



Istituto di Ricerche sulla Popolazione e le Politiche Sociali

IRPPS working paper series

A COSMOPOLITAN PERSPECTIVE ON GLOBAL JUSTICE

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Maggio 2015

ISSN 2240-7332

IRPPS WP 75/2015



CNR-IRPPS

A Cosmopolitan Perspective on Global Criminal Justice

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The paper tries to identify some key principles that distinguish cosmopolitanism from other approaches in terms of individual responsibility in international affairs. Many of these principles, and notably the idea that a political community is not responsible for the wrongdoings of its rulers, have been absorbed by international law and practice. Since the end of WWII these principles have been codified in important documents, such as the Universal Declaration of Human Rights and the Nuremberg Principles. With the end of the Cold War, a further crucial development has emerged and the international community has started to be more active in carrying out, through a variety of national and international courts, investigations against egregious criminals.

But we are still far from proper cosmopolitan criminal accountability. International hearings have put at the bar the weak rather than the strong players of world politics. This confirms the realist prediction that the legal infrastructure is likely to reinforce the actual distribution of power rather than to counter-balance it. Moreover, the disproportion between the scale of international crimes on the one hand and the amount of individuals at the bar on the other hand undermines the legitimacy of individual criminal justice.

The paper explores possible evolution of to the current judicial system for international crimes following basic cosmopolitan principles. 1) The International Criminal Court should fully implement its mandate and thus also be able to cover the crime that it is more likely to be committed by strong world political players, that is, aggression. 2) The noble tradition of opinion tribunals, inaugurated by Bertrand Russell, Jean-Paul Sartre and Lelio Basso with the Tribunal for war crimes in Vietnam, should become a core aspect of a cosmopolitan criminal justice system since it is more likely to target the powerful and the winners rather than the powerless and the losers. Even if opinion tribunals are not in the position to inflict punishment, they can vindicate the reasons of the weak players. 3) While the cosmopolitan idea that key culprits should be held criminally responsible still holds, there is the risk of exonerating collective responsibility through a few scapegoats. Some fresh forms of addressing major crimes also through collective awareness need to be explored. 4) Finally, the potential of truth and reconciliation commissions, on the model pioneered by South Africa, should be further developed as a method to integrate individual criminal responsibility.

Keywords: International law, cosmopolitan law, International Criminal Court, Ad-Hoc International Criminal Tribunals, Nuremberg Principles, Universal Jurisdiction

CNR-IRPPS

Una prospettiva cosmopolitica sull'emergente giustizia penale globale

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2015, p. 25 IRPPS Working paper 75/2015

Questo paper tenta di identificare alcuni principi fondamentali che contraddistinguono il cosmopolitismo da altri approcci, in termini di responsabilità individuali negli affari internazionali. Molti di questi principi, in particolare l'idea che una comunità politica non sia responsabile per le malefatte dei suoi governanti, sono stati assorbiti dalla legge e dalla prassi internazionale. Dalla fine della seconda guerra mondiale questi principi sono stati codificati in documenti importanti, come la Dichiarazione Universale dei Diritti Umani e i Principi di Norimberga. Con la fine della Guerra fredda, è emerso un ulteriore cruciale sviluppo e la comunità internazionale ha cominciato a portare a termine, attraverso una varietà di tribunali nazionali e internazionali, indagini contro atroci criminali.

Ma siamo ancora lontani da una corretta responsabilità penale cosmopolita. Le udienze internazionali hanno messo alla sbarra gli attori deboli, piuttosto che quelli forti, della politica mondiale. Ciò conferma la previsione realista che l'infrastruttura legale può rafforzare l'effettiva distribuzione del potere, piuttosto che controbilanciarla. Inoltre la sproporzione tra la portata di crimini internazionali, da un lato, e il numero di individui messi alla sbarra, dall'altro, mina la legittimità della giustizia penale individuale.

Il paper esplora la possibile evoluzione dell'attuale sistema giudiziario internazionale seguendo i principi di base del cosmopolitismo. 1) La Corte Penale Internazionale dovrebbe dare piena attuazione al proprio mandato e quindi essere in grado di coprire il crimine di aggressione che è quello che più spesso viene commesso dagli attori più forti della politica mondiale. 2) La nobile tradizione dei *tribunali di opinione*, inaugurata da Bertrand Russel, Jean-Paul Sartre e Lelio Basso, con il Tribunale per i crimini di guerra in Vietnam, dovrebbe diventare l'elemento centrale di un sistema di giustizia penale cosmopolitica, in quanto più adatta a colpire i potenti e i vincitori piuttosto che i deboli e gli sconfitti. Anche se i tribunali d'opinione non sono in grado di infliggere delle pene, essi possono difendere le ragioni degli attori più deboli. 3) L'idea cosmopolitica secondo la quale i principali responsabili dovrebbero essere penalmente responsabili può rischiare di esonerare la responsabilità collettiva attraverso alcuni capri espiatori. Alcuni modi nuovi di affrontare i crimini principali attraverso una coscienza collettiva dovrebbero essere esplorati. 4) Infine, il potenziale delle commissioni per la verità e la riconciliazione, sul modello sperimentato dal Sud Africa, dovrebbe essere ulteriormente sviluppato come metodo per integrare la responsabilità penale individuale.

Parole Chiave: Diritto Internazionale, Diritto Cosmopolitico, Corte Penale Internazionale, Tribunali Penali Internazionali Ad-Hoc, Principi di Norimberga, Giurisdizione Universale, Tribunali d'opinione

Il Working paper è accessibile online dal sito dell'Istituto: www.irpps.cnr.it

Citare questo documento come segue:

Daniele Archibugi. *A Cosmopolitan Perspective on Global Criminal Justice**. Roma: Consiglio Nazionale delle Ricerche - Istituto di Ricerche sulla Popolazione e le Politiche Sociali, (IRPPS Working papers n. 75/2015).

Editing e composizione: Cristiana Crescimbene, Luca Pianelli, Laura Sperandio

To be published by George Andreopoulos and Henry F. Chip Carey (editors), *Justice and World Order: Reassessing Richard Falk's Scholarship and Advocacy*, London, Routledge, 2015.

* Preliminary versions of this paper have been presented at International Studies Association Annual Convention, New Orleans, 2010; at the Conference on "Cosmopolitanism and Conflict", John Cabot University, convened by Tom Bailey, Rome, October 2013; and at the Conference "Critical Foundations of Contemporary Cosmopolitanism", convened by Tamara Caraus, New Europe College, Bucharest, Romania, November 2013. I wish to thank the participants, Mariano Croce and Alice Pease for very fruitful suggestions.

Redazione: Marco Accorinti, Sveva Avveduto, Corrado Bonifazi, Rosa Di Cesare, Fabrizio Pecoraro, Tiziana Tesauo

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The emergence of a new branch of criminal and international law

A new global criminal justice system is emerging. The hope that appeared after the end of WWII in Nuremberg and Tokyo but, above all, with the Nuremberg Principles approved by the International Law Commission in 1949, has started to become a reality. As Richard Falk reminded already in the 1960s, the Nuremberg Principles were a promise that lawyers and politicians, human rights activists and concerned citizens had to grasp. The Cold War froze these hopes and any attempt to develop a robust international jurisdiction has run into a dead-end for too long.

With the conclusion of the Cold War, new important developments have occurred: the new ad hoc tribunals for the former Yugoslavia and Rwanda and, above all, the institution of the International Criminal Court (ICC) contributed to the appearance of a new branch of criminal, as well as international, law¹.

For all his life, Richard Falk has been a passionate advocate and commentator of the projections of this emerging global criminal justice. He has consistently put his legal expertise at the service of his human and political values. He has: i) commented on almost all the most important cases of criminal jurisdiction, including those of Augusto Pinochet and Saddam Hussein; ii) advocated the creation of the new international criminal court; iii) participated in opinion tribunals on war crimes². In this chapter, I will discuss to what extent such an emergent international criminal justice has contributed to achieving the cosmopolitan ideals that Richard Falk and others have envisaged.

Criminal justice has always been one of the key attributes of sovereign states: states have the power to ascertain what a crime is, who is an offender and who is innocent, and finally to punish the culprits. Modernity has progressively deprived non-state institutions, such as religious bodies, of the competence to decide when and how individuals should be punished. The fact that some institutions beyond and sometimes above the state could decide on what the crimes are and who deserve to be punished is necessarily in conflict with supreme state sovereignty. The emerging global criminal justice is therefore contesting one of the key attributes of the sovereign state. In this sense, it is intrinsically supporting a cosmopolitan aspiration, namely the idea that we need to move towards forms of political organization where states are not the exclusive source of legitimacy. But in which ways are the legal and political developments of the last twenty years satisfying cosmopolitan principles?

This chapter tries, first of all, to single out the cosmopolitan principles which should inspire criminal justice beyond borders. What are the cosmopolitan features of an independent judicial

¹ For a first attempt to provide a systematization of this new branch of law, see Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003).

² A sketch of the contributions provided by him to international justice can be found in the entry Henry F. Chip Carey, "Falk, Richard", in Deen K. Chatterjee (ed.), *Encyclopedia of Global Justice* (Berlin: Springer, 2011).

power to trial suspects in supra-national institutions³? The second part makes an attempt to assess to what extent the current situation can satisfy the cosmopolitan viewpoint. Is the emerging international criminal justice fulfilling cosmopolitan aspirations? What are its strengths and weaknesses? The third part indicates what actions are needed to develop a global criminal justice system compatible with cosmopolitan ideals.

Cosmopolitan principles

Is it possible to identify some core cosmopolitan principles for criminal justice? Cosmopolitanism has become a rather important stream of political theory, developing considerations on duties beyond border, distributive justice, political organization and global ethics⁴. There have also been important attempts to develop a cosmopolitan legal theory, which could inform the reform of existing international organizations and even the creation of new ones⁵.

The desire to make political leaders criminally accountable and the willingness to prosecute egregious crimes also in other communities have often been associated to cosmopolitanism. But the connection between the emerging global criminal justice and cosmopolitanism has not been fully explored. I suggest that there are at least six principles that could inspire politics beyond borders (see Table 1).

1) Violations of rights in one part of the earth are felt everywhere

More than two centuries ago, Kant made a very far sighted statement:

“the peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere”⁶.

This is a rather forceful declaration especially if we consider the historical moment in which it was made. At the time, European states were affirming their sovereignty and, at the same time, were colonizing all other continents. The idea that violations of rights were not merely a

³ For a variety of perspectives, see Garrett Wallace Brown and David Held (eds.), *The Cosmopolitan Reader* (Cambridge: Polity Press, 2010). See also Catherine Lu, “The One and Many Faces of Cosmopolitanism”, *Journal of Political Philosophy*, vol. 8, no. 2 (2000): 244-267; Angela Taraborrelli, *Contemporary Cosmopolitanism* (London: Bloomsbury, 2015).

⁴ See Pavlos Eleftheriadis, “Cosmopolitan Law”, *European Law Journal*, vol. 9, no. 2 (2003): 241-263; Garrett Wallace Brown, “Moving from Cosmopolitan Legal Theory to Legal Practice: Models of Cosmopolitan Law”, *Legal Studies*, vol. 28, no. 3 (2008): 327-492. I myself have tried to explore the legal foundations of a cosmopolitan democracy in Daniele Archibugi, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy* (Princeton: Princeton University Press), pp. 119-122.

⁵ For a complementary exercise, see Antonio Franceschet “Four Cosmopolitan Projects: the International Criminal Court in Context”, in Steven C. Roach (ed.), *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court* (Oxford: Oxford University Press, 2009).

⁶ Immanuel Kant, “To Perpetual Peace. A Philosophical Project”, trans. H. B. Nisbet, in HS. Reiss, (ed.) *Kant’s Political Writings* (Cambridge: Cambridge University Press, 1991), at pp.107-8.

local problem was very much challenging the abuses of power occurring inside and outside borders. Even more important is the explanation provided by Kant: violations of rights are felt everywhere not because humans are creatures of the same God or because they belong to the same race. Kant does not provide a metaphysical justification, but rather a *social* justification. The fact that “the peoples have entered into a universal community” – what today we would call “globalization” – makes it no longer possible to depict individual communities as independent.

Here lies the important difference between, on the one hand, Kant’s cosmopolitan law and, on the other hand, the much older natural law tradition. For the natural law tradition, rights exist as long as humans exist. Under cosmopolitan law, rights violations are perceived everywhere because of human interconnections. In other words, they are associated to a specific historical context.

Kant does not explain how violations of rights should be addressed. He does not mention justice, let alone punishment. But, at least, he indicates that it is conceivable to build a new branch of law, what he baptizes “cosmopolitan law”⁷, separate from public law and international law. While public law is internal to a state, and international law governs the relationship among states, cosmopolitan law does not originate from states, much as states, as well as individuals, should respect its prescriptions. Kant does not say who should establish such a cosmopolitan law, nor who should enforce it. But, at least, he believes that a further, independent branch of law should be created and that such branch should not be constrained by inter-state relations. And perhaps he is also suggesting that such a cosmopolitan law, although powerless, is nevertheless legitimate.

Kant wrote *Perpetual Peace* a few years after the National Assembly in Paris approved the *Declaration of the Rights of Man and Citizen*. The Declaration had an important ambiguity: it was approved by a *national* assembly, but it was not clear if the rights it proclaimed were exclusively those of French citizens or also those of humanity at large. Perhaps Kant tried to generalize what the National Assembly did, giving to it a more general meaning. A sort of *Cosmopolitan* Assembly could have served to provide adequate legitimacy to such a cosmopolitan law.

The Universal Declaration of Human Rights (UDHR) and the several covenants it generated can be seen as a further development of Kantian cosmopolitan aspirations. First of all, because the UDHR provides a list of rights, something that was still lacking in Kant. Secondly, because the UDHR has been formally approved by the governments of all countries; states themselves have been willing to concede that there are universal rights above them. We may discuss if this list is too broad or too narrow, we may complain that the Declaration does not provide guidelines for implementation, we may argue that there is no punishment associated to the

⁷ I have addressed these issues in D. Archibugi, “Kant, Cosmopolitan Law and Peace”, *European Journal of International Relations*, vol. 1, no. 4, 1995, pp. 429-456. For an historical account, see G.W. Brown, “Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution”, *History of Political Thought*, vol. 27, no. 4, 2006, pp. 661-684.

violation of these principles. But, at least, we have a list subscribed by all UN member countries: the violation of rights is no longer a state problem only.

2) Human rights violations should be globally accountable

Much progress has been made to better identify human rights violations and how they can also be protected through the involvement of agents outside the state⁸. External governments, international organizations and non-governmental organizations can now contribute to the assessment of national human rights regimes. Human rights rankings are becoming a very popular exercise and the press and media devote a lot of attention to them.

The widespread human rights machinery developed since the second half of the XX century allows international organizations to carry out investigations, to identify culprits and to demand that member states put in place appropriate remedies. Violations of human rights are not only felt everywhere, but can also be condemned through legal devices. In a planet divided into sovereign states, the fastest and most effective way to implement remedies for human rights violations is to act through those who exercise control over territories, namely governments. If rights are violated, the inter-governmental human rights machinery may require individual governments to recognize the problem, work to sort it out and punish the culprits.

But, as the long history of the former UN Human Rights Commission and now Human Rights Council (HRC) shows, the real problem is how to protect human rights when the perpetrators of abuses are the governments themselves. The procedures of the HRC and of the various international organizations are slow and ineffective. Since they exercise power, governments and their officers have mostly been immune from the consequences. The fact that those responsible for crimes are government agents has made the human rights regime dependent upon diplomatic negotiations, with the consequence that too often investigations have been inconclusive and procedures have not led to clear indications. International organizations cannot inflict individual punishment and collective punishment, such as sanctions, is not effective. Is the cosmopolitan principle still useful if there are no direct consequences on perpetrators? The principle of global human rights violations accountability has been established but it has not yet been implemented.

3) A government agent is individually responsible for his/her actions

The Tribunals of Nuremberg and Tokyo have wiped out two old dogmas of international law by stating that:

- i) An agent that acts on behalf of its state *is not* immune from responsibility.
- ii) Obeying governments' orders *does not* exonerate individual responsibility.

Much has been written about the legitimacy of the claims made in the hearings of Nuremberg and Tokyo, but lawyers have done their best to restate and refine the principles used in these celebrated trials: when in 1949, the UN International Law Commission approved the

⁸ This is, for example, at the core of Richard Falk, *Human Rights Horizons. The Pursuit of Justice in a Globalized World* (London: Routledge, 2001).

Nuremberg Principles it clearly listed a limited number of crimes under international laws. The Nuremberg Principles have been often used not only in theory, but also in courts. Over the last decades, the defence strategy of suspects for international crimes has frequently changed: individuals at the bar have less and less defended themselves claiming individual immunity because they were acting on behalf of their government or because they were executing orders. When these arguments have been used in Courts, they have proved progressively less effective and eventually counter-productive.

The generalization of the Nuremberg Principles includes an important cosmopolitan principle: state norms are no longer the supreme source of legitimacy to guide individual behaviour⁹. Of course, this does not apply to all norms, but only to the limited subset that the Nuremberg Principles defined as crimes under international law. The fact that individuals should respect not only the rules of the state, but also the rules of the international community is an important breach of state sovereignty. The occurrence that, when there is a conflict among the two the latter should prevail, is a powerful cosmopolitan value. The individual's loyalty towards his/her political community has precise limits recognized by international law.

4) Punishment for crimes should be individual and not collective

The principle that crime and associated punishment is individual and not collective is largely shared within political communities: in any legitimate society, nobody is criminally responsible for crimes committed by others. This principle, however, is not automatically extended to the international sphere.

The *ius gentium* tradition assumes that when a government commits an international crime, all the community could bear the responsibilities. A late student of the law of nations tradition, Adam Smith, clearly articulates this position:

If the government commits any offence against a neighbouring sovereign or subject, and its own people continue to support and protect it, as it were, in it, they thereby become accessory and liable to punishment along with 'it'. As by the Roman law, if any of these slaves which every private person kept for his own advantage had done any damage to another, one of these two things was to be done, he must either keep the slave no longer, or pay the damage. In like manner a nation must either allow itself to be liable for the damages, or give up the government altogether.¹⁰

According to this tradition, there is a direct connection between the ruler and the ruled. It is implicitly assumed that the ruled have the possibility to get rid of the ruler that commits crimes and if the ruled are not willing or not able to do so, they should bear the consequences. The *ius gentium* is contradictory since, in many versions, it denies the people's right to resist their

⁹ For an assessment, see Vesselin Popovski, "Legality and Legitimacy of International Criminal Tribunals", in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds.), *Legality and Legitimacy in Global Affairs* (Oxford: Oxford University Press, 2012).

¹⁰ Adam Smith, "The Law of Nations", in Adam Smith, *Lectures on Jurisprudence* (1766), edited by R.L. Meek, D.D. Raphael and P.G. Stein (Glasgow Edition) (Oxford: Oxford University Press, 1978).

ruler.¹¹ Whether or not the people are legally authorized to revolution, there is the basic notion of the total identity between the responsibilities of the governors and those of the governed.

Cosmopolitans have an opposite view. Even when crimes are committed by the head of government, this does not necessarily mean that the whole community is responsible. The Nuremberg Principles have already ascertained that, as a cosmopolitan *duty*, a government agent is individually responsible including when representing a state or obeying orders. But it should also be affirmed a specular cosmopolitan *right*, namely that a political community should not be punished for the crimes of its ruler.

Individual responsibility and the lack of collective responsibility should be seen as a duty/right pair. Identifying the duties of the individuals also helps to affirm the individual right to protection from retaliations. There is a reason why cosmopolitans hold this view: cosmopolitans believe that the “social contract” between the ruler and the ruled – which is the theoretical assumption behind Adam Smith’s position – is an unbearable fiction. Why should it be assumed that an implicit social contract exists within a state? If any such contract exists, it is intellectually and, above all, politically more robust to conceptualize it at the global rather than at the state level.

Realists will also argue that it is very difficult to hold individually responsible those in the government. If punishment for an international crime should be inflicted, it is easier to impose it collectively rather than individually. Again, Adam Smith makes this position clear.

Another cause is that it is often very difficult to get satisfaction from a subject or from a sovereign that may have offended. They are generally in the heart of the country and perfectly secured. If we could get at them, no doubt they would be the first to objects of our resentment, but as this is impossible we must make reprisals some other ways. We have suffered unjustly on account of our connections, let them also suffer unjustly on account of theirs. In war there must always be the greatest injustice but it is inevitable.

The cosmopolitan position is, again, different. It holds that reprisals amount to the “greatest injustice” against peoples who are not the perpetrators. These forms of punishment should be avoided and alternative forms of punishment should be pursued. Out of an emergency, cosmopolitans share the libertarian position of the presumption of innocence expressed by William Blackstone and his followers: “The law holds it better that ten guilty persons escape, than that one innocent party suffer”¹². Cosmopolitans believe that the presumption of innocence, so well-developed within liberal states, should also hold across nations, and especially when supposed collective responsibilities are at stake. Otherwise, both in war and in peace, the use of force does not administer justice but retaliation. For this reason, individual responsibility is also needed to prosecute, when needed, those “sovereigns perfectly secured”.

¹¹ For an analysis of the various versions of the *ius gentium* on the right to resistance, see Daniele Archibugi, Mariano Croce and Andrea Salvatore, “Law of Nations or Perpetual Peace? Two Early International Theories on the Use of Force”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2014).

¹² W. Blackstone, *Commentaries on the Laws of England* (London: Cavendish, 2001).

5) Judicial institutions can constrain and moderate the use of power

Power needs to be tamed and the greater the number of the players to monitor power, the less likely that it will be abused. Independent judicial institutions are instrumental in minimizing the abuses of the executive power. The idea that the judicial power and, more generally, the legal construction, could contribute to the taming of power has always been controversial. Thrasymachus believed that “justice is nothing but the advantage of the stronger”¹³, and contemporary realists such as Danilo Zolo share the same view¹⁴. Constructivists hold the opposite view. Luigi Ferrajoli, for example, has argued that strong players do not need the infrastructure of law to get their power affirmed and therefore, even when legal rules are generated by the strongest, they ultimately turn out to be beneficial to the weaker¹⁵.

Can the same principle be extrapolated and applied to international politics? To what extent would a global judicial power defend the interests of strong and weak players? Pure realists assume that the judicial power ultimately responds to the interests of the strongest players since those with more resources are able to better shape ideology and norms. The argument was repeated again and again by commentators of the Tribunals of Nuremberg and Tokyo, and it has been used again with reference to the special Tribunals for the ex-Yugoslavia and Rwanda.

A cosmopolitan thinker does not necessarily ignore the realists’ arguments, especially if they are meant to interpret the state of things. But a cosmopolitan might also note that, once a new practice of law is established, this is less likely to respond to the interests of the strong. Or, to be more precise, the judicial infrastructure becomes contestable and all parties, strong and weak, may try to use it to their advantage. Norms and institutions are difficult to introduce but once they are in place, they are rather persistent. Laws and courts, once established, have their own life and can evolve along very different lines than those for which they were created. The principles of Nuremberg, for example, were strongly supported by the United States and their allies in the late 1940s. They were established to affirm that the WWII winners were not only militarily but also morally superior to the losers. But many of the principles were later used against the United States and the Soviet Union and helped to constrain their abuses of power. Richard Falk has often denounced the way in which courts have bowed to political authority but he has nevertheless expressed a faith in the capability of laws and norms to offset executive power.

6) The players of a global justice should not be governments alone

Much of the legal construction of post-WWII is based on inter-governmental consensus. But judicial institutions partially betray this spirit. Although governments voluntarily decide when and how to be party to international judicial institutions, once Courts are instituted, they are based on the fundamental principle of the independence of the judicial power. Judges of the

¹³ Plato, *The Republic*, book I.

¹⁴ D. Zolo, *Victors’ Justice: From Nuremberg to Baghdad* (New York: Verso Books, 2009).

¹⁵ Luigi Ferrajoli, *Dei diritti e delle garanzie* (Bologna: Il Mulino, 2013).

International Court of Justice (ICJ) and of the International Criminal Court (ICC), although nominated after cunning diplomatic negotiations, are requested to proceed according to their beliefs and not according to the interests of their state. Controversies could therefore be addressed not only through executive bodies such as the Security Council, but also in compliance with a genuine interpretation of international law. And crimes under international law could also be persecuted by independent judicial institutions.

Of course, the ICJ and the ICC are not sufficiently independent from the executive power. The fact that judges are nominated by member states makes it difficult to preserve their independence. We know too well, for example, that judges of the ICJ seldom move away from what they perceive to be in the interest of their nation¹⁶. The story of the ICC is still too young to be assessed but it may sadly lead to similar results.

At the moment, there are not viable alternatives to guarantee the independence of judicial institutions. In a pure cosmopolitan spirit, the judicial role of the ICJ and of the ICC could be reinforced if judges were designated by institutions independent from states. Alternative institutions, such as a World Parliamentary Assembly, are a long way off from being instituted¹⁷. But, again, it should not be ignored that, with their very existence, formally independent international judicial institutions have started to erode the monocratic role of governments in international politics.

Table 1 recaps the arguments of the six cosmopolitan principles.

¹⁶ See the statistical analysis of Eric A. Posner and Miguel F.P. de Figueiredo, “Is the International Court of Justice Biased”, *Journal of Legal Studies*, vol. 34, no. 2 (2005): 599-629.

¹⁷ Richard Falk and Andrew Strauss have bravely and repeatedly advocated the creation of a World People’s Parliament. See their papers in Richard Falk and Andrew Strauss, *A Global Parliament: Essays and Articles* (New York: Committee for a Democratic U.N., 2011). I have argued that such a Parliament would be the ultimate source of legitimacy for global judicial institutions. See Archibugi, *The Global Commonwealth of Citizens*, cit., pp. 165-171.

Table 1 – Accomplishments and problems of cosmopolitan criminal accountability and punishment

	<i>Cosmopolitan principles</i>	<i>Accomplishments</i>	<i>Problems</i>
1	Violations of rights in one part of the earth are felt everywhere	Through the UN UDHR and subsequent Covenants, there is international consensus on what human rights violations are	The international human rights machinery is highly ineffective in identifying individual and governmental responsibilities. Rights are felt everywhere, but very little is being done to defend them
2	Human rights violations should be globally accountable	Through the Principles of Nuremberg, there is an agreement on a selected list of international crimes that can be prosecuted by remote national courts and by international tribunals	The universal jurisdiction by national courts is ineffective. The administration of international criminal justice is still highly selective and biased. Not all states have adhered to the ICC. Aggression, the crime that it is most likely to concern powerful governments, is still without a definition
3	A government agent is individually responsible for his/her actions	The principle has been largely accepted by both national and international Courts	Government agents of powerful states have de facto benefitted from immunity for the international crimes they have committed since political arguments have prevailed
4	Punishment for crimes is individual and not collective	The principle is accepted and there is an increasing effort to exclude civilians in case of war	Wars continue to be fought even when they jeopardize the innocent. The so-called “humanitarian interventions” have produced a large number of victims among the innocent
5	Judicial institutions can constrain and moderate the use of power	Judicial institutions are formally based on impartiality	So far, judicial institutions have targeted the weak and the losers rather than the strong and the winners
6	The players of a global justice should not be governments alone	International judges of the ICJ, ICC and ad hoc tribunals should act independently	International judges are nominated by assemblies of member states and are de facto controlled by governments

Source: Author’s elaboration.

From discomfort to new hopes

If we look at the six principles of cosmopolitan justice identified above, some steps forward have been taken. We are far from reaching the supremacy of the legal construction already recommended by Hans Kelsen¹⁸, but in the nearly 70 years since the end of WWII many steps have been taken in the direction of a cosmopolitan judicial power. Progress has been achieved in each of the areas, even if in none of them this progress is definite. Column 2 of Table 1 tries to synthesize these achievements.

While slowly evolving, this legal construction had also to meet new historical conditions. In the same period, there have been new areas of modern warfare that have not been properly addressed legally and that would require a much more robust cosmopolitan enforcement. Nuclear weapons and their proliferation have obviously an impact on all the citizens of the world and would require a proper cosmopolitan monitoring. But they are still treated as an issue of national security and none of the most important members of the nuclear club is disposed to accept any form of external control.

¹⁸ Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944).

Since the end of the WWII, aerial bombing has frequently been used. It has been neither condemned nor banned from international judicial institutions for its inability to distinguish between combatants and non-combatants, crime perpetrators and victims. It is true that over the last decade they have become more precise and the risk of provoking what has been labelled “collateral damages” has decreased. But not even the impressive technological development achieved has satisfied the cosmopolitan principle of individual responsibility, since – as the interventions in Kosovo 1999, Iraq, 2003 and Libya 2011 show – the killing of civilians continues to be huge. If these military interventions are also motivated by the desire to protect individuals from international crimes perpetuated by the incumbent governments, they have fallen short of their humanitarian target. On the one hand, they have often generated more victims than those that they saved; on the other hand, seldom did they manage to punish individually the responsible of the original crimes. Moreover, warfare through aerial bombing has become a form of punishment that substitutes a judicial review.

The procedure used to justify and ultimately carry out these so-called humanitarian interventions has nothing cosmopolitan about it. The use of force has been decided by states, it has been used as a bargaining chip in inter-state relations, and it has followed the individual power capacity of each state. When crimes are committed, strong states and their agents are immune from punishment, regardless of how serious their crimes are.

Can international criminal justice help to rebalance the situation? International tribunals have become more frequent, and their cases have gained greater resonance. Two things emerge from the chronicle of the last twenty years. The first is that the judicial devices have multiplied. The activism of national courts under universal jurisdiction has substantially increased, ad hoc institutions have proliferated and the ICC has been active for more than a decade. Developments have been substantial and lawyers and international relations scholars have worked hard to provide typologies of the various tools. These combined developments justify talking about an emerging global justice. Table 2 reports some of the paradigmatic examples of the instruments, tribunals and accused.

Despite the existence of different Courts, there is certain repetitiveness in the way that trials have operated. Both the claimants and the defendants have used similar arguments and the interest of public opinion and of the media, which (have been) initially are/were rather eager to follow, started to decline. The idea of an individual criminal responsibility flourished as one of the hopes generated by the end of the Cold War, and was very much nurtured by the hope that the most vicious dictators of the world could be held accountable for their crimes. A hope that is progressively vanishing.

Table 2 – Forms of the Emerging Criminal Justice

<i>Typology of the emerging global criminal justice</i>	<i>Court</i>	<i>Striking Accused</i>
National tribunals instituted after civil or International wars	Supreme Iraqi Criminal Tribunal	Saddam Hussein
National tribunals applying universal jurisdiction	Belgian Courts empowered by a wide-ranging Law from 1993 to 2003 Spanish Court	Although the prosecution stopped in the preliminary stages, Ariel Sharon, Yasser Arafat, George H.W. Bush, Colin Powell and Dick Cheney, among others, were indicted. Augusto Pinochet
Ad hoc International tribunals with limited geographical and temporal jurisdiction	International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda	Slobo Milosevic and Radovan Karadzic
Ad hoc mix tribunals (in force thanks to agreements between National governments and International organizations) with limited geographical jurisdiction	Special Court for Sierra Leone Extraordinary Chambers in the Courts of Cambodia	Charles Taylor Kang Kek Iew
Permanent international institutions	International Criminal Court	Omar Hasan Ahmad Al Bashir

Source: Author's elaboration.

The second, and perhaps decisive, fact is that the connection between the crimes committed and the trials continue to be incommensurable. The scale and atrocity of the international crimes committed do not find any adequate historical reconstruction and punishment in the icy court-rooms. The mismatch between crimes and perpetrators at the bar was already noted by Hannah Arendt as one of the most striking elements of the trial of Eichmann¹⁹. Again and again, these trials have shown that the crimes committed can neither been punished nor forgotten²⁰.

It is sufficient to see how short the list of suspected and culprits at the bar is vis-à-vis the list of the victims to realize the enormous disproportion which exists. Crimes under international law have generated, only in the last twenty years, millions of victims. People at the bar are a few dozens. The disproportion between criminals and victims is very distressing, but this should not be used as an argument to sink the emerging global criminal justice. From its very origin, global criminal justice aimed to have a symbolic power. Is the basic message about the accountability of power reaching those who exercise command?

What continues to be disturbing about the emerging criminal justice is not only that the suspects are very few, but that they appear to be all from one side. If we look at the rather few prosecutions at the ICC, people at the bar are among the losers and weak players of international politics and ultimately those averse to the political agenda of Western powers. This raises important concerns about at least one of the cosmopolitan principles, namely the need to use the judicial power as a guarantee for the weak rather than as an instrument in the hands of the strong. When legal devices allowed charging of potent political players, as happened when the

¹⁹ Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (London: Penguin, 1963).

²⁰ Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner* (Paris: Editions Odile Jakob, 2002).

Belgian Parliament empowered national judges to act widely on universal jurisdiction, the Parliament soon had to remove the law and to reintroduce norms aligned to the standards of the other European countries²¹. The ICC, which should become the principal judicial tool, is working on cases from the African continent only.

We have to again wonder: can the emerging global criminal justice become an additional check and balance against the actual distribution of power? Historical records, so far, indicate that it does not. Trials have mostly been a sanctification of the winners over the losers. No doubt those at the bar were active perpetrators of egregious crimes. No doubt these crimes deserved to be uncovered also through legal investigations. But, as Nuremberg and Tokyo evidently demonstrate, those at the bar were not only the criminals: they were also the losers.

Towards cosmopolitan justice

Cosmopolitans have good reasons to be happy about the emerging global criminal justice, but also some very good reasons to be worried about the shape it is taking. What appeared a great opportunity to control the indiscriminate use of violence, to limit state sovereignty, to increase the accountability of political leaders and, ultimately, to tame power is still having uncertain results. After twenty years, it seems that the development of global criminal justice corroborates Carl Schmitt's thesis that the judicial infrastructure is a tool to assert the moral and not just the political and ultimately military superiority of the winners over the losers²².

It is very unlikely that the existing architecture of the emerging global criminal justice will collapse. As it is often the case with international institutions, they may experience periods in which they are more active and others in which they are more sleepy. Unfortunately, there is not yet a connection between the activism of the ICC and of other courts and the international crimes committed: the global criminal justice is more likely to be influenced by international politics than by the scale and ferocity of crimes.

It is, however, far too early to sink the original hopes that have inspired the dream of an impartial global criminal justice system. Its future developments are likely to be associated to contestation in which anti-hegemonic political players, from progressive governments to non-governmental organizations, from concerned public opinion to opposition movements, will push

²¹ Malvina Halberstam, "Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics"; *Cardozo Law Review*, vol. 25, (2003-2004): 247-266. More generally on the Princeton Principles on Universal Jurisdiction (Princeton: 2001, at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) made a valuable attempt to revitalize the notion. For the analysis of some paradigmatic cases, see Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2006).

²² The most direct articulation of Carl Schmitt's position is the response he gave when he was jailed and interrogated by the Allied in Nuremberg in 1945-47. See Joseph W. Bendersky, "Carl Schmitt and Nuremberg", *Telos*, Thursday, July 19, 2007, at <http://www.telospress.com/carl-schmitt-and-nuremberg/>. *Telos* has also published a fourth and last interrogation. For the complete text of the interrogations see, in Italian, Carl Schmitt, *Risposte a Norimberga* (Roma-Bari, Laterza, 2006).

the agenda in a genuine cosmopolitan direction²³. In line with the hopes of legal pluralism, the proliferation of norms and institutions increase the possibilities of accountability, and also of powerful players²⁴. What can be done?

1) Towards the full implementation of the ICC

The ICC should still be able to fulfil its promises. We are very far from obtaining the ICC that was envisaged at the beginning of the 1990s. The authority of the ICC will be measured against its capability to impeach not only defeated political players, but also the winning ones. If this does not happen, the ICC will remain a judicial instrument to further burden the losers and will hardly acquire its much needed aura of impartiality.

The question remains if special and ad hoc tribunals will flourish in the next decade. A Kelsian vision about the unity of law would recommend integrating the activities carried out by national courts under the universal jurisdiction principle and those of ad hoc tribunals with those of the ICC. But legal pluralism, on the contrary, recommend preserving a variety of institutions and norms since this could allow to better tailor criminal justice to local contexts²⁵. The real problem, however, is to make sure that there is a consistent body of laws to make sure that international crimes are clearly identified ex-ante and not ex-post.

The ICC will become the core criminal juridical institution only inasmuch as it will increase its efficiency in terms of timing, effectiveness and costs. So far, most of its actions have been constrained by governments and also by a strong reluctance to commence proceedings that might be detrimental to powerful players. Realists would not be surprised. The impartiality of the Court is also seriously hampered by the fact that many states have not yet signed the Rome Statute. This generates the impression that the world is composed of two set of countries, those that are under its jurisdiction and those that are immune from it.

There is an important area in which the competence of the Court is hampered: the crime of aggression. While the ICC is already operative for three of the four international crimes under its jurisdiction – genocide, war crimes and crimes against humanity – the definition and the implementation of the fourth, aggression, has proven very controversial. Aggression is the typical crime that concerns powerful rather than weak players and, in the current international context, is the offense that may concern also the militarily dominant countries. Only the 2010 Kampala Conference managed to produce a definition of “aggression”, giving competence to the Court to exercise its jurisdiction in 2017 only. What has already been envisaged in novels

²³ See Richard Falk, “The Criminal Accountability of Leaders”, in Id., *The Costs of War. International Law, the UN and World Order after Iraq* (London: Routledge, 2008).

²⁴ See Mariano Croce, “All Law is Plural. Legal Pluralism and the Distinctiveness of Law”, *Journal of Legal Pluralism*, vol. 44, no. 65(2012): 1-33.

²⁵ See Alexander K.A. Greenawalt, “The Pluralism of International Criminal Law”, *Indiana Law Journal*, vol. 86(2011): 1063-1129.

and movies²⁶ could hopefully become a reality. But ultimately state parties have been given the possibility to opt out, making an effective jurisdiction over the crime difficult, if not impossible, to achieve. Moreover, the ICC Prosecutor has to notify the Security Council, which in turn can delay the procedure²⁷.

It is perhaps in vain to envisage a judicial power fully autonomous from political power. Although a liberal constitution aims to guarantee the separation of powers and the independence of the judicial from the executive, this is seldom the case, even within consolidated democracies. Nobody knows how the activities of the ICC will evolve. Realist predictions doubt that it will ever become an institution able to balance power in international politics. Constructivists are more optimistic. Cosmopolitans do not need to align with either of these schools, since their aim is prescriptive rather than descriptive. But cosmopolitans would certainly argue that it is very unlikely that the ICC and other international organizations involved will become more active and impartial without due pressure exercised by non-governmental organizations²⁸.

The ICC, as any other international tribunal, will always be under political constraints: the judges are nominated by member countries, and the budget is also provided by the latter. The only way to contrast the influence of national governments is to make the ICC accountable in the eyes of a vibrant and demanding public opinion²⁹. Denouncements of human rights violations carried out by non-governmental organizations such as Amnesty International, investigations by inter-governmental organizations such as the Human Rights Council, will certainly pressure the ICC state parties and the ICC staff into being more daring.

The role of NGOs has been crucial not only to establish the ICC³⁰, but also to press for the achievement of a genuinely independent global criminal justice. Through the Coalition for the International Criminal Court (CICC)³¹, a large number of NGOs have federated their competences and are able to provide advice as well as criticism to the ICC and national governments.

2) More active role of Opinion Tribunals

²⁶ In Robert Harris' *The Ghostwriter*, London, Hutchinson, 2007 (and the film with the same title directed by Roman Polanski, 2010) a former UK Prime Minister is prosecuted by the ICC for war crimes.

²⁷ For a discussion, see Matthew Gillett, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review*, vol. 13, no. 4 (2013): 829-864.

²⁸ The argument is forcefully stressed by Marlies Glasius, "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations", *Human Rights Quarterly*, vol. 31 (2009): 496-520.

²⁹ John Gastil, Colin J. Lingle and Eugene P. Deess, "Deliberation and Global Criminal Justice: Juries in the International Criminal Court", *Ethics and International Affairs*, vol. 24, no. 1 (2010): 69-90, make an innovative proposal to increase the legitimacy and impartiality of ICC by using also popular juries.

³⁰ The role of NGOs in the generation of the ICC is well documented in Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London: Routledge, 2006).

³¹ CICC is a network of 2,500 civil society organizations active on human rights issues and provides updated and competent information on the activities carried out by the ICC. See <http://www.iccnw.org/>

The emergent global criminal justice should not be limited to what is allowed for by governments and inter-governmental organizations. It is equally important that the judicial rhetoric and devices are used by civil society. Opinion tribunals have already played a crucial role since they are affirming the principles that: i) crimes cannot be defined only by states and inter-state institutions; and ii) the right to judge (even if not to punish) is not a monopoly of governments.

This important tradition, inaugurated by Bertrand Russell, Jean-Paul Sartre and Lelio Basso for war crimes in Vietnam in the 1960s, has played a fundamental role in using the judicial procedure to denounce some of the most important crimes of the last 50 years. The Permanent International Peoples Tribunal, hosted in Rome by the International Basso Foundation, has been one of the ventures particularly active in the issue³². Other ventures have been organized elsewhere. Particular influential in the last decade has been the World Tribunal on Iraq, that operated from 2003 to 2005, and which was opened by an insightful speech by Richard Falk³³.

In the long decades between the Nuremberg Principles and the early 1990s, opinion tribunals have been the most important initiatives to assess and denounce international crimes. The creation of the more official institutions over the last twenty years has not made opinion tribunals redundant. On the contrary, they are a crucial component and represent one important way according to which NGOs, human rights organizations and public opinion at large could investigate and condemn when the prosecution of international crimes is blocked by political constraints.

Opinion tribunals can provide inputs to the ICC, sometimes producing evidence that the ICC itself has not been able or willing to collect. Although opinion tribunals can be partisan, they can act in a timely way and outside the straitjacket of inter-state relations. If they are promoted by authoritative and charismatic personalities, and if they uncover impartially important information, they can have an impact on public opinion that it is comparable and complementary to the more cautious international tribunals.

3) Envisaging collective punishment as well as individual punishment

The principle of individual, rather than collective, responsibility that cosmopolitans apply to global politics certainly has some limits. Hitler and the defendants at Nuremberg were certainly responsible for the atrocities of WWII, but they could have not carried out their crimes without a much wider collaboration from the German people. George W. Bush was re-elected in free

³² See Gianni Tognoni (ed.), *Tribunale permanente dei popoli. Le sentenze* (Verona: Bertani editore, 1998). For a first narrative of international opinion tribunals, see Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals. Mobilizing Public Opinion to Advance Human Rights* (Houdmills: Palgrave, 2001).

³³ Documents about the activities of this Opinion Tribunal are reported in Richard Falk, Irene Gendzier and Robert Jay Lifton (eds.), *Crimes of War. Iraq* (New York: Nation Books, 2006). See also his "World Tribunal on Iraq. Truth, Law and Justice", in Falk *The Costs of War*, cit. For a description and discussion, see Craig Borowiak, "The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability", *New Political Science*, vol. 30, no. 2 (2008): 161-186.

and democratic elections less than two years after the invasion of Iraq. The principle of individual responsibility still applies, especially since previous forms of collective sanctions are not effective forms of punishment, but the fact that individuals should not be punished through violent methods does not necessarily mean that they are totally innocent.

Can collective forms of punishment be envisaged to complement individual criminal responsibility? Collective responsibility should be addressed not in the form of retaliation, but rather as a form of awareness of a community to the consequences of its actions. US occupation troops in Germany at the end of WWII forced German citizens to visit nearby concentration camps. This was a remarkable case with the combination of awareness for the population, punishment for the key figures, but also reconstruction through the Marshall Plan. The Germans were the losers, and we have to wonder: is it possible to envisage similar forms of collective punishment through awareness for the winners too?

Perhaps, democratic societies may accept that they should be aware of the consequences of their international actions even when they are the winners. Let's imagine, for example, organizing special debates, broadcasted by the media, where the American and European public are informed of the effects of warfare on civil population in Vietnam, Kosovo, Iraq, Libya and elsewhere. Such a "punishment through awareness" could become an occasion for a global accountability not only of the leaders, but also of the peoples that, at least in democratic societies, have elected governments that commit international crimes.

4) Combine individual punishment with reconciliation

The magnitude of international crimes should also be compared with the number of peoples that are brought to justice. Take, for example, the genocide that occurred in Rwanda in 1994, when an estimate ranging from half a million to a million of people (were killed in just a few weeks. The International Criminal Tribunal for Rwanda has managed, so far, to bring to justice 95 individuals only, a number that represents only a very few of the criminals involved in the mass killing.

To provide justice to the Tutsi community, an impressive number of Hutus should be put at the bar, trialled and jailed, in a scale that goes beyond the potential of criminal justice. When crimes are massive, punishment seems to be useless as well as impossible. An alternative is what the South Africa of Nelson Mandela tried to achieve after the end of apartheid in 1994: reconciliation³⁴. Reconciliation is based on the idea that the coexistence of different communities needs to be based on truth and on the acceptance of common responsibilities. This

³⁴ Particularly stimulating the anthropological perspective discussed by Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2011). For an analysis of several cases of reconciliation, see Naomi Roht-Ariazza and Javier Mariezcurrena (Eds.), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006). See also Luc Huyse and Mark Salter (eds.), *Justice traditionnelle et reconciliation après un conflit violent. La richesse des expériences africaines* (Stockholm: Institute for Democracy and Electoral Assistance, 2009).

does not impede that some of the egregious culprits are subsequently also punished according to criminal law, but it allows involving a larger number of participants to the hostilities. Reconciliation is also a typical communitarian instrument: it is needed to re-build the trust and friendship that any community needs to survive and prosper. But in many occasions, the cosmopolitan external accountability could help to foster and facilitate reconciliation, especially when third parties could act as brokers and referees.

Conclusions

The last twenty years have marked an important milestone: international crimes can be persecuted even when they are committed by political leaders. This is happening for a very tiny number of criminals, but at least there is not any longer the certainty of impunity. Cosmopolitans can be satisfied that egregious crimes are no longer under the exclusive jurisdiction of national authorities. Criminal justice, a crucial component of state sovereignty, should face the checks and balances of international law, institutions and courts. So far this is only possible for international crimes but the theoretical implications are much wider: the legal construction could progressively lead to a global judicial framework. This is, indeed, an important change not only for our understanding of individual responsibility, but also of the dynamics of world politics.

The hope that an emerging global criminal justice could contain violations committed by the agents of powerful states has, so far, not materialized. As predicted by realists, the emerging global criminal justice has rather reinforced rather than counterbalanced the current distribution of power. Powerful agents have managed to manipulate and to use criminal justice much better than the weak agents. However, constructivists may be right in arguing that there is no certainty that this situation will perpetuate in the future. The seeds of the global criminal justice can bloom in unexpected directions.

In this chapter I have indicated that a progressive development of the emerging global criminal justice is not only associated to what judges and ambassadors, governments and lawyers will do. It is also associated to the role that the global civil society will be able to play. I have indicated four actions that should be taken in order to make the emerging global criminal justice align with cosmopolitan aspirations.

First, the ICC is likely to be effective in its aims only if it manages to integrate the rather few trials with an ample debate that involves NGOs. Trials at the ICC are helpful if they are amplified by local ventures and aim to reconcile society. I have also noted that if the crime of aggression is not properly defined, the ICC will continue to be an instrument in the hands of the powerful players over the weak players. Second, opinion tribunals should be reinvigorated by the existence of new Courts and their role should be more important today than in the past. Third, individual criminal responsibility should also be combined with forms of collective awareness about the crimes committed. Fourth, criminal responsibility should also be combined with a strategy of reconciliation, which could be fostered and facilitated by external third parties.

The cosmopolitan hope of an independent and impartial criminal justice system continues to be a dream. But the remarkable changes of the last twenty years have clearly shown that there is no progress without dreams. And that, as Richard Falk has shown us for several decades, dreams come true when there are agents willing to fight for them.

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