

## Universal Jurisdiction and International Power Politics: Ideal versus Real

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### Abstract

The main problem of universal jurisdiction lies in the contradiction between the *universality* of its mission and the *particularity* of the political interests of the sovereign nation-states which provide the statutory framework for the application of the doctrine. The paper explores the nexus between law and politics in the field of international criminal justice and poses the question as to the institutional and procedural limits to universal jurisdiction, especially as regards the separation of powers as an indispensable element of criminal justice and the rule of law in general. It evaluates, *inter alia*, the practice of international courts that operate on the basis of *ad hoc* arrangements (such as the Yugoslavia Tribunal set up by the Security Council) and compares these arrangements to the structure and functioning of the newly established International Criminal Court. The paper further explores the long-term prospects of the Court in the framework of a unipolar world order where the only superpower actively opposes the Court as organ of universal jurisdiction.

### (I)

*“Only if the victors submit themselves to the same law which they wish to impose upon the vanquished States will the idea of international justice be preserved.”*  
(Hans Kelsen)<sup>1</sup>

This maxim – formulated towards the end of the Second World War – has again proven its relevance for the efforts, undertaken since the end of the Cold War, at reviving the idea of universal jurisdiction and practicing international criminal justice as a contribution to, though not instrument of, global peace. The “ideal,” however, has been compromised from the outset by the “real,” namely by considerations of

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<sup>1</sup> *Peace through Law*. Chapel Hill: University of North Carolina Press, 1944, pp. 114f.

power politics that have taken precedence, in different degrees, over virtually all projects of international criminal justice except the International Criminal Court (ICC).

Not only does criminal law – as law in general – require the absence of selectivity, in whichever form, in the application of the norms; of equal importance for the rule of law in any given framework, whether domestic, international or eventually supranational, is a functioning *separation of powers*. The independence of the judiciary is of vital importance for the legitimacy of its decisions. This requirement, particularly as regards a clear distinction between judicial and executive powers, has been difficult to achieve at the domestic level; it has proven to be highly problematic – in certain cases almost impossible to implement – at the transnational level where the interests of sovereign states are at stake. This has been evidenced in all projects of international trials, whether implemented or not, since the era of the First World War.

In order to have any meaning at all, the doctrine of universal jurisdiction – with its implicit appeal to the conscience of mankind – requires the *highest standards* of a separation of powers. It is based on the universal recognition of human rights and evokes ideals of justice, impartiality and fairness which are in turn related to, though not dependent upon, the preservation of peace on a global scale.<sup>2</sup> Since the beginning of the twentieth century, the question has been up to what extent, if at all, the expectations raised by the proclamation of universal jurisdiction, implying the idea of universal justice, can be met under the conditions of international realpolitik. (As a philosophical principle, universal jurisdiction is dating back to a much earlier period than the twentieth century. The idea can be traced back to “articles of war” proclaimed in the 14<sup>th</sup> century.)<sup>3</sup> So far, virtually all examples of the exercise of universal jurisdiction have been flawed; they have simply not met the high standards set by the doctrine.

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<sup>2</sup> On the normative relation between the goals of peace and security on the one hand and (criminal) justice on the other see, *inter alia*, the author's analysis in his 1999 Memorandum on the Yugoslav war crimes tribunal: 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*. Vienna/New York: Springer, 2003, pp. 353f.

The predicament of universal jurisdiction has always lied in the virtual impossibility of reconciling politics with law in a framework which is determined by the interplay of forces among states as primary subjects of international law. As history has shown, the problems and obstacles are manifold. Not only has international criminal justice, based on the doctrine of universal jurisdiction, to be practiced in a framework of power politics (with excessive emphasis on state sovereignty and the sanctity of national interests resulting from it) – something which undermines the separation of powers from the outset; one of the basic, so far almost insurmountable obstacles, lies in the problem of enforcement, i.e. the lack of judicial authority. Court decisions, if not backed up by the power of “willing” states, remain mere recommendations – and the “executive” support for international criminal justice always has its price in terms of the national interests of the “willing” states becoming part of supposedly purely judicial considerations.

The practice of international criminal justice under the conditions of *realpolitik* further suffers from a serious credibility problem insofar as the interests of involved states almost unavoidably impose upon it a “judicial policy of double standards.” Inconsistencies in the application of legal norms are part and parcel of the delivery of justice in the power-centered framework of relations between states. Because of the perceived “pitfalls” of universal jurisdiction – as they were articulated by Henry Kissinger, who obviously addressed the issue *pro domo* –,<sup>4</sup> political leaders have generally tended to limit its scope and tie its application to specific political circumstances, something which explains the rather erratic course of international criminal justice, including often legally inconsistent court judgments, since after the Second World War. Apparently, political leaders were afraid of the, albeit dysfunctional, separation of powers when it comes to transnational justice; they were – and still are – worried about the prosecutorial risks involved for themselves resulting from universal jurisdiction’s negation of “sovereign immunity.” And many of them were – and still are – not prepared to accept the basic conceptual implication

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<sup>3</sup> See Hans Köchler, *Global Justice or Global Revenge?*, p. 35, fn. 8.

<sup>4</sup> Henry A. Kissinger, “The Pitfalls of Universal Jurisdiction,” in: *Foreign Affairs*, Vol. 80, No. 4 (July/August 2001), pp. 86-96.

of a separation of powers, namely the judiciary exercising its international (“universal”) mandate *beyond* the political control of the nation-states – something which Kissinger considered a major “pitfall,” describing it, erroneously as we think, as a lack of democratic accountability.

The highly problematic nature of the exercise of universal jurisdiction – insofar as its lack of consistency and the application of double standards are concerned – has been particularly obvious in the framework of *ad hoc* arrangements. The “temptations of victor’s justice,” inherent in any power-centered form of criminal justice, have been greatest – and the most difficult to control – in the tribunals that have been set up following or in connection with armed conflicts, whether domestic or international. This has been evident in the post-World War II military tribunals, the tribunals established by the United Nations Security Council since the end of the Cold War, the courts set up on the basis of mixed domestic-transnational arrangements such as those for Sierra Leone and Cambodia, as well as certain courts and tribunals that, though officially of domestic nature, are *de facto* set up and controlled by an occupying power (as in the case of Iraq). In all these cases, the doctrine of universal jurisdiction has been invoked in different variations, while in reality the respective arrangements of criminal justice have amounted, to a considerable extent at least, to the settling of scores by the victorious party (or parties) with the vanquished, something which has also been the case with the Security Council’s *ad hoc* tribunals. This predicament has been eloquently articulated more than six decades ago by Judge Radhabinod Pal in his dissenting opinion in the judgement of the Tokyo Tribunal: “It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing the victor cannot give to the vanquished is justice.”<sup>5</sup>

When we study the practice of international criminal justice since 1945, we notice that the separation of powers is actually invalidated in the respective

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<sup>5</sup> “Judgment of Mr. Justice Pal, Member from India,” in: B. V. A. Röling and C. F. Rüter (eds.), *The Tokyo Judgment. The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946 – 12 November 1948. Volume II: Judgment of the Member from India. Opinion of the Member from the Netherlands.* Amsterdam: APA – University Press Amsterdam BV, 1977, p. 1037.

international context; the problems are similar – whether the arrangements are formally domestic, regional, international (as in the case of the Security Council acting as creator of courts), or of mixed domestic-international nature:

- In most cases, prosecutors and judges are chosen on a political basis.
- They are not in a position to operate independently; frequently, the running of the courts depends (either totally or in part) on politically-motivated funding by interested states and even non-state donors (NGOs).
- The mandate of the courts is often politically defined and/or interpreted; certain categories of people, for instance, are excluded from jurisdiction or “shielded” from it through the conduct of the court officials, which amounts to an effective, though not admitted, policy of double standards. (One of the most famous examples has been the non-prosecution of NATO officials by the International Criminal Tribunal for the Former Yugoslavia [ICTY].)
- Criminal prosecution is often pursued in a strange and contradictory relationship – “cohabitation,” to use French political phraseology – with national reconciliation efforts and the granting of amnesty (as in the case of the Sierra Leone court), whereby no explanation can be given as to how to reconcile the imperative of punishment with that of amnesty, something which undermines the very notion of *universal* jurisdiction (which does not allow a statute of limitation).

The examples of political interference in the proceedings of international criminal trials are numerous. The International Criminal Tribunal for the Former Yugoslavia is a case in point. Having been created by the Security Council, it has never been able to establish its credentials as a genuine and independent court – something which, for structural reasons, cannot be expected of that entity anyway, as Benjamin Ferencz, American member of the prosecutorial team at the Nürnberg Tribunal, explained in the preparatory phase of the ICTY: “How could the veto power and the prosecutorial

role of the Security Council be reconciled with a fair and impartial trial?"<sup>6</sup> The lack of a separation of powers, i. e. the mixing of law and politics, in the set-up and practice of the ICTY has been demonstrated in many instances and facts of which I shall mention only a few exemplary ones:

- The appointment of court officials is filtered through the Security Council, the supreme executive organ of the United Nations.
- In spite of its territorial jurisdiction, the Tribunal's Prosecutor obstinately refused to investigate the behavior of personnel and officials from NATO countries, and she did so on the basis of highly implausible reasoning, citing lack of evidence linking those officials to the alleged violations of international humanitarian law committed in the course of the NATO bombing of Yugoslavia in 1999.<sup>7</sup>
- The Tribunal obviously applied double standards by acquitting, in December 2005, former UÇK (Kosovo Liberation Army) commanders, apparently putting political considerations on the part of certain European countries above strictly judicial ones; at the beginning of the delicate phase of negotiations on the future status of Kosovo the Tribunal apparently did not want to make a move that might have been perceived as politically counterproductive (at least by the Western countries actively involved in the Balkans).
- Frequent political statements and evaluations by the subsequent Prosecutors of the ICTY further have documented the Tribunal's inability to draw the line between political and judicial matters. The

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<sup>6</sup> Benjamin B. Ferencz, "An International Criminal Code and Court: Where They Stand and Where They're Going," in: *Columbia Journal of Transnational Law*, Vol. 30 (1992), pp. 375-399; p. 382.

most recent example are Ms. del Ponte's erratic statements on (or "evaluations" of) Croatia's "co-operation" prior to that the initiation of that country's membership negotiations with the European Union in September 2005.

- The indictments of Yugoslav and Serb leaders at the height of the NATO bombing campaign in 1999, immediately after visits of the Prosecutor in Western capitals, further made visible the political framework in which the ICTY has operated since the very beginning.

The most recent case of politicization of criminal proceedings in an international context is that of the so-called "Iraqi Supreme Criminal Court" (earlier: "Iraqi Special Tribunal"). Although that court has been set up as an organ of the domestic judicial system of Iraq, in terms of legal doctrine it is situated within an *international* framework because of its jurisdiction over *international* crimes committed on the territory of Iraq. Furthermore, the court is, though not admittedly, "international" in view of the fact that it was set up under foreign occupation and is operating, though not admittedly, under the *de facto* control of the leading *de facto* occupying power in Iraq, the United States. This undertaking is indeed a novel feature of victor's justice in the 21<sup>st</sup> century, whereby the military victor does neither directly administer criminal proceedings nor propagate an international court under its effective control, but imposes and controls arrangements within the *domestic* framework of the conquered country. (The "recognition" – *ex post facto* – of the political structures put in place as result of an illegal invasion and occupation by the United Nations Security Council does, in our analysis, not legitimize the acts of the organs created on this basis, including the Iraqi court.<sup>8</sup>)

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<sup>7</sup> See Michael Mandel et al., In the International Criminal Tribunal for the Former Yugoslavia. Re: William J. Clinton et al., Notice of the existence of information concerning serious violations of international humanitarian law within the jurisdiction of the tribunal; Request that the Prosecutor investigate named individuals for violations of international humanitarian law and prepare indictments against them pursuant to Articles 18.1 and 18.4 of the Tribunal Statute. To: Madam Justice Louise Arbour, Prosecutor, ICTY, The Hague. 6 May 1999.

<sup>8</sup> The legal details have been explained by the author in his lecture "The U.S. Handover of

The Iraqi Supreme Criminal Court is indeed a striking example of how difficult, if not impossible, it is for a supposedly victorious power to resist the temptations of victor's justice.<sup>9</sup> Not only has the court effectively been set up by the US-dominated "Coalition Provisional Authority" (CPA) – which fictitiously "ceded" Authority to the provisional Iraqi government ("Iraqi Governing Council") for a matter of hours to promulgate the court's original statute; the administrative preparations for, the financing of the court, and the legal training of court officials (outside Iraq) have been undertaken by the United States and the United Kingdom, the principal occupying powers in Iraq; in addition, the suspects – now the accused – are in the effective custody of the United States military, not of the Iraqi authorities. In view of the initial performance of the court and the public comments about the expected results made by the highest officials of the Iraqi government (which operates effectively under US control and with US security guarantees), it is hard to see how that court will be able to evade the verdict resulting from the condemnation of victor's justice by Radhabinod Pal in 1946, namely that "[t]he name of Justice shall not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation."<sup>10</sup>

Unlike in international post-conflict or conflict situations (such as the one in Iraq), the practice of universal jurisdiction within the domestic judiciary of countries that are in a state of peace appears less problematic. In a certain sense, at least, the requirement of a separation of powers can be met more easily. However, as recent practice, particularly in Belgium, Spain and the United Kingdom has demonstrated, interference from the part of the "host country's" foreign policy and intelligence establishment can be a real threat to the independence of the proceedings. As the

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Sovereignty to Iraq. Moral and Legal Questions": Public Forum, People's Forum on Peace for Life, National Council of Churches in the Philippines, Ecumenical Women's Forum, Pilgrims for Peace, Manila, Philippines, 18 June 2004. – See also Hans Köchler (ed.), *The Iraq Crisis and the United Nations. Power Politics vs. the International Rule of Law*. Studies in International Relations, XXVIII. Vienna: International Progress Organization, 2004, esp. pp. 65ff.

<sup>9</sup> For details see [Hans Köchler], "Statement by the President of the I.P.O. on the prosecution of international crimes in Iraq: lack of constitutional basis for war crimes trials," in: Hans Köchler (ed.) *The Iraq Crisis and the United Nations*, pp. 73-76.

<sup>10</sup> Op. cit., p. 1038.



rather bizarre developments in Belgium have made clear, a country exercising jurisdiction over international crimes committed by *foreign* citizens on *foreign* territory, whereby those acts may be totally unrelated to the “host country” of the prosecution, embarks on a judicial “mission impossible.” The handling of cases that are almost always of a highly political, and therefore legally controversial, nature may obstruct the foreign policy of the very country acting as agent of universal jurisdiction and may bring it into direct conflict with another country’s claim to sovereignty, not to speak of the potential negative implications for the former’s economic interests. Belgium, for instance, has quickly learned the lessons of *realpolitik* and sacrificed the *ideal* of universal jurisdiction on the altar of the country’s very *real* interests. The original war crimes law of 1993 has been made virtually toothless – i.e. meaningless in terms of universal jurisdiction – through a series of modifications by which the Belgian legislature inserted into the law instruments of political control, including the possibility of a deferral of cases according to *political* considerations.<sup>11</sup> Apparently, the government determined that – because of the problems resulting from the domestic judiciary becoming the battlefield for the settling of scores by rival political groups from foreign countries – the noble idea is not worth the effort and quickly abolished the law in its original form. Thus, it was admitted, at least implicitly, that a country can administer universal jurisdiction – all by itself – only by applying *double standards*, i.e. by avoiding the prosecution of all cases that negatively affect that country’s national interests. The Belgian experiment has at the same time demonstrated the failure of the most far-reaching model of universal jurisdiction within a domestic judicial system so far, suggesting that the ideal cannot be reconciled with the political reality.

Having examined regional, domestic and international *ad hoc* arrangements, we are, thus, left with the question whether the application of double standards can eventually be avoided when it comes to the prosecution of international crimes. In our assessment, only a permanent transnational arrangement resulting from an intergovernmental treaty will have a chance of overcoming the problems and evading the pitfalls of universal jurisdiction we have identified so far, albeit on a selective

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<sup>11</sup> For details see Hans Köchler, *Global Justice or Global Revenge?*, pp. 85ff.

basis. This requirement is evidently not met by any arrangements resulting from Security Council resolutions on the basis of Chapter VII of the UN Charter or from resolutions by other intergovernmental bodies, whether of the United Nations or regional organizations. However, through the entering into force of the Rome Statute of the International Criminal Court (ICC) in 2002, a paradigm shift has occurred in the exercise of universal jurisdiction. The superiority – in terms of a separation of powers and all that this entails for the fairness and impartiality of judicial proceedings – of a permanent international court over *ad hoc* arrangements is now being tested for the first time.

## (II)

In order to assess the potential of the ICC as an instrument of universal jurisdiction – and as alternative to traditional *ad hoc* or domestic arrangements – we have to identify specific problem areas in regard to the global political framework in which the Court operates, its specific procedural set-up, and the interpretation and application of certain provisions of the Rome Statute by the officials of the Court itself as well as by the “international community,” states and non-states parties alike.

Some of the questions related to the geopolitical framework are:

- Are the provisions of the Rome Statute indeed, as argued, an effective antidote to the politicization of international criminal justice? (This question has been extensively debated in the British Parliament prior to the ratification of the Rome Statute by the UK.)<sup>12</sup>
- In what sense does the judicial authority of the ICC enable it to avoid victor’s justice? What are, in addition to the Court’s very nature as a *permanent* institution, the statutory and procedural safeguards which

make a politically expedient and selective judicial practice less likely than in the case of *ad hoc* courts?

- Can the implicitly *supranational* judicial authority vested, by way of an intergovernmental treaty, in the International Criminal Court be exercised in such a way that the Rome Statute is perceived by the international community (including the major powers) as compatible with the principle of state sovereignty, one of the pillars of the contemporary international system, in particular the United Nations Organization? Doubts as to the normative consistency of the Rome Statute (as in this particular case) and its compatibility with norms of general international law may cause serious problems not only for the legitimacy of the ICC, but for the consistent judicial practice of the Court itself.
- How can the problem of a lack of “autonomous jurisdiction” of the ICC be addressed, which results from the limited number of States Parties to the Rome Statute? This state of affairs *indirectly* imposes on the Court a mode of operation as if double standards were applied. (In many instances where serious international crimes are committed the Court cannot investigate or prosecute due to the lack of jurisdiction on the basis of territoriality as well as nationality.) Although the majority of UN member states are now States Parties (100 as of January 2006), the majority of those with a powerful military, including three permanent members of the Security Council, are not. In all such cases where jurisdiction, because of non-ratification or non-accession, does not exist, the Court simply has to wait for the referral of a situation by the Security Council – which, in a certain sense, makes its jurisdiction directly dependent upon international power politics. The Court’s predicament is most obvious in the case of international crimes

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<sup>12</sup> House of Commons, London, *International Criminal Court Bill [Lords] in Standing Committee D*, 10 April 2001 (debate in connection with the author’s report on the

committed on the territory of Iraq by personnel and officials of non-States Parties to the Rome Statute. The Abu Ghraib prison scandal is a case in point.

- How can the Security Council's special role in the exercise of the jurisdiction of the ICC be reconciled with the basic requirement of a separation of powers? The Council's right of *referral* of a situation (applying also to situations where no jurisdiction would exist otherwise [Art. 13 of the Rome Statute]) and its right of *deferral* of an investigation or prosecution (Art. 16) have blurred the lines between law and politics and imposed upon the Court, as far as the exercise and actual scope of its jurisdiction is concerned, a rather awkward *cobabitation* with an agent of international power politics. Because of the veto provision applying to all decisions under Chapter VII of the UN Charter, referrals of situations by the Security Council are always politically filtered. As the Council's practice in 2002 and 2003 (concerning UN peacekeeping missions) and – more recently in 2005 (related to the Sudan) – has demonstrated, decisions on a deferral are also highly problematic insofar as the most powerful member of the Council has, in those specific areas, succeeded in imposing one-sided preventive measures for the protection of its own personnel from prosecution.<sup>13</sup>
- How can the Security Council's privileges, written into the Rome Statute, be brought into conformity with the requirement of strict judicial independence? The way the Council acted in the case of the Sudan – where the referral of a situation according to Art. 13 of the Rome Statute was linked to, in fact conditioned upon, a kind of selective and preventive deferral of investigation or prosecution according to Art. 16 – has made the dangers of political interference into the Court's mandate drastically clear. As we have stated in a

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Lockerbie trial).

<sup>13</sup> For details of the problem of deferrals under Art. 16 of the Rome Statute see Hans Köchler, *Global Justice or Global Revenge?*, pp. 254ff.

memorandum dated 2 April 2005, “[u]sing Art. 16 to restrict the jurisdiction granted under Art. 13 (b) – i.e. to render that Article ‘harmless’ for a powerful non-State Party, as resolution 1593 (2005)<sup>14</sup> 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.”<sup>15</sup> As we have explained in the memorandum, with this resolution the Council has violated letter and spirit of the Rome Statute and severely undermined the Court’s efficiency, credibility and legitimacy.<sup>16</sup>

In the international political framework in which the Court has to operate, Court officials have made tactical moves and interpreted the Court’s mandate<sup>17</sup> in a way that appears to be ceding terrain to the Security Council, implicitly putting the ICC’s mission in a context that is alien to universal jurisdiction. Understandably, this raises fears of a potential politicization of international criminal justice even when it is administered by a permanent institution. In the annual report of the International Criminal Court for 2004, the Court’s purpose is characterized in a way that gives it a quasi-political role which is similar, or subordinates it, to the mandate of the Security Council set out in Chapter VII of the UN Charter: “The International Criminal Court is intended to contribute to efforts to restore and maintain international peace and security and guarantee lasting respect for and the enforcement of international

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<sup>14</sup> Resolution adopted by the Security Council on 31 March 2005, S/RES/1593 (2005) (“Reports of the Secretary-General on the Sudan”).

<sup>15</sup> *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, [www.i-p-o.org/Koehler-Sudan-ICC.pdf](http://www.i-p-o.org/Koehler-Sudan-ICC.pdf).

<sup>16</sup> See also the news release “Sudan: Double Standards in International Criminal Justice,” April 2, 2005, *Global Policy Forum*, New York, [www.globalpolicy.org](http://www.globalpolicy.org).

<sup>17</sup> In his address at the Fourth Session of the Assembly of States Parties on 28 November 2005, the President of the Court, Mr. Philippe Kirsch, has himself acknowledged that “[t]he Court understands that it has its own responsibility in the effective implementation of its mandate.” (International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005, The Hague, 28 November 2005, *Statement by Philippe Kirsch, President of the International Criminal Court*, p. 6.)

justice.”<sup>18</sup> However, contrary to what the similarity of the wording to the formulations in Art. 39 of the UN Charter suggests, no such auxiliary role vis-à-vis the Security Council is to be found in the wording of the Rome Statute. Apart from a rather vague reference in the Preamble to international crimes as threats to peace and security,<sup>19</sup> nowhere else does the Rome Statute mention peace – or a “political” role of the Court for the preservation of peace. The Preamble’s formulation cannot be construed in such a way as to make a connection between the Court’s mandate and enforcement measures of the Security Council under Chapter VII – a connection that, in another context, has been made by the Council itself in order to justify the creation of *ad hoc* tribunals by means of Chapter VII resolutions.

The ICC must not follow precedents in which the Council has acted *ultra vires*.<sup>20</sup> In light of the experience with the Council’s *ad hoc* tribunals, the ICC must zealously guard its independence and be very cautious so as not to become an instrument of the Security Council in any way.

The danger of politicization is becoming obvious in the ICC’s 2004 report in another respect, too. By characterizing the Prosecutor’s mandate in an almost political fashion, mentioning “a policy of targeted prosecution, focusing on the persons who bear greatest responsibility,”<sup>21</sup> the report evokes fears as to the arbitrariness of prosecutorial decisions, eventually serving the aim of political expediency. Who will define the criteria according to which the persons to be prosecuted will be selected? How can the Prosecutor assure that the selection will not be made according to an undeclared political agenda (one that mixes political with strictly judicial considerations)? If one bears in mind the high-profile political cases with which the ICC will have to deal according to its jurisdiction, these are not superficial concerns.

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<sup>18</sup> *Report of the International Criminal Court*. United Nations, General Assembly, Doc. A/60/177, 1 August 2005, Par. 3.

<sup>19</sup> “Recognizing that such grave crimes [referred to in the previous paragraph as the victimization of millions of people during the 20<sup>th</sup> century / H.K.] threaten the peace, security and well-being of the world ...” (*Rome Statute of the International Criminal Court*, Preamble, Par. 3)

<sup>20</sup> See the author’s analysis of the Security Council’s resolution setting up the ICTY: “Memorandum on the indictments by the International Criminal Tribunal for the former Yugoslavia” (27 May 1999), in: Hans Köchler, *Global Justice or Global Revenge?*, pp. 353-356.

The problematic issues of interpretation of the mandate by the Court's officials themselves must be dealt with in the context of the judicial practice of the ICC (which is naturally limited because the Rome Statute has only entered into force in July 2002). Some of the questions coming to mind are:

Why has the ICC not initiated an investigation of actions of troops of the United Kingdom in Iraq and into the possible criminal responsibility of UK commanders and politicians? This is a situation where the Court undisputedly has jurisdiction on the basis of nationality. The spectacular "Basra prison case" (the attack in September 2005 on an Iraqi prison, to free two secret agents, by crashing the gates and smashing the walls with armoured vehicles, resulting in several casualties);<sup>22</sup> sabotage actions by secret commandos or, more precisely, *agents provocateurs* disguised as "Arab terrorists;" acts of torture and killing of Iraqi prisoners and civilians, and other forms of inhumane treatment: the cases are too numerous to be listed in detail. They are well documented by the UK and international media. According to its mandate, and in particular in view of the complementarity principle of Art. 1 of the Rome Statute, the ICC should by now have examined the quality and genuineness of eventual measures of investigation and prosecution of the alleged international crimes by the British judiciary. (It goes without saying that we do not refer here to jurisdiction over the crime of aggression itself because the respective jurisdictional provision in Art. 5 [1] [d]) of the Rome Statute is not yet operative due to the lack of definition of the term "aggression.")

Furthermore, will the ICC eventually exercise its jurisdiction in cases of international crimes that may have been committed on the territory of several European States Parties of the Rome Statute by officials of the United States in collusion with European officials? The secret "renditions" of detainees by the United States to secret jails in Europe, the secret detention of non-US citizens in those jails: all these acts are serious breaches of international humanitarian law and are clearly, as

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<sup>21</sup> Loc. cit., Par. 28.

far as certain European states are concerned, within the jurisdiction of the ICC on the basis of territoriality and, as regards possible acts of complicity by European officials, also on that of nationality. These operations – having been revealed in some detail in the international media, but immediately denied by the concerned authorities – will, because of their “top secret” nature, not be investigated in a genuine and credible manner by the concerned European States Parties. Because of the “unwillingness” of those states to investigate the cases, the mandate of the Court to investigate this situation and eventually prosecute the suspects is clearly established according to Art. 17 of the Rome Statute.

It is exactly these delicate and politically sensitive cases that make the nexus between law and politics in the field of international criminal justice drastically obvious. It is not by accident that the ICC, so far, apparently has taken “political precautions” and – as far as is publicly known – chosen not to exercise jurisdiction. In view of the Court still being a rather fragile entity, the Prosecutor may, as in the case of the UK, not wish to alienate an important State Party in a phase when the Court’s future – its long-term success – is still uncertain. At a time when the Court’s jurisdictional authority is not yet robust enough to allow it to act with self-confidence and when much depends on the political, not only moral, goodwill of non-States Parties who are to be induced to accede to or ratify the Rome Statute, harsh treatment of the personnel and leaders of a powerful State Party may be perceived as counterproductive by the Court’s officials. Naturally, this is again a purely political, not a judicial consideration; though alien to the ideal of independence of the judiciary, it is a calculation being made by those who are supposed to implement the mandate of the Court.

In view of these harsh facts of international politics, we should not be surprised that, so far, the Court has only opened investigations “where it does not hurt” or where, for obvious political reasons, it cannot be avoided: apart from the investigation into the situation in Darfur (Sudan), referred to the Court by the

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<sup>22</sup> See “UK soldiers ‘freed from militia.’” *BBC News*, [newsvote.bbc.co.uk](http://newsvote.bbc.co.uk), 20 September 2005. – On the political background – which makes genuine investigation of the case and prosecution of the suspects by British authorities almost impossible – see also “Basra



Security Council, the Prosecutor is only investigating situations in two (!) – internationally non-influential – African countries on the basis of referrals by States Parties, namely the Democratic Republic of Congo and Uganda.<sup>23</sup> As we have stated at the conference on “The Emerging Trends in International Criminal Jurisprudence” in New Delhi in December 2005, the litmus test of the supranational authority of the ICC, and especially the Court’s preparedness to fully exercise its jurisdiction, will be “whether the ICC will take up, *proprio motu*, high profile cases where it has jurisdiction on the basis of nationality or territoriality, or whether it will wait for referrals – ‘cleared,’ as they are, through the channels of power politics – from the Security Council ...”<sup>24</sup>

The virtual impossibility of drawing the line between politics and law, so painfully felt in the ICC’s rather “austere” and timid exercise of prosecutorial powers, is indeed the predicament of the most ambitious project, to date, of universal jurisdiction. The ICC, still in its incipient stage, has to worry about its very authority in a geopolitical context where many of the powerful states are either indifferent or openly hostile to this new form of supranational criminal justice.

An analysis of the ratification status of the Rome Statute makes us even more aware of the impact – whether open or concealed, direct or indirect – of power politics on the Court’s authority and future prospects. What is at stake is the viability of the very concept of universal jurisdiction under the political realities of a unipolar world:

A majority of states with a powerful military (i.e. superior military capability) or where the military plays a strong role in the domestic political set-up, have preferred to “stay away” so far; they have either not ratified the Rome Statute (in cases where they have signed it prior to 31 December 2000) or not acceded to it. This

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Prison Break Investigator Mysteriously Dies.” *GlobalResearch.ca*, 17 October 2005.

<sup>23</sup> “Situations and cases” as of January 2006: International Criminal Court, <http://www.icc-cpi.int/cases.html>.

<sup>24</sup> 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: Indian Society of International Law, 2005, pp. 28-30; p. 30.

does not augur well for the *universal* implementation of the Court's mandate of *universal* jurisdiction. In his report to the Assembly of States Parties to the Rome Statute, the President of the ICC implicitly referred to that problem by stressing "that promoting universality was still a priority for the Court" and mentioning that more had to be done "although international support continued to rise with the addition of new States Parties."<sup>25</sup>

Apart from the lack of enthusiasm of some of the major international players, the universality of the Court's jurisdiction – and, for that matter, its legitimacy – is hampered by the *particularity* of vested interests of the military establishment in the most powerful countries, including States Parties. The officials of these countries are more likely to find themselves in a position to commit acts punishable as "international crimes" in comparison to officials from "weaker" states where the "technical" means of committing international crimes are simply not available, or not available on the same scale. This imbalance may explain, to a certain extent, why, in the case of non-States Parties, countries still hesitate whether they should join the Court, and, in the case of States Parties, governments may not co-operate wholeheartedly with it. The latter problem is also documented by the fact that many States Parties have openly undermined the authority of the Court in signing so-called Art. 98 non-extradition treaties with the United States, the most powerful and vociferous opponent of the International Criminal Court.<sup>26</sup>

### Conclusion

While the project of universal jurisdiction requires the highest standards of the rule of law – similar to, or even higher than, those applied in any domestic constitutional system –, its predicament is revealed in the truth according to which the reality of international relations is still one of power politics, whereby relations between states are conducted on the basis of the assertion of national sovereignty. For a *permanent*

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<sup>25</sup> International Criminal Court, Assembly of States Parties, Fourth Session, *Press Release*, No: ASP2005, 28 November 2005.

<sup>26</sup> For details see Hans Köchler, *Global Justice or Global Revenge?*, pp. 245ff.

and *universal* court (with tendentiously comprehensive membership)<sup>27</sup> such as the ICC to operate under such conditions requires a delicate – and fragile – balance between the dictates of *realpolitik* and *judicial integrity*. In view of the above-described dilemma, particularly as regards a *modus operandi* designed not to discourage prospective States Parties, this is in itself an acknowledgment of the impossibility of separating law from politics in a precise manner.

For *ad hoc* courts – first and foremost those created by the Security Council – to try, in good faith, to realize the principles of universal jurisdiction is simply a *mission impossible* because those courts operate by way of negation of those very principles. They have been set up on a *selective* basis with the criteria of jurisdiction essentially being determined by political considerations of the Security Council's permanent members or other states and entities (as in the case of the “hybrid” arrangements for Sierra Leone and Cambodia). In view of the selectivity of their mandate, they do not meet the universality requirement in any way.

Thus, the observer of the ambitious project of international criminal justice is faced with a crucial question: will the beauty of a philosophical idea – similar to that of Immanuel Kant's notion of “perpetual peace” – withstand the test of political reality? Will universal jurisdiction survive the “reality check” in an international system which is characterized by the absence of a balance of power? In other words: will this fragile idea be practicable under the harsh conditions of power-driven international politics?

How can a concept that, essentially, requires a supranational organizational structure be implemented in an environment which is still characterized by the interaction among sovereign nation-states? Those who are dealing with the intricacies of a constitution for the European Union, that tries to reconcile supranational with intergovernmental decision-making, are well aware of the enormity of the task.<sup>28</sup>

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<sup>27</sup> At least in the long term, the universality of the Court's mandate is to be reflected in – and complemented by – the universality of its membership, if the idea of universal jurisdiction is to survive in a system still based on state sovereignty.

<sup>28</sup> Cf. Hans Köchler, “The European Constitution and the Imperatives of Transnational Democracy,” in: *Singapore Yearbook of International Law*, Vol. IX (2005), pp. 87-101.

Has the notion of “universal jurisdiction” eventually arrived too early on the global scene? What makes us think twice about the viability of the entire project is the fact that, so far, universal jurisdiction has almost exclusively been rendered in the form of victor’s justice. In all efforts at establishing a viable system of criminal justice on the basis of universal jurisdiction, one is confronted with the fundamental question – an answer to which would, at least for the philosopher of international law, be tantamount to squaring the circle: how does, in an international context that is determined by the politics of national interest, state power go along with a system that is based on the *taming* of that very power? The long-term prospects of the International Criminal Court – and the fate of supranational law enforcement in general – will depend on the answer to that very question. Almost four years since the coming into the force of the Rome Statute of the International Criminal Court, there is still no definitive answer as to whether the *ideal of universal jurisdiction* can be reconciled with the *reality of a unipolar world* – a reality which is painfully obvious in the fact that the global hegemon has not only chosen not to endorse, but to actively oppose that doctrine.

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