

The International Criminal Court at the Mercy of Powerful States: How the Rome Statute Promotes Legal Neo-Colonialism


On 29 June 2016, Dr Res Schuerch (University of Amsterdam and University of Zürich) provided a presentation on the topic of his PhD dissertation, titled "The International Criminal Court at the Mercy of Powerful States: How the Rome Statute Promotes Legal Neo-Colonialism". This event was organised by the T.M.C Asser Instituut as part of the Supranational Criminal Law lecture series, in partnership with the Coalition for the International Criminal Court (CICC) and the Grotius Centre for International Legal Studies of Leiden University.

Dr Bérénice Boutin opened the event by introducing Dr Schuerch and his topic, who began his presentation by outlining how he became interested in the relationship between the International Criminal Court (ICC) and powerful states. Dr Schuerch noted that his work provided a Western perspective of an issue more often addressed from an African standpoint, with the intention to distinguish his work from the more political and emotive arguments that existed within critical legal approaches towards the ICC.

In his presentation, Dr Schuerch analysed three provisions of the Rome Statute and provided a critical analysis of how they contributed towards a system of power imbalance between powerful and less powerful states.

Dr Schuerch first introduced the concept of legal neo-colonialism. He outlined the historical background of the notions of colonialism and neo-colonialism and sought to place the discussion on the ICC's relationship with states within this framework. Classical colonialism was based on direct territorial control, while the notion of neo-colonialism denotes political control of former colonial powers. In this context, Dr Schuerch defined legal colonialism as the imposition of selective law as well as their asymmetrical enforcement. The notion thus aims at analysing the structural power of states in the application of the Rome Statute, and more precisely whether structural conditions lead to uneven application of its provisions.

Dr Schuerch first analysed Article 13(b) of the Rome Statute, and noted that it provided the Permanent Five (P5) members of the United Nations Security Council (UNSC) with a 'de facto immunity' from prosecution before the ICC. Under this provision, the P5 have the capacity to not refer situations that affect their own territory or citizens, as well as to offer 'patronal protection' from prosecution to 'client states', including for example, Syria or North Korea. Dr Schuerch concluded that the historical privilege of the P5 combined with their power in the ICC system resulted in a structural imbalance of power.



Second, Dr Schuerch analysed Article 16 of the Rome Statute. He argued that the capacity for the UNSC to defer an investigation or prosecution provided an example of powerful states' structural advantage providing them with the capacity to steer the course of an investigation. He noted that the provision provided some safeguards but still creates a legal asymmetry through selectivism that can prevent the legitimate exercise of jurisdiction.

Finally, Dr Schuerch analysed whether bilateral non-surrender agreements signed by the United States with other states, which were assessed in light of Article 98(2) Rome Statute, contributed to a system of structural power imbalance between powerful and non-powerful states at the ICC. Article 98 (2) Rome Statute requires the Court not to proceed with a request for surrender in case the requested state is confronted with a conflicting obligation under international law. Dr Schuerch, whilst criticising those agreements, noted that the resulting asymmetry is not structurally embedded in the Rome Statute and therefore does not fall under the elaborated framework of legal neo-colonialism. Rather, asymmetry was here the result of the non-permanent relational power imbalances between powerful and non-powerful states.

In closing, Dr Schuerch outlined that the findings of this thesis are not exclusively applicable to an African context, but that the asymmetrical distribution of power within some provisions of the Rome Statute works to the structural advantage of powerful states, and to the disadvantages of those which are less powerful.

Following the presentation there was an engaging questions and answers session, where audience members posed questions to the speaker, including the likelihood of prosecutions against United States and United Kingdom officials, as well as the impact that the ratification of the Kampala Agreement on Aggression might hold for the conclusions of his overall thesis.