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The Transcivilizational Perspective and the Universalism of the International Criminal Court*

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The International Criminal Court (ICC) seems to have finally realized the ending legal globalists have long yearned for: a potentially universal, centralized and permanent court, able to enforce international humanitarian law without the mediation of the state. A legal system of mankind seems now more possible than ever before. The universalistic claim of the ICC, I contend in this article, is nevertheless potentially biased by a West-centric prejudice. Critically drawing on the transcivilizational perspective suggested by Onuma Yasuaki, I propose to overcome the West-centric approach of the ICC by assuming the multiplicity of universalisms, thus relativising each of them.
Keywords: international criminal law, cosmopolitanism, universalism, transcivilizational perspective, westcentrism, Onuma Yasuaki

In the last decades it has been increasingly argued that the state is no longer able to face the challenges of our age. These challenges have become more and more border-crossing: the answers to them, it is argued, should also overcome the traditional national dimension. Expectations have consequently converged on international institutions and the claim for creating new ones and strengthening the powers of the existing ones has gained strength and support.

Such an impetus has encouraged a number of political-legal reforms as well as new academic research. These two aspects are in many ways intertwined: the theoretical reflection has given a rational frame for the *ratio* and aims of supranational institutionalization, thus contributing to its legitimation, while the institutionalization process has provided «empirical evidence» to support the correctness of the former.

At the theoretical level, the enthusiasm for supranational institutions has

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particularly influenced the cluster of theories that Danilo Zolo has called «legal globalism»: a line which supports the legal unification of the world under a common law, produced, administered and enforced by supranational global institutions[1]. This school of thought is rooted in Immanuel Kant's cosmopolitanism and in his idea of the moral unity of mankind, and has among its earliest representatives Hersch Lauterpacht and to some extent Lassa Francis Lawrence Oppenheim. At the end of the Second World War Hans Kelsen marked an important development of this tradition, by proposing the institution of a League of States whose court, among others, had jurisdiction over individuals responsible for international crimes[2]. Among its contemporary supporters are scholars such as Norberto Bobbio, Jürgen Habermas, Richard Falk and David Held[3].

In this article I aim to critically appraise such an approach with reference to one of the most recent and innovative domains of supranational institutionalization: international criminal law (ICL). I shall ask whether international criminal tribunals (the ICC in particular) and the legal-globalist arguments that have supported their institution are a desirable and effective way to address global challenges in the realm of humanitarian law. I will contend that the ICC is characterized by a West-centric prejudice, which prevents it from both effectively and legitimately redressing grave human rights violations. I shall suggest that an alternative path of reaction to grave human rights violations can be developed drawing on alternative approaches such as Onuma Yasuaki's[4] transcivilizational perspective, and conclude by sketching guidelines for such an alternative path.

1. The Creation of International Criminal Tribunals: Global Enforcement of Human Rights Law?

[1] D. Zolo, *The Lords of Peace: from the Holy Alliance to the New International Criminal Tribunals*, in B. Holden (ed.) *Global Democracy. Key Debates*, London, Routledge, 2000, pp. 73-86.
[2] H. Kelsen, *Peace through Law,* Chapel Hill, The University of North Carolina Press, 1944.
[3] N. Bobbio, *Il problema della guerra e le vie della pace*, Bologna, Il Mulino, 1977; Id., *Il terzo assente*, Torino, Edizioni Sonda, 1989; J. Habermas, *Kants Idee des Ewigen Friedens – aus dem historischen Abstand von 200 Jahren*, in «Kritische Justiz», 28 (1995), n. 3, pp. 293-319; R. Falk, *The Status of Law in International Society*, Princeton, Princeton University Press, 1970; D. Held, *Cosmopolitanism. Ideals and Realities*, Cambridge, Polity Press, 2010.
[4] I follow here the Japanese usage, according to which the family name (Onuma) precedes the given name (Yasuaki). See Y. Onuma, *Pitfalls of Internationalization*, in «HIJ Bulletin», 4 (1984), n. 4, pp. 1-5.

The development of ICL is typically presented as a constantly-improving process, started after the end of World War II and still ongoing.

The first international criminal courts, the Nuremberg and Tokyo tribunals, are considered crucial yet very imperfect stages of this development. As also noted by contemporary insiders, although they were supranational bodies, they were far from being impartial and universal. Their *modus operandi* and outcomes have been labeled as «victor's justice»: only citizens of defeated countries were prosecuted by these tribunals, while the judges came exclusively from countries which won the war[5].

Compared to these early institutions, the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), created in the early nineties of the past century, are commonly considered a step forward towards the realization of a truly global and impartial rule of criminal law. Their jurisdiction is still *ad hoc*, applying only to crimes committed respectively in the territory of the former Yugoslavia and Rwanda, but, it is argued, they are no longer expressions of a victor's justice. They have been created by the decision of a supranational body, the Security Council, and the judges are supposed to be in a more impartial position than their predecessors.

Yet the definitive departure from the early, biased system of ICL is considered to have been achieved in 1998 with the establishment of the International Criminal Court (ICC). The scope of this new court is not limited to a particular area or conflict, but is in principle universal. Normally – although with important exceptions – its jurisdiction is based on states' consent, and the judges' election policy is aimed at covering different geographical areas.

The ICC has been welcomed by the legal globalist thinkers, who used to consider enforcement mechanisms one of the most important missing pieces of the emerging global legal system. The ICC seems finally to be able to secure enforcement of the laws prohibiting the most serious human rights violations through a centralized and potentially universal body.

This picture of a progressive improving system of ICL ending up in a truly

[5] B.V.A. Röling, C. F. Rüter, *The Tokyo Judgement. The International Military Tribunal for the far-East (I.M.T.F.E.) 29 April 1946 – 12 November 1948*, Amsterdam, Amsterdam University Press, 1977; H. Kelsen, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?*, in «The International Law Quarterly», 1 (1947), n. 2, pp. 153-171.

impartial institution has been challenged by scholars who pointed at the selectivity which still characterizes the contemporary international tribunals and, in some cases, considers them to perpetuate the model of the victor's justice[6].

I consider such criticisms well-founded; nevertheless, I recognize that the ICC, among the international criminal tribunals, is the one which most resembles an impartial and universal system of criminal law. It is therefore the most challenging and interesting subject for a critical appraisal of the legal globalism approach[7].

2. The ICC as Part of an *in Fieri* Legal System of Mankind

The ICC is perceived both by legal practitioners and theorists as an important part of a developing universal system of criminal law, which applies to the whole of mankind.

In its official documents, the ICC is presented as «the centerpiece of an emerging system of international criminal justice» which involves national, international and hybrid tribunals, and international organizations such as the United Nations[8]. The ICC is therefore presented as being at the center of a multi-level system, which also includes decentralized mechanisms, but all connected to and by the potentially global ICC.

The official documents of the ICC in fact stress the need to pursue a ratification strategy which will reach all countries of the world and which would allow the ICC to have jurisdiction over the whole globe[9]. Moreover, the jurisdiction of the ICC is already universal when the Security Council decides to submit a case to the court, for in this case the court's jurisdiction also applies to those states which did not ratify the Rome Statute (see Arts 12(2) and 13(b) of the ICC statute).

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[6] G.G. Bass, *Stay the Hand of Vengeance. The Politics of War Crime Tribunals*, Princeton, Princeton University Press, 2000; D. Zolo, *Victor's Justice: From Nuremberg to Baghdad*, London, Verso, 2009.

[7] By critically approaching the ICC I do not intend in any way to underestimate the gravity of international crimes. However, I am convinced that grave human rights violations ought not to be assumed as an alibi to perpetuate domination relationships by applying a double-standard justice, and that therefore a critical appraisal of such justice is necessary.

[8] International Criminal Court, *Report of the International Criminal Court to the United Nations for 2004*, UN Doc. A/60/177, 1 August 2005, Introduction; International Criminal Court, *Report of the International Criminal Court to the United Nations for 2005-2006*, UN Doc. A/61/217, 3 August 2006, Summary and Section IV.

[9] Assembly of States Parties to the ICC, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, fifth session, The Hague, November 23 to December 1, 2006 (International Criminal Court publication, ICC-ASP/5/32), part III, Resolution ICC-ASP/5/Res.3, p. 1 and annex I.

The universalistic aspirations of the ICC are also confirmed by the re-emergence of the Kantian idea of the unity of mankind in its documents. The statement which opens the ICC statute, for instance, affirms that the state parties decided to establish the ICC «conscious that all peoples are united by common bounds». This phrase was also recalled in the final declaration released at the end of the first review conference of the ICC, held in Kampala in June 2010[10]. Moreover, the Preamble of the Rome Statute reads that the crimes under the jurisdiction of the court are «of concern to the international community as a whole», and affirms that such atrocities «deeply shock the conscience of humanity».

Prominent scholars have elaborated on the ICC statute by going a step further in stressing the universal and centralist character of the ICC. As to the universal aspirations of the ICC, they contend, there is a worldwide international community of shared interests and values. International crimes threaten these universal basic values: This is the reason why their punishment is of concern to the whole international community and they ought to be judged by international courts[11]. In the words of Kai Ambos «the protection of *fundamental legal values* of human beings and the international community [...] justifies, to a great extent, the recognition of an international duty to punish[12]». According to Ambos, moreover, the emerging system of ICL is developing towards a state-like, centralized system of criminal law: «The international community today finds itself where the nation-state stood when it came into existence: with the building-up and consolidation of a monopoly of power in the area of ICL, on the basis of which a *ius puniendi can be founded*[13]».

More audacious in interpreting the ICC as a universal, state-independent court is Michael Köhler[14], who nevertheless refuses to apply the state model to international relations.

Köhler agrees that specific and particularly grave crimes are «of concern to the

[10] Assembly of States Parties to the ICC, *Kampala Declaration adopted at the 4th Plenary Meeting*, June 1, 2010, RC/Decl.1.
[11] K. Ambos, *On the Rationale of Punishment at the National and International Level*, in M. Henzelin, R. Roth (sous la direction de), *Le droit pénal à l'épreuve de l'internationalisation*, Paris, LGDJ-Georg-Bruylant, 2002, pp. 305-323; G. Werle, *Völkerstrafrecht*, Tübingen, Mohr Siebeck, 2007.
[12] K. Ambos, *On the Rationale of Punishment at the National and International Level*, p. 309.
[13] K. Ambos, *Ivi*, p. 311, italics in the original.
[14] M. Köhler, *Zum Begriff des Völkerstrafrechts*, in «Jahrbuch für Recht und Ethik», 11 (2003), pp. 435-467.

international community as a whole», as the preamble of the Rome Statute reads. However, he claims that ICL not only protects the legal goods and interests of the international community, but also the basic relationship of international law, i.e. the subjectivity and autonomy of states and peoples.

Köhler's interpretation is inspired by a Kantian conception of law, according to which international law, as well as domestic law, is based on the categorical imperative to leave the state of nature and to enter into a legal constitution. This imperative is original and *universal*: as to the interstate relationships, its content is expressed by the international subjectivity and the autonomy of peoples and states, and requires states to submit to a common legal constitution. For Köhler the adequate form of this constitution is international law, and the duty to leave the state of nature does not mean for states and peoples (differently as for individuals) to create a state-like power.

This does not diminish the universalistic character of Köhler's interpretation. Among the international crimes Köhler distinguishes a group of crimes, which he calls «universal», that negate the subjectivity and autonomy of peoples and states and thereafter negate the basic relationship of international law. «Universal crimes» are for Köhler only genocide, war of conquest and extermination war, for their maxim, if universalized, negate the living together of peoples and states under a common law. For this reason universal crimes are crimes against the *Menschheit*, against humanity as the unity of all human beings, as opposed to humanity as *Menschlichkeit*, the common qualities and attributes of all humans[15].

The universal character of these crimes gives rise to a universal criminal jurisdiction, which is valid *per se*, independently from states' wills and from any international treaty recognizing it. Applied to the ICC, this means that, as far as genocide and wars of conquest and extermination are concerned, its jurisdiction is universal and coercive, independent of the number of states which have ratified the Rome Statute.

3. The Universalism of the ICC: a Masked Particularism?

[15] The usual German translation for «Crimes against humanity» is «Verbrechen gegen die *Menschlichkeit*».

Following this line of argument, recurrent, as we have seen, in both the official documents of the ICC and in theoretical works, the ICC is building a universal, centralized system of criminal law, able to «make justice» on behalf of mankind.

This assumption about the universality of the ICC can be contested at several levels and thereby conceals, I will contend, the particularistic character of the ICC.

I shall not concentrate on the partiality of the ICC at the empirical level. Circumstances like the fact that all the cases on which the ICC has conducted investigations or trials so far refer exclusively to African states[16], while the former prosecutor of the ICC, Luis Moreno Ocampo, refused to open investigations which could have recognized the responsibilities of Western citizens in committing international crimes, such as in the case of Iraq, are of course critical to appreciate the partiality of the ICC[17]. Nevertheless, here I am concerned with a different level of analysis: I am interested in clarifying the theoretical grounds for the failed universalism of the ICC, of which its partiality can be considered the empirical correlate[18].

First of all, to apprehend the degree of universality of the ICC, it is critical to look at the legal mechanisms adopted by the ICC. The question is whether they can be considered as corresponding to a universally shared idea of justice. By that I mean a conception which is common to all societies, and first of all shared by the societies directly affected by the crimes.

The activation of the ICC is regulated by the complementarity principle, which gives priority to national courts and allows the intervention of the ICC only if national courts are unwilling or unable to conduct impartial proceedings, or if they have opened a case only in order to prevent activating the court and to grant impunity to the defendants (Art. 17 of the ICC statute). On the other hand, the national proceedings have to meet a set of requirements established by the Rome Statute: They must conform to the standards of the due process, for instance, to respect the accused party's right to defense and to being represented by a lawyer. The ICC evaluates whether the national

[16] As of April 2014.

[17] E. Orrù, *Il Tribunale del Mondo*, Bologna, Libri di Emil, 2010 and E. Orrù, M. Ronzoni, *Which Supranational Sovereignty? Criminal and Socio-economic Justice Compared*, in «Review of International Studies», 35 (2011), n. 5, pp. 2089-2106.

[18] That the link between the empirical partiality of the ICC and the theoretical background furnished by the legal globalism is more than a supposition is significantly supported by the position of Köhler, who openly justifies the double standard of ICL with respect to «republican» and «non-republican» states; see M. Köhler, *Zum Begriff des Völkerstrafrechts*, cit., p. 466.

proceedings meet these requirements and has the final word in deciding whether to open a case or not.

The ICC Statute does not consider the case in which the national proceedings are inspired by non-criminal forms of justice, such as truth commissions or other restorative justice procedures. South Africa's attempt to insert a norm in the Rome Statute which would have also allowed truth commissions to prevent the ICC from opening a case was unsuccessful. Legal theorists still disagree on the status of these alternative procedures and on the question whether their activation might prevent triggering the court's jurisdiction. Even the most progressive doctrinal interpretations consider such an eventuality possible only in exceptional cases and only if the national measures meet the requirements of the Rome Statute[19].

The ICC statute therefore, even according to the less restrictive interpretations, gives supremacy to the criminal system based on the fair trial model over alternative forms of justice, thus implicitly considering it a universal justice model.

This is not whatever system indeed: on the contrary it is an ethical, political and legal model typical of Western contemporary political and judicial orders.

The idea of *individual* accountability is grounded in a particular perspective, which since the modern era has been distinctively Western, and has not permeated other civilizations to the same extent. This is even more apparent for the particular way adopted by the ICC for making individuals accountable for their actions, the model of the due process. These standards and ideals are deeply rooted in Western history and culture and inseparable from the liberal and individualistic assumptions which supported their historical development[20].

The universalistic assumption of the ICC would be unproblematic if we could suppose to have an international society homogeneous enough to converge on such a system as a universal one. However, I will contend that this is not the case.

4. The ICC in Perspective: the Historical Development of the International Society

[19] O. Triffterer, *Commentary on the Rome Satute of the International Criminal Court. Observers' Notes, Article by Article*, München, Beck, 2008, p. 617 f.
[20] P. Costa, D. Zolo (eds.), *The Rule of Law. History, Theory, Criticism*, Dordrecht, Springer, 2007.

I shall argue that the contemporary international society has no legal and political background established enough to converge on the Western criminal model as a globally-shared system of reaction to international crimes. I will not deny that there might be an ethical consensus to ground a universal condemnation of international crimes. But this *negative* consensus does not entail a *positive* consensus about the means that need to be used to react to international crimes. In other words, the universal condemnation of international crimes does not justify considering ICL as the universal answer to them.

The reason for that, I shall argue, is that the contemporary international society is characterized by strains which mirror the dialectic between universality and hegemony which has permeated its history.

The reconstruction of the historical formation of what is called «international society» is a matter of controversy itself. I will refer firstly to the probably most authoritative one, developed by Hedley Bull, one of the most prominent figures of the English School of International Relations. According to this reconstruction, the modern international society developed as a consequence of the fragmentation of the *Respublica Christiana*. The unity of the latter broke down at a time when, at the beginning of the modern era, several power centers set up in Europe and expanded themselves into the newly discovered overseas territories. Protagonists of both these processes are the European powers, because the classical sovereignty model was shaped by them and because during the confrontation with the overseas civilizations the political-military supremacy of European powers was overwhelming.

The importance of European influence on the evolution of the international society was first investigated by Hedley Bull in his most known work, *The Anarchical Society*, and subsequently more in-depth in the book edited with Adam Watson, *The Expansion of International Society*[21].

Bull defines an international society as «a group of states (or, more generally, a group of independent political communities) which […] have established by dialogue and consent common rules and institutions for the conduct of their relations, and

[21] H. Bull, *The Anarchical Society. A Study of Order in the World Politics,* London, Macmillan, 1977 and H. Bull, A. Watson (eds.), *The Expansion of International Society*, Oxford, Clarendon, 1984.

recognize their common interest in maintaining these arrangements[22]».

Bull divides the process of setting up and expanding the international society, between the fifteenth and the twentieth centuries, into three phases.

The first one corresponds to the period from the fifteenth to the nineteenth century: In this phase the European states expanded their domination over the rest of the world. At the same time they elaborated a common system of norms and institutions which gave birth to a European international society, whose basic principles were the legal equality and absolute sovereignty of its members.

Around the mid-nineteenth century, the expansion of European states had already created a worldwide system of exchanges, but no similar broadening of the international society followed. At the beginning of the nineteenth century the international society was therefore still essentially and exclusively European, because it was composed only of states of European culture.

During the nineteenth century a critical change occurred. The European international society started to open to states of non-Christian religion and of non-European ethnic and cultural background.

However, the entrance of these non-European political communities did not determine the crisis of the European character of the international society. First of all, in order to become members of it, the non-European political communities had to adopt the political model of the sovereign state. This was a European-created model that in this period also became a basic principle of international relations with extra-European states. Secondly, the latter had to accept the system of international law, which had been created throughout the centuries by and for European states[23]. In other words, according to Bull, the international society of this period was not exclusively European anymore, if we mean by this a society composed only of European states, but it was nevertheless *à la* European, because it was ruled by distinctively European norms.

At the time of the First World War the extension of this international society *à la* European could be considered universal. Until World War II it was dominated by

[22] H. Bull, A. Watson (eds.), *The Expansion of International Society*, cit., p. 1.

[23] H. Bull, *The Emergence of a Universal International Society*, in H. Bull, A. Watson (eds.), *The Expansion of International Society*, cit., pp. 117-126; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2002; S. Suzuki, *Civilization and Empire. China and Japan's Encounter with European International Society,* London, Routledge 2009.

European powers and by the United States – which for Bull is of European culture, for it was a former colony where the European component prevailed over others. The states of European ethnic and cultural background considered the entrance of non-European political communities into the international society as an admission into an exclusive club, whose entrance criteria was established by the founding members. According to Bull the structure of international relations, as set up during the twentieth century, is therefore the legacy of the European supremacy over the rest of the world. This supremacy is still perceivable and influential in the international society.

Between World War I and World War II a second critical change shattered the homogeneity of the international society *à la* European. At the same moment in which it attained universal reach, it started to weaken and to be progressively shaken in its foundations. This process accelerated suddenly after World War II when the non-European states undertook a «revolt against the West» deep enough to undermine the structure of the international society. One of the principal directories of the struggle of non-Western states was the campaign for liberating themselves from the intellectual and cultural influence of the West, and for reaffirming their identity and autonomy in the spiritual sphere. While in other areas, such as the struggle for political independence, for racial equality and economic justice, the revolt against Western domination was conducted in the name of Western values, the struggle for cultural liberation might suggest that the revolt against the West was also a revolt against Western values as such[24]. According to Bull, as an outcome of this revolt the contemporary international society – or at least what was the international society at the time of the publication of *The Expansion* in 1984 – is marked by strong strains, cultural heterogeneity and extremely narrow consensus areas.

In other words, the post-World War II international society increased in terms of number of members and geographical extension, but lost ethical and cultural cohesion. It broadened as a consequence of the expansion of the European international society and initially maintained its distinctively European main features. However, when the international society assumed global scope, its ethical and cultural cohesion was undermined by the revolt against the European and Western domination. As a result, it

[24] H. Bull, *The Revolt Against the West*, in H. Bull, A. Watson (eds.), *The Expansion of International Society*, cit., pp. 217-228.

developed into a heterogeneous and strained society[25].

The reconstruction of the expansion of the international society illustrated above, as anticipated, is neither the only existing nor the most critical one. In the following I will refer to Onuma's transcivilizational perspective extensively and, more shortly, to Balakrishnan Rajagopal's interpretation of the history of international law, as alternative theories to Bull's one[26]. Challenging Bull's theory is also Anthony Anghie's position, which stresses the intimate relationship between sovereignty and imperialism and argues that indeed, the whole development of international law and its institutions is thoroughly shaped by western imperialism[27]. Following this latter interpretation, it would be almost obvious to argue that the ICC is in line with this history, being an expression of western dominance in international relations.

However, even relying on a more moderated interpretation such as Bull's, it is possible to maintain that the universalistic claims of the ICC and its advocates are one-sided. They seem to ignore the existence of the post world war II tensions, as if the original European international society had imposed its values worldwide without encountering resistance. From this point of view, the ICC seem to reproduce a model of exportation and imposition of Western values similar to the one operating in the international society *à la* European before World War II. The point is that today, as we have seen, the model of a homogeneous and Western-centered international society has been put under critique for a long time and extensively by concurrent models.

As anticipated above, I do not deny that a minimal universal consensus might be found as to the moral condemnation of international crimes even in a heterogeneous society. However, it does not descend that there is also a universal consensus towards the Western criminal system as the best reaction to them.

To assume such an existence means to interpret the needs of the international community in an exclusive punitive meaning and to address them by a culturally-specific system as if it were the only available model, and a universally suitable one. In other words, the ICC claims to speak in the name of all peoples although it represents a

[25] A. Bozeman, *The International Order in a Multicultural World*, in H. Bull, A. Watson (eds.), *The Expansion of International Society*, cit., pp. 387-406.
[26] Y. Onuma, *A Transcivilizational Perspective on International Law*, Leiden, Nijhoff, 2010; B. Rajagopal, *International Law from Below. Development, Social Movements, and Third World Resistance*, Cambridge, Cambridge University Press, 2003.
[27] A. Anghie, *Comment*, in «Journal of the History of International Law», 6 (2004), n. 1, pp. 15-20.

particularistic point of view. Such an approach suggests a stereotyped image of a homogeneous international society, which, as stressed by authors such as Antoine Garapon, Mark Findlay and Ralph Henham, is intrinsically anti-pluralistic[28]. From a political perspective, the ICC may be therefore interpreted as a means to perpetuate and strengthen the hegemony of that part of the international community that presents itself as the only, universal international society.

5. Multiplying Universalisms: the Transcivilizational Perspective

The universalistic claims of the ICC can be further relativized referring to Onuma's transcivilizational perspective, which at the same time may offer useful hints to overcome the actual hegemonic function of the ICC.

Onuma considers Bull's reconstruction of the expansion of the European international society to a certain extent correct, but partial and Eurocentric, for it projects the global extension of the international society back to the centuries in which the European model was only one peripheral model among others and because it does not consider the perspectives of the other «international societies» existing before the XIX century[29]. For, in Onuma's words: «It is one thing to recognize the fact that Europeans dominated and unified the world. It is quite another to see the process of this European domination and unification solely from the perspective which Europeans have taken for granted»[30].

As to the history of international law, Onuma aims to show the world views of civilizations other than the European, also with reference to the way they considered

[28] A. Garapon, *Des crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale*, Paris, Odile Jacob, 2002; M. Findlay, R. Henham, *Transforming International Criminal Justice. Retributive and Restorative Justice in the Trial Process*, Cullompton, Willan, 2005.

[29] Y. Onuma, *A Transcivilizational Perspective on International Law*, cit., *passim.*

[30] Y. Onuma, *When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective*, in «Journal of the History of International Law», 2 (2000), pp. 1-66, p. 6. Onuma refers polemically to the statement of the editors of *The Expansion* that «Because it was in fact Europe and not America, Asia or Africa that first dominated and, in so doing, unified the world, it is not our perspective but the historical record itself that can be called Eurocentric», H. Bull, A. Watson (eds.), *The Expansion of International Society*, cit., p. 2. Onuma asserts that such partiality is shared by other studies of the English School of International Relations, yet more sensitive towards the non-European world, like Charles H. Alexandrowicz's and Gerrit W. Gong's account. See C.H. Alexandrowicz, *An Introduction to History of the Law of Nations in the East Indies*, Oxford, Oxford University Press, 1967 and G.W. Gong, *The Standard of «Civilization» in International Society*, Oxford, Oxford University Press, 1984.

Europe and its universalistic claims at the time in which several civilizations coexisted on the globe[31]. Onuma focuses on the doctrine of *siyar* which was predominant in the Islamic world from the seventh to the eighteenth centuries, and on the Sinocentric conception of the world which dominated in Asia between the second century B.C. and the nineteenth century. They shared the universalistic claim which was also characteristic of the classical European doctrine of international law, although, clearly, none of them was globally valid indeed.

As a result of its rapid expansion under the Abassid dynasty, between 750 and 1258, Islamic rulers finally controlled a population of non-Arab peoples, persons converted to Islam as well as people of Jewish and Christian religion. In this period critical concepts as to the relationship with the non-Muslim world were developed. They integrated into the *siyar*, the part of the *sharia* which regulates the relations between Muslims and non-Muslims. Islamic lawyers theorized the separation of the world into the abode of Islam (*dar-al Islam*), which was controlled by the (Muslim) believers, and the abode of war (*dar al-harb*), which included all the territories dominated by the unbelievers (non-Muslim). This fundamental dichotomy, on which the distinction between the self and the other was based, was also maintained in the centuries to come.

Also after the tenth century, when the Muslim world was apparently not unitary any more, but divided into several dynasties, the cognitive central scheme continued to be based on faith differences: The central question was whether a human group was Muslim or not, and, if not, whether it was a «People of the Book» (Christian or Jewish). Also when the idea of the unity of the Muslim kingdom contradicted the reality, then, the religious criterion was not substituted by the national one. In the Islamic world order, we may conclude, the concept of sovereignty and the adherence to the European system of international law played no role in identifying political entities as such.

Similarly, according to the Sinocentric vision of the world which prevailed in Asia until the nineteenth century, the state notion was not as important as it is nowadays. The fundamental question was whether a group of people was a civilized member of the Sinocentric world order.

[31] Y. Onuma, *A Transcivilizational Perspective on International Law*, cit.

The Sinocentric system extended over the territory which approximately corresponds to contemporary China, Korea, Japan, Taiwan and Vietnam. It was a sphere of civilization composed of several political bodies, very different for extension, culture and structure. They shared nevertheless several characteristics such as Chinese characters, Confucianism and Buddhism, rules and institutions of Chinese origin and a normative system to regulate their reciprocal relations.

This normative system was based on the superiority of China over the other entities and was considered an extension of its domestic normative system. From the Chinese point of view, the Chinese emperor ruled over the whole world[32].

Only when the Islamic and the Chinese systems started to decline, the international perspective began to expand outside Europe. Between the seventeenth and the eighteenth centuries, when the European states' economic and military power increased, the power of the Ottoman Empire and of the other Islamic dynasties began to weaken. The relations among them, which until then were conducted according to the Islamic normative system, started to be conducted on an egalitarian foot and on the basis of the principle of equal sovereignty distinctive of European international law. The Islamic political entities were compelled to join the Eurocentric system of world order, which thereby started to expand over broad areas of the Eurasian continent. The same destiny occurred to the Sinocentric system. Notwithstanding its reluctance to accept European international norms, in 1839 after the military defeat by England, China ratified the treaty of Nanching, which marked its entry into the Eurocentric system.

When, at the end of the nineteenth century and as a consequence of the colonization process, the African continent was also completely dominated by the European powers, the Eurocentric normative system became universally valid. Until then, international law was only one among many normative systems coexisting on the earth, all of them being equally ethnocentric and universalistic. For a long time international law had been valid only for a minority of territory and people, and had been considered by other civilizations a peripheral, barbarian system, at times risible in its universalistic claims.

[32] Equally interesting would be to reconstruct from an intercivilizational perspective the «international societies» of civilizations existing in Africa and South America before colonization. Unfortunately, as far as I know and as far as my linguistic competences reach, there is no bibliography available on this topic.

Onuma argues that the European system imposed itself over the others does not mean that the concurrent systems have been completely eradicated. The universal validity of international law does not imply that it reflects the world views and value systems of every people. The world views of the other civilizations continued to survive after the universal imposition of the European system, protected by the non-intervention principle. Moreover, life on the most populous continents of the world continues to be governed by non-legal norms, such as religious and traditional ones[33]. To know the story and the point of view of normative systems different from the Western one is therefore necessary not only in the sake of historical correctness, but also in order to understand and face the challenges of our world.

Such a more inclusive perspective seems even more urgently needed if considered that 80% of the world's population belongs to non-Western societies.

7. The ICC in a transcivilizational perspective

Observed from a transcivilizational perspective, the outreach of the ICC seems to confirm on the empirical level its West-centric character.

More than half of the states of the world, 122, have so far ratified the Rome Statute[34]. But the states party to the ICC are unevenly distributed among the different regions of the world. While the European region is the highest represented one, with 42 states members, the North African and Arab region is hardly represented at all since only two states, Jordan and Tunisia, have ratified the ICC statute. Ratification from the Asian region is marked by the absence of China and India, the two most populous countries of the world.

While a pure international perspective would concentrate on the fact that more than half of the world's states accepted the Court's jurisdiction, the transcivilizational perspective stresses the fact that the acceptance of the ICC is extremely limited in the areas where civilizations with world views concurrent to the Western one have existed. It stresses also the fact that the percentage of the world's *population* whose states

[33] A. Anghie, *Comment*, cit.
[34] http://www.iccnow.org/?mod=romeratification, last update 10 July 2014.

ratified the ICC is less than the percentage of the *states* which ratified the ICC statute.

Many non-Western countries have expressed criticisms as well as offered proposals regarding the ICC.

China for instance expressed perplexity as to the universality, impartiality and independence of the court[35]. It emphasised the need for a judge's election strategy which truly represents the different regions of the world and criticized the lack of independence of the court. This was also criticized by other non-Western countries, in particular the ones belonging to the Non-Aligned Movement (NAM[36]). The concerns of NAM countries regard in particular the faculty conferred to the Security Council by Article 16 of the ICC statute to stop investigations and trials started by the ICC. This already allowed the Security Council, on the initiative of the United States, to adopt resolutions to prevent the ICC opening cases which could involve peacekeepers who are citizens of states which, like the US, are not party to the ICC[37].

These countries are also concerned with the power of the Security Council to have a word in the definition of the acts of aggression upon which the court will exercise its jurisdiction. An amendment to the ICC statute negotiated during a conference held in June 2010 in Kampala, Uganda, provides that the prosecutor, in order to initiate an investigation in respect of a crime of aggression, shall «first ascertain whether the Security Council has made a determination of an act of aggression committed by the

[35] China, People's Republic of, *Position Paper of the People's Republic of China on the United Nations Reforms*, June 07, 2005, available online at http://www.iccnow.org/documents/China_PositionPaperUNReforms_7Jun05.pdf; Id., *Statement of the Representative of China at the Sixth Committee of the 57th Session of the General Assembly*, October 15, 2002, available online at http://www.iccnow.org/documents/China6thComm15Oct02.pdf; Id. *Statement of the Representative of China at the Sixth Committee of the 58th Session of the General Assembly*, October 20, 2003, available online at http://www.iccnow.org/documents/China6thComm20Oct03.pdf.

[36] NAM, *Final Document of the Ministerial Meeting of the Non-Aligned Movement Coordinating Bureau*, NAM 2009/MM/Doc.1/Rev.1, April 27, 2009, available online at http://www.coalitionfortheicc.org/?mod=nam; S. Mirzaee-Yengejeh, *International Law as a Cultural Perspective: Towards a Convergence of Civilizations. Contributions of Developing Countries to the Formation and Application of International Law*, in R.S.J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community,* Leiden-Boston, Martin Nijhoff, 2005, pp. 191-222; Cuba, government of, *Declaration of the representative of Cuba's government at the 63th Plenary Session of the UN General Assembly*, October, 30 2008, available online at http://www.iccnow.org/documents/Statement_by_Cuba_during_the_63rd_General_Assembly_plenary_meeting_on_Agenda_Item_69,_The_ICC.pdf.

[37] See the Security Council Resolutions 1422/2002, 1487/2003 and 1593/2005.

state concerned[38]». Both in positive and negative cases, the prosecutor can proceed with investigations, but the Security Council retains, such as with other crimes, the power to stop investigations and proceedings according to Article 16 of the ICC statute.

I would add to these concerns the problems related to the fact that the Security Council can activate the jurisdiction of the ICC and that in this case the court's jurisdiction can apply universally. Even if theoretically the court can refuse to open the case, this means that the Security Council can dispose of the ICC as an *ad hoc* tribunal, established by the Security Council and imposed upon countries against their will.

Concerns regarding the type of legal system adopted by the ICC have also played a role for some non-Western countries in their decisions to not become members of the ICC. India is among others concerned about how Indian criminal proceedings would be judged by the ICC, since the Indian criminal system departs from the Western criminal model adopted by the ICC in many respects[39].

As to concrete cases, Algeria and Syria expressed their skepticism towards the ICC's decision to open a case on the situation in Sudan and proposed diplomatic actions as alternative solutions to the judicial proceeding[40]. Algeria in particular opposed an African Union-led diplomatic action, which would also involve the Sudanese government and the armed groups operating in Sudan, to the external (to the African continent) judiciary activity of the ICC.

Moreover, the failure to recognize the existence of other civilizations and their perdurable influence on the world views of non-Western peoples from the side of the ICC brought about «clash of civilizations»-like reactions. For example, the decision of the ICC to incriminate Sudan's President Al-Bashir provoked in-bulk reactions by the Arab League and the African Union, whose leaders refused to accept the decision of the Court and declared that they would not cooperate with the Court by arresting or

[38] Art. 15bis(6) ICCSt. The article provides also that the ICC jurisdiction over the crime of aggression is subject to a decision to be taken by the majority of the states parties after 1 January 2017.

[39] U. Ramanathan, *India and the ICC*, «Journal of International Criminal Justice», 3 (2005), n. 3, pp. 627-634.

[40] Algeria, representative of, *Algeria declaration on the vote of Security Council Resolution 1593*, March 31, 2005, available online at http://www.iccnow.org/documents/Algeria.Statement.SCreferralDarfurICC_31March05.pdf; Syria, representative of, *Declaration of Syria's Representative at the 63th Plenary Session of the UN General Assembly*, September 27, 2008, http://www.iccnow.org/documents/syria_en.pdf.

extraditing Al Bashir[41]. Such a clash of civilizations approach is well summarized by the words of the Sudanese foreign minister, who declared at an African Union meeting: «We think that Africa is now one front against the ICC […]. Most Africans believe it is a court that has been set up against Africa and the third world»[42].

8. Which Alternative to the Exclusive Universalism of the ICC?

So far the analysis, but can the transcivilizational perspective help to sketch guidelines to overcome the hegemonic character of the ICC? And if yes, how is it possible to incorporate the complexity that it shed light on into strategies to face transnational challenges?

Onuma's theory, of course, is not a perfect tool.

Fist of all, the very use of categories like «civilization» is problematic. The risk, as illustrated by Edward Said, is to reduce the multiplicity to imposed archetypes that provide the epistemic background to perpetuate power inequalities and subjugation[43]. On the other side, as I argued in the article, universalistic claims, by concealing differences and defining what is «universal» and what is «particular», may lead to the same effects. So we face a dilemma: we need words to name differences and concepts to make them visible without embedding individuals and people in fixed, externally imposed schemas. Secondly, related to the epistemic risks of referring to civilizations as heuristic tools are the possible socio-political consequences of such use. A civilizational-based approach may lead to exclude the groups that do not belong to the greatest cultural, religious and philosophical traditions from the transcivilizational dialogue[44]. This point is particularly relevant as to ICL, for these apparently marginal

[41] *Regional Rifts Stymie Arab Summit*, in «BBC News», March 30, 2009, available at http://news.bbc.co.uk/2/hi/middle_east/7971255.stm; *Appeal over Al Bashir Genocide Charges*, in «Al Jazeera English», July 8, 2009, available at http://english.aljazeera.net/news/africa.

[42] AU Criticised over Bashir Decision, in «Al Jazeera English», July 4, 2009, available online at http://english.aljazeera.net/news/africa.

[43] E.W. Said, *Orientalism*, New York, Vintage Books, 1978.

[44] D.A. Bell, *Beyond Liberal Democracy. Political Thinking for an East-Asian Context*, Princeton, Princeton University Press, 2006; N. Gordon (ed.), *From the Margins of Globalization: Critical Perspective on Human Rights*, Lanham, Lexington Books, 2004. For further criticisms to Onuma's approach see R. P. Anand, *Review Article*, in «Journal of the History of International Law» 6 (2004), n. 1, pp. 1-14 and J. Fisch, *Power or Weakness? On the Causes of the Worldwide Expansion of European International Law*, in «Journal of the History of International Law» 6 (2004), n. 1, pp. 21-

groups are also the ones most exposed to serious human rights violations.

As to the theoretical risk of the use of the category of «civilization», Onuma itself is very cautious. He considers it crucial to avoid essentialist, monolithic understandings of civilizations and stresses the fact that internal differentiation, the existence of minorities and multiple belongings are constitutive elements of every civilization. Given the dilemma I referred to above, I consider such cautious use of the category of civilization a reasonable alternative to the universalistic position. As to the practical risk, it may be tempered, in my opinion, by combining the transcivilizational perspective with approaches that focus on resistance by social movements, NGOs and marginal groups as a shaping force of international law and international relations[45].

This caution adopted, I think an attempt is worth to translate such theoretical positions in guidelines for weakening the unequal and hegemonic character of the ICC.

There are in my opinion two possible ways to do that: the first one consists of converting the universalism of the ICC from being divisive into becoming a more inclusive universalism. The second way – in my opinion more promising – requires the ICC to renounce to its universalistic claim.

I shall outline potential features of both options. However, it is not my aim to suggest a detailed, comprehensive project. For building a more inclusive system of ICL is not a task any isolated scholar can solve by abstractly reasoning on it. On the contrary, it is a task to be carried out in the practice, through the participation of every involved community, through the resistances and the conflicts that such a process would most likely entail. Consequently, I will now only suggest a few features that may make the decision process more inclusive, rather than prescribing what their outcome should be.

The first way implies that the ICC modifies itself along the lines of the proposals and claims of non-Western countries reported above. To sketch some guidelines to reform the ICC according to these claims, the full formal and substantial independence of the ICC from the Security Council and the related abolition of the abovementioned powers of the Security Council should be the first steps for creating a more inclusive system of ICL. It is true that the Security Council is not composed only of Western

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[45] B. Rajagopal, *International Law from Below*, cit.

states, but it is also true that it is a hierarchical and elitist body, which replicates power inequalities and represents in a very uneven way the different regions of the world.

Another key feature of a more inclusive system of ICL should be the explicit inclusion of non-criminal forms of justice among the national proceedings which could avoid activating the ICC. As we have seen above, the current definition of the ICC statute is at least ambiguous on this point. It is to be hoped that the ICC statute explicitly refers to non-penal systems, like the one inspired by the restorative justice paradigm, as fully valid alternatives to criminal prosecutions. Also as to the penal model, a debate should be opened about a possible mediation with non-Western criminal systems, and the criminal proceedings should not interfere or hamper diplomatic and other non-judicial actions.

The second way would be to abandon the universalistic ambitions of the ICC and opt for a pluralistic and regionally-based system of reaction to the grave violations of human rights. This system would take into account the existence and the world views of the different civilizations which have existed on the globe, and elaborate responses to international crimes which would respond to both the cultural, legal and political traditions of every civilization and directly address the exigencies of the involved community. It would support the establishment of a *plurality* of decentralized and independent regional mechanisms, each of them establishing the most suitable means to react to international crimes in autonomy from the others, and in the way which is most compatible with the cultural and political character of its members. It might be organized by regional blocks not controlled by a central institution. Inside every regional system there might be multilevel mechanisms – local, national and supranational – among which priority should be given to the lowest one. The superior levels should be activated only if the lower level is not available or is not able to work effectively.

In such a system every community should dispose of mechanisms which are as near as possible to the world view of the civilizations to which it belongs. Criminal law might be, in such a context, *one among* many solutions, to be adopted only if it reflects the notion of justice shared in a given community. Beyond the criminal option, other options should be available such as mechanisms inspired by a restorative justice model,

like truth commissions or semi-traditional courts as the Rwandan *gacaca* courts[46]. The criminal or non-criminal proceedings should be held in a language familiar to the involved communities so that they can actively participate in it.

The relations among the different regional blocks might be coordinated by the normative means already available under international law, such as customary norms, and bilateral and multilateral treaties. These might be used to solve competence disputes over particular cases[47]. In my opinion one of the basic criteria to decide the competence over a case should be the victim's provenance, which does not currently play any role for the ICC.

Such a system would have the advantage of addressing the claim which motivated the creation of the ICC, i.e. the idea that given the nature of international crimes, which are often committed by states' representatives, they cannot be effectively redressed by the state itself. At the same time it would avoid the exclusive universalism of the ICC.

I am aware that there is no guarantee that the hegemonic dynamics would not replicate at the regional level, and they most likely would. But it is my conviction that the processes of emancipation at the global, regional, and national levels do not exclude each other. On the contrary, an emancipatory project of non-Western countries at the global level can and should be sustained by a process of emancipation *inside* these countries and world regions and vice versa. The presence of oppressive ruling elites in non-Western countries ought not to be used as an excuse to speak in their people's place.

Responding to the justice claims of the involved societies rather than to the imposed values of the «international society» could be a step toward the realization of this emancipatory project.

[46] For a more detailed description of the functioning of the *Gacaca* courts see E. Orrù, *Il tribunale del mondo*, cit.
[47] I owe suggestions on this point to Miriam Ronzoni.