite but because of its susceptible nature, law cannot be contained by power (Golder and Fitzpatrick, 2009: 53, 54).

As noted earlier, Foucault does not eliminate sovereignty as a totally pre-modern imposition of power upon the subjects. In *Security, Territory, Population*, he juxtaposes law and sovereignty while stressing, "sovereignty is absolutely not eliminated by the emergence of a new art of government that has crossed the threshold of a political science" (2007: 143). Confusion derives because of the fact that Foucault explicitly noticed sovereignty had been embodied in the form of a ruler who was equated with the legal power. The monolithic feature of sovereign power broke down with nationalism and nation-states when "the will of the sovereign ruler" transformed into "the will of the sovereign nation". The mere difference is that the juridical power does not originate from an individual personality in the shape of a prince or king, or a specific group such as a dynasty or elites, but it originates from the common will diffused across a broad yet highly abstract entity called "nation".

In this modern type of sovereignty, law remains very much "part of the social game in a society like ours" (Foucault, 2000: 392). Even if new power economies in modernity caused suspension of law, this suspension remains partial, not total (Foucault, 1977b: 223). Law is in relation to other modalities of power, and this relationality disrupts any thesis that law is complete, coherent and totally an independent body. It, nevertheless, does not mean that law is dependent on modern

power modalities (Golder and Fitzpatrick, 2009: 61). Quite the contrary, the new technologies of power, because "they are called upon to speak the truth of society to itself from an entirely immanent position – one which aims to secure a comprehension of the social field from a position within that field itself", are dependent on law, as law is left as the only knowledge outlet in modernity providing a transcendent reference point (Golder and Fitzpatrick, 2009: 63). What is more, the new phase of human sciences provides law the power of this transcendent "truth" (Golder and Fitzpatrick, 2009: 66). As Foucault states in *Discipline and Punish* (1977b: 256):

> That the grip of the prison on the penal system should not have led to a violent reaction of rejection is no doubt due to many reasons. One of these is that, in fabricating delinquency, it gave to criminal justice a unitary field of objects, authenticated by the 'sciences', and thus enabled it to function on a general horizon of 'truth'.

Thus, law and disciplinary power mechanisms are in fact interdependent and "in their relation they serve to constitute the other as natural and necessary" (Golder and Fitzpatrick, 2009: 66). Even when Foucault sounds confirmative at times when he underlines the repressive role of judicial law, this is so to speak in historical terms and with the ultimate aim of taking attention to a lack of elaborate discussion on the fundamental role of judicial system (Foucault, 1980: 14). The judicial system "is [one] which has basically a triple role; and depending on the period, depending on the state of struggles and on the conjuncture,it was one or other of these roles which was dominant" (Foucault, 1980: 14). One of these roles is "to force the people to

accept their status as proletarians and the conditions for the exploitation of the proletariat"; the other one to target the "the most mobile, the most excitable, the "violent" elements among the common people"; and finally "to make the proletariat see the non-proletarianised people as marginal, dangerous, immoral, a menace to society as a whole" (Foucault, 1980: 14, 15). Here, Foucault is not talking exclusively on the China case and in fact depicting an overall picture for various roles of the penal and judicial systems which at times appear to be concentrated on the construction of contradictory identities in society.

In modernity, the construction of identities, identification and stigmatization of abnormality in their fractured and incomplete fashion, have been conducted through the human sciences. Yet, the human sciences need a sanctioning mechanism to enforce their scientific motion. Law, though remaining in the disciplinary field, has to put a certain distance between itself and scientific knowledge in return. Law has to hold itself apart in order to maintain its totalizing and absolute truth claims and to intervene when science fails to discipline its subjects (Golder and Fitzpatrick, 2009: 70).

Foucault's law has two complex and ostensibly contradictory dimensions regarding determinacy. The first dimension expresses a determinate and definite content which draws the line on the side of the "norm". This is a law to be resisted and transgressed. The second dimension expresses a more indeterminate and responsive content which becomes constantly mutable and flexible in order to

encompass and respond to what lays beyond the very red line it had previously drawn itself. Law, through this perpetual change and reconstruction, contains resistances and challenges. According to Foucault, these two dimensions of law –one determinate and rigid, and the other responsive and self-resistant – do not represent two conflictual or opposite understandings as law needs to be both determinate and responsive at the same time. Law has to be determinate to the extent that it has to secure social order, but it also has to be indeterminate as power can neither be embodied by certain actors nor be encapsulated in any given institution or structure. A further significant feature of power is that Foucault interprets it as responsive to – and generally formed by – resistance. This is not a relationality which positions power on the one side, and resistance on the other side. In fact, resistance is an intrinsic content of power (Golder and Fitzpatrick, 2009: 71-77).

Law has to reproduce and reconstruct itself in order to adapt to the ever-changing social world. Yet, there has to be a limit to the responsiveness of law. Law's responsiveness and indeterminacy cannot be limitless as law loses its power of securing social order and predictability if not detained on a determinate foundation. What's more to the point, there will be no determinate position without a terrain exterior to this determinacy. In other words, there has to be a line to be maintained and secured which draws the frontiers of the determinate ground and which enables transcending and transgressing towards alterity and out-law possibilities. This alterity and out-law terrain is what exactly makes law an indispensable necessity and reality

for societies as there would be no need for law if there were not anything out-of-law (Golder and Fitzpatrick, 2009: 80-82).

To sum up, law has to remain flexible, fluid and mutable to enable a group, class or ideology to subordinate it. The very same flexible, fluid and mutable law has to be so to enable resistance and transgression as it is this responsive nature of law which ensures its adaptability to the every-changing social world and which provides a certain degree of determinacy for a particular period and particular set of power relations. Still, it is a conditioned and temporary determinacy.[36] The indeterminate nature prevents any totalitarian comprehension of law by power (Golder and Fitzpatrick, 2009: 82). Just as there always will be need for change to speak of tradition, determinacy of law will ensure indeterminacy both of which at the end will render it impossible for any power to permanently contain it. It used to be the monarchs skilfully wielding law as instruments of power in the past (Foucault, 2007: 99). In the age of governmentality, law continues to be wielded as instruments or supportive mechanisms of bio-politics and disciplinary power (Foucault, 1979: 144). This is something going beyond the expulsion thesis because law, though not being subordinated by an explicit power centre or locus, continues to accomplish its mission as one of the power economies.

[36] Laclau and Mouffe's (1987) theory on discourse resembles to Foucault's determinate and indeterminate aspect of law approach. In Laclau and Mouffe's terminology, a "closure" refers to a temporal and partial fixation of meaning of signifiers. However, the possibility of complete constitution of structure is denied and the terrain of the social is open unconditionally which enables the temporal and contingent "closure(s)" change in time and in context.

A further point which needs to be underlined once again is that law is in desperate need of an external force to maintain its intrinsic legal power that used to be the force of the prince in the pre-modern period. All the bloody and ceremonial practices of punishment of pre-modernity did not in fact represent an excessive law, but a dependent law incomplete and weak without external support (Golder and Fitzpatrick, 2009: 83, 84). As Foucault underlines in *Discipline and Punish* (1977b: 22), "[law] functions and justifies itself only by this perpetual reference to something other than itself."

In modernity, law still cannot be a self-executing mechanism; it cannot be "the master of its truth" (Foucault, 1977b: 98). Law continues to operate with the help of an external execution while the form and nature of this external execution is not a static or fixed one. The Westphalian state is not an irreplaceable form of government for the operation of power in Foucauldian terms. Government is not a technique applied or used by state authorities or apparatuses; instead, the state which is nothing but a temporal and historical form of stabilization of societal power relations is one form of government (Lemke, 2002: 58). It might be a monarchical state where power is embodied in the form of a king or prince, or a nation-state where power operates in a much more diffused way. The crucial thing is that there is and has to be macro-level that "brings together, arranges, and fixes within that arrangement the micro-relations of power" (Dean, 1994: 157). And as long as the forms and instruments of power has historicity, the room is open for alternative forms and instruments

transcending the nation-state at the international level where the state is just one of the players.

3.6. Inceptive Arguments

The initial argument is that there can be no absolute impartiality for any legal system and courts. Lack of questioning the principle of legal impartiality and accepting it as taken for granted supports and strengthens wider social, political and economic systems which hold on this principle as a motto. To the contrary, questioning impartiality enables one to reflect on the relationship between legal systems and governance. Courts, even though the assertive claim is quite the opposite, serve to a particular set of interests framed as reflecting the common good. These interests, while deemed to be for the benefit of the whole public, impose a certain type of governance which at the end favours certain groups in comparison to the others. Because there is a connection between governance and legal systems, criminal judiciary as part of the wider legal system also has a connection with the particular governance which it represents.

Carrying a Foucauldian perspective to the international level has been regarded as something unfitting the work and purpose of Foucault. Selby (2007) argues that Foucault's main interest was techniques, modalities and rationalities of governance at the level of domestic societies within liberal western states, and these cannot be carried to the international due to the latter's specific ontological features.

The international is still an arena of large actors wielding concentrated and centralized power. Joseph (2010) agrees with Selby regarding the problems of a Foucauldian perspective which characteristically deals with the liberal order and which can end up with neo-liberal repercussions when attempted to be applied to other parts of the world. Both Selby and Joseph have problems with the idea of making use of Foucault at the international level, as the overwhelmingly practiced disciplinary power at this level supposedly contradicts with the domestic liberal governance techniques. This may not be a right claim, as Foucault's governmentality does not exclude disciplinary power. Governmentality both at domestic and international levels comprises –at least in part- concentrated and centralized power mechanisms. Walters (2012: 94-96) attempts to contribute to the argument underlining that liberal governmentality has not been the only power modality for Foucault and he has been mistakenly associated with liberal order. Walters might also be wrong in his attempt to correct the case by recalling non-liberal orders besides liberal ones as he, in this manner, excludes disciplinary power from a liberal order. Application of coercive or disciplinary practices and discourses is neither contradictory for a liberal type of governance nor refutes claims of a liberal type of governmentality at the international domain. Besides, a Foucauldian perspective fits even better for the international level when global governance is defined as "governance without government" (Rosenau and Czempiel, 1992) though we can see the kernel of a governmental system such as a becomingly centralized judiciary with the ICC even without the presence of a visible government. Governmentality at the international level should not lead us to think that sovereignty or state power has

totally ended. Foucault does not mean to emphasize that governmentality brings an end to state power or sovereignty when he illustrates the cutting off the king's head. Sovereignty and state power is still there both at the national and international levels, and there is now a growing body of global governance without a head and even without a visible body though there are floating organs here and there.

The ICC, which has been greeted with great enthusiasm and formal support, is a unique – supposedly supranational – institution holding an unprecedented jurisdiction over a wide territorial and temporal scope. The apparent lack of a world state or world government is not due to the immature nature of the international system. Absence of a world state or government can be interpreted as a further stage of governance instead of immatureness or underdevelopment. The mantra that *a state is a state is a state* is misguiding both for the national and the international as there are now various state-society complexes as argued thoroughly by Cox.

The ICC does not imply an extension of domestic politics. Nevertheless, it would not be an absolute extravagation to claim that there is not much "international" about what is going on regarding international criminal prosecutions for now just as there has been slightly an international dimension for the previous examples of international criminal judgments. Regarding the past examples of international criminal prosecutions, there has been strict limitations of time and space for jurisdiction as well as limitations on whom to be prosecuted and the persons to be prosecuted. Ironically, such problems about the jurisdiction of the international criminal courts on temporality, place, subject crimes and persons – *ratione temporis,*

ratione loci, ratione materiae and ratione personae respectively – have been common points for both critics and advocates of such prosecutions. While opponents focus on the "international" character of the prosecutions claiming that this is only an illusion owing to the limitations of jurisdiction and only a mask for the non-international nature of these courts, advocates have tried to develop a more positive critical stance aiming to expand the scope of jurisdictions.

It seems that the winning party of the conflict is the advocates of international criminal prosecutions with the ICC now in operate. The ICC, as has been said earlier, benefits from an unprecedented degree of jurisdiction. Still, what we have begun to experience in connection with the ICC is neither a perfection of "international" criminal prosecutions nor a "domestication" of the international. The prosecutions before the Court do not simply reflect the type of relations which can be defined as "international". This is a growing and evolving type of governance in a global scale that we cannot explain solely through international dynamics or through a plain domestic analogy.

Hegemony naturalizes certain strategies and techniques of governmentality. The question should be why in this particular period, in this particular form and under these particular conditions such hegemony is operative. What is happening in the aftermath of the Cold War that international criminal prosecutions as particular techniques and strategies of global punishments turned out to be achievable political ends as well as legal procedures? It remains hard to find an answer through a traditional Gramscian perspective as interactions between the structure and agents at

the international level are positioned in a different way than the domestic one. Despite certain common features with the liberal domestic legal order, the ICC also represents outstanding contradictions such an order would reveal.

Effects of techniques and strategies of governmentality are not distributed evenly. The current historical bloc, representing a global hegemonic order in neo-Gramscian terms, selects its cases with a particular "threat" interpretation and reasoning. For some, the selective and biased practice of the ICC reflects the current system's non-democratic nature while carrying out so-called democratic ideals in a paradoxical way. The ideal of not letting perpetrators of crimes against humanity, genocide, and war crimes just go by without any prosecution and punishment has been regarded as a reflection of progress of human civilization. This ideal is one of the basic tenets of liberal democracy. Accordingly, the "non-international" character of the evolving international criminal law which also represents non-democratic and non-liberal features reveals that the ICC is not a sign of the domestication of international space by a liberal democratic type of governance. But it may be the case that so-called features frustrating freedom of individuals and preventing emancipation are just much more explicit in comparison to a domestic liberal government. After all, democracy is itself an illusionary governmentality in terms of liberating the individual. That is to say, there are certain parallels between the national and the international though a simplified domestic analogy would be misguiding for any attempt to understand the dynamics of the latter.

While the nature and number of players at the global scale are quite comprehensive as well as diverse, the legal discourse carried out by these players poses homogeneity rather than heterogeneity. The state at the domestic level is not a monolithic entity, but a major site for articulating and mediating contradictions and conflicts between social forces. And now, global governance posits a different stage: a site that is more complex and intricate for social forces in play in comparison to the site of the state. The achievement of historical blocs in western democracies has been to supply a legal ground of compromise through relative autonomy in their legal systems. Likewise, liberal world order introduces its homogenous legal discourse and maintains a compromise through its own relative autonomy while reflecting inequality not despite but through the purported ideal of liberal democracy.

How is it possible for inequality to prevail while the common discourse of international "equality" and "justice" is the widely accepted mantra? The answer lies beneath the relation between indeterminacy and determinacy of law as crucial outlets for Foucault and some CLS writers. Foucault's understanding of law, though being misinterpreted to a large extent for some time, illustrates how micro techniques and strategies gradually permeate into global legal and political institutions. One of the stunning novelties, probably the outstanding one, is that these techniques and strategies are not encompassed by a state-type organization at the international level. Interactions between international institutions, organizations and states do not represent a hierarchical pyramid where the state is positioned at the top. State, now more than ever, has turned into a means instead of an end in itself as one of the actors

of governmentality. States and international institutions are similar spaces of governmentality where micro and macro practices are implemented in connection with a global hegemony. Current global hegemonic structure introduces both conditions of operationality of these techniques and strategies of governmentality as well as conditions of possibility for challenges and counter-acts. Thus, hegemony explains something which governmentality cannot on its own while governmentality depicts the techniques and strategies being colonized in the hegemonic context (Joseph, 2012). Hereafter, it is the purpose of the analysis to initially foreground the diachronic aspects of the international criminal law and the ICC, and then introduce the particularities of the discursive practices with a governmentality perspective. Finally, the attempt to converge Foucault and Gramsci in law will be furthered with a political economy perspective as the last stage of analysis.

CHAPTER 4

TRACING BACK THE ICC

The international Criminal Court, which is beyond any doubt a subject matter of international criminal law, both shapes and implements the law it embodies. The ICC, therefore, carries out a double mission by prosecuting the core crimes defined as "international crimes" and developing the case law for these crimes simultaneously. But, the ICC is part of a broader picture that goes beyond the legal sphere. To read the story in a different way, the first analysis chapter will go back in time looking for the cues in the name of continuities as well as the ruptures for discontinuities in a genealogy-inspired manner.

Reading the discontinuities alongside of continuities does not reflect merely a description, neither an embracement, of a historical production; as Foucault's genealogical approach focuses on the dimensions of power that certainly go beyond "the discourses of various professions and disciplines [and replaces them] with a discourse that emphasizes control, subjugation and domination (Shapiro, 1984: 219).The purpose of genealogy is not to reveal the universality of the concepts but to

demonstrate their scarcity, which is complemented by affirmation in any case and in fact the scarcity of affirmation (Foucault, 1984: 133). For Foucault (1977a: 152):

> The role of genealogy is to record [humanity's] history; the history of morals, ideals, and metaphysical concepts, the concept of liberty or of the ascetic life; as they stand for the emergence of different interpretations, they must be made to appear as events on the stage of historical process.

To follow the scarcity and confirmation of international crimes as an event in historical process, the chapter will first look at how the breach of certain rights has come to be perceived as a threat to society, thus, paving the way for their codification as crimes. The focus, meanwhile, will be the construction of particular subjects and objects that infolds the dimensions of power a genealogy purports to reveal.

4.1. The Triangular Relationship of "Rights-Breaches-Crimes"

One of the ways to see the particularity of the ICC discourse is looking into history and reading how human groups in different periods perceived "rights", "breaches" and "crimes" in different ways. To explore the particular interpretation on international crimes codified within the ICC system, the relationality of rights, breaches, and crimes are carried to the international level with a parallel engagement with the objects and subjects being constructed through such relationality.

4.1.1. "Rights" to Be Protected in Law, "Breaches" to Be Codified as "Crimes"

While debates have concentrated on the distinction between law and morality for most of the 20th century –and even in the first decade of the 21st century – a strange three-fold categorization and ranking regarding "rights" have been widely accepted as *a priori* and natural. The categorization is an important indicator of how we, both as individuals and groups, have come to perceive what constitutes the most important values to be reflected in the form of rights and later criminal codes that are designed to protect these rights. The foremost intention here is to show that these rights, as well as the corresponding categorization, are not *a priori* or natural as they are believed to be. In order to do that, historicity of the related rights and crimes will be underlined with a deeper look at the conditions of possibility which have led to different discourses in time.

Many of the scholars take civil and political rights as representing the first generation of rights; economic, social and cultural rights as the second generation; and finally, solidarity rights such as the rights to peace, development, and a protected environment, as the third generation. There is a follow-up categorization inherent in this three-fold list as to which rights have been codified constituting positive laws and which have yet not been. Again, there is a widespread consensus among the scholars that the first two generations represent *lex lata* meaning "the current law" while the third still remains as *lex feranda* (future law) (Meron, 1986: 2).

The first problem about this categorization arises due to the general inclination regarding the third generation to be codified which gradually takes away the *lex feranda* character and turns it into *lex lata*. The problematic nature of this categorization might be explained with the fact that recent developments both in domestic and international legal systems do challenge the futuristic aspect of this out of date approach. Today, the so-called distinction between *lex lata* and *lex feranda* seems less meaningful as certain rights under the third generation have developed and been codified at least to some extent.

A second yet more significant problem is the interconnectedness between these three generations of rights that has been widely overlooked. But, the criminalization of the first and partially the third generation of crimes cannot be simply because of a pure negligence or inattention of such interconnectedness. The real cause of the current situation should be a particular understanding on what constitutes "peace", "solidarity", or "development". In other words, it is our interpretation of these concepts which reveals or conceals connections between the categories besides the very construction of the categories.

The underlying logic and legitimate cause of law is that its violation would threaten the security of the group. That's why, it is accepted that acts jeopardizing society are and should be prohibited. There is a hypothetical correlation between the danger to the physical and moral well-being of the society and the severity of the rules, that is, the greater the danger is perceived, the more stringent the rules are to curb and punish them (Thurbin, 1998: 3, 4). So, interpretations on what constitutes

"peace", "security", or "danger" to our physical and mental well-being, have repercussions not only on theoretical or scholarly categorizations. Just the contrary, it is such intersubjective interpretations and perceptions that shape positive law of our societies.

It might seem reasonable to assume that certain acts that are currently criminalized under international law have been carried out for as long as human groups began to live as social groups under a certain degree of organized polity. Almost all of the acts that are recognized as international crimes today have been committed by human species though the form or techniques of their commission might have been subject to transformation in time. Still, the criminalization of these acts is a recent phenomenon. There was a time when these acts which are recognized and codified as international crimes were neither counted as crimes nor as unethical or immoral which implies that facts are old while the law is much younger. Besides, international humanitarian law and human rights law are in close interaction despite certain differences. While human rights law basically gives rights to individuals, humanitarian law permits "some" suffering. However, the offences included in international criminal law documents are virtually indistinguishable from major human rights violations (Meron, 2000: 266). On the other hand, it is also evident that these major human rights violations have not been criminalized for such a long period.

Two interrelated premises, that law is not an objective body of rules recognized and applied independent from temporal and spatial contexts; hence the prohibitions

and punishments envisaged by criminal law are associated to a values system, induce a search for a similar pattern at the international level. One of the options one can envisage is that there is an international society which urges for the codification of a certain body of rules under international criminal law, just as it has been the case at domestic societies.[37] An alternative way of thinking is to question the type of relationship between a society and body of law which proposes that the former precedes the latter. It is possible that a particular type of society might be in its evolutionary process while the body of rules and norms are being codified in parallel. Or, it might be that the society is the ensuing one of the rules and norms which it is claimed to be a reflection of.

4.1.2. Construction of Agents and/or Objects

Different practices and different perspectives on what constitutes an international crime do not show the historical relativity of such crimes. The purpose is not to deny the validity of something called as "international crime" either. It is a self-evident reality that there is currently a list of acts defined as international crimes, which a recently established international criminal court, the ICC, is charged for their prosecution and punishment. But neither the crimes nor the social entity called as the "international community" which stands to be concerned about these crimes can be

[37] For an example of establishing this type of a relationship between international society and international law, in particular international criminal law, see Margueritte (2011).

said to be constant and fixed objects. Moreover, the conventional belief that crimes are reflections of acts in legal texts is a misleading postulate giving a deficient thus false impression that the former follows the latter. It has widely been accepted that human societies first experience a new phenomenon and then reacts to it carrying the act to the criminal code system as a crime. That is to say, plane hijacking necessitated new rules in aviation or scientific developments in chemistry are followed by specific regulations in humanitarian law texts.

Yet, this is not the right position to start analysing international criminal law and the ICC. As Veyne (1997: 155) argues,

> [o]bjects seem to determine our behaviour, but our practice determines its own objects in the first place. Let us start, then, with that practice itself, so that the object which it applies is what it is only in relation to that practice.[…] The relation determines the object, and only what is determined exists.

So, it is humanitarian law and convergence points of human rights with humanitarian law, and finally the "idea" that human groups should prosecute and punish certain breaches of this law that we have to approach as a practice. This is a practice which, instead of being a universal or fixed reality, evolved and transformed in time. And it is this evolving practice which gave rise to first *ad hoc* criminal tribunals, and then, a permanent international criminal tribunal, the ICC.

What should be noticed is that only certain acts are codified as breaches of law, which should take the attention of the analyst to practices before objects. The crux of the matter is whether it is an unprecedented event – e.g. a terrorist attack in

the form of plane hijacking – giving rise to codification of the crime of terrorism through plane hijacking, or it is a "particular codification" giving rise to a "particular crime" – i.e. terrorism – and a "particular criminal" – i.e. terrorist. In the latter case, definitions on a specific act as "crime" and a specific personality as "criminal" are not natural consequences of the plane hijacking. In other words, objects determining codifications and legal proceedings are not the crime of plane hijacking and a terrorist committing the crime. Objects, which in this case are the crime and the criminal, follow our practices as it is our practices determining which acts construct a crime and who a criminal is.

Another significant point is that the "event" in this type of a genealogical analysis is not the acts such as plane hijacking or use of chemical weapons at wartime. The event is the emergence and transformation of practices (Walters, 2012: 18), which in this case is the birth of international criminal prosecutions. International humanitarian law texts are followed by international criminal codes that construct the event as prosecutions. So, it is not the crime and criminal as objects precipitating the prosecutions but a particular relation with the objects giving the latter a certain type of identity. Thus, what is in sight is "the map", not the naked "territory". Litowitz (2000: 540), taking inspiration from Denis Wood's study on maps, carries the same understanding to law:

> Laws perform a similar sleight-of-hand, pretending merely to regulate a pre-existing set of relations, when in fact the law is what creates such relations in the first instance. For example, property law contains rules of descent for the passage of an estate, but the very notion of an "estate" is a legal fiction derived from property law.

Law's mapping is in operation in different spaces and scales with so many interactions and intersections. Thus, it is hard to speak of law and legality, but rather interlaw and interlegality that can engender different legal objects upon the same social objects (Santos, 1987: 287-88). Amongst the constructed legal objects are the ones taking the responsibility of prosecuting these crimes and criminals – i.e. international community, prosecutors, legal advisors, and any related agents.

4.2. From Human Rights and Humanitarian Law towards International Prosecutions

It is possible to trace initiatives for limiting warfare, whether they failed or were successful or even trials that appear to be similar to the image of war crimes trials of the 20th century, back to antiquity, ancient Greece and ancient India (Cryer, 2005: 11-13). The common denominator of these very early examples, which still remain quite difficult to regard as an early inspiration for international criminal law and international prosecutions, is the fact that they were somehow linked to a binding belief or moral system. The same is the case in the centuries during and after the Middle Ages, the binding resource of allegiance being natural reason, volitional acts or independent human will. Yet, the main purpose of this section is to exemplify the ruptures rather than claiming and exposing a so-called linear and progressive process

of international criminal law that finds its roots in human rights and humanitarian law.

4.2.1. Initial Steps

Starting from the 16th century, a shift in the legal discourse begins to spread amongst contemporary thinkers in Europe that introduces and develops piecemeal a distinct entity defined as "international law". What has mostly been forgotten or disregarded is that there was not a clear-cut distinction between the two legal systems of domestic and international law before. This is mainly due to the latter's normalization and universalization process which makes one think that international law has always been out there rather than being constructed at a given time under given circumstances. Yet, before defining a separate and distinct body of norms and rules called as international law, the system was monistic in that it was almost impossible to think of diverse sanctions for states to be applied in cases of non-compliance to certain rules (Koh, 1997: 2605).

Despite differences between prominent legal philosophers and theologists of the day, thinking on a separate body of rules and norms as "international law" paved the way for a new type of order between political entities that would later on be identified with the era taking start with the Peace of Westphalia of 1648.[38] Old

monistic legal order has been replaced by a dualistic system where relations between units were to be regulated according to a new body of rules. The power shift from larger to smaller units has been lost behind dazzling ideas of codifying law in war (*jus in bello*) and law on the use of force (*jus ad bellum*), or pompous words such as "law of the civilized nations". What had already been embraced to some extent in the monistic system became more obvious and concrete when the system cracked into multiple units as modern international relations have developed.

4.2.2. From Prohibitions to Crimes

As a separate body of rules and norms has begun to be categorized under a new title of "international law", borders between what ought to be done and what ought not to be done have also begun to be drawn. Still, there was a long way for prohibitions to be codified as crimes and for the violators to become subject to prosecutions before international criminal tribunals.

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[38] Vitoria, Suarez and Gentili of 16th century, Grotius and Pufendorf of 17th century, Vattel of 18th century, are all significant legal theoreticians who are now believed to be founders of modern international law. The idea of an international community governed by international law can be seen in the writings of Vitoria, Suarez and Gentili while the latter is claimed to be one of the fathers of a secular international law doctrine. Grotius, Pufendorf and Vattel, highly influenced by Gentili, developed a more or less positive law doctrine in the following centuries. The traces of a broader community bound by norms and ideals of Christianity are open to debate for each of these writers. But it is certain that their ideas marked the prominent discourse of a denial of Emperors' claim to exercise jurisdiction over princes while the latter gained power *vis a vis* the former in accordance with the new Westphalian order. For an introduction for the parallel between these international law theoreticians and the Westphalian order, see Gross (1948).

In this section, three of these prohibitions, two of which later turned into criminal acts under international criminal law, are to be exemplified in order to show that, first, not each category of current international crimes had always been inhibited let alone being prosecuted, and second, not all of them have become international crimes. Slavery and slave trade, which subsequent to prohibitions have been codified as international crimes, are two outstanding examples, because it sometimes seems easier to forget that we, humans, not only did not condemn or take sides against this absolutely discriminative policy in the past but also approved of and took part in its practicing. If reminiscence has the upper hand over amnesia, it is again more convenient and comforting to identify with people who had fought against slavery. Piracy is selected as the third example of an internationally prohibited act not only because it has often accompanied slavery and in some instances slave trade, but also because of the equivocal character of the practice having the potential of being labelled as legal or illicit depending on the identity of the perpetrator. Piracy turns into a legitimate act under the term "privateering", which is still the very same act but conducted by ships licensed by state authorities. The line between piracy and privateering is a significant one especially for those who holds on the belief that criminal law frames a criminal act not according to its perpetrator but according to its elements.

Aside from the doublespeak inherent in connection to piracy and privateering, and the disturbing fact that not any of these examples are codified as international crimes later on, these acts might be categorized as representing the first generation of

crimes. Why they are not altogether covered under the statutes or charters of international criminal tribunals is a matter going to be discussed hereinafter.

4.2.2.1. Piracy and Slavery as First Generation of Crimes

Piracy and slavery were common practices since antiquity and in many instances they were taking place concomitantly in the form of enslavement through pirating. Besides, many other acts that are recognized as constituting international crimes today such as persecution, extermination, torture, deportation or forcible transfer of population, were practiced in tandem with enslavement and piracy. Piracy has always been a problem for states and some measures were taken against this irremissible act.[39] But the widespread efforts to make provisions against piracy had taken start in the 18th century. The first half of the 18th century witnessed the first intense wave of pirating, especially between 1700 and 1730s, when an overwhelming number of pirates arrived to the Caribbean after the War of Spanish Succession. Caribbean pirating was directly related to the broader competition on trade and colonization among the rival European powers including the empires of Britain, Spain, Netherlands, Portugal and France. The second intense period of pirating after the 1730s began around 1810s and lasted till 1830s. Pirating during this period

[39] Even Julius Caesar was kidnapped and briefly detained by Cilician pirates in 75 BC which at the end triggered the Senate to take initiatives to deal with the problem of piracy in 67 BC.

concentrated on American waters when pirates turned their eyes on the northern America coasts from the Caribbean Sea.

The reaction from the newly established United States came straightforward with the Congress act dated 1790. This was the first comprehensive anti-piracy code banning murder and robbery at sea and introducing death penalty for the crime. The remarkable point about codification on pirating was the changing attitude of United States in a relatively very short period of time when the Mexican War of 1846-48 came. The code of 1818 which was re-amended a year later was extended to cover not only US citizens but also pirates from all nationalities. In 1847, when the Mexican War was still on fire, the Piracy Act introduced the last major change in US law on piracy through recognizing that the definition of pirate was not confined to an independent criminal and included sailors acting on commissions from foreign nations "when and if their commissions violated US treaties with their government". Another significant change in the first half of the 19th century came from the other side of the Atlantic when focus turned on slavery with the British initiative including the slave trade under the act of piracy in 1827.[40]

[40]For a detailed overview on the history of maritime piracy and its reflections on specific national legal domains as well as international law, see Heller-Roazen (2009), Kraska (2011), and Latimer (2009).

4.2.2.1.1. Piracy or Privateering? An Intricate Matter

If piracy is the act or acts accepted to be illicit initially at national level and then at international level, privateering is its mirror image as the legalized form of the very same act(s), this time commissioned under the authorization of a government or monarch. In the case of privateering pirates supposedly act in accordance with a so called "letter of marque" from a legitimate authority to capture merchant ships belonging to an enemy.[41] Privateering constituted an important part of war at seas particularly during 17th and 18th centuries till its abolition – at least by the prominent European powers of the time – under The Paris Declaration Respecting Maritime Law dating 16 April 1856. The 1856 Declaration, while remaining far from constituting a new category of international criminals as "privateers", is the first international initiative to codify rules which were to be applicable in times of war. It has to be noted that the underlying concern of figuring out such a regulation was to maintain the safety and security of international commerce which later was clarified under The Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI).[42]

Besides being an exemplary initiative for future international regulations regarding rules of war, codifying privateering signifies a further implication of who

[41]For a comparative narration between piracy and privateering, see Bowling (2005) and Lunsford (2005).

[42] The 1907 Convention consists of thirteen treaties of which twelve were ratified and entered into force, and one declaration. The Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities is the one numbered VI.

is authorized to do what under which circumstances. Privateering stands probably as the first and foremost example amongst a group of practices which is prohibited when committed without the permission of a legitimate and internationally recognized authority while accepted as legal under permission. It might be taken as a predecessor of acts that are to be regulated and legalized under certain conditions while being criminalized if these conditions are not met.

4.2.2.1.2. Prohibition of Slavery and Slave Trade

Regulating and abolishing slavery happened to be much more challenging than piracy. Anti-slavery sentiments were widespread by the late 18th century and slavery was abolished in many states such as Revolutionary France or numerous northern states of the United States. Still, both slavery and slave trade was practiced till being abolished gradually in the 19th century. First, Britain banned the importation of slaves from its colonies in 1807. The United States followed Britain a year later. Banning slave trade did not bring an end to slavery as an institution, and more than two decades had to pass till slavery was abolished in the British Empire by the Slavery Abolition Act of 1833. Though slavery was abolished with the French Revolution in 1794, it was restored by Napoleon in the French colonies, and the comprehensive abolishment was recognized in 1848. The abolishment of slavery took place in the United States in 1865 with the 13th Amendment to the US Constitution.

The first international document on the prohibition of slavery and slave trade is The General Act of the Brussels Conference of 1890 where the state signatories declared their intention to establish international mechanisms to suppress the Atlantic slave trade and slavery in all of its forms. In the Convention of *Saint-Germain-en-Laye* of 1919, the same intention was reiterated. In the League of Nations period, these two pioneering documents were amended taking the form of the Convention to Suppress the Slave Trade and Slavery in 1926. The 1926 Convention was also amended in 1953 by the Protocol Amending the Slavery Convention when the United Nations took over the League of Nations after the Second World War. In 1957, the Economic and Social Council adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices to Slavery. In addition to these international documents solely focusing on the problem of slavery, the prohibition took its place also in basic human rights documents such as the Universal Declaration of Human Rights (UDHR) with Article 4, the International Covenant on Civil and Political Rights (ICCPR) with Article 8, the European Convention for the Protection of Human Rights and Fundamental Freedoms with Article 4, the American Convention on Human Rights with Article 6, and the African Charter on Human and Peoples' Rights with Article 5. Besides lacking clear definitions on what constitutes slavery and slave trade in most of these basic international documents, there is another problem regarding these regulations that they principally target chattel slavery instead of an inclusive approach which would cover more implicit and modern ways of enslavement such as forced labour, forced prostitution, or child labour (Rassam, 1999).

The problem seems to be resolved at least to some extent under the Rome Statute where the "crime against humanity of enslavement" is taken not only as chattel slavery in the form of "purchasing, selling, lending, or bartering person or persons, or by imposing on them a similar deprivation of liberty" (Elements of Crimes, Article 7(1)(c)). It is agreed on that deprivation of liberty can take the form of "exacting forced labour or otherwise reducing a person to a servile status" (Elements of Crimes, Article 7(1)(c), footnote 11) or"trafficking in persons, in particular women and children" (Rome Statute, Article 7(1)(c)). In Article 7(1)(g)-2, another crime related to slavery, "crime against humanity of sexual slavery", is also codified.[43] But another problem regarding these crimes is that they are connected to the element that is an "attack directed against a civilian population" (Article 7 (1) of the Rome Statute; Article 7 (1) of Elements of Crimes). Sexual slavery is also regulated as a war crime in the Rome Statute (Article 8 (2) (b) (xxii) and Article 8 (2) (e) (vi)) in case it is committed as part of an international or non-international conflict.

4.2.2.2. Constructing Atrocity Crimes as International Crimes

The codifications on slavery, slave trade and piracy might be explained as a reaction to the rise of the problem which particularly intensified after the 18th century. This kind of an approach brings us back to the conventional reasoning for norm-

[43] The same wording in footnote 11 for the "crime against humanity of enslavement" which extends the elements of the crime to cover forced labour or human trafficking is repeated for the "crimes against humanity of sexual slavery" in footnote 18 in the Elements of Crimes.

construction, which is that norms and rules follow certain events and objects that cause problems for societies. But, as mentioned above, it is in fact our practices and changing discourses constructing objects such as a particular crime and criminal category. Throughout all those centuries that colonial powers enslaved and exploited newly discovered lands and peoples of those lands, the human mind was not conceiving of his or her acts as slavery or piracy. In order to accommodate to the new situations, human groups show a tendency to perceive what has been experienced in the past, what is happening at the moment and what will be experienced in the future as reflecting a progressive line.

This is a perfect strategy which eases the mind to get rid of the guilty feelings from the past and rationalize current practices and thoughts. In accordance with this basic belief in progress, abolishment of slavery and similar ferocious acts belong to a dark past which, instead of constituting a ground for shame or dishonour, demonstrates how our species gets through extremely difficult hurdles towards a promising future. For the case of slavery, slave trade or piracy, it is right that the Enlightenment ideology and its adherent thinkers have contributed much to the fight for the abolishment and codification process. But, the real question that has to be asked should be why the process had to wait to take a start till the 19th century and why not before.

Taking into consideration both materialistic and ideational reasoning, the most succinct answer would be to link the lack of any substantial challenge against conventional practices to the hegemonic ideologies of the day. Slavery and slave

trade had become incommensurable with ideologies and other conditions of the 19th century that meaningful and efficient resistance flourished in response. It is a new discursive power which permeates into and occupies current discourses in time. It is this new discourse providing the necessary ground for looking from a different perspective retrospectively, condemning and calling for change. When there was not a meaningful resistance of the sort against the colonizing power, there was no urge to think against the acts what we now define as inhuman, unacceptable or incomprehensible.

The type of resistance does not have to be conducted through military means. As a matter of fact, neither slave trade and slavery nor piracy had come to an end because of a counter balancing power coming from the enslaved or captured. There were different ways of resistance during colonialism and will always be many alternative ways of resistance against power in the future. There is, for example, the potential of resistance against newly constructed categories and objects through the same weapons. If codifying certain acts as outlaw and criminal is a way of designing reaction through a novel discourse, the so-called outlaws and criminal ones may also carry the potential and power to show resistance to this newly emerged order of things. For the case of piracy, it is inspirational to see how the locals did show their reaction when the constantly rising and barbarously widening competition on colonization has carried the problem to other corners of the globe. Former or actual rivals were becoming allies when confronted by opposition. But it was striking to see that pirating was turning into one of the strategies of resistance to foreign occupation.

During the 1840s and 1850s, the US Navy allied with the Royal Navy in a common campaign against Chinese pirates. The fight between conventional navy forces and small Asian junks resulted with the destruction of the latter in large numbers in the Second Opium War and the Taiping Rebellion.

Nevertheless, the real resistance comes through discourses which would intrinsically have reflections in the legal field as well as carrying political, social or cultural aspects. What we call as Enlightenment is a set of challenging discourses against an antecedent set that developed and permeated through societies in an age introducing the right conditions. The legal reflections of the Enlightenment discourse happened to be prohibitions on slavery, slave trade and piracy at the international level as well as national level while the criminalization had to wait for the international tribunals of the 20th century.

4.2.2.2.1. Preliminary Phase before International Tribunals of the 20th Century

It has never been the protection of individual human beings at issue under international law as long as the relationship between the individual and its state has been regarded as something impenetrable for a long time. And when the protection of human groups appeared as an issue, it has not been any group but just certain groups. The Peace of Westphalia of 1648 provided certain guarantees for religious

minorities. The Treaty of Peace between Russia and the Ottoman Empire signed at Adrianople in 1829 issued protection of Christian minorities within the borders of the latter. Other examples are the Treaty of Peace and Friendship between France and Great Britain signed at Utrecht in 1713, or the Definitive Treaty of Peace between France, Great Britain and Spain, signed at Paris in 1763 that envisaged the protection of francophone Roman Catholics within British North America (Schabas, 2009: 18).

Besides the initiatives for protecting certain groups living under different rules and regimes, international human rights law have some footprints also in early humanitarian law documents. The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, adopted in 1864, might be said to be an outcome of bloodshed being witnessed during the Crimean War of 1853-1856, and the Italian Campaign of 1859 including the Battle of Magenta and the Battle of Solferino that shocked so many after such a long-lasting peace period in Europe. The Hague Conventions of 1899 and 1907 followed the First Geneva Convention of 1864. But before the Hague Conventions, two Russian initiatives on regulating warfare, namely the Declaration of St. Petersburg of 1868 and the Brussels Declaration Concerning the Laws and Customs of Warfare of 1874, stimulated the forthcoming conventions despite the narrow scope of the first and the failure in terms of ratification of the latter.[44]

[44] The declaration of St. Petersburg of 1868 covered the prohibition of a certain type of bullet, namely musketball, while the Brussels Declaration of 1874, which was an initiative of Czar Alexandre II of Russia, aimed to cover a wider scope of regulations. See, *Conventions and Declarations between the powers concerning war, arbitration and neutrality*, 1915.

The Hague Convention of 1899[45] consisted of three main treaties and three additional declarations which were designed to regulate disarmament and the laws of war.[46] Between The Hague Conventions of 1899 and 1907 comes The Second Geneva Convention of 1906 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. The Hague Convention of 1907[47] was not only expanding the scope and depth of its predecessor by modifications or new additions but also giving more focus on naval warfare. The 1907 Convention consisted of thirteen treaties, and one additional declaration.[48] A

[45] The treaties, declarations and final act of the First Hague Convention of 1899 entered into force on 4 September 1900.

[46] The three main treaties of the Hague Convention of 1899 are (preceding in order): Convention for the Pacific Settlement of International Disputes (I), Convention with respect to the Laws and Customs of War on Land (II), and finally, Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (III). Three additional declarations to the Hague Convention of 1899 are: Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods, Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases, and Declaration concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations.

[47] The treaties, declarations and final act of the Second Conference constituting the Hague Convention of 1907 entered into force on 26 January 1910.

[48] The thirteen treaties of the Hague Convention 1907 are (preceding in order): Convention for the Pacific Settlement of International Disputes (I), Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts (II), Convention relative to the Opening of Hostilities (III), Convention respecting the Laws and Customs of War on Land (IV), Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land (V), Convention relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities (VI), Convention relative to the Conversion of Merchant Ships into War-ships (VII), Convention relative to the Laying of Automatic Submarine Contact Mines (VIII), Convention concerning Bombardment by Naval Forces in Time of War (IX), Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (of 6 July 1906) (X), Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (XI), Convention relative to the Establishment of an International Prize Court (XII), Convention concerning the Rights and Duties of Neutral Powers in Naval War (XIII). The only Convention which has never come into force is the Convention relative to the Establishment of an International Prize Court (XII). The one declaration added to The Hague Convention of 1907 is Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.

third conference was planned to take place at The Hague in 1914 and later rescheduled for 1915, but the plan could not be realized due to the First World War.

Unfortunately, many of the state parties to the above treaties, declarations and final acts did not fulfil the responsibility to follow the rules put forward in these documents during the First World War. In the post-war period, much emphasize was put on human rights law with a focus on the need for special protection of national minorities. The idea of establishing an international criminal court came to the agenda but it was still far away from being realized though there was an attempt of establishing a "High Tribunal" to prosecute "enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity" (McCormack, 1997: 46, 47; Schabas, 2009: 22). The attempt failed such as the article 227 of the Treaty of Versailles stipulating the trial of Kaiser Wilhelm II was not fulfilled, and only a handful of lower ranked German soldiers were tried at Leipzig, because Germany opposed to prosecute its elite cadres reasoning that this would imperil the government's existence. A very parallel approach was agreed on regarding the Treaty of Sevres, but this treaty was never ratified and not put into force (McCormack, 1997: 48; Schabas, 2009: 22-26).

The failures of the First World War experience might be attributed to the still prevailing approach on state sovereignty of the day. A noticeable effort for a compromise on the articles of the Treaty of Versailles to deal with prosecuting violations of laws and customs of war is indeed interesting especially when the extremely heavy and rigid clauses of the Treaty are taken into account (Schabas,

2009: 23, 24). The situation is even more complicating when the famous "German guilt" question, and an earlier suggestion that massacres of ethnic minorities within a state's borders would give rise to both state and individual responsibility (Schabas 2009: 19) are considered. These are all indicators that state sovereignty even when atrocities come into question is still the prevailing rule while corporate liability cannot be completely put aside to be replaced by the principle of individual responsibility.

Nevertheless, with the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed in 1925 and entered into force in 1928, and The Third Geneva Convention relative to the Treatment of Prisoners of War, signed in 1929 and entered into force in 1931, seemed to resume the process of codifying humanitarian law which halted because of the outbreak of First World War.

4.2.2.2.2. International Crimes

The developments in international human rights and humanitarian law in perspective, it would not be surprising that prohibition of certain weapons such as chemical weapons was followed by criminalization of the use of these weapons. As noted before, not all of the first generation crimes are included in the statutes or charters of international criminal tribunals. Slavery and acts that would amount to slave trade are

enumerated under crimes against humanity and war crimes categories leaving aside piracy, drug-trafficking, terrorism or the use of certain weapons out of international crimes categories. There is not just one explanation for this outcome[49], yet the most important one is the fact that these crimes are not interpreted and perceived as "atrocity crimes", which characterizes a totally different generation of crimes in the 20th century.

Atrocity crimes can be differentiated from the earlier generation of crimes through a contextual element which also determines the international characteristic of this group. The contextual element for war crimes and the crime of aggression seems to be easier to discern at least in principle as long as there is an international or non-international type of conflict. Though the crime of genocide and crimes against humanity can be committed either in peace time or in war time, a required element for crimes against humanity is that there has to be a widespread or systematic attack against a civilian population. The definition of genocide stresses that the enumerated genocidal acts should be committed with the intent to destroy in whole or in part one of the protected groups. So, even in the crime of genocide, which might seem to be the only international crime having no direct connection to the requirement of an international or non-international conflict, there should be a distressful situation of destroying a human group. All these elements indicate an extraordinary context which makes atrocity crimes connected with a broader social unrest.

[49] The definition problem on terrorism might be claimed to be the primary reason of its exclusion from international crimes categories, but there has been substantial controversy also for the definition of the crime of aggression which the drafters seem to work on harder than terrorism cause.

4.2.3. A Real Turning Point: Nuremberg and Tokyo Tribunals

The relatively short period of time starting from the late 19th century and covering the first decades of the 20th century appears to be somehow very productive introducing quite a number of treaties, declarations and final acts which constituted the law to be applied during warfare when the Second World War started. The effectiveness of the rules being codified prior to the First World War and the Second World War is extremely dubious as many of the state parties to these treaties, declarations and final acts, continued to breach certain rules they had approved early on. Still, the process continued with The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which was signed during a series of conferences which reaffirmed, expanded and updated the three former Geneva Conventions in 1949. Thus, the term "Geneva Conventions" today refer to the whole set of these four Conventions which are also called as the Geneva Conventions of 1949.

Before the final form was given to the Geneva Conventions of 1949, criminalization and prosecution of individuals in relation to certain acts appeared to become a reality right after the end of the Second World War. The idea was already officially endorsed and declared by the governments of the Allies represented by Roosevelt, Stalin and Churchill in the Moscow Conference of 1943. The Statement on Atrocities, as part of the Moscow Declaration issued at the end of the Conference, is a turning point in the history of international criminal law as it gives a clear

message about the prospective prosecutions as well as the ones who hold a legitimate right and authority to carry out this crucial mission. Some of the significant notes from the Statement are:

> The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled. […] Accordingly, the aforesaid three Allied powers, speaking in the interest of the thirty-two United Nations[50], hereby solemnly declare and give full warning of their declaration as follows:
>
> At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. […]
>
> Thus, Germans who take part in [the aforementioned crimes] will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.
>
> Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.
>
> The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies. (Joint Four-Nation Declaration)

Though the declared goals defined as prosecuting the accused ones in the scene of the crimes and their judgment carried out by the peoples whom they have outraged

[50] Though the United Nations officially came into existence on 24 October 1945, the use of the term dated back to 1942 when 26 governments signed the Atlantic Charter on the 1st of January of the same year.

were not achieved, the Statement was still introducing a ground-breaking stage in terms of international criminal law. It has been widely recognized that the Nuremberg Trials represent a great achievement not only for the victors, which is one of the sources of criticism about the Tribunal, but also for the whole humanity through disseminating a very strong message that those who are at the highest level of state power cannot have any immunity for the crimes they committed.

The 1943 Statement should not be overlooked due to the achievements or failures of the Nuremberg Trials. It is this Statement which shows an unforeseen determination and decisiveness to prosecute and punish individuals responsible for certain acts while the war was still at its highest stage. There is no question about who holds or represents the authority regarding the issue on atrocities committed by the Hitlerite forces. While there are sentences underlining that the prosecutions would take place at the scene of the crimes and be carried out by the peoples who had been victimized, it is going to be the "governments of the Allies" to take the crucial decision "to punish". There is doublespeak in this Statement: the three Allies claim to act on behalf of the United Nations now represented by thirty-two states, and they emphasize the role of the outraged ones in the judiciary process; on the other hand the 'real' decision makers do not seem to feel any genuine need to hide behind the scene and prepare the setting for a *mise-en-scene* to make it look like it would be the victim groups and states to prosecute and punish. This is a point considerably important to understand international criminal law and international prosecutions. This is what the realist thinking has postulated for so long in a

pertinaciously manner that the powerful one(s) take(s) the decisions and formulate(s) the policies. Furthermore, it is not only realist thinking giving the lion's share to the actors who, in international relations, are presumed to be mainly the states. Through turning inside out the pessimistic and national-interest based realist approach which maintains that international legal institutions are simply what powerful states found and manipulate in order to practice their political goals, most liberal thinking still holds on the actors in the system with a future hope of development and improvement for all. But the story might be totally a different one.

In 1943, when the Moscow Declaration was signed, the Allies did not seem to have any concern to conceal their direct and influential role in the prosecutions as there is no sign that they did have a concern of that sort. Nuremberg and Tokyo Tribunals was never a plot against the Germans or the Japanese, nor were they symptoms of arrogance or revengefulness that the victorious Allies might have had at the end of the war. The Tribunals represented a rightful and legitimate cause the victors believed they were holding for all time. It was a duty, or the final stage ought to be done in the fight against evil instead of being part of a sinister plan of *realpolitik*.

The famous von Hagenbach trial[51] set aside, Nuremberg and Tokyo Tribunals are the first international criminal prosecutions in modern history. As already

[51] Schwarzenberger (1968: 310) considers the trial of Peter von Hagenbach as the forerunner of international criminal prosecutions. Hagenbach was tried in 1474 for atrocities committed during the occupation of the Burgundian city of Breisach. The panel prosecuting von Hagenbach consisted of twenty-eight judges appointed by allied towns who had fought von Hagenbach and Charles the Bold,

mentioned, the decision to prosecute those who were responsible for commission of international crimes was agreed on before the war came to an end. The London Agreement which provided for the creation of an International Military Tribunal was signed on 8August 1945 by the four allied powers. The Tribunal had jurisdiction on three categories of crimes: crimes against humanity, crimes against peace, and war crimes[52]. On 20 October 1945, 24 Nazi leaders were served with indictments and their trial which is known as the "Trial of the Major War Criminals" commenced the following month. 19 defendants were found guilty a year later and 12 of them were sentenced to death (Schabas, 2011: 6). A modified version of the Charter of the International Military Tribunal, known as Control Council Law No. 10, provided the legal ground for a series of trials both before military tribunals that were run by the occupying regime and German courts. The International Military Tribunal for the Far East, mostly known as the Tokyo Tribunal, charged Japanese war criminals under similar provisions to those used at Nuremberg (Schabas, 2011: 7). But the legacy of

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Duke of Burgundy who appointed von Hagenbach as governor of Breisach. McCormack (1997: 37, 38) is chary of the international character of the trial and withholds from regarding von Hagenbach trial as a precedent case for international prosecutions of the 20th century.

[52] It is widely recognized that The Lieber Code, prepared by Francis Lieber, and promulgated by President Lincoln on 24 April 1863 to be followed by the Government of Armies of the United States in the field, represents the first codification of war crimes albeit at the national level. The scope of the Code to be followed during the American Civil War only by the forces of the United States should not reduce the pioneering role of the document as it is also believed to correspond to the existing laws and customs of war at the time. Though the category of war crimes can be said to be developed depending on The Hague and Geneva Conventions, one has to bear in mind the early codification initiatives of the 19th century which have stimulated the main international documents on war crimes. In an interesting manner, against the background of internationally codified documents, one can still find several references to the Lieber Code, which is after all a domestic document, in some of the recent international prosecutions. (Prosecutor v. Furundzija, IT-95-17/1-T, Judgment, para. 137.)

the Tokyo Tribunal had paled beside the Nuremberg Trials partly due to the prevalent legal deficits of the latter.[53]

The post-Second World War Tribunals were both the latest stage international criminal law has reached in 1945 after an intense process of an emergent legal discourse in the 19th century and early 20th century, and the initial step that heralded the start of a new era of international prosecutions.

4.2.4. Post-cold War Tribunals: International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)

It is very often stated that the process of development in international criminal law in terms of case law came to a full stop with the Cold War. During this stagnant era, only a few examples of case law directed to individual criminal responsibility for mass atrocities committed during Second World War can be said to have some prospective contributions as reflections of the Nuremberg and Tokyo legacy. The primary examples of such cases are the judgement of Adolf Eichmann in Israel, Klaus Barbie in France, and Imre Finta in Canada. The crucial point of these prosecutions is the widespread conviction agreed on by many who were involved in

[53] For an overview of the Tokyo Trial from the critical perspective of Justice Pal who is renowned for his dissenting opinion for judgment at the Tokyo Trial, see Kopelman (1990).

these prosecutions that the process was legitimate and legal through the principle of universality and by implication of customary law even though the cases were held before domestic courts.[54]

The ostensible reason for the first major initiative of establishing an international criminal tribunal since Nuremberg and Tokyo was the atrocities in the territory of former Yugoslavia which the world began to learn about in the summer of 1992. The International Criminal Tribunal for former Yugoslavia (ICTY)[55], besides being the first international criminal tribunal since Nuremberg and Tokyo, is also the first international criminal tribunal established by the Security Council in accordance with Chapter VII of the UN Charter in May 1993. There are four categories of crimes the ICTY has jurisdiction over: grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws and customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). The tribunal can only prosecute individual persons and not organizations, political parties, army units, administrative entities, states, or other legal subjects. Both the territorial jurisdiction and temporal jurisdiction of the ICTY are limited as to the territory of the former Socialist Federal Republic of Yugoslavia beginning on 1 January 1992. In Article 9 of the Statute, it is said that the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for the crimes enumerated committed in the territory of former Yugoslavia since 1 January 1992. But the following Article 10 makes it

[54] For further information on these trials, see Powderly (2011).

[55] The full title of the Tribunal is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991".

clear that it is in fact the ICTY having a higher authority over the national courts. In accordance with the principle of *non bis in idem*, no person shall be tried before a national court for the acts he or she has already been tried by the ICTY while the ICTY holds the right to try a person who has already been tried before a national court for the same acts when certain criteria are not met by the national court in question.

On 8 November 1994, just 18 months after the establishment of the ICTY, the UNSC established the International Criminal Tribunal for Rwanda (ICTR)[56], again by a Security Council decision in accordance with Chapter VII of the UN Charter. The three categories of crimes the ICTR has jurisdiction over are: genocide (Article 2), crimes against humanity (Article 3), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4). The only reason for the lack of a separate article for war crimes in the Statute is the obvious fact that the conflict in Rwanda was an internal conflict. Following the ICTY, the ICTR also prosecutes only natural persons. The territorial jurisdiction of the Tribunal is limited to the territory of Rwanda and neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. Again, the temporal jurisdiction is limited, but this time even in more exact terms than the ICTY, that the Tribunal shall prosecute crimes committed between 1 January 1994 and 31

[56]The full title of the Tribunal is "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994".

December 1994. Regarding the principle of concurrent jurisdiction and *non bis in idem*, the ICTR Statute uses the same language with the ICTY that shows both international tribunals hold a higher position in relation to national courts.

The language used to provide general information about the Tribunals on the official web pages of these institutions supports the unequal relationship between the Tribunals and national authorities. The ICTY is described as a means of conflict resolution and post-conflict development by the Tribunal itself. The linkage between justice and peace replaces the former discourse which has counter-positioned them previously:

> The Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible. (The International Criminal Tribunal for Former Yugoslavia, "The Tribunal irreversibly changed the landscape of international humanitarian law")

It is clear that the ICTY has a self-perception of having accomplished an active and efficient role in conflict resolution and post-conflict development, and this is not confined to the conflict that had taken place in former Yugoslavia. The implication that the Tribunal had played a leading role laying the foundations for the latest norm on conflict resolution and post-conflict development as well as the institution's "success" in achieving efficient and transparent international justice show that the ICTY has an extremely self-assured image and regards itself not only as a contributor

to the peace and development process of a country but as a crucial agent. The overall identity of the Tribunal is represented as a role model.

In the same text, the ICTY continues to support this image, but this time turns its face to the communities experiencing the mass atrocities in particular.

> The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied. […]
>
> While operating at full capacity, the Tribunal is working towards the completion of its mandate. The ICTY aims to achieve this by concentrating on the prosecution and trial of the most senior leaders, while referring a certain number of cases involving intermediate and lower-ranking accused to national courts in the former Yugoslavia. This plan, commonly referred to as the Tribunal's 'completion strategy', foresees the Tribunal assisting in strengthening the capacity of national courts in the region to handle war crimes cases. (The International Criminal Tribunal for Former Yugoslavia, "The Tribunal irreversibly changed the landscape of international humanitarian law")

The kind of contribution the Tribunal mentions does not inspire a relationship between equals. The impression is that without an international tribunal like the ICTY there would be a potential left for communities to deny what they had experienced. It means national legal or related systems always possess such a probability while international institutions and organization do not. Just the contrary, international institutions and organizations are the liberators and insurance mechanisms to prevent such probabilities. The saviour role of the ICTY is not limited to these sublime aims. The Tribunal, through its "completion strategy", acts as a supervisor and trainer by referring lower-ranking accused to national courts in the former Yugoslavia. It is clear the ICTY opines that the national courts in the

former Yugoslavia lack the required capacity to prosecute the most senior leaders. The incompetence of African countries also requires the help and assistance of an international institution to fill the gap domestic institutions fall short of. In the legal field this international institution is the ICTR which delivers the lessons the African countries must learn and change their faulty cultural environment.

> NEVER AGAIN. African countries must absorb the lessons of the Rwanda genocide in order to avoid a repetition of the ultimate crime on the continent. Weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships that will do anything to cling to power. (The International Criminal Tribunal for Rwanda, **"**Relevance for Peace and Justice")

What is also interesting in the above paragraph is the use of the famous Holocaust quote "never again" in relation to the Rwandan genocide, but this time in a manner pointing out the weakness of the African countries' institutional capacity and accountability culture. In contrast to the straightforward and active use of the "never again" discourse by the Jewish community, which was the direct victims of the Holocaust, it happens to be an outsider to teach the lesson to the weak African communities. In the below paragraphs, the message is mainly to the guilty leaders and warlords as well as some of the countries in the continent who may allow fugitives from the jurisdiction of the ICTR.

> EVOLUTION OF POLITICAL AND LEGAL ACCOUNTABILITY. It is usually individuals in power or authority that can in practice commit genocide and crimes against humanity. This is the first time high-ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa. The Tribunal's work sends a strong message to Africa's leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is

providing an example to be followed in other parts of the world where these kinds of crimes have also been committed.

COOPERATION OF AFRICAN COUNTRIES. The accused persons in the custody of the Tribunal in Arusha have been arrested and transferred from more than 15 countries. Several countries in Africa have increasingly cooperated with the Tribunal in the discharge of its mandate. There appears to have been a progressive realization in these countries that they cannot allow fugitives from international justice in their domain. (The International Criminal Tribunal for Rwanda, **"**Relevance for Peace and Justice")

4.2.5. International Criminal Court (the ICC)

If *ad hoc* international criminal tribunals are capital stages of a process oriented towards global governance, then, with the ICC the process seems to get closer to be almost completed in the judicial sphere. This is mainly because the ICC is not just the latest example of another international criminal tribunal. The ICC represents an utterly different era though owes much to the achievements of the *ad hoc* tribunals. The change is not that the once dominant powers remain in the background to conceal their perpetual interest-oriented policies in this new era. Nor it is the case that liberal ideals have prevailed finally that we have reason to hope for a new world order giving voice to equal and just relations in every sense. The ideal of prosecuting major international criminals remaining the same since Nuremberg and Tokyo, the ICC is the symbol of a dramatic change of how power, with a developing legal

discourse on international criminal law, functions in a much more diffused way throughout each society.

There are various ways to explain what made the establishment of the ICC possible many of which these explanations point at the end of the Cold War as the primary facilitator (Hagan, 2003: 29, 30; Horne, 2006; Scheffer, 2002). In fact, the legal discourse paving the way for international criminal prosecutions has already advanced since early 20th century with the precedents of Nuremberg and Tokyo Tribunals. The end of Cold War has resumed the process which has already taken a start instead of being a genuine cause for the establishment of the court. The real cause of motivation for the ICC is the shift in human rights discourse which focuses on accountability for mass atrocities. Before the accountability regime the overwhelming discourse hinged on the assumption that criminal justice was not an efficient way to prevent atrocities. Human rights have been regarded as a body of norms and rules mainly granting rights instead of proposing punishment and repressions.

The shift regarding human rights and humanitarian law discourses indicates that what was once believed to be unbeneficial has begun to replace the previous vision, which was based on the idea that granting rights and freedoms would solve the problems. Criminal justice, according to this previous perspective, was taken as an inefficient, if not archaic, way to prevent crimes as it should not be repressing or punishing individuals but grant more rights. The return to criminal justice through an accountability regime reflects also a shifting perception what constitutes a threat to

security and why it matters to prosecute perpetrators of a group of crimes. It is the subject and aim of the following chapter to analyse the particular perception on threat to international peace and security that constitutes and designs the content of international crimes.

CHAPTER 5

WHAT IS PARTICULAR ABOUT THE ICC DISCOURSE

It is possible to read the particularity of the ICC discourse in a given time period rather than, or in addition to an effort to discern this particularity through looking at the continuities and discontinuities in history. Particularity becomes visible not only by genealogical perspectives but also by looking at the current discursive practices in action. The ICC case law, which shows how the Statute and other legal documents are interpreted in decisions and judgments, is the primary guidance to discern the discourse of practices of the Court. The discourse of practices shows how certain statements are made in order to justify and rationalize the ICC's accomplishments, as well as the international community and other actors in the broader context. This is to some extent a linguistic type of analysis though the language used in the ICC texts is taken not only as a reflection of a particular social interaction but also a social development giving rise to this interaction. According to this perspective, the international criminal law discourse embodied through the ICC influences and changes social relations – e.g. relations between global actors. After all, the international criminal law discourse is not only a form of influence and change; it is

also subject to influence and change. This is, yet a different perception of power, which, according to Foucault (1980), is not confined to institutional or political arenas, but circulates through all spheres of life as a relational phenomenon. The relationality of the discursive power of the ICC will be the subject of the next chapter focusing on the governmentality aspect of the international prosecutions.

5.1. What Does a Title Tell about an Institution?

The ICC introduces a radical change regarding not only the content of the international criminal law applied, but also how the international system operates. The change reveals itself even in the title of this recent international organization when compared to the *ad hoc* tribunals of the post -Second World War and the post-Cold war era. The precursors of the ICC have been entitled as "tribunals" that gave countenance to their jurisdiction in a narrow scope. Tribunals mostly specialize in a particular area; have a more relaxed approach on rules of evidence and supposedly resolve the cases in a cheaper and quicker manner. On the other hand, courts have the power to adjudicate in a variety of cases instead of being restricted with a narrow scope, and follow a strict code of procedure such as setting extremely rigid rules of evidence. In short, it would not be wrong to identify courts as more formal and powerful institutions than tribunals despite common features of both. In this respect, the choice of legal scholars, writers, politicians and activists who have contributed to and developed the idea of a permanent international criminal institution to call this

institution as a “court” instead of a “tribunal” should not be taken to be merely a coincidental or accidental decision.

Except for the fact that titles of institutions tell something to their audiences, it is the discourse bearing a much more considerable message through texts and practices. For the discourse of the ICC, the texts to be analysed will be the Statute, the Elements of Crimes, the Regulations, the Rules of Procedure and Evidence, and other relevant texts including UN Security Council referrals, decisions to open investigation as well as the very first examples of case law. These texts consist of a particular discourse through which one can understand how the ICC interprets rules set out in the Statute and other related texts to authorize an investigation for a specific situation and how it legitimizes its approach.

5.2. Particularity of Situations and Crimes within the Jurisdiction of the Court

There are currently nine situations before the ICC which the Office of the Prosecutor is currently investigating. The nine situations and the corresponding cases to these situations are:

1. Uganda (*The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*);
2. Democratic Republic of Congo (*The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*; *The Prosecutor v. Callixte Mbarushimana*; and The Prosecutor v. Sylvestre Mudacumura;

3. Darfur, Sudan (*The Prosecutor v. Ahmad Muhammad Harun "Ahmad Harun" and Ali Muhammad Ali Abd-Al-Rahman "Ali Kushayb"*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*; *The Prosecutor v. Bahr Idriss Abu Garda* - charges not confirmed, OTP to present additional evidence); *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* and *The Prosecutor v. Abdel Raheem Muhammad Hussein*;
4. Central African Republic (*The Prosecutor v. Jean-Pierre Bemba Gombo*);
5. Kenya (*The Prosecutor v. William Samoei Ruto Henry Kiprono Kosgey and Joshua Arap Sang* - charges not confirmed against Henry Kiprono Kosgey, OTP to present additional evidence) and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* - charges not confirmed against Mohammed Hussein Ali, OTP to present additional evidence);
6. Libya (*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*);
7. Côte d'Ivoire (*The Prosecutor v. Laurent Koudou Gbagbo* and *The Prosecutor v. Simone Gbagbo*)
8. Mali
9. Central African Republic II (the OTP announced on 24 September 2014 the opening of a second investigation)

There are four categories of crimes as enumerated under Article 5 of the Rome Statute as the crimes within the jurisdiction of the Court. These are:

(a) The crime of genocide,
(b) Crimes against humanity,
(c) War crimes, and
(d) The crime of aggression

Definitions for these four categories of crimes are provided under Article 6, Article 7, Article 8, and Article 8 *bis*, respectively. The cases before the Court do not consist of any allegations of criminal responsibility for the crime of aggression at the moment. The only case including alleged criminal responsibility for the crime of genocide in addition to war crimes and crimes against humanity is *The Prosecutor v. Omar Hassan Ahmad Al Bashir*. Except that, all accused are being prosecuted either for counts of crimes against humanity or war crimes, or for both.

5.2.1. Authorization for an Investigation

The Trial Chamber which is in charge of deciding whether to authorize an investigation regarding a particular situation has to make a legal evaluation depending on the criteria set forth under Article 15 of the Statute. According to Article 15(3) and 15(4) and 53(1) of the Statute, the Court has to conclude that there is reasonable basis to proceed for an investigation. What is meant by a "reasonable basis to proceed" is clarified under Article 53(1) (a), 53(1) (b) and 53(1) (c). First of all, according to Article 53(1) (a), there has to be reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. The standard of "reasonable basis to believe" differs from the standard of "reasonable basis to proceed" as the former is one of the three components of the "reasonable basis to proceed" standard and implies a minimum requirement for "suspicion" for an "objective observer" concerning the crime (Decision 31 March 2010, paras. 27, 31). The second component of the 'reasonable basis to proceed' standard that is clarified in 53(1) (b) is that "the case is or would be admissible under Article 17". According to Article 17 (1), the Court shall determine that a case isinadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the

> decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

While the first three sub-paragraphs directly refer to the principle of complementarity, the final one adds a further requirement introducing a "gravity" threshold. Thus, the admissibility process is evaluated according to the principle of complementarity and the requirement of gravity of the crime in question.

5.2.1.1. Questions on "Gravity"

The question of gravity of the crime in question poses a contradictory position against the "objective" standards as introduced in Article 53(1) (a), which stipulates that there has to be reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. The so-called objectivity criterion in Article 53(1) (a) leaves the ground for a subjective evaluation in 53(1) (b) with the requirement of "gravity" of the crime.

The Pre-Trial Chamber II while taking its decision on the authorization for an investigation into the situation in the Republic of Kenya states:

> As for the element of gravity, the Chamber notes that according to article 17(1) of the Statute,"[...] the Court shall determine that a case is inadmissible

> where: [...] (d) the case is not of sufficient gravity to justify further action by the Court." (Decision 31 March 2010, para.55)
>
> In this context, the Chamber recalls that all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying *peripheral* (emphasis mine) cases. (Decision 31 March 2010, para.56)

The selective approach regarding the crimes to be investigated by the ICC is supported by a former decision of the Court in the Lubanga case. Pre-Trial Chamber II evaluating the gravity of crimes falling under the jurisdiction of the Court refers to Pre-Trial Chamber I's approach which stated:

> [The] gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court. (Decision 24 February 2006, para. 41)

The direct conclusion of the gravity threshold is that international crimes do not entail prosecutions *per se,* but some of the most serious crimes for the international community as a whole remains outside the jurisdiction of the ICC even when it is one of the crimes enumerated in the Rome Statute and the case is not or has not been brought before a national court. This is the case regarding the preliminary examinations on the situation in Iraq where the Prosecutor decided not to seek an authorization to initiate an investigation due to the failure of meeting the gravity threshold even though he concluded that there was reasonable basis to believe that crimes falling under the jurisdiction of the Court had been committed (OTP letter 2006). As exemplified by the wording of "peripheral cases" in para. 56 of the Kenya

Decision (Decision 31 March 2010), such an approachintroduces an incomprehensible situation that there are crimes against humanity, war crimes, and genocide cases which may not be of sufficient gravity at the end, and which legitimizes the inactiveness of the Court in such cases.

Because there are no concrete case(s) before the Court at the preliminary stage, the Chamber in charge makes its evaluation of the gravity threshold on the likely set of cases or "potential case(s)" that would arise in conjunction with the investigation stage. What establishes a potential case will be determined with reference to i) the groups or persons involved that are likely to be object of an investigation for the purpose of shaping future case(s); and ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s) (Decision 31 March 2010, para.59). For the first element, the Chamber makes an overall assessment whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed (Decision 3 October 2011, para. 3). For the second element, there has to be a significant nexus between the crimes committed and the incidents that will be the focus of the investigation. In other words, the crimes in question should have an unquestionable and explicit role and gravity in the particular context they have been committed (Decision 31 March 2010, para 61).

So, it is implicitly assumed that an investigation may not capture the ones who bear the greatest responsibility for the alleged crimes committed. Furthermore,

there may not be an interplay or nexus between the crimes in question and the context within which these crimes have been committed. While this approach may be justified as a necessary step in order to avoid a potential multiplication of cases, it might also cause just the contrary outcome of overlooking certain cases due to a lack of explicit interplay between the crimes and the incidents. It is, thus, an implicit confirmation of the view that there are and there may be cases of crimes against humanity, war crimes, or the crime of genocide which have no significant connection with the incidents at focus and which will fall beyond the jurisdiction of the Court. Another problem arises because of the sentencing of the first element, which requires the capture of the ones who may bear the greatest responsibility of the crimes committed. This further problem will be discussed below when the contextual elements of crimes against humanity are discussed. It is sufficient here to note that besides problems related to the "gravity" threshold, there are already certain problems about the "admissibility" criteria put forward in Article 17 as a whole.

When it comes to the decision on the admissibility criterion of Article 17(1) (d), the Court makes it clear that it is not only the quantitative dimension but substantially the qualitative dimension in determining whether the commission of crimes in a particular situation meets the gravity requirement. When considering the gravity of a crime, the relevant Chambers resort to 145(1) (c) and (2) (b) (iv) of the Rules that are deemed to provide the guidance in such a determination process. Some of these factors are summarized as:

> i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); ii) the nature of the unlawful behaviour or of the crimes

> allegedly committed; iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and iv) the impact of the crimes and the harm caused to victims and their families (Decision 31 March 2010, para. 62).

While the emphasis on the "impact of the crimes and the harm caused to victims and their families" is a direct reference to the victims and their families, the other factors such as the intensity, scale, or means applied introduce a third party in the criminal process which is the international community. The Court evaluates the gravity of the crimes taking into consideration the impact and harm posed against the international community as a whole. So, the very same crimes committed in a relatively limited scale, with means that are not deemed as harmful enough, and which do not affect the international community as well as the victims and their families, will not be prosecuted and punished. In spite of the effort to clarify what precisely is meant by the "gravity" of the crimes committed through making reference to the Rules, it is again completely up to the Court to determine when and how the intensity, nature of the crimes, or the manner of their commission reach to a satisfactory level.

The gravity requirement has a further implication that through the introduction of this requirement the Court forges a fictious terrain where it would be supposedly comprehensible and possible to commit war crimes, crimes against humanity or the crime of genocide without causing much harm and damage to both the victims and their families and the international community as a whole. On the other hand, the explicit emphasis on the role of the impact of the crimes whether directly on the victims and their families or on a larger community as a whole implies a retrogressive approach as long as it is accepted that the replacement of the

role of the consequence with the role of intent of the perpetrator represents a development in criminal legal systems.

Till the Enlightenment, the courts and tribunals used to be interested mainly in consequences rather than in the mosaic of elements that made up a particular crime. This was the case both for the various physical acts that comprised an offence, and for the mental element involved in its commission. Thus, it was not taken into account whether or not harm is done deliberately or because of recklessness or negligence. For the Enlightenment thinkers, punishment should be restricted to those who have voluntarily broken the law. In time, the two main elements of a crime divided into two limbs: the material element representing the physical acts, and the mental element representing the 'intent' to break the law (Thurbin, 1998: 77). Gradually, all criminal legal systems affected by the ideology of the Enlightenment have encompassed the dichotomous understanding of what exactly constitutes a crime and they adopted their codes to this modern understanding in order to comprise the material element and the mental element, respectively *actus reus* and *mens rea*.

The same configuration is applied by the international criminal tribunals and courts, not exempting the ICC. For all the crimes the ICC has jurisdiction over, there has to be a mental element accompanying the material element in order to convict a suspect. But when it comes to the assessment whether the related crimes meet the gravity requirement, the Court turns back to the old tradition of focusing on the consequences. Despite the fact that the Court's assessment is not with respect to the existence or absence of a crime, but related to the gravity requirement to initiate an

investigation and prosecutions, this assessment is conducted on the basis of the consequences of the crime.

One of the main arguments in establishing a permanent international criminal court was to prevent injustice caused by lack of prosecutions and impunity for international crimes. But the requirement of gravity poses a difficult and again incomprehensible situation as to non-prosecution of some of these crimes. So, some cases of genocide, crimes against humanity and war crimes will be classified as "minor" cases which do not pose any threat to the peace and security of the international community and which do not require any international prosecution.

5.2.1.2. Does the investigation Serve the Interests of Justice?

Towards taking the decision to initiate an investigation, the Prosecutor of the ICC shall consider, in addition to the requirements of "reasonable basis to believe" and further "admissibility" criteria under Article 17, a final requirement which is yet another abstract notion, "interest of justice". Article 53(1) (c) reads as follows:

> Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The concluding sentence of Article 53(1) is that:

> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

According to Regulation 48, Pre-Trial Chambers may request the Prosecutor to present information in order to enable a review mechanism for the latter's decision of inaction. What is of value here is the fact that unlike sub-paragraphs (a) and (b) of Article 53(1), which require an affirmative finding to evidence that there is reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed and that this crime has the sufficient gravity, sub-paragraph (c) does not require the Prosecutor to establish an affirmative finding. Indeed, the Prosecutor does not have to present reasons or supporting material to prove that an investigation is in the interest of justice. On the other hand, the Prosecutor has to explain the reasons for "not to initiate an investigation"; in other words, to justify why active legal intervention would not serve the interest of justice.

> In case the Prosecutor decides not to investigate solely on the basis of article 53, paragraph 1 (c), he or she shall inform in writing the Pre-Trial Chamber promptly after making that decision. (Rule 105(4))
>
> The notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion. (Rule 105(5))

Thus, the conventional belief is that international prosecutions would serve the interests of justice as a rule, but there might be exceptional cases that the Prosecutor might conclude this may not be so. To ask from the Prosecutor for specific or additional information or documents only when (s)he has concluded that an investigation would not serve the interests of justice means that except such exceptional cases, investigations serve the interests of justice *ipso facto*.

5.2.2. Crimes against Humanity, War Crimes, and Genocide

As it is seen, the admissibility process of the ICC is a highly demanding one, which eliminates a great number of potential cases at the start. Beyond the difficult path of admissibility, many cases that would be conceivable of falling under the definition of mass-scale atrocities in a different design are also excluded through the determinate nature of international crimes.

Article 7(1) of the Statute defines crimes against humanity as:

> [A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(2) (a) of the Statute further indicates that:

> '[A]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

The ICC observes that there are five basic requirements for crimes against humanity in sight of the related Article 7(1): i) an attack directed against any civilian population, ii) a State or organizational policy, iii) the widespread or systematic nature of the attack, iv) a nexus between the individual act and the attack, and v) knowledge of the attack (Decision 31 March 2010, para. 79).

In an attempt to clarify what a "civilian population" means, the Court states that "the potential civilian victims under article 7 of the Statute could be of any

nationality, ethnicity or other distinguishing features" (Decision 15 June 2009, para. 76). Though national or ethnic groups are not counted as constituting the definition of a civilian population exclusively in this decision, the explicit message is that there should be "distinguishing features" to speak of an attack directed against a civilian population.

Regarding the requirement of a state or organizational policy, the ICC underlines its selective approach on the organizational capacity of the perpetrators:

> There were accounts of opportunistic crime which accompanied the general situation of lawlessness. However, the Chamber is of the view that the violence was not a mere accumulation of spontaneous or isolated acts. Rather, a number of the attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force (Decision 31 March 2010, para. 117).

It is noteworthy that the Court does not use the term "crime(s)" in the second sentence of the paragraph while it is obviously the criminal acts in question as stated in the first sentence. While accepting that the acts are criminal acts in spite of their opportunistic nature, the word "acts" replaces "crime" in the second sentence. It is hard to conclude that in a legal document such as this one, preference and setting of words cannot be randomly decided as it would also be the same for any other text. The primary object of this paragraph is to underline the focus of the ICC on systematic and widespread criminal acts that are carried out through a state or organizational policy. The outcome of this approach is that the Court will not deal with crimes that do not correspond with the threshold determined.

The relevant Pre-Trial Chambers decide whether the attack has been carried out through a state or organizational policy depending on the information gathered through international and non-governmental organizations. Pre-Trial Chamber III, in its decision on the situation in the Republic of Cote d'Ivoire, makes this evaluation using references to reports of Human Rights Watch, Amnesty International or the UN Human Rights Council. Based on these reports the Chamber concludes that the alleged crimes have been committed in connection with the government of Laurent Gbagbo. Pro-Gbagbo government forces had hired around 4,500 mercenaries, armed them with weapons, and in some cases uniforms, and provided training (HRWa: 143; Reporta: 19; Reportb: 57-58; ONUCI: 140). Following a media campaign by President Gbagbo, security forces under the control of the government and militias loyal to the President caused killings, disappearances, rapes and persecution of West-African nationals, all of which had been conducted through a policy of systematic violence (HRWb: 155). As a result, the Chamber is convinced that the "attack" was committed pursuant to a state policy (Decision 3 October 2011, para. 51).

What the Court intends regarding the term "widespread" carries a consequence oriented approach in a similar fashion with that of the evaluation on the "gravity" requirement. According to the Court (Decision 31 March 2010, para. 95), "widespread" refers to:

> [T]he large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. [It may be the] cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.

On the other hand, the "systematic" nature of the crime is possible to be inferred "through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis" (Decision 31 March 2010, para. 96).

Following these guidelines, the Court concludes that the crimes committed in Cote d'Ivoire have a widespread and systemic nature due to the extended time period (from 28 November 2010 to May 2011) and the geographic range (many of the neighbourhoods of Abidjan and the west of Cote d'Ivoire) (Decision 3 October 2011, para. 62). Despite the dubious nature of the terms "geographically wide" and "extended time period", the Court's exemplification gives the message that the attack should not be confined to just one town or city or a relatively small area; and should not last through a relatively short period of time such as one-day or one-hour. Moreover, the criminal act has to be "frequent", which excludes single acts causing mass violence and deaths. Emphasis on the "prolonged nature of the attacks" while determining the necessary nexus between individual acts and the attacks is another indicator of this approach excluding single initiatives taking place instantly (Decision 3 October 2011, para. 87).

The last element which is a direct reference to the mental element of a crime is exempted from evaluation before the Chamber with the pretext that there are no concrete case(s) and no suspect(s) before the Court (Decision 31 March 2010, para. 79; Decision 3 October 2011, para. 29). This is an open contradiction with the above mentioned required elements on gravity. How the Court will make an assessment on

the gravity of the allegedly committed crimes with respect to individuals or groups of persons, if there is no knowledge of the identity of those individuals? As noted, the Court indicates that the investigation should involve the ones who might bear the greatest responsibility for the crimes committed in order to support the future case(s). A very similar logic is also in effect concerning the assessment of the admissibility of a case. The principle of complementarity stipulates that a case can be admissible by the ICC if there are no national proceedings or if the State that has jurisdiction over the case appears to be unable or unwilling genuinely to carry out the investigation or prosecution. The Prosecutor of the ICC has the authority to examine whether or not there are national proceedings and the power to submit the possible case(s) to arise from his investigation when "[t]here is a lack of pending national proceedings against those bearing the greatest responsibility for the crimes against humanity allegedly committed" (Decision 31 March 2010, para. 183). That is to say, the Prosecutor of the ICC has or should have certain individuals or groups of persons to bear the greatest responsibility in mind when he submits his request for an investigation.

The contradiction becomes even more incontrovertible when Pre-Trial Chamber III makes its assessment on the admissibility of the case of Cote d'Ivoire taking into consideration the principle of complementarity. The Chamber concludes that the individuals for whom authorization to proceed with indictments was granted by the Military Prosecutor in Cote d'Ivoire do not fall within the category of those who may bear the greatest responsibility for the most serious crimes falling within

the Court's jurisdiction (Decision 3 October 2011, para. 198; Decision 16 August 2011, para. 16). The Daloa Prosecutor, who is overseeing and directing investigations into alleged crimes committed in the west of Cote d'Ivoire in relation to the post-election violence, has also no intention to prosecute or request warrants of arrest for those who bear the greatest responsibility (Decision 3 October 2011, para. 199; Decision 16 August 2011, para. 17, 18). Furthermore, the proceedings in France are also excluded as the Chamber confirms the Prosecutor's former conviction that the investigations conduced by the French judicial authorities are not related to the crimes under the jurisdiction of the ICC (Decision 3 October 2011, para. 200; Decision 16 August 2011, para. 19). All these evaluations imply that both the Prosecutor and the Pre-Trial Chamber in charge have certain individuals in mind as to who bear the greatest responsibility of the crimes falling within the jurisdiction of the ICC even before the concrete cases start, and they check these individuals against the ones who were or are being prosecuted before either national courts of the state that the incidents have taken place or the courts of another state party. Thus, it stands as incoherent and purposeless that the Court exempts the mental element of knowledge from evaluation with the pretext that there are no accused individuals for such an evaluation.

In parallel with crimes against humanity, war crimes are subject to the jurisdiction of the ICC only when there is a widespread or systematic policy or plan, or when the crimes in question are committed within the framework of a large-scale campaign (Article 8). The main difference between crimes against humanity and war

crimes is the prerequisite for the latter that the criminal act in question should be committed in the course of an armed conflict or as part of a military attack. Though there is no direct reference to a state or organizational policy for war crimes, it is beyond question that the armed conflict in question is one between parties with high level organizational capacity. Different Chambers confirm this approach by underlining, "[t]he hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups" (Decision 15 June 2009, paras. 229-31; Decision 3 October 2011, para. 119; Decision 29 January 2007, paras. 232-34). The counterpart of the required element for crimes against humanity that the criminal act has to be committed in connection with a widespread and systematic attack against a civilian population is the requirement for war crimes that there has to be a connection with armed conflict.

With respect to the crime of genocide, Article 6 of the Rome Statute, reproduces *verbatim* the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Accordingly, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

The acts constituting the crime of genocide refer to physical or biological obliteration of the protected groups and not to a metaphorical annihilation such as the change in the group identity or culture while the members of the group are physically existent (Reportc: 45 ; Reportd, para. 506; The Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, para. 505; The Prosecutor v. Rutaganda, ICTR-96-3-T, Judgment; Prosecutor v. Stakic, IT-97-24-T, para. 517).

5.3. A Particular Discourse Reflecting a Particular Purpose

It is obviously not spontaneous or isolated crimes that bother the ICC and the international community. It is not any crime *per se* that invokes international level responses but a general, widespread, organized criminal activity. Feasibility problems for prosecuting a wide spectrum of crimes or financial as well as political issues might be assumed to be the leading causes for regulating international criminal prosecutions confined to only a limited group of crimes, namely war crimes, the crime of genocide, crimes against humanity and the crime of aggression. The legal documents as well as early case law demonstrate that the purpose is to protect human populations and prosecute crimes targeting the physical subsistence of these populations. But the admissibility procedures makes it clear that there is a strict selective approach also among the cases of genocide, crimes against humanity, or war crimes according to the requirements of gravity and existence of a state or

organizational policy. Thus, international crimes do not only indicate elements limiting international prosecutions to criminal activities committed against populations, but the threshold of admissibility before the ICC also raises the bar to target crimes corresponding to certain criteria of gravity and organizational capacity.

Why the international community gives utmost importance to organizational, systematic and widespread threats against certain populations? How it happens that the international community establishes a close relationship between threats against populations with its own security, order and well-being? The ICC discourse, which introduces a novel phase of surveillance on certain crimes though being highly selective, is hard to be fully explained through merely financial or practical concerns. The discursive practices showing, first, a novel perspective of the international community's concern with populations and, second, its selective approach with regards to the cases to satisfy the high threshold of gravity and organizational capacity entails a further analysis to understand the rationale of the ICC discourse.

CHAPTER 6

THE ICC AS AN ACTOR OF GLOBAL GOVERNMENTALITY

In the post-war period of the 20th century, liberal state governments of the industrial world have focused on reducing social and economic risks and distributing the costs of such risks under the rubric of social welfarism. This rationality on public welfare reflected a double shiftthat disseminated risks spatially "from the level of individuals, groups, firms, and communities to society" (Simon, 2002: 177), and contextually to issues such as poverty, unemployment, the declining birthrate, anti-social behaviour, and the social consequences of ill-health (Rose and Miller, 2008; Walters, 2012).Encouraging particular individuals, groups, and communities to take greater responsibility for their lives and livelihoods establishes the main feature of this rationality of government which is often described as advanced liberalism or neo-liberalism (Dean, 2010; Rose, 1993; 1999). Individual efforts, whichare deemed as positive and described as empowering (Ilcan, S., & Lacey, A. 2006: 209), should not be taken as exclusively referring to individual human bodies as in the global context it may well refer tosub-level entities such as nation-states as well as any type

of national, international or transnational organizations taking over certain responsibilities to govern.

Carrying the neo-liberal governmentality perspective to the international with a focus on the ICC is only one way to apprehendhow the international community has been constructed as a novel site of government. The International community is most of often described as a community of states, but it is something beyond the sum of the member states – an entity sometimes dealing with problems at the sub-state level, sometimes focusing on inter-state relations, and sometimes transcending the conventional state-level relationality when dealing with problems defined as "global". This multi-dimensional and multifaceted governmentality of the international community could become a reality only through empowering various actors whether such empowerment is inspired by the market or by the promise of self-government and autonomy, or any other reasoning. What deserves a careful scrutiny is that "the object of empowerment is to act upon another's interests and desires in order to conduct their actions toward an appropriate end; thus 'empowerment' is itself a power relationship"(Cruikshank,1999: 69). Before anything else, it is a power relationship because of the very intrinsic nature of each and every community, which is the requirement and unavoidable consequence that distinctions are made about it and that its spaces are ordered, mapped, or visualized (Gupta and Ferguson, 1992; 1997). The same goes for the international community that achieves this bordering practice in relation to international crimes through international criminal law and the ICC.

In addition to the power dimension of empowerment, a governmentality perspective enables us to discern the heterogeneous and symbiotic nature of governance techniques at the global level. The ICC discourse, which can be discerned mainly by the wording of the Rome Statute, and other relevant legal documents as well as the Court decisions, builds up the ground and justification of intervention that is not confined to military, political or economic spaces. In the post-ICC world, governmentality has begun to surveil and shape the legal spaces of different communities and polities initially by indirectly policing the national jurisdictions and finally by a more direct judicial process undertaking the prosecution of international crimes when national authorities fail to accomplish what falls on their part. A further contribution of a governmentality perspective is to grasp the mutually constitutive relation of language and practice (Merlingen, 2003: 371). It is the aim of the governmentality analysis to show, beyond the power relationship the ICC constitutes with its addressees, that the international community is not a pre-existing entity but is simultaneously and continuously being constructed through the discourse empowering various actors as well as the Court itself to intervene when deemed necessary.

The international community, with multi-dimensional and multi-level perspectives represents a complex and flexible structure changing its form and content, transforming from certainty to blurriness, targeting exlusion or inclusion depending on the actual agenda and purpose, and choosing its method according to the circumstances. Thus, in a strange way, the international community turns the gaze onto itself while it surveils both its constituent parts whether in the form of

states or communities as well as the outsiders who are evaluated as not meeting the criteria of becoming part of this community. The international community empowers itself though empowering and imposing self-management onto others, and while doing this, it both constructs and elevates itself to a leader or guardian position. Besides, it also takes the attention from or leaves behind the old perspective of a need for a central government to govern populations, and expresses the relevance for a community without a single state in the form of a global state or government. This is a community that signifies an even more advanced one than the western neo-liberal state, where the state coexists and operates along with the modern liberal governmentality techniques. Through international prosecutions the nexus between the role of globalism and the atrocities are blurred, as no prosecutorial mechanism reflects on its complicity in, or in other words "self-responsibility" of, the crime that it judges. Through international prosecutions, the lack of capacity and skill to prosecute its own perpetrators of mass-scale atrocities in conflict-driven communities are underlined. It is a concurrent and mutually sustaining process of the emphasis of the power of the international community and the impotence of certain communities.

To follow the path of the international community in constructing its "outsiders", the chapter will start with a focus on the relationship between a community and the criminal legal system, then carry this perspective to the international community. The ICC is not merely the embodiment of a particular categorization of crimes that are selected as the most serious and threatening ones, but it is an institution that takes part in grading and classifying communities at least in legal aspects. While elucidating how international crimes are linked to notions of justice, order, and

security, the ICC's governmentality techniques and rationality constitutes a certain type of relationality to the communities it addresses. Yet, it is not only a relationality directed at the outside. While the borders between inside and outside are blurred,what has been regarded as incidents occurring in other societies are becomingly taken as common problems in need of care and solution, thus giving a particular meaning to the international community that surveils, observes, evaluates, and finally directly intervenes as the superior one that not only construes what justice means but also charges itself now with the responsibility to prosecute following the responsibility to protect.

6.1. Liaisons between Communities and Criminal Courts

While the initial aim is to underline the versatile relationship between justice, order, and security, this aim is not centred on the story of the timeless weak against criminals or the many ways rights have been breached while also tried to be protected by authorities. The relationship between justice, order and security, rather than representing a fixed and ontologically pre-existing one, is prone to express changing meanings. Thus, the inextricable relationship of justice, order and security does not imply a constant liaison, but a flexible and responsive one in connection to the indeterminacy of law. Such a liaison necessitates various actors and ways to govern, as well as results in social compartmentalisations.

6.1.1. The Inextricable Relationship of Justice, Order and Security

> […] then Ana and Bel called by name me, Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak …, and enlighten the land, to further the well-being of mankind. […] When Mark sent me to rule over men, to give the protection of right to the land, I did right and righteousness […] and brought about the well-being of the oppressed.
>
> Preamble of the Code of Hammurabi

No matter how cruel and brutal the codes of Hammurabi stand in relation to the modern reasoning and aside from the origins of his authority, there seems to be a common logic between this exemplary archaic criminal code system and its successors. This logic simply claims that the weak will be protected against the strong. Differing and mostly conflicting approaches to who constitutes the weak and how they are to be protected have led to correspondingly different political orders, each one developing its particular vision of the weak to be protected and particular ways to accomplish this mission. But the fact that there will be and always has to be someone or some groups to be defined as weak very often remains unnoticed.

Order and justice have almost always been wedded since the very first written code of Hammurabi. The presumed dilemma between order and justice, which became prevalent to a large extent during the Cold War was based on a temporary and conditioned perception of disconnectedness, and has begun to vanish in the post-Cold War era. The evanescence of the dilemma is hard to explain only through the

rising power of international, non-governmental or supranational organizations both in quantitative and qualitative terms. It is rather the content and discourse of what constitutes justice, order and security that has temporality and spatiality, and which brings together or loosens the bind between these concepts.

As it is hard to introduce fixed and stable definitions on what constitutes a criminal person and a crime, it is also hard to come out with constant meanings of justice and order. Justice, having particular meanings being construed as a system of rules and practices to confront crimes and criminals, discloses the impossibility of a constant meaning of what constitutes order and security as well. Nevertheless, the indeterminate nature of criminal law and justice should not obfuscate the temporary and contingent determinacy of law. In the post-Cold War era, the connection between justice, order, and security is established in a much more strong and substantial way than it has ever been in international law. What one should not also keep out of sight is that the determinacy of law has found its place more powerful than ever through the codifications of international crimes and binding regulations on prosecutions while international criminal law simultaneously has an indeterminate dimension which can be detected through its flexible and unfixed content throughout history.

The indeterminate nature of international law should not be confused with absolute indeterminacy or complete lawlessness. The fact is that the international community is not believed to have a direct and indefinite interest in prosecution and

punishment of all types of crimes, and that most of the crimes committed within the confines of a state or society is not the first and foremost concern of international community. It is a specific group of crimes which takes the attention of the international community, and it is these crimes which are perceived as threatening international peace and security. In a domestic legal system each criminal act has to be prosecuted and punished at least in principle. Legal authorities at the national level do not eliminate and disregard some cases of murder or theft just because of these acts being sporadic, opportunistic or isolated from a wider organizational network. This is mostly because each one of such acts that are codified in domestic criminal law systems is assumed to pose a threat to nation-wide peace and security where organizational criminal activities are not the only preoccupation for national jurisprudences. Before everything else, national jurisprudences are built on certain premises that define the type of relationship between the individual and the state, as well as the relationship amongst individuals.

Taking communities, rather than individuals, versus a broader international community should not be taken as an indication of drawing boundaries between domestic and international politics. Hutchings (1997: 112) warns the Foucauldian scholar on the blurriness of boundaries between the domestic and international domains, and underlines that the main interest would be more of relations of power floating through sub-state and trans-state levels. Instead of proposing a model for the international domain apart from domestic politics, what is at issue regardinginternational prosecutions is the global governance mechanisms' inclination

to observe, supervise and regulate communities, partly due to concerns of feasibility and efficiency, but mainly due to changing perceptions on order, justice and security . Furthermore, it is not any organized crime that is taken into account by global mechanisms, as numerous types of organized crimes still fall exclusively under the jurisdiction of nation-states. It is only when a limited group of organized crimes are committed through state apparatuses or advanced organizations of similar type holding the capacity to challenge state-power that someone else –i.e. the ICC – takes charge of prosecuting and punishing.

The ICC is now the primary organization intervening in order to fill the gap in the judicial process at the international level when a state fails to take action or proves to be incompetent to do so in such a manner as expected by the international community. Yet, the relations of power to be scrutinized in terms of human rights and humanitarian law should not be reduced to a dichotomous relationship like the one between the state and its citizens or different groups. Rights to be claimed and protected with reference to individual citizens or groups against the state is misleading, for that type of an individual-state dichotomy would fail to indicate the social discourses allowing for extant or changing forms of operation. Rather, the role of a myriad of social actors should be taken into account in shaping the social construct which is also subject to change in accordance with changing social formations (Hammer, 2007: 72). That means, the concept of human rights defined as indicating a relationship between individuals or certain groups *vis a vis* the state is a conditioned one which obfuscates the role of social discourses and suggests the state

as the central focus of power. The limited and misguided nature of such a dichotomous relationship causes similar problems in case the same perspective is utilized to understand how global security governance mechanisms work through a global rationality. The key role of the ICC regarding the social, political as well as legal process of investigating and prosecuting international crimes should not cause any confusion as if the relationship occurs merely between the state and the Court, as this is a social process comprised of various actors both at the national and global levels, where the state and the ICC are just two these actors.

6.1.2. New Players on the Ground

The relationship between justice, order and security introduces a different and complex terrain whereon states and the ICC should not be taken as if formulating secondaryrelationships. The intermingled terrain of justice, order and security has reconstructed the sovereign state which is now characterized by forces beyond its control. What we understand by concepts of justice, order and security has dramatically been shaped by a different discourse of human rights and humanitarian law norms, which at the end has enabled the formation of a body of rules defined as international criminal law. States, though continuing to be one of the key actors in practicing and reproducing this particular discourse on justice, order and security, are not alone in practicing and it.

As long as the traditional nation state is not the primary actor in providing and maintaining security – security here understood in terms of "human security" albeit with a focus on "population security" instead of individual security – and is even taken as a leading source of threat to such security, various organizations have popped out at the international arena acting both as representatives of and on behalf of the international community. Furthermore, it is not only the institutionalized actors who affect the process though lack of institutionalization is an obvious weakness for being influential.[57] As governance cannot be claimed to be centred anymore on state control, the focus should be directed towards not only institutional forms beyond the state, but also towards different kinds of social movements including meaningful outlets for resistance (Rajagopal, 2003). So, it is not and should not be the state or any other actor at issue, but the relationality between various actors who use certain techniques and tactics of domination while making space for resistance at the same time.

The ICC, while making a decision either on an extremely technical matter regarding a situation or a case within the framework of this situation, performs its mission in a dense collaboration with a wide range of actors. These actors are most of the time highly institutionalized ones such as international organizations operating under the UN structure. In this connection, UN Security Council (UNSC), Office for the Coordination of Humanitarian Affairs (OCHA), United Nations High

[57] According to Diani (1992: 13, 14), social movements should not be taken as consisting only of NGOs or civil society movements. This is mainly because social movements do not have to be institutionalized in an NGO form.

Commissioner for Refugees (UNHCR), United Nations International Children's Emergency Fund (UNICEF), United Nations Operation in Cote d'Ivoire (UNOCI), Office of the High Commissioner for Human Rights (OHCHR), and European Union bodies, as well as non-governmental organizations such as International Rescue Committee (IRC), Human Rights Watch (HRW), Amnesty International (AI), Federation Internationale des Ligues des Droit de l'Homme- International Federation for Human Rights (FIDH), International Crisis Group (ICG), International Committee of the Red Cross (ICRC) can be counted as the most prominent ones alongside national non-governmental organizations. Critical evidence for decisions is provided through reports, press releases and other relevant documents prepared by these organizations. All these texts support the flow of information that in the end are transformed into ICC-texts. The Court in effect resorts to these texts not only to provide evidence required for the elements of the crimes, but also to legitimize its cases before anything else. Without the information and documentation provided by these organizations, neither the Prosecutor not any Court body would be able to legitimize and formulate a case. So, one of the direct outcomes of these texts is to enable and justify international prosecutions.

The type of relationship between the ICC and different global actors is not a unilateral one. The intertextuality, besides evidencing the required elements of the crimes and legitimizing legal interventions which primarily take place in the form of prosecutions before the Chambers, has further outcomes. Ideologies cannot penetrate into social and political strata when restricted to move on an unfounded and

imperceptible ground. Thoughts need technical and calculable forms to operate on. As one of the leading ideological and material institutions dealing with mass-scale atrocities, the ICC produces technical and calculable knowledge through giving the "disaster" a concrete form. This, in return, provides other subsidiary institutions and organizations, both domestic and global, a suitable ground to deploy their policies. Just as a "right" is not solely a right *per se*, a "crime" is not only a crime reflecting that a particular act is prohibited and subjected to sanctioning. Rights do not come into being only to protect something or someone, but they frame certain relations between actors who hold certain roles in the wider social construct (Hammer, 2007: 78). Likewise, crimes and prosecutions introduce different roles and meanings for actors, who develop an understanding on the roles towards others in addition to the self.

6.1.3. Governing Mass-scale Atrocities

Foucault has defined governmentality as an activity or practice that brings up questions mainly on what this activity or practice of governing is; who can govern; and who or what is governed. For Foucault, there are at least three or four outlets to analyse the practice of governing: the idea of government as a form of "pastoral power" taking its origin from Antiquity and early Christianity; the idea of *raison d'etre* and the police state in early modern European history; the 18th century liberalism, and finally, the neo-liberal thought which Foucault has described as rather

a hybrid type converging the "pastoral" and "liberal" power modalities with "individualization" and "totalization" in tandem (Gordon, 1991: 3-8). Rather than depending on pure violence, governmentality carries the idea of interdependency between governing subjects and manifestations of truth, which is no longer possessed exclusively by the state (Foucault, 2007: 357). Governmentality in modern societies operates through the power of truth at a distance, neither through compulsion nor in a direct manner (Rose and Miller, 2008: 42, 43). "Government in the name of truth", which is more than pertinent for all governmental rationalities, has found its expression through a subsidiary mantra of "government in the name of justice" for the global security governance which juxtaposes and at many points converges security with justice.

As power cannot penetrate into social and political strata when restricted to move on an unfounded and imperceptible ground, discourses have a transactional role rather than being merely functional for the governmental rationality, and introduce distinct means to govern individuals and communities to create and regulate subjectivities (Foucault, 1991). These distinct means providing technicality and calculation enable intervention through, first, problematization, and second, diagnosing, prescribing and solving the problem. The technical reflection and elaboration here is not confined to legal or economic domains; Foucault (2007: 353) points to the significance of a third category, "security", which has become "the fundamental objective of governmentality" especially after the 18th century. In this society of security, political security and social security have an interwoven

relationship wherein the state undertakes to formulate the problems for the social (Gordon, 1991: 35). Problematization is a key component of governmentality, as who defines the problems also determines possible solutions, which is itself furthering the determination and delimitation on who can act and who has the legitimate or rational cause to act.

A very similar governmental rationality is reflected at the international level, where the ICC represents the central locus for governmental technologies in the field of international criminal law. As long as it is not the mere consideration of territory or population as objects of neo-liberal governmentality, and rather a focus on the relations within the population through the things that do not only indicate wealth or resources, but also climate, irrigation, fertility; or manners, customs, ways of acting and thinking; or accidents and misfortunes such as famine, epidemics, or death (Foucault, 2007: 96), global governmentality proceeds to deal with disasters through a "mass-scale atrocities" discourse, talking on behalf of the "international community", acting for the "international community", and in fact "managing" the parts supposedly constituting this community.

Population as the ultimate end of governmentality (Foucault, 2007: 105) finds its reflection for global governmentality through a focus on the international community. Global governmentality embraces the concept of human security, which marks a break with more traditional security concepts through deepening as well as widening it from the level of the state to individuals and communities, and from military to non-military issues. The development of the human security concept

introduces also a new global security governance model wherein a state-centric bias transforms towards a complex network of states and non-state actors (Krahmann, 2003). In this complex network, mass-scale atrocities are not just extreme incidents that would otherwise be symbols of pain and sorrow, and would solely remain in rhetorical reflections. There is clearly a relationship established between these atrocities which are codified as international crimes and international security with an implication that governmental rationality at the international level moves with a consistent and steady emphasis on a certain type of security associated with the international community. Population security, now connected to global security, is taken as a concept which cannot be left solely to the nation state, but requires close scrutiny and at times active intervention by the international community (Bruderlein, 2001).

The mission of diagnosing and finding solutions to the problem of international crimes is accomplished both by and for the international community through the expertise and technicality that is partially provided by international lawyers, jurists, and legal experts. It is "the international community [that] agreed on the creation of a permanent international court" (ICC Press Release, 2013a), and through this initiative, what has been established in Rome is not only a permanent international court, because "the world embarked upon an audacious plan to create a global justice system" (ICC Press Release, 2013a) or what may be called as an "entire Rome Statute system" (ICC Press Release, 2013b) or simply "the ICC system" (Song, 2013: 7) by signing the Rome Statute.

The Rome Statute represents a sort of contractual tutelage both over the states parties and non-state parties. The once defined dichotomous relationship of the individuals or certain types of groups against the state is replaced by a scaled up relationship between local communities and the international community while it is impossible to suppose the latter to breach or pose any threat against individual or group rights. The triangular relationship between the international community, international crimes as mass atrocities and security takes its expression in the Preamble of the Statute, where the states parties underline that "during this century millions of children, women and men have been victims of unimaginable atrocities" and "such grave crimes threaten the peace, security and well-being of the world" while "the most serious crimes of concern to the international community as a whole must not go unpunished". Atrocities constituting grave crimes with a great potential of threatening the peace, security and well-being of a wider community beyond traditional borders is a reiterated discourse in the decisions and judgments as well as statements and press releases of the Court.

Producing technical and calculable knowledge is accomplished in collaboration with states as well as a wide array of domestic and global organizations which, in turn, provide these organizations with a suitable ground to deploy specific policies. It is pertinent to claim that states, as well as other institutions and organizations, execute the duty that befalls them, while the ICC and the UNSC stand as the main stakeholders. The governmental rationality of neo-liberalism, which ascribes to the individual citizen the role of both a player and a partner (Gordon,

1991: 36), finds its reflection in the global governmentality game through "individual states" as members of the international community. On the other hand, the relationship between the ICC and the UNSC is a complicated one, as the ICC still seems to be closely dependent in many aspects on the UN system against the initial arguments and expectations that the ICC would be an independent court unlike the *ad hoc* tribunals of ICTR and ICTY. Besides the provision of the Rome Statute in Article 13 (b) that the Prosecutor may initiate an investigation upon the referral of a situation by the UNSC acting under Chapter VII of the UN Charter, rhetorical as well as technical and logistical assistance of the UN is noteworthy as expressed by the ICC in its report to the UNGeneral Assembly (Reporte, paras. 98-105).

In its 26 February 2011 Resolution on the situation in Libyan Arab Jamahiriya (UN Security Council *Resolution 1970 (2011)*, S/RES/1970), the Security Council reiterates that it is "its primary responsibility [is] the maintenance of international peace and security under the Charter of the United Nations." It is not a novel fact that the UN Security Council undertakes such a responsibility of maintaining international peace and security. What has become a novelty is that human rights and humanitarian law violations are taken as parameters of international peace and security. Under the same resolution, the Security Council defines the demands of the Libyan population as "legitimate". So, it is not only a "securitization" that the Security Council is actually achieving, but it is at the same time a "legitimization" process of demands from an administration towards

democratization and liberation. In the following paragraph, the Council urges the Libyan authorities to:

> (a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;
>
> (b) Ensure the safety of all foreign nationals and their assets and facilitate departure of those wishing to leave the country;
>
> (c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and
>
> (d) Immediately lift restrictions on all forms of media.

Before connecting the situation to a referral to the Prosecutor of the ICC, the Security Council "requests all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country" (UN Security Council *Resolution 1970 (2011)*,S/RES/1970). Following the "request", the Security Council:

> 4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;
>
> 5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;
>
> 6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.

In addition to the reiterated emphasis that mass-scale atrocities cannot be left unnoticed no matter if the related state is a state-party to the Rome Statute or there is a government-in-charge, the point to notice here is that it is not only the Libyan authorities which the Security Council addresses with a decisive and authoritarian tone. The member states of the UN, even though some are not party to the Rome Statute, are urged to cooperate fully with the Court and the Prosecutor.

6.1.4. Classifying and Grading through the Complementarity Principle and the Gravity Requirement

Mass-scale atrocities and incompetent or unwilling judicial systems are regarded as "abnormal categories" in a similar fashion to the construction of the mentally ill as an incompetent subject and a perturber of society corresponding to an emergent public sensibility towards the socially irregular (Foucault, 1988b). The International community's sensibility towards mass-scale atrocities is a similar construction in that the societies experiencing such atrocities and national jurisprudences not prosecuting such crimes properly are also perceived by the international community as irregular and incompetent. Governmentality envisages the interference and direct conduct of the central authority when the legally mandated private or localauthority fails to perform as required. Till that happens, the rationale of governmentality is

"conducting the conduct at a distance", as it cannot meet all details of prosecutions in each case.

As it has been clarified early on, there are three basic requirements for an investigation to be taken into consideration. First, the crimes should fall under the jurisdiction of the Court, the details of which are given in Articles 13, 14, and 15. Second, the principle of complementarity as well as the element of gravity should be met in order to conclude that the case in question fulfils the requirements for admissibility (Article 17). And, finally, the Prosecutor should not conclude that an investigation will not serve the interest of justice (Article 53 (1) (c)). The principle of complementarity, which has been presented as supporting more or less equality between the ICC and the national courts, is predicated on an evaluation whether the national courts perform a proper judicial process being able and willing to prosecute the ones who are the most responsible perpetrators. This second element that the national judicial process should capture the ones most responsible for the allegedly committed crimes is not clear in the Rome Statute and comes into the picture through the case law. There are two possible implications of this requirement, which is also closely connected to the gravity threshold: one is that national courts may be prosecuting some individuals but not the most responsible ones, or the ones being prosecuted before national courts are indeed the real perpetrators who hold the greatest responsibility for these crimes but they are just random individuals who are not in important positions. In the first instance, the Court might decide that there is sufficient reason to proceed with an investigation while in the second one it is highly

probable that this decision will take a negative form and the Court will not proceed. That means, the ICC is in fact controlling and observing the ones who hold authoritative positions within the state mechanism and who govern populations. The gravity requirement does not seem to be only about the gravity of the crime, but also about the identity of the perpetrator who commits these crimes.

In its report to the UN General Assembly (Reporte, para. 40), the ICC indicates its negative assessment about the Libyan jurisprudence stating that "the Chamber concluded that Libya's national system was unable to secure the transfer of the accused into their custody or to carry out the proceedings in the case against Saif Al-Islam Gaddafi." The same assessment is reiterated by the Prosecutor that "Libya is unable genuinely to carry out the proceedings against Mr Gaddafi" (Bensouda, 2013a).

In fact, it is not only the ICC carrying out such kind of an evaluation process. The UN bodies, instead of being dependent on reports from the ICC, may initiate its own evaluation process as was the case in the situation of Darfur, Sudan. The International Commission of Inquiry on Darfur established by the Secretary-General concluded:

> The Sudanese justice system is unable and unwilling to address the situation in Darfur. The system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in the Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of those acts' (Reportd: 6).

The Darfur case shows that the existence of a functioning government does not preclude the ICC to intervene. What the Court reckons is not the mere absence or presence of a ruling authority, but a particular type of relationship between the government and its citizens. This relationship does not have to fully overlap with the rules, procedures or traditions of an advanced liberal democracy in every aspect, but has to provide the protection of the basic right to life the least. In case the right to life disappears and populations become subject to mass-scale atrocities, it is the responsibility of other states, international institutions and organizations, *videlicet* the international community, to intervene. What is at issue is not merely the protection of the basic right to life or the occurrence of mass-scale atrocities, but the lack of a properly functioning judicial system that meets the standards set forth by the international community. It is not just "living" but "better living" that becomes relevant for government intervention (Foucault, 2007: 338), and ensuring accountability for mass-scale atrocities is recognized as part of what constitutes "better living".

Governmentality envisages the interference and direct conduct of the central authority when the legally mandated private authority fails to perform as required. The principle of complementarity, which has been presented as supporting equal relations between the ICC and the national courts, contributes to the mapping and framing of the undeveloped, incompetent, or simply the "other". The principle of complementarity, through ensuring the means for "knowing the subject", involves a gradation of types of legal systems if not types of people. Evaluation at this point is

conducted of the actual and potential capacity of national jurisprudences. The ICC, rather than acting as an equal partner, accomplishes a monitoring, surveillance and controlling process in which the performances of national legal systems vis-à-vis the atrocities are the key components of evaluation. What is expected is not merely the prosecutions, but a particular type of jurisprudence in operation, the standards of which are introduced through global governmentality at times in the form of seminars or training programs as in a recent example for witness protection training for nine francophone African states parties (Press Release, 03 July 2013). It is also extremely noteworthy that such training programs are not confined to the judiciary sphere, but target also local authorities such as police, media and various non-governmental organizations (Reportf: 13), which show how the governmental power of discourse penetrates into different fields in a capillary form and benefit from all sorts of local mechanisms.

Being part and parcel of a wider disaster, international crimes constituting mass atrocities are therefore transformed into some sort of a mapping of development, civilization and democracy. This kind of a mapping draws borders between developed and undeveloped, civil and uncivilized, and even human and non-human. Regions and populations are worked on through not only legal devices but also through economic, liberal or administrative discourses so that these populations are to be integrated into the system or excluded – maybe irrevocably – at all.

It is not just that a clear, distinctive line is drawn between the ICC representing the international community and countries where mass atrocities subject

to investigation are committed. There are more than one binary drawn between societies and their respective polities. These binaries construct different audiences while multiple messages are communicated targeting these audiences. The first group of audience includes groups that are victimized and groups that are criminalized though the first impression might be that it is individual suspects and victims instead of groups for this first addressing. As already underlined, international criminal prosecutions target communities despite the widely-supported argument that criminal law has been evolving in a progressive way to prosecute and punish individual persons in accordance with the principle of "individual responsibility". Though it is not groups being prosecuted and punished before international tribunals, international crimes are not individualistic crimes which can be committed without group-level organization and planning. Likewise, the victims are not individual persons, but members of groups who have become victims due to their membership to these groups. So, the direct message is directed to victimized and criminalized groups though it appears to be –and in fact it has to be –individuals representing their groups before the Court.

The second group of addressees consists of potential victim and criminal groups whom we might classify as "hearers", who, according to the conventional belief, criminal legal systems target first and foremost in order to deter future crimes and to show the potential victims that they can readily rely on the system. But there is a third audience who most of the time do not come into the scene and show itself, and who is thought to become never directly part of such a criminal activity neither as

perpetrators nor as victims. This is the "international community" both prosecuting and watching as the audience the judicial proceedings. It is the instance that the authors and the subjects of international community overlap.

6.2. From Raison d'état towards Raison d'internationale

> There is, after all, nothing more reassuring than thinking that we are better humans than those men and women of the past. Nothing is more comforting than a history that allows us to maintain the *status quo* (Fudge, 2006: 116).

Fudge (2006), in her work on (un)changing perceptions and attitudes regarding human-animal relations, indicates a mostly disregarded point that we humans tend to rule out contradictions in the past in order to rule out the very similar present contradictions. The reference point for Fudge is a history narrated and depicted in a particular way, which functions as a justification mechanism for today's and tomorrow's order of things. The past is formulated to represent the "other", this "other" holding what has been surpassed, overcome, subjugated or even forgotten. If the fundamental tenet of criminal legal systems, which is that no order would survive if there is no protection for the weak, stands as an explanation for the need of constructing the "other" in a given time and space, then Fudge's point that we, instead of remaining still in a given time and spatial zone, travel both in time and place to provide justifications for our civilization.

The ICC, representing the final stage in international criminal prosecutions, operate both as an alienation and justification mechanism: alienation from temporal and spatial zones of conflict, and justification for the means of achieving this alienation and governing not only the ones being categorized as "others", but also the ones representing the so-called international community. Governing others turns into governing ourselves as past and present atrocities tell us a narrative urging the need and necessity of protecting the *status quo*.

There exists an interactive relationship between fear and protectionism, which at the end results in a vicious circle enabling neither of them to overcome the other. Protecting the self and the belongings feeds into more fear rather than preventing or removing it, and further fear nourishes further protectionism, which in turn causes a spill-over effect of alienation and otherness. International prosecutions in fact represent a post-modern way of over-protectionism that has been nourished by fear of not actually becoming subject to similar atrocities, but mostly being affected somehow if remained inert and inactive. All types of security organization need something or someone to define as the "other". The "other" for the police forces and the judiciary is simply the criminal, without whom the existence of police forces and courts would remain unjustifiable and meaningless. There has to be a "threat" – materialized in the form of a "crime" – to legitimize and explain the need of police forces and judicial-penitentiary bodies.

The "other" for the international community is the community associated with international crimes either as victims or as perpetrators. The crimes codified as

"international crimes" have a collective character, which contributes to mapping world communities according to a certain set of standards. The collective nature of international crimes and the reactions of the international community to these crimes represent a novel phase of governmentality at the international level. Just like so many different questions in economic, social, political or cultural fields, the problem of how to deal with particular atrocities has also been embedded in the matrices of liberal governmentality.

The collective nature of international prosecutions is not only related with the group or community directly associated with the criminal activity. Though the criminal tradition has turned its face towards individual responsibility of the crime committed, prosecution and punishment of the individual act has transformed into a collective initiative in connection with the modern mantra "responsibility to protect". So, the crime is individual, but prosecution is a collective responsibility reflecting the close relationship established between international crimes and international peace and security. This is a relationship supporting and consolidating the "responsibility to protect" and carrying it even to another level through the "responsibility to prosecute".

This version of governmentality is not confined with governing the processes or outcomes, but it also deals with governing certain affects and emotions (Walters, 2012: 112). Through bringing to the fore a certain group of atrocities under the rubric of "international crimes", the ICC in an implicit way governs emotions and reactions of the audience, especially the "overhearers". This audience, therefore, directs their

emotions showing pity to the victims of the selected atrocities and anger to the perpetrators. Orientation of reactiveness to a certain channel thwarts potential reaction to other atrocities, at least not with the same degree. Detained, tortured or annihilated individuals or groups, victims of human trafficking, excluded immigrants and refugees, or people suffering through "daily" genocide or crimes against humanity, all remain in the shadow when attention and emotions are directed to the ones made "more visible" and "savage".

The idea of justice the ICC, in collaboration with numerous global governance bodies, promises to realize is an end in itself, which is supposedly in harmony with the well-being and happiness of everyone. Though lacking a materialized hierarchical state-organism at the international level, global governmentality introduces a parallel logic with that of the nation-state. *Raison d'état* of the nation-state has been described as the maintenance of the well-being and happiness of its citizens. However, the interest of the state in improving its citizens' well-being and happiness was not an ultimate end in this logic. Instead, this was an interest coinciding with that of the state itself. It was not because the well-being and happiness of citizens was a "supreme and non-negotiable end", but because the welfare of the citizens was a means to enable the state to survive and advance (Walters, 2012: 28). Global security governance also takes an interest in improving the welfare of its subjects, as well as prosecuting and punishing the ones threatening it. Here, again, there is an interaction between the well-being of the international community and interests of global security governance. The ICC, as the final stage

ininternational prosecutions, tries to protect and maintain "justice" understood in a particular manner, not because "justice" is taken as a supreme and universal end, but because "justice" is a means to an end, with the end being the survival and advancement of global governmentality.

While the ICC discourse seems to be developing towards a human security oriented one, the parameters of what constitutes human security remains highly limited and restricted. The type of security which should be established for the population does not go beyond actual physical survival though a number of alternatives such as preventing civilian unrest due to famine, providing a context for sustainable development or creating a viable program to eliminate illiteracy (Acharya, 2001) may well be integrated into this contemporary discourse. Besides, what is meant by physical survival of communities remains almost the same with the traditional concept of security. With regard to war crimes, there is no question about the required linkage with an armed conflict. For the crimes against humanity, Article 7(1) of the Rome Statute clarifies that the punishable acts should be committed as part of a widespread or systematic attack. For the crime of genocide, the state of warfare is not a prerequisite as the crime can be committed during peace time. Still, the acts constituting the crime of genocide refer to physical or biological obliteration of the protected groups. So, even when death by starvation or disease can be regarded as criminal acts, they should be committed with an intention to bring about a physical destruction of the protected groups, and only these groups instead of every human group. Though the state as the referent object of security has been replaced by

human groups in this new discourse, what is understood by human security continues to imply and reproduce the old security understanding.

Additionally, this new combination of justice, which has so far been interpreted through a rights-oriented discourse, but is now incorporated into order and security concerns, results in a strange and even paradoxical relationship oscillating between granting and suppressing freedom. The security and order components in the recent discursive formation of the ICC contribute to a narrow and restrictive framework for international criminal law. Yet, in another paradoxical way, the narrowly defined international criminal law discourse brings about a proliferation of new actors, which do not function only to impose discursive power onto others, but also to implement this discourse over the self. It is not the case that local authorities (i.e. states) delegate or renounce their power to an international or supra-national authority. Contrariwise, a globally functioning mechanism is ascribing certain duties and responsibilities to individual states as well as organizations at various levels. Global governmentality moves within and beyond conventional borders governing the autonomous self in the form of states and many other actors.

In the case that the right to life disappears and populations become subject to mass-scale atrocities, these actors sharing the once sovereign power of the state intervenes. Although the ICC is but one of these actors, it is a very crucial one indeed, and its discourse is perhaps the most conspicuous example of how changing threat and security perceptions lead to the construction of different identities, while conferring certain responsibilities to particular members of the so-called international

community. Hereof, the follow-up question is why at a certain stage, and under what sort of circumstances such responsibilities are conferred to the international community.

CHAPTER 7

LAISSEZ FAIRE LAISSEZ PASSER OR LAISSEZ TUER LAISSEZ MOURIR

The genealogical reflections on the ICC, its particular discursive practices, and finally the governmentality aspect indicate a very significant change with regards to the global legal architecture. The change displays the limited and misguiding perspectives which take law merely as a constraining power against the extremes of governments, or an instrument of different power groups. Discourse analysis supplemented by a governmentality perspective unfolds that law, which is articulated to the global power structures through novel institutions and discourses as seen in the case of the ICC, cannot be taken as an outright representation of the superstructure. However, Foucauldian perspective while looking at discontinuities in discourses tends to pay little if any attention to the non-discursive or extra-discursive levels of reality (Layder, 1994: 109). To overcome the problem, Gramscian insights are invoked to articulate the structural sources of power with an attempt to complement Foucault (SeeCocks, 2012; Kenway, 2013; Laclau and Mouffe, 2001;Jessop and Sum, 2006;Mercer, 1980; Smart, 1986; Sum and Jessop, 2013).

Notwithstanding the critics on any kind of convergence between Foucault and Gramsci, which are mainly due to the focus on the difference of the former againstthe unity of the latter (Geras, 1990), Foucault does not reject all correspondence between discourse and materiality but the pre-given ones. For Foucault, each and every correspondence or non-correspondence should be analysed on its own terms (Smart, 2013: 94) as "the forms of articulation and determination may differ in relation to the relative importance of different non-discursive (material) factors in terms of both place and time" (Olssen, 1999: 54). Discourse is not split from non-discursive, in other words "material world" or practice, and not subordinated to the latter. Again, Gramsci departs from classical Marxism through attributing great importance to the superstructure that has a certain degree of autonomy from the economic base. As such, both ways of thinking,avoiding from dichotomous and deterministic explanations, are inclined to be overdeterministic (Olssen, 1999: 52-54).Neo-Gramscian analyses converge with Foucault also through displacing the distinction between state and civil society and stressing the influential role of micro-techniques besides macro ones (Jessop, 1990: 220-247). Foucault, on the other hand, recognizes the never-ending struggle between groups and classes on dominating the others. This is a "play of dominations", domination of certain men over others leading to particular sets of values, rationales, and techniques (Foucault, 1977a: 148-152).

Relating to social conditions of possibility is a road many Foucauldian writers do not tend to take as they rather look at the effects to grasp the analytics of

government in a diagnostic manner and "to diagnose is to discriminate or differentiate" (Rose, 1999: 57). Cutting the direct link between an epicentral power, as there is not a central locus of power at sight at the international level, and the operation of governmentality, which conforms with the lack of such locus rather than posing a contradiction, is not necessarily a negation of a Gramscian perspective. What is needed is to further the traditional Gramscian perspective of distinguishing political society and civil society in a way to explore the intermingling of these two bodies which at the end support and reinforce each other.

The purpose of the final analysis chapter is to subject the operation and discourse of the ICC to the play of dominations at the global level with a focus on the latter's political economic rationale. Similar to the differentiation between politics and economics in the *laissez faire* doctrine assumed incorrectly as natural (Gramsci, 1971: 160-61), the more recent discourse on the urgent need and legitimacy of intervention in mass-scale atrocities is also a fictious and artificial one. Yet, despite its temporality and conditionality, there is a certain rationale behind the *laissez faire* as well as the current interventionist tendency. While exploring the relationality of the current global liberal capitalist context with the interventionist rationale regarding mass-scale atrocities, a further aim is tomove beyond the instrumentalist and structuralist explanations of.

The attempt to converge Foucault with Gramsci is accompanied by yet another attempt of testing the commensurability of different meanings attributed to neoliberalism. Despite arguments on the contrary (see, Barnett, 2005; Castree, 2006),

neoliberalism as a form of governmentality and neoliberalism as a hegemonic ideology are compatible at certain points. Rather than taking an either/or position, the current global neoliberal order is considered as a discourse that is neither top-down nor bottom-up, but rather a circuitous process (Springer, 2012). As such, neoliberalism takes the form of a common-sense converging notions of hegemony and discourse that associates with a limited government subordinated to civil society and economic growth, a monoculture dominated by capital and consumerism, individualist and materialist modes of thought and action leading in due process to a hierarchical, disciplinary and materially unequal world order (Gill, 2014: 30). In this unequal world order, the fordist universalist claims are to the greatest extent deserted though*laissez faire* is not maintained as the guiding principle. For the sake of efficiency and risk prevention, not everyone is responsibilized, self-regulated or repressed. Instead, through a highly segmented networking, both in spatial and temporal terms, communities as well as individuals are differentiated while some are self-regulated as responsible ones and others marginalized and excluded according to performative evaluations (Fraser, 2003: 169).

International criminal law, through the operations of the ICC, plays a significant role in constructing the responsible as well as the excluded and marginalized ones as already underlinedheretofore. The current chapter connects such continuous construction to liberal capitalism albeit the latter does transform the content and meaning of the classical liberal doctrine of *laissez faire*and extend it toa different, which is “global”, scale. Law, which is an active governing technique that is

productive of political authority, "is [also] central to the constitution of the power of capital as well as neo-liberal forms of state, or political and civil society, in the emerging world order" (Gill, 2014: 29). The civil society in this new configuration takes the form of the "international community" to which the state next to manifold sub and supra level organizations becomes subordinated.

To start with, the transformation of the *laissez faire* doctrine with a focus on the underlying rationale on the protection of life, in particular population life at the global level is evaluated in connection with political economy. Then, pro and counter alliances to neoliberalism are explored, which foreground the potential and actual outlets of violence and resistance. The chapter concludes with an outlook at the re-territorialisation process that is enabled, maintained and justified through international criminal law's humanitarian principles.

7.1. Cannot Let Them Die and Cannot Let Them Kill

The motto *laissez faire* is believed to be first enunciated in a dialogue between the mercantilist French finance minister Jean-Baptiste Colbert and businessman Le Gendre, which then was developed by Quesnay who added the second part *laissez passer,* and later took the longer form *laissez faire et laissez passer, le monde va de lui même* (let do and let pass, the world goes on by itself) by the French physiocrat Gournay. The *laissez faire* doctrine was promoted by classical liberalists who

supported state intervention restricted to the protection of life, liberty and property. These three main principles – life, liberty, and property – constitute the basis of natural rights, and in fact reflect a further stage of the natural law doctrine though the liberals favouring *laissez faire* compare markets with nature and argue that there should be no interference to economy as the natural order of its functioning will eventually finds its equilibrium.

The journey from natural law to natural rights, and then to human rights, is significant in the sense that it reflects in parallel another ideational journey of a polity's relationship to its subjects. The natural law addresses everyone and every polity on earth through its objective principles. Yet, while recognizing differences and inequalities rather than pursuing an aim for change, natural law assigns the responsibility to the polity a patronizing role. Natural rights approach, on the other hand, turns to subjective demands replacing the objective principles of natural law doctrine, and introduces the three props, namely, right to life, right to liberty, and right to property. These three fundamental rights, which represented a revolutionary stage breaking down the particularity and asymmetry of natural law, was an attempt to equalize the subjects through appealing to every individual regardless of his identity or whereabouts. Human rights, as the final stage of the process, bring together the objective principles of natural law and subjective demands of natural rights in an attempt to accommodate the former's communitarianism with the latter's individualism and rationalism (Vincent, 1986). In this regard, *laissez faire*, while emphasizing the role of nature, corresponds more with the individualistic stance of

natural rights and rejects the state's patronizing interventions with the assumption that it will do more harm than good.

The current global governance, rather than being merely a representation or extension of the*laissez faire* approach, applies the logic of human rights and initiates to govern the globe by both regulating the communities and intervening at instances when considered necessary. International criminal law corresponds to the logic of human rights giving out the message that it will not "*laissez tuer laissez mourir* " (let them kill and let them die). As it is not the case that a policy of *laissez faire laissez passer* in a pure and absolute form is followed in global markets, there cannot be a policy of *laissez tuer laissez mourir* that would amount to leaving communities alone when under threat of annihilation.

The prevailing policy choice regarding how global markets should function does not point to absolute liberty and lack of constraint, and the "hidden hand" is not left totally on its own without any backing. So, in fact, the "hidden hand" is not always hidden in the sense that it comes into the picture whenever necessary. Adherence to the rules is a *sine qua non* condition for the efficient operation of the "hidden hand" of the market so that the global governance mechanisms consisting of both formal and informal organizations and acting like a "nebuleuse" (Cox, 1996) can provide and maintain capitalist expansion (Evans, 2011: 13). Certain rules and codes provide the minimum guidance and intervention if necessary while the "hidden hand" at times manifests itself in the form of states or non-state actors. As underlined previously, states are just amongst various actors of this type of a "nebuleuse",

however, they are very significant actors equipped with enormous resources surpassing alternative organizations thus far, and move in collaboration with the capital. Therefore, it is not only states but also corporate and financial institutions that are interested in "creating the conditions for stability, including low transaction costs, control of crime and corruption, economic efficiency, and the consistent application of general norms of economic activity" (Evans, 2011: 16).

The corporate and financial institutions, as well as local or international organizations not directly related to finance or trade, are "interested" in control of crime and corruption, but this interest does not necessarily imply "direct involvement" for all crime categories. Governmentality, distributing responsibilities in the most possible efficient way to a myriad of actors, has allocated the responsibility to protect communities against mass-scale atrocities and prosecute the accused for such crimes to the international community, the ICC being the leading actor in monitoring and evaluating the judiciaries at the local level and initiate its own prosecutions if local courts fail to satisfy the general standards. Therefore, governmentality, which introduces the rules of conduct with the aim of designing, directing, and controlling from a certain distance, does not let communities and polities to have absolute liberty in doing damage to their physical integrity. Limiting certain ways of conflict, and the codification of international crimes is not a replication of humanitarian law norms and rules. Despite the deep affiliation between international criminal law and humanitarian law, international criminal law represents a novel phase in its disciplining and governing capacity which

humanitarian law lacks. But, why give such disciplinary and governmental power to an organization like the ICC? What has been the motivation underneath of clarifying who should be prosecuted for what and how?

> In accordance with the principle *nulla poena sine lege*, the rule upon which any penalty is based must be well-defined and known beforehand. Even though it transpires after the fact, punishment thus always entails preventive force: It can deter the potential law breaker. In definitional terms, however, the retrospective character has priority. Considered in itself, the punishment is a reaction, i.e., a retribution; the deterrent is initially only a (granted, unavoidable) side-effect, a thoroughly welcome utility (Höffe, 1998: 218).

Whether put into operation to deterpotential law breakers or for retribution from a retrospective perspective, international criminal law is special and different in comparison to common criminal law systems in that it selectively targets punishing acts directed against the physical security of communities at certain levels. Two possible questions arise from an elemental comparison between international criminal law and a common criminal legal system: why international criminal law selects mass-scale atrocities to prosecute rather than covering also atrocities against individuals, and why international criminal law selects mass-scale atrocities to protect the physical security of communities rather than covering also atrocities against their social or economic security? Contrary to the more explicit connection of the latter question with political economy, the first question seems to be directly related to governmentality. Still, governmentality carries an economic rationale as well, and in addition to altruistic or politically-driven motivations, it is this rationale that connects international prosecutions to global political economy and unravels international criminal law's concern for the physical security of communities. Thus,

rather than distinguishing the motives and rationale of the aim of protection of communities and its limitation to physical security, it seems more appropriate to discuss governmentality and political economy together.

7.1.1. Political Economy of Governmentality on the Protection of Life

Governmentality's focus on the individual's capacity for self-regulation of conduct turns into polities' and societies' capacity for self-regulation of conduct as reflected in the "principle of complementarity" in the Rome Statute. What is at issue for global governmentality is a wider perspective which reflects a relationship between populations and political entities. Global governmentality's focus on the relationship of political entities with populations, rather than implying a total disregard of the physical security of individuals, reflects an advanced allocation of responsibilities. In this recent design, political entities are "responsible" as first degree authorities for the protection of both individual and community security. Just as the modern government delegates the responsibility to govern to micro-level locuses, with the latter becoming both the subject and object of government, global governmentality delegates the responsibility to prosecute international crimes to states on condition to reclaim this responsibility when the state fails to accomplish the mission. The conventional view that the responsibility to protect populations from mass-scale atrocities and prosecute international crimes passes from the state to international institutions is misleading in that the latter, rather than capturing existent state

responsibilities, defines, develops and imposes instead novel and unprecedented responsibilities to its subjects. Neo-liberal governmentality, thus, transcends the idea and practice of limiting state-power, and now projects the "prosecution of state-power" in certain cases and under certain conditions.

As it is shown in Foucault's approach on law, Foucault has been mistakenly interpreted as positioning law against modern power technologies. Foucault, rather than trying to exclude law from modern modalities of power, emphasizes instead how law accompanies with its determinate nature to certain conditions of possibility while accommodates itself to change in time and place through an elusive indeterminacy. In its deteminacy, liberal societies insert law, economy, police power and political economy in a modern understanding on security (Neocleous, 2008: 13). The specificity of current global governmentality lies in it taking human rights and humanitarian law breaches as one of the key issues of security. Yet, it would not be sufficient to argue that this specifity has emerged due to the internationalization or universalization of grave breaches of human rights and humanitarian law, which international law categorizes as international crimes, as part of the globalization process. Globalization is rather about deterritorialisation or supraterritorialisation (Scholte, 2005: 59-64) since international crimes creates new spaces rather than falling within the borders of a specific territory or domain. Through this sort of a spatiality, dealing with international crimes becomes part and parcel of global governmentality, which takes the commission of these crimes and the lack of their prosecution as a security issue.

As already indicated, the ICC complements a security agenda where law is identified as an important condition and tool for development. The interconnection between development and security is not argued to be a post-Cold War phenomenon; on the contrary, it is argued that "development has long functioned as a liberal technology of security" (Duffield, 2010: 61). What is critical regarding the formation of the interconnection between development and international security is the role of liberal interventionism which supposedly carries an ethical aspect for the purposes of development since different or unfamiliar life is perceived as an incomplete one necessitating development to become complete (Duffield, 2007b: 230). Besides, it is necessary for the purposes of international security since underdevelopment breeds threats to international security (Duffield, 2010: 56). In this vein, the continuation of liberal intervention was ensured by the constant (re)constitution of poverty as at the heart of all the problems starting with the "communist spread" in the Third World in the 1950s to the "terrorism" in the 21st century. By this, it is argued that the external sovereign frontier of the West was expanded even in the 19th century, advocating "illiberal forms of rule" abroad for the "underdeveloped", then "barbarian", while at the same time claiming to be civilized or developed through "liberty, equality, and democracy" (Duffield, 2007b: 228).

The rule of law constitutes the very basis for liberal democracies, as what is needed from the perspective of neoliberal governmentality is not only law but how law is implemented; in other words, the type of institutions whereby law is put into operation. How rule of law is measured and evaluated is significant since it

demonstrates a meaningful connection between the political economy of neoliberalism and its corresponding law perspective. The quality of contract enforcement, property rights, the police and the courts, as well as the likelihood of crime and violence isamongst the primary indicators of the rule of law evaluations (World Bank, n.d.). There is a growing trend since 1990s that global institutions of neoliberal governance relate all types of conflicts to poverty while the latter is regarded as a consequence of poor or underdeveloped liberal legal environments (SeeWorld Bank, 2003; World Bank, 2013; WJP, 2015).

The ICC is just one of the institutions elevating certain problems, which were not used to be perceived as global problems, to the global level. There are two prominent features for the ICC's contribution to the rule of law: first, the Court engages with protection of population life; and, second, this is achieved ruling "through" law though the underlying rationale is originated in the rule of law.

7.1.2. Political Economy of Protection of Population Life

"[T]he rediscovery of internal conflict following the end of the Cold War has shifted policy focus from states to people" (Duffield, 2005: 153), the latter replacing states as the central actor in modernization, industrialization and economic growth

(Duffield, 2005: 152). The shift from states to people is accompanied by a concomitant shift from economic growth *per se* to sustainable development, which takes "the responsibility for self-reproduction from states to people reconfigured as social entrepreneurs" (Duffield, 2005: 152). The decolonization process has bequeathed an "innovative, unstable and circulatory 'world of peoples'" (Duffield, 2005: 144) that are now taken as both the facilitators of sustainable development and the sources of threat in case of failure. Sustainable development is difficult to achieve in case of internal conflict as it "destroys the very possibility of self-production" (Duffield, 2005: 153).

> In distinction to the heroic narratives of liberation and resistance which attached to civil conflict prior to the 1990s, today's conflicts are the antithesis of this earlier modernizing trend: internal conflict has been redefined in terms of its threat to sustainable development. (Duffield, 2005: 153)

So, the agency in achieving sustainable development turns towards the population from the state though the state maintains its key position as a means of global governmentality. It is not the failed state, which poses the greatest of security threat to world communities, but populations in turmoil that at times gets close to the point of extinction through massacres, genocides and armed conflicts of all types. As long as the focus was on states, international law was designed to regulate the relations between states. With the focus shifting from states to populations, there arises a new international law introducing international criminal law as its associate focusing the attention on populations. Under this new configuration, non-insured life of the individual at the domestic level and non-insured life of the population at the global

level cannot be tolerated. The rule is self-(re)production and self-regulation while global governmentality intervenes when the local subjects risk their and others' lives by failing to prevent mass-scale atrocities, which is the exception.

7.2. The New Historical Bloc

Aside from any economic determinism or an instrumentalist view that power can only be attained and employed by a privileged class or group, the relationship of global political economy to various and at times conflicting interests needs an analysis through the common security perspective. As has already been underlined, it is the international community that formulates the global security perspective while it simultaneously constructs itself over and over through this particular perspective related to mass-scale atrocities. Yet, is it possible to read the international community as a broader and globally operating reflection of the Gramscian concept of "historical bloc"?

Against the premise of orthodox Marxism,which takesclasses more or less as unified entities, classes might well breakdown into different fractions due to colliding interests, powers or relations; and in a similar way, distanced classes or groups might come close to each other on the basis of a common perspective (Poulantzas, 1973). For Gramsci (1971: 186-191), it is the process of closing the distances between classes, individuals and groups that leads to a historical bloc. The

narrowing of distances does not indicate a total compromise or affiliation, but there is certainly an intensifying common-sense with regard to mass-scale atrocities and the prosecution of their perpetrators. States, international institutions or activists who take the lead in promoting and/or participating in humanitarian interventions contribute to the development of the moral and intellectual leadership, thereby, to the mediation between otherwise dissident parties (Manokha, 2008: 123). Yet, there is a significant asymmetry between the conventional Gramscian perspective, which takes the subordinated classes and groups as passive actors, and the global actors' potential to challenge and resist to the moral and intellectual leadership of the new historical bloc.

In brief, crude and oversimplified economic determinism cannot explain how a pervasive humanitarian law and criminal law discourse have become one of the dominant discourses of neoliberalism that is now in operation globally. Yet, the fact that economics is not the dominant structure does not preclude the determining power of economics as to which non-economic levels become dominant or the degrees of autonomy and dependence these levels have both in relation to each other and themselves (Althusser, 1979). Accordingly, global political economy has a rationale in granting a substantial degree of autonomy to international law and international criminal law albeit it is still formulated with certain constraints and limitations. Law's indeterminacy, despite such constraints and limitations, provides a substantial flexibility and autonomy to liberal law that now shapes international criminal law in accordance with the basic tenets of liberal ideas.

7.2.1. The Post-modern *Sati*: African Violence?

The flexibility in time and spatiality of detecting and identifying mass-scale atrocities is accompanied by an iterative construction of the non-Western world through "post-modern sati(s)" under the rubric of international crimes and criminals. Yet, the mobility of the international criminal law discourse should not be confused with absolute indeterminacy as there still is a determinant dimension of the discourse given the conditions of possibility. The straddling question which enables one to explore the conditions of possibility and the unequal relations these conditions introduce is "what has been damaged and who is correcting the damage".

In the aftermath of the Cold War, a huge increase in arms trade began to fuel African conflict zones. The underlying reason for almost all of these conflicts is the competition to control the limited resources in the region (Clarke 2009: 45). Despite obvious connections with global trade circuits, the response to the violence in Africa came from a different end of global governance: international criminal law. The contradictory and "hypocrite" (Dillon and Reid, 2000: 119) nature of liberal governance is not confined to the African continent. While the international community calls for intervention against the Indonesian actions in East Timor, it is the liberal states who are members of the very same community furnishing the Indonesian army with the means to carry out the condemned actions (Dillon and Reid, 2000: 119). It seems to be yet another striking dilemma for the international

community that the law it eagerly tries to support to prevent child soldiers can do nothing to prevent the liberal states who are the primary supplier in global arms economy (Dillon and Reid, 2000: 119).

Yet, what is described as a contradiction may not be a genuine one. In a market economy, selling and buying weapons does not necessarily have to be restricted though the way of their use can certainly be a question of governmentality. The selectivity of the ICC, as well as other non-governmental or international organizations to intervene, does not imply an accidental decision-making. The intimate relationship between states and commercial security corporations, or the seemingly contradictory attitude of military attaches in their commitment to selling both arms and security reforms (Dillon and Reid, 2000: 122, 123) has an underlying logic which constitutes one of the basic tenets of capitalism. At the end, capitalism does not prohibit war at all; capitalism brings out and imposes its own design of "humanitarian war" and expects the parties to adhere to the rules which determine who can do what under what sort of conditions. The humanitarian assistance takes various forms with a wide range extending from poor relief to military intervention while the underlying logic of all these forms remains the same: to minimize the risk of chaos in the bottom layer (Cox, 1997: 58).

7.2.2. Violence and/or Resistance?

Examples of the politics of international criminal law not only illustrate the flexible and complicated nature of resistance but also reveal another striking feature: "[i]f law eludes encapsulation by power, the same holds for resistance" (Krasmann, 2012: 390).Rebels welcome the ICC arrest warrants of government leaders in Sudan against an on-going propaganda carried out by the Sudanese government declaring the Court as another attempt of the West to topple an Islamic regime. Uganda has dramatically changed its attitude from full-scale support for the ICC in its quest for international support against the rebel movement led by The Lord's Resistance Army (LRA) towards taking the lead in a continent-wide opposition against international prosecutions (Nouwen and Werner, 2010: 948-956). Despite the increasing tension between the ICC and the African Union (AU), which intensified particularly following the warrant arrests issued for high-rank state officials in Sudan (including President al-Bashir), the Union calls for the African regional court (African Court of Human and People's Rights or AfCHPR) to investigate and prosecute suspects of international crimes as a counter-strategy against the ICC. Kenyatta, the Kenyan head of state, who is the first sitting president to appear before the ICC, displays a different kind of resistance by not refusing to stand before the Court (NewVision, 2014). So, the problem at sight for the African countries and leaders seems to be the locus of the trial, the identity of the insitution, or its hidden intentions, not the discourse against impunity for international crimes.

As to the loci of violence and resistance, "the locus of governmentality is being unbundled, broken up into several distinct functions, and assigned to several distinct agencies which operate at several distinct levels, some global, some regional, some local and subnational" (Fraser, 2003: 167). This is also the case with the policing and criminal law functions, yet one should not ascribe a definite level to these distinct agencies. It is argued that international criminal tribunals, the ICC and universal jurisdiction is an upward representation of post-fordist governmentality (Fraser, 2003: 167), yet the complementarity principle of the Rome Statute enables the Court to function both upward and downward without restricting its activities to the global level.

Global governmentality blurs not only where power is located or where exactly the locus of law resides, but it also conceals where violence takes place and what different forms violence can take. Violence, as understood in forms of genocide, crimes against humanity, war crimes and the crime of agression, is projected to remote parts of the globe. All the eight situations under investigation before the ICC are located in the African continent. Preliminary investigations, which include Afghanistan, Central African Republic, Colombia, Comoros, Nigeria, Georgia, Guinea, Honduras, Iraq and Ukraine contribute to distancing the developed wealthy West from the savagery of the non-West even though the discourse of international criminal law supposedly embraces the whole humanity in the name of the international community.

Although what represents the West and non-West is belived not to reflect a particular geographical or territorrial locus, and globalization is seen to penetrate indiscriminately to all parts of the globe, "the core regions of what could now be termed the liberal world system appear to be consolidating and strengthening the ties between them at the expense of outlying areas" (Duffield, 2007a: 3). So, accumulation of capital and welfare, beyond being reserved at a certain loci, produces a further consequence of excluding the rest of the world (Castells, 2010a, 2010b). Rather than the expansion of economic power, what happens is an "involution", and the loci of economic power remains stable in its own zone (Hoogvelt, 2001). Yet, the stability of this zone has repercussions such as creating instability in the under-developed non-West that entails a new historical bloc to provide the compromise between these two main poles.

At the particular juncture of designing the justifications of intervention and reclaiming the responsibility to prosecute, the international community, as the third audience alongside the direct and potential victims and criminals, becomes also subjugated to the international criminal law discourse. Here, a different type of violence, which is not realized in the form of mass-scale atrocities, remains concealed and unnoticed as the surveillance is directed beyond where mass-scale atrocities take place. The violence projecting the third audience is hidden in peace-time, implemented and sustained in so-called peaceful wealthy Western societies that mould the niches of the international community.

7.2.3. Responsibility of the New Historical Bloc

The actions of transnational corporations and financial institutions are accomplices of gross violations (Ratner, 2001) though no criminal liability can be projected onto these institutions. This is to a great extent because the prevailing criminal liability mentality depends on individual responsibility that excludes corporate responsibility. But, there is an underlying rationale also for the prevalence of the principle of individual criminal responsibility which is that the connection between corporate actions and the detrimental consequences on social and economic as inequalities remains highly hypothetical and difficult to prove in legal terms. The ruling norm of individual responsibility, beyond excluding corporate responsibility, entails yet a further consequence of concealing the role of such corporate actions which have a not so insignificant share in the structural violence increasing both in depth and breadth through global capitalism (Evans, 2011: 19-21).

It is certainly unthinkable to prosecute the structure while the impossibility of its criminal liability does not prevent connecting the atrocities and human rights violations to the structure with a purpose of conducting a critique. According to the typology on violence, structural violence differs from other types of violence due to the lack of a person as subject of the violent act. When there is an identifiable actor directly committing the violent act, it falls under the category of direct violence while there is no such actor for indirect or structural violence (Galtung, 1969: 170). Though criminal law has evolved in a way to cover indirect besides direct means of

liability, it is personal actorness hallmarking the modern criminal law tradition, and excluding any reference to structural responsibility. Under these conditions, noone or no institution can be held responsible for the millions dying because of starvation, malnutrition, lack of access to clean water, diseases, or sanitation unless there is a direct linkage between the act and the consequence. The commonsensical attributions of international criminal law, thus, contribute to relieving the tensions emanating from problems of global political economy. As is the case in general with language, law also supports if not directly produces hegemonic power relations in an out of courtrooms while transcending conventional borders and territories.

While the prosecutions diverts attention away from the root causes which the modern world has a share on, the discourse disseminated through the ICC as well as various NGOs and INGOs also support a follow-up concern about sustainable development. As there is not an equal relationship between the groups constituting the international community and the outsiders of this community, not every participant of the international community has access to equal resources or rights. Though all is subjugated in a Foucauldian world, not everyone is oppressed equally in a Gramscian sense.

The versatile nature of the West and non-West in geographical terms does not indicate there is no rationale regarding which locuses or populations are detected and identified to intervene through international prosecutions. Populations whose life is at danger are the ones in urgent need. While calling for aid and assistance from the international community, imaginary borders are built between the ones in need and

the ones intervening. However, it is not only the strangers who are saved, because "saving strangers" (Wheeler, 2000) also means "saving ourselves". So, the real danger is not the one that the international community encounters while initiating missions to save strangers, but the real danger is drawing back the initiative in such missions.

7.3. From De-territorialization to Re-territorialization

Regardless of reflections whether it was possible that human societies could have lived in different social and economic structures than they had in the past, the fact is that their rulers controlled territories and subjects through a particular relationship which was dominated to a large extent by notions of obedience to the former. Yet, in a different economic structure that does not depend on ownership of land, what is meant by the notion of obedience has been subject to change. It does not indicate the over-all renunciation of obedience as a word itself, but a change on what it bears in terms of responsibilities and rights, as well as who appears to be the receiver and holder of these responsibilities and rights. One of these rights, and probably the primary one, is the right to life which accordingly charges the administrators with the duty and responsibility to ensure its protection. "Why somebody does not stop the killing" was not a common question in medieval societies where feudalism was the overriding model as the ruler whether it used to be the king or prince or emperor did not supposedly hold such a duty. In fact, it was the ruler who was governing by

taking the decision on who should be dead. A different discourse replacing the former one on death has begun to focus on living and bestowed the government the decision on determining the means and reasons on life.

As the nature of markets change, the relationality of subjects to politics has also changed while law accommodated itself to this transformation. The former relationship of territory to economics has been replaced by a de-territorialisation process. Territory is still important, yet its importance does not derive from the fact that the main economic activity depends on its cultivation but that it provides the appropriate grounds for better practices which now transcends if not totally eliminates land cultivation.

And, as "society must be defended" (Foucault, 2003), the international community must be defended for global power mechanisms to survive. To defend and ensure the international community's survival, the members of this community must be satisfied on what has been framed as basic human rights with the protection of the right to life being in the lead. Another important point is that this global power cannot justify non-intervention when basic rights of the international community are perceived as under threat at large scale. As global power is not bound by territory, intervention of international community can hardly be restricted to issues remaining out of the traditional borders of sovereign states. This changing perspective is not an indication of the closure of the time of sovereign states, but represents a radical change in terms of the meaning attributed to the notion of sovereignty. "Sovereignty not only gives states the right to exercise jurisdiction over their territories but also

puts them under obligation to respect the rights of other states" (Aalberts and Werner, 2008: 2187) and now sovereignty also refers to the responsibility to respect the rights of people. The new sovereignty understanding laden with new responsibilities has evolved from protection of rights deemed as fundamental towards prosecution when they are breached.

Extension of the content and the meaning of sovereignty bring about two inter-related processes: de-territorialisation and re-territorialisation, which means that governmentality not only dissolves present spatial configurations but also constructs alternative and even adversary ones. Like the shift of, for example, Bosnia from representing a space in need of immediate humanitarian aid to a sovereign state (Tuathail and Dahlman, 2004), situations before the ICC represent spaces of emergency for the international community while constructing stark differences in and of itself. In the evolving global legal architecture, the relation of the extension of the notion of sovereignty to concomitant processes of de-territorialisation is accompanied by a further re-territorialisationcongruent to the conditions of globalism.

Neoliberalism, as "a mutable, inconsistent, and variegated process that circulates through the discourses it constructs, justifies, and defends" (Springer, 2012: 135), defines the conditions of globalism that gives rise to both de-territorialisation and re-territorialisation. The rationale behind the active intervention against mass-scale atrocities is directly related to the conditions of neoliberalism which cannot sacrifice, nor justify, the very basic kernel of liberal though of "right to

life". Property rights, though they appear to be the constitutive element of the liberal rule of law, cannot supersede the right to life as liberal law's first and foremost subject is the free individual person, without whom the exercise of the rights of property and political representation in any capitalist market would be infeasible and disrupted.

Thus, it is not only the autonomy of the corporation against governments, but in fact the autonomy of law maintaining and protecting the autonomy of the individual before anything else that constitutes the neoliberal capitalist rationale in the current world order. Though the identity of the "human" and "human groups" varies in legal texts, humanity cannot be confined to the borders of a temporal or spatial domain anymore. Against the view that the emerging global civil society, or alternatively the "international community", is antithetical to transnational capital (Chimni, 2004), there is a dynamic but not mutually subversive relationship between this community and transnational capital. It is not also the case that state sovereignty has been demolished in favour of global institutions as global governmentality is in need of free and autonomous actors who are capable of fulfilling the responsibilities bestowed upon them. These are free and autonomous actors in that what has been taking place with regards to social, economic, political, and legal responsibilization is a process conducted onto the self as well as others. Despite the fact that neoliberalism supports the "conditions conducive to the spread and growth of global capitalism and not the improved welfare of third world peoples" (Chimni, 2004: 6), there is an evolving new historical bloc consisting not exclusively of a coalition of

powerful social classes and states, but a much broader coalition that paradoxically reconstructs while breaking down the determinacy embedded in the capitalist configuration.

CHAPTER 8

CONCLUSION: WHY INTERNATIONAL CRIMINAL LAW?

> Criminal law is determined by legislators, applied by judges, executed by the corresponding parts of the executive branch (Höffe, 1998: 219).

Although Höffe's words are an oversimplified way of describing the criminal legal system as such, the depiction is important in showing that criminal law is tied to legislative and executive functions to be effective and in force. Besides the fact that the nation state is not the exclusive organizational design where judiciary stands as one of the main pillars, what makes criminal law functional and efficient is not merely its being part and parcel of the judiciary branch but a deeper philosophical association to rights. "It is essential to a right that it is a demand upon others, … [a]nd a right has been guaranteed only when arrangements have been made for people with the right to enjoy it" (Shue, 1996: 16). Yet, rights cannot be guaranteed only through an arrangement enabling the right-holders to enjoy them, but they have to be safeguarded against violations, with criminal law being one of these safeguarding mechanisms.

The international criminal law discourse and the human rights discourse is inextricably connected with each other since international prosecutions appear to be one of the ways to show reaction against certain human rights violations. The intersections between human rights and international criminal law go beyond the latter rising as a response against the violations of human rights. Human rights emerged and evolved positioning the individual as a right-holder against the state that is regarded as the primary source of threat against the rights of the former. The relationship construed as a conflictual one between the individual and the state finds a straightforward expression in leading human rights documents where the offender with regards to a human rights violation is defined as a public official or other person acting in an official capacity, e.g. the requirement about the identity of the offender in torture or other cruel, inhuman or degrading acts in the 1984 Convention. When the offender is not specified under the guise of a public official or other person acting in an official capacity, it is still the state responsible to protect its citizens' human rights confirming the original point of departure positioning the state vis a vis the individual. Thus, the state is either the offender or the duty-bearer to protect its citizen against the offenders when there is a human rights violation (Pogge, 2001). Likewise, international crimes have been codified signifying states and other highly organized entities capable of committing the acts covered under the crime categories, and the duty-bearers to protect populations against mass-scale atrocities. In parallel with an understanding constructing states both as duty-bearers for protection of human rights and the most probable offenders against these rights, the international

criminal law discourse addresses states and groups with advanced level organization capacity as its target group for surveillance.

In this context, it is unavoidable to reflect on criminal law in connection with rights, and international criminal law in connection with human rights and humanitarian law. Moreover, the difficulty to detect a tangible and conventional state mechanism at the global level is not necessarily a rebuttal of governmentality, as legislative, executive and judiciary mechanisms can operate and move smoothly through various layers where there is no central government at sight.

What stimulates and encourages a deep sensitivity on the protection of certain rights at the global level, and to render it as a common security issue for the members of the international community? Inasmuch as finding the correct answer depends on posing the correct questions, what seems to be the right step to begin with is to reset the question "why international criminal law" and to consider whether this question corresponds to the objective of understanding the current power of the international criminal law discourse, which is embodied through the ICC, so that this power in force can be challenged through an exemplary critique. A sceptical approach to the question "why international criminal law" compels us to see that it falls short of adequate guidance in understanding the connections between the international criminal law discourse with the current global politics. It is also not sufficient to grasp the rationale beneath the recent developments granting unprecedented power to a permanent international criminal court as well as discerning the particular techniques applied to its disposal. The question "why international criminal law"

inspires thinking on the relationship between human rights violations and the sanctionary mechanisms, yet does not tell what happened giving rise to this end. An alternative to the question "why international criminal law" might be formulated as "why international community prioritizes the violation to the basic right to life of groups rather than, for example, violations to economic, social or cultural rights". Still, this might be the wrong place to start with, as the first and foremost inquiry should be "why the international community is concerned with the particular right to life and its violation" rather than questioning "why not the other rights or crimes as well". Elucidating the question on why the international community prioritizes the communal right to life requires further thinking on how widespread and systematic threat to life has become a security, order and peace issue at the outset.

8.1. The Basic Crime against the Basic Right

Since human rights are subject to change in connection to perceptions on what human dignity means (Donnelly, 1989: 26), international crimes also evolve in a way to reflect different perceptions towards what constitutes the most basic threat to human rights at the global level. The changing threat perception is connected to what is understood as the security, order and peace of the international community. The problem is that what constitutes the basic right and therefore the basic threat is taken as a fixed and universal concept while its contingency is very often disregarded. The straightforward consequence of a basic right conception is building a hierarchical

structure for crimes as well as rights while the right to physical security is believed to be irrevocably the most important of all.

> No rights other than a right to physical security can in fact be enjoyed if a right to physical security is not protected. Being physically secure is a necessary condition for the exercise of any other right, and guaranteeing physical security must be part of guaranteeing anything else as a right. (Shue, 1996: 21, 22)

The "elementary", "primary", and "universal" significance of physical security for order is a widely recognized phenomenon since Hobbes (1991). Yet, even what constitutes physical security is an open terrain for multiple probabilities, and the subordinated rights as well as criminal legal systems designed in correspondence with the protection of rights have indeterminacy to some extent providing change and compatibility to new conditions. Securing life against violence, agreements against non-compliance, and property against arbitrary confiscation and infringement sustain social order (Bull, 2002: 4). What is noteworthy is that the changing content of physical security, basic agreements and property deemed as unsurpassable define also the content of crimes which give a shape to the society whose members are both agents designating the content of the rights and crimes, and subjects who are governed by the same rules they take part in the codification process.

The relationship between the right to physical security and the maintenance of other rights matches with the relationship between the right to physical security of communities and human rights. The basic right to life, which is interpreted in the form of physical security of communities, gains meaning beyond merely constituting

the basis of other rights for members of communities. Taking the responsibility of not only protecting communities against threats to their physical security, but also prosecuting international crimes when this very basic right to life is violated, is now perceived as associated with the security and well-being of the international community. It is the recently established connection between security of "others" and security of the "international community" –security understood in a particular way as physical security constituting the foundation of all other aspects of security – resulting in the codification of international crimes and the improvement of relevant enforcement mechanisms.

The agreements and fundamental promises to be kept in this configuration are reflected in basic human rights and humanitarian law documents. As long as security, order and peace are perceived in connection with the basic right to life of groups, the international community's well-designed aim to protect the right to life before everything else cannot be detached from global security. Economic, social and cultural rights are not neglected altogether in this post-modern configuration, but subordinated to the physical integrity of certain groups as they are deemed as dependent on the protection of the latter.

In brief, it is possible to represent international law as being subject to a dramatic change with international crimes becoming part of positive law, if positive law is taken as equating legal rules with legally enforced rules. It is vital to see that the change related to international criminal law reflects a broader change of perspective not only in international law but also in international relations. For

instance, the codification of international crimes supported with certain enforcement mechanisms has reflections also onto other international rules such as rules on immunity or accountability. The underlying logic of immunity *ratione personae* is that in the absence of such immunity heads of states and governments will be hindered in the exercise of international functions if they are arrested and detained whilst in a foreign state. As long as international affairs is not, and cannot be, defined as relations between states in a traditional sense, it has become clear that it is not the absence of such immunity, but the absence of prosecutions hindering the continuity and legitimacy of international functions. Besides, jurisdiction in relation to acts performed in official capacity ("functional immunity" or "immunity *ratione materiae*") has to be revisited as nothing conflicting the international law and international criminal law can be regarded as part of acts related to official capacity. Thus, what is observed is not merely a revision of some of the basic principles of international law, but a dramatic change in connection to perceptions of what hinders the functioning of the international system.

The crux of the matter is to notice the content and meaning of this change that carries the analysis to a different level in understanding the possibilities as well as the limits. International criminal law has become a recent phenomenon with a particular content and structure and is certainly going to be subject to further change in due course. What is taken to be at stake and what is aimed to be protected are closely linked to how this protection is operationalized. The particularistic rationale concerning global level protection of basic right to physical security of communities

introduces a permanent international criminal court, the ICC, which operates as part of global governmentality and in accordance withthe current global political economy.

8.2. The Regulatory Power of International Criminal Law

The developments with regard to the field of international criminal law are linked both to the expansion and deepening of global governmentality, as well as to the rise of a human rights discourse. This is a binary process of colonization: one, in-depth colonization; and the other, at the level of territories. A supposedly universal truth has been pervading into fields not dealt with before, and it is progressively constructing new spaces and grids of knowledge through legal discourses. The demonstration of truth in the field of international criminal law is now not confined to the courts whether they are operating at the local, national or international levels. The legal truth secures its space almost in all fields beyond the court rooms, in justifying national or international politics, in creating new professions at universities or organizations, and articulates with diverse economic or social mechanisms. International criminal law is a specific constitution of a space of discipline as it puts a legal stamp on mass-scale atrocities.

The discursive power of international criminal law has also a significant administrative aspect that is embedded in and through judicial power. Just like

administrative power becomes an inseparable part of the penitentiary system or medicine, international criminal law progressively encloses administrative tactics. Something strange happens despite the universality claims of the legal truth through the interplay of specialization and professional qualification: only trained and specialized individuals can demonstrate appropriately this legal truth. Thus, the truth is believed to be "more complete" through demonstrating what sort of atrocious acts some humans could be responsible of, yet this truth can be discovered, prosecuted and punished only by the competent cadres who speak to the atrocities with the language of law.

With international criminal law, international law has ceased to function as a territorializing norm, and has instead started to investigate and judge behaviours of actors including but not limited to conventional state borders. Instead of regulating relations between sovereign units, international law evolves into a body of rules regulating behaviours beyond territories. Nevertheless, it does not indicate the end of sovereignty, but a certain shift in the meaning and content of sovereignty now involving responsibilities and duties.

As crime is regarded as a way of revolt, or madness as a will in revolt in its simplest expression (Foucault, 2006: 173),it is possible to define criminal law as a struggle against the will and act of revolt. In accordance with this, the main aim of criminal law systems is argued to be the rehabilitation of the moral corruption of the criminal mind represented in the will to revolt against order. Yet, international

criminal law is probably the most selective criminal legal system in history in terms of its jurisdiction and includes only certain acts.

First of all, the ICC regime cannot protect everyone in all types of rights breaches; but global governance has arrived to a stage that it feels the need of providing "minimal protection against utter helplessness to those too weak to protect themselves" (Shue, 1996: 18). To be helpless refers sometimes to be left alone, which implies non-intervention or non-interference. The common approach is that communities cannot, and in fact should not, be left alone when threatened by mass-scale atrocities. International criminal law is a struggle against communal crimes, or we may say "communal revolts", that are perceived as threats against global peace, security and justice. In this respect, international prosecutions of individuals for international crimes represent a will to rehabilitate not only the perpetrators who stand individually before trial, but also a social moral corruption.

Leaving alone subjects when their physical existence is under threat is taken as another type of violence. Hence, global governance resorts to governmentality techniques, and executes a much more diffuse and indirect power through various actors and means. Global governmentality, as distinct from absolute non-interference, takes direct action on a selective and sporadic ground which is perfectly in harmony with the appeal to human rights as a last resort in modern law. Modern law is assumed to interfere to protect human rights and prosecute human rights violations "when [these rights] are unenforceable by ordinary legal or political means" (Donnelly, 1989: 13).

> All rights claims are a sort of "last resort"; rights are claimed only when enjoyment of the object of the right is threatened or denied. Claims of human rights are the final resort in the realm of rights; no higher rights appeal is available. They are also likely to be a last resort in the sense that everything else has been tried and failed, so one is left with nothing else (except perhaps threats of violence) (Donnelly, 1989: 13).

In an ideal world where there are no rights violations or where competent authorities fulfil their duties to, first, prevent such violations and, second, to prosecute and punish when preventive measures fail, there is going to be no need for appeal to a last resort organization. "Human rights claims therefore aim to be self-liquidating" (Donnelly, 1989: 14) whether it is a realistic project or not.

By the same token, the ICC's operation as a court of last resort through the complementarity principle implies that international prosecutions are also self-liquidating in the sense that there will be, and in fact there should be, no need for international prosecutions if domestic criminal systems fulfil their duty to prosecute these crimes. The distinction between the loci of prosecutions and the law being applied should not lead to confusion in that international crimes, as defined in international criminal law, do not change in terms of their content and meaning when the law is applied at a "lower level" in a domestic court. What is significant here is that international criminal law and international crimes remain almost the same no matter at which loci or court they are being applied though international prosecutions have a very similar feature like human rights as they both come into question when "lower level remedies" (Donnelly, 1989) fail.

Though the international criminal law discourse is at its very early stage of operationality, the capillary power of the discourse penetrates throughout a wide range of geography with the support of a myriad of actors and organizations. The *de facto* complementarity of the ICC leaves the prosecution of "lower level" crimes and restricts its observation exclusively to the violations of right to life when these violations are widespread, systematic and mass-scale. The *de jure* complementarity of the ICC, as clarified in the Rome Statute, stipulates the Court's intervention only when the local level authorities fail to meet the criteria to prosecute and punish the widespread, systematic and mass-scale atrocities targeting physical security of communities. States become disciplined subjects that are watching over themselves, accommodating their judicial systems as well as political or economic systems to the globalized standards, and using the self-referral mechanism of the ICC when they conclude they fail to satisfy these standards envisioned through international criminal law. In the global market economy, political rulers are not expected, and in fact they cannot, control each and every event taking place in the market. It is due to partly the feasibility question and partly efficiency concerns that require supportive subjects such as states and non-governmental organizations as cogs of a broader mechanism. The concomitant and closely linked network of local and global organizations, which are not confined to only judiciary mechanisms, provide the transmission of information required for surveillance and evaluation of subjects.

8.3. Determinacy versus Indeterminacy

International criminal law might seem to represent the most sublime and humanistic ideals whether rooted on ideational or materialist/positivist basis. Still, it does not mean that the particular discourse of the ICC has nothing to do with the international structure wherein the Court moves. Through the establishment of the ICC, international criminal law has overcome the difficulties owing to the limited nature of prosecutions of the *ad hoc* tribunals' system both in territorial and temporal terms. Now, the range and depth of the criminal discourse has reached to an unprecedented level.

The problems related to enforcement should not be taken as a denial or refutation of the growing enforcement mechanism of international crimes. The universal enforcement problem is a far less serious problem than it first appears to be, because enforcement does not have to be restricted to the ICC as long as the discourse is almost universal. The major non-states parties to the Rome Statute, rather than arguing against the validity or righteousness of international criminal law, justify their reservations through having already well-established national legal systems or relatively minor issues they disagree about the Statute. The power of the ICC discourse depends not exclusively on the institutional practices, but penetrates in almost every corner of the globe encompassing each and every community where it appears as unthinkable to openly demonstrate non-compliance inasmuch as there is the desire of becoming or remaining part of the international community.

The power exerted by the ICC, rather than representing a reducing or weakening stage of state sovereignty and its planning capacities, or a transformation from *formal* to *informal* techniques of government, should be taken as part of global governmentality that is now operational in various ways and platforms. When the state is taken not as an end but as a means of governmentality in Foucauldian terms, it becomes easier to grasp the radical transformation from traditional criminal jurisdictions to international prosecutions. What we observe and experience today, then, represents a transformation from *formal* techniques practiced at the national/local level to another group of *formal* techniques at the international/transnational or supra-national level. The global actors are sharing their tasks with the locals and vice versa. While power operates in a different form, at a different level and shape as well as through a different discourse, the purpose of critique should be to interpret and analyse this particular discourse in connection with the conditions enabling its operationality. Herein, we may begin to see contemporary legal and social theories on human rights and humanitarian law not only as theories, but components of a rationality which is inseparable from the surrounding social practices. The governmentality perspective reveals that the discourse on human rights and humanitarian law enables certain social practices through formulating, supporting and reinforcing the dominant mode of thinking which carries certain common features with "ideology" as well. It is under particular conditions that such a particular discourse flourishes which, in return, contributes to the maintenance of the system.

The displacement of traditional state-level governmentality techniques does not necessarily result in wider-scope liberty, freedom, or equality for individuals and groups. The ostensible fact that the ICC is not a direct means of power in the hands of a group of states, interest groups or individuals, but represents a complex and intertwined body of interests and interactions that at the end might bring even the most unexpected one(s) before the Court does not refute the relationship between law and structure altogether. It is hard to blame the liberal legal system, like so many Marxists do, by arguing that law always operates on behalf of certain groups or individuals in a forthright manner, and the liberal law will accordingly benefit whoever holds the economic power. The law which is brought to bear in the courtrooms and the procedures in individual cases are hard to associate directly with structural factors. However, law is not absolutely indeterminate, but is one of the means of compromise between the weak and the powerful.

8.4. A Civilization Higher than the Rest – A Civilization Reconstructing Itself through "Others"

When we believe to do justice through prosecuting and punishing criminals of atrocities, the aim is to give the message to everyone that we are not the same as the criminals, and thus our civilization representsa more decent one than the actual or imaginary alternatives. Yet, the message extends not only over different communities at a given time: "'The West' does not understand [the legal] evolution in relation to

other cultures but in relation to itself, to its own past. If the modern era is arrogant, it is so primarily vis-à-vis the Middle Ages and Antiquity" (Höffe, 1998: 215).

The international community and international prosecutions do not introduce a chronological event or a sequence of events, one preceding the other. Rather, the international community, while identifying certain communities and states failing to prevent and prosecute mass-scale atrocities, is being constructed simultaneously through emphasizing the failures of the others and celebrating the achievements of the self. In the course of the construction of the international community, the subjects who are directly related to mass-scale atrocities are also under a continuous (re)construction process which is paradoxical in the sense that these subjects are confined within the sphere of the international community as posing a problematic while being excluded with a simultaneous otherization. These subjectscannot be left alone when their very existence is threatened, because it is the existence of others and it being threatened which ascribes meaning to the international community. The "right to punish", rendered as the foundation of sovereign power for Hobbes (1991: 214), and "which takes the form of a survival of state of nature at the very heart of the state" (Agamben, 1998: 106), presents itself through international prosecutions at the global level in the 21st century. This time, it is not the sovereign power of the state, which embraces the "right to punish" in order to continuously reproduce itself by including and excluding (Agamben, 1998) or developing contrary representations of inside and outside (Walker, 1990), but a novel type of governmentality which uses its power through its subjects in the name of "international community".

It might seem ironic of the international community to respond to mass-scale atrocities through judicial intervention in the form of international prosecutions along with other means of economic, military or social interventions while the root causes of mass-scale atrocities lie beneath the globalism which gave rise to such a community. Ironic, because the international community's intervention to remedy globalization's faults resembles a criminal struggling to correct the damage it is responsible of. However, criminals do not judge and prosecute themselves, but wait for a third party to do the job. The international community, not only as a reflection of globalization but standing as "the third party", projects the responsibility of the crime to others rather than judging and prosecuting itself.

Globalisation compels states to reorganize the conventional national structures coordinated with the needs of global capital accumulation priorities, which at the end contributes to the erosion of the state's political and economic integrity, and the rise of social exclusion connected to international insecurity (Hoogvelt, 2005: 596). Thus, rather than being an irony, globalism needs to offer solutions to the insecurities it generates, therefore produces an alternative *loci* of prosecution for international crimes while frustrating a genuine "alternative" for the structure. What is secured is the global capitalist structure, the liberal ideas which envisages intervention of all forms when deemed as necessary, and the international community whose identity remains most of the time not completely clear. What is secured in this picture is neither the local community nor the state, as the former is an issue when its problems are deemed as connected to the international while the latter

is supported as long as it meets the standards introduced by the international community.

Securing, protecting, helping, and the like, are litigious terms that open and close ground and potentialities of both governing and resistance. The international community, through the subjectivization of different audiences, carries the international legal discourse to its subjects. Yet, constructing a patronizing relationship with its subjects, space is closed for radical resistance within both the outsiders and the international community. The international community, positioning itself as the superior against its subjects, fixates and absolutizes the civilization it embodies. This is the construction of an absolute good besides the absolute evil, which stands as the arch enemy before freedom (Ranciere, 2004).

Critique, according to Foucault (1991a: 84), is not meant to give prescriptions to problems: "[it] doesn't have to be the premise of a deduction which concludes: this then is what needs to be done. It should be an instrument for those who fight, those who resist and refute what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in programming. It is a challenge directed to what is." The present critique of the ICC, thus, is meant to unsettle the mind; the mind of the advocates, supporters, even opponents of institutions like the ICC; to remind what has been the "truth" like in the past, and what it looks like now; and what is lost while little is gained by holding on today's truth.

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