

THE INTERNATIONAL CRIMINAL COURT REFLECTIONS FOR A STRESS TEST ON ITS FOUNDATIONS

Mateus Kowalski

email: mateus.kowalski@gmail.com

PhD student in International Politics and Conflict Resolution at Universidade de Coimbra, holder of a Master Degree in International Law and of a Bachelor Degree in Law. Author of articles and papers on the Theory of International Law, the UN system, human rights, and security issues.

Guest lecturer at Universidade Autónoma de Lisboa, where he is a researcher in the field of international criminal justice (Observatory for External Relations), and at Universidade Aberta.

Legal adviser to the Ministry of Foreign Affairs of Portugal, in the field of International Law

Abstract

The constitution of the ICC in 2002 represents the ultimate example of the evolution of international criminal justice. The Court is referred to as a paradigmatic institution of the universalist concept of International Law, which envisages an enhanced international public order and which falls within the broader framework of the dominant liberal construct that currently characterizes both International Law and International Relations. However, the criticisms of universalism, in particular as regards the impositions of global liberal institutions and regulatory standards, are also reflected on the ICC. In particular, it has been met with several essential criticisms, such as its dependence on the Security Council, suggesting political interference in a criminal court, or the fact that until now only issues pertaining to Africa have been submitted to the Court, which in turn leads to suspicion about their selectivity. These are the criticisms that undermine the foundations of the ICC.

At a time when the Court has not yet concluded any trial, and when there is still some scepticism about the success of its mission, knowing what to expect from the ICC in its task of crime preventing and retribution and building peace depends largely on the strength of its theoretical foundations. It is argued that despite the seemingly solid support discourse rooted in universalism, the answers advanced by this theory are not fully satisfactory due largely to the structural weaknesses that characterise it. This article seeks to offer food for thought on the subject and starts by gauging the competence of legal universalism to support "its" ICC with regard to these issues. It then identifies the aspects that can be addressed in within a more complex context, such as critical theory, which may contribute to the development of a discourse that grants the Court greater theoretical sustainability.

Keywords

International Criminal Court; International Law; Universalism; Critical Theory

How to cite this article

Kowalski, Mateus (2011). "The International Criminal Court. Reflections for a stress test on its foundations". *JANUS.NET e-journal of International Relations*, Vol. 2, No. 2, Autumn 2011. Accessed [online] on date of last view, observare.ual.pt/janus.net/en_vol2_n2_art6

Article received on July 2011 and accepted for publication on October 2011



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Mateus Kowalski

1. Introduction

The implementation of the idea that any person, wherever he/she may be and regardless of official status may be liable for crimes relevant to the entire humanity represents a break with the Westphalian paradigm that presupposes that it is up to each state to do justice to "his" people. Various international criminal courts have been created after the Cold War, such as the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and a permanent criminal court, the International Criminal Court (hereinafter "ICC"). Power is no longer a shield of impunity as before. The leaders involved in conflicts learned to fear international criminal justice as the "sword of Damocles". On the other hand, the creation of international criminal courts, in their various forms, has become a method for consolidating peace in post-conflict situations and a mechanism of restorative justice.

The constitution of the ICC in 2002 represents the ultimate example of the evolution of international criminal justice. The Court is referred to as a paradigmatic institution of the universalist concept of International Law, which envisages an enhanced international public order and which falls within the broader framework of the dominant liberal construct that currently characterizes both International Law and International Relations. As referred by Bogdandy and Dellavalle, «in the global context, the development of this project for a true international public order and a true international law is currently largely based on the fate of the International Criminal Law» (2008: 2). However, the criticisms directed to universalism, namely the imposition of liberal global institutions and regulatory standards, are also reflected on the ICC. These include, in particular, its dependence on the Security Council, suggesting political interference in a criminal court, or the fact that until now only issues pertaining to Africa have been submitted to the Court, which in turn leads to suspicion about their selectivity. These criticisms undermine the foundations of the ICC in the context of universalism.

At a time when the Court has not yet concluded any trial, and when there is still some scepticism about the success of its mission, knowing what to expect from the ICC in its task of crime preventing and retribution and of building peace depends largely on the strength of its theoretical foundations. This is the argument of the present study, which argues that despite the seemingly solid support discourse rooted in universalism, the answers advanced by this theory are not fully satisfactory due largely to the structural weaknesses that characterise it. Thus, subjecting the ICC to a stress test with regard to its theoretical foundations enables us to identify its stress points and, at the same time, seek other theoretical frameworks that may produce a discourse that holds and sustains it.

This article seeks to offer food for thought on the subject and starts by gauging the competence of legal universalism to support "its" ICC with regard to these issues. It



then attempts to identify the aspects that can be addressed within a more complex context, such as critical theory, which may grant the Court greater theoretical sustainability.

2. Universalism and the ICC

Theorizing about the universality of public order, and particularly about the current debate around its constitutionalization is, at the level of International Law, an example of modern rationality that characterizes prevailing liberal thought. In turn, the narrative of liberal peace, whose agenda is part of the ICC, is a universalist concept with a rational basis (Richmond, 2008). Unlike what happens with conservative concepts of International Law, the currents of thought that embrace universalism argue that international public order is possible and advisable, even a logical construct led by reason (Dellavalle, 2010). These currents share a universal conception of public order that is underpinned by a fundamental normative core common to international players and institutions for collective action towards universal goals.

For universalism, International Law must comprehensively regulate international society in the various dimensions of human action in such a way that is not confined to the jurisdiction of the state and of its various stakeholders, including individuals. Achieving this goal requires the cooperation and partial integration among states (ideally democratic) in a process that is properly framed by international organizations.

The ideals of Kant about a cosmopolitan Law and of a world republic founded on reason constitute the starting point for the universalist understanding of public order which dominates today and is markedly present in prevailing liberal doctrine. The subjective mental process ruled by reason that is characteristic of each individual becomes the common element that underlies universalism.

The dilution of the power of the state into other political levels beyond it, increasingly stronger globalization of democracy, development and respect for human rights, chained to the practice of "good governance", cause new impulses and complement and deflate domestic constitutional frameworks. This is how the proposal for global constitutionalism is presented as an apology of universalism of objective rationality. Global constitutionalism is perhaps the most important structural change in recent times in International Law and has impacted profoundly on the debate around the subject (Machado, 2006). Basically, the proposal for universal constitutionalism offers a legal compensation to state constitutional shortages brought about by globalization (Peters, 2009).

The ICC clearly fits this liberal universalist conception, and this is shown in two ways: on the one hand, in the exercise of criminal justice beyond the State, and on the other, in the importance given to the individual as a subject relevant to international social relations.

As regards to the first, criminal prosecution is a power that traditionally forms part of the core sovereignty of States. The ICC represents a break with this classical postulate: the power for criminal prosecution is also exercised by an entity that stands beyond the public competencies of states. This international criminal prosecution power does not require authorization by the states. The investigation, arrest warrant and the trial may be triggered by a decision of the Court and may even oppose the will of the states



that have primary jurisdiction over it. This is the case when the jurisdiction has been established by the Prosecutor or by the Security Council under Article 13 of the ICC Statute, which may even imply the exercise of jurisdiction over states that are not Party to the Statute. This is reflected in the strengthening of the international public order, whereby it is granted criminal jurisdiction, similar to what happens in state orders.

As regards to the second point, it is worth noting that the Court exercises its action centred on the individual, as it aims, through the exercise of justice, at fulfilling the objectives of protecting and promoting human rights, restricting the use of force and reducing its effects on civilians. Under the ICC, these objectives denote a concern about the universal dignity of human beings, which is a concern of the international community and not merely of the state. But this centralization on individuals has also other equally important manifestations, such as the individuals' capacity to intervene in international criminal proceedings. However, none of the parties in the process is a state: rather, on the one side there is the Prosecutor, and on the other the defendant¹. Then, the Prosecutor's investigation may have originated in information given by non-governmental organizations, which also contribute to the collection of documentary and testimonial evidence. It is also important to stress that an international employee, the ICC's Prosecutor, may, on his own initiative, start an investigation². Finally, the victims intervene in the process, taking on a role similar to the one assigned to them in punishments decided by states.

3. Criticism of the ICC and the Response of Universalism

Currently, the ICC has met with hard and lasting criticism with regard its foundations and which somehow reflects a concern about the decision to impose liberal "Western" ethical and regulatory solutions. This criticism is basically twofold: statutory and factual. Regardless of the fact that this criticism may be based on reasons of a juridical nature or on everyday political motivations, it is possible to identify, from a universalist perspective, arguments that seek to rebut those criticisms and support the ICC by means of a discourse anchored on objective rationality.

3.1. Dependence on the Security Council

Criticism that the action of the Court is excessively dependent on the Security Council and, therefore, largely determined by political rather than legal criteria of its jurisdiction, is a concern that refers to a statutory aspect. Indeed, the power of the Security Council over the action of the ICC is stated in the Statute of the Court, particularly in Articles 13 and 16.

Article 13, clause b) states that the Security Council may refer a situation in which there is evidence of serious crimes having been committed within the jurisdiction of the

¹ The designation of cases brought to the ICC reflects the idea that we are dealing with an international accusation system where the parties are the Prosecutor and the defendant. For example, the first case of the ICC is called *Prosecutor v. Thomas Lubanga Dilo*.

² Article 15 of the Statute of the ICC.



ICC to the Prosecutor. Thus, of the seven cases under consideration³, two were submitted by the former. This power granted to the Security Council has, since the preparatory work behind the ICC Statute, met with several objections, ranging from the loss of independence and credibility of the Court, to the argument that the Security Council has no competence in matters of international criminal justice under the terms of the United Nations Charter and to the accusation that this creates a situation of selectivity in the establishment of jurisdiction (Yee, 1999).

The underlying point in any of these criticisms is that cases referred to the ICC are subject to political decision criteria that are different from the eligibility criteria specific to a court like the ICC. In addition, there is the fact that of the five permanent members of the Security Council, three – China, the US and Russia – are not Party to the Statute of the Court. Given that they have right to veto⁴, any situation occurring in their territories or involving their own nationals would certainly never have the chance of being referred to the Court. This reinforces the idea that the jurisdiction exercise of the Court may be selective, depending on the dynamics of the Security Council.

The power of the Security Council under Article 16 is, however, the one that has been touted as the most serious example of political interference. Under its terms, the Security Council may decide to suspend any investigation or criminal proceedings in progress at the ICC for a period of twelve months, which is renewable. The Security Council has gone to the extent of passing resolutions conferring immunity to persons involved in peacekeeping operations at the service of a state that is not Party to the ICC Statute.⁵

It can even be argued that this is a modification of the Rome Statute by the Security Council (Jain, 2005). This, on the one hand, conflicts with the objective of fighting impunity for the gravest international crimes, and, on the other, attests the full extent of intervention the Security Council is prepared to undertake. Several human rights non-governmental organizations have indeed pointed to the promiscuity between judicial action and political logic as being harmful to international criminal justice (Bourdon, 2000). A mechanism for consultation and dialogue between the Security Council and the Court would have been favoured instead (Bourdon, 2000).

In cases of crime of aggression, the role of the Security Council extends even further. The ICC Statute review conference held in Kampala in 2010 introduced the crime of aggression – not initially defined in the Statute – and established that the exercise of jurisdiction by the Court depends on prior decision by the Security Council that there has indeed been an act of aggression⁶.

In this critical view of the role of the Security Council with regard to the ICC there is an underlying concern about the duties of an executive entity that is centred on the narrow circle of its permanent members and with no real mechanisms of political control or jurisdiction (Kowalski, 2010). This is a concern for which the very discourse of universalism does not provide an answer.

³ Including the situation on the Ivory Coast, whose admissibility, at the time this paper is being written, is being considered by the 2nd Trial Court.

⁴ See articles 27, no. 3 of the UN Charter and 13 b) of the Statute of the ICC.

⁵ See, for instance Resolutions S/RES/1422, of 12 July 2002 and S/RES/1487, of 12 June 2003.

⁶ See UN Depository Notification C.N.651.2010.TREATIES-8, 29 November 2010. The Court may exercise its jurisdiction if the Security Council does not act within six months after being notified by the Prosecutor of his intention to open an investigation into an act of aggression.



Nevertheless, the analysis of the issue from the perspective of universalism produces arguments that relegate those criticisms to secondary place, stressing instead the evolution in shaping the international order. Accordingly, in what concerns the capacity of the Security Council to submit a situation to the Court, it means, therefore, that the ICC has the possibility of prosecuting crimes connected to states which are not Party to the Statute and over which it could not otherwise exercise its jurisdiction. More than anything, the intervention of the Security Council under Article 13 clause b) is a mechanism that allows circumventing the wills of States and thus extend the jurisdiction of the Court. Given that only 116 States are Party to the Statute, the mechanism for the Security Council's submission potentially guarantees that the Court may try crimes committed anywhere by anyone. On the other hand, the Security Council effectively has authority to deal with matters of a criminal nature, which was actually the argument advanced by the ICC with regard to the Former Yugoslavia on the *Tadić* case⁷. Another argument in favour of this option is that the Security Council would cease to establish *ad hoc* criminal courts, as in the case of the former Yugoslavia and Rwanda (Cassese, 2008).

With regard to the more controversial power of suspension of investigation or criminal proceedings in progress, the universalism discourse will defend that this was a necessary negotiation compromise mechanism: there should be a balance between the action of the Court and the primary responsibility of the Security Council in maintaining peace and international security. Moreover, the analysis of the preparatory work shows that Article 16 strips powers from the Security Council in relation to the draft Statute prepared by the International Law Commission and which formed the basis for negotiations.⁸ The at time Article 23, point 3 of that draft provided that the ICC could not initiate any proceedings with regard to a matter under discussion at the Security Council pursuant to chapter VII of the Charter, unless the latter decided otherwise. After intense negotiations in what became known as the "compromise of Singapore", the way the Security Council intervened was inverted, with the latter acting only when it wishes to suspend the procedure.

On the other hand, it is a fact that, so far, the Security Council has never resorted to its power to suspend an investigation or criminal proceeding in progress. Some African States have even exerted great pressure on the Security Council to exercise the power conferred to it under Article 16 of the ICC Statute, namely with regard to the situation in Sudan (Darfur) where Omar Al Bashir, President of Sudan, is charged with genocide, crimes against humanity and war crimes. This attests the responsibility and caution with which the Security Council exercises this power.

Thus, according to this concept and when those dispositions are analysed in the broader context of international criminal prosecution, the intervention of the Security Council is the result of a consensus necessary to build the ICC, and means a relative evil, even a possible benefit. Following this line of reasoning, and despite the abundant literature that advances arguments such as the vulnerability of nationals from the United States or even the absence of trial before a jury because that State is not Party

⁷ *Prosecutor v. Duško Tadić*, ICTY – Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

⁸ See International Law Commission (1997). *Yearbook of the International Law Commission: 1994, II(2)*. New York: United Nations.



to the Statute, Schabas defends that the rub lies actually on the excessive independence of the ICC with regard to the Security Council (2004).

3.2. Selectivity in the exercise of Jurisdiction

Another strong criticism that has been advanced mainly at political and diplomatic levels and that has generated some hostility by African States with regard to the ICC has to do with a factual point: so far only situations concerning Africa have been submitted to the ICC. This would illustrate the selectivity of the Court.

All seven cases referred to the ICC pertain only to African States: Uganda, the Democratic Republic of the Congo, Central African Republic, Sudan (Darfur), Kenya, Libya, and the Ivory Coast. This factual and undeniable finding has fostered the accusation that the ICC is not impartial in the establishment of its jurisdiction, and this has been coupled by complaints, at least implicit, of neo-colonialism.

The accusations have gathered the protest of several States in Africa, more or less united in a common stance, which has manifested itself primarily through the African Union. Following the ICC arrest warrant against Omar Al Bashir, there has been a harsh reaction against the Court's attempt to bring African leaders to trial, particularly from States that are not Party to the ICC Statute. At the 15th Summit of the African Union, its Member States have confirmed that they would not cooperate with the Court in the arrest and submission of Omar Al Bashir. On the other hand, they refused a closer cooperation with the ICC by turning down the opening of a liaison office in Addis Ababa⁹.

The travels of the President of Sudan to countries that are Party to the Statute of the Court have also generated some tension. In Omar Al Bashir's controversial trip to Chad and Kenya, the ICC demanded that those States complied with the arrest warrant and handed in the President of Sudan to the Court. The African Union responded in a serious manner advancing decisions taken by that organization and arguing that it knew the reality of the region better¹⁰, thus assuming an attitude of rejection against neo-colonialist interference. More recently, the issuance of an arrest warrant by the ICC against Libyan leader Muammar Gaddafi took the African Union to ask its members to ignore such warrant. As if summarizing the concerns of several African States, the President of the African Union Commission, Jean Ping, stated that the ICC is discriminatory because it only deals with crimes committed in Africa, ignoring those carried out by "Western powers" in Iraq, Afghanistan and Pakistan.¹¹

In this sense, the African Union has repeatedly tried that the Security Council of the United Nations suspends the proceedings in progress at the ICC against Al Bashir¹² by resorting to the dispositions in Article 16 of the ICC's Statute. As the Security Council has not shown any openness to suspend the proceedings, the African Union went to the extent of proposing an amendment to Article 16 requesting that when the Security

⁹ See "15th AU Summit – Press Release 104: 'Decisions on the 15th AU Summit'", 29 July 2010.

¹⁰ See "AU Press Release 118/2010", 29 August 2010.

¹¹ See Associated Press "African Union calls on Member States to Disregard ICC Arrest Warrant Against Libya's Gadhafi", 2 July 2011.

¹² See "AU Press Release 118/2010", 29 August 2010.



Council refuses to act, its authority be transferred to the UN General Assembly¹³, where the suspension of a case would have more favourable conditions for approval.

The reasons for this type of criticism are essentially political, to which the discourse rooted in universalism responds with strict observance of the ICC Statute criteria, in which thirty two African States are present, making it the largest group represented.

Thus, it immediately points out that complementary is a principle that informs the ICC's exercise of jurisdiction. Under the terms of Article 1 of the Statute, it means that the ICC is complementary to national jurisdictions on criminal matters, exercising it only when the latter do not want or are not genuinely able to do so. Not to be able to enforce jurisdiction, which may require the further intervention of the ICC, includes those cases in which suspects have been covered by an amnesty (Cassese, 2008). This subsidiary position in relation to national jurisdictions is also intended to encourage States to start criminal proceedings when crimes of extreme gravity are involved (Kleffner, 2008). This complementary principle opposes the primacy enjoyed by the *ad hoc* tribunals set up for the former Yugoslavia and Rwanda with regard to the corresponding national criminal jurisdictions.

Therefore, when the ICC started criminal proceedings in those situations in African States, it did so because either the states themselves denounced the situation – which is what happens in most cases¹⁴ – or because there was strong evidence of serious crimes that were relevant for the entire international community and the States with primary jurisdiction did not want or were genuinely unable to conduct the trial. The fact that the Court is analysing situations of States that are not Party to the Statute – such as Sudan or Libya – cannot be subject to criticism, inasmuch as that possibility is inherent to the very same Statute and aims to avoid situations of impunity.

That said, the accusation of selectivity would only make sense if arguments were advanced for other situations in the world to be referred to the Court. In this case, it would not be the correctness of the cases under consideration relating to situations in Africa, but the injustice of other cases remaining unpunished. In addition, the fact remains that other situations have been or are still being considered by the Court, particularly by the Office of the Prosecutor, and which include other regions besides Africa, namely facts that took place in Afghanistan, Colombia, Georgia, Guinea, Iraq, Palestine, Venezuela, Nigeria, Honduras, and in the Republic of Korea. The preliminary assessment is subject to general and abstract criteria established by the Prosecutor based on the Statute of the Court¹⁵, which formally prevents any selectivity or discrimination in the decision to start, or not, criminal proceedings in a given situation.

4. The shortcomings of Universalism: Are there Alternatives?

The two sets of criticism referred to earlier deserve a seemingly secure and convincing answer on the part of the universalism discourse, and one that is formulated around logical-deductive arguments and that attests the sustainability of the Court as a structural component of the international public order. However, if one shifts the focus

¹³ See "Report on the Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)", AU Executive Council Document EX.CL/568 (XVI), 29 January 2010.

¹⁴ These are the cases of Uganda, the Democratic Republic of Congo, the Central African Republic or the Ivory Coast.

¹⁵ See "Draft Policy Paper on Preliminary Examinations", 4 October 2010, www.icc-cpi.int.



of criticism to the actual universalist construct, then it will be the theoretical framework of international public order in which the Court is set which will be called into question. The ICC may find itself devoid of a theoretical support and at the risk of breakdown or at least of being relegated to a secondary role in the international system when its state of grace comes to an end.

The criticism, gaps and unmet needs of the universalist theory, particularly in the field of global constitutionalism, lead to the need to probe new avenues for International Law as a juridical science. The post-positivist approach, namely that rooted in critical theory, which is more advanced in other social sciences, including International Relations, may offer a way to rethink International Law. Particularly with regard to the ICC, it is important to identify some key aspect of the Court that enables its interpretation and justification beyond the shortcomings of universalism.

4.1. The shortcomings of Universalism

Any attempt do define international public order solely in terms of universalism, particularly global constitutionalism, by looking at the state is an exercise that risks being a failed promise for International Law and for the international social systems it envisages to regulate, because one cannot draw a parallel between the concerns and response mechanisms of both (Uruena, 2009). In the description of Koskenniemi, global constitutionalism is intuitively interpreted as if it was domestic constitutionalism: «multilateral treaties as legislation; international tribunals as independent jurisdictional powers; the Security Council as the police» (2005a: 117).

The lure of the global constitutionalism project must be restrained by an alert critical exercise. Firstly because in the current framework of international social relations, the project risks enhancing the dynamic of power rationales which already influence the more or less institutionalised, and more or less informal, international social relations. For this reason, Zolo draws attention to the dangers of global constitutionalism centred on the United Nations Charter which can lead to excessive concentration of power, making «the international protection of rights and the pursuit of peace even more precarious» (1997: 121). Despite the dominance of liberalism, which is indeed detached from simplified power relations, the fact is that international social relations are still dominated by a state-centred rationale that aims to influence global governance according to own interests, thus forming a "hegemonic bloc".

The structuring power of liberalism finds a correspondence in current International Law (Koskenniemi, 2005b). The theory of International Law has, indeed, taken the Law (or the rule) and power (or political reality) as the two axes of reference. This double dimension of International Law immediately turned it into a tool for the States, and increasingly a key factor for shaping international society. This means a concern to ensure the balance between Law and power, between legitimation and resistance (Krisch, 2005): on the one hand, to ensure a distance between law and political reality that hampers the political defence and absolute freedom of the State; on the other, the approximation of Law to the political reality to avoid the utopia of mismatched social solutions (Koskenniemi, 2005b).

The liberal agenda and manifestations are clearly also infiltrated, albeit in a more subliminal form – due to the fact that the international structure is more complex – by



power rationales. In the framework of the universalist concept, liberalism provides a theoretical cover that confers it a scientific rationale that legitimizes the pursuit of individual interests by the States which greater capacity to do so – i.e. those with greater power. The “problem solution” approach that characterises liberalism and currently predominates in the theory and practice of International Law can serve a domination strategy. Accordingly, by acting as if the structures actually reflect a particular set of true and unique ideas, the problems that affect the functioning norms, processes and institutions get solved, and structures are deemed to be immovable. This leads to the stabilization of those norms, processes and institutions, as well as to the crystallization of structures that may lie at the root of the problem, without an alternative being sought. Thus, power and truth feed each other (Foucault, 1980).

However, this methodological and somewhat ideological understanding is rooted on a wrong premise: that political and social reality is immutable (Cox, 1981). Critique of this liberal approach encourages, as stated by Cox, «a strategic action guideline to bring about an alternative order» (1981: 130).

4.2. Post-Positivism in International Law

For some post-positivist stances, universalism is possible and eventually desirable. However, from the epistemological viewpoint, it moves away from the notion of a universal rationality that enables the universal objectivation of reality. Critical theory challenges the central possibility of objective knowledge, that societies and individuals are part of a natural order or that knowledge can only be acquired through experience (Hollis, 1996). Accordingly, it states that the object of perception (empirical reality), be it in the context of legal, social, political, economic or cultural relations, is inseparable from the subject that is trying to capture it, analyze it and explain it.

Critical theory, faced with the shortcomings of single truth departing ideas, as well as of orthodox universalist ontology and epistemology, aims to overcome them by resorting to the central concept of emancipation. The ethical discourse leads to greater freedom and emancipation detached from the Westphalian straitjacket which never really allows seeing beyond the State. The post-positivist critical theory alternative is thus able to withstand the rational basis of universalism as a form of hegemony by granting it increased representativeness (Hoffman, 1988). Knowledge, discourse, equal opportunities or justice are ethical elements that act as a shield against hegemony.

Post-positivism thought fosters a multidisciplinary interpretation of international social relations, particularly at the level of International Relations and International Law. The impulse given by critical theory applied to Political Science, particularly with regard to International Relations, feeds from other social sciences where social critical theory is more advanced and more present in specific ideas (George, 1994). This is perhaps one of the most important advances in contemporary theory of International Relations (Richmond, 2008): the abandonment of the defence of the eternal present and the quest for a richer theory (Pureza, 1999).

In terms of International law, the critical process that underlies the post-positivist approach has moved in two major opposing trends: on the one hand, there is a current that calls for a theoretical redefinition without cutting completely with the existing



system – this current is influenced by the Frankfurt School¹⁶; on the other, stands the trend that advocates a total break with modernity as it would prove impossible to use any of its bases for the necessary new theory¹⁷. Without wishing to expand on this, as this is not the place, it is, nevertheless, important to demystify the idea that critical theory necessarily implies condemning International Law (Carty, 1991) and that deconstruction means destruction.

A post-positivist analysis allows us to say that International Law can be different from the one built by the theory and practice of orthodox liberalism, and certainly of liberalism. This can give rise to a new conception of International Law based on a post-positivist paradigm: stress the critical theory dimension in International Law and thus build a true ethical and normative system and a legitimizing authoritative discourse which conforms to an international society that is less oligarchic and more equal (Pureza, 1998).

The ontology of this International Law is not just objective or “empirical” reality, but also its subjective representation, with a normative base and a transformative intention, in which everyday life and empathy are operational concepts. An International Law that aims to be a factor for transformation cannot simply break with political reality and pretend it never existed. First it needs to understand this reality in order to deconstruct it and then attempt a critique towards the construction of an alternative system. For this reason, and although there is a break with the theoretical postulates of the orthodox notions of International Law, critique cannot ignore objective reality (norms, facts, institutions, processes) upon which it wants to act.

4.3. Elements for an interpretation of the ICC in a Post-Positivist Framework

Post-positivist thought, especially in the context of critical theory, can lead to a divisive deconstruction of current international organizations, particularly if interpreted as an attempt to break with post-modernism: Koskeniemi argues in favour of International Law as an alternative to the current international order, saying this could be achieved through the empowerment of independent groups outside international organizations (2004); Kennedy, in turn, defends that the ICC was a “bad idea” (Moore, 2005). Without wishing to start a debate about post-modernism in this paper, it must be pointed out that there are some aspects about the Court that should be reflected upon and interpreted in a post-positivist approach, particularly in the context of critical theory.

Both sets of criticisms referred to earlier, currently quite audible, could be, and they are, to some extent, fed by the discourse of critical theory. However, there are aspects that are core to the ICC that could be the starting point to inform a post-positivist

¹⁶ See, among others: Habermas, Jürgen (1984). *The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society*. Boston: Beacon Press; Habermas, Jürgen (1987). *The Theory of Communicative Action, vol. 2: Lifeworld and System – a Critique of Functionalist Reason*. Boston: Beacon Press; Habermas, Jürgen (2008). «A Political Constitution for the Pluralist World Society?». In Jürgen Habermas (ed.), *Between Naturalism and Religion*. Cambridge: Polity Press, 312-352.

¹⁷ See, among others: Koskeniemi, Martti (2005). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press; Kennedy, David (2004). «Speaking Law to Power: International Law and Foreign Policy Closing Remarks». *Wisconsin International Law Journal*. 23(1), 173-181.



construct that holds the Court in a discourse of emancipation and transformation anchored on ideals rooted on human dignity. The figure of the Prosecutor and the role of civil society are examples of such elements, which are mentioned here as a suggestion for future reflection.

The Prosecutor, that is, the Office for the Prosecutor¹⁸, is responsible for receiving information on crimes within the jurisdiction of the Court, examine them, carry out investigation and institute criminal proceedings before the Court. The Prosecutor is autonomous with regard to the Court and can start an investigation and charge individuals for the practice of crimes under the jurisdiction of the ICC, always subject, of course, to further examination by the competent Court. In what concerns crimes committed in the territory or by a State Party to the Statute, the Prosecutor exercises those powers *motu proprio*. This, incidentally, is considered to be one of the important achievements for human rights non-governmental organizations and for the victims (Bourdon, 2000).

The figure of the Prosecutor of the ICC has no parallel in the international system. It is an international official who exercises criminal jurisdiction independently, and he can investigate, charge and order the arrest of individuals of any nationality, regardless of their official position or even the will of States. The status of the Prosecutor and his authority are a break with the Westphalian order. On the other hand, the independent exercise of his powers contributes to the development of the international social system by means of international ethical and normative postulates centred on human dignity.

In turn, both organizations and individuals from civil society have left a decisive mark on the Court, basically due to three aspects: the establishment of the ICC, collaboration in the investigations and collection of evidence, and in promoting the role of the Court and the universality purpose of its Statute. The first two aspects deserve special mention.

The contribution of civil society in the creation of the Court and even in the framing of the Statute is a landmark in the formation of International Law and in the constitution of international organizations (Glasius, 2006). It is significant that two hundred and thirty seven non-governmental organizations from around the world were accredited at the diplomatic conference that adopted the ICC Statute in Rome on 17 July 1998.¹⁹ These organizations had direct influence on the drafting of some of the provisions of the Statute through collaborative work (Struett, 2008).

The intervention of non-governmental organizations in reporting crimes under the ICC's jurisdiction²⁰ and in the investigation of cases is another aspect that attests the importance of civil society in the functioning of the Court. Non-governmental organizations have always had very close contact with serious human rights violations, documenting and reporting them. The close contact with victims and witnesses has been of paramount importance for their protection and collection of evidence. Their contribution in terms of reporting situations and investigating cases can thus be decisive (HRF, 2004). It should be noted that the attribution of a role to non-governmental organizations pursuant to Article 15 no. 2 of the Statute is a landmark in

¹⁸ In accordance with Article 42 of the Statute of the ICC, the Prosecutor chairs the entity "Office of the Prosecutor".

¹⁹ See UN Document A/CONF.183/INF/3, 5 June 1998.

²⁰ By May 2011 the Office of the Prosecutor had received around 4,898 communications with some sort of connection to the jurisdiction of the Court. Source: ICC – www.icc-cpi.int.



the international institutionalization of civil society. It is equally relevant that the information conveyed by NGOs is handled by the Office of the Prosecutor, who is responsible, at least initially, to determine its importance in the context of an investigation or prosecution.

These two elements for reflection could be joined by a third pertaining to the contents of the principle of complementarity of the ICC's jurisdiction. It concerns the development of this principle by seeking local forms, including traditional ones, of administering justice. Indeed, there is a recent trend to soften the dialogue between peace versus justice in the context of the Court and the subsequent focus on finding new forms of justice of proximity that are complementary to the ICC (*Ambos et al.*, 2009).

5. Conclusion

The creation of the ICC should be seen not only as an innovation but above all as an achievement of civilization in the defence of human dignity and in the promotion of peace. The long journey undertaken so far has also contributed to a paradigm shift in International Law and International Relations, whose focus is moving away from States and refocusing on the individuals. Nevertheless, this is a long way that we are still taking.

Almost ten years after the creation of the Court, the results – that is, to put it bluntly, the convictions – are still lacking, contributing to the swell of criticism and to feed a sceptical discourse which, until some time ago, had been overwhelmed by the excessive enthusiasm surrounding the Court at academic, diplomatic and political level, which was also shared by the civil society. The structural criticism that it receives, namely its dependence on an oligarchic organ of realism which represents an expired order – the Security Council – and its selective action which, to date, has only targeted African States, undermine its foundations.

The accusation behind these criticisms is the global imposition of liberal ethical and normative standards. Even if the selectivity criticism is inspired more by a state-based particularistic stance rather than by a universalist perspective, the truth is that it is the international public order viewed from an universalist stance that is being questioned. The responses of universalism are effective, but they stand the stress tests only because universalism itself is insufficient.

The ICC is still living in a state of grace. However, the risk of marginalization has been increasing. The review conference in Kampala in 2010 was a warning: the sun had not yet set over Lake Victoria on the last day of the conference and there were already differences about the application of what had been agreed. Indeed, to date no State has bound to the amendments adopted at the conference, including those relating to the definition of the crime of aggression.

Reflection on the ideals behind the ICC must be ongoing in order to create an ethical legitimization discourse that grants it effective resilience and transformation capacity. But in order to have legitimacy, it is necessary to ensure critique, deconstruction and disclosure so that the hopes placed on the ICC may be linked to the hope in the critical reflection and in the will of all the international players involved in it.



The considerations presented in this paper are proposals that seek to contribute to a reflection on the theoretical sustainability of the ICC in the current liberal universalist framework. Consequently, accepting that the ICC may be developed according to a post-positivist stance, and not simply marginalized, is important not only to the Court itself but also to the development of an International Law theory which, alongside International Relations, gets the impact of the shortcomings of liberalism-based legal universalism and is able to offer a viable, emancipatory and transformative alternative. Ascertaining if that is actually possible may require a contextualized analysis based on the reflection proposed here.

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