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A-1010 VIENNA, KOHLMARKT 4 • TEL.: 43-1-5332877 • FAX: 43-1-5332962 • info@i-p-o.org • www.i-p-o.org

Dr. Hans Köchler

University Professor of Philosophy
Life Fellow, International Academy for Philosophy
President of the International Progress Organization

**Depoliticizing International Criminal Justice:
Global Justice or Global Revenge**

*International Criminal Tribunal for Rwanda:
An Independent Conference on Its Legacy from the Defence Perspective*

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(I)

Under conditions of global realpolitik, depoliticizing international criminal justice may well be a mission impossible. In order to understand what is implied in this noble goal, we have to be aware of the delicate relationship between law and politics, indeed of the predicament of the rule of law in general:

In any given situation where the political stakes are high, the *separation of powers* – that is quintessential for the rule of law – becomes dysfunctional. This is true at the domestic as well as at the international level. Whenever political (“national”) interests, or the personal interests of politicians or high officials, are involved in a case of criminal justice, the investigative process may become ineffective – or be entirely stopped –, or the proceedings (once a prosecution has begun) may not be genuine.

The examples of this state of affairs, namely a rather “defective” separation of powers, abound at the domestic level everywhere and under diverse political and constitutional conditions. To illustrate what is at stake I would like to refer, from among hundreds of possible cases, to the prosecution of those responsible for secret and illegal arms deals of an Austrian company with Iran and Iraq during the protracted war of the 1980s (the first Gulf War). In spite of several mysterious deaths of officials and a former general manager and notwithstanding the wealth of incriminating evidence, the personal criminal responsibility of politicians involved in the scandal was never properly investigated and the judicial proceedings were inconclusive. If these were “international crimes” and the alleged acts had occurred after 2002, the behaviour of the Austrian judicial authorities might have been a case for the ICC, which could have diagnosed a lack of genuine investigation under Art. 17(2) of the Rome Statute. In a similar, even more drastic and arrogant act of political intervention into the judicial process, the government of the United Kingdom did stop an investigation by that country’s Serious Fraud Office (SFO) of corruption charges in connection with a multibillion dollar arms deal of BAE Systems with Saudi-Arabia. In a letter dated 8 December 2006, then British Prime Minister Tony Blair had stated that the investigation of the corruption charges would entail the “real and immediate risk of a collapse” in the security, intelligence and diplomatic cooperation between the two countries.¹

¹ See the report “Documents reveal that Blair urged end to BAE-Saudi corruption investigation,” first published on 21 December 2007 at www.thecornerhouse.org.uk/item.shtml?x=559591, last visited on 18 November 2009. See also the report on the Prime Minister’s statement in the House of Commons: “Blair: BAE investigation would have ‘wrecked’ UK,” 13 June 2007, at [www.politics.co.uk/news/foreign-policy/middle-east/middle-east/blair-bae-investigation-would-have-wrecked-uk-\\$474784.htm](http://www.politics.co.uk/news/foreign-policy/middle-east/middle-east/blair-bae-investigation-would-have-wrecked-uk-$474784.htm), last visited on 18 November 2009.

While in most countries common are prosecuted in conformity with the constitutional requirements, high-profile cases are almost nowhere prosecuted according to the book. The political and constitutional system where the separation of powers is upheld even in cases that affect supreme state interests or the personal interests of the leading political protagonists is still to be invented.

What makes the situation even more serious in the field of international criminal justice is the “structural” proximity of potential cases (of war crimes, crimes against humanity, genocide) to supreme state interests or the personal interests of the leaders of states. Accordingly, “high profile cases” are the rule rather than the exception. The seeming indivisibility of political and judicial aspects of cases is indeed the *predicament* of international criminal justice.

A vivid illustration of the tangled web of law and international (power) politics and its detrimental consequences for the rule of law is the obvious miscarriage of justice in the case of the midair explosion of Pan Am flight 103 over the Scottish town of Lockerbie (1988). As international observer, nominated on the basis of a Chapter VII resolution of the Security Council, the author of these lines got a glimpse at the administration of justice in a framework that was, at least partly, determined by the supreme executive organ of the United Nations. Three trial judges passed – and five appeal judges upheld – a verdict that was based on a rather speculative and generally inconsistent argumentation (Opinion of the Court), meant to prove a magic pilgrimage of a bomb suitcase from Malta via Frankfurt to London and on to the doomed flight. Without going into details, it can be said that the trial was conducted like an intelligence operation – with constant interference into the procurement of evidence, and in the presence of agents of foreign governments on both, the side of the Prosecution and Defence in the courtroom, etc. The result of this exercise of criminal justice in the context of a political dispute between three states (Libya, the US and the UK) was that a Libyan official was convicted as a scapegoat for an act he in all likelihood did not commit – and could not have committed under the conditions described during the trial itself. As in so many cases of political justice, the guilty verdict almost entirely depended on circumstantial evidence and in particular on testimony of witnesses with dubious credibility; the court’s audacious theory was built on a narrative about the insertion of a certain piece of unaccompanied luggage at Malta’s Luqa airport, an assertion that itself was based on an identification of the convicted Libyan national by a Maltese shopkeeper who, as we now know, got (together with his

brother) a reward of USD 3 million from a foreign intelligence agency.² The so-called Public Interest Immunity (PII) certificate by which the Foreign Secretary of the United Kingdom more recently (2008) prevented the disclosure of vital evidence on grounds of “national interests,” making fair trial in the by now abandoned second Lockerbie appeal impossible, has further demonstrated that the requirements of the rule of law cannot be reconciled with the dictates of realpolitik.

(II)

In spite of the systemic problems of international criminal justice in terms of the separation of powers, numerous practices in different organizational frameworks have been established, particularly since the collapse of the power balance of the Cold War.³ A false sense of idealism, even euphoria, has been created as if justice could be rendered, and fair trial could be guaranteed, *under conditions of (political) injustice*, namely an extreme imbalance of power relations among states and the resulting constant interference of national interests with criminal proceedings (as in the Lockerbie case mentioned above). In order to be meaningful and credible, any undertaking of international criminal justice, whether based on the principle of universal jurisdiction or not, must always take into account the practical conditions under which fair trial is to be ensured. There is no magic wand that would make power politics and national interests suddenly disappear – so that justice could be rendered in strict adherence to the rule of law, which, in the international context would imply total independence from the concerned (“interested”) countries’ national interests.

It appears, therefore, appropriate to ask what measures ought to be taken so that the politicization of international criminal justice, namely constant political interference into investigations and prosecutions, can at least be limited, if not completely eliminated. Several areas come to mind in regard to the practices and organizational frameworks that have evolved mainly over the last two decades:

² For details see Hans Köchler and Jason Subler (eds.), *The Lockerbie Trial. Documents Related to the I.P.O. Observer Mission*. Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002, and the web site of the International Progress Organization’s observer mission: http://i-p-o.org/lockerbie_observer_mission.htm.

³ For details see Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads. Philosophical Reflections on the Principles of the International Legal Order Published on the Occasion of the Thirtieth Anniversary of the Foundation of the International Progress Organization*. SpringerScience. Vienna/New York: Springer-Verlag, 2003, esp. ch. I/5, pp. 75ff (“The primary avenues of international criminal justice”).

- (1) The UN Security Council should create no ad hoc tribunals in the future. As supreme executive organ of the United Nations, the Council cannot, and should not pretend, to be an administrator of justice. Criminal justice simply cannot be practiced as an instrument of collective security under the provisions of Chapter VII of the UN Charter; measures of criminal justice are nowhere listed among the coercive measures enumerated under Articles 41 and 42 of the Charter. In creating the two tribunals, for the former Yugoslavia and Rwanda, the Council has acted *ultra vires* and has done a disservice to the international rule of law, seriously undermining the worldwide efforts for the establishment of credible forms of international criminal justice.⁴ Because of the great power privilege in the Security Council (namely the veto rule in Art. 27), a *structural politicization* of criminal proceedings is unavoidable whenever the Council “creates” a court as a measure of enforcement of international peace and security under Chapter VII. (It is to be noted that the Council has resorted to a practice of acting almost like a court administrator *by means of Chapter VII resolutions*, whether in regard to the appointment of the judicial functionaries or even the day-to-day running of the tribunals.⁵) The record given by the former Prosecutor of the two *ad hoc* tribunals of the Security Council is a vivid illustration of the negative impact the political interests of some of the permanent members of the Council may have on the judicial proceedings, making it effectively impossible for the Prosecutor to exercise the mandate under the respective Statute. The words by which Carla del Ponte describes her quickly abandoned efforts, as Prosecutor at the ICTY,

⁴ For details concerning the Yugoslavia tribunal see Hans Köchler, *MEMORANDUM on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the “International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.”*

International Progress Organization, Caracas, 27 May 1999, at <http://i-p-o.org/yu-tribunal.htm>.

⁵ This problematic practice, which amounts to constant interference of executive power into the supposedly autonomous judicial domain, is evidenced, *inter alia*, in resolution 1878 (2009), adopted on 7 July 2009, concerning personnel decisions and other day-to-day arrangements at the International Criminal Tribunal for Rwanda. “Acting under Chapter VII of the Charter of the United Nations” (which means exercising its coercive powers in the service of peace and security), the Council “decided,” *inter alia*, that two judges “may work part-time and engage in another judicial occupation or occupation of equivalent independent status in their home countries during the remainder of their terms of office until the completion of the cases to which they are assigned,” etc. That such administrative arrangements are ordered by way of “Action with respect to threats to the peace, breaches of the peace, and acts of aggression” (title of Chapter VII), demonstrates not only the absurdity of the Council’s arrogated judicial role, but illustrates the Council’s utter neglect for the separation of powers. Apparently, basic principles of the rule of law do not apply when the Security Council has decided to be seized of a matter.

at investigating NATO war crimes on the territory of the former Yugoslavia leave no room for interpretation: “I quickly concluded that it was impossible to investigate NATO, because NATO and its member states would not cooperate with us. (...) I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. (...) [i]t was impossible to go on politically without undermining the rest of the tribunal’s work.”⁶ Because of the well-documented history of political interference in the cases of the Yugoslavia and Rwanda tribunals it has become obvious even to the most naïve observer of international affairs that courts established by the Security Council will only produce a *UN-version of victor’s justice*.⁷ If, in the future, international *ad hoc* courts are to be created (because of dysfunctional municipal systems in situations of armed conflict), they should only be established by *intergovernmental treaty*, not by fiat of the principal agent of global power politics and “administrator” of double standards, the United Nations Security Council.

- (2) Preferably, a *universal* and *permanent* institution for the administration of international criminal justice should be created. The presently existing International Criminal Court (ICC) is only a caricature of such an institution. Two aspects are of particular relevance: (a) The lack of universal membership makes the Court prone to acting quasi-politically; its officials may exercise their mandate so as not to alienate potential candidates for membership or not to embarrass powerful state parties. The rather timid, in one case, audacious in another case, but generally *selective* use of his powers by the Prosecutor leaves no room for any doubt as to the Court’s independence from the “political universe” (to use Carla del Ponte’s peculiar terminology). So far, the Court has only taken up cases from sub-Saharan Africa; notably, Mr. Campo has chosen not to investigate the actions of officials and personnel from states parties to the Rome Statute in Iraq since 2003. (b) Another systemic problem of the Rome Statute of the ICC is the linkage of the exercise of jurisdiction by the ICC to the authority of the Security Council, which seriously hampers the

⁶ Carla del Ponte with Chuck Sudetic, *Madam Prosecutor. Confrontations with Humanity’s Worst Criminals and the Culture of Impunity: A Memoir*. New York: Other Press, 2009, pp. 60f.

⁷ For details of the politicization of both the Yugoslavia and Rwanda tribunals see the author’s analysis: *Global Justice or Global Revenge?*, pp. 166ff.

Court's ability to exercise its mandate in a non-discriminatory manner. The provisions of Articles 13(b) (referral of a situation) and 16 (deferral of an investigation or prosecution) have effectively subjected the Court to the constantly fluctuating constellation of interests among the permanent members of the Security Council. This state of affairs is documented in the fact that the Security Council has referred to the Court the situation in Darfour/Sudan (resulting in an arrest warrant for that country's President), but not the situations in Israel/occupied Palestine or Iraq or Afghanistan, etc. This has imposed upon the ICC a structural "policy of double standards" in all cases where the Court is made an agent of *universal* jurisdiction, namely in cases where the Court would otherwise have no jurisdiction *sui generis* (on the basis of the Rome Statute).⁸

- (3) *Practical* measures in the defence of impartiality and judicial independence will also have to be considered if the goal of depoliticization is seriously pursued: (a) The financing of any operation in the field of international criminal justice and of the courts themselves must solely come from the states parties that have created the respective legal framework or have set up the court, not from any private sources or from otherwise "interested" states or intergovernmental entities. In the case of the existing *ad hoc* tribunals, this means that the expenses have to be covered from the general United Nations budget alone. (b) Judges and prosecutorial officials must not be citizens of, or expatriates from, states that are engaged in military confrontation or are involved in a political dispute with the country or countries of those investigated or prosecuted. In the case of the ICTY, for instance, judicial officials from NATO countries were judging the crimes of leaders and officials from the Federal Republic of Yugoslavia (now: Serbia), the very country that was attacked by NATO in 1999. This was not only detrimental to the impartiality of the proceedings, but has totally undermined the tribunal's international credibility.
- (4) The exercise of universal jurisdiction by individual states should be abolished. Even more than regional or international arrangements,

⁸ For details see the author's paper: "Global Justice or Global Revenge?: The ICC and the Politicization of International Criminal Justice," in: Hans Köchler, *World Order: Vision and Reality. Collected Papers Edited by David Armstrong*. New Delhi: Manak, 2009, pp. 312-321.

proceedings in municipal courts are prone to political interference because they potentially *interfere* with the conduct of the respective country's foreign policy and assertion of national interests.⁹ It is no surprise that Belgium – the country where universal jurisdiction was invoked in a multitude of cases, and in complex legal battles that were often fuelled by the vindictiveness of expatriates and by domestic disputes in faraway countries – has amended its 1993 war crimes law in such a way that cases cannot any more be brought before domestic courts irrespective of whether there is any relation to Belgium or not. At the same time, it does not make much sense for a domestic judiciary to pose as agent of universal jurisdiction when the country's executive power can effectively impose a policy of double standards, depending upon the state's interests related to a given case.

- (5) Finally, as regards the requirements of depoliticization, constitutional or special statutory guarantees of judicial independence (of prosecutors and judges) are not worth the paper on which they are written if officials are driven by fear of repercussions from the conduct of their duties in the shadowy world of international power politics, with intelligence services and other (often secretly acting) political lobbies and interest groups constantly interfering in their work. In each and every case and set-up, the legal guarantees of independence must not only include the usual statutory measures, but, in order to be meaningful, they will have to be implemented through effective practical arrangements for the personal safety of officials (and their families), their financial independence, and, subsequently, their protection from political pressure. However, all of these statutory guarantees and practical safeguards are useless if officials lack the necessary moral integrity (“high moral character, impartiality and integrity” in the language of the Rome Statute, Art. 36) or act in a climate of “political officialdom” where they subordinate themselves quasi freely, and “preventively,” to what they perceive as supreme state interests, resigning

⁹ Apart from these reasons related to the fairness and impartiality of proceedings, there are also other legal grounds, related to the basic norm of national sovereignty, which limit the exercise of universal jurisdiction by individual states. See the exemplary judgment of the International Court of Justice (ICJ), dated 14 February 2002, General List No. 121: *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

themselves into acting in a politically expeditious manner. One of the most obvious examples in recent judicial history was the *sacrificium intellectus* made by the Scottish judges in the Lockerbie case.¹⁰ The problem of the corruption of justice must not be overlooked!

All these requirements and procedural as well as practical regulations for the depoliticization of international criminal justice should be written into a document that would have to be adopted by the General Assembly of the United Nations. Such a covenant should contain the principles and general guidelines for the administration of justice at the transnational level (whether by municipal courts [where and insofar the doctrine of universal jurisdiction is upheld], by special courts operating on the basis of executive decisions or established by intergovernmental treaties, or a permanent world court). A “United Nations Declaration on the Principles of International Criminal Justice” is urgently needed if arbitrariness and political abuse are to be curbed.

(III)

The efforts at depoliticizing international criminal justice are also hampered by an irritating inconsistency of the regulations concerning jurisdiction. This revolves around the interpretation and application of universal jurisdiction in a system of international law that is still determined by the emphasis on sovereign equality and non-interference, principles that are enshrined in the United Nations Charter. There exists a rather strange *disparity* when it comes to the exercise of investigative and prosecutorial rights in regard to international crimes:

The doctrine of universal jurisdiction, according to which there exist no boundaries to judicial authority in cases of international crimes, is mainly applied by *individual* states, something that may constitute an infringement upon the sovereignty of other states and cause diplomatic tensions or conflicts. In contrast to the arrogation of universal authority by municipal courts under the doctrine of universal jurisdiction, international criminal courts exercise jurisdiction according to the specifics set out in their Statute (whether it has been

¹⁰ See Par. 18 of the author’s *Report on the appeal proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate by Professor Hans Köchler, international observer of the International Progress Organization nominated by UN Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)*, Vienna, 26 March 2002. – See also Hans Köchler, “The Lockerbie Trial and the Rule of Law,” in: *The National Law School of India Review*, Vol. 21, Issue 1 (2009), pp. 149-162.

adopted by a resolution of the Security Council as in the cases of *ad hoc* tribunals or by virtue of an intergovernmental treaty as in the case of the ICC). There is only one exception to the strict regime concerning jurisdiction, namely when the Security Council refers a “situation” to the International Criminal Court in cases where the Court would have no jurisdiction *sui generis*, making it an agent of a kind of “borrowed” universal jurisdiction.

While in cases handled by international courts, the terms of jurisdiction are clearly defined (in terms of temporality, territoriality as well as nationality), domestic prosecutors and municipal courts enjoy *plein pouvoir* whenever they act as agents of universal jurisdiction. The vagueness of the very notion is almost an invitation to arbitrariness and carries the risk of “political justice” in the traditional and discredited sense. As the cases brought before Belgian courts under the now amended war crimes law of 1993 have documented, a virtually unlimited mandate will quickly lead to a situation in which criminal justice risks being instrumentalized for the pursuit of political disputes “by other means,” for scoring points in political battles in other countries, and mobilizing the respective public for one’s political cause.¹¹ The eventual interference, in violation of the constitutional maxim of the separation of powers, of the political institutions of the state whose judiciary acts, or has made known that it intends to act, in a case of universal jurisdiction¹² makes the dilemma between the (claimed) universality of jurisdiction and the particularity of its (permitted) exercise painfully obvious. “Damage control” in the form of political interference (as evidenced e. g. in high profile cases brought before courts in the UK and Spain) further discredits the very doctrine of universal jurisdiction because it makes obvious that the meaning of *universality* is effectively determined by a domestic authority, albeit not a judicial one, but by the government as agent of the national interest.

It goes without saying that the kind of “judicial anarchy” that results from the application of universal jurisdiction by individual states, acting on behalf of humanity, will completely undermine the specific jurisdiction over international crimes by international courts.¹³ It is simply unacceptable that a single state may claim jurisdiction in virtually any case of international crimes, and in virtually any country, while international courts have to

¹¹ For details see Hans Köchler, *Global Justice or Global Revenge?*, pp. 91ff.

¹² We refer here to the termination of investigations as a result of decisions of the executive authority and to amendments of laws that have made the investigation and prosecution of certain cases impossible (as has happened in Belgium).

¹³ Interestingly, the prosecution of cases under the doctrine of jurisdiction is presented as a kind of auxiliary measure in connection with the International Criminal Tribunal for Rwanda, ensuring that suspects of international crimes will be prosecuted even after the Tribunal has seized operations: Thijs Bouwknecht, “The long arm of Universal Jurisdiction.” *Radio Netherlands Worldwide*, 11 November 2009, www.rnw.nl/print/38736, last visited on 20 November 2009.

exercise jurisdiction strictly in accordance with their Statute and, as in the case of the International Criminal Court, on the basis of complementarity. If the politicization of international criminal justice is indeed an issue of general concern in the present system of international relations, its consequences cannot be condoned in one instance (namely of individual states acting as agents of universal jurisdiction), and rejected in the other. In order to be credible, measures against the politicization have to be applied *universally*.

There is no doubt that the five types of action we have suggested in that regard are in conflict with international realpolitik, at least under present conditions. They are based on maxims against which the holders of executive power will naturally object, stating reasons of state (national interests) in one case or a purported obligation to humanitarian principles in another. However, the contradictions in and the defects of the actually existing forms of international criminal justice have to be *identified as such*, and measures of reform or redress have to be proposed if a further erosion of international legitimacy is to be avoided.¹⁴

The practices described here – by *ad hoc* courts (whether Security Council-created tribunals or “special” courts or some form of hybrid arrangements), individual states and the International Criminal Court as well – will breed resentment and may, in the long term, undermine efforts for the establishment of a truly comprehensive, and cohesive, system of international criminal justice that integrates the different practices under unified rules and effectively eliminates the loopholes for political interference. As history has amply demonstrated, criminal proceedings that are perceived as politically influenced will always aggravate existing tensions and conflicts and are, thus, not compatible with the Purposes and Principles of the United Nations Charter. *Global justice*, not *global revenge*, must be the guideline for all efforts aimed at the preservation of peace on the basis of the international rule of law. Under no circumstances must the administration of justice be made a function of, or subordinated to, the exercise of power politics.

¹⁴ See also the author’s article: “Universal Jurisdiction and International Power Politics: Ideal versus Real,” in: Hans Köchler, *World Order: Vision and Reality*, pp. 291-306.