How Jurisdiction and Power Politics interacts internationally?

A Review of Hans Köchler's *Global Justice or Global Revenge*

Mohamed Jalid

The philosophical reflection, presented in Hans Köchler's *International Criminal Justice at the Crossroads: Global Justice or Global Revenge*, deals with concepts of great importance today, such as 'universal jurisdiction', 'international legal order', 'international rule of law', 'humanitarian intervention', etc. It also deals with stakes and challenges of the legal theory and practice while settling causes of military conflicts, international crimes, transgression of international laws and conventions, and international terrorism. In addition, it reconsiders the historical development and practice of the international criminal justice since the first proposal for the establishment of an international criminal court was made in 1872 by the president of the international committee of the Red Cross Gustave Moynier.

The writer reconsiders, most of all, the legal and philosophical foundations of international criminal justice, and the way of its application in an international context that is really characterised by the dominance of power politics and double standards, and putting political and economic interests above coexistence and mutual respect between peoples, cultures and civilisations. The book's problematic is formulated as follows: Can universal jurisdiction, particularly the idea of international criminal justice, be applied even though world main powers, especially United States of America, are against the idea? What are the possibilities of the international rule of law, knowing that the international community still clings to the state sovereignty, gives priority to individual responsibility, and rejects the complete separation of powers?

Before answering this problematic, it is worth mentioning the methodological approach adopted by Köchler in this book, which is established on two basic choices. The first one relies mainly on description. This technique seeks, on the one hand, to describe comprehensively the historical development and trajectories of both international law and international criminal justice since the first attempt of universal jurisdiction after World War II, especially with the experience of 'Nuremberg' and 'Tokyo' Tribunals. On the other hand, it seeks to present the basic legal and political references, sources, and documents that include texts of acts, speeches and correspondence of judges, lawyers, analysts, observers, politicians, legal theorists, etc.

The second methodological choice, which can be called 'analysis technique', is based on comparing and analysing different legal and philosophical bodies of the subject matter which is, in this case, universal jurisdiction. This technique's main objective is to analyse conceptual apparatus, and to interpret provisions of legal texts, wordings, readings and reactions produced during or after any experience of international criminal justice, since the World War II Nürnberg and Tokyo Military Tribunals, Lockerbie Court, Extraordinary Chambers in the courts of Cambodia (Khmer Rouge Trials), up till Yugoslavia and Rwanda Tribunals. This choice also seeks to answer a set of basic questions, a part of which we will present in this paper. These questions are well chosen and accurately formulated, for they constitute either the introduction or conclusion of chapters.

By dealing with this tricky subject and adopting this method, professor Hans Köchler seeks to describe a theoretical concept of criminal justice, and to analyse its world application reality. The objective of this philosophical work aims at uncovering falsity and bias manifestations of this application, by providing an overview of international criminal justice since the 19th century, and presenting a convincing argumentation and a critical evaluation of power impacts on the international rule of law.

Let us now go back to the writer's general question: How to overcome the states interests to apply justice as sole solution for thorny issues of international crimes? Or, how to get a "balance between competing claims to the advantages of social life," as John Rawls puts it, without any influence or effect of state sovereignty, and of its political and ideological considerations, and apart from what the author calls the 'power politics'? To answer this complex question, Hans Köchler asserts, from the very beginning, the need to be aware of the complicated relationship between law and politics. Here once again the question becomes clearer and more direct, and more simple, but more profound: How to undertake international criminal justice and to preserve states interests and sovereignty?

Thinking realities and historical experiences of global jurisdiction, considered by the the writer as the task of legal philosophy, requires secondary questions about the legal bases and norm requirements, which will surely help establish a general perception of an applicable universal jurisdiction, while conserving state's sovereignty and power politics which will not disappear, at least in the foreseeable future, from the world's political arena. Thus, Professor

Köchler's questions about this complicated situation are as follow: Is the separation of powers- that is a principle necessary for an optimal judiciary and judicial function- possible even though states tenaciously cling to their national sovereignty? How to maintain the judiciary independence within such context of state sovereignty? Is the world states the only possible framework for a global justice system that is actually unable to fully perform its job? Finally, how to escape favoritism in international law application when political and economic interests of states, especially of powerful ones, are directly affected because of the firm stress on judicial procedures?

To answer these questions, Hans Köchler demonstrates experiences of various international criminal justice, showing how international law was, and still is, manipulated and exploited by world politics, especially after the fall of Berlin Wall and the collapse of Soviet Union. Furthermore, the international rule of law is generally prevented, according to Köchler, because judicial causes, particularly war crimes, genocides and crimes against humanity, and states' interests and/ or countries leaders or their allies personal interests are adjacent to each other. Therefore, the lack of a decisive separation between the judicial requirements and political and economic interests is the real and critical dilemma that faces the application of international criminal justice.

The clear demonstration of this dilemma and discord between legal requirements and policies and implications of international hegemony which are, according to Köchler, disastrous for the international rule of law, and international democracy in general, lies in the intentional mismanagement of Lockerbie case that is qualified a case of international terrorism: A famous downing of the Pan Am 103 plane over Lockerbie, Scotland in 1988, which was followed by the writer as an international observer nominated by the United Nations Secretary- General. In view of this complex case, the writer's philosophical view of law and this binary opposition law/ politics is based on the final verdict of Lockerbie case. He argues that «[the] elaborate extraterritorial arrangements provided for in the agreement served the unique purpose of undertaking a criminal trial in case that was directly related to a political dispute between the United Kingdom, the United States and Libya over the downing of Pan Am flight over Lockerbie (Scotland).»[1] The author further considers that the trial was conducted as an intelligence operation. According to him, the trial's proceedings were attended by Parties from

1 Hans Köchler, *International Criminal Justice at the Crossroads: Global Justice or Global Revenge?* Newyork: SpringWien (2003), p. 111.

the conflicting governments, either in support of the prosecution, or to the side of the defense. The result of this complicated exercise of international criminal justice, in which three states- U.S.A, U.K and Lybia- were involved, ended to the conviction of a Libyan official, whom the writer considers a scapegoat that was sacrificed in a crime that remained ambiguous even after the trial.

We should be aware here that the writer does not issue a condemnation against anyone, but he proceeds from legal philosophy, and presents sound arguments that prove law twisting the protection of personal or allies interests. We are interested, by evoking Lockerbie case and other judicial cases such as Yugoslavia, Rwanda Tribunal, the Extraordinary Chambers in the courts of Cambodia (Khmer Rouge Trial), military and ad-hoc courts, with the fact that the charge is always based, as Köchler puts it, on circumstantial and questionable arguments, or on statements of doubtful witnesses, as is the case of Lockerbie, in which the argument is built on the following presupposition: A bomb is transported in a bag, without any owner, and must get through three international airports into the intended plane. In addition, the case is based on the witness of a Maltese trader who received 3 million dollars from a foreign intelligence agency.

The writer also depicts manifestations of international power politics diktats in judicial experiences that followed Lockerbie Trial, especially in the ad-hoc Tribunals established by the Security Council in Yugoslavia and Rwanda. Köchler concludes that the dilemma of universal jurisdiction will always be tricky, even in the practice of the Security Council, as it has introduced, by founding ad-hoc tribunals in some cases and rejecting that in some others, "an element of arbitrariness and legal anarchy into the system of international relations. The council may have further discredited the principle of universal jurisdiction by trying to exercise a kind - albeit indirect- of political control over the ad-hoc tribunals established through resolutions under Chapter VII [of the United Nations Charter]."[2] Thus, when the Security Council acts as guarantor and protector of justice, and as creator of ad-hoc criminal tribunals, it puts at stakes the legality of international criminal justice cases, because they are not subjected, in fact, to the legal requirements, but to the variables of political and national interests of the council permanent members.
In this context, the International Criminal Court (ICC) is, according to Professor Hans

2 Ibid, p. 184.

Köchler, a real revolution within the system of contemporary international law in general, and a «qualitatively new step» forward in the history of international criminal justice in particular, if compared with the earlier judicial experiences, and given its serious shortcomings of application. For it is the first time in the history of international law that a permanent and independent judicial institution which is charged, at least theoretically, with the exercise of universal jurisdiction, far from the traditional restrictions that were imposed on national or international courts. But the key question in this section is: Does the ICC constitutes a paradigm shift in international criminal law? Is it able to go beyond the concept of national sovereignty and states interests into a transnational jurisdiction; that is to say, to be able to practice jurisdiction in isolation from power politics diktats?

Furthermore, having reviewed the various jurisdiction issues enlisted by Rome Statute, signed on July 17th, 1998 and entered into force on July 1st, 2002, the author goes on to describe reasons of the Court inability to fulfill its judicial role. Köchler considers that getting the argument sufficient for conducting judicial proceedings and allowing the court to conduct investigations depends, primarily, on political volition. In other words, the Court shall always be dependent on states sovereignty. In fact, it will always be subjected to power politics, as long as the Rome Statute imposes resorting to the Security Council or the Assembly of member states Parties, in the cases of non-cooperation. This will hold the court's authority and law enforcement in pledge to power politics within the Security Council, for it is obliged to take into account foreign policy considerations of member States in the Court.

Although the writer admits that the court is, inevitably, trapped in this politico-legal predicament, which requires exercising authority on the basis of referral to the Security Council or the Assembly of member states, he considers it "the best available option for the practice of universal jurisdiction."[3] He also states that "in a system which is determined by sovereign nation-states loosely organized in the framework of the United Nations Organization, compromises with realpolitik are unavoidable."[4] In spite of these limitations imposed by the Rome Statute on the ICC, it is still, as Köchler puts it, "the closest possible approximation to the international rule."[5] Unlike military and ad-hoc tribunals statutes, Rome

3 Ibid, p. 203.

4 Ibid.

5 Ibid.

Statute stems from an official inter-governmental agreement. According to Rome Statute, the ICC shall justly and democratically issue its decisions, without being subject to the veto, enjoyed by the Security Council permanent members. Furthermore, the Statute prevents the Security Council, theoretically at least, establishing of ad-hoc courts, and prohibits national courts, such Belgian or Spanish, from practicing universal jurisdiction.

However, this legal motivation is a major challenge for the ICC, especially with regard to its ability to issue judgments totally different from the 'victors justice', and to exercise its jurisdiction, without having consequences on political stability, or on security in a particular country, or on regional stability. This challenge lies mainly in overcoming what the author calls 'structural conflict' between power politics based on state sovereignty and international justice, which requires that justice shall not be selective. Therefore, the fundamental question is, essentially, about the possibilities of jurisdiction exercise: Can the Court officials challenge national governments, particularly governments of powerful non-States Parties, while exercising jurisdiction? How can the Court enforce its authority, independently and fairly, in cases of international armed conflicts?

To answer these questions, it is of great importance to recognize that the book's subject is not about the theoretical dimensions of international law, but it addresses, firstly, the psychological and moral conditions for jurisdiction practice and, secondly, a highly scientific competence, laudable morals and right personality that keeps out from revenge, corruption, bias, selectivity, injustice, etc. Such qualities are commendably requested for an international judge to do his job. There must also be a need for pluralism in the court's composition, which allows a geographical and cultural representativity balance, and permits the independent behavior of the court's staff that rejects selective jurisdiction. In this way, the court could erase the distinction between the victor and the defeated, avert the 'facts on the ground', created by military confrontations, and seek 'incontrovertible proof', or 'conclusive evidence'. Each of these psychological and moral dimensions, besides legal requirements, contribute to the foundation of global jurisdiction based on objectivity, fairness, transparency and justice.

However, the practice of universal jurisdiction can collide, especially when related to international crime, with how to define some basic concepts such as: war crimes, genocide, crimes against humanity, crime of aggression, etc. And although Geneva treaties, protocols

and annexes provide clear definitions that agreed upon by most of States Parties, the definition questions still haunt theorists, as well as sympathizers, of universal jurisdiction, as weapons technology and war methods are widely/ wildly developed, and the emergence of nuclear wars have made the use of force restrictions outdated and obsolete. As Hannah Arendt puts it, the reality "was that by the end of the Second World War everybody knew that technical developments in the instruments of violence had made the adoption of 'criminal' warfare inevitable. It was precisely the distinction between soldier and civilian, between army and home population, between military targets and open cities, upon which the Hague Convention's definitions of war crimes rested, that had become obsolete."[6]

To get out of this dilemma the Professor still has to ask: "Should international criminal law and norms be adapted to realities created by weapons technology development, as well as truths of battlefields? is it necessary to adapt universal principles and values of so that they can serve military needs arising from new weapons technology? should definitions of international crimes be reconsidered in a way that integrates methods and techniques of the new wars? Would the project of the ICC meaningless if the definitions of crimes does not include the use of mass destruction weapons- such as nuclear nukes that are the deadliest?"

According to Professor Köchler, these troubling questions will surely test the credibility of the entire project of universal jurisdiction. Excluding the use of mass destruction weapons from crimes elements, will put the ICC legitimacy at stakes, and will make it useless and meaningless. These questions are valid and actual, Köchler says. The law will always be of no importance unless it supports universal norms, whose task is to redress human behavior, not the other way round.

Irrespective of this textual/ subjective obstacle, covert in Rome Statute, an objective constraint is obvious in the clear contrast between national interests of both nuclear and non-nuclear states, which prompted several states not to sign and ratify the ICC Statute. This contrast is embodied in disagreement over the interpretation of the Statute requirements between: (1) those who are cautious and reserved in terms of the explicit reference to the use of nuclear weapons in Elements of Crimes, such as France which made an implicit reservation through *Interpretative Declaration*, and (2) those who insist on the fact that Statute should

6 Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*. Newyork: Penguin Books, 1994. Cited in Hans Köchler, ibid. P. 219.

include the criminalization of nuclear weapons use during armed conflicts, such as Egypt which issued a *Declaration* on the necessity that MDW use should be included within definitions of Rome Statute's Article 8.

In addition to this contrast, the American Service members' Protection Act- ASPA- (2002), is also a challenge to ICC while exercising its jurisdiction. ASPA, which is «the most principled and most decisive rejection of the [ICC]'s jurisdiction by a non-state party»,[7] seeks to protect American soldiers from any judicial prosecution, or any other forms of litigation, either during the conduct of military operations outside the U.S. borders, or even after the war. Thus, this act is, according to Köchler, in stark contrast with the universal judicial principles either stipulated by Rome Statute or included within other international legal instruments that are already agreed on the international community. Here, it is important to recognize that Professor Köchler has unveiled stark ethical scandals of the U.S. military policy. We may mention some of them in the following:

- ASPA prohibits American soldiers from providing military support to all states that ratified the Rome Statute, with the exception of NATO members, non-NATO allies and Taiwan. This prohibition must be kept unless the U.S. «President determines 'that it is important to the national interest of the United States to waive such prohibition'».[8]
- United States may not contribute in peacekeeping missions «unless the president has certified to Congress that the Security Council has 'permanently' exempted members of the U.S. Armed Forces from prosecution by the ICC, or unless the countries of operation are either not States to the ICC Statute or have (..) concluded bilateral agreements with the U.S. guaranteeing U.S. personnel from criminal prosecution.»[9]
- ASPA prevents the U.S. courts from cooperation with the ICC, whatever the case may be. It also «prohibits the extradition of any person from the United States to the ICC and bans all investigative activities of agents of the ICC in the united States.»[10]
- ASPA allows the U.S. president to «use all means necessary and appropriate» to release America's or its Allies soldiers imprisoned or detained on order issued by the

7 Hans Köchler, ibid. p. 241.

8 Ibib.

9 Ibid.

10 Ibid. p. 242.

ICC or on its behalf.

- In addition to these prohibitions, the United States obliged several States to conclude bilateral agreements that seeks to prevent the extradition of U.S. soldiers involved in international crimes to the ICC.

In front of this reality, which seeks to immunize the U.S. military from any judicial prosecution, rare are the chances for the success, which does not recognize any form of immunity for Heads of State and military personnel, especially when the powerful state in the world is not neutral, but it mobilizes lobbies, and concludes bilateral agreements to hinder the international rule of law. The historic challenge before the Court, at the present time, lies in taming the power politics practiced by the United States and other powerful countries. But this challenge may diminish, if the ICC takes advantage of the collective desire, expressed by the ratification of a large number of states (90 countries up till May 2003) on Rome Statute.

Therefore, one must ask for the kind of practical measures which should be undertaken in order to depoliticize international criminal justice, and get rid of political interference in investigations and trials. Within this scope, several organizational applications and regulations has evolved over the last two decades, that will help to overcome the structural problems hindering the practice of international law in general, and international criminal justice in particular. Let us have a look on the following headlines:

- the Security Council shall stop establishing ad-hoc courts in the future. As the executive authority of the United Nations, the council shall abstain from claiming that it is competent to exercise justice, for criminal justice shall not be practiced as a means of collective security under provisions of Chapter VII of the UN Charter, whereas measures of criminal justice are clearly expressed in articles 41 and 42 of the same Charter.
- A universal and permanent institution for international criminal justice shall be established, because the actual ICC is, in the author's opinion, but a superficial model. Two aspects are of great importance: First, the absence of an universally organic membership makes the ICC vulnerable to political interference; its officials may avoid being marginalized while exercising their powers, or being embarrassed by the powerful Parties. Second, there is a regulatory problem of law in Rome Statute that lies in linking the ICC jurisdiction with the Security Council, which weakens the

court's ability to exercise jurisdiction equally between all nations.

- A review of practical procedures concerning integrity, impartiality and judicial independence must be achieved if the goal of limiting the political impact in the international judicial practice. Any court or operation of international criminal justice should not be funded, only if it is supervised by the States Parties, which established the legal framework, or contributed to the Court's foundation. This fund should not come from private sources, from countries that are linked to a particular interest, or from entities with multiple governmental affiliations. In addition, the Court judges and officials should not come from the countries involved in military conflicts or political struggle.
- States, such as Belgium and Spain, should abandon practicing universal jurisdiction. International prosecutions in domestic courts will always remain vulnerable to political interference, as it is inconsistent with the course of foreign policy and vital interests of the state and / or States involved in a particular conflict or prosecution.
- Finally, with regard to the requirements of disconnecting judiciary and politics, the legal and constitutional guarantees for judicial independence (which should be enjoyed by judges and prosecutors) would be meaningless if the officials are to fear the results of their professional duties in a world governed by power politics, as well as intelligence interests, political lobbies, and think-tanks, which interfere with or oppose their work.

To conclude, the efforts that seek to get rid of political influence in the field of international criminal justice are also hindered by the lack of harmony in interpreting the rules and regulations of jurisdiction. This focuses on the interpretation and application of jurisdiction within the field of an international law system that emphasizes the principle of sovereign equality and non-interference, as well as the requirements of the United Nations Charter. There is a strange paradox, as described by the author, when it comes to the practice the investigation rights and the prosecution of international crimes.

The individual states may assume the responsibility of the principle of the universal jurisdiction, as recognized by Rome States itself. But this may be a breach of the principle of sovereign equality and may cause diplomatic tensions, especially if criminals involved belong to several countries. Therefore, judicial anarchy may arise from the exercise of universal jurisdiction by States, and may cancel prosecuting international crimes at a permanent

international court. There is no doubt that the five conditions, proposed by the writer above for the sake of limiting the political impact in international justice, stand against the reality of imperialist domination. It is based on arguments that are in contrast with the interests of executive power holders, especially the Security Council permanent members. Global justice, not global revenge, must be the spark of hope for all efforts that seek maintaining world peace and promoting world democracy. This universal goal should be based on the international rule of law. Unless this is the sole condition for international criminal justice, as Professor Köchler Hans puts it, the exercise of universal jurisdiction will always be subjected to power politics.