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Item 11: Civil and political rights, including the questions of (d) Independence of the judiciary,
administration of justice, impunity

THE CRUCIAL CONDITION FOR GLOBAL JUSTICE:

THE INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT

The Purposes and Principles of the United Nations, as explicitly stated in the introductory Articles 1 and 2 of its Charter, attest the sovereign equality of all its members, respect for peace, security and justice, abstention from the threat or use of force, and promotion of human rights for all. Such magnanimous aims, which may be restated overall as the rule of law, can be achieved, however, if basic legal standards are recognized and implemented. Double standards will confine them to the rhetoric only and annul its contents, no matter how lofty they may sound. The absence of international criminal law and an efficient system of applying it will rob the world from global justice. Even if some states argue that they administer humanitarian intervention on behalf of all, such engagement may develop within the concept of power politics and serve solely one set of interests. This has been the exercise for the whole duration of a few past centuries. Powerful and victorious entities, whether states or individuals, enjoyed legal immunity while the weak and the defeated ones were penalized.

On the other hand, for the first time in history, the creation of the International Criminal Court (ICC), whose fundamental document (the Rome Statute) was approved on 7 July 1998, and whose authority was established (after proper constitutional endorsements) on 1 July 2002, represents a major change for the better in universal jurisdiction. It succeeds several previous attempts of regional and *ad hoc* tribunals that were designed to achieve partial justice employed by the victorious powers at the end of the two world wars or by some permanent members of the U.N. Security Council. The Rome Statute and the ICC are achievements in the right direction, that is, the standpoint of strengthening universal rule of law. The founding document and the Court based on it distinguish themselves as permanent, independent, international and supranational. There is no doubt that it is designed as a new kind of authority in criminal matters based on universal human rights. It is not free, however, of some in-born weaknesses and also a few but powerful enemies.

Although the development, improvement and the revitalization of international law have been a worthwhile topic that attracted the attention of seekers of world justice, including myself, I am gratified to refer to the recent compendium, entitled **Global Justice or Global Revenge? International Criminal Justice at the Crossroads**, by Prof. Dr. Hans Köchler, one of the leading scholarly and inventive legalists and thinkers of our decades. When the author kindly send me this erudite work, so comprehensive and

persuasive, before the book was offered to the general public, the least that I could do was to suggest it for immediate translation to my native tongue (Turkish), the rendering of which I had the responsibility of editing.

After this appropriate acknowledgement, I may now return to the general topic. The ICC is an embodiment of an achievement meeting more than half way the age-old quest for global justice. But its authority needs to be protected against the onslaughts of the most powerful nation(s) and the U.N. Security Council. My citation of the two last-mentioned centers of power is not accidental. They are the ones that travelled some distance to undermine the principle of separation of powers, a *sine qua non* for the correct functioning of a court and the reign of rule of law. The ICC depicts what the international community evolved to the point of discouraging global revenge and invigorating instead global justice. The former is the continuation of power politics and the latter the institution of impartiality.

Revenge accompanied the end of wars, at the expense of the defeated parties in 1918 (in Europe), in 1945-46 (in Germany and Japan), in 1999-2000 (Yugoslavia), and in 2003 (Iraq). "Victors' justice" was operative in all these cases. The president of the International Committee of the Red Cross (Gustave Moynier), who made the first proposal (1872) to form an international criminal court, suggested tribunals to be set up at the end of each war, three of the five judges to be chosen from the noncombatant states. The *ad hoc* tribunals, following the footsteps of the Treaty of Versailles, accused and penalized only the defeated parties. There is ample evidence, on the other hand, that the personnel of the victorious nations also committed atrocities. The latter enjoyed the immunity that the all-powerful system of power politics gave them a blank check. Hans Kelsen, the renowned specialist in international law who rejected victors' justice *ex principio*, suggested in 1944 an international court with compulsory jurisdiction on all nations.

The Nürnberg and Tokyo trials dealt with crimes against peace, war crimes and crimes against humanity, and established that high-ranking officials could also be tried and that orders from the superiors could not be excuses for crimes. But in both cases the victors judged the vanquished with little or no regard for basic legal norms. The tribunals, composed of judges appointed by the victors (for instance, General Douglas MacArthur, the commander of the U.S. occupation forces in Japan, appointing the judges and the prosecutor, and also endowed with the right to alter the verdicts), complimented the military campaigns. Such past occurrences bring to mind the contemporary quests for the trial of the so-called "Al-Queda suspects" at the Guantánamo Bay U.S. military base in Cuba and the trial of the ex-Baath supporters in Iraq. Fascism and militarism, and their appalling consequences, had to be put on trial, but also the offenses of the Allied personnel then, just as the behaviour of the Coalition forces in the contemporary theatres of war in the Middle East now.

The *ad hoc* tribunals established by the U.N. Security Council in relation to cases involving Cambodia, the Democratic Republic of the Congo, Rwanda, Libya, Sierra Leone and Yugoslavia may hardly be models for adoption. The Belgian judge who issued a warrant of arrest for the Congolese Minister of Foreign Affairs was a citizen of the country which had earlier colonized that African community. The Brussels Court of Appeals dismissed (2002) a war crimes case against Israel's Ariel Sharon (related to the Sabra and Shatila massacres in Lebanon) on grounds that he was absent from Belgium. (PM Sharon had to change his travel plans to avoid entrance into Belgium territory.) Although both the Hutus and the Tutsis committed crimes, it was mostly the former which had been indicted. The handling of the Lockerbie case had legal irregularities. The Yugoslav experiment failed to meet the basic requirements of the separation of powers. The cases of Cambodia and Sierra Leone, where the interests of the great powers did not clash, may be said to represent a significant degree of independence.

Compared with the illustrations above, the International Criminal Court should be described as the

first independent institution in terms of its composition and rules of function. Its judges (and the prosecutors) are elected by the States Parties by secret ballot, on the criteria of the principal legal systems, equitable geographical representation, and gender balance. Such voting procedures eliminate political pressure and ensure separation of powers. The first bench of 18 judges have already been elected. The ICC possesses jurisdiction over crimes committed on the territory of a State Party. Its judicial authority is not subordinated to any executive power, be it any State or the Security Council. All Signatories pledged cooperation with the ICC. The Rome Statute, thus, gives it judicial powers to be exercised on a non-discriminatory basis.

However, there exist some structural weaknesses as well as abuse of loopholes. Granted the well-known difficulties, there are no adequate definitions of aggression and terrorism in the Rome Statute either. France, a nuclear power, introduced a reservation stating that Article 8 of the said Statute does not and should not cover nuclear arms within the definition of war crimes. The ICC, thus, runs the risk of being operative only against the non-nuclear powers, that is, not against the powerful but against the comparatively weak nations.

The United States was one of the seven States that originally voted against the Rome Statute. China and Israel were among the seven known States for having cast their votes in the negative. President B. Clinton, who signed it on 31 December 2000, the last day open for signature, did not recommend it for Senate approval. Nor did his successor, President G. W. Bush. The U.S. signature is virtually withdrawn.

Official American attitude may be deduced from a U.S. House of Representatives Act, the quest to sign bilateral agreements with the States Parties and a Security Council resolution. The American Servicemembers' Protection Act (2002) rejects the ICC's jurisdiction in every conceivable way. It brings that country into conflict with all others which have signed and endorsed the Rome Statute. Such total dismissal led to bilateral agreements guaranteeing immunity to U.S. military and civilian personnel from criminal prosecution. This is a striking case of double standards. It may be safely assumed that political and economic pressure is exerted to reach such agreements. Hence, the European Parliament requested (2002) the governments and the parliaments of EU members and candidate countries to resist such pressure or refuse to ratify the agreements already signed. Further, the Security Council adopted, under U.S. leadership (or pressure) on 12 July 2002, just eleven days after the formal establishment of the ICC, a resolution that aimed to alter the meaning of Article 16 of the Rome Statute. The latter only states that the Security Council may propose a postponement up to a maximum of one year of a case already taken up by the ICC. The alteration implies, on the other hand, a collective and preventive immunity for an entire people, whether or not a case is taken up by the Court.

Although the International Criminal Court is faced with the rivalry of power politics and the possibility of disowning parts of its authority, it is still permanent, significantly supranational and structurally independent in a variety of ways. *Ad hoc* tribunals are no longer necessary, and improvements may be taken up in the evaluation conference of the States Parties that is due seven years after the legal adoption of the Rome Statute, i.e., in the year 2009.

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