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Hegemony through the Architecture of the International Criminal Court

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Abstract

This article links the buildings housing the International Criminal Court to the workings of that court by putting the Gramscian concept of hegemony to work. It considers occulted functions of the structure and subconscious aspects of the operations of the court. Gramsci's hegemony is an articulation of a relationship of power between dominant and dominated classes. This relationship is not only one between consenting States and the court, but also between non-ratifying States and the court. It is also the locus of a power struggle between an elite judicial class and the sovereign ratifying States. The physical structure in which this international law is adjudicated and this struggle for power takes place, answers those criteria of hegemony as this article will demonstrate.

Keywords

Hegemony, International Criminal Court, elite, fortress, economy

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A. Michael Baines

I. Introduction

The International Criminal Court (ICC) is currently at the apex of International Criminal Law (ICL). The Rome Statute (RS) which created the ICC gave it jurisdiction over three crimes or groups of crimes: war crimes, crimes against humanity and genocide. Although much discussed during the run-up to the Rome Diplomatic Conference at which the RS was completed, the crime of aggression was only covered at the first Review Conference, in Kampala in 2010. This young institution has elicited often contentious academic studies covering all aspects of its difficult and necessary work. The concepts of domination and hegemony have been used in many of these studies even if to mainly criticize the institution. However, the profound meaning of hegemony as developed by Antonio Gramsci has rarely been used; the articulation of a relationship of power between dominant and dominated classes in which a basic criterion is the combination of consent and coercion. This article aims to address this omission principally by considering the architecture of the buildings where the court sits. This not only shows how the ICC has the potential to dominate its creators but it also elucidates how the judges of this court can develop not just the powers of the court but also their own powers as a transnational elite. It is vital to commence filling this lacuna as relations of power at the highest level determine aspects of control and hence democracy.

This article is in four parts, the first of which will consider Gramsci's concept of hegemony and its relevance to the architecture of the ICC. The second part will consider the many tensions which are apparent from the architecture of the building. Tensions are manifestations of power struggles and power struggles manifestations of hegemony. In the third part the intellectuals involved in the operation of the ICC and those who designed its edifice will be considered. The final part will conclude first by

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considering how struggles in the judicial complex reflect hegemony and secondly by considering some alternatives.

II. Hegemony

The author's use of the concept of hegemony refers to that used by Gramsci. Hegemony is used in the sense of domination by a class (of individuals or States) of dominated classes (of individuals or States) which is maintained by the preponderant use of one technique. This Gramscian technique (Gramsci, 1975, Q4§38, p. 457; 1996, p. 179) is one of surrendering some peripheral advantages enjoyed by the dominant to the dominated class in order to ensure the latter's continued consent to the prevailing system, with coercion held in reserve. The way Gramsci conceived of hegemony means that consent by the dominated class(es) is a prerequisite to achieving and maintaining hegemony; otherwise, there is domination, exercised through coercion (Ali, 2015, p. 241). This strategy is also used in those situations of political stability which arise when an equilibrium between forces is achieved. Hegemony is then (momentarily) achieved when the dominated and the dominant believe that there is no realistic alternative to the prevalent order and that subject to peripheral changes, it is satisfactory. And so the power of a class is maintained.

In the context of ICL, there are really but two classes,[1] or groups, which can be considered suitable candidates for this hegemonic position. The first is the entire legal apparatus of the ICC as Agents for the founding States of the ICC. Through the consent reached by the Assembly of States Parties (ASP) and its 21-member Bureau, the creators of the ICC dominate ICL and its materialization in any investigation, prosecution, and trial initiated by its Agent, the ICC. The ASP is the management oversight and legislative body of the ICC. The second class is the lawyers of the ICC as they form a transnational class with hegemonic traits. These lawyers are the judges, the prosecutor, the registrar and the defence counsel. The judges are elected by the ASP by means of a political procedure and have a limited period to imprint their vision although their decisions outlast their mandate. Their judicial actions are subject only to

[1] In the text, 'class' will often be used according to the 2015 Oxford English Dictionary definition: 'a system of ordering society whereby people are divided into sets based on perceived social or economic status'.

obtaining the consent of their peers. They have no hierarchical superior of any kind; their decisions are law. In a dynamic, globalized, polyarchic world, it is normal that there should be different hegemonic classes at different levels of activity which furthermore regularly impact on each other as they exercise their respective power. In ICL as being developed by the ICC the diarchy in question – sovereign States assembled in the ASP on the one hand and the lawyers of the ICC on the other hand – the constant flux of power relations is symptomatic of hegemony. ICL as a negotiated position to allow continued rule by an elite is created by the actions of Sovereign States when they negotiate treaties and by lawyers when they argue in court. By obtaining democratic consent to these legal acts hegemonic ICL is therefore the tool created by this consent. The ICC building in the Hague is the physical manifestation of this hegemony. As Adam Morton says 'The urban form is therefore replete with dominant class rule using abstract space as a mode of organizing the means of production to generate profit' (Morton, 2018, p. 125). In such a dynamic state, equilibrium requires articulatory counterweights: hegemony calls for its opposite, for resistance. Gramsci did not define this opposition but scattered throughout his writings are innumerable references to struggle and reform, which are needed for an equilibrium to be reached and held.

In the context of the ICC, there are several strata of conflictual opposition (Gramsci, 1975, Q4§38, p. 455; 1996, p. 157). One such stratum encompasses those nations which did not ratify the ICC Statute for reasons founded in power politics or indeed others for religious reasons. The non-ratifying permanent members (PMs) of the UN Security Council (UNSC) have varying and variable reasons for abstaining from the ICC, but the root cause seems to be their adherence to a Westphalian concept of full sovereignty where power politics are a fact of life. These States will counter the growing influence of the ICC in order to protect that sovereignty. The position of the United States is more ambivalent than that of China, Russia, India, and other non-ICC ratifying States. On the one hand its economic and military position is such that it is the dominant party in any power struggle and it does not want to be shackled to an independent judicial power over which it has no control. On the other hand, it feels that it has a unique task in the world, which qualifies it for global leadership. It aspires to being a

role-model for all other sovereign nations, in ICL also. The US Administration and Senate felt that personnel of its armed forces was too much at risk from political prosecutions. One of the main reasons for this was that US armed forces are involved across the globe, including in UN missions. Under President G. W. Bush the USA convinced more than one hundred countries to sign Bilateral Immunity Agreements (BIAs) . These BIAs meant that the counter-parts to the USA agreed not to surrender US Nationals (and in fact not only members of the armed forces) to the ICC if so required by an ICC warrant. The legality of such agreements is debated when evaluated against the Vienna Convention on the Interpretation of Conventions which requires in its Article 18 that signatories to the Convention should refrain from acts which defeat the object and the purpose of a Treaty. A country ratifying the RS is obligated to accept the courts' judgements, orders and decisions. Being a signatory to both a BIA and the RS would therefore seem contradictory. Although much criticism has been directed at the US, it should be noted that the BIAs are reciprocal.

Many other non-ratifying States (e.g. China) had problems with the independence of the prosecutor from UNSC control. The RS which was negotiated by consensus achieved this independence against strong opposition from some States; eventually the large majority of States which wished to see a court less dependent on the UNSC and very ably supported by the Chairperson of the Committee of the Whole, Mr Philippe Kirsch, achieved a third means for prosecutions to be initiated. Additional to State Party and UNSC referrals, the prosecutor could also initiate *proprio motu* proceedings, albeit subject to confirmation by an ICC judicial decision and subject to the UNSC not suspending such a prosecution for one year. Russia signed but did not ratify, claiming constitutional issues. It later unsigned (after an investigation into matters relating to the Georgia-Russia conflict) and became a critic of the ICC. India was publicly very supportive of the creation of the ICC, but among other objections it found that the extension of the court's jurisdiction *ratione locis* to internal matters was unacceptable. Other non-ratifying countries and their jurists resisted the hegemony of the ICL as propounded. When J. M. Pureza (Pureza, 2005, p. 271) writes '[…] what some countries such as the United States criticize in the ICC Statute is its intention of becoming a sort

of planetary judiciary with effective powers' he reveals a root cause of why – at a different level from that which led to the signing of BIAs – the United States did not ratify the Statute and is considered to be regularly trying to disempower the ICC and so to assert its hegemony, but some would call a domination.

The ICC building in the Hague could not have been built in the shape and size it was, if the United States had been a ratifying and contributing nation. The scale and the architectural splendour would have been totally different: a brief look at the Federal courthouses in Tuscaloosa, in St. Louis and Austin among others suffices to make the point. As it is, the ICC building reflects the neutrality and second-power status of its ratifiers. The ICC complex does not have any recognisably South American, Eastern or African architectural features: it aspired to and achieved neutrality by being a series of contemporary office blocks with traditional global north materials.

Photograph 1, with kind permission of Leo Oorschot, Architect & Researcher

A second stratum comes from both ratifying and non-ratifying States, many from the global south, which opportunistically revolt against the global north orientation of ICL as practiced by the ICC. Such opportunities are rare, principally because many referrals come

from the concerned States, not from the UNSC or the prosecutor's *proprio motu* powers. The actual reasons for originally ratifying even though rarely publicly mentioned or evidenced impede later revolt: these reasons are often based in the desire to avoid reductions in aid-, investment- and trade flows and to maintain cohesion with neighbouring countries or associations of countries. Once political will coalesces around such a revolt it may become a trend and change could go fast. The very existence of the African Court on Human and People Rights (ACHR) as also the Islamic International Court of Justice (IICJ) are prime examples of how the opportunity to trend can remain immanent for some time (see below).

The assumed neutrality of the Hague building allows for inside gardens of the complex to show off tropical plants and exotic growth from the global south. The garden architects had hoped that

> seven characteristic courtyards representing the contributing countries, including the Scandinavian patio with pine trees and cones, the African garden with red soil and exciting vegetation, a lush Korean rooftop garden and a Dutch dune landscape … [would] result [in] a risk-reducing urban landscape and an open forecourt, which instead of barricading ICC behind walls and barbed wire opens the institution up to the public …

Photograph 2, with kind permission of Royal Mosa, copyright holders

Although a natural and protected dunes landscape surrounds the complex, the gardens are only accessible to people inside the building. The construction costs for the landscaping were €5 million (out of a total expenditure of €200 million).[2]

When considering the design of the court rooms one has to concede that, in that matter also, no practical effect has been given to those clauses of the ICC Statute which require multiculturalism among its judges. Here, Article 36, 8(a)(i) of the ICC Statute requires 'representation of the principal legal systems of the world'; or even the Bureau of the ASP only needs such representation to be 'adequate' (Article 112, 3(b) of the ICC Statute). Electing judges from different parts of the world does not help to achieve multiculturalism when all the judges have been through the mill of global north academic institutions. The author has considered the curricula vitae of 53 judges elected since 2003 and divided them summarily into three groups based on them having spent an important academic time in any one of the three groups. The first comprises Canada, New Zealand, UK and the USA, the second EU countries and the third others. In percentage terms, the first has 45.28% of judges, the second 28.30% and the others 26.42% .

The courtrooms are mirror images of those found in the global north and the antithesis of sharia' or Gacaca courts in Rwanda.

A final stratum would be formed by the triangular relationship between the UNSC, the General Assembly of the United Nations (GA) and the ICC. There are geopolitical relationships along the three sides of the triangle. First, the UNSC side. Although three Permanent Members have not ratified the RS and therefore neither vote in the ASP meetings nor are compelled to finance the ICC, and the remaining two PMs are second rate powers both in military and economic terms, all five nevertheless may individually block any investigation or prosecution by the ICC (the deferral powers granted by Article 16, RS). This has been used to protect geopolitical situations for example when Russian and China vetoed the referral to the ICC of the situation in Syria. The US abstained at a UNSC vote on a Kenyan request, supported by the African Union (AU), to have the pending case against it deferred, even though

[2] Cf. the information from SLA, a Danish architectural company, very much devoted to nature, appointed landscape architects for the ICC, to be found on their website at https://sla.demo.supertusch.com/en/projects/icc-international-criminal-court.

public statements had indicated that the US Administration was in favour of the ICC taking such action and should therefore have used their veto rather than abstain.[3]

The second side of the triangle is the relatively new phenomenon of the GA not only diplomatically lobbying the UNSC but slowly building what might become a normative power. The GA created a Human Rights Council (HRC) in 2006 (Bichet and Rutz, 2016). This HRC has installed Commissions whose fact finding reports are acquiring more and more standing and whose language is drifting from concerns on human rights violations to criminal activities which fall under the ICC remit. The GA supports these Commissions and hence exerts pressure on the UNSC. The GA hopes to develop its normative place on the international scene especially when the UNSC remains deadlocked whilst terrible crimes are being committed with little chance of prosecution.

The third side is that where the ICC connects with the UNSC and the GA. Here the judicial-political tightrope which the ICC must follow is most difficult; the prosecutor and the president have to consider geopolitical reality and financial constraints at every step before committing the court to a process which may determine its survival, let alone achieve justice in a specific case. The ICC judges will conduct trials and appeals from a bench where no single person can decide on the fate of the accused and it is the president of the court, elected by the judges (RS, Art 38) who decides which judge will handle which case in which Chamber. However, they can only consider cases which the prosecutor presents. By Statute, judges are intellectuals at the top of their profession. They are of high moral character, impartial, and have strong moral principles. They possess the qualifications required in their respective States for appointment to the highest judicial offices. Upon a single nine-year appointment, the 18 judges achieve diplomatic immunity, high esteem, and financial security for life.

A final stratum of conflictual forces is visibly embodied by the judges of the court and indeed the whole of the ICC, who exert continued pressure to extend their jurisdiction by pushing the boundaries of the ICC Statute. This occult violence is extremely difficult for the ratifying sovereign States to control; common sense

[3] 'I urge all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC' (Obama, 2010, statement of 15 December).

requires that justice be seen to be done and so it is problematic for governments to be seen attempting to restrain this push by the independent judiciary to extend ICL.

The dominated States develop a consciousness of their situation in the power struggle which takes place in the hegemonic system. Opportunistically African States resist the ICC as a neo-colonial grab for power. This is principally a political move; they can resist completely and individually by withdrawing (Burundi for example, for reasons linked to its internal situation) or partially and collectively (for example African signatory countries of the RS Chad, Egypt, Djibouti, Kenya, and Mali invited the indicted Sudanese President al-Bashir to enter their sovereign territory with total immunity).

In this context it is apposite to mention Article 46 A bis of the Malabo Protocol which grants immunity to 'AU Heads of State or government or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'. But the International Criminal Tribunal for the Former Yugoslavia (ICTY) also complained publicly about States resisting investigations or trials. This expression of inferiority is a reflection of the struggle for hegemony; inferiors will resist, propose change and accept compromises. At the end of any struggle over power, the inferior will give in to the dominant power after having gained some advantage. When they have developed enough power, they can even overcome the dominating class; the judges and prosecutor interpreted the ICC Statute in such a way that the Rohingya situation fell under their jurisdiction. Although this may be only one investigation among the sixteen so far initiated by the court, it does show that it has that latent power and will use it. Similarly, a truly operational ACHR operating under the Malabo Protocol would move from being in an inferior position to the ICC to being an alternative of substance.

The Protocol (full name: the 'Malabo Protocol on the Statute of the African Court of Justice and Human Rights') was signed in 2014 in Equatorial Guinea by 15 member States out of the 55 who make up the AU. But as yet, none has ratified the Protocol. The court's jurisdiction extends to the following crimes, according to Article 28(A):

> try persons for the crimes of genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

During these continuing struggles the dominant class will grant non-essential elements of its hegemony to the inferior class. Similarly, this class is constantly labouring in such a way as to increase its leverage not only over the decisions of the dominant class but also over the ways and means in which it is dominated.

This opportunism manifests itself architecturally; neither the ACHR nor the IICJ have proper, purpose-built courts. Building such courts would be a concrete (!) manifestation of political will and would signal that the ICC's hegemony is physically contested. On the other hand, these States fully realize that by ratifying in sufficient number the treaties which empower the ACHR and the IICJ they would thereby empower judges to consider some of their own sovereign acts (and misdeeds).

Judges by most definitions can be classed as intellectuals. Gramsci's theories on intellectuals have been summarized as follows:

> If social classes do not exercise power directly but through political and cultural intermediaries, then the role of these intermediaries – the intellectuals – in maintaining and reproducing a given economic and social order (in the exercise of hegemony), is of decisive importance (Forgacs, 2000, p. 300).

The people who designed the ICC, the architects, are also members of the intellectual class. Gramsci wrote that the 'Intellectuals of the urban type […] have no autonomous initiative in elaborating plans for construction […]' (Gramsci, 1975, Q12§1, p. 1520; 1971, p. 14) by which he principally meant that the initiative to construct or not – here in a literal sense – lay in another's power.

As intellectuals lawyers do have autonomy within spheres which are prescribed by others. This is a classical field of struggle between autonomy and heteronomy. Domestic fora judges are bound into a tighter political heteronomy than international judges. ICC judges are really independent and the prosecutor does have an autonomous initiative (a major stumbling block for the United States). Pablo Ciocchini and Stéphanie Khoury give some clear indications of this by suggesting that the

novelty of applying a Gramscian perspective to the analysis of the judicial decision-making process is two-fold. Firstly, this analysis reveals that as judges enforce the law, they act as legal 'technicians', applying officially recognized interpretations of the law. Their role is to reproduce and conserve the status quo. But judges can also occupy a leadership role by promoting certain moral values. They do this by expanding, and in some cases even subverting, traditional legal concepts (Ciocchini and Khoury, 2018, p. 77),

and further

judges lead the dominant factions of the ruling class and create consensus within the power bloc (Ciocchini and Khoury, 2018, p. 84).

Gramsci was a convicted political prisoner of Mussolini's Fascist Italy in 1930 when he wrote

Everything that directly or indirectly influences or could influence public opinion belongs to [ideological structure]**:** libraries, schools, associations, and clubs of various kinds, even architecture, the layout of streets and their names (Gramsci, 1975, Q3§49, p. 333; 1996, p.53).

Slavoj Žižek (2009) in a lecture in New York also puts his finger on the potentially hegemonic characteristics of public buildings:

in postmodernism we get a multiplicity of codes. This multiplicity can be either the multiplicity (ambiguity) of meanings or the multiplicity of functions [while …] the antagonistic tension between different standpoints is flattened into indifferent plurality of standpoints.

Assuredly the ICC court buildings are the outcome of an enforced neutrality between not only different architectural standpoints, but cultural standpoints. And the result is a flattened, if defensive, construction. In the words of the Danish architects:

It was a real challenge to design this building given that many nations have signed the Rome Statute. However, we decided early on not to be specific regarding all these nationalities, cultures, and religions, as it's just not feasible for all of them to be reflected in a coherent architectural design. Instead, you have to generalize, simplify, and be innovative.[4]

[4] MOSA, Design Studios, 2015, on Architonic Website https://www.architonic.com/en, *International Criminal Court: the Hague* at https://www.architonic.com/en/project/mosa-international-criminal-court-the-hague/510326.

Operating at all these levels are the Non-Governmental Organizations (NGOs) . Each has its agenda, sometimes in violent opposition to that of others (e.g. right for abortion NGOs as against anti-abortion NGOs). The presence of NGOs it is said was crucial to certain clauses being incorporated in the Statute. The 'Coalition for the ICC', an overarching NGO, was even involved thanks to a Resolution of the ASP in the competition process which led to the building of the court. The independence of NGOs from neo-liberal hegemony must however be questioned: the very procedure of becoming recognized necessitates conformity to certain pre-requisites. This falls into Gramsci's description of the way a dominant class transforms an opposing force; he uses the evocative word *trasformismo* to describe this method of enervating a movement (cf. Gramsci, 1975, Q19§24, p. 2011; 1971, p. 58). This is a widely used way of watering down an antagonistic movement's strength by agreeing on mutual concessions, where the dominant power actually surrenders something it doesn't consider vital to its interests.

III. Tensions

Courts are spaces where struggles take place, using laws, procedures, and psychology as tools and weapons. An awkwardness in all truly international courts has been the difference between the common law and civil law systems, as they manifest themselves i.a. in law, in procedure and in evidentiary matters. These differences

have not (yet) led to damaging arguments but are at best a locus of struggle not conflict. The possibility for judges to pronounce their individuated opinion is an example of such a difference: although some civil law countries allow such an opinion it is far from universal. As Jiří Malenovský (2009, p. 39) says

> It is nevertheless interesting to observe how a number of countries which are traditionally associated with civil law systems, amongst which are some which were faced with an excess of totalitarianism in the past, are ready to integrate certain elements of common law in their legal systems. They have for example introduced the practice of having separate opinions at the level of their respective constitutional courts. Examples would be Germany (*Sonder-votum*, *Abweichende Meinung*), Spain (*voto particular*) or the new democracies in Central and Eastern Europe (Hungary, Poland, Czech Republic, Slovakia or Slovenia). In France, as in certain other countries of civil law discussions are being held although the situation has not yet progressed (author's translation).

The ICC specifically allows for separate opinions (Art. 83, RS): this was achieved not least because during consultations the judges of the ITFY and ITFR were very positive about their right to so do (ITFY, Art 23/3 and ITFR, Art 22). As the Trial Chamber shall have three judges and the Appeals Chamber shall have a bench with the president of the ICC and four other judges (Art. 39/1 and 2, RS), there is scope for such opinions.

The crimes which the ICC handles, just as its predecessors in Nuremberg, Tokyo or the ad hoc tribunals of Yugoslavia or Rwanda or the hybrids of Cambodia, Kosovo or Sierra Leone, are no different compared to the crimes which sovereign courts handle: it is the scale which is different. The legal conflicts they all concentrate on are fought out in the prescribed arena, according to mostly self-imposed but often contested rules. The origin and the remit of the ICC proceeds from a *longue durée* movement to create a forum where ICL would flourish and that movement is rooted in the global north. As the International Committee of the Red Cross website states with regard to ICL:

> This is the branch of international law that is designed to hold individuals who are responsible for particularly serious violations of international law to account before the law. The idea that individuals, and not only States, could be found responsible for such violations started to gain ground after World War II with the establishment of the Nuremberg and Tokyo tribunals, which were set

up to prosecute persons responsible for atrocious crimes (International Committee of the Red Cross, 2021).

All the post-war and post-crime courts mentioned were called into life to handle crimes perpetrated in a specific territory, during a specific lapse of time and, in the minds of their creators, with a temporal finality. These pre-ICC courts came about by virtue of the will of military victors (e.g. the International Military Tribunal for Europe (IMTE) and the International Military Tribunal for the Far East (IMTFE)), or of UN fiat such as the International Criminal Tribunal for Rwanda (ICTR) and the ICTY, or of a Treaty between a sovereign state and the UN (Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, Kosovo Specialist Chambers & Specialist Prosecutor's Office, Special Tribunal for Lebanon).

The ICC is *sui generis*; it is a Treaty Organization, ratified by more than 120 sovereign States, which handles those crimes enumerated in the Treaty and perpetrated in all those signatory States or by any of their nationals, as from the date of ratification, without prescription or statute of limitations. The creation of the ICC was not ex nihilo; it was the product of many decades of political thinking on the expanding need for international crime to be punished. Furthermore, it built upon the text, experience and jurisdiction of its predecessors, especially the ICTR and the ICTY. Such an adherence to precedent is nearly inevitable. Gramsci would have elaborated it by looking to human sociology which shows how institutions which appear to work satisfactorily even if to the occulted advantage of any social class are manoeuvred by the dominant class into being accepted by the dominated class as common-sensical solutions, with no reasonable alternative. He summarizes this in a most interesting sentence in a note written in 1932 as follows, where art – which must include architecture – and law are furthermore united:

> at this point we reach the fundamental question facing any conception of the world, any philosophy which has become a cultural movement [… or] produced a form of practical activity or will in which the philosophy is contained as an implicit theoretical "premiss" (One might say "ideology" […] a conception of the world that is implicitly manifest in art, in law, in economic activity, in all manifestations of individual and collective life) (Gramsci 1975, Q11§12, p. 1380; 1971, p. 328),

which the author would link with an *a contrario* reasoning with a further sentence in the same note:

> conclusions that old [new] conceptions have an extremely stable [unstable] position among the popular masses; particularly when they are in accord [in contrast] with orthodox convictions […] conforming socially to the general interests of the ruling classes (Gramsci 1975, Q11§12, p. 1391; 1971, pp. 339-40).

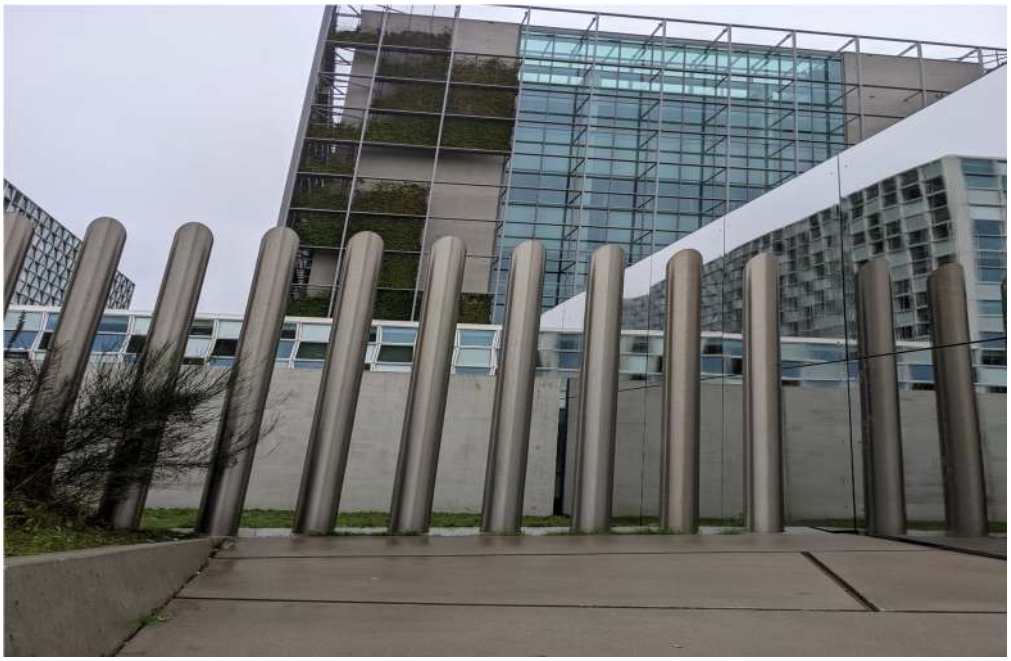
The legislative creep towards individual liability and the dismantling of the so-called Westphalian sovereignty of States was resisted at nearly every stage by individual and powerful States or alliances of such States. Until the IMTE the combined cloaks of executing orders by superiors, reasons of state and or immunity had insulated individuals from most (international) criminal pursuit. The sovereignty of the territorial authority was at the basis of the Treaty of Westphalia and so was its authority over its citizens. Between individual sovereign States, agreements covering extradition establish this sovereignty. Sovereign States surrendered this authority by virtue of ratifying the RS in favour of an international institution. This resistance is best summarized by considering that three of the five PMs of the UNSC did not ratify and that the two weakest PMs which ratified were European.

When considering the ICC complex, its very architecture reflects four areas where tensions occur, both visible and occulted.

A. *Symbolism and neutrality*

The first struggle is between symbolism and neutrality. The core crimes which the ICC must prosecute are enormous crimes in every sense. It is therefore right that the space where such matters are fought out, should be accessible to all in surroundings which reflect the magnitude of the crime. It is considered appropriate and common-sensical that the majesty of a court be reflected in the majesty of the building where it is housed: so works symbolism. And indeed, as far as the ICC is concerned its openness to the outside world, its willingness to see and look out seems embodied by the use of very large amounts of windows. Loopholes in castles and forts are also designed to allow those inside to observe the outside. The polyangular style used for the ICC windows are a requirement for defending the building, making it blast-proof, but it

also means that the windows do not allow the outsider to actually see in very much.



A building erected on behalf of more than 120 States cannot project common symbols of justice, law or punishment, for they do not exist. It had to be soberly impressive, without any trace of cultural domination by any power. The ICC's statements made at different moments of the design and building read

> the ICC will be housed in an iconic group of buildings that will leave visitors with a strong image of the Court: that of an august institution established to combat impunity by imparting justice in accordance with the rule of law (ICC Press Release, 2013),

and then, not quite two years later, when the finished building was handed over, the 'design of the building reflects the transparency of the institution and its innovativeness. It combines striking architecture with stringent security measures' (ICC Press Release, 2015) leads one to expect a truly memorable building: iconic, august, transparent, innovative, striking. A Derridean deconstruction of the latter statement cannot fail to show the divergence between what is said about a building and what it actually is. For what does Derrida's work require? Analysing a certain text and exposing the binary oppositions which form the basic structure of our way of

thinking. The ICC statement actually refers openly to a visible opposition: 'transparency' and 'security measures'. But deconstructed, one must observe that in the legal thinking of the global north 'innovativeness' in criminal law is to be repressed and only very exceptionally allowed, not to be lauded and encouraged. Did the statement actually warn the ASP that the court would and should push for innovation? Similarly deconstructed 'striking architecture' which is combined 'with stringent security measures' is visually and visibly incorrect. The ICC building is either one or the other: what can these competing interpretations really say about it? That those who conceived of it were not able to reconcile these competing goals and agreed that security should dominate the architecture, not vice versa.

In the absence of a truly universal and homogenous culture, the struggle between impressive symbolism and neutrality had to be decided in favour of neutrality. The result is an expensive but standard complex of office blocks. The impressive official rhetoric which accompanied the opening of the ICC is not matched by the glass, concrete, and steel on the ground. Iconic buildings are also often actually marketing symbols on behalf of the financiers that back the construction. The ICC is not a shopping mall or a concert hall, so no immediate financial risk had to be taken into consideration when erecting such an edifice. However, there are principals – the ratifying, contributing States – who act as financiers. They do want these buildings to achieve a special status because the prestige of the building reflects positively on those who made it possible. Hence the legal class together with the architects and all the crafts and professions involved in the construction mobilize the media in order to obtain recognition that the building which houses the Court has such a symbolic and iconic status. This encourages the financiers to keep paying for the institution housed in the building, hence ensuring an economic future and social stability to those that work there. An expensive building has the sought-after effect of (self-)aggrandizement of the sponsors and those who work there.

The architecture of the complex reflects this. It is blatantly universally modernistic; the multitude of cultures from which the ICC Statute emerged could not allow for any clear architectural symbolism; no common culture could be reflected in a common building. What was built was an ideologically neutral structure. A

multicultural and international organization can only counteract any objection that there was domination by its physical headquarters by showing rigid control of size and cost and by studied neutrality. As far as size is concerned, the ICC building and the land it occupies is hardly majestic; at a surface area of 72,000m² and built area of 54,000m² it is hardly huge. Furthermore, the central tower is only 33m high whereas the Tribunal de Paris (opened 2019) is 160m high. As far as cost is concerned, a final bill of approximately €200 million is not immense. In most countries, this cost criterion is the one taken most into consideration, e.g. in England (H.M. Courts and Tribunals Service, 2019). The European Court of Justice is housed in buildings now with 150,000m² of court capacity and costing €500 million,[5] the new law courts in Belgium (in Antwerp, a city of 500,000 inhabitants) have 57,000m² and cost at least €280.3 million. The Criminal Court Complex in Riyadh, Saudi Arabia which was taken into service in 2012, features one main tower block 44m high, has 46,330m² built in a total area of more than 100,000m², and cost less than €100 million. Neutrality in the ICC complex was maintained: the initial proposal of having the central tower, where the two courtrooms are situated, cladded in black material was rapidly outvoted as possibly referring too much to the Kaaba in Mecca. It was replaced by the idea of having green gardens growing up the outside.

The lay-out of the courtrooms (for there are two) also reproduces that feeling of studied neutrality and technical expertise. During trials, the human link with the horrible crimes is maintained by the presence of witnesses and victims: but protective measures can make them invisible again, not only to the defence but also to the public gallery and the media. This when the judges decide that the witness, victim or their testimony should be *in camera*. The accused are normally present (at least by video-link if they are removed from the courtroom); their behaviour is controlled by rules which enhance the decorum of the court. There is no architectural provision of any kind for a jury; the hegemony of the judge is considered preferable to the unpredictability of a jury. A supreme judge, radiating expertise, is taken as a symbol of neutrality. The

[5] Cf. information on the site of Design Build Network, presenting itself as Designbuild-network.com, the essential online industry resource for the architecture and construction industries.

complexity of the cases and the cost of keeping a jury empanelled are often cited as the main reasons for never having had juries in international criminal trials. Rarely is the equally possible reason advanced that it is the lawyers who make the process complex and its length inordinate. Having a jury system must produce a more efficient and faster procedure than that which currently prevails at the ICC. Hence cheaper, which would not be in the material interest of the multiple agents in ICL.

B. *Imagery and efficiency*

The second area of conflict is between imagery and efficiency. The Statute and the image of ICL projected by the media in the first place is that of an implacable source of justice for all. ICC statements on impunity and concern for victims regularly accompany media reports on atrocities and crimes; the ICC will provide justice as it is a defence and a rampart against illegality and impunity. Proving that the existence of the ICC has a deterrent effect on the commission of those crimes it prosecutes is very difficult, if at all possible. The ratifying States know that to banish crime and to punish culprits domestically is a never-ending battle which needs to be fought, whatever the cost. Apart from punishing the guilty, the ICC will succour the victims from the safety of its location. Reflecting this, the complex is a fortress, an enclosed space. It can be seen as either keeping out dangers which threaten it from outside but equally keeping dangerous people in who may not get out. The building proclaims that what happens inside it is of concern to everybody, but the larger part of the complex is hidden away from and inaccessible to the uninitiated.

The ICC building projects a business-like image to the outside world: this implies efficiency and expediency, expertise, and competence. Visitors are efficiently guided through the approach and entrance to the building. For them, this approach is towards a blind wall with a dark access gate. The subconscious feeling of a defensive curtain cannot be avoided. As little as possible is left to improvisation and chance: pre-booking, X-ray machines, bag- and person-searches, checking of passport, camera surveillance… All such measures are considered normal in today's security and safety conscious culture. What use if any is made of such information is less public. A large part of the ground-floor western wing of the

lobby is even a kind of museum, where artefacts of international justice are exhibited and explained. To continue the use of similes from military architecture is not difficult. The passage to the towers where the court itself is situated is across a bridge, with water on both sides;

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admittedly, there are no visibly chains to lift the bridge, nor a portcullis. The courtroom is in the central tower, like the living quarters in the keep of a castle. Once access – controls and checks again, no cameras or recording devices – to the courtroom has been granted, the comparison continues. The wide open space, the high ceiling, the lights, the raised dais for the judges: all echo medieval halls where kings and emperors held court. Only the total absence of any decoration makes a noticeable difference; but with so many cultures to satisfy, how could any harmony be achieved if paintings or sculptures, woodwork or tapestries were displayed?

Just like courts in any sovereign state, the ICC cannot prosecute every crime for which it has jurisdiction: expediency does not allow for it. This is an occulted locus of tension; between the utopia of overall justice and the reality of limited resources. Even if the political will were present, the financial consequences of such a policy are untenable. The ICC's annual budget is close to €150 million with as sole purpose the prosecution of the most serious crimes and, by doing so, ensuring they do not go unpunished and so ending impunity. Compared to the annual justice bill of most

developed countries this is very small and so it is not surprising that the ICC is constantly pressing for more money so that it can initiate more investigations and prosecutions. It has office space for nearly one third more staff than it currently employs and just as there is no shortage of crimes which can be prosecuted, there is no shortage of applicants to work at the ICC. The struggle here is between the ASP which represents the governments which foot the bill on the one hand and the aspirations of the court on the other hand. For indeed, the budget is financed by the States Parties; their contributions are assessed in the same way as they are for the working budget of the UN budget (ICC, 2020). The image projected is that law enforcement is a business, so an office-like architecture suits. Efficiency starts at the foundations of the complex and the Statute itself; every architectural decision was and is budgeted, every decision by the court also. So an ICC decision to proceed is actually in the hands of the registrar of the ICC: he holds the purse strings on behalf of the ASP. Even if it is the prosecutor who moves the court towards cases which the lawyers want to see prosecuted and, in their opinion, have a fair chance of success, it is a financial calculation, an assessment of the risks, of the opportunities and possibilities as also of the effects of a course of action which determines which situations metamorphose from examinations into situations under investigation and then into cases. Some would argue that this is the situation in most countries: that does not affect the argument that the RS was portrayed as the means of ending impunity which it seemingly cannot (yet) achieve and that therefore utopia is put back in its place whilst frail humanity is back in charge of the multiple stages of an ICC procedure: investigation with four phases of analysis, pre-trial stage, trial stage, appeals stage and finally enforcement of sentence. It is a practical demonstration of how the hegemony of economic forces pushes justice, with the consent of all, into a subservient position. Again Adam Morton sees the link with architecture:

> Although reflective of repressive relations, or the seat of institutional power, monuments can equally be a site of collective redemption expressing an ethical and aesthetic power that can project a sense of alternative being, a differential space, an awareness of utopic space (Morton, 2018, p. 127).

This does not imply that politics (or economics) interfere directly in the application of law, only that resources are finite and that the judicial arm is responsible for deciding how to deploy these limited resources (ICC Report, 2019, p. 37).

Inside the court, the image of hi-tech management predominates. Although there is some paperwork on the lawyers' benches, the vast array of identical computer screens and terminals appear to make all equal. Overhead screens and power points all imply efficiency and expertise; guilt will undoubtedly be established.

In this sanitized world, the physical presence of witnesses and victims is a problem for the court. A unique feature of the ICC compared to previous such courts is that victims are to be given a protected and special status. But their physical presence although extremely useful for attracting media attention and coverage, is expensive and time consuming. It also creates security problems. And so there is an increasing use of digital and technologically derived evidence which allows for much of this problem to be avoided, so producing much needed savings. On the other hand removing victims from the courtroom, removes them from the legal theatre where the media operates. And the ICC needs the media to put its case to the ASP directly and to the electorates of the ASP indirectly so as to ensure its funding.

The ICC's funding is regulated by Articles 113 et seq. of the RS and Regulation 5 of the Financial Regulations and Rules as laid down by the ASP with as consequence that it is the scale adopted by the UN for its regular budget which determines the assessment of the States Parties. That scale is then adjusted according to the 'capacity to pay'. With some of the richest countries not having ratified (e.g. US and China) the burden falls on the current 123 ratifying countries. According to the author's calculation on the basis of World Bank classification, 47 countries (38%) are high income, 36 countries (29%) are upper middle income, 27 countries (22%) lower middle income and 13 countries (11%) lower income. These 13 countries contribute less than 1% to the ICC budget and the 47 richest more than 50%.

Theatricality is what the media need to justify their expensive presence and investment at the court, but the ICC needs the media to project its message across the world. As the court is removed from the place and indeed the people where the crimes took place,

the spectators or the public in the Hague can only be symbolic, in some way representative of those who cannot attend. The real public, the real target of the court is those very many viewers who can watch or listen live or to recorded material, who can read newspapers and magazines which cover important moments. This is the public whose opinion is vital to ensuring the power of the court and the growing power of its permanent inhabitants, the lawyers and their staff.

C. *Judges as arbiters of law*

The third arena where hegemony is an issue is where the Statute and the judicial class articulate. Not only the United States, but many other countries feared putting the power to sanction their nationals in the hands of a permanent court. Relevant in this context are not only military men and women who were only obeying orders, but also higher staff officers and political leaders. The attempts to increase the hold of the UNSC over the prosecutorial freedom of the ICC prove this sufficiently. It should not be a surprise that those countries where the judiciary are the most independent are those which are the most interested to curtail by law the freedom of those same judges (Rodriguez-Garavito and Santos, 2005, p. 271). States where the judiciary tend to obey the executive branch have less experience with and fear of independent-minded judges. The Statute defined the crimes which the ICC should prosecute but it was the ASP – which the ICC calls 'the court's management oversight and legislative body' (ICC-Assembly of States Parties, current; cf. RS Art. 112) – which laid down in much greater detail than for any previous international crimes tribunal those Rules of Procedure and Evidence which the court is meant to adhere to. The democratic legitimacy of the ASP can be seriously put into doubt. Although States may send eminent legal experts to debate and decide, the electoral link with citizens is wafer-thin. Furthermore the Statute in its Articles 51(3) and 52 allows for the judges to draw up provisional Rules which will remain in force unless the ASP at a later date amends or rejects them. This is a further occulted way for the judges to develop their powers.

The judges, in their very interpretations of the Statute and of the area of their jurisdiction are combatants in an arena where the struggle for power is continuous. When in the matter of the

Rohingya/Bangladesh the Pre-Trial Chamber authorized the prosecutor to open an investigation into alleged crimes, the judges decided in effect that if there was a consequence on the territory of a ratifying State of possible crimes initiated on the territory of a non-ratifying State, the prosecutor could investigate the matter as the ICC has jurisdiction (ICC Pre-Trial Chamber Decision: ICC, 2018). This decision by the ICC can but irritate China, Russia and the United States whose Ambassadors at the Diplomatic Conference leading to the Statute raised this very specific possibility (UN Document 2002: pp. 196, 361-362). It seems that if the judges act in a way which the media present positively, the ASP will have to be extremely brave and judicially creative to rein in their power. The fortress-like structure of the court in the Hague may be an unconscious reflex by the architects and the competition committee, influenced by the judges who were members of this committee, to resist this possibility of pressure being applied to the judges' independence: a bulwark was needed against outside pressure. The Statute goes into great detail in order to ensure the representativeness of the judges, who are elected by the ASP. This to ensure that together they represent a universal desire for justice. The Statute itself makes the compulsory nod towards the principal legal systems of the world; however as to the qualifications of the judges, the Statute remains sufficiently vague for the political process to proceed unobserved. The procedure is entirely political; there is no qualifying examination by any body of the quality, background, opinion, ability of a proposed judge. This of course suits States who have a dominant status in the ASP; it allows for their opinions to be overrepresented. A cursory study of those judges who have been elected shows how hegemonic a global northern academic background is. The author has considered the *curricula vitae* of 53 judges elected since 2003 and divided them summarily into three groups based on them having spent an important academic time in any one of the three groups. The first comprises Canada, New Zealand, UK and the USA, the second EU countries and the third others. In percentage terms, the first has 45.28% of judges, the second 28.30% and the others 26.42% . The global north academia is not only dominant, but hegemonic: judges implicitly consent to this.

D. *Choice of location*

The fourth locus of struggle is that between existing hegemonic powers and dominated powers, where common-sense and the seeming lack of any alternative mean that the dominated States submit to what is proposed. The very location of the court is such a locus and seemed a sensible solution.

The economic value to that city of pulling in such a prestigious body as the ICC which might have over 1,000 well paid international civil servants is immense (van de Wijngaard, 2012).

Rwanda wanted the ICTR to be located in Kigali, but eventually accepted that it should be Arusha in Tanzania. An automatic consequence was that the Rwandan Government's intention of having many thousands of accused prosecuted by an international tribunal became a dream. By going to Arusha a severe selection had to be made. The ICTR eventually indicted less than 100 persons, mainly because of the logistical and financial burden of moving evidence, victims and accused over 1,000 kilometres.

During the Rome Diplomatic Conference and later discussions the consensual and common-sensical location, under the hegemony of the global north, was to place the ICC somewhere in Europe. Locating the ICC in the United States, Russia, or China, who were at best going to sign but never ultimately ratify the Statute was never contemplated. A similar mind-set determined that the ICC needed one prestigious and permanent building where ICL would be practised. This mind-set of having one permanent, fixed location was elaborated over 60 years; there seemed no alternative to the Hague which already had many international institutions, including the International Court of Justice. This mental and psychological attitude mirrored the cultural background of the vast majority of the participants at the Diplomatic Conference, ASP Meetings, and those committee members who considered and voted on the premises of the ICC.

As Richard Bower writes:

> The wider potential for strategic change in such projects is rarely able to be followed through. They remain isolated by political and social entropy that seems to stifle architectural projects that attempt to exist outside conventional Westernized hegemonic relations (Bower, 2016, p. 117).

It seems therefore that again economic interests and motivations build consent in accepting that there is no seeming alternative; the cost of building the court, of maintaining it, of the many thousands who earn their living in and around it must be accepted and the interests of bringing justice close to the victims and perpetrators a very much less important fact. This is a clear manifestation of hegemony by economic forces of the global north.

The procedure and rules which governed the competition organized to find the best design for the premises were similarly a manifestation of that hegemony: the participants had to establish that they had 10 years' experience, had submitted a similar project in the last 10 years, had at least 20 employees in the last three years and had to show technical aptitude for such a project (Jansen, 2011). Young, less experienced, less financially strong but possibly creatively stronger architects would have had very little chance of getting over these hurdles. And so the architectural style of the ICC complex reflects the hegemony of global northern aesthetic norms which are, for public buildings, a continuation of those prevalent in large privately financed buildings. But the pre-ordained outcome of this struggle, this tension, was occulted by the very rules of the competition, which appeared neutral. A dominated architectural class locked in a hegemonic situation can however show resistance by developing its very own style. The Egyptian Supreme Court building, finished in 2000, is an excellent example of an alternative outcome to such a struggle. The neo-pharaonic elements contrast totally with any contemporary public building in the global north.

On the other hand, the ACHP court ('African Court on Human and People's Rights') on with an annual budget just above €9 million) established in Arusha creates a treble contrast with the ICC complex:

i. Rented and circumscribed.

First, it is not (yet) in a purpose-built edifice, but manages with temporary premises. Most striking for the approaching visitor and contrasting with the ICC is the very large sign over the main entrance: 'Welcome to the African Court'. The African Court Protocol may as yet not cover such horrific crimes as the ICC does but, as indicated above, the Malabo Protocol – when a sufficiency of States will have ratified it – will give the ACHP such a

competence and the court will create a new section to handle these cases (Protocol on Amendments, Article 16, paragraph 1 and 2). This development virtually ensures that when a sufficient number of States have ratified, the ICC's role will be curtailed in Africa at least, by the operation of the clause of complementarity. It hardly needs stating that the ultimate dominant class on the African continent is no different to the one which operates in the ICC context: the beneficiaries of the neo-liberal globalized economy. Class structure is just as powerful regionally as it is on a global basis. The confrontational aspect here is actually double. There is on the one hand the perceived advantage that activating the ACHP diminishes the power of the ICC but on the other hand the regional élite apprehends full well the disadvantage which might flow from the fact that the judges appointed to the ACHP will, just as their ICC confrères, seek to expand their role. The AU's position is maybe therefore also ambivalent. On the one hand, it is well known that the AU's position with regards to the ICC is usually negative: the AU has stated that they encourage the withdrawal from the ICC of African signatories from. The AU was instrumental in the matter of the Kenyan situation: it asked the UNSC to request deferral of the ICC's investigation. On the other hand the AU has not pushed strongly for development of the ACHP.

An appointment to the ACHP will follow occluded rules prevalent in most if not all bureaucracies; a *fin-de-carrière* successful candidate will be usually grateful to the authority which gave him or her such a position but at the same time wish to show some independence in their last rulings and decisions. To paraphrase Malenovský:

> the personality of the 'national' [arbiter] judge reveals two contradictory aspects: on the one hand, that of a docile and privileged interpreter of the legal arguments advanced by his state and on the other hand that of an independent expert who cannot act as simple [representative] agent of a State, as if just a diplomat (Malenovský, 2009, p. 43: author's translation).

ii. Individuals or sovereign States?

The second contrast is proximity to people. Eight AU member countries have signed the Additional Protocol which allows individuals and NGOs to submit complaints. Although such a large proportion of those complaints emanated from Tanzanians that that country has in principle withdrawn its ratification of the

Additional Protocol, the principle has been established that individual victims may approach that court at least and apply for relief, sanction, and indemnity. This is not possible at the ICC.

iii. Global or continental?

The third contrast is that the Rome Statute attributed to itself a position as the fount of global norms. The Preamble of the ICC refers to 'all peoples', whereas the African Charter on Human and People's Rights not only restricts itself to Africa but proudly refers to a common African heritage and struggle against colonialism. The globalism of the ICC and its basic lack of common historical and cultural past mean that it has a profound weakness at its heart, which the African Charter does not have.

The other locus of the struggle within civil society over ICL clearly shows that the conflict over ideas which is continually taking place occurs in layers. The dominant powers wanted the precedent set by their post-war military tribunals to form the basis for any future ICL. This precedent determined not only how such Tribunals were created but also the rules and procedure which they would follow. The economic and ideological collapse of the Soviet bloc allowed a hegemonic United States to successfully push for further judicialization of humanitarian law at an international level. The UNSC and the General Assembly approved the *ad hoc* creation of the ICTY and ICTR; their rules and procedure follow nearly seamlessly from those of the IMTE and IMTF. As Gramsci pointed out when discussing common sense and the difficulty of finding alternatives, the very nature of law means that what has been done and seen to work, is copied. When the Statute was being negotiated, it became clear that the United States was worried about the independence of the court from the UNSC, where it had a veto power. China and Russia voiced similar fears and eventually all three did not ratify. The Westphalian principle of sovereignty played an equally very important role, especially as all three States feared the risk their nationals would face. The very strong support for the ICC from principally the EU, but also South American and still many African States, can actually be considered as a move by them against United States hegemony (with China and Russia). In Gramscian terms, it is clearly the weaker States which see advantages in supporting the ICC against the hegemon.

The United States consents to certain uses of ICC power in cases where humanitarian law is at stake and where it feels the ICC is moving in the correct way. Their abstention on (rather than veto of) the Darfur referral to the ICC prosecutor is a case in point. On the other hand, their very status as a military and economic hegemon, makes them see themselves as in a vulnerable situation vis-à-vis a court which could for blatantly political reasons assert jurisdiction over its nationals. The United States is also used to the judicial supremacy of its own Supreme Court which theoretically at least, can be controlled by constitutional changes enacted by their democratically elected institutions. It is the US President, flanked by the US Senate, who appoints the judges. This is not the way most of the ASP countries submit names of future ICC judges. A sign of this Westphalian inheritance is the possibility for ratifying States to emit reservations to Treaties they adhere to. In the case of the ITFY and ITFR, such a possibility was not possible to the international community of States, as it was the UNSC which created the Tribunals. In the case of the ICC which is a Treaty organization, the right to reservations was specifically excluded under Article 120 of the RS.

Opposition to the ICC can also be nascent: the IICJ is to date irrelevant. However, as the Organization of Islamic Cooperation has 56 member countries which together represent slightly more than 17% of the world's population, its empowerment would represent a very significant move down an alternative and antagonistic path. In its Statute, Sharia is taken as the cornerstone of law; a clearer conflict with the ICC cannot be envisaged. Adam Baczko's recent ground-breaking study of the Taliban courts in Afghanistan is foundational here. Three processes best demonstrate, in the opinion of the author of this article, the underlying difficulty in harmonizing the global north and Islamic legal systems when they confront each other in the legal arena.

First, rotation: the Taliban try to rotate judges every 6 months (Baczko, 2021, pp. 190 et seq.): whereas ICC judges every 9 years. Secondly, procedure: using professional counsel is not allowed and oral testimony is preferred (Baczko, op. cit. p. 235). Thirdly, speed: Taliban courts pride themselves on the celerity of their decision making: most judgements are made within days (Baczko, op. cit., pp. 236 and 289). From an architectural point of view, the distance

between all parties and the judge, sitting cross-legged in a private home, and the assembled lawyers in an ICC courtroom is immense. But Baczko unwittingly evokes a Gramscian principle when he says

> the judicial system of the Taliban gives an advantage to people who have had a religious education, understand the language and the essential points of Islamic law […] As the state's law is sharia'h, the Islamic jurisconsults have an interest in the state. By defending the application of a law and of judicial procedures separated from the specific interests of the conflictual parties, the ulemas universalize their own interest, that of a social group which does not have any economic capital […] By their moral discourse and legal practice, they promote a society in which the religious form of cultural capital obtains levers to power and decision making (Baczko, op. cit., p. 297: author's translation).

There are differences between the Statutes governing the ad hoc Tribunals and the ICC, as there are between the buildings where they are situated. The ICC is in a purpose-built complex; with the exception of the Special Court for Sierra Leone, all other courts and tribunals were housed in existing buildings. When considering the physical architecture of the ICC complex, its blandness is in some way a reflection of the court's basic status among international courts. Although it is the ultimate forum, its competence is residual: it is only competent if no national court properly addresses the case. Such a limited competence was considered a very important concession by the majority of nations (which had wanted an ICC which could hear a case in all circumstances) to the United States. Complementarity *in fine* means that if a state prosecutes in acceptable circumstances an accused over whom the ICC is competent, the ICC cannot start proceedings. The clause creates a last chance, a kind of safety net to ensure that impunity cannot reign.

This concession did not suffice to bring the United States, China, India or Russia on board. A building without sharp edges or points, which projects static equilibrium, answers this requirement of not being aggressive, but blending into a quiet background. The local building regulations in the Hague comfort this view; no building, even in the international zone, even for an international organization, can escape these provisions. These laws, regulations, and decrees reflect the image of the host country, the Netherlands, as a constitutional and parliamentary monarchy. Its colonial past has been buried so deeply that it is accepted, consensually, as an

unexceptional, peaceful country. It makes common-sense that such a country should host an additional court in a city which even the UN has acknowledged as an international city of peace and justice.

IV. Hegemony by unusual classes

Gramsci's theories on hegemony have been used as explanatory building blocks progressively for more and more human activities. Law and architecture have remained relatively immune from the consequences which a confrontation with those theories would produce. There are two probable reasons for this, the first being that there is an academic and media concentration on politics and political economy as more obviously an area of struggle, power, and control than on law or architecture. The second is that the intellectuals involved in the articulation of this hegemony, i.e., the legal and the architectural profession, are protected by their consensual status as experts working on behalf of a superior ideal. In the case of law, this ideal is justice and neutrality; in the case of architecture, aesthetics and functionality. The author would propose the following *aperçu* of Gramsci's important and complex work on the place of intellectuals in a hegemonic structure.

Those who believe they are autonomous are traditional intellectuals, and those who are linked to a social class are organic intellectuals. This is not a scientific classification, only one established for analytical purposes. Indeed an intellectual or a group of intellectuals can change from organic to traditional or have characteristics of both types. So where would architects and lawyers fit in this changing society? Typically, lawyers will be traditional intellectuals. The successful exceptions (for example Cromwell, Robespierre, Gandhi) will coalesce a rising class of interests around them and establish a new hegemony. Architects are artists. As Gramsci says in Notebook 3§155 they are able to demonstrate their art on paper only; they do not actually have to build anything. It is in fact when they move to realization of their project that their intellectual typology is modified, as they then have to submit consensually to their principals, those who give them their practical task.

Architects as intellectuals

Architects are constrained by three classes of barriers. The first is financial; whatever the architects' views on the building they are commissioned to design, the principal will decide what the budget is

and what can therefore be built. This applied very much to the ICC complex and affected the final design in many ways.

The second is technical; this covers security matters (concrete walls, blast proof windows…), local building regulations (height of building, square metres per employee…) and functional requirements (media presence leading to provision of high-tech communication facilities).

Finally, aesthetics themselves must submit to the principals' wishes. A structural feature which could refer to a religious symbol (the Kaaba) had to be withdrawn but another incorporated: gardens and plants, from all the continents, were encouraged as they symbolized an apparent universal liking for greenery. But for security reasons they were placed between the towers and so only visible to those who come into the complex. This strongly diminishes the value of the public statements that they are a natural continuation of the dunes on the northern side of the ICC, themselves in a highly protected nature reserve.

Gramsci's comments on architecture and Rationalism (Gramsci, 2017), his views on Futurism (Gounalis, 2018; Holub, 2014) show how he understood that space and its divisions were strong ways for hegemony to manifest itself. The global north's ideology still rests on a scalar frame for assessing importance: the level of funds

allocated to architectural spending on spatial delimitation, control and order determine importance. Efficiency and security are invoked to insure this, suppressing alternative claims as for example closeness to the people, accountability and simplicity. Courtrooms built to handle minor offences are smaller than Assizes, just as the monetary fines often dispensed in the former weigh less than life sentences delivered in the second. In times of seemingly endless growth, as Gaëlle Dubois (2014) shows when considering the Belgian architect Poelaert's plans for the Brussels' Palace of Justice or in times of desperately holding onto a disappearing past as Miriam McKenna (2020) shows, this proportionality is lost.

Lawyers as intellectuals

Lawyers in the ICC context are theoretically united in achieving criminal law's purpose: establishing the truth. This is achieved by convincing the judges of which version of the truth best fits the facts as presented in court. Such a version arises out of a struggle, a conflict, between teams. This conflict does not occur in a vacuum; it takes place in a building whose very structure determines who can access which parts. It takes place between professionals whose expertise determines which version has the best chance of being accepted. Expertise comes at a cost, which in the case of the ICC means virtually entirely at the court's expense. This means the ASP or further down the line, the individual ratifying States and even their individual taxpayers foot the bills. The size of the ICC's budget, which is managed by the registrar, determines which situations will be investigated, which cases opened, which prosecutions initiated. Irrespective of those judicial steps, the staff will get its UN-related salary, whether there is one accused or none. Defence counsel also is paid by the ICC unless the accused is found to have sufficient means; it is the registrar who *in fine* decides on the budget for the defence. These judges, prosecutor, registrar and counsel are allocated separate spaces in the ICC building and access from one space to another is controlled. Access to the courtroom is similarly controlled to ensure physical independence; judges do not access the court the same way as defence, witnesses cannot meet the accused, judges don't share the same canteen as the others. In all these ways, the inner architecture of the building reflects the dominant ideology.

Lawyers and architects fall neatly into Gramsci's descriptions of intellectuals. They appear as principally experts and technicians with specialist knowledge; fundamentally and functionally they are the tools of the dominant group of the society where they live and work. As tools, the architects obey the rules imposed on them as far as dividing and classifying space is concerned just as the lawyers submit to their place in a hierarchy. They work in a hierarchical hegemony which imposes the proper procedure to be followed when faced with a situation leading to a predetermined range of results. And so lawyers and architects are not at all autonomous from the hegemonic socioeconomic class; the public image these classes broadcast of working on behalf of the rule of law or the satisfaction of functionality whilst being free of politics and ideologies is mythical. There is coercion operating on the architects' autonomy. Although the judges and the prosecutor are free of obvious constraint, the budget can decide which situation becomes a case and so they too are coerced.

V. Conclusion

Lawyers as motors for change

The public image of the ICC Statute and the Rules as well as the public image of a neutral and permanent ICC building, appear to reflect the primacy of the rule of law and the functionality of the building. We have seen that these images emanate from the over-arching hegemony of the ASP and its working committees, where representatives of sovereign, preponderantly neo-liberal States lead the discussion and channel the decisions. One group of lawyers has the potential to fundamentally break the ICC away from this hegemony and determine an independent future: the judges. We classified three sub-groups as lawyers; the judges themselves, the prosecutor, and the registrar. In fact, they form a transnational élite whose common interest is their profession and their status. The judges of the ICC have no judicial masters; their Appeal Chamber has the final word on any matter submitted. The prosecutor, also elected for a non-renewable term of nine years, has no judicial masters either and benefits from the same élite status. Furthermore, he or she is the centre of media attention and the best pressure point for non-judicial influence. The registrar, elected for five years only but re-eligible once, is a very powerful actor through his or her

preponderant weight in all matters administrative and financial. Funding lies at the nexus of ICL's operations, and the ICC is no different than other tribunals in this matter. Donations to the Special Court for Sierra Leone increased substantially once it announced that Charles Taylor would be tried in the Hague rather than in Freetown; no link between the donations and the locus for the trial has been proven.

The judges are in a position to interpret the ICC Statute and adjust the Rules with no limit or control beyond that imposed by their conscience and their peers' consent. This countervailing strength (when put against the ASP as agents for their principals, the dominant sovereign states) has been used multiple times; the judicial class can be inferior in one relationship and hegemonic in another. The power of the judges can be seen in the following decisions: changes to the immunity of heads of state, territorial extension of jurisdiction, extension of jurisdiction from international to internal conflict, reduction of number of judges in cases of administration of justice sitting on pre-trial, trial, and appeal. The ICC went so far, in this latter case, as to invoke a neo-liberal prerequisite: 'efficiency would be improved'. The prosecutor can be the voice of this policy: the 'Policy Paper on Case Selection and Prioritization' of September 2016 (ICC 2016, pp. 5, 40-41) stated that ICC Statute crimes which result in the destruction of the environment would be given particular consideration. This when the Statute itself mentions the word environment just once.

The architecture of the ICC was considered and debated by committees established by the ASP. The manifest result of their deliberations and decisions is a balance between making the building important but also insignificant among other office buildings. As to the inside, the position of the court and the judges was visibly kept central but some kind of equilibrium was kept by enhancing the role of the prosecutor. This organ was granted a large amount of space. The registry has the most working area but this important status is occulted from the public. A preponderant working area for administration and finance is not considered the correct image for the court to broadcast.

It can be concluded from this study of the reciprocal influence which hegemony and architecture have on the operations of the ICC, that no great change was expected in the way that the worst

crimes against humanity were going to be prosecuted or the degree of impunity of the perpetrators of these crimes. The hopes of the victims past and especially future therefore must lie in the still dormant power of the judges of the ICC to seize the opportunity which they have been given to effectively use the tools to hand to create just law.

VI. Appendix

Possible adaptations to the Court and the Statute

A final consideration would be to consider what realistic alternatives can be proposed which have the greatest chance of gathering sufficient support to achieve a judicial system closer in every way to the people. The author insists on using the word 'realistic'. The RS is not only a tool for hegemonic forces, but also a utopian charter. To the extent changes are desired, these will only be achieved by slow and concerted action over many years. The author proposes hereafter a very short list of those changes which should reduce the underlying domination by certain States (moving trial away from a global north location), by judges (allowing juries and judges from States directly involved), by bureaucracy (make trials faster).

Physical adaptations

The court is not only a social complex, it is a physical complex which lacks empathy and funding. The author believes there is an inexpensive and rapid intervention which could change the face of this office building: use of the roof and parapet for visual stimulus and advertising. Coloured lights, including strobe lights with or without messaging would truly illuminate the court. During daytime, changing the fortress appearance is achievable again with the creative use of painting with light. At marginal cost the multitude of cultures involved in achieving justice and prosecuting criminals can be achieved in an up-to-date form which will also ensure continued media attention.

Statutory adaptations

We would propose five adaptations.

The first adaptation would be that no prosecution takes place in the Hague but only in the country where the crimes were committed or in the country of origin of the victims, in temporary

premises. It would be a requirement that these premises be close to operational public transport. This can be achieved by the addition of the following to Article 3:

> 1. The **principal** seat of the Court shall be established at The Hague in the Netherlands ('the principal host State').
> 2. The Court shall enter into a headquarters agreement with the **principal** host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
> 3. For the Trial stage of the proceedings, the Court shall sit in the country where the serious crimes were said to be committed or from which the victims originate, unless it considers it undesirable
>
> Rule 100 of the Rules of Procedure and Evidence to be adapted in consequence.

The second adaptation, that the trial start within one month of arrest, terminate within a certain period, and that the court deliver its verdict within a certain time limit. The following changes to Article 29 would achieve this:

> 1. *No change suggested*
>
> 2. Notwithstanding the imprescriptibility of the crimes, no trial shall start later than 30 calendar days from the transfer of the incriminated person to the Court and no trial shall continue beyond 180 days from its commencement and a verdict delivered within 30 days thereafter

Rule 101 of the Rules of procedure on evidence to be changed by adding a third paragraph:

> 3. The Court shall issue its judgement within one calendar month of the 180th day of the commencement of the trial, failing which a decision of not proven will be issued by the Registrar.

It follows from a severe time limitation, that the presence of the accused should no longer be a requirement. A small addition to article 63 would solve that:

> 1. The accused shall **preferably** be present during the trial.

A fourth adaptation would be that the required uneven count of judges include one from the country of the indicted person and one from the victims' country if different. This would make the argumentation about victors' justice redundant and bring the judicial process closer to those more directly involved.

There shall be a new article 42:

> Article 42. National judges
> 1. The judge elected by the Assembly of States Parties shall be in Chambers with one judge appointed by the State Party where the victims or the crimes have their origin and one judge appointed by the State Party of the country of origin of the incriminated person. Should there be plurality of sovereign territories involved, the President will determine which State Party has the preponderant interest in appointing a judge.

A consequence of involving more closely the territory where the crimes occurred in the human and practical stage of the trial is to keep the ICC for procedural matters only. The ICC in the Hague would function as a *Cour de Cassation* or Supreme Court: on points of law only. As proposed above, the Trial court would take place in the place much closer to where the crimes occurred, the victims and the perpetrators originated from.

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