Some Reflections on Recent Developments on Double Standards and Selectivity in International Criminal Law

By:

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International criminal law [ICL] is often seen and criticized as a hegemonic tool, applied opportunistically and inconsistently by powerful states. In some situations, ICL has been applied extensively – and (arguably) with success. In others, however, there have been no tangible results in enforcement. For example, while most trials concerning international crimes in third states take place before courts in European countries, investigations and prosecutions of European actors or their allies remain the exception. Despite pledges to uphold ICL indiscriminately and "to put an end to impunity," a blind eye is turned when, for example, EU agencies and authorities in EU member states collaborate with Libyan actors in "transporting" people on the move back to conditions of systematic abuse in Libya.

Similarly, torture allegations against British soldiers in Iraq have not led to any prosecution, nor have allegations of international crimes committed by US forces in Afghanistan, Iraq and beyond. Most recently, some states have raised arguments to dissuade the International Criminal Court (ICC) from issuing arrest warrants for Israeli officials. As to the situation in Ukraine, joint efforts for accountability were undertaken when states realized that Russian aggression against Ukraine implicated the interests of Western states. However, this only occurred following many years of inaction and indifference, despite the existence of reasonable grounds to believe that international crimes had been committed. Beyond this, countless other situations of mass atrocities, in Ethiopia, Sudan or Yemen, remain largely unaddressed by any comparable international mobilization for accountability. The goal to limit power through the law and its enforcement – the basic principle that the rule of law is based on – has always been difficult to achieve and in this regard, international criminal law makes no exception.

Discrepancies between the aspiration to apply ICL indiscriminately and the reality of its application described above drive perceptions of double standards. In this blog post, I will sketch the origins and context that led to double standards in ICL and consider how to differentiate double standards from selectivity and whataboutism. I will argue that recent developments illustrate double standards within the ICL framework. Given that the legitimacy of international criminal justice crucially depends on its impartial application, it remains paramount to work towards unmasking and remedying such double standards in ICL.

The notion of “double standards” in ICL and its origins

In light of the increasingly diverse usage of the term “double standards” by a wide range of actors, it is crucial to arrive at an understanding before proceeding with an analysis of where such double standards are currently detectable in the application of ICL.

This calls for clarification of the standards which serve as benchmarks. With regard to ICL, these standards are established by the legal framework defining certain acts as international crimes that trigger individual responsibility: the *Rome Statute* and other international conventions (such as *the Genocide*

Convention, Convention against Torture, or the Convention for the Protection of All Persons from Enforced Disappearances), the customary international law underlying them, and their domestic implementation. It is important to point out that referring to these norms as "standards" does not imply that this framework is perfect – and various points of criticism to this effect should be taken into account (see Jeßberger/Steinl/Mehta and Mehta/Imani/Melchior, p. 205 f., to name a few). It simply means that these codified norms refer to the lowest common denominator to which states have pledged to adhere. Thus, in principle, they should all be held to such standards equally and impartially, as they constitute an absolute legal prescription, which labels a certain act as an international crime.

The term selectivity is understood as the application of these standards to one situation or action, but not to another. While such selective application is sometimes equated with double standards, this is not the understanding advocated here. Rather, both notions overlap but are not identical. ICL's application is necessarily selective – as is true for all criminal law. What is decisive are the underlying reasons for selectivity. Two of the most important factual constraints on the application of ICL are lack of evidence and failure to apprehend perpetrators. Where prosecutorial authorities prioritize one situation over another for these reasons, ICL is applied selectively, but not due to double standards.

By contrast, double standards, as understood here, come into play when the legal framework is applied inconsistently for political reasons, often due to power relations among states. Such double standards are partially due to and ingrained within the abovementioned imperfections of international law, with its problematic history as a hegemonic framework established by powerful states to regulate international relations in their interest and to the detriment of others – particularly colonized peoples. This dichotomy between the politically powerful and "the others" is similarly reflected in ICL and its application (see also Makaza, p. 485 f. with further references). In this traditional line of thinking, powerful (Western) states have repeatedly identified ICL as a tool to call for the accountability of political opponents – both among "rogue" or "enemy" states as well as non-state actors, often classified as "terrorists." However, the readiness to subject their own officials to the same standards lags far behind (see Kaleck, p. 47 ff.). We see similar phenomenon from non-

Western actors, such as South Africa's demands that Israeli officials be prosecuted for their alleged crimes against Palestinians but no analogous concern about the prosecution of Russian leaders for their alleged crimes against Ukrainians.

At any rate, the establishment of the ICC could have constituted an important step towards counteracting these double standards – with an independent, permanent international institution rather than states or ad hoc tribunals as the only enforcement mechanisms. However, legal loopholes that allow the introduction of political considerations have been retained within the Rome Statute, as well as in the emerging "ecosystem" of international criminal justice which will be addressed in due course. Moreover, numerous influential states, including many non-Western states, have not joined the court, and it does not have universal jurisdiction, despite suggestions to the contrary. Thus, there remains plenty of room for inconsistencies in the application of ICL. It is however important to note that the "success" of ICL should also not only be measured in the number of prosecutions per conflict. There are many other steps between full impunity and numerous convictions, such as statements by witnesses, summons, public debates about prosecutorial or court decisions, that can have effects on people and societies as well.

It is crucial to acknowledge that neither selectivity nor the application of double standards concerning one case sustains the conclusion that prosecution becomes impermissible in other cases. In this sense, as a strategy of "whataboutism", both selectivity and double standards have become a welcome argument for autocratic governments and dictatorships fearing accountability but is certainly not limited to those. Whoever commits an international crime should be held accountable for it. The consequence of double standards in the application of ICL is, however, a loss of trust in the impartiality of the institutions that apply it – a feature upon which the legitimacy of international criminal justice particularly depends.

The international framework – Selectivity and double standards in the Rome Statute system

The Rome Statute contains various provisions allowing for selectivity or double standards in the investigation and prosecution of international crimes in a

specific situation. Heavily criticized as potential gateways for political considerations, the powers of the UN Security Council to refer and defer a situation (Arts. 13(b), 15ter, 16) were included at the Rome Conference after extensive lobbying by powerful states that sought to weaken the Court. Another opening is the application of the gravity threshold (Art. 17(1)(d)) to close investigations or to justify the prioritization of crimes of one party to a conflict over those of another (see Ranganathan, p. 255, 277; Krever, p. 95). Similarly, considerations on whether investigations would "not serve the interests of justice" (Art. 53(1)(c)) can lead to politicization.

Another example of a criterion that grants leeway is complementarity. According to Art. 17(1)(a) Rome Statute, a case is inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Art. 17(2) and (3) provide certain guideposts to determine unwillingness or inability. Besides its commendable function of strengthening domestic prosecutions (known often as "positive complementarity"), Art. 17 is also an acknowledgement of state sovereignty and has helped garner support for the Rome Statute (see Werle/Jeßberger, p. 118).

In the concrete application of the criterion, double standards have become apparent in that Western democracies have been given the benefit of the doubt, in contrast to other states. This feeds into a narrative of the tendency of the ICC to address cases concerning allegedly "underdeveloped" states or non-state actors, while powerful states ensure accountability themselves (see Krever, p. 94, Jeßberger/Steinl, p. 394 and Clarke).

The inaccuracy of this assumption is illustrated by the closing of the preliminary examination of war crimes committed by UK forces in Iraq. To date, the UK has failed to prosecute any official in connection with the systematic abuse of detainees in Iraq. Looking back into history, it becomes obvious that, for decades, British commanders were never prosecuted before their own domestic courts – an observation in line with the criticism of ICL as a hegemonic tool.

As just described, the Rome Statute, by virtue of how the complementarity test and other admissibility criteria were included, opens the door for political considerations when interpreting legal provisions. Open notions, such as

“genuine” or “sufficient gravity,” permit the politicization of a legal decision on the admissibility of a case. In the UK/Iraq situation, the European Center for Constitutional and Human Rights [ECCHR] submitted several communications to the ICC pointing to this fact. Nonetheless, and despite finding “various aspects of the domestic process […] to be areas of concern,” the ICC closed its examination, granting considerable leeway to the UK in its domestic proceedings.

Similar debates regarding the applicability of the criterion of complementarity have already emerged around the arrest warrants requested by the ICC Office of the Prosecutor in the situation in Palestine. While it has never been practice in other situations for states to intervene at the stage of a decision on the Prosecutor’s application for arrest warrants before the Pre-Trial Chamber, Germany claimed in its *amicus brief* submission, *inter alia*, that the court should take into account whether a state is committed to the rule of law and has a robust and independent legal system. If so, according to the German *amicus brief*, the state should be given more time to conduct domestic prosecutions. Essentially, Germany is taking the position that even if the Prosecutor is convinced that sufficient evidence has been gathered to successfully apply for an arrest warrant before the Pre-Trial Chamber, the ICC should not immediately proceed if the case concerns a state that respects the rule of law.

Applying this line of argumentation -- a political consideration that gives the benefit of the doubt to a rule of law country -- would cause the delay of a judicial decision, potentially rendering it impossible. As we’ve seen in other cases, e.g., in the abovementioned UK/Iraq situation, evidence becomes weaker or is lost over time. Moreover, producing a deterrent effect within an ongoing conflict requires an immediate judicial reaction (see e.g., Germany’s domestic prosecutions of Syrian perpetrators from 2011 on), even at a time when a conflict is still ongoing. Germany’s approach towards the ICC and the Rome Statute system is one of the best examples illustrating the application of double standards, as it aims at a decision in line with Germany`s overall “Staatsräson” of unconditionally supporting Israel. This leads to favoring a state allegedly committed to respecting the rule of law over other states around the world that are mostly not party to the alliances between Western democracies and their geopolitical interests. Instead of taking a principled approach, fully supporting and endorsing the “rules-based” order created in a direct reaction to World War

II, Germany puts political interests over a principled legal approach. In this case, the principle of complementarity is the gateway into the Rome Statute.

Besides the abovementioned openings for selectivity in the Rome Statute, another aspect conducive to double standards is the restricted jurisdictional scope of the Rome Statute, owing to non-ratification by many states on the one hand, and a purposefully restricted jurisdictional regime concerning the crime of aggression on the other (Art. 15bis). The gap for the crime of aggression, which is a specific, politically charged crime is the result of Western states' negotiations in Kampala – particularly the UK, France, and the US as permanent UN Security Council members seeking to uphold their dominance over the interpretation of the prohibition of the use of force.

A coalition of states, as well as academics and CSOs, are currently using international momentum to advocate for a correction of these restrictions by amending the Rome Statute's jurisdictional regime over the crime of aggression. Such a reform is crucial to ensure accountability for cases of aggression generally and to counter the perception of double standards at work – stemming from states that use the law only against "the other"/their enemies – by nominally supporting Ukraine's push for a Special Tribunal on the Crime of Aggression (for details of Western positions on the tribunal, see Patryk Labuda, Jennifer Trahan and Rebecca Hamilton). Even if such a special tribunal would set a precedent to prosecute a state leader for the crime of aggression, it would remain subject to future geopolitical interests and power (in)balances whether another leader would ever stand trial before e.g. another special tribunal. The reform of the Rome Statute would at least partially – depending on ratification by states – ensure a future mechanism to address the crime of aggression beyond a single given situation. Alternatively, a hybrid Ukrainian-internationalized institution focusing on all core international crimes committed by parties to the conflict in Ukraine, in order to support domestic and ICC prosecutions with additional resources, would be a welcome step forward.

Takeaways

Manifold openings exist for the influence of political considerations on the selection of cases. It stands to reason that powerful states will continue to make use of these gateways, in perpetuation of the historical use of law as a tool wielded by the powerful over the weak. In this blog post, I've argued that

the persisting impunity for post-9/11 “war on terror” crimes as well as most recently Germany’s argument against the issuance of arrest warrants against Israeli officials illustrate the existence and use of double standards in ICL. However, it’s not only about the results in forms of convictions on which one should measure the impact of ICL, but also the effects of filing cases, of investigations and summonses issued, of challenging negative decisions as well as of the public discourse connected to these processes, that generate important results between the “all or nothing”. It remains crucial for the legitimacy of ICL and the institutions enforcing it to work towards its indiscriminate and equal application, free from double standards.

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