This paper examines the discursive power of International Criminal Court (the ICC) that has been established with unprecedented jurisdiction both in terms of the crimes being prosecuted and the territorial scope the court can reach. Analysing how current international criminal law is shaped and developed will bring to the surface particular power structures embedded in legal texts and practices. It is not only the criminalization of certain acts in international law but also the evolution of a permanent international criminal court holding various forms of power enabling sanctioning, prosecuting and punishing such acts that might be claimed to fill the gap of a judiciary that evokes critical discussions. In this framework, distinguishing criminal prosecutions with its moralistic dimensions from political realities is a misperception which holds the potential of bringing about further failures to understand the very nature of law and its relationality with society and politics. Morality with its particularity gives international criminal law its “power”, albeit with another understanding on the latter. A Foucauldian discourse analysis on the particular discourse of the ICC contributes to our understanding of novel techniques and procedures of global governmentality.

Law produces discourses and establishes discursive power in societies. The discursive power relations between international law and international society follow a very similar path with the type or relations between law and society at the domestic level; the essential difference for the latter having still certain authority mechanisms within sight while the origins of such authority is much more diffused and blurred at the international level. International criminal law, whether taken as a recently developing subfield of international law or an interdisciplinary category borrowing from many disciplines particularly criminal law and international law, is a perfect reflection of this pattern of discursive power floating within society while constructing particular agents and identities which unavoidably shapes the very society it claims to act on behalf of.

The history of international law with respect to the protection of human rights and humanitarian law seems to follow a progressive line gradually encompassing a larger quantity of acts to be recognized as international crimes. Nevertheless, the very challenge against the “soft” or “moralistic” nature of humanitarian law and international criminal law norms and rules does not arise from the recent extension of scope and depth of the both. The establishment of a permanent international criminal court –the ICC, with unprecedented jurisdiction, is what really challenges the foregoing debate on the nature and power of international law. It is not only the criminalization of certain acts in international law but also the evolution of a permanent international criminal court holding various forms of power enabling sanctioning, prosecuting and punishing such acts that might be claimed to fill the gap of a judiciary that evokes critical discussions. In this framework, questioning whether law has the potential and capacity to act as an arbiter between political realities and moral ideal carries us to another terrain holding that law with its discursive “power” does not exclude “morality” at all. Just the contrary, it is this “morality” with its particularity which gives international criminal law its “power”, albeit with another understanding on “power”.

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On my way to grasp the type of power functioning both in and out of societies and state borders which, instead of moving in one direction, takes part in a mutually constitutive fashion, Foucault is invoked to contribute to understanding of novel techniques and procedures of global governmentality. For this, Foucault’s approach on law which has caused certain degree of controversies will be covered in the first part of the paper. In the second part, I will aim at carrying Foucault’s approach to international law with a closer focus on international criminal law and the International Criminal Court.

I- Foucault on Law

The “Expulsion Thesis” and its critics

The conventional and widespread conviction on Foucault’s approach towards law is that he takes law as a pre-modern way of imposing power through rulers or governments on the subjects of the State. As modern forms of power operate out of the sphere of State or State-like organizations, law remains as an irrelevant field of study for those following Foucault. According to this group, Foucault takes law simply as a direct expression and exercise of power. Owing to the fact that Foucault’s main concern is how power has evolved in a way to function more subtle and implicitly in modern techniques, the common belief has been that he failed to take proper account of law’s constitutive role in addition to its repressive role. Foucault was searching for modern forms of power which were not visible in the first instance and which were effective on the human body through mechanisms other than the government. Thus, law would remain as one of the pre-modern government tools.

For Foucault, content and exercise of the rules which supposedly constitute and maintain the substructure of the idea of “justice” are conditioned and differ according to social structures. All law is then particular which strives for being recognized as universal, which is of course an illusionary conviction- in order to enhance and consolidate its justification. The idea of justice is put to work either by the rulers as an instrument of power, or by the opponents to that power as an instrument of resistance.  

1 However, this negative, repressive form of power is progressively overtaken by novel and modern technologies which Foucault defines as “disciplinary power”. Disciplinary power techniques which are more productive and effective when compared to the repressive power practices of the sovereign body have rendered law as merely an instrument site in modern societies. The expulsion thesis was initially developed by Hirst and Fine, and has found its fullest expression in later works of Hunt and Wickham.

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The main outlet of critics against the expulsion thesis is a rejection that Foucault counterposes law and disciplinary power. Instead, Foucault is claimed to state at many points that law and disciplinary power coexist and complement each other. It is highly possible that misinterpretation of Foucault’s approach towards law derives from the 1976 College de France lectures being published at a relatively late date. Reading Foucault as if the whole set of his ideas, understandings and thoughts represent a uniform and constant entirety would be unfairness and even some sort of a betrayal to the very meaning and purpose of his work. A deeper insight of his studies, especially after the 1976 lectures, indicates a novel approach—or “correction” as some would argue—on the interaction between different forms of government techniques as well as the relations between the self and technologies of domination. Accordingly, many critics decline the expulsion thesis propounding the claim that Foucault never totally outlawed law. Whether legal power integrates to or is assimilated by governmental or administrative techniques, it continues to be part of Foucault’s account of modernity. It is the scope and depth of this association which is the cause of contention.

Besides, some claim that Foucault might have excluded the juridical dimension of law but not the whole of it. Foucault correlates the diminishing power of juridical sphere with the rise of bio-power, but this correlation should not imply that law has totally abandoned its power to out-law means as law is not merely juridical. Legal power can reveal itself beyond the judicial field. Any differentiation should be made not between legal, disciplinary and bio-political power, but between juridical law and normative law. If Foucault excluded all law from modern power economies, there would be little room to grasp his normative forms of power which now becomes disciplinary and bio-political.

**An Alternative Reading of Foucault’s Law**

A third stance on Foucault’s approach on law reinterprets both the expulsion thesis and its critics not in order to refute them all but in order to relate them through a different perspective. The common point of this alternative approach is the claim that both the expulsion thesis and its critics have failed

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4 See, Foucault 1988, “Technologies of the self (A seminar with Michel Foucault at the University of Vermont, October 1982)”, in L. H. Martin, H. Gutman, P. H. Hutton (eds.), Technologies of the self: A seminar with Michel Foucault, University of Massachusetts Press, Amherst; Foucault 1993, “About the beginning of the hermeneutics of the self (Transcription of two lectures in Dartmouth on 17 and 24 November 1980, ed. M. Blasius)” Political Theory, Vol. 21, No. 2, pp. 198-227;

5 Walby points to the risk of not fully grasping the genuine relation of law with modern power economies. For him, the disagreement between the critics to the expulsion thesis on the nature of law’s relation to governmentality might well prevent us to see the ‘constitutive’ nature of law in societies. If law is perceived as only a supplementary component of new power modalities, it will be impossible to understand how law (re)generates itself concerning legal governance. (Kevin Walby 2007, “Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism”, Social and Legal Studies, Vol. 16, pp. 551-571.

to grasp Foucault’s understanding of law. Foucault’s aim was to “cut off the head of the king”\(^7\) in order to focus on the modern techniques of disciplinary power which mainly derive through micro practices. But this “cutting off” does not necessarily mean there is no coercive or consensual forms of governance at macro levels.\(^8\) The question should not be “how power operates without a central body”, but rather, “how power operates with a headless body?” and “how is it possible that this headless body behaves as if it indeed had a head?”\(^9\)

Foucault’s law is both receptive and determinate. In its being flexible, law is susceptible to domination by predominant powers whether they derive from a sovereign or in a disciplinary or biopolitical form. Still the argument should not be confused with the expulsion thesis which reduces law solely to an instrument of power. For Golder and Fitzpatrick, not despite but because of its susceptible nature, law cannot be contained by power.\(^10\)

As noted earlier, Foucault does not eliminate sovereignty as a totally pre-modern imposition of power upon the subjects. In Security, Territory, Population, he juxtaposes law and sovereignty:

> [S]overeignty is absolutely not eliminated by the emergence of a new art of government that has crossed the threshold of a political science.\(^11\)

Confusion derives because of the fact that Foucault explicitly notifies sovereignty had been embodied in the form of a ruler so that legal power was equated with the ruler. The monolithic feature of sovereign power broke down with nationalism and nation-states when ‘the will of the sovereign ruler’ transformed into ‘the will of the sovereign nation’. The mere difference is that the juridical power does not derive from a personality in the shape of a prince or king, but it derives from the common will diffused across a nation.

In this modern type of sovereignty, law remains very much “part of the social game in a society like ours”.\(^12\) Even if new power economies of modernity caused a suspension of law, this suspension remains partial, not total.\(^13\) Law is in relation to other modalities of power, and this relationality disrupts any thesis that law is complete, coherent and an independent body. It, nevertheless, does

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\(^8\) For an elaborate discussion on why we should not take Foucault’s call to cut off the king’s head as a rejection of sovereignty discourse, see Andrew Neal 2004, “Cutting Off the King’s Head: Foucault’s *Society Must Be Defended* and the Problem of Sovereignty”, *Alternatives*, Vol. 29, No. 4, pp. 373-398.


not mean that law is dependent on modern power modalities.\textsuperscript{14} Quite the contrary, new
technologies of power, because “they are called upon to speak the truth of society to itself from an
entirely immanent position – one which aims to secure a comprehension of the social field from a
position within that field itself”, are dependent on law as law is left as the only knowledge outlet in
modernity providing a transcendent reference point.\textsuperscript{15} What is more, the new phase of human
sciences provides law the power of this transcendent ‘truth’.\textsuperscript{16}

That the grip of the prison on the penal system should not have led to a violent reaction of
rejection is no doubt due to many reasons. One of these is that, in fabricating delinquency, it
gave to criminal justice a unitary field of objects, authenticated by the ‘sciences’, and thus
enabled it to function on a general horizon of ‘truth’.\textsuperscript{17}

Thus, law and disciplinary power mechanisms are inter-dependent, and “in their relation they serve
to constitute the other as natural and necessary”.\textsuperscript{18} The human sciences can identify and stigmatize
abnormality in their fractured and incomplete fashion, yet they need a sanctioning mechanism to
enforce their scientific motion. Law, though remaining in the disciplinary field, has to put a certain
distance between itself and scientific knowledge in return. Law has to hold itself apart in order to
maintain its totalizing and absolute truth claims and to intervene when science fails to discipline its
subjects.\textsuperscript{19}

Foucault’s law has two complex and ostensibly contradictory dimensions regarding determinacy. The
first dimension expresses a determinate and definite content which draws the line on the side of the
‘norm’. This is a law to be resisted and transgressed. The second dimension expresses a more
indeterminate and responsive content which becomes constantly mutable and flexible in order to
encompass and respond what lies beyond the very red line it had previously drawn itself. Law,
through this perpetual change and reconstruction, contains resistances and challenges. According to
Foucault, these two dimensions of law –one determinate and rigid, and the other responsive and
self-resistant- do not represent two conflictual or opposite understandings as law needs to be both
determinate and responsive at the same time. Law has to be determinate to the extent that it has to
secure social order, but it also has to be indeterminate as power can neither be embodied by certain
actors nor be encapsulated in any given institution or structure. A further significant feature of
power is that Foucault interprets it as responsive to –and generally formed by- resistance. This is not
a relationality which positions power on the one side, and resistance on the other side. In fact,
resistance is an intrinsic content of power.\textsuperscript{20}

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\textsuperscript{14} Golder and Fitzpatrick 2009, \textit{Foucault's Law}, p. 61.
\textsuperscript{15} Golder and Fitzpatrick 2009, \textit{Foucault's Law}, p. 63.
\textsuperscript{18} Golder and Fitzpatrick 2009, \textit{Foucault's Law}, p. 66.
\textsuperscript{19} Golder and Fitzpatrick 2009, \textit{Foucault's Law}, p. 70.
\end{flushright}
Law has to reproduce and reconstruct itself in order to adapt to the ever-changing social world. Yet, there has to be a limit to the responsiveness of law. Law’s responsiveness and indeterminacy cannot be limitless as law loses its power of securing social order and predictability if not detained on a determinate foundation. What’s more to the point, there will be no determinate position without a terrain exterior to this determinacy. In other words, there has to be a line to be maintained and secured which draws the frontiers of the determinate ground and which enables transcending and transgressing towards alterity and out-law possibilities. This alterity and out-law terrain is what exactly makes law an indispensable necessity and reality for societies as there would be no need for law if there were not anything out-of-law.\(^{21}\)

To sum up, law has to remain flexible, fluid and mutable to enable a group, class or ideology to subordinate it. The very same flexible, fluid and mutable law has to be so to enable resistance and transgression as it is this responsive nature of law which ensures its adaptability to the ever-changing social world and which provides a certain degree of determinacy for a particular period and particular set of power relations. Still, it is a conditioned and temporary determinacy.\(^{22}\) The indeterminate nature prevents any totalitarian comprehension of law by power.\(^{23}\) Just as there always will be need for “change” to speak of ‘tradition’, determinacy of law will ensure indeterminacy both of which at the end will render it impossible for any power to permanently contain it. It used to be the monarchs skillfully wielding law as instruments of power in the past.\(^{24}\) In the age of governmentality, law continues to be wielded as instruments or supportive mechanisms of bio-politics and disciplinary power.\(^{25}\) This is something going beyond the expulsion thesis because law, though not being subordinated by an explicit power center or locus, continues to accomplish its mission as one of the power economies. Golder’s and Fitzpatrick’s interpretation, relating indeterminacy and determinacy, takes forward critics on the expulsion thesis.

An additional point which needs to be underlined once again is that law is in desperate need of an external force to maintain its intrinsic legal power. As Foucault depicts in Discipline and Punish, this external force of law used to be the force of the prince in the pre-modern period. All the bloody and ceremonial practices of punishment of pre-modernity did not in fact represent an excessive law, but a dependent law incomplete and weak without external support.\(^{26}\)


\(^{22}\) Laclau and Mouffe’s theory on discourse resembles to Foucault’s determinate and indeterminate aspect of law approach. In Laclau and Mouffe’s terminology, a “closure” refers to a temporal and partial fixation of meaning of signifiers. However, the possibility of complete constitution of structure is denied and the terrain of the social is open unconditionally which enables the temporal and contingent “closure(s)” change in time and in context. (Laclau and Mouffe 1987, “Post-Marxism without apologies”, *New Left Review*, Vol. 166, No. 11-12, pp. 79-106.)

\(^{23}\) Golder and Fitzpatrick 2009, *Foucault’s Law*, p.82.


[Law] functions and justifies itself only by this perpetual reference to something other than itself.  

In modernity, law still cannot be a self-executing mechanism; it cannot be “the master of its truth”. Law continues to operate with the help of an external execution while the form and nature of this external execution is not a static or fixed one. The Westphalian state is not an irreplaceable form of government for the operation of power in Foucauldian terms. Government is not a technique applied or used by state authorities or apparatus; instead, the state which is nothing but a temporal and historical form of stabilization of societal power relations is one form of governmentality. It might be a monarchical state where power is embodied in the form of a king or prince, or a nation-state where power operates in a much more diffused way. The crucial thing is that there is and has to be macro-level that “…brings together, arranges, and fixes within that arrangement the micro-relations of power”. And as long as the forms and instruments of power has historicity, the room is open for alternative forms and instruments transcending the nation-state at the international level where the state is just one of the players.

Today, when the national army corps or police forces fail to support law, international security mechanisms come to the scene in order to provide the ‘sword’ in global governance. Just like the ineluctable and organic relationship between the legal order and the administrative power at the national level, international criminal law and international security organizations—e.g. the UN, NATO—operate interdependently.

II- International Criminal Court (the ICC)

The codification of international criminal law, in other words the homogenization of criminal norms and rules, takes its final stage with the establishment of a permanent International Criminal Court (ICC). Rome Statute establishing the ICC was adopted on 17 July 1998. The Statute entered into force on 1 July 2002 after receiving 60 required ratifications. As of March 2013 there are 122 states parties to the Statute.

The four categories of crimes that are under the jurisdiction of the Court are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Prosecutor of the ICC may commence an investigation in three ways: (s)he may act upon referral by states parties, by the Security Council, or upon his/her personal conviction.


31 Foucault refers to the ‘sword’ as law’s executionary force which the latter always has to resort to. (Foucault 1979, *The Will to Knowledge: The History of Sexuality*, Vol. 1, p. 144.)
There is also the possibility that the Rome Statute may be applicable for the non-party states if the Security Council decides that there exists a situation threatening international peace and security. The Prosecutor may commence an investigation under such circumstances in the territories of a state, which has not signed and ratified the Rome Statute. This possibility, in addition to the Prosecutor’s right to commence an investigation upon personal convictions, is a clear step beyond traditional international law, which takes “sovereignty” and “non-interference” in the domestic affairs of states as core principles. Another significant feature of the ICC is the principle of complementarity that gives authorization to the court only when national courts are unable or unwilling to judge and punish the accused persons for the enumerated crimes in the Statute.

Though the ICC, even with limited and brief information such as noted above, might be taken as a tendency towards universality both in terms of the crimes to be prosecuted and the scope of the jurisdiction of the court, one has to be careful on the term “universal” as anything defined as universal is a conditioned reality.

**Construction of agents and objects**

Different practices and different perspectives about what constitutes an international crime cannot be said to be a direct sign of their historical relativity. The purpose of exemplifying international criminal law is not to deny the validity of something called as “international crime” either. It is a self-evident reality that there is currently a list of acts defined as international crimes which a recently established international criminal court, the ICC, is charged for their prosecution and punishment. But neither the crimes nor the social entity called as “international society” which stands to be concerned about these crimes can be said to be constant and fixed objects. What’s more, the conventional wisdom that crimes are reflections of acts in legal texts is a misleading postulate giving a deficient thus false impression that the former follows the latter. It has widely been accepted that human societies first experience a new phenomenon and then reacts to it carrying the act to the criminal code system as a crime. That is to say, plane hijacking necessitated new rules in aviation or scientific developments in chemistry are followed by specific regulations in humanitarian law texts.

Yet, this is not the right position to start analysing international criminal law and the ICC. As Veyne argues, “Objects seem to determine our behaviour, but our practice determines its own objects in the first place. Let us start, then, with that practice itself, so that the object which it applies is what it is only in relation to that practice … The relation determines the object, and only what is determined exists.”

So, it is humanitarian law and convergence points of human rights with humanitarian law, and finally the “idea” that human groups should prosecute and punish certain breaches of this law that we have to approach as a practice. This is a practice which, instead of being a universal or fixed reality, evolved and transformed in time. And it is this evolving practice which gave rise to first ad hoc criminal tribunals, and then, a permanent international criminal tribunal, the ICC.

What is to be notified is that only “certain” acts are codified as “breaches” of law which should take the attention of the analyst to practices before objects. The crux of the matter is whether it is an unprecedented event – e.g. a terrorist attack in the form of plane hijacking- giving rise to codification of the crime of terrorism through plane hijacking, or it is a “particular codification” giving rise to a

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“particular crime” – i.e. terrorism- and a “particular criminal” –i.e. terrorist. In the latter case, definitions on a specific act as “crime” and a specific personality as “criminal” are not natural consequences of the plane hijacking. In other words, objects determining codifications and legal proceedings are not the crime of plane hijacking and a terrorist committing the crime. Objects, which in this case are the crime and the criminal, follow our practices as it is our practices determining which acts construct a crime and who a criminal is. Besides, the “event” through a Foucauldian perspective is not the acts such as plane hijacking or use of chemical weapons at wartime. The event here is the emergence and transformation of practices\textsuperscript{33}, which in this case is the birth of “international criminal prosecutions”. International humanitarian law texts are followed by international criminal codes which construct the event as prosecutions. So, it is not the crime and criminal as objects precipitating the prosecutions but a particular relation with the objects giving the latter a certain type of identity.

Thus, what is in sight is “the map”, not the naked “territory”. Litowitz, taking inspiration from Denis Wood’s study on maps, carries the same understanding to law:

“Laws perform a similar sleight-of-hand, pretending merely to regulate a pre-existing set of relations, when in fact the law is what creates such relations in the first instance. For example, property law contains rules of descent for the passage of an estate, but the very notion of an “estate” is a legal fiction derived from property law.”\textsuperscript{34}

It is not only the crime and criminal as constructed objects. The ones taking the responsibility of prosecuting these crimes and criminals – i.e. international society, prosecutors, legal advisors, any related agents- are also constructed in process. So, the real question regarding the meaning of the ICC should be how it happened that we, so-called members of an international society, have begun to interpret a certain group of acts and their outcomes in a different way that has also dramatically transformed our practices.

What is new about the ICC?

If \textit{ad hoc} international criminal tribunals are capital stages of a process oriented towards global governance, with the ICC the process seems to get closer to be almost completed in the judicial sphere. This is partially because the ICC is not just the latest example of another international criminal tribunal. The ICC represents an utterly different era though owes much to the “achievements” of the \textit{ad hoc} tribunals. The change is not that the once dominant powers remain in the background to conceal their perpetual interest-oriented policies in this new era. Nor it is the case that liberal ideals have prevailed finally that we have any reason to hope for a new world order giving voice to equal and just relations in every sense. The ideal of prosecuting major international criminals remaining the same since Nuremberg and Tokyo, the ICC is the symbol of a dramatic change of how power, with a developing legal discourse on international criminal law, functions in a much more diffused way throughout each society.


There are various ways to explain what made the establishment of the ICC possible many of which these explanations point at the end of the Cold War as the primary facilitator. In fact, the legal discourse paving the way for international criminal prosecutions has already advanced since early 20th century with the precedents of Nuremberg and Tokyo Tribunals. The end of Cold War has resumed the process which has already taken a start instead of being a genuine cause for the establishment of the court. The real cause of motivation for the ICC is the shift in human rights discourse which focuses on accountability for mass atrocities. Before the accountability regime human rights discourse hinged on the assumption that criminal justice was not an efficient way before atrocities. Human rights have been regarded as a body of norms and rules mainly granting rights instead of achieving its goals through proposing devices for punishment and repressions.

The shift regarding human rights and humanitarian law discourses indicates that what was once believed to be unbeneﬁcial has begun to replace the previous vision which based on the idea that granting rights and freedoms would solve the problems. Criminal justice was taken as an ineﬃcient, if not archaic, way to prevent crimes as it should not be repressing or punishing individuals but grant more rights. The return to criminal justice through an accountability regime reﬂects also a shifting perception what constitutes a threat to security and why it matters to prosecute perpetrators of a group of crimes.

Liaisons between Societies and Criminal Courts

Lawlessness or the fact that some crimes are being committed in any society is not the ﬁrst and foremost concern of the international community. It is a speciﬁc group of crimes which takes the attention of international community and it is these crimes which are perceived to threaten international peace and security. In a domestic legal system each criminal act has to be prosecuted and punished at least in principle. Legal authorities at the national level do not eliminate and disregard some cases of murder or theft just because of these acts being sporadic, opportunistic or isolated from a wider organizational network. This is mostly because each one of such acts that are codiﬁed in domestic criminal law systems is assumed to pose a threat to nation-wide peace and security. It is not only organizational criminal activities here at issue. Before everything else, national law systems are built on certain premises which deﬁne the type of relationship between the individual and the state as well as the relationship amongst these individuals.

Communities going beyond national borders replace the individual at the international level as it is deemed that only communal activities can pose the type of threat that requires global measures and prosecutions when these measures do not work. The relationship between the individual and the State is replaced by a scaled up relationship between communities and the international community at the international level. It is not any more individuals that global governance observes, regulates and supervises. It is not any organized crime that is taken into account either, because many cases of organized crime still fall under the jurisdiction of nation-states. It is organized crime(s) committed by nation-states or similar types of organizations holding the capacity to challenge state-power when authority and power of the latter collapses that someone else takes in charge of prosecuting and punishing. It is the ICC ﬁling the gap of the judicial process at the international level.
What is meant by collapse of authority and power is a determinant factor in deciding whether to intervene through judicial means in a case. It is possible to claim that there is still a substantial degree of authority in Sudan while the ICC has taken the decision to start an investigation. One should notify that, for the recently evolving global governance, it is not the mere existence of a government or a ruling stratum in a country that provides the sufficient ground to speak of a proper type of governmentality. “Globalization ... constitutes its natural habitat”³⁵, and it seems that it is not acceptable and not even conceivable in this natural habitat to leave unnoticed mass scale atrocities in a given society no matter if there is a government-in-charge. There has to be a certain type of relationship between the government and its citizens which does not have to be an advanced liberal democracy in every aspect for the moment, but which has to protect at least the basic right to life. In case the right to life disappears and populations become subject to mass scaled atrocities, there are international institutions and organizations to intervene which the ICC is just one of them.

International and non-governmental organizations have a substantial role in the Court’s decision on elements of the crimes. The ICC performs its mission in a dense collaboration with other actors of global governance. These actors include international organizations, especially the ones operating under the UN structure such as UNSC (UN Security Council), OCHA (Office for the Coordination of Humanitarian Affairs), UNHCR (United Nations High Commissioner for Refugees), UNICEF (United Nations International Children’s Emergency Fund), UNOCI (United Nations Operation in Cote d’Ivoire), OHCHR (Office of the High Commissioner for Human Rights), and European Union bodies, as well as non-governmental organizations such as IRC (International Rescue Committee), HRW (Human Rights Watch), AI (Amnesty International), FIDH (Federation Internationale des Ligues des Droit de l’Homme- International Federation for Human Rights), ICG (International Crisis Group), ICRC (International Committee of the Red Cross) and national non-governmental organizations. Critical evidence for decisions is provided through reports, press releases and other relevant documents of these organizations. All these texts support the flow of information that at the end are transformed into ICC-texts. The Court in effect resorts to these texts not only to provide evidence required for the elements of the crimes but to legitimize its cases before anything else. Without the information and documentation provided through these organizations neither the Prosecutor nor any Court body would be able to legitimize and formulate a case. So, the direct outcome of the texts is to conduce toward prosecutions.

The type of relationship between the ICC and different global actors is not a unilateral one. The intertextuality, besides evidencing the required elements of the crimes and legitimizing legal interventions which primarily take place in the form of prosecutions before the Chambers, has further outcomes. Ideologies cannot penetrate into social and political strata when restricted to move on an unfounded and imperceptible ground. Thoughts need technical and calculable forms to operate on. As one of the leading ideological and material institutions dealing with mass atrocities, the ICC produces technical and calculable knowledge through giving the “disaster” a concrete form. This, in return, provides other subsidiary institutions and organizations both domestic and global a suitable ground to deploy their policies. Mass atrocities are not just extreme incidents which would otherwise be only symbols of pain and sorrow, and would remain in rhetorical reflections without any real outcomes. Atrocities are perceived as disasters. Being part and parcel of a wider disaster, international crimes constituting mass atrocities are transformed into some sort of a mapping of

development, civilization and democracy. This kind of a mapping draws borders between developed and undeveloped, civil and uncivilized, and even human and inhuman. Regions and populations are worked on through not only legal devices but also through economic, liberal or administrative discourses so that these populations are to be integrated into the system or excluded—maybe irrevocably—at all.

The principle of complementarity, which has been presented as supporting more or less equality between the ICC and the national courts, contributes to the mapping and framing undeveloped, uncivilized, or the “other”. The principle of complementarity depends on a gradation of types of legal systems if not types of people. Evaluation at this point is conducted on the actual and potential capacity of national legal systems. The ICC is not an equal partner in a cooperation game played with domestic authorities. In reality, the court is accomplishing a monitoring, surveillance and controlling process which national legal systems’ performances are the key components of evaluation. In a statement by the Head of the Appeals Division of the Office of the Prosecutor, Dr. Fabricio Guariglia, the superior position of the court as well as the differentiative language framing “we” and “they” is obvious:

“We did everything in the Kenya case; we told them ‘you can do it, you should do it, and we will help you to do it … either do it or refer it to us’ …”

So, there are different categories before the ICC: full citizens as members of developed countries, mostly living under liberal western democracies; hopeless cases that intervention is strictly needed; and cases between these two poles, sometimes showing signs of meeting the required standards to become a part of the first group of citizens of the international society while sometimes being irresponsible to encouraging, supportive or severe guidance as is the case in the Kenya case. International prosecutions’ disseminating different messages to different groups construct different audiences which at the end completes the mapping of the globe with certain outcomes.

**Different Audiences**

It is not just that a clear, distinctive line is drawn between the ICC representing the international society and countries where mass atrocities subject to investigation are committed. There are more than one binary drawn between societies and their respective polities. These binaries construct different audiences while multiple messages are communicated targeting these audiences. The first group of audience includes groups that are victimized and groups that are criminalized though the first impression might be that it is individual suspects and victims instead of groups for this first addressing. As noted above, international criminal prosecutions target communities despite the widely-supported argument that criminal law has been evolving in a progressive way to prosecute and punish individual persons in accordance with the principle of “individual responsibility”. It is true that groups are not prosecuted and punished before international tribunals and the ICC at the moment, but the crimes these legal bodies have jurisdiction over are not individualistic crimes which can be committed without group-level organization and planning. Likewise the victims are not individual persons but members of groups who have become victims due to their membership to

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36 Fabricio Guariglia, Head of the Appeals Division of the Office of the Prosecutor, the ICC, Speech given at Human Rights Centre, NUI Galway, June 20, 2013.
these groups. So, the direct message is directed to victimized and criminalized groups though it appears to be—and in fact it has to be— the individuals representing their groups before the Court.

The second addressees are potential victim and criminal groups whom we might classify as “hearers” while the prosecutions proceed. The conventional belief is that it is this second group of audience that criminal legal systems targets first and foremost in order to deter future crimes and to show to the potential victims that they can readily rely on the system. But there is a third audience who most of the time do not come into the scene and show itself, and who is thought to become never directly part of such a criminal activity neither as perpetrators nor as victims. This is the so-called “international society” both prosecuting and watching as the audience the judicial proceedings. It is the instant that the authors and the subjects of international society overlap.

The overhearers

There is, after all, nothing more reassuring than thinking that we are better humans than those men and women of the past. Nothing is more comforting than a history that allows us to maintain the status quo.37

Fudge, in her work on (un)changing perceptions and attitudes regarding human-animal relations, indicates a mostly disregarded point that we, humans, tend to rule out contradictions in the past in order to rule out the very similar present contradictions. The reference point of Fudge is a history narrated and depicted in a particular way which functions as a justification mechanism for today’s and tomorrow’s order of things. Past is formulated to represent the “other”, this “other” holding what has been surpassed, overcome, subjugated or even forgotten. International criminal tribunals and now the ICC as a permanent court perform a similar function of both alienation and justification: alienation from temporal and spatial zones, justification for the means of achieving this alienation and governing not only the ones being categorized as “others” but also the ones representing the so-called international society. Governing others turns into governing ourselves as past and present atrocities tell us a narrative urging the need and necessity of protecting the status quo.

There exists an interactive relationship between fear and protectionism which at the end results in a vicious circle disabling neither of them to overcome the other. Because of fear of certain things or persons, people try to protect themselves and their belongings. But sometimes protection feeds into more fear instead of preventing or removing it. As fear nourishes protectionism, protectionism nourishes fear causing increasing degrees of alienation and otherness. The circle continues with rising levels of overprotectionism and fear. International prosecutions in fact represent a post-modern way of overprotectionism that has been nourished by fear of not actually becoming subject to similar atrocities but mostly being affected somehow if remained silent. All types of security organization need something or someone defined as “other” and the “others” of the police forces as well as legal orders are the criminals. Without crimes and criminals the existence of police forces and courts remains meaningless and even impossible. There has to be a “threat”—materialized in the form of a “crime”- to legitimize and explain the need of police forces and judicial-penitentiary bodies.

Fear and concern of protecting a particular way of living and values-system has resulted in international interventions in the era of globalization as it has become ineluctable to ignore violations of these values in other societies or places of the globe. This is simply because there is no “other” society or “globe” than ours which creates a paradoxical position with the idea of constructing “otherness” to consolidate what remains as “ours”. But this is a false paradox as there is not –and never can be- one, united, complete whole as an international or world society without any construction of otherness.

Another false impression about the nature and function of international criminal courts and the ICC is that the idea of justice these bodies promise to realize is an end in itself which is in harmony with the well-being and happiness of everyone. Despite the lack of a materialized, concrete hierarchical state-organism at the international level, global governance carries a parallel logic with that of the nation-state. *Raison d’etat* of the nation-state has been described as to maintain the well-being and happiness of its citizens. But the interest of the State in improving its citizens’ well-being and happiness was not an ultimate end. Instead this was an interest coinciding with that of the State itself. It was not because well-being and happiness of the citizens was a “supreme and non-negotiable end” but because welfare of the citizens was a means to enable the State to survive and advance. Global governance mechanisms also take an interest in improving the welfare of its subjects as well as prosecuting and punishing the ones threatening it. Here, again, there is an interaction between the well-being of the international society and interests of global governance. The ICC, as the final stage at international prosecutions, tries to protect and maintain “justice” – justice, as understood in a particular manner- not because “justice” is taken as a supreme and universal end, but because “justice” is a means to an end, the end being the survival and advancement of global governance.

*From Raison d’Etat towards Raison d’Internationale*

Incidents of mass-scale atrocities are no more taken only as savageness or barbarousness occurring in remote parts of the world. Though the criminal tradition has turned its face towards individual responsibility of the crime committed, prosecution and punishment of the individual act has transformed into a collective initiative in connection with the modern mantra “responsibility to protect”. So, crime is individual, but prosecution is a collective responsibility. This is because there has been a close relationship being established between these crimes and international security. Like so many different questions in economic, social, political or cultural fields have entered into security and liberal governmentality, the problem of how to deal with a certain group of atrocities has been embedded in the matrices of liberal governmentality.

Security Council resolutions referring some situations to the Prosecutor of the ICC are sound indicators how a group of mass-scale atrocities are perceived and introduced as security issues concerning not only the State these atrocities take place or other regional countries but also the whole globe. In its 26 February 2011 Resolution on the situation in Libyan Arab Jamahiriya, the Security Council reiterates that it is “its primary responsibility ... the maintenance of international


peace and security under the Charter of the United Nations.” It is not a novel fact that the UN Security Council undertakes such a responsibility of maintaining international peace and security. What has become a novelty is the fact that human rights and humanitarian law violations are taken as parameters of international peace and security. Under the same resolution the Security Council defines the demands of the Libyan population as “legitimate”. So, it is not only a “securitization” process what the Security Council is actually achieving. This is at the same time a “legitimization” process of demands from an administration towards democratization and liberation. In the following paragraph, the Council urges the Libyan authorities to:

(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

(b) Ensure the safety of all foreign nationals and their assets and facilitate departure of those wishing to leave the country;

(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

(d) Immediately lift restrictions on all forms of media;

And it is at this point that the Security Council connects the situation to its referral to the Prosecutor of the ICC. But before that it “requests all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country.” Following the “request”, the Security Council

4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

It is not only the Libyan authorities that the Security Council addresses with a decisive and authoritarian tone. The member States to the UN, even though some are not party to the Rome Statute, are urged to cooperate fully with the Court and the Prosecutor.

This version of governmentality is not confined with governing the processes or outcomes but it also deals with governing certain affects and emotions. Through bringing to the fore a certain group of atrocities under the title of “international crimes”, what the ICC implicitly does is to govern emotions and reactions of the audience, especially the “overhearers”. This audience, therefore, directs their emotions showing pity to the victims of the selected atrocities and anger to the perpetrators. Orientation of reactivity to a certain channel thwarts potential reaction to other atrocities, at least not with the same degree. Detained, tortured or annihilated individuals or groups, victims of human trafficking, excluded immigrants and refugees, or people suffering through “daily” genocide or crimes against humanity, all remain in the shadow when attention and emotions are directed to the ones made “more visible” and “savage”.

Conclusion

In the twentieth century a global regime on human rights began to evolve gaining power through international institutions and covenants. Philosophical reflections on human rights confirmed and reinforced these developments. The main trend has been to take human rights and humanitarian law as “natural” categories instead of underlining their illusionary as well as constructed dimensions. The so-called “natural” feature of the legal discourse has led to a “law-like necessity” of international criminal prosecutions. It might be argued that, manifold criticisms on the rights and breaches have been “critical with a legal discourse perspective” but not “critical on this legal discourse”, the latter pointing out to conducting a critique rather than criticism. This paper is a preliminary initiative to take attention to the scantiness about critical research on the discursive power of the ICC.

Law not only travels through time but also through space. Law legitimizes both what has already been done in the past and what is to be done at present as well as in the future. Legitimization is on its move not only in time, but also in space. International criminal prosecutions legitimize humanitarian interventions, and the governments from which those interventions arise from. Just like the category of crimes against groups, communities, or the state has a policing concern though implementing this concern through modern techniques on the self; international criminal law reflects a policing concern for the international. Legitimization is in harness about what is being done indoors in addition to, and even more than, what is being done on the projected subject abroad.

43 Walters 2012, Governmentality, Critical Encounters, p. 112.


45 Jenny Edkins 1999, Poststructuralism and International Relations, Bringing the Political Back In, London, Lynne Rienner, p. 5.
The ostensible fact that the ICC is not a direct means of power in the hands of a group of states, interest groups or individuals but represents a complex and intertwined body of interests and interactions that at the end might bring even the most unexpected one(s) before court does not refute the relationship between law and structure altogether. After the foregoing struggle between law and structure resettles and comes to an end with the codification of a particular type of law, law may begin to operate as an independent body. But it does not mean that the struggle at the outset is independent from the structure. Liberal legal system cannot be blamed to operate on behalf of some groups or individuals in a forthright manner. The law which is brought to bear in the courtrooms and the procedures in individual cases may seem independent of structural factors at first sight. Still, who reaches trial, which acts are counted as criminal acts, are concerns dependent on the structure that the very law in charge in present had a fight with in the past.

That international criminal law seems to represent the most sublime and humanistic ideals whether rooted in ideational or materialist/positivist basis doesn’t mean that the particularistic discourse of the ICC has nothing to do with the international structure wherein this court moves. Moreover, through the establishment of the ICC, international criminal law has overcome the difficulties owing to the limited nature of prosecutions of the ad hoc tribunals’ system both in territorial and temporal terms. Now the range and depth of the criminal discourse has reached to an unprecedented level which stands as a fact requiring further research not only by legal scholarship but also by any social science discipline.