Chapter 3  The International Criminal Court five years on: Andante or Moderato?

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1. The failings of the current world community

If you pause for a moment from the hubbub of daily life and cast a glance at the legal standards and institutions of the world community as they have evolved over the last thirty or forty years, you are bound to feel dispirited. The great promises heralded in the 1960s and 1970s – the upholding of forward-looking notions such as obligations erga omnes, “obligations owed to the international community as a whole”; jus cogens, the aggravated responsibility of States, the common heritage of mankind, the right to development – have remained unfulfilled. Thirty or forty years later, these notions have not yet been acted upon by States or judicial organs. They still do not have the strength to guide the daily action of the primary actors on the world stage. Furthermore, the body of law designed to restrain States’ resort to military force has remained replete with loopholes: neither the doctrine of anticipatory self-defence nor that of resort to force on humanitarian grounds have been clarified by states or the United Nations. The major flaws of international humanitarian law (in particular: the failure to restrain the conduct of hostilities through the enactment of detailed and precise legal standards designed better to protect civilians, and the failure to ensure impartial and steady monitoring of breaches of the law by the combatants) have not been remedied. Human rights law, the most significant hallmark of the new international community reborn in the aftermath of the Second World War, has not made much headway. The gap between standard-setting and implementation remains conspicuous. The replacement of the UN Human Rights Commission with the Human Rights Council has not involved any major change: that body still remains in the hands of sovereign States, bent on playing politics more than ensuring respect for human dignity. The law of the sea has been stripped of its most progressive concept, that of “common heritage of mankind”, thus returning to traditional notions based

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1 Now proposed in Article 42 of the International Law Commission’s Articles on State Responsibility.
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on reciprocity and joint interests. The law and institutions of development, of trade, in particular the WTO, as well as the law of the environment are plodding along, strained by the effort to keep up with the mushrooming of often intractable problems of poverty, underdevelopment, large-scale pollution and global warming.

In short, many lofty legal concepts have not gone beyond legal rhetoric; they have not been translated into daily living reality. There still is a marked deficit of “community sentiment” in the world community, that is, the feeling that one belongs to the same community and consequently has the duty both to work on its behalf (rather than only to promote its own interests) and to induce the other member to do likewise.

Moreover, we are still faced with a striking contradiction: the five permanent Members of the Security Council, who make up the “Board of Directors” of the international community and under the UN Charter should be responsible for ensuring peace and stability, are the biggest manufacturers and exporters of weapons, which they primarily export to developing countries. On top of this, fundamentalist ideologies are pervading the world: some in favour of violent subversion and terror, others – admittedly not dangerous albeit preoccupying – in favour of the overall exportation, if need be by force of arms, of western democracy to the whole world. These ideologies, whatever their implications, are a far cry from the ideals enshrined in the UN Charter: peace, respect for human rights (that is, tolerance and understanding), cooperation, and self-determination of peoples, that is, freedom of peoples from the oppression of foreign countries.

2. The ICC – one of the few bright spots in the world community

I have given you a quick sketch of the current landscape of the world community, for I think that it is against this general background that we should look at and appraise the ICC and more generally the current surge in international criminal justice.

The only two areas where clear progress stands in stark contrast to the general stagnation in the world community, are, I believe, that of regional protection of human rights (I am thinking in particular of what is being done in Europe by the European Court of Human Rights and more generally by the Council of Europe and in Latin America by the Inter-American Court of Human Rights) and that of international criminal justice.

The belief in, and spread of, international criminal justice, for all its indubitable failings, is indeed one of the few positive things of the world community we may observe in the last twenty years. International criminal justice has been a dream for years: the dream to put an end to atrocities not by using traditional channels, that is, via sovereign States, but by making directly answerable those individuals who, often sheltering behind the shield of state sovereignty, grossly breach human rights. Bringing to book those individuals has been held for years to be one of the most efficacious manners of ensuring respect for human rights. This dream has come true in the early 1990s with the establishment of ad hoc tribunals. They were, however, marred by various failings, chiefly that of dispensing selective justice. The ICC, with its drive to universality, constitutes the only true and fully-fledged realization of the ideal of jus-