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Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel

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Is it possible for the ICC to become an actor in political struggles over the definition and labelling of friends and enemies? In our article 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' we gave an affirmative answer to this question, based on empirical findings from Uganda and Sudan and a concept of the political derived from Schmitt, Kirchheimer and Shklar. Taking Schmitt's concept of the 'enemy of mankind' as his starting point, Schotel disputes our conclusions. Although 'parties to a violent/political conflict may *try* to mobilize the law in their struggle', Schotel argues, 'the structure of the law itself escapes the political: law cannot be "political" in the Schmittian sense'. He continues: 'If legal authorities are indeed in the business of defining the enemy of mankind, then they are not doing this *through* or *with the help of* the law. They may simply act *against* the law.' Schotel's main points of disagreement with our article concern (i) the way in which 'enemies of mankind' are created; (ii) the structure of international criminal law; and (iii) the difference between the law and the people applying the law.

(i)

Schotel's first point is that the term 'enemy of mankind' as such is not used in the ICC material that we have presented. This is no coincidence, Schotel contends, as the term is hardly used in modern case-law and not at all in the Rome Statute. While one could debate whether 'enemies of mankind' are indeed largely absent from modern

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case-law,[1] the more important point is that one need not use the precise term in order to portray one's enemies as 'enemies of mankind'. The Preamble of the Rome Statute, for instance, provides a rich vocabulary from which synonyms can be derived: those who commit crimes defined in the Statute can be said to threaten 'the common bonds' that 'unite' 'all peoples', 'deeply shock the conscience of humanity' and 'threaten the peace, security and well-being of the world'. Indeed, one need not cite any words from the Rome Statute in order to label one's enemy; the mere fact that one's enemy is sought by the ICC helps to secure allies (friends) and to isolate one's enemy. The opportunity in this way to involve the ICC in a political struggle was apparently not lost on Ugandan President Museveni, who declared in his 2005 state of the nation:

> The International Criminal Court is a good ally because it makes Kony untouchable as long as it has got indictment; anybody who touches him will have problems with the International Criminal Court, therefore, that is the advantage. Now, some people who went to confuse the International Criminal Court wanted to relieve Kony from that pressure. Like for instance, if Kony goes in the part of Sudan which is far away from where we operate and there is an indictment, they will be under pressure to follow him, but if there is no pressure, then he will be free. They wouldn't be as pressurized as when there is an ICC indictment.[2]

While Museveni may be exceptionally explicit, he is not alone in considering the ICC as a friend and a useful tool to turn one's enemies into the enemies of the international community as a whole. So did the armed movements fighting the Sudanese government, cited in our article. In many situations beyond our case studies, too, political opponents have used the language of international criminal law, and the institutions applying it, to label their enemies as *hostes humani generis*. Hear Libyan rebel spokesman Al-Issawi, reportedly saying that 'Gadhafi's crimes "cannot be forgiven" and that they "touched the whole world," making the international criminal court the appropriate venue'.[3]

(ii)

Secondly, Schotel argues, the structure of (international) criminal law makes it virtually impossible to create enemies. Criminal law deals with individual behaviour, requires the presence of the defendant at the trial and is about past conduct, while enmity resides in the possible threat posed by a collectivity. However, Schotel's liberal reading cannot be generalized into statements on '*the* structure of criminal law'. For instance, the Special Tribunal for Lebanon does allow for trials *in absentia*.[4] Moreover, while individual responsibility is one of the articles of faith in international criminal

[1] The term has been used in some ground-breaking domestic cases as discussed by G. Simpson, *Law, War & Crime* (2008), at 162–164.

[2] Uganda, *Hansard*, Tuesday 7 June 2005.

[3] F. d'Emilio, 'Libyan Rebel Spokesman: Gadhafi Must Face Trial', *Associated Press* (22 July 2011).

[4] Article 22, Statute of the Special Tribunal for Lebanon, attached to UN Doc. S/RES/1757 (2007).

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law,[5] the character of international crimes, often linked to a general policy or acts of collectivities,[6] makes arrest warrants and trials of such crimes ideal means to demonstrate the evil nature of a particular group or government.[7] Take, for example, the way the ICC Prosecutor defended the arrest warrant against Al Bashir before the Security Council:

> The evidence shows that the commission of such crimes on such a scale, over a period of five years, and throughout Darfur, has required the sustained mobilization of the entire Sudanese state apparatus. The coordination of the military, security and intelligence services. The integration of the Militia Janjaweed. The participation of all Ministries. The contribution of the diplomatic and public information bureaucracies. The control of the judiciary.[8]

More than establishing individual guilt, this statement criminalizes the entire Sudanese state administration.

Finally, while we agree with Schotel that criminal law is backward-looking, this does not prevent the prospective use of criminal law. Prosecutor Ocampo, for instance, observed with respect to a Sudanese ICC suspect: 'Ahmad Harun is currently the Governor of South Kordofan. He should be arrested before he commits new crimes in his new position.'[9]

(iii)

Schotel's third point is that our analysis is largely confined to statements made by the Prosecutor (instead of judges) and based on documents that are not likely to make it to the official court proceedings. More generally, Schotel argues that international criminal law does not make a distinction between friends and enemies, and that if the Court's officials nonetheless try to do so they *abuse* the law and the ICC. In our view, however, international criminal law achieves its impact through authoritative invocation, application and enforcement, which can take place outside judgments. Indeed, in the case of the ICC, press statements or statements to the Security Council may have a stronger impact on conflicts than court proceedings read only by lawyers. In other words, for us the Court is a social, communicative construction that plays a role in the distinction between mankind's allies and its enemies prior to, during and after court

[5] In the often quoted formula of the Nuremberg Tribunal: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced', *France et al. v. Goering et al.*, 22 IMT 411, 466 (Int'l Mil. Trib. 1946).

[6] M. Drumbl, *Atrocity, Punishment and International Law* (2007); Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR', 16 *Leiden JIL* (2003) 115.

[7] Koskenniemi, 'Between Impunity and Show Trials', *Max Planck Yearbook of United Nations Law*, 6 (2002), 1–35.

[8] Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, 3.

[9] Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), New York, 11 June 2010, 3, para. 46.

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proceedings. In most instances, court officials will be involved in making such distinctions without intending to take sides in political struggles. But at times it is difficult not to observe any intention, for instance when reading a report of an interview with Prosecutor Ocampo regarding the Libya investigation: '"Gadhafi's personality helped unite the world against him", he said, while insisting that he would remain impartial. "I have to protect his rights," he said. "We don't care about personalities."'[10]

As we have argued in our article, there is no contradiction between claiming impartiality and describing a suspect as enemy of the world. Contrary to Schotel's view, in ours it is the character of international criminal law and the institutions that apply it, in particular the claim to impartiality, that make international criminal law such a strong tool in political struggles.

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[10] B. Hubbard, 'International Court Expects Libyan Prosecution', *Washington Post*, 24 March 2011.