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Response

Proma Sen

On a preliminary reading of “International Criminal Justice: Growing Pains or Incurable Contradictions,” by Professor James von Geldern, one understands that the debate about enforcement arises from the assumption of a pre-existing set of human rights concerns in the world today. Beyond the continuing debate surrounding the universal applicability versus the cultural relativism of these rights, the very existence of human rights in today’s globalizing context leads to the question of how these rights can be protected and who is responsible for their enforcement? To date, the largest internationally accepted organization with the combined political power of multiple nations is the United Nations and its various sub-organizations. The highest global power seemingly permitted to pass cross-national judgments today is the International Criminal Court (ICC), formed by the Rome Statute, which was drafted in 1998. Yet the ICC has not convicted enough aggressors to truly be deemed a successful mechanism for justice.

In his essay, Professor von Geldern argues that international criminal justice as a concept itself is in its early stages, “so riddled with contradictions, so at odds with the foundations of international society, that it is an idea with a distant prospect of realization.” Based on the reasons outlined for the failure of international justice as a concept upheld by the ICC, this essay will further the argument to the overall claim that judgments cannot be made by political compromises. It is not enough to believe that “mechanisms evolve more slowly than the ideals that inspire them.” The politicization of ICC verdicts is not solely in question. It is the very foundation of the United Nations and the ICC that requires a re-evaluation of internationally accepted concepts of national sovereignty and domestically accepted principles of human rights.

This argument is divided into four main sections, following the introduction. The first section highlights Professor von Geldern’s key arguments describing unfair procedures in ICC jurisdiction through the referral system as well as the continued functioning of the Security Council with its core members holding veto power. The second section explores the main concepts of international justice, the culture of accountability in relation to the concept of a family, and the importance of national sovereignty. Section three emphasizes the strengths and

weaknesses of the professor's arguments in the overall context of what it means to be part of an international community or an international society in today's world. The fourth section summarizes the conclusions.

I begin with the basic assumption that acknowledges a set of universally accepted human rights accorded to people solely by virtue of being born human. The lack or limited amount of human rights justice delivered on a global scale requires an understanding of obstacles encountered by authoritative bodies founded on the principle of protecting international justice. This involves a dual understanding of how these organizations were formed and simultaneously assessing their accepted procedures used to deliver justice.

The key question, as highlighted by Professor von Geldern, is whether or not human rights are to be perceived as a highly politicized Western conceptualization. As often critiqued, the Universal Declaration of Human Rights was in fact subject to the moral standards of Western political thought, yet its stipulations are widely accepted as the basis upon which human rights conditions are assessed across countries. In fact, the politicization of these selected global actors is evident through two elements of their functioning referenced in Von Geldern's work: the referral system under which cases are selected as well as the imbalance of power demonstrated in the existence and actions of the Security Council.

In the first case, the crucial point of contention is that "the focus on fair procedure ignores the absence of mutuality in ICC jurisdiction." Briefly, cases can be referred through three methods: by a state party, by the Security Council under Chapter VII powers, and by the prosecutor against a state party. The first two methods are far more controversial than the last. In the past, as was the case with Uganda, national governments have been able to utilize the international platform for justice to further their own political agenda. Essentially, a political compromise is reached and only partial justice is delivered.

Pertaining to referrals by the Security Council, the question of an imbalanced power structure is far more transparent. Countries with veto power were decided upon after the Second World War, celebrating the spoils of the victorious Allies. It is no wonder that the power dynamics of those nations in what is considered an internationally

representative body do not even reflect the power dynamics of the modern world. As quoted in Professor von Geldern's essay, the matter in contention is well highlighted by Mahmoud Mamdani, who says, "Granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if its members were not all signatories to the treaty." To date, the United States continues to oppose the Rome Statute that created the ICC and is not a signatory. Yet its role in the decision-making process of the Security Council and holding veto power gives it influence over which cases are referred to the ICC and which ones are not.¹ In addition to this mismanagement of universal jurisdiction, Article 13(b) of the Rome Statute remains silent on whether Security Council referrals can be directed at non-signatory states or not. The important factor to keep in mind is that the ability to exert control is not merely limited to those states in the Security Council holding veto power. As Von Geldern recognizes, it simultaneously includes "any non-signatory allies that those powers might choose to protect from the Court."

An understanding of the concept of international justice is crucial to an understanding of the law-making bodies that govern it. Using John Rawls' definition, "the most reasonable principles of justice are those everyone would accept and agree to from a fair position."² However, the clear politicization of the institutions formed by these principles demonstrates that no individual or nation is on a level plane in the international sphere. In this context, a point Professor von Geldern touches upon in the words of Eleanor Roosevelt is that, "Justice cannot be for one side alone, but must be for both." This radical statement indicates the relevance of semantics and power dynamics in the context of international justice.

The most commonly used example is that of genocide and the terminology surrounding it. Even though nations are able to agree that genocide is a gruesome crime against humanity that must be punished, they choose to remain vague about defining which acts can be considered genocide. The concern here is whether a given systematic killing should be considered genocide if there is a "greater cause" in mind and it is not due to pure hatred. Essentially, the hatred behind the action, or the "genocidal intent" for mass killing, must be proved without a reasonable doubt. Genocidal intent is itself defined as a

construct in the minds of the actors, a premeditation or foresight of genocide before it even occurs.³ Nations have concluded that genocide is not determined by concrete action but rather by what is in the minds of the perpetrators, an abstract and subjective concept.

For this reason, the debate over Srebrenica and the Bosnia-Herzegovina trials in the ICTY continue. Is it mere coincidence that fewer men from the Serbian or Yugoslav military have been tried as compared to Bosnian Serbs? Does singling out Slobodan Milosevic, through a process British historian Marko Attila Hoare terms “command responsibility” (simply personalizing the guilt of so many individuals), remove the original basis of a joint systematic killing? Is an individual’s intent enough to exempt other actors from assuming responsibility for their collective actions? In the end, holistic justice should culminate in a process of reconciliation among affiliated aggressors and victims alike.⁴ Perhaps then it is even more necessary to fairly try aggressors of specific countries in order to aid others, related to the country but with no fault of their own, in freeing themselves from the experience of collective guilt.

This brings forth another important concept highlighted in the essay: international justice in relation to a “culture of accountability.” In this phase of rapid globalization, it seems that one is constantly striving towards Dante’s formulation of a “universal political order.” As Professor von Geldern emphasizes, there is confusion about the extent to which general principles of human rights law, developed largely by a Western understanding of society, can be used in the domestic context of nation-states. When we speak of our sister’s and brother’s keeper, we must bear in mind how limited our concept of these relationships is in the contemporary era. The concept of *family* is limited by convention and often extends only as far as the political boundaries of nation-states. It also challenges the perceptions of both national identity and international belonging. The concept of belonging recognizes that individuals share loyalties to groups that are both smaller and larger than the nation-state. Smaller groups may refer to cultural, religious, or local communities while larger groups are the ones to be further explored, such as transnational communities and international society. Article 23 of the International Covenant on Civil and Political Rights (ICCPR) states that, “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁵

Even so, the principle of a family in the political sphere itself is problematic because it excludes all that are not perceived to be a part

of this closed social network. In many nation-states, family extends so far as there continues to be a shared cultural or political history. Oftentimes, cultures with a history of disadvantage, loss, or suffering have a stronger sense of bonding. Our conception of our sisters and brothers still only theoretically extends to the global context. In practice, the immediate concerns tend to overshadow our long-term concerns for the sake of all humanity. Therefore, to what extent is an individual perceivably responsible to humanity as opposed to his or her own immediate national or familial identity? Therein lies the paradox surrounding international justice and national sovereignty in light of individual and national identity. This dilemma characterizes the conflict in understanding the subtle differentiation between the rights of the individual versus the alleged rights of his or her "family." According to a number of treaties, "international justice can only be built at the expense of self-determination, the first right enshrined in both the ICCPR and the ICESCR," as Von Geldern submits. In the context of a truly multicultural international society, to what extent can punitive action be taken to further the enforcement of rights envisioned for the sake of humanity, but at the expense of national sovereignty or individual identity?

In Professor von Geldern's contribution, his portrayal of the historic nature in which the U.N. was created emphasizes the culpability of all individuals for placing such tremendous power in a mechanism like the ICC that can so easily be misled. The awareness of the acute dangers this entails is crucial to our understanding of human rights. It is this awareness that brings forth the possible claim to a change in the global system, with a better understanding of individual versus group responsibility.

At the same time, the fact that so much power has been invested in this court as a globally agreed upon adjudicator challenges the rather dismal picture painted about the second key concept highlighted: the existence of an international community. It is true that without a clear functional understanding of the meaning of *international community*, international justice is hard to conceive of as a potential reality. In that case, what is the significance of having an international community in the first place? The term is used everywhere today amongst politicians, statesmen, diplomats, scholars, and others. There are various defini-

tions of what an international community means to an individual or an institution. Some say it is important as a moral concept, that in turn can shape institutions and inform policy choices. There are yet others who say that it is defined as “a virtual community...as a potential source of power, to promote common cause or legitimize common action.”⁶ The essential point of contention between these two understandings of an international community is that the first model relates an international community to a collectively agreed upon moral standard acknowledged by all humans, an idealistic reference point for universal ethical concerns. In contrast, the second definition is more particular in form. It assumes that the international community is an agent that can legitimize action or intervention, without requiring the consent of those perceived not to be a part of the international community or those perceived to be harmful to it.⁷

Therefore, is there a single dominant international community or is it formed through a system of hierarchy? Where does it derive its power? Is an international community a unitary actor, as in the concept underlying the United Nations, or is it to be considered an agglomeration of state actors? Universal concerns of the United Nations and related international organizations are still mediated through interstate negotiations. Consequently, to what extent has the concept of an international community been incorporated into the domestic policy-making decisions of nation-states? Perhaps one could argue that sharing very basic interests and values results in the formation of a society that could conceivably be governed by a common set of rules demonstrated in the workings of a common institution. However, is the formation of an international society enough to foreshadow the formation of an international community? Is society merely a culmination of a moral political order based on a universal conception of right and wrong?

Christopher Weller indicates that societies and communities are entangled with each other. Neither can ever exist in a pure form. In addition, it is unknown whether the first causes the second or vice versa, and whether the two can exist entangled in a state of harmony or conflict.⁸ In essence, an international community rests on a feeling of collectivity. This amount of perceived “we” feeling can only be measured as a range. This scale of measure was put to the test during the relatively recent invasion of Iraq, when tensions between the United States and the United Nations were maximized. The defeat of Saddam Hussein boosted U.S. confidence in unilateralism, against the wishes

of the United Nations. In fact, it questioned the very function of the U.N. itself in the face of the international community. At the same time, the realization that the invasion of Iraq was a failure on the part of the United States legitimized action on the part of U.N.⁹ On this account, it was proven that action without collective agreement was easily achievable yet morally unacceptable to the international community at large.

Professor of European Politics Frank Schimmelfennig created one scale to measure the strength of an international community. He described four ideal stages of social interaction between states: (1) co-existence with low interaction and no common ethos, (2) interdependence with high interaction but no common ethos, (3) civilization with common ethos but low interaction, and finally (4) community with common ethos and high interaction of states.¹⁰ It is hard to imagine today a shared common ethos, a common natural disposition or moral character that evokes a new sense of identity. It requires state actors to imagine themselves as a part of a greater political community striving for the common goal of achieving the abstract concept of a better way of life. The question, then, is where on the spectrum of world anarchy and international community does the world stand today, and is this dream ever to be realized?

In truth, some progress has been made in terms of number of member states that agreed to join the U.N. Membership has increased from the original 51 members in 1945 to 192 members since 2006. The U.N. has also proved itself to be far more successful than its predecessor, the League of Nations. Even though the foundation to human rights is shaky and arguably arises from a Western conceptualization, it is worth noting that no individual in the global context dares to directly oppose the notion of birthright, which could include the rights inherent in being born a human being. Therefore, it is certainly not enough to analyze the concepts of international community and international justice without addressing the institutions responsible for their promotion and the measures of punishment they deem suitable. Simultaneously, it is worthwhile to analyze the direct methods of enforcement, such as arms embargos, alongside analysis of the procedures determining whether enforcement is required or not. Criticism of the means themselves is extensive in its own right.

To reiterate the main thoughts expressed in this essay, the “incurable contradiction” perceived in international society is that between the problematic politicization of the judiciary at the international level and the shared goal of a new political order amongst nation-states. Since politics seems to be at the heart of what is still determining global identity, how can it consequently be excluded when passing judgment? At the same time, there is no one political order that dominates the world today, so how can political goals begin to converge in the first place? If the concept of family is to be extended to that of political order, as done by Rousseau in his work *Le Contrat Social* (The Social Contract), one must thoroughly re-examine who is excluded from an individual’s perception of immediate family and a state’s perception of its own brothers and sisters.

Unfortunately, there are no clear answers to the above questions since it is simply impossible to forecast where international politics is heading at its current pace. The goal here is to build awareness of an understanding of the changing contexts around us today. On the whole, it is worth contemplating the shortcomings of our current international society in order to determine the future of the conceptual international community we are all striving to emulate.

Notes

1. A. Mokhtar, “The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute,” *International Criminal Law Review* 3 (2003): 296–300.
2. Rawls 1971, as cited in Professor von Geldern’s essay.
3. Marko Hoare, “Bosnia-Herzegovina and International Justice: Past Failures and Future Solutions,” *East European Politics & Societies* 24 no. 2 (2010): 195–196.
4. *Ibid.*, p. 202.
5. International Covenant on Civil and Political Rights (ICCPR), Article 23.
6. Sadako Ogata, “Guilty Parties,” *Foreign Policy* 132 (2002): 39–40, cited in Barry Buzan and Ana Gonzalez-Pelaez, “‘International Community’ after Iraq,” *International Affairs* 81, no. 1 (2005): 32.
7. *Ibid.*
8. Buzan and Gonzalez-Pelaez 2005, pp. 33–34.
9. *Ibid.*, p. 47.
10. Frank Schimmelfennig, “Goffman Meets IR: Dramaturgical Action in International Community,” *International Review of Sociology* 12, no. 3 (2004): 426.