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Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*

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(I)

Structural flaws in the Rome Statute of the International Criminal Court

Among many sectors of international civil society the creation of the International Criminal Court (ICC) has raised hopes that, from now on, international crimes could be prosecuted in a *comprehensive, credible* and *consistent* manner, in a way completely different from the victor's justice of post-war tribunals (such as those of Nürnberg and Tokyo after World War II) or *ad hoc* tribunals (namely those for the former Yugoslavia and Rwanda) created by the United Nations Security Council, the supreme executive organ of the world organization, in the years after the end of the Cold War. The idea behind the adoption of the Rome Statute of the International Criminal Court in 1998 was that the investigation and prosecution of international crimes should be taken out of a context of power politics and would be conducted on a permanent basis and by an independent (transnational) judicial entity that operates according to the principle of the *separation of powers*, which is the basic requirement of the rule of law. The independent position of the Prosecutor (Art. 15[1] of the Rome Statute) is absolutely crucial in that regard. With one important exception – that threatens the normative consistency of the Rome Statute as

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such¹ –, the Court, which has been in existence since July 2002, is meant to function not on the basis of *universal*, but *complementary* jurisdiction; this implies that it will only investigate and prosecute if the concerned sovereign states do not undertake such judicial measures on their own, or do not undertake these measures in good faith or in an adequate manner.

However, the noble idea of international criminal justice, administered by the ICC as a permanent institution, has been compromised from the outset and in two basic respects:

- (1) Since the Court, *per se*, can only exercise jurisdiction vis-à-vis citizens of states that have ratified the Rome statute or persons who are suspected of having committed crimes on the territory of those states, the Court is structurally condemned to practice *selective justice*, and especially so as long as major military powers (such as the United States, Russia, the People's Republic of China, India, Israel, Turkey, and others) are not States Parties. It can only punish the weak and has to spare the powerful – a fact that will completely undermine the Court's credibility in the eyes of the international public. There should be no illusion about it: The idea of universal justice simply makes no sense if the most powerful countries are determined to stay away from such a court.
- (2) This predicament is aggravated even further by two provisions in the Rome Statute that completely undermine the independence of the Court from (power) politics, domestic as well as international. Although the Court is not in any way part of the United Nations system – it is an independent entity created by intergovernmental treaty –, Arts. 13(b) and 16 of its Statute tie it to the United Nations

¹ See our analysis of the implications of Art. 13(b) of the Rome Statute in paragraph (2) below.

Security Council in a manner that renders the fundamental principle of the separation of powers entirely meaningless and makes the Court vulnerable to political interference at any moment. It is to be noted that both provisions require the Council's action under Chapter VII of the UN Charter which sets out that body's coercive powers.² Art. 13(b) – in connection with the specific provisions (or, rather, omission) of Art. 12(2)³ – gives authority to the Security Council to refer a “situation” to the ICC also in cases where the Court has no jurisdiction *per se* (i.e. neither on the basis of nationality nor on the basis of territoriality). This means that the Council, the supreme executive organ of the UN, can effectively *create* jurisdiction where it otherwise would not exist on the basis of the Rome Statute.⁴ This is not only in violation of the general principle of international law according to which only states party to a treaty are bound by that treaty's provisions⁵ (a point repeatedly emphasized by the United

² These powers exclusively relate to “Action with respect to threats to the peace, breaches of the peace, and acts of aggression” (title of Chapter VII) and include the right to impose sanctions and to use armed force.

³ Art. 12(2) states as “preconditions to the exercise of jurisdiction” (a) that the state on the territory of which the suspected crime has occurred is a Party to the Rome Statute, or (b) that the person accused of the crime is a national of a state Party – but only in cases where a situation is referred to the Court by a State Party or an investigation has been initiated by the Prosecutor *proprio motu*. The “preconditions” of Art. 12(2) do not apply to referrals of situations by the Security Council.

⁴ This provision makes the Court the agent of a rather strange “borrowed” version of universal jurisdiction. In view of the Security Council's right of referral, the Court can exercise jurisdiction over citizens of virtually any country. However, an exercise of universal jurisdiction that is regulated by power politics is a *contradictio in adjecto*.

⁵ See *Vienna Convention on the Law of Treaties* (1969), entered into force on 27 January 1980, Art. 34: “A treaty does not create either obligations or rights for a third State without its consent.” It could further be argued that subjecting a state to obligations resulting from a treaty it has not acceded to violates the principle of sovereign equality of all United Nations member states (Art. 2[1] UN Charter), a peremptory norm of general international law. (On sovereign equality as peremptory norm see e.g. Rafael Nieto-Navia, Judge of the Appeals Chamber for the International Criminal Tribunals for the former Yugoslavia and Rwanda: *International Peremptory Norms (jus cogens) and International Humanitarian Law*, published by Coalition for the International Criminal Court, at www.iccnw.org/documents/WritingColombiaEng.pdf, p. 13, retrieved 2 April 2009.) In view of Art. 53 of the Vienna

States in its arguments against the ICC)⁶ – it effectively subjects the Court’s exercise of jurisdiction to the vagaries of international power politics. Due to the voting procedure laid out in Art. 27 of the United Nations Charter, it will essentially depend upon the five veto-wielding permanent members of the Council whether the ICC will exercise jurisdiction on the territory or in regard to citizens of non-States Parties. This great power privilege unavoidably imposes upon the Court a practice of selective justice and the application of double standards. This has become more than obvious in the fact that, since the coming into force of the Rome Statute in 2002, the Council has referred only one situation to the ICC, namely that of Darfur (Sudan), but has not referred the situations of Israel (as occupying power in Palestine), Iraq, Afghanistan, Somalia, etc. where serious international crimes (war crimes, crimes against humanity) have been documented. The political (“national”) interests of any individual permanent member can effectively prevent the Council from referring a situation to the Court as they may prevent the Court from going ahead with an investigation or prosecution even in cases where the Court has genuine jurisdiction.

A special irony of the Council’s “referral authority” (i.e. its competence to create

Convention, this has serious consequences for the Rome Statute of the International Criminal Court: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” The problem of the validity of the Rome Statute under existing international law can only be resolved if the Conference of States Parties amends the Statute and removes those provisions that entitle the Security Council to “create” jurisdiction over citizens of or on the territory of non-States Parties.

⁶ See e.g. David J. Scheffer (first United States Ambassador-at-Large for War Crimes Issues), “The United States and the International Criminal Court,” in: *American Journal of International Law*, Vol. 93, No. 1 (1999), p. 18: “A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms.” – It is to be noted, however, that Scheffer and other advocates of the U.S. position have made this point in regard to the Court’s principle of territorial jurisdiction (Art. 12[2a] of the Rome Statute), which implies that nationals of non-States Parties are subject to the Court’s jurisdiction if the alleged crimes were committed on the territory of a State Party to the Rome Statute.

jurisdiction for the ICC where it otherwise would not exist) lies in the fact that it is bound to the political will of states that are not even parties to the Rome Statute (at the moment three permanent members out of five, first and foremost among them the United States of America) and who, with their own and their allies' leaders and personnel being shielded from the Court's jurisdiction, can use the Court to advance their own political agenda. This "privilege" granted to states whose leaders and personnel enjoy themselves *de facto* immunity from prosecution, has created a situation which reminds us of the dictum of "the fox protecting the henhouse." Apart from this element of (super)power politics, it is to be stated that as soon as the United Nations Security Council is entrusted with judicial functions, the borderline between law and politics is blurred and "international justice" is made a function of "international power politics." This predicament has also been proven in the case of the two ad hoc tribunals established by the Security Council in 1993 and 1994 respectively.⁷

The Rome Statute of the International Criminal Court is flawed in another basic respect, namely in relation to the principle of the *separation of powers* which is of fundamental importance for the rule of law and, thus, for the international legitimacy of the ICC and its acceptance by the international public. By virtue of Arts. 13(b) and 16, the Statute gives special "prosecutorial" rights to an executive body that essentially operates within political parameters and that is not organically linked to the Court, namely the United Nations Security Council. Thus, *political interference* is made part of the Court's terms of reference. The privilege granted to the Security Council to refer or defer an investigation or prosecution compromises, to put it mildly, the Court's judicial authority. It is very similar, in structural terms, to the power given, under the United Nations Charter (Art. 27[3]), to the five permanent members of the Security Council to veto any substantive (i.e. non-

⁷ Concerning the ICTY see *MEMORANDUM on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."* International Progress Organization, Caracas, 27 May 1999.

procedural) decision of the Council in matters of international peace and security, a provision which effectively has enabled, even encouraged, those countries to systematically violate international law, and which has allowed them to act in a climate of impunity – without fear of the consequences, even in cases of wars of aggression.⁸

Furthermore, Art. 16 of the Rome Statute authorizes the Security Council to defer an investigation or prosecution for the renewable period of one year. Again, because of the provision of Art. 27 of the UN Charter, this means that no deferral can be ordered against the will of a permanent member. As was the case in another area of (legally binding) Chapter VII resolutions, namely the Council's sanctions policy⁹ (e.g. against Iraq or Libya), all other Council members will be held hostage of a previous decision if only one permanent member objects. A case will be pending "eternally" if a particular permanent member considers this a state of affairs that is suitable to its interests. In order to bring about a deferral of a politically motivated referral, a lot of political bargaining will be required among, first and foremost, the five permanent members of the Security Council, something which does not go along with the principles of the independence and universality of justice.

It is quite obvious that the provisions of Arts. 13(b) and 16 make the Court completely dysfunctional when it comes to the establishment of its judicial authority on the basis of complementarity with domestic jurisdictions. The idea of complementary jurisdiction makes no sense if states that have a political interest in a certain case (whether in favour of investigation/prosecution or against), but are not parties to the Rome Statute, are in a position to interfere with the Court's jurisdiction.

A further irony lies in the fact that these two provisions have been written

⁸ For details see Hans Köchler, *The Voting Procedure in the United Nations Security Council. Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, XVII. Vienna: International Progress Organization, 1991.

⁹ See Hans Köchler, *The United Nations Sanctions Policy and International Law*. Penang (Malaysia): Just World Trust (JUST), 1995.

into the Rome Statute because of the special insistence during the negotiation process by, among others, the United States, the country that has even “unsigned” the Rome Statute and has made clear, so far, that it opposes the International Criminal Court as a matter of principle and has concluded so-called Art. 98 non-extradition agreements with a large number of states, thus seriously undermining the ICC’s ability to exercise jurisdiction on the basis of the Rome Statute.¹⁰

(II)

Lack of basis in law for the decisions of the ICC concerning citizens of the Republic of Sudan

The structural flaws of the Rome Statute have become more than obvious in the arrest warrants issued by Pre-Trial Chamber I of the ICC against citizens of the Republic of Sudan, including the country’s President. The respective decisions of the judges are solely based on jurisdictional authority that is derived from Security Council resolution 1593 (2005) of 31 March 2005 by which the Council, acting under Chapter VII of the UN Charter, decided “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”¹¹

In the same resolution, however, the Security Council, under operative Para. 6, has exempted officials and personnel from a “State outside Sudan [sic!] which is not a party to the Rome Statute” from the consequences of that very referral, determining that such persons “shall be subject to the exclusive jurisdiction” of that State. Apart from the double standard that the Council applies in this resolution – since the Sudan, itself a “State which is not a party to the Rome Statute,” is not included in this exemption –, the resolution is in clear and open

¹⁰ For details see Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads. Philosophical Reflections on the Principles of the International Legal Order Published on the Occasion of the Thirtieth Anniversary of the Foundation of the International Progress Organization*. SpringerScience. Vienna/New York: Springer, 2003, pp. 244ff.

¹¹ For an analysis of the political implications and the impact of this decision on peace efforts see David Hoile, “Darfur and the International Criminal Court,” in: *Darfur: The Road to*

violation of the Rome Statute of the ICC as such. Art 13(b) of the Statute, which is the basis for the Council's authority in that regard, does in no way allow a selective referral such as the one concerning Darfur, where the Council apparently wanted to shield U.S. personnel, among others, from the Court's jurisdiction – a political condition of the United States which obviously had to be met in order to get the resolution passed at all. The respective Article of the Rome Statute merely states that the ICC may exercise jurisdiction if “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” Nowhere does the Statute mention the possibility of a “partial” or “selective” referral, exempting certain categories of persons. There is absolutely no room for conditionally linking the authority of referral under Art. 13(b) to the authority of deferral under Art. 16 of the Rome Statute.

We have outlined the legal contradictions of that Security Council resolution, which is the only basis for the ICC's recent action against the President of Sudan,¹² in a memorandum issued on 2 April 2005,¹³ shortly after the adoption of the resolution. The main arguments are reproduced here:

Undisputedly, referral of a “situation” in which international crimes may have been committed to the Court's Prosecutor is sufficient basis [according to the Rome Statute / H.K.] for the exercise of jurisdiction by the ICC¹⁴ – which is of particular importance in cases where the

Peace. London: European-Sudanese Public Affairs Council, 3rd, revised ed. 2008, pp. 210ff.

¹² ICC-02/05-01/09, *Case The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation in Darfur, Sudan, Public Court Records – Pre-Trial Chamber I, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir,” 4 March 2009.

¹³ *Double Standards in International Criminal Justice: The Case of Sudan*. Statement by Dr. Hans Köchler, President of the International Progress Organization. Vienna: International Progress Organization, 2 April 2005, P/RE/19140c-is.

¹⁴ This refers to the factual situation in terms of the interpretation and implementation of the Rome Statute by the States Parties. In our evaluation, however, Art. 13(b) contradicts the principle according to which no state is bound by the provisions of a treaty it is not a party to. (Art. 34: “General rule regarding third States.” For details see fn. 4 above.)

Court would otherwise have no jurisdiction on the basis of territoriality or nationality. However, it clearly follows from the wording of Art. 13 (b) of the Rome Statute that any referral of a situation by the Security Council must be made without conditions as to the categories of people to be investigated or prosecuted by the Court.

In an inadmissible way, the Security Council has tied the referral of the situation in Sudan according to Art. 13 (b) of the Rome Statute to a deferral of investigation or prosecution according to Art. 16. While the Security Council, under the Court's Statute, has the right to refer a "situation" (not individual cases) in which crimes that fall under the jurisdiction of the Court appear to have been committed to the Prosecutor of the Court, the Council has no authority to order a deferral of investigation or prosecution on a *selective* and at the same time *preventive* basis.

Art. 13(b) can simply not be interpreted in the sense of *selective* referral; according to that Article's wording, it is a "situation" that is being referred without any qualifications as to the groups of suspected violators. Similarly, Art. 16 cannot be construed in such a way as to grant immunity from prosecution to certain categories of people. Using Art. 16 to restrict the jurisdiction granted under Art. 13(b) – i.e. to render that Article "harmless" for a powerful non-State Party [such as the United States / H.K.], as resolution 1593 (2005) has effectively done – is an exercise in sophistry for the sake of power politics; it is an inadmissible effort by a political body, the Security Council, of exercising control over the International Criminal Court. (...)

The resolution's "recalling" of Art. 16 of the Rome Statute in the Preamble is incompatible with the decision, under operative par. 6 of that resolution, that nationals, officials or personnel from non-States Parties to the Rome Statute (e.g. the United States) "shall be subject to

the exclusive jurisdiction” of their respective state. By linking the referral of a situation to a collective deferral in favour of certain categories of people, the Council, under United States pressure, has not only undermined the authority of the International Criminal Court but introduced a “policy of double standards” into the practice of international criminal justice.

In its intention, resolution 1593 (2005) resembles earlier “preventive” resolutions, namely those adopted by the Security Council in 2002 and 2003 on the “collective” deferral of investigations or prosecutions of personnel of UN peace-keeping missions from non-States Parties to the Rome Statute.¹⁵ (...) While this particular practice has stopped in 2004 (as a result of the Iraq prison scandal), it has now been revived in another context.

It is evident that any resolution is *legally invalid* which contains contradictory norms; the logic of legal reasoning is no different from logic in general. The constellation is even more serious in this particular case since the resolution contravenes the very provisions of the legal instrument on which the Council’s authority is based, namely the Rome Statute (which itself appears to contain contradictory norms).¹⁶ Furthermore, through that resolution the Council tried to arrogate special judicial powers (including prosecutorial discretion) it does not possess under the UN Charter (and it is not given under the Rome Statute either). It is to be recalled that the Council’s mandate is action “for the maintenance of international peace and security” on behalf of all United Nations member states (Art. 24[1] of the UN Charter).¹⁷ Irrespective of what the most powerful permanent member, itself not a Party to the Rome Statute, and its allies may be intending in the present case, even

¹⁵ Resolution 1422 (2002), adopted by the Security Council at its 4572nd meeting, on 12 July 2002, and resolution 1487 (2003), adopted at the 4772nd meeting, on 12 June 2003.

¹⁶ See Chapter I/2 above.

¹⁷ See also the title of Chapter VII of the UN Charter: “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.”

the United Nations Security Council is not above the law – and the Council is definitely not the supreme judicial organ of the United Nations.

Furthermore, the “political” posturing and lobbying of the Prosecutor of the International Criminal Court in the chambers of the Security Council and at international press conferences concerning this decision against the President of Sudan is definitely not compatible with the Prosecutor’s duties under the Rome Statute and points in the direction of a – totally improper – political interpretation of his duties.¹⁸

In view of these well-documented circumstances it is obvious that the arrest warrant against the President of Sudan is without legal basis, and states, whether parties to the Rome Statute or not, are not obligated to implement it. Similarly, states’ obligations under the United Nations Charter do not force them to honour the warrant either since, as explained above, the Security Council resolution contains contradictory norms and is itself *ultra vires*. The international rule of law requires that no state or intergovernmental body, not even the United Nations Security Council, puts itself above the law.¹⁹

Resulting from the *systemic flaw* of the Rome Statute (Arts. 13[b] and 16), the politicization of international criminal justice by the supreme executive organ of the United Nations, the Security Council, may lead to a systemic failure of the International Criminal Court before it has even been able to prove its worth and credibility vis-à-vis the international community. Selectively prosecuting cases from formerly colonized countries of sub-Saharan Africa while choosing not to use

¹⁸ “Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.” (Art. 42[5] of the Rome Statute) See also the requirement of Art. 42(3): “The Prosecutor and the Deputy Prosecutors shall be persons of high moral character ...”

¹⁹ See the exemplary judgment of the International Court of Justice (ICJ) in relation to the dispute between Libya, the United States and the United Kingdom over the Lockerbie case, as regards the ICJ’s competence to evaluate the legality of Security Council resolutions: *CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA v. UNITED*

prosecutorial authority in cases that affect the interests of influential States Parties – and non-States Parties – to the Rome Statute is definitely not the way to convince the international public of the worthiness of the goals pursued by the International Criminal Court.²⁰ The Court must demonstrate that it is able to act like a court of law and that it is not merely a political tool in the hands of the most powerful member states of the United Nations. The ICC's only *raison d'être* lies in becoming an institution of *universal*, i.e. non-discriminatory, justice, not of victor's justice and revenge.

KINGDOM). PRELIMINARY OBJECTIONS. JUDGMENT OF 27 FEBRUARY 1998.

²⁰ Hans Köchler, "Law and Politics in the Global Order: The Problems and Pitfalls of Universal Jurisdiction" [Abstract], in: *International Conference on the Emerging Trends in International Criminal Jurisprudence, 10-11 December 2005, New Delhi. Souvenir & Conference Papers*. New Delhi: Indian Society of International Law, 2005, pp. 28-30.