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Struggles of Justice in a Highly Political Context

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Introduction

In the movie *Casablanca*, we may recall the scene in which Humphrey Bogart's character, Rick Blaine the Barman, terminates a line of dialogue with two state agents, by saying the following words: *'You'll excuse me, gentlemen. Your business is politics, mine is running a saloon.'*

There have been many times in the work of the International Criminal Court, when we would hope to arrest the attitude of certain people, by saying: *'Excuse me, ladies and gentlemen. Your business is politics, ours is running a law court.'* But that may well be futile hope, at some levels. The mandate of the ICC struggles constantly with the 'political phenomenon' at every turn. There is an avenue through which the political phenomenon bears at the work of the Court, in a manner that is inherent and entirely unsurprising. But, there is, on the other hand, another way in which the political gremlin continues to circle the wagon of the Court's life in insidious and surprising ways, which must be abjured.

I address them both – in what can only be a cursory discourse on the matter.

PART I

The Inherence of the Political Question in the Work of the International Criminal Court

Ambrose Bierce defined politics as: *'A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage.'*[1] But such caricatures are not necessary to validate the proposition that politics could never be a reliable guide in the administration of justice.

A vital proposition that underlies the very nature of the judicial function is that **Judges ought not to be deterred by the prospect of political controversy that might be provoked by the discharge of their duty**.

That proposition was famously registered by Lord Mansfield when presiding in *Rex v Wilkes* – in 1768. The case involved Mr Wilkes' efforts to vacate the outlawry judgment that had been entered against him. Mr Wilkes had been pronounced an outlaw for evading penal exactions following his prosecution on charges of *'seditious and scandalous libel'* (for his publication of *The North Briton, No 45*), and for the charge of *'obscene and impious libel'* (for his publication of 'An Essay on Woman').

[1] Ambrose Bierce, *The Unabridged Devil's Dictionary* (edited by David E Schultz and S T Joshi) (2000) p 184.

Beginning in 1762, Mr Wilkes began to give turbulent journalistic support to Earl Temple's campaign against the government of Lord Bute – using the political tabloid that Wilkes published under the masthead of the *North Briton.* Bute was a Scotsman who had been a former tutor to the future King George III – and whom (upon ascension to the throne) the young King George had appointed Chief Minister. In his attacks against Bute, it was not beyond Wilkes to evoke what was then a popular English disdain for the Scots; it was also not beyond him to write libellous innuendos about Bute's relations with the King's mother. It is said that Wilkes' incitement of popular feelings against Bute was partly responsible for Bute's decision to retire in April 1763. But Earle Temple's hostility against government did not cease upon the resignation of Lord Bute. It was thus that Temple encouraged Wilkes to publish the notorious 'No 45' of the *North Briton,* in April 1763. It was an excoriation of the King's speech, delivered at the beginning of the new government formed by George Grenville. King's – or Queen's – speeches are always vulnerable to political attacks, as they are generally understood and accepted as the Government of the day speaking through the reigning Monarch.[2] In 1763, in their keenness to put the disruptive Mr Wilkes in his place and teach him a lesson or two – also encouraged by the King's personal animus against the slanderer of his mother – the new Government commenced criminal proceedings against Mr Wilkes.[3] By attacking the speech, Wilkes was accused of having exposed King George III to the risk of popular feelings of opprobrium.

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For its part, Wilkes' 'Essay on Woman' was lewd parody of Alexander Pope's more famous 'Essay on Man.' Wilkes was in France and remained there during the proceedings, and was thus convicted *in absentia*. Having subsequently failed to appear for the exaction of the resulting penalties, he was duly pronounced an outlaw. Upon his eventual return to England, he commenced very highly publicised proceedings to reverse his outlawry, on a technical point of law.

In the course of those proceedings, Lord Mansfield felt constrained to address the matter of the attacks orchestrated against him in the press. His declarations to that effect included the following remarks:

> *But here, let me pause!—*
>
> > *It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in Court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and*

[2] One may only recall Jeremy Corbin's reaction to Queen's speech of December 2019, following Prime Minister Johnson's historical Brexit Election victory a few days earlier. I hasten to add, of course, that it was certainly nothing in the order of John Wilkes' commentary in North Briton No 45.

[3] See Ian R Christie, 'John Wilkes' in *Encyclopaedia Britannica*, available at https://www.britannica.com/biography/John-Wilkes#ref224826

afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.

Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error which will bear us out, to reverse the outlawry; it must be affirmed. The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how[soever] formidable [] they might be: if rebellion was the certain consequence, we are bound to say "fiat justitia, ruat cælum." … We are to say what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences.

I pass over many anonymous letters I have received. Those in print are public: and some of them have been brought judicially before the Court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. The lies of calumny carry no terror to me. What am I to fear? That mendax infamia from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me.[4]

In those words, written in 1764, Lord Mansfield spoke a cardinal creed for all judges and for all time.

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In light of the nature of the crimes over which the International Criminal Court has jurisdiction, ICC Judges are quite simply not free to hide behind the refuge of refusal to discharge their functions – on grounds that the questions presented involve matters of politics. Specifically, the ICC exercises jurisdiction over genocide, crimes against humanity, war crimes, and, the crime of aggression (as set out in article 5 of the Rome Statute). These are crimes that typically result from misprisions of politics played out in the national or transitional dimensions.

Take the crime of genocide, for instance. It typically involves a malignant strain of politics that culminates in the view that an identified group do not belong where they are. That was the story of the Holocaust; as it was the story of the Rwandan Genocide; as that of any other genocide that you can conjure up.

In the Kenya situation at the ICC, the case brought by the Prosecutor against Mr William Samoei Ruto and Mr Joshua Arap Sang for crimes against humanity arose directly from national political contest – being the 2007 Presidential election – which culminated in the eruption of violence. Beyond the immediate circumstances that the violence had directly result from electoral politics, it may also be considered that at the heart of the matter lay the intractable colonial and post-colonial politics of Kikuyus versus Kalenjins.

[4] *R v Wilkes* (1768) 4 Burr 2527 at pp 2561-2562; 98 ER 327 at pp 346-347.

The case brought by the Prosecutor against Mr Laurent Gbagbo and Mr Charles Blé Goudé in the Côte d'Ivoire situation, for crimes against humanity, also concerned post-election violence in the 2011 Presidential election in the Côte d'Ivoire.

As for war crimes and the crime of aggression, it may be enough to recall the following quote made famous by Chairman Mao Tse-Tung: *'War is the continuation of politics.'* It has been noted that the sense of that quote is that *'war is politics and war itself is a political action.'*[5]

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All that is to say that the crimes over which the ICC has jurisdiction are often committed in the context of armed conflicts rooted in rampant political discord at home or across national borders. That being the case, the ICC would have become redundant if its judges should feel free to avoid doing their job, because the matter at hand has connections with politics.

No, **the judicial role must not retreat abruptly at the doorstep of difficult questions of a political nature**.

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The preeminent courts of the world recognise the proposition.

At the international level, that point was made at the ICC, in the *Ruto and Sang* case.[6]

Earlier, in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice, quite rightly made that very point.

In that case, the ICJ considered arguments that it should decline to exercise its jurisdiction on the ground that the requested advisory opinion on the legality of 'the Wall' and the legal consequences of its construction could were either essentially questions of a political nature or that the advisory opinion could impede a political, negotiated solution to the Israeli-Palestinian conflict and that such an opinion could undermine the scheme of the 'Roadmap to a Permanent Two-State Solution'.

The ICJ reiterated its previous jurisprudence, in the following words:

[5] *Bloomsbury Dictionary of Quotations*, p 249.

[6] ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, para 392.

> *[N]o matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation*.[7]

Furthermore, the ICJ held as follows:

> *Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion*.[8]

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The proposition under consideration remains largely the same at the national level. The case of *R (on the application of Miller) v The Prime Minister and Cherry v Advocate General for Scotland,* the recent landmark ruling of the Supreme Court of the United Kingdom in the BREXIT debacle is also instructive in this debate. The case arose following the challenges brought against the decision of Prime Minister Boris Johnson to prorogue Parliament in the particular circumstances of the case. The Government forcefully argued that the Supreme Court should decline to consider the challenges, as they involved political matters for which the Prime Minister was accountable only to Parliament. The Government argued that in deciding the lawfulness of the prorogation, the Supreme Court would be stepping impermissibly into the political arena, whereas it should respect the separation of powers.

In their judgment, the Supreme Court unanimously underscored that the political nature of decisions of the executive did not prevent it from considering them. It held that:

> *[A]lthough the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in […] its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense*.[9]

The UK Supreme Court went on to assess the government's reasons for prorogation.

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[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, at para 51 [emphasis added].
[8] *Ibid*, para 58 [emphasis added].

[9] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41*, 24 September 2019, para 31 [emphasis added].

Similarly, the Supreme Court of Canada in the ***Operation Dismantle*** case, held that:

> *Courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state.*[10]

The Canadian Supreme Court sensibly identified the dividing line that seems to cause confusion. In that connection, the Supreme Court insisted that *'it is important to realize that judicial review is not the same thing as substitution of the Court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed'*.[11]

Another Canadian case of interest is the ***Secession of Quebec Reference*** case, which concerned the very political question of the whether the Province of Quebec may secede from Canada. There, the Supreme Court had set out the qualities which rendered the case justiciable. Namely that:

> *The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous so as not to permit a proper legal answer.*[12]

The court ultimately found that: *'The reference questions … do not ask the Court to usurp any democratic decision that the people […] may be called upon to make'.*

Finally, in ***Bush v Gore***, the issue decided by the US Supreme Court could not have been more closely related to the political sphere - it looked at the democratic process itself in the Presidential elections in 2000.[13] In view of the impact of its judgment, the court recalled its judicial obligations in the following words:

> *None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.*[14]

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Indeed, there is no appreciable normative reason to barricade or protect the judicial function from the province of seemingly intractable socio-political disputes. As the US Supreme Court was at pains to explain in *Bush v Gore*, it is in the very nature of a judge's

[10] *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, para 63.
[11] *Ibid.*
[12] *Reference Re Secession of Quebec*, [1998] 2 SCR 217, p. 4.
[13] *Bush v Gore* [2000], 121 S.Ct. 525.
[14] *Ibid*, p. 111.

mandate to adjudicate such disputes. All that, of course, is without prejudice to politics producing whatever desirable outcomes that are possible in its own realm and time.

And, there is much reason to consider that if disputes were presented to a court of law for resolution, the judges would surely be expected to do their best to resolve the given disputes - subject always to any clear superior law that bars the court from entertaining particular questions. But the existence of any such superior law must be clearly established, and not left to vague and subjective suppositions of what democracy requires.[15]

It is true, of course, that issues presented before judges are often fraught with controversy upon which opinion in society may be strongly divided. But, that is more a reason for judges (as impartial arbiters) to resolve the particular dispute: it is precisely the purpose of the judicial function to resolve vexing disputes that worry social stability. It is very odd to suppose that judges should be spared the trouble of resolving such disputes, by the contrived argument that their characterisation as 'political' should insulate them from judicial resolution – thus potentially leaving them perpetually unresolved.

PART II:

The ICC has no 'Political Overlords'

The essential moral of the foregoing analysis is that judges must operate beyond politics – and the politics of an issue – in order to discharge their judicial functions properly.

A necessary corollary to that truism is that **proper courts of law do not have 'political overlords'**. That is a cardinal principle of the idea of separation of powers.

In his book titled *English Law and the Moral Law*, published in 1953, Professor A L Goodhart correctly identified four cardinal principles that form the bedrock or cornerstones of the constitution of Great Britain:

i. Rule of law or the supremacy of the law, essentially that no one is above the law
ii. Free elections
iii. Freedom of speech, and
iv. Judicial independence.[16]

[15] ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang, Decision on Defence Applications for Judgments of Acquittal*, ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, para 393.
[16] See A L Goodhart, *English Law and the Moral Law* (1953), p 55.

Goodhart was certainly right to identify them as the cardinal principles of the British Constitution law, but they are not peculiar to the Great Britain. They are by now generally accepted as cardinal principles of constitutionalism in any free and democratic society.

Speaking to that fourth cardinal principle of constitutionalism, Professor Goodhart rightly insisted that *'[i]t has been recognised as axiomatic that if the judiciary were placed under the authority of either the legislative branches or the Government, then the administration of the law might no longer have that impartiality which is essential if justice is to prevail.'*[17]

The observations of Sir William Holdsworth in his essay of 1932 ironically titled 'His Majesty's Judges' were to the same effect. According to him:

> *The judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers*.[18]

Perhaps, I should pause here to review briefly one import of Holdsworth's point made above. And I do so by venturing — ever so diffidently — that perhaps one source of confusion for Continental judges and lawyers may lie in their willingness to accept the proposition that European judges are 'civil servants.' Common law judges will cringe at the suggestion.[19]

It is a misplaced sense of humility on the part of judges to characterize themselves as 'civil servants'. One obvious problem with the view of a judge as a 'civil servant' is that 'civil servants' usually have 'political masters'. If judges accept themselves as a 'civil servants', they not only begin psychologically to limit their own judicial independence – in deference to a perceived 'political masters'; but they also confuse the other branches of Governments and their own leaders into the same state of mind. This is because 'civil servants' have 'political bosses' in the form of the office holders at the top of the branches of Government. Hence, if the spirit of egalitarianism impels a judge to self-categorise himself or herself as a civil servant 'like every *other* civil servant,' then the tendency is for the bosses of the '*other* civil servants' to see themselves also as the bosses of the judges. It confuses the very idea of separation of powers.

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[17] *Ibid*, p 60.

[18] See Sir W S Holdsworth, 'His Majesty's Judges' (1932), 173 *Law Times* 336.

[19] Perhaps, one explanation for the implausibility of that description in the common law world is that the average judge of the superior court comes to the Bench following many years of successful practice at the Bar. Upon preferment to the Bench, successful senior counsel are less likely to accept or adapt to treatment as 'civil servants' after many years of successful practice at the Bar; unlike their continental European counterparts who are invariably 'caught young' as judges. Having been accustomed to such treatments as junior judges it may become more difficult to change one's own mindset, or those of others, about such treatment by the time the judge has become a senior judge.

In the common law jurisdictions, that difficulty does not arise. Judges are seen as public office holders, who are not subordinate to any other public office holder, including the Head of State or Monarch, as the case may be. It is in accordance with that understanding that Holdsworth observed, as quoted above, that the *'Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers.'*

That is also a principle that operates at the ICC, as a careful review of the Rome Statute makes so plain. But that essence of the Rome Statute is not always readily appreciated in practice.

The just concluded session of the Assembly of States Parties to the Rome Statute saw the adoption of a resolution to conduct a review of the Rome Statute system, for better delivery of mandate. Once it was broached, the review idea was promptly embraced by the Court's leadership as a wonderful idea. That should not be surprising. Reviews are salutary for human institutions. This is especially so for judicial systems: as none in the world has ever escaped stakeholders' clamours to do better – be it in Canada, Ireland, Japan, UK or the USA. In some international institutions, reviews are done in quinquennial intervals. It has not been done once at the ICC in all of its 17 years. It is long overdue – both for the Court itself, and for the Assembly of States Parties that was established to fund and support the Court and act as its legislative structure.

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In the nature of things, the occasion presents a psychological moment – for deeper reflections on necessary adjustments in methods and practices and attitudes that bear upon the ability of the Court to discharge its mandate. Some of those adjustments will be reducible in writing as concrete action points in standard operating procedures. But others will be left to the realms of conventions and etiquette, which depend on mindfulness and discipline. And, some of these adjustments will abide the report of the committee of experts engaged to conduct the review; while others will entail corrections of degradations in obvious standards that occurred over time – corrections that do not require external experts to point them out. The reflections made below engage a particular manner of such aberration – degradation that occurred over time to an obvious standard. It is time to correct it without further ado.

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That degradation concerns a struggle that has waxed over the years in the affairs of the ICC. As the Court's President, I am in a position to speak to it. That *struggle* was all too obvious in the discussions leading up to the adoption of the review resolution at the ASP

session concluded at the end of 2019. The *struggle* involves the Judiciary and the Office of the Prosecutor, on the one part, who are keen to assert (as they should) their judicial and prosecutorial independence, respectively. On the other part, there is a palpable tendency on the part of certain representatives of States – though not all of them are of that mind set – who appear ever-anxious to give the ASP a large and dominating role in the affairs of the Court. Elements of that attitude principally include the following phenomena: the general tendency of certain – but not all – representatives to seek to micro-manage the Court. This tendency comes ostensibly in the name of the statutory power laid down in article 112 of the Rome Statute, which rightly gives the ASP the authority of 'management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court'. In this regard, may be noted the establishment of a study group on 'governance' with a seemingly perennial mandate. There is also the undisguised impatience that some representatives – though not all of them – project when confronted with the Court's insistence that it must be guided by strict adherence to legal principles and the norm of independence (of Judges and the Prosecutor) rather than the political preferences of representatives (who are invariably made up of the executive branches of States). More recently, there has been the insistence upon a disciplinary arrangement for the Court to be centrally driven by an Internal Oversight Mechanism that is a subsidiary body of the ASP. To be noted, in that regard, is the absence of a code of conduct for delegates while such a code exists for the Judges of the Court. And, in the context of the review now under way, there was an insistence by many delegates (though not all of them) that only the Court will be subjected to the independent Review Committee of Experts, but that the ASP alone will review itself, if at all.

Two objections are to be expected against the reflections that I make here. The first could that the reflections only stress an obvious point. Indeed, the point ought to be obvious. But stressing it has been made necessary by events in the affairs of the Court over the years, which now urgently call for a restatement of a principle so obvious. The second objection could be a matter of form – in the nature of foreseeable perturbation on the part of some who will read these reflections. The objection will not be that the observations are incorrect: it would rather be that they have been made in public, outside of the hush-hush diplomatic corridors. But, such a sentiment is entirely unhelpful. What is required is soul-searching – in circumstances where the impugned degradation of obvious norms has continued to occur and harden over the years, despite polite exhortations made precisely in the secrecy of diplomatic engagements. So, we must engage the problem now in a public way.

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The idea of the ASP playing a large and dominating role in the affairs of the Court is a most dangerous idea in the work of this particular court of law. The idea must be arrested immediately.

The ASP is necessarily a political body. A careful review of the Rome Statute will readily show that it was neither designed nor intended to have a large and dominating role in the affairs of the Court. And it should not have that role as a matter of practice.

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Here are some of the dangers of a view of the Court as in thrall to a large and dominating role of the ASP. The case against the Deputy President of Kenya was terminated – in what has judicially been described as a 'mistrial' because of what the Trial Chamber found to have been political interference which would reasonably have an intimidating effect upon witnesses. But the extent of the political interference included the heavy presence of Kenyan politicians at the ASP session of 2015. They came to campaign at the ASP session, in the obvious belief that the ASP would in turn politically influence the Trial Chamber to 'drop the case'. That belief was seriously mistaken, of course. The ASP played no role at all in the termination of the cases and could not have done. The fate of the case resulted from its own forensic circumstances. But the impression of the Court as a mechanism that operates under the large and dominating political role of the ASP would leave the Court hopelessly vulnerable to the impression that the vagaries of politics that are in the nature of the ASP might in fact displace the ethos of judicial independence in obvious or more discrete ways. That impression has remained a matter of constant struggle for the Court to erase.

For instance, in a recent interview that I gave to the *Voice of America* TV, I was required once more to address the concern that the ICC is a 'political tool'. That allegation has been levelled at the Court by many who resist its work – including some (but not all) African leaders, as well as some members of the current US Administration, as well as dissenting voices from other parts of the world. I have heard it from officials of important non-party States, as explaining their opposition to the Court and their reasons for declining to join. I have joined others in rejecting in the strongest way the allegation that the Court is a 'political tool'. But, such rejections – however strong – are potentially undermined by the attitude of those State Party representatives who do their best to project the ASP as having a large and dominating role in the affairs of the Court.

It is impossible to draw a happy dividing line within any circumstance in which a political body is seen as dominating a court of law. That is to say, it will be futile to try and separate acceptable political domination from domination that is unacceptable. If the ICC and its officials and judges are conquered into a reality of accepting such political domination – in any aspect of its work – upon the charlatan theory that (s)he that pays the piper dictates the tune, we must then accept, in turn, the resulting reality that such conquest comes built-in with the hollow ring of the vigorous denials that the Court is not a political tool of the more powerful States Parties or a group of them. And, just as damaging is the very real possibility that the actions and forbearances of the Court and its judges and

officials may anticipatorily follow – consciously or subconsciously – the political wind vane in the direction of what *some* of the Court's judges and other officials may be conditioned to speculate as acceptable or pleasing to the more powerful ASP delegations or a group of them.

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It must be stressed that there can be no happy dividing line between political control that is good and acceptable as opposed to one not so good and acceptable. It thus makes it imperative to return to the original and simple norm that the Court has no 'political overlords'.

But that norm is more than a convenient proposition. It is actually borne out in the Rome Statute: not only in the care taken to underscore the norm of judicial independence and prosecutorial independence in the text of the Rome Statute; but also in the circumstances in which both the Court and the ASP were created in the Rome Statute.

In the latter regard, it is necessary here to correct the mistaken view often heard around The Hague, to the effect that the 'ASP created the Court' – and, what is more, they can do as they please with the Court. Such views are both factually and normatively mistaken. The correct historical fact is that it was the international community as a whole – operating through the auspices of the United Nations General Assembly – that created both the Court and the ASP – by negotiating and adopting the Rome Statute. Notably, the Court was created in article 1, and it was not until article 112 that the ASP was created. The significance of that historical fact is that following the events of World War II, the primary concern of the international community – as coordinated by the UN General Assembly – was to create a mechanism of international jurisdiction that would counter impunity for violations of international criminal norms. In the event, the ICC was created in article 1 of the Rome Statute. But, the international community knew that the ICC would need a structure of support beyond itself. It was for that reason that the ASP was created in article 112.

In the circumstances, the relationship between the ASP and the Court must not be likened to the relationship between the United Nations and the International Court of Justice. The UN was established as a general purpose multi-lateral organisation. This was done in the initial, enacting clause of the UN Charter. Subsequently in article 92 of the Charter, the ICJ got established as *'the principal judicial organ of the United Nations.'* In contrast, the ICC was not established as an 'organ' of the ASP. It is legally incorrect to treat it as such in practice.

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It is also philosophically and normatively mistaken for any ASP representative to suppose (though not all of them do so) that the ASP may do as it pleases with the ICC. It is important to stress here that in creating the Court, the international community was seeking to counter a blight that humanity had endured throughout history – that being impunity for crimes most gross.

The establishment of the ICC is one of the leading examples of what Eleanor Roosevelt, Harry Truman, Robert H Jackson – and Woodrow Wilson before them – would regard as the joint effort of nations *'to accomplish something good for the world'* that no one State could hope to accomplish on its own.

But it is important to stress that this historical achievement came during a rare window of opportunity that can truly be described as a lucid moment in time in the often disheartening circumstances of global geopolitics; which plays out in the micro-climate of the UN Security Council, where the US, Russia, China, France and the UK wield the veto power – and where some seem ready and willing to use it more often than others, regardless of its consequences to the broader lot of humanity. And this is a highly significant factor, of which we must neither lose sight nor take for granted.

That is to say, the Rome Statute that established the ICC was adopted in 1998. This was within a five-year band of time during which the UN Security Council had managed to create two ad hoc international criminal tribunals: one for the former Yugoslavia (in 1993), the other for Rwanda (in 1994) – respectively to bring accountability for the violations including ethnic cleansing that were committed in the former Yugoslavia, and violations including the genocide that had been committed against Tutsis in Rwanda. That was indeed a lucid moment at the time, some of the heady hallmarks of which were the Glasnost and Perestroika and their associated demolition of the Berlin Wall; as well as the dissolution of the apartheid regime in South Africa and the associated release of Nelson Mandela from a lifetime of political imprisonment.

As fate would have it, that lucid moment lingered long enough to permit the ICC finally to be created in 1998 – following moribund efforts that had long been dismissed in the previous decades as wishful thinking.

Perhaps, the significance of the lucid moment of the 1990s may be better appreciated if one considered that the other time that the US, Russia (then generally known as the USSR), China, France and the UK, had agreed to the creation of an international accountability mechanism with a global prestige was at the London Conference of 1945, regarding the Nuremberg proceedings that was to address the atrocities of World War II.

But, that was before the United Nations was up and running. In the subsequent years – in the age of the UN - the global mandate for the maintenance of international peace and

security was consigned to the Security Council. It may be noted that in the odd half century between the Nuremberg experiment of 1945 and the Security Council's creation of the ad hoc tribunals (in 1993 and 1994, respectively) for the former Yugoslavia (the ICTY) and for Rwanda (the ICTR) - pursuant to the Council's mandate of international peace and security - no international accountability mechanism was created under the auspices of the UN. Yet, it could not be credibly supposed that there had not been troubling events in Africa, Latin America, Asia, Europe and elsewhere that engaged the need for such an accountability mechanism. And all that gives especial significance to the lucid moment of the 1990s that saw the creation of the two ad hoc tribunals, the ICTY and the ICTR.

That the opportunity was also seized to create the permanent ICC directly in the wake of the creation of those two ad hoc tribunals is a matter of much significance. That significance should escape no one. To be kept in mind in that regard is that the purpose or effect of creating the ICC – against the background of historical experience – was to avoid holding questions of accountability (for gross atrocities) hostage to ad hoc solutions that may not materialise due to the vagaries of geopolitics of the UN Security Council.

We know that the lucid moment of the 1990s has now become a stationary object in the rear-view mirror, as the world drives down the lane of heartaches for many of the victims of apparent mass atrocities. And looking at the state of current affairs, it should be difficult to reproach anyone who may worry that the politics of the Security Council may not permit a new ad hoc tribunal to be created now, should grave violations be committed in ways that conjure up the ghosts of Srebrenica or Rwanda.

That underscores in a very particular way why it is wrong to suppose that anyone can do with the Court as they please.

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I hasten, however, to add that nothing in these reflections should diminish the important role that the ASP must legitimately play in relation to the Court. Those roles include the following. The ASP plays the much needed roles of the legislature, budgetary appropriations and 'management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court'. Such roles for the legislature are not unknown in national jurisdictions. In UK, Canada and Australia, it is called 'parliamentary oversight'; and in the US, it is called 'congressional oversight.' In the national sphere, such oversight roles do not make the Parliament the 'boss' or 'overlords' of co-equal branches of government.

And to say that the ASP are not the 'political overlords' of the Court does not negate an appropriate political role that the ASP can play. Appropriately, as needed, it can harness, combine and deploy its own political assets and act as a firewall, to protect the Court against

political attacks or interferences from outside sources. But that wall must never lean against the Court itself – not even ever so slightly.

Conclusion

I conclude by adverting to the latest political agitation with which the Court is currently confronted.

Just last December (2019), the Prosecutor, Mrs Fatou Bensouda, submitted to the Judges a legal question about the scope of the Court's jurisdiction in relation to an aspect of the Israeli-Palestinian conflict. It may be noted that this is the second matter that has reached the Judges in the context of the Israel-Palestinian conflict: the first has to do with Comoros' referral of the 'Mavi Marmara' incident to the Prosecutor for investigation. More on that later.

The Prosecutor's submission of last December has now provoked a political onslaught against her – and the Court itself by extension. Amongst other things, she has been called an 'anti-Semite'. This is entirely wrong.

Those who follow the Court's activities closely will know that the Judges have never been shy to reject the Prosecutor's positions and submissions – if that is the resulting outcome following careful and complete judicial analysis of the issues and the facts, in the light of the law as the Judges understand it.

But, it is wrong to impute untoward motives against her. In particular, there is no basis to call her an 'anti-Semite'.

In that connection, it needs to be pointed out that these kinds of political attacks are not new. Some African leaders – though not all of them – had for a long time taken to branding the ICC as 'racist', 'anti-African', 'instrument of Western imperialism', 'political tool of powerful States' and so on – all because the Court had subjected to its processes cases from Africa. Those allegations are precisely in the nature of the new allegation that the Prosecutor or the Court is 'anti-Semite'.

As an African, the Prosecutor displayed commendable fairness and integrity in her firm repudiation of those allegations, and continued to do her work. In my own time, I, too, as an African, joined her in firmly rejecting the allegations that the Court is 'racist', 'anti-African', etc. The Prosecutor's rejection of those allegations did not make her a 'racist', 'anti-African' or a 'tool' of Western imperialism. She does not now become an 'anti-Semite', because she presented the questions that she presented to the Judges in December 2019. She must be allowed to do her job, as her conscience dictates.

It also needs to be pointed out that the Prosecutor has steadfastly refused to investigate the Comoros referral concerning the conduct of the Israeli Defence Forces in the 'Mavi Marmara' incident. A particular appreciation of the law may lead one to disagree with her position on the matter – as may well happen in the circumstances of the questions she presented in December. But her refusal to investigate the Mavi Marmara incident does not make her an 'Islamophobe' – any more than it now makes her an 'anti-Semite' because she decided that there are some legal questions that she sees as needing answering now in connection to that conflict.