

A WORTHY GUIDE FOR A CURED INTERNATIONAL LEGAL ORDER

Dr. TÜRKKAYA ATAÖV

Professor Emeritus of International Relations
at Ankara University, Turkey.

Dr. Hans Köchler, a distinguished professor of philosophy and law, added another thorough analysis, entitled *Global Justice or Global Revenge?*, to his impressive list of challenging publications, all of which should be judged justifiably as marked contributions to a world order based on legality.

For the purposes of this review, one has to dispense with detailed references to his previous but much-related published works that constitute an extensive record laying out the author's consistency in thinking and certitude in preferences. All of them are scholarly tributes to the universality of democratic principles, revitalization of international law, and the reconstruction of an alternative society for the world at large.

Without probing into specifications, and certainly very much short of a full bibliography, one may mention, nevertheless, by way of drawing a deserved framework, some titles and their essential significance. Analyzing the changing nature of international relations in the era of globalization (*Globality versus Democracy?* 2000), Prof. Köchler devoted several books/booklets to the study of relations between democracy and related concepts. Some are: *Democracy in International Relations*, 1986; *Democracy and Human Rights*, 1990; *Demokratie und Neue Weltordnung*, 1992; *Democracy after the End of the East-West Conflict*, 1995. In all of them, and more comprehensively in his *Democracy and the International Rule of Law* (1995), Prof. Köchler searched for a reformulation of the democratic concept applicable on a world-wide basis.

Various publications entail his timely suggestions for U.N. reform. Some are: *The United Nations and International Democracy*, 1995, 1997; *The United Nations and the New World Order*, 1992. One of his books examines the normative contradiction in the U.N. Charter and its consequences on international relations (*The Voting Procedure in the United Nations Security Council*, 1991). Two books are devoted to the unethical aspects of the U.N. sanctions policy. They are: *Ethische Aspekte der Sanktionen im Völkerrecht*, 1994; *The United Nations Sanctions Policy and International Law*, 1995.

Coming to some selected topics, he dwelled in *Terrorism and National Liberation* (1988), on the conflict of wills of a powerful versus a weaker state. In another treatise, entitled

Green Dialogue for an Alternative World Order (1995), he judged the industrialized countries in terms of their attitudes *vis-à-vis* various issues from global warming to toxic wastes. Still another (*In Search of a Just World Order*, 1998) treated the gap between the right to vote and popular participation, especially in the Pacific region.

In various other books, he urged for alternative international economic and information orders, appraised the cultural-philosophical aspects of international cooperation, and took up such diversified issues as non-alignment, Palestine and President Reagan's foreign policy. Almost all of the author's scholarly endeavours are, in the main, philosophical reflections on the principles of an improved international legal order. Even his criticism of Edmund Husserl's phenomenology as an "idealistic misunderstanding" is a quest to utilize the effectiveness of philosophy in interpreting direct world experience.

Prof. Köchler's latest compendium (*Global Justice or Global Revenge? International Criminal Justice at the Crossroads*), released during the last month of 2003, is an inspiring guide for those attracted to the evolving concept of universal jurisdiction. The author's criterion in this work has been to define and elaborate on the measures of international law enforcement, which should agree with the norms governing peaceful co-existence in general and the U.N. rules of collective security in particular. Analyzing the legal and philosophical foundations of universal jurisdiction, the book scrutinizes the problems of legitimacy of international legal institutions within the context of power politics.

The book also presents (pp. 51f) a valuable historical overview of efforts, since the first proposal in 1872, towards international criminal justice. It took more than a century to reach the level of the 1998 Rome Statute of the International Criminal Court (ICC), on which the author dwells exhaustively.

The author notes that although the Nürnberg and the Tokyo trials established new standards of criminal responsibility (such as making heads of states accountable for criminal actions and rejection of obedience to superior orders as a defence argument), these two post-World War II tribunals were still examples of victors' justice. For instance, the Tokyo Tribunal had been preceded by U.S. Military Commissions set up to try Japanese war criminals on the basis of an order by General MacArthur, who also appointed the President of the Tribunal.

He considers the creation of two international tribunals (for former Yugoslavia and Rwanda), by the permanent members of the U.N. Security Council (UNSC), as a violation of the basic legal standards. They were, indeed, set up in a discriminatory manner defining legality in terms of power politics. The permanent members of the UNSC having a *de facto*

control over them, they fall short, as observed by the author, of meeting the requirements for an international penal tribunal. The presiding judge in the Milosević case, for instance, is a citizen of one of the countries that have waged war against the country of which the accused was the Head of State.

The author accurately perceives that political emotions prevent a rational analysis of the responsibilities for war, and consequently only the behaviour of the defeated party is judged, not that of the victor. The victor, now transformed into a judge, sets up the tribunal and the terms of persecution and enjoys total immunity from the same scrutiny.

A separation of powers is, then, a prerequisite for an international rule of law. He correctly underlines its value throughout the book (pp. 19-24, 67f, 117f, 251f). The author observes that the Special Court for Sierra Leone, to look into the crimes committed by the factions during the civil war in that country, is the one that meets the basic requirement of separating legality from politics. Being international and independent, it enjoys advantages over the other *ad hoc* courts.

The author emphasizes that global peace and security can prevail only if an efficient system of international criminal law entrenches itself. He rates the ICC, a supranational authority exercising some functions otherwise reserved to states, as a significant step in that direction. He terms its emergence as “a new qualitative stage” (p. 75). A fully independent international court is, indeed, a *sine qua non* for global justice, or the reverse of global revenge.

Still, the ICC has to protect its independence against the most powerful nation-states and the UNSC (pp. 200-57, 261-63). Well aware of the predicaments facing universal jurisdiction in a unipolar world, the author is repeatedly but appropriately critical of the stubborn efforts of the United States to challenge the authority of the ICC. From the point of view of a superpower, especially in a unipolar world, international law enforcement means the application of its own laws and the reinforcement of its own interests.

The United States has been paralyzing the ICC from its very beginning. Its withdrawal from the Rome Statute, the adoption of the American Servicemembers’ Protection Act (2002), and the bilateral agreements to guarantee the non-extradition of U.S. citizens to the ICC demonstrate official American position towards universal justice. The UNSC, acting *ultra vires*, altered the meaning of Art. 16 of the Rome Statute and limited the scope of the ICC’s jurisdiction. The United States, then, not only refused to recognize its jurisdiction over American citizens, but also extended its own (U.S.) jurisdiction to the territory of other states. According to Prof. Köchler, the 2002 Act is the “most decisive rejection” (p. 241) of the ICC

by a non-state party thus far. The author poses, then, the following valid question: “How can the Court exercise its universal mandate when the unrivalled superpower threatens states with unilateral sanctions in the case of their ratifying the treaty or cooperation with the Court?” (p. 265). Further, if nuclear arms are not mentioned, in line with the French reservation (pp. 223-26), in the definition of war crimes, the ICC runs the risk of becoming irrelevant.

Prof. Köchler’s book is not only a scholarly investigation into the past and present of criminal justice, but also a well-timed warning that the lessons from experience may not be in vain. His concerns do not invalidate the basic idea of universal and supranational jurisdiction. The book is a *vade mecum* that may be synopsized as “Justice, Not Revenge!”