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The Autonomy of International Criminal Justice

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1. Introduction

I thank the organizers for giving me this opportunity to honour President Philippe Kirsch today. I recall very well when you took up your service at the International Criminal Court (ICC), Philippe. With you arrived an outstanding sense of disciplined and deliberate organization: respecting the value of planning, preparation and predictability; and a feeling that the ICC is not an orphan, but an international court, firmly embedded in the international community of States. Our limited direct interaction was always meaningful and pleasant. Although I was serving another Organ of the Court, I learned from you. I would have benefitted from learning more, but priorities did not allow that before I left the Court at the end of December 2005.

Let me also compliment the organizers of today's seminar on a carefully conceptualised programme on independence and interdependence. It contains enough questions for a week of discussions. I think this reflects favourably on The Hague Academic Coalition, which is well placed to make important intellectual contributions to the discourse on criminal justice for atrocities. I say 'criminal justice for atrocities' – rather than 'international criminal justice' – because the reality of the complementary nature of the ICC will entail a shift of focus from the international level to that of national criminal justice for atrocities. The era of multiple ad hoc international criminal tribunals is coming to a likely end within a few years. The new era of criminal justice for atrocities will focus on the ICC at the international level and national criminal justice. With this transition, we may see a reduction of jobs in international criminal justice from maybe as many as 4,000 to – hopefully – less than 1,000 at the ICC. We are talking about a real transition.

This should not be seen as a negative challenge for the city of The Hague and The Hague Academic Coalition. Rather, today's seminar concept shows that by placing less emphasis on 'The Hague' and 'Coalition', and more on 'Academic', you project intellectual leadership from The Hague, above and beyond your privileged custodianship of international justice institutions and the broad-minded foreign policy which we have learned to expect of this city. Let me mention at this point Mr. Adriaan Bos, a distinguished former servant of this house, who played a decisive role in making the 1998 Rome Conference possible. I also want to mention several younger international lawyers in your Ministries of Foreign Affairs and Justice who make important contributions through their hard work, competence and open minds. We see you. We see your lucidity, practical sense and willingness to consider new ways.

2. Normalising Criminal Justice for Atrocities

We should not be discouraged by the likely reduction of the international criminal justice community. On the contrary, it means that criminal justice for atrocities is coming of age – that it is gradually approaching maturity. We are moving from ad hoc institutions to permanent criminal justice, with the capacity to benefit from the higher levels of legitimacy which should be generated by the permanent ICC and national criminal justice. This significant advantage of permanence should make criminal justice for atrocities more effective, less expensive – providing for an ever higher quality of justice.

The normalisation of criminal justice for atrocities will have many implications. Having worked for the Norwegian Director of Public Prosecutions during the

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past two years, inter alia, on war crimes cases, I see some distinct differences from the international prosecution services that I served the preceding 11-12 years. Not surprisingly, the quality of comparable work processes is higher in an established national prosecution service such as that in Norway. But that is not my point here. Rather, the question we should ask ourselves is why it is like that? After all, it costs less than 15 million Euros to run the entire higher national prosecution service of Norway, much less than some international criminal jurisdictions. The accumulated pressure of scrutiny surrounding the Norwegian prosecution service would seem to differ somewhat from what we have in international criminal justice. Consider the combined force of a hungry national press; a very resourceful national auditing system; all eyes of the full defence bar; your peers in the national community of lawyers; the watchful administrators of the Ministry of Justice; the aspirations of Parliament's justice committee; and a civil society that is normally juxtaposed with the prosecution, which it has tended to see as the cold face of criminal justice. Such constraints may be helpful to criminal justice for atrocities.

It may be warranted to refer to the ad hoc tribunals as the 'Rolls Royces of criminal justice for atrocities'. Some of these jurisdictions have worked with resources that are not available at the national level. I recall that at one stage, we had more than 600 persons working for the ICTY Office of the Prosecutor, with more than 220 investigators and 80 analysts. That is quite impressive, I guess. Against this background it is reasonable to suggest that up until now international criminal justice has served other political purposes for donor States than national war crimes prosecutions of refugees or in a territorial State on whose territory the crimes occurred. States may have been more willing to contribute resources to international criminal jurisdictions than to national war crimes programmes. The money has tended to come from another part of the state budget. This imbalance might change.

I think we must expect more scrutiny of international criminal justice in the future, also of how much money is spent. We should not fear but welcome a more normal critical discourse around the institutions of international criminal justice. Like all public institutions, they need mirrors in order to constantly strive to broaden the acceptance of the institution and its work, and to generate stronger legitimacy. How would we look without mirrors? If we keep our fingers on the pulse now, we can see that this critical wave is coming to international criminal justice, coinciding with the end of the phase of initial institution-building as the ICC and its work is starting in earnest. Clouds are gathering. And there is a need for the light of sharp legal minds to make contributions. I attended an Oxford University seminar last week on the effects and role of international criminal justice. Like me, you may have found the vigorous will to attack international criminal justice eye-opening. I have not observed anything of the same calibre since I joined this area of work early 1993.

3. Real Civil v. Common Law Tension?

The role and merit of international criminal justice is best defended when its house is in order. One of the rarely articulated strains on international criminal justice from the mid-1990s up until I left The Hague in 2005 was the tension between common and civil law groups or interests, in and around the justice institutions. This tension had some roots in facts and others in fiction. Regrettably, by 2002, some 85% of managers in the ICTY Office of the Prosecutor came from four countries: the United States, the United Kingdom, Canada and Australia. More than 50% of the lawyers in the Office were from the same four countries, as were approximately 75% of its GTA lawyers. Add to that, transparent layers of information showing who was assigned to which cases, to which witnesses and which legal questions, and the contours of the topography of power start to emerge with some clarity. You need not have the History of the English-Speaking Peoples by Churchill by your bed to realise that some continental-European governments would slowly become uncomfortable.

How could common versus civil law become a main dividing line of international criminal justice in the 1990s – rather than North-South, rich-poor? Did the details of the distinguishing features of common and civil law criminal procedure really have the capacity to mobilise governments and international justice institutions? Or was the common versus civil law divide merely a proxy tension, a smoke-screen? Interests do mobilise – conflict of interests even more. Maximising the national interest by working together with like-minded States or other actors is not unknown to multilateral diplomacy and international organization. We may not always openly identify our group of actors – or declare the full nature of the glue that holds it together. Some would argue that the labels 'civil and common law' may simply have been banners of convenience, rather than a transparent statement of what this

tension was all about.

With six years of President Kirsch at the helm of the ICC, I trust that this problem of adolescence of international criminal justice has been overcome or at least significantly reduced. He embodies the lawyer who was born in a European civil law country (Belgium), whose career meteorised through a common law country (Canada), before returning to high judicial office in the international justice capital of the world, The Hague. He – just as the Governments of Canada and the Netherlands – is well-placed to be a bridge-builder during tensions between common and civil law in international criminal justice.

4. Fraternity of International Criminal Justice

I hear younger international lawyers remark that, whereas the paternity of international criminal justice can be ascribed to the community of States behind the justice institutions, is there such a thing as the maternity of international criminal tribunals? They do not question whether the international criminal justice institutions treat member-States equally, only whether some States are treated more equally than others, in the best interest of the protection of young, fledgling institutions – protection against inherent weaknesses in the institution, against undue influence of human rights activists, or against governments perceived as having a wish to instrumentalise an aspect of the institution's activities. Their concern is very much one of judicial independence versus operational interdependence. Young at heart, they ask whether there is not a third way, a fraternity of international criminal justice, whereby international justice institutions seek an equal measure of protection from all States Parties. This is all speculative – but thought-provoking nevertheless.

5. Are There 'Constituencies of Interpretation'?

Let me move on to a third reflection on the independence-interdependence duality which this seminar addresses. It concerns the context of interpretation of substantive law in international criminal jurisdictions, both in the judiciary and prosecution services. Most legal questions in the international criminal tribunals concern only the parties and judges; some are of interest to select non-governmental organizations and academics; and a few have a broader appeal, including for States. In any event, prosecutors and judges are supposed to interpret the law in a dispassionate, objective and independent manner – when, at the same time, the very conscience of humanity is shocked by a matter that is of concern to the international community as a whole. Here, lies a duality between the normative expectations of us as interpreters and the human situation we find ourselves in. The more serious the alleged crimes are, the higher this tension may be.

As international lawyers we are fortunately guided by formal principles on sources of law as well as on interpretation. In the context of the ICC, Articles 21 and 22 of its Statute offer relatively specific guidance compared with the Statute of the International Court of Justice and the Vienna Convention on the Law of Treaties. Such principles suggest that interpretation is a technical exercise resting squarely on the firm pillars of independence and impartiality. Indeed, judges would be expected to emphasize the rule-bound, technical nature of their interpretative practice. But is there not in reality a considerable human or personal dimension to interpretation of international criminal law when the conscience of humanity is shocked? Are we not animated by a wish to reach a fair or just conclusion? Or to find a widely acceptable solution, often one which is not too controversial? Are we not sometimes driven by a wish to close the case file or issue at hand as soon as possible? And not to be overturned on appeal? Or to provide adequate interpretative reasoning, without getting bogged down in a time-consuming manner? Could it be that we are concerned with impressing readers through the quality of our interpretative reasoning? To be cited or to make precedents? Or that we are driven by a wish to receive the acceptance of interested groups or stakeholders in the issue in question?

These should not be forbidden questions, however provocative they may be. If indeed there are such personal factors at play, understanding the identity and role of what may be described as 'interpretation constituencies' in international criminal justice would be particularly important. Could such 'constituencies of interpretation' include victims and non-governmental organizations? Victims are often encouraged to feel ownership of the justice provided, and some non-governmental organization actors profess ownership of criminal justice for atrocities. What about writing academics? Are judges and prosecutors entirely detached from what leading academics will write about their decisions or submissions? What about the views of governments? If we do hear such views, which States and State interests speak most loudly? Finally, are military lawyers a 'constituency of interpretation' in international criminal justice? To which extent are we concerned with the positions and arguments of military lawyers in States that participate in armed conflicts?

How politically correct is it among international criminal lawyers to suggest that this is an important group to listen to?

There may well be a need to analyse more thoroughly and critically the culture of interpretation in international criminal justice, including the notion of 'constituencies of interpretation'. It may be warranted to subject the de facto role and power of non-governmental organizations in international criminal justice to honest scrutiny. Transparency in interpretation – or responsible discussion about the interpretative process – does not necessarily undermine the virtues of formal principles of interpretation or the perception of independence and impartiality. On the contrary, it may increase the quality and legitimacy of interpretation of international criminal law.

6. Informed Critical Discourse

Talking about a common versus civil law divide, the fear of a maternity of international criminal tribunals, or of possible 'constituencies of interpretation' in international criminal justice is as unpleasant as it is important. Making this intervention is obviously not a choice of opportunism. It is unpleasant because it dissonates with the pure melody of judicial independence – we can all hear that. But also because facts relevant to the three problematic aspects of the independence-interdependence dichotomy discussed above are for obvious reasons not easily available to the public. Even with adequate access to factual information, using it to substantiate important insights can be very challenging.

A mastermind may well issue a call for volunteer storytellers to come forward and make their factual propositions – marionettes in performances yet to be staged. But the needle's eye of credibility is very narrow here: how likely is it – we may well ask ourselves – that such a storyteller would be motivated by the cause of international justice, rather than by intellectual exhibitionism, by some flavour of bitterness, or by sheer folly? Courage is required to pursue serious inquiries in this area. As lawyers we tend to gravitate towards the centre of power, even when the law is there to protect the weaker margins of society. Our needs for job security, promotion or appointment to positions instil in us a deference for, and an interest in, the Zeppelins or recognized authorities in our areas of work, those towering figures who have the capacity for upward mobility. They seem more interesting than our inquiry into the limits of the autonomy of international criminal justice.

At the same time, it is important that the landscape of real and fictitious interests enveloping international criminal justice be articulated, in a responsible manner, by lawyers. Our topic today is judicial independence. Independence from what? What are the real challenges – if indeed any – to judicial independence in international criminal justice? Without a realistic assessment of real challenges, discussions on judicial independence may well be played out in the normative world of principles, distinctions and categorisations alone. As lawyers, we may find ourselves comfortable with that. But the utility of insulated discussions is another matter.

This keynote appears in the FICHL Policy Brief Series in response to numerous requests. Morten Bergsmo is Visiting Professor of Law, Georgetown University; Visiting Fellow, Stanford University; Fernand Braudel Senior Fellow, European University Institute; and ICC Consultant and Co-ordinator of the ICC Legal Tools Project. He was formerly Visiting Scholar, UC Berkeley (2010 Spring); Senior Researcher, PRIO (2006-09); Special Adviser to the Office of the Director of Public Prosecution of Norway (2007-08); Senior Legal Adviser and Chief of the Legal Advisory Section, ICC Office of the Prosecutor (2002-05); Co-ordinator of the establishment of the ICC Office of the Prosecutor (2002-03); Legal Adviser, ICTY (1994-2002); and Legal Adviser, UN Commission of Experts for the Former Yugoslavia established pursuant to Security Council resolution 780(1992) (1993-94). He represented the ICTY to the UN negotiation process to establish the ICC (1996-2002). Since 2005, he has worked extensively with national capacity building, knowledge-transfer and legal empowerment in the area of core international crimes. He founded and directs the capacity building platform Case Matrix Network (www.casematrixnetwork.org) and the Forum for International Criminal and Humanitarian Law (www.fichl.org).
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