

International Criminal Law Has Lost Its Innocence

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[1] There was a principle, which read: "All persons are equal before the law." It is this achievement of the French revolution with its quest for "égalité," which is today enshrined in international human rights treaties and national constitutional law, including the American Constitution. This principle no longer seems to apply since the passage of Security Council Resolution 1422 (2002) of July 12th, at least not in international criminal law. It now reads: "All persons are equal before the law, with the exception of those that are citizens of the United States of America." That the principle was set aside at the same time for other non-treaty parties of the International Criminal Court (ICC), above all China, Russia and India, does not improve the matter. They are joyful beneficiaries of the US initiative.

[2] The damage to public international law and international relations caused by the Resolution of July 12th is not yet foreseeable, as the discussion has only just begun. It is, nevertheless, clear that resolution 1422 creates a two-tier system for international criminal law: it draws a distinction between those states that subject their national soldiers in UN Peacekeeping missions to the jurisdiction of the new ICC, and those states that enjoy immunity from this jurisdiction. But how can this discrimination be reconciled with a sense of fundamental justice if, for instance, a German soldier can be brought before the ICC for alleged war crimes – possibly engaged in the same combat mission – while his American colleague enjoys immunity?

[3] How will this affect the motivation and the mutual solidarity in UN Peacekeeping missions? How are we to assess the legitimacy of UN Peacekeeping operations that are tainted by the stain of immunity from ICC-jurisdiction? And, how reliably can the Security Council in the future decide on Peacekeeping measures, if, in order to do so effectively, it must regularly dismantle mankind's (so far) grandest achievement in the fight against impunity from the gravest human rights violations?

[4] Resolution 1422 does not only re-interpret the ICC-Statute, in particular its Article 16, but it in fact turns the past logic of peacekeeping measures in the UN system upside down. If the ICC could, so far, be understood – by proponents as well as opponents – as a peacekeeping measure, because, according to the Statute's preamble, it shall prevent the threat to peace and security of mankind by grave international crimes, it now takes on a whole new nature. In light of the Council's resolution, the Court becomes itself a threat to peace, because only under this condition can the Security Council adopt a resolution under Chapter VII of the UN-Charter. Let us pause to assess this truly grotesque logic: a resolution as it was adopted by the Security Council on July 12th presupposes that the ICC must be labeled as a threat to peace, which can only be averted by granting immunity before the Court!

[5] Didn't the Security Council maintain, in innumerable resolutions, just the opposite? Don't those resolutions primarily maintain that the fight against impunity served the maintenance of peace and security of mankind? Didn't this very Security Council in 1993 – exactly for this reason – set up the Ad-Hoc-Tribunal for former Yugoslavia? Isn't this Tribunal also concerned with Bosnia-Herzegovina and thus also competent to prosecute UN peacekeepers? Has this Tribunal been presenting a threat to peace, precisely because it may call US soldiers into its chambers? Why, then, did the Security Council not decide in favor of immunity in this case?

[6] This critique must not be understood as being a mere attack on the "unilateral overdrive" of the present US administration. Remarkably, the adoption of Resolution 1422 would not have been possible without the decisive support of the Europeans, above all the English. Anyone present in Rome could not have expected anything different. Would it not be possible – at least this time – that the European Union and the numerous other Allies of the USA, which support the idea of a World Court of Criminal Justice, remain faithful to their principles? There was, indeed, some reason for hope: Canada, South Africa, Brazil and New Zealand wrote an open letter on the eve of the crucial vote in which they expressly warned against such a resolution.

[7] Would it have really been impossible for a similar alliance to back France in eventually vetoing the resolution's adoption, at least by abstention? Would it, ultimately, have been impossible to continue the UN mission in Bosnia-Herzegovina without the USA (and would the USA actually have let this and other mission fail because of the ICC)?

[8] July 12th is not only a black day for international criminal law. It is also a black day for Europe and its ability to defend its common ideals and values. It is a disappointment for all those that believed in a united Europe serving as a counterpoise to the over-powerful USA on this question. That day marks the end of innocence of international law, vis a vis power politics.

* Dr. Ambos was expert member of the German delegation during the negotiations for the Rome Statue and of the working group set up by the German Ministry of Justice that drafted the German Code of International Criminal Law (Völkerstrafgesetzbuch). For translations in all UN-languages, see: >www.iuscrim.mpg.de/forsch/online_pub.html>.