

## Renegotiating 'polis' and 'cosmopolis' at the International Criminal Court

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My SRA visit at the International Criminal Court (ICC) has taken place within the framework of my doctoral research work. This enquires into the rise of the norm of sovereignty as responsibility, exploring its institutionalization within the framework of the ICC.

The considerable growth of human rights in the last decades has sparked competing claims of change and continuity with regards to the normative fabric of international society and, notably, the status of sovereignty. A widespread account is that, albeit the persistence of a few traditional 'Realpolitik' factors, the end of the Cold War has opened the door to the reorganization of international society along more cosmopolitan lines and, foremost, to the recharacterization of sovereignty as responsibility.

The idea of sovereignty as responsibility has gained popularity since the publication of 'The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty (ICISS)' in 2001 (ICISS 2001). This notion emphasizes "the transcendent and universal character of obligations owed to human beings" (Mégret 2010, p. 17) and involves two prongs: (1) "sovereignty is not an absolute right of national governments, but is rather an earned right, based upon fulfilment of government's responsibility to protect its people" (Contarino & Lucent 2009, p. 563); and (2) "when governments fail to protect people, the responsibility to do so befalls the international community" (ibidem, p. 564).

The Rome Statute, which led to the establishment of the ICC in 2002, is premised on the same principles. It affirms that, if domestic courts fail to genuinely prosecute those guilty of genocide, crimes against humanity, war crimes, the ICC will prosecute them, with no exception for representatives of state power. The common moral commitments of the 'responsibility to protect' doctrine (also referred to as R2P or RtoP) and the ICC are, therefore, clear (ibidem, p. 563-564): "the responsibilities to protect and prosecute reside first and foremost in the state and both regimes insist that a residual responsibility rests with international society" (Ralph 2016, p. 638).

Furthermore, the ICC is said to overcome the *collective actor problem* that hinders the implementation of R2P more in general. It is argued that, given the absence of specific agents officially entrusted with a broad responsibility to protect, "there is a danger that states will 'free-ride' on the back of a notional 'international society'" (ibidem) or "intervention will be contingent on a coincidence of major power interests" (ibidem). International criminal justice, instead, would have institutionalized the residual responsibility to prosecute, allocating it to the ICC and notably to its Prosecutor (ibidem). The ICC is, therefore, expected to deliver concrete and impartial action, thanks to prosecutorial decision-making unmarred by political interference matched with the power to put real people in real jails. In sum, the establishment of the Court raises hopes that, finally, "the normative structure being created by international law might influence or even restrain the Hobbesian order established by the politics of States" (Sadat 2000, p. 41).

Leaving behind the common dualism that pits power and law, facts and norms, polis and cosmopolis as opposites (Walker 2003, p. 269), my research argues that, not only the process of delegating legal authority to a judicial body is an intensely political process; but, also the delegation of legal authority does

not resolve the collective actor problem. Indeed, it may inadvertently end up re-entrenching precisely what it is meant to constrain: the irresponsible exercise of sovereignty.

Reflecting the ambiguous consensus of states with regards to supra-national institution building, and in line with the claim that the re-characterization of sovereignty does *not* entail any “transfer or dilution of state sovereignty” (ICISS 2001, para 2.14), the system negotiated in Rome is one in which the Court is judicially independent, but also crucially dependent on states in practice. The ICC relies on the elective involvement of sovereign states to: (1) establish and accept its jurisdiction; (2) fund the institutions; and (3) give it access to the information and resources required to build cases and arrest suspects (Bergsmo & Yan 2012, p. 4). As such, the Rome Statute has placed the Court in the pressing need to enlist state power for its cause (Megret 2010, p. 16), thereby ultimately *relocating* the ‘unwillingness’ and ‘inability’ of states to investigate and prosecute (Ralph 2015, p. 643).

Effective investigations and prosecutions are, thus, generally difficult to achieve, “having to depend upon the same institutional and procedural weaknesses that were deemed incapable of supporting domestic investigations and prosecutions” (Rastan 2008, p. 455).<sup>1</sup> But the short-circuit between the ICC’s sovereignty-limiting rationale and sovereignty-based operation has a more specific upshot, which cuts, even more, to the core of the theoretical premises and practical purposes of both R2P and international criminal justice. While the exercise of jurisdiction by the ICC in the absence of state consent is the most visible manifestation of the Court’s supranational authority, this is also the situation in which it is most likely to remain symbolic: “absent extraordinary international pressure or a military intervention, the very unwillingness of the regime to prosecute alleged criminals will also preclude the ICC from securing custody over defendants who remain under the regime’s protection” (Greenawalt 2007, p. 630).

Arguably as result of the intersection of states and ICC’s interests – respectively, in side-lining political opponents and improving international standing (by siding with ‘the good’ against ‘the evil’), and obtaining the political support and cooperation to carry out effective investigations and prosecutions - the element of top-down enforcement has been radically relativized (if not exactly trivialized) in the practice of the Court (Megret 2017, forthcoming). State ‘self-referrals’ represent the majority of the situations before the Court; 80% of the cases concern non-state actors; *all* the individuals who are or have been in the Court’s custody are associated with non-state actors; and, what is more, looking at the relative gravity of crimes, it appears that non-state actors may even have a stronger chance of being prosecuted for less serious crimes. In sum, with this in mind we see how, in striking contrast with the expectation that state actors would no longer be above the law (Falk 2002, p.341), the ICC’s intervention may inadvertently end up re-entrenching their power to the detriment of their accountability (Megret 2010, p. 20).

This is the bundle of topics that I have tackled head-on during my SRA project. My research visit, in fact, consisted of a four-month period spent in close contacts with ICC personnel and experts, attending hearings, and, crucially, carrying out interviews to a broad range of relevant figures (especially at the Office of the Prosecutor where, thanks to their good disposition towards outreach, most of the interviews have taken place). Indeed, the interviews were not always easy to navigate, given the critical approach of some of the questions, on the one hand, and the great share of expectations the Court has been invested with, on the other. What is more, the withdrawal of Burundi from the Rome Statute right during my fieldwork,

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<sup>1</sup> Setting aside the Central African related cases involving offences against the administration of justice, in more than a decade of activity the Court has obtained 4 convictions, while twelve warrants of arrest against thirteen individuals in different situations remain outstanding.

readily echoed by threats of withdrawal by other African states, added 'other irons in the fire', materializing the ultimate backlash that may emerge if states see its mandate being stretched too far beyond what they are willing to support. At the same time, a report released by the Court approximately one month after Burundi's decision has confirmed that the ICC has reached an unprecedented involvement in situations where it may - or may not - take on (powerful) state interests: in Georgia and Ukraine (Russia), Iraq (United Kingdom), Afghanistan (United States), Palestine (Israel) (Office of the Prosecutor 2016)

To conclude, the ICC has surely reached a tipping point, and the next decisions to investigate and prosecute will be a crucial test bench. Nevertheless, no matter what these decisions will be, the case of the ICC, and the underlying struggles to resituate political authority and power, is a clear warning to abandon the framing of historical, ethical, and political destiny as a grand trek from polis to cosmopolis (Walker 2003, p. 269) and, indeed, to renegotiate our very understandings of both the polis and the cosmopolis (Walker 2003, p. 284).

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