International Progress Organization

Organisation internationale pour le progrès

Hans Köchler

THE DILEMMA OF INTERNATIONAL CRIMINAL JUSTICE

Fourth Scientific Conference
"About the Understanding of Law and Jurisprudence"

Faculty of Law and Administration
University of Szczecin, Poland

24 November 2023

I.P.O. ONLINE PAPERS

VIENNA: INTERNATIONAL PROGRESS ORGANIZATION, 2023
WWW.I-P-O.ORG

ABSTRACT

Independence of the judiciary, secured by a separation of powers, is an indispensable criterion for the rule of law. In any state system (domestically), this requires an elaborate mechanism of checks and balances between the branches of government. Specifically, "independence" rests in the judiciary's not being bound by political instructions, but solely by the norms of the democratically created law (within the bounds of the Constitution), and in the ability (i.e. authority) to *enforce* its decisions via the executive branch in a subsidiary role. Only such an arrangement can ensure the exercise of judicial authority in a *consistent* manner. *Equality before the law*, as basic principle, cannot be guaranteed in any other setting.

The above conditions – indispensable for the rule of law – are absent outside the normative framework of the sovereign state. Internationally, in the largely anarchic space between states, there simply is no **separation of powers.** There may exist a **balance of power** among a multitude of sovereign actors, holding each other in check. Judicial authority that stretches beyond state borders is alien to such a system. If it is asserted nonetheless, its exercise, legally dubious in itself, risks being arbitrary and politicized.

This has been the case with virtually all arrangements of international criminal justice since the Second World War, such as:

- the "unilateral" projection of sovereignty in cases where a state claims "universal jurisdiction" (measures that have the potential to trigger conflicts with other states);
- the "collective" projection of power by states that establish a court either as victors after armed conflict or as members of the United Nations Security Council (in violation of Article 14[1] of the International Covenant on Civil and Political Rights);
- the International Criminal Court, established by intergovernmental treaty, where *limited* membership (in particular regarding the absence of great powers) is in contrast to the quasi-*universal* prosecutorial mission of the Court (potentially also over officials from non-state parties, as far as territorial jurisdiction is concerned, in contravention, as some states argue, to the Vienna Convention on the Law of Treaties).

The **dilemma** of international criminal justice consists in an irreconcilable contradiction at the roots of these projections of judicial power, namely a conflict between **national sovereignty** and **supranational authority** (which is situated totally outside a framework of checks and balances). This antagonism has opened the door for the politicization of the judicial function. As regards legal consistency and moral legitimacy, but also mere effectiveness, the problems are similar to those of today's humanitarian intervention. In the absence of a world state, both risk becoming pawns of global power politics.

***

"… δίκαια μὲν ἐν τῷ ἀνθρωπείῳ λόγῳ ἀπὸ τῆς ἴσης ἀνάγκης κρίνεται, δυνατὰ δὲ οἱ προύχοντες πράσσουσι καὶ οἱ ἀσθενεῖς ξυγχωροῦσιν."*

(A)

Enforcement of norms and *consistency* in enforcement are defining criteria of the rule of law in any constitutional system. The latter criterion strictly excludes double standards in the application of the law. Efficacy is a condition of the validity of legal norms in general, and their enforceability distinguishes legal from moral norms.[1] Fulfillment of these criteria requires an elaborate system of checks and balances between the state authorities. Under a genuine constitutional separation of powers, the status of the judiciary will be independent in the *formal* as well as in the *material* sense. The constitutional provisions defining the powers of the judicial branch must be tied to mechanisms of *effective* enforcement of its authority. Guarantees without precise rules of application are meaningless. This requires that the judiciary under all circumstances be in a position to resort to the tools of executive power in order to give effect to its decisions. It also requires financial independence of the judiciary under the state budget. As regards criminal justice, the initiation of investigations, the issuing of arrest warrants, the detention of suspects, and the rendering and enforcement of judgments must in no case be influenced by tactical considerations of any sort. Above all, prosecutors and judges – and court officials in general – must be able to act *free from fear* and free from any concern as to potential political or financial implications and ramifications of their decisions. However, an open and controversially debated question in many state systems is the constitutional independence of the prosecutorial authority, i.e. its not being bound by instructions from the executive branch.[2]

---

* Thucydides, *The Peloponnesian War* (finished around 411 BC), Book V, Chapter 89 ("Athenians to the Melians"). Greek original text: *Sammlung Tusculum: Der Peloponnesische Krieg*. Ed. Michael Weißenberger. Berlin/Boston: de Gruyter, 2017, p. 926. ("… right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." Translation by Richard Crawley, in: *History of the Peloponnesian War*. London/New York: J.M. Dent/E.P. Dutton, 1910, p. 269.)

[1] Cf. Hans Kelsen who defines law as a "coercive normative order," in clear distinction from a system of (unenforceable) moral norms: *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit*. Vienna: F. Deuticke, 1960, pp. 45ff.

[2] For the problem in the legal systems of Austria and Germany, cf. Iris Quendler, *Die Weisungsgebundenheit der Staatsanwaltschaft im österreichischen und deutschen Recht*. MA thesis, University of Graz, Faculty of Law, Dept. of Criminal Law, 2011.

Constitutional arrangements at the level of the *sovereign state* may – at least in principle – ensure *justice* that is more than a series of arbitrary or ad hoc decisions, dictated by considerations of power and opportunity. Fulfillment of the above-described criteria distinguishes a *Rechtsstaat* (constitutional state) from a *Willkürstaat* (authoritarian state).

(B)

In the international realm – in relations between sovereign states – there are no rules or mechanisms that could be compared to the constitutional separation of powers at the domestic level. This will not change as long as there is no "world state." Accordingly, *international* criminal justice risks being pursued in a kind of vacuum, i.e. in a space where (legal) **fiction** replaces **reality** (of power). As soon as criminal justice transcends the boundary of the sovereign state, it is fraught with systemic normative contradictions, a predicament that makes it hostage to the vagaries of politics.

So far, all projects of international criminal justice appear to have ignored, or tried to repress, the hard facts, namely the absence of any provisions for a separation of powers. The United Nations Charter does not provide such a framework. Instead of a *separation of powers*, the Charter's provisions embody the *balance of power* as it existed between five member states upon the foundation of the organization.[3] Ultimately, it is the "rules" of power politics that determine relations between sovereign states. The history of international criminal tribunals and of the rather hastily abandoned practices of "universal jurisdiction" is ample proof of this.

At the root of the problem appears to be the unresolvable contradiction between two core concepts: namely, of **national sovereignty** and **jurisdictional authority**. Even a cursory look at the creation, make-up and functioning of ad hoc courts or other projects of international criminal justice since the Second World War will make this obvious. This relates, inter alia, (a) to the post-war tribunals of Nürnberg and Tokyo, or, similar to those, the post-Cold War ad hoc tribunals established by the United Nations, (b) to cases of a "unilateral exercise" of judicial authority (by individual

[3] Cf. Köchler, "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," in: *Chinese Journal of International Law*, Vol. 5, No. 2 (2006), pp. 323-340.

states) in the name of so-called "universal jurisdiction;" or (c) to the "world court without a world state," namely, the International Criminal Court (ICC), which, to this day, in spite of the founders' ambitions, is struggling with its credibility as a truly impartial body that operates free from undue political influence and interference, whether from State or non-State Parties.[4]

Because of systemic contradictions and the operation of these projects of criminal justice outside a robust system of checks and balances, they have produced either forms of *victor's justice* or *unenforceable rulings* with essentially tactical purpose (as in cases against acting or former heads of state). In some proceedings before the ICTY[5] and the ICC it was more than obvious that prosecutors or judges tried to "accommodate" powerful state actors, donors, supporters or – as with the ICC – actual or prospective State Parties to the Court. In these circumstances, judicial practice is unavoidably under the influence of double standards. Equality of justice remains an illusion in such a context. In virtually all arrangements for criminal justice at the transnational level so far, it has been *politics* that dominates *law* – in practice as well as in statute.

The Chief Justice of the United States (1941-1946), Harlan Fiske Stone, has made the point very clearly in remarks on the ad hoc tribunals after World War II. "So far as the Nürnberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, (…) I dislike extremely to see it dressed up with a façade of legality. The best that can be said for it is that it is a political act of the victorious States, which may be morally right, as was the sequestration of Napoleon about 1815. But the allies in that day did not feel it necessary to justify it by an appeal to nonexistent legal principles."[6]

(C)

Similarly, reporting on a conversation between the delegates of Athens and Melos in the course of the Peloponnesian War, Thucydides – almost two and a half millennia ago – addressed the supremacy of power over law in relations between states. If, in the

[4] For details, see Köchler, "Justice and Realpolitik: The Predicament of the International Criminal Court," in: *Chinese Journal of International Law*, Vol. 16, Issue 1 (2017), pp. 1-9.

[5] International Criminal Tribunal for the Former Yugoslavia (ICTY).

[6] Quoted in: Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law*. New York: Viking Press, 1956, p. 715. – N.B.: The crime of aggression has only recently been codified, in the Rome Statute of the International Criminal Court.

ancient Athenians' assessment, "right (…) is only in question between equals in power,"[7] what space is left for the administration of justice between states? Is there a way out of the antagonism between law and politics, the very predicament of international criminal justice? How can, in the absence of a separation of powers, the independence of the judiciary be secured and uniform, impartial enforcement of the law – including, first and foremost, criminal judgments – be guaranteed? We shall focus here briefly on four particular domains and practices of criminal justice: the International Criminal Court; ad hoc courts established by the United Nations Security Council; the exercise of universal jurisdiction by individual states; and judicial proceedings on the basis of ad hoc extraterritorial arrangements.

The following crucial questions are at stake:

(1) How can the **International Criminal Court** (ICC) impartially enforce the law

if:

- the areas of its jurisdiction are scattered around the globe like spots on a leopard skin? (To date, of the 193 member states of the United Nations, only 123 are State Parties to the Rome Statute of the ICC.)
- the most powerful countries (particularly those with the largest military capabilities) remain outside the Court, but nevertheless occasionally resort to using it (via the Security Council) if and when it suits their interests – while steadfastly refusing to accept the Court's territorial jurisdiction in cases where it could stretch to their nationals (e.g. in Afghanistan, Ukraine)?
- the Court's judges or Prosecutor are tempted to act opportunistically in order to attract funds (from states or private institutions), to please powerful actors, to attract new members, or just to avoid being sanctioned?

(2) How can **ad hoc courts** established by the United Nations Security Council meet the basic requirements of the rule of law

if:

- procedures of criminal justice are treated like measures of collective security under Chapter VII of the UN Charter (i.e. politically)?[8]
- courts are created by executive fiat instead of by intergovernmental treaty?

[7] See the text quoted in the motto above.

[8] For details, see Köchler, *The Security Council as Administrator of Justice?* Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011.

- o powerful permanent members of the Council effectively interfere into the exercise of jurisdiction (as e.g. admitted by Carla del Ponte concerning the investigation of NATO officials at the Yugoslavia Tribunal).[9]

(3) How can impartial enforcement of the law be guaranteed in cases where individual states decide to exercise **"universal jurisdiction"**

<u>if</u>:

- o a state attempts to stretch its judicial authority (criminal jurisdiction) over the entire globe while being unable to face the consequences in terms of realpolitik? (Belgium's rather drastic experience with its 1993 law for the prosecution of "international crimes" is a case in point.[10])
- o that state – out of misplaced self-righteousness – cannot resist the temptation of making opportunistic use of criminal justice?
- o political disputes (e.g., between exiles) in foreign countries are being settled in a third country, and criminal justice is effectively instrumentalized for a (foreign) political agenda?

(4) How can **extraterritorial arrangements** for judicial proceedings ensure the independence of a court

<u>if</u>:

- o an intergovernmental, ultimately political, dispute over jurisdictional issues is at the roots of the court's creation by special governmental decree (as in the case of the Scottish Court in the Netherlands, the so-called "Lockerbie Court")?[11]
- o the court, in terms of procurement of evidence, is effectively subjected to interference of intelligence services from countries involved in the dispute, and thus has to operate in an environment of international power politics?
- o the creation of the court is tied to specific political goals of the opposing parties in a dispute (e.g. lifting of sanctions, "global war on terror," etc.)?
- o and the judges, therefore, are under mental pressure to produce an outcome that is diplomatically palpable? (The Lockerbie trial was a case in point. The contradictory reasoning of the indictment, modified in the course of the proceedings, and of the judgment – almost a *sacrificium intellectus* on the part of the judges – may be an indication as to the

[9] "I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. (...) And my advisors warned me that investigating NATO would be impossible." (Carla del Ponte with Chuck Sudetic, *Madame Prosecutor : Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir*. New York: Other Press, 2009, p. 60.)

[10] For details of the political dilemma faced by Belgium in attempts to implement the law (and the eventual abolishing of its essential provisions), see Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads.* Springer: Vienna/New York, 2004, pp. 90ff.

[11] For details, see 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.

enormous political strain under which this extraterritorial court had to operate.)[12]

(D)

So far, the above-described challenges have proven insuperable under the realities of today's international law. In spite of all the conceptual constructions or legal fictions in support of *universal prosecution* of international crimes – crimes "erga omnes" – the global jurisdictional effort, borne out of a kind of post-war or "new age" euphoria (after the collapse of the bipolar order of the Cold War), is ultimately faced with the reality of *national sovereignty*. Global order is still shaped by a multitude of state actors that – according to Article 2(1) of the UN Charter – enjoy the status of "sovereign equality."

Under these circumstances, projects of criminal justice beyond national borders risk being *overambitious* (as when based on claims to "universal jurisdiction") or *dishonest* (as in the cases of victor's justice). Due to the normative incompatibilities, *international realpolitik* has often been the "arbiter" – or brutal corrective – of such undertakings. Examples are:

- the so-called "Hague Invasion Act" of the United States Congress;[13]
- the sanctions imposed by the United States on the Prosecutor and other judicial officers of the International Criminal Court in connection with the investigation of the situation in Afghanistan;[14]
- political threats by powerful state actors against states attempting to exercise universal jurisdiction (e. g., Belgium);
- secret deals – or pressure – to determine the scope of prosecutorial activity or the outcome of trials (as in the Lockerbie trial or the Yugoslavia Tribunal);[15]
- direct or indirect influence on the conduct of investigations and prosecutions at the ICC – via dedicated financial contributions or donations by State

---

[12] For details, see *Report on and evaluation of the* Lockerbie Trial *conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)*, at http://i-p-o.org/lockerbie-report.htm.

[13] United States Congress, *American Servicemembers' Protection Act of 2002*, H.R . 4775, Public Law 107- 206, Sec. 2001-2015 (Aug. 2, 2002) (dubbed "The Hague Invasion Act").

[14] For details, see: International Progress Organization, *The International Criminal Court in the Web of Power Politics: Statement by Dr. Hans Köchler on the Executive Order signed by the President of the United States on 11 June 2020***,** Vienna, 26 June 2020/RE/20689c-is. – President Biden revoked the Executive Order on 2 April 2021.

[15] For the Lockerbie Trial, 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. – For the Yugoslavia Tribunal, see the above quoted admission by Carla del Ponte (fn. 8).

> Parties and also from outside the Court, including from NGOs (as in the case of Ukraine).[16]

All of the above occurrences or practices are strictly incompatible with the independence of the judiciary. Vis-à-vis nation-states as sovereign actors, a transnational system of criminal justice may easily be rendered dysfunctional. Whether we like it or not, supranational authority at global level – which the notion of "universal jurisdiction," or of transnational competence of courts, implies – is still at odds with the international (i.e. intergovernmental) order enshrined in the UN Charter, based on the principle of sovereign equality of states.

To stress it yet again, global justice in a context of a multitude of competing nation-states risks being a dystopian project. The vision – and its purported realization through the earlier described projects or institutions – appears even more challenging given that the decision-making rules of the United Nations Security Council are themselves an element of world government. Due to the provisions of Article 27(3) (concerning the "veto" and a special non-abstention privilege),[17] the group of the Council's five permanent members (P5) enjoys a kind of global (supranational) authority over all other states in matters of war and peace. In the name of "collective security," the UN Charter privileges only five states as enforcers of peace between all states. Although the system potentially defeats its own purpose – because of the mutual blockage among the P5, the supposed enforcers of the law, in all cases affecting their national interests or relating to their own acts of aggression – the fact remains that a foundational norm of today's international order, the prohibition of the international use of force,[18] is virtually unenforceable when it comes to the actions of those five powers. In other words: the norm can only be applied on the basis of double standards. Thus, supposedly for the sake of peace, not only sovereign equality (of all other states) is sacrificed, but also a state of international anarchy is established. The

---

[16] Article 116 ("Voluntary contributions") of the Rome Statute of the ICC has opened the Pandora's box for influence peddling, which is incompatible with the independence of the Court. In the case of Ukraine, the Prosecutor has accepted contributions also from countries that provide armed support to one side in the ongoing conflict. For details, see the report by Agence France-Press, *ICC prosecutor urges "stamina" in Ukraine probes at London meeting*, London, 21 March 2023, https://news.abs-cbn.com/overseas/03/21/23/icc-prosecutor-urges-stamina-in-ukraine-probes.

[17] For details, see Köchler, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.

[18] Article 2(3) of the UN Charter.

paralysis of the Security Council in all cases where any of the P5 members decides to protect its interests by use of the veto has been evidence of this predicament.

As creator of ad hoc international courts (a role for which it lacks proper authority)[19] and by virtue of its referral authority under the Rome Statute of the ICC,[20] the Security Council has extended this kind of anarchy also to the judicial realm.[21] Because all of the Council's decisions in judicial matters will ultimately be dictated by the interests of the P5, the other member states of the world organization are faced with the unenviable *reality of power* described in the dictum attributed by Thucydides to the Athenians during the Peloponnesian War.

(E)

In the present global system, and in the total absence of international checks and balances (except among the P5 as "equals among themselves"),[22] international criminal justice is exposed to the arbitrariness and whims of power politics. The lack of procedural constraints on the assertion of power by the P5 – their statutory impunity under the UN Charter – precludes any semblance of a separation of powers within the current UN system. There can be no justice when politics determines the prosecutorial conduct, whether directly or indirectly (in terms of jurisdictional scope as well as prosecutorial choice).[23]

---

[19] On the lack of authority, cf. International Progress Organization, *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"*. Caracas, 27 May 1999, at http://i-p-o.org/yu-tribunal.htm.

[20] Article 13(b).

[21] For details, see Köchler, *The Security Council as Administrator of Justice?*

[22] Cf. Köchler, "The Dual Face of Sovereignty: Contradictions of Coercion in International Law," in: *The Global Community – Yearbook of International Law and Jurisprudence 2019*, Part 6: "Recent Lines of Internationalist Thought." New York: Oxford University Press 2020, p. 884.

[23] As regards the latter, the conduct of the ICC Prosecutor is a case in point. While de-prioritizing the investigation of U.S., Australian and British personnel and personnel of the former Afghan government in favor of the prosecution of Taliban and Al-Qaeda fighters (citing "limited resources available to my Office"), the Prosecutor decided to accept donations from parties involved in the ongoing armed conflict in Ukraine, and to exert special efforts in investigating cases in that country. – Concerning Afghanistan, see *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, ICC News Release, 27 September 2021. Cf. also Amnesty International's critical assessment: "Afghanistan: ICC Prosecutor's statement on Afghanistan jeopardises his Office's legitimacy and future," *Amnesty International Public Statement*, 5 October 2021, index number IOR 53/4842/2021, https://www.amnesty.org/en/documents/ior53/4842/2021/en/. – It remains to be seen to what extent the Prosecutor will (be able to) act independently in investigating and prosecuting potential crimes

So far, sporadic and inconsistent prosecutorial acts – whether by UN-sponsored ad hoc courts or by a permanent body such as the ICC – have often discredited the idea of the international rule of law and, in many instances, undermined prospects of peace in the very situations those initiatives were meant to help pacify.[24] *Fiat justitia, pereat mundus* cannot and must not be the guideline of transnational justice in a context of geopolitical instability – and even less so when "justitia" means *political* justice.

Domestically, a constitutional **separation of powers** is the *conditio sine qua non* for the independence of the judiciary and, thus, a prerogative under the *idea* of justice. *Internationally*, in relations between sovereign states, a **balance of power** is the only antidote to abuses of criminal justice in the regulatory vacuum, or chaos, of the **struggle for power** that still determines the global status quo. One cannot put the cart before the horse. There can be no world court without a world state, and there can be no *universality* of jurisdiction co-existing with the *particularity* of interests of the states that constitute today's "global community." The dilemma of international criminal justice remains unresolved.

under the Rome Statute committed on both sides of the Gaza conflict of 2023. Cf. Karim Khan, "We are witnessing a pandemic of inhumanity: to halt the spread, we must cling to the law," in: *The Guardian*, U.K., 10 November 2023.

[24] This clearly has been the case with the ICC arrest warrants in the cases of the situations in Sudan and Ukraine, the former on the basis of a referral of the Security Council, the latter following from a declaration of the government of Ukraine under Article 12(3) of the Rome Statute. In these cases, involving countries that are not State Parties to the ICC, the Court operates on the basis of "borrowed" jurisdiction resulting from decisions dictated not by judicial, but political considerations. In both cases, the Prosecutor acted "expeditiously" according to the expectations of the countries whose decisions enabled the Court to exercise jurisdiction.