

# UNIVERSAL JURISDICTION AND INTERNATIONAL POWER POLITICS: IDEAL VERSUS REAL

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by

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Editör'den,

Dergimiz'de bu sayıdan itibaren hakemli makalelerin yanı sıra değerli bilim insanlarının görüşlerine de yer verilecektir. Bu sayıda Sayın Prof. Dr. Hans KÖCHLER'in Eskişehir Osmangazi Üniversitesi'nde 16 Şubat 2006 tarihinde vermiş olduğu "Universal Jurisdiction And International Power Politics: Ideal Versus Real" konulu konferansına yer veriyoruz.

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The separation of powers is an *indispensable* requirement of the rule of law, at the domestic as well as the transnational level. It is *quintessential* for the judicial process, in particular for the integrity and fairness of criminal proceedings. While the independence of the judiciary (including the prosecutorial authority, even if, in many countries, the latter is partly intertwined with executive power) is the most delicate – and difficult – issue of the separation of powers at the domestic level, it has proven to be even much more fragile in an international, eventually supranational, framework.

Since the end of the Second World War, the doctrine of universal jurisdiction has raised high expectations among those who are committed to the international rule of law and global peace, but in most cases of its invocation it has actually been rendered as a variation of victor's justice, evidencing the very absence of a separation of powers.

It is necessary to analyze the different constitutional and statutory arrangements through which universal jurisdiction has been practiced and to assess the compatibility of the procedural requirements of international criminal justice with the mechanisms of traditional power politics. One of the basic problems to be addressed is whether the norm of state sovereignty can be reinterpreted in such a way as to allow for a *genuine* judicial process in the transnational realm. The credibility – and legitimacy – of universal jurisdiction will ultimately depend on whether it can be exercised independently of the dictates of international realpolitik. So far, the experience has not been a very encouraging one. Almost always, the lofty doctrine of universal jurisdiction had to be implemented in a context of political compromises – something which has imposed upon the respective courts and tribunals a “policy of double standards.” This tendency has been particularly obvious in the *political selectivity* of prosecutorial decisions and the politicization of criminal proceedings in general. The issuing of indictments on an effectively discriminatory basis by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) – who refused to investigate cases of officials from NATO countries in spite of that court's territorial jurisdiction – has been a clear case in point.

A comprehensive analysis will also have to deal with what Henry Kissinger, albeit with a different emphasis, has referred to as “the pitfalls of universal jurisdiction.” What appears as “pitfall” to an involved political leader, whether incumbent or retired, is indeed a major achievement if the doctrine is applied not in a merely symbolic manner, but by holding to account all persons responsible for international crimes irrespective of their nationality and position. Should universal jurisdiction ever become a global standard – which it is not at the present time –, politicians will have to come to grips with a situation where they cannot invoke the principle of “sovereign immunity.” If fear of such predicament determines their future behaviour – and encourages them to abide by the rule of law – the world

will undoubtedly become a more peaceful place. So far, however, this is nothing more than a utopian vision.

The crucial issue to be addressed in that context will be how courts dealing with high profile cases can avoid getting entangled in political disputes, something which may negatively impact on the fairness and impartiality of the proceedings. Being instrumentalized as a surrogate political institution (a foreign policy tool of states parties interested in a particular case) is undoubtedly one of the risks, indeed pitfalls, of tribunals adjudicating cases of international criminal justice. The handling of the so-called “Lockerbie case” by the Scottish Court in the Netherlands, although located outside the doctrinary framework of universal jurisdiction, has drastically demonstrated those risks. The erratic pronouncements of the Chief Prosecutor of the ICTY on court issues with grave political implications (such as Croatia’s co-operation with the ICTY or lack thereof, having a direct and immediate effect on that country’s status, including membership prospects, vis-à-vis the European Union) are proof of those risks. When prosecutors act as surrogate politicians – as was repeatedly the case with the ICTY under Prosecutors Arbour and del Ponte –, they not only discredit the court, but do disservice to the cause of universal jurisdiction. The handling of war crimes cases (or cases of crimes against humanity) of foreign nationals by domestic courts or prosecutorial offices such as those of Belgium (in the Sharon case, among many others) or Spain and the United Kingdom (in the Pinochet case) illustrates this predicament of universal jurisdiction even more drastically.

In view of the numerous constitutional, doctrinary, and political problems faced by universal jurisdiction and the pitfalls its application “*sine ira et studio*” may create for powerful countries and their political leaders, we have to ask whether – in terms of normative logic – the only consistent form of the exercise of universal jurisdiction is that by a *permanent* and potentially *universal* institution such as the International Criminal Court (ICC). Only such an institution, based not on a resolution of the Security Council, but on a treaty among sovereign states, may be able to resist eventual obstruction from the part of interested or involved governments.

Nonetheless, even if one transcends the *ad hoc* arrangements that have so far characterized the practice of universal jurisdiction, the basic question remains whether such a court will be in a position to establish its authority *sui generis* in the prevailing system of international (i.e. inter-governmental) law and defend an essentially supranational ideal vis-à-vis the often conflicting interests of states parties and non-states parties alike. The litmus test, in that regard, will be whether the ICC will take up, *proprio motu*, high profile cases where it has jurisdiction on the basis of nationality or territoriality, or whether it will wait for referrals – “cleared,” as they are, through the channels of power politics – from the Security Council as in the case of the Sudan.

Questions that are coming up in that regard are: Why has the ICC not initiated an investigation of actions of troops of the United Kingdom in Iraq and into the possible criminal responsibility of UK commanders and politicians? This is a situation where the Court undisputedly has jurisdiction on the basis of nationality. The spectacular “Basra prison case” (the attack in September 2005 on an Iraqi prison, to free two secret agents, by crashing the gates and smashing the walls with armoured vehicles, resulting in several casualties); sabotage actions by secret commandos or, more precisely, *agents provocateurs* disguised as “Arab terrorists;” cases of torture and killing of Iraqi prisoners and civilians, and other forms of inhumane treatment: the cases are too numerous to be listed in detail; they are well documented by the UK and international media. According to its mandate, the ICC should by now have examined the quality and genuineness of eventual measures of investigation and prosecution of the alleged international crimes by the British judiciary.

Furthermore, will the ICC eventually exercise its jurisdiction in cases of international crimes that may have been committed on the territory of several European States Parties of the Rome Statute by officials of the United States in collusion with European officials? The secret “renditions” of detainees by the United States to secret jails in Europe, the secret detention of non-US citizens in those jails: all these acts are serious breaches of international humanitarian law and are clearly, as far as certain European states are concerned, within the jurisdiction of the ICC on the basis of territoriality and, as regards possible acts of complicity by European officials, also on that of nationality. These operations – having been revealed in some detail in the international media, but immediately denied by the concerned authorities – will, because of their “top secret” nature, not be investigated in a genuine and credible manner by the concerned European States Parties. Because of the “unwillingness” of those states to investigate the cases, the mandate of the Court to investigate this situation and eventually prosecute the suspects is clearly established according to Article 17 of the Rome Statute.

It is exactly these delicate and politically sensitive cases that make the nexus between law and politics in the field of international criminal justice drastically obvious. It is not by accident that the ICC, so far, apparently has taken “political precautions” and – as far as is publicly known – chosen not to exercise its jurisdiction in these cases. As the Court is still a rather fragile entity, the Prosecutor may, as in the case of the UK, not wish to alienate an important State Party in a phase when the Court’s future – its long-term success – is still uncertain. At a time when the Court’s jurisdictional authority is not yet robust enough to allow it to act with self-confidence and when much depends on the political, not only moral, goodwill of non-States Parties who are to be induced to accede to or ratify the Rome Statute, harsh treatment of the personnel and leaders of a powerful State Party may be perceived as counterproductive by the Court’s officials. Naturally, this is

again a purely political, not a judicial consideration; although being alien to the ideal of independence of the judiciary, it is a calculation being made by those who are supposed to implement the mandate of the Court.

In view of these harsh facts of international politics, we should not be surprised that, so far, the Court has only opened investigations “where it does not hurt” or where, for obvious political reasons, it cannot be avoided: apart from the investigation into the situation in Darfur (Sudan), referred to the Court by the Security Council, the Prosecutor is only investigating situations in two (!) – internationally non-influential – African countries on the basis of referrals by States Parties, namely the Democratic Republic of Congo and Uganda.

The fate of universal jurisdiction will finally depend on whether the International Criminal Court will be given a fair chance of independent action by shielding judicial proceedings from state interference, whether of unilateral or multilateral nature (as in the case of the United Nations Security Council). Much will depend on the ratification of the Rome Statute of the ICC by major powers from all continents, but also on the goodwill of those states that have already ratified the Statute.

Being the embodiment of the supranational ideal of global justice, universal jurisdiction must face the realities of a unipolar international order. The lack of a global balance of power has seriously undermined the legitimacy of the United Nations Organization and hampered its ability of multilateral action; this state of affairs may be considerably more detrimental to the nascent system of supranational law enforcement on the basis of universal jurisdiction. The dialectical relationship of (power) politics and law has proven to be the most intricate issue of the domestic rule of law; it is infinitely more complex – and complicated – when norms of *jus cogens* of general international law are eventually to be enforced against the most powerful international actors in the highly fragile framework of universal jurisdiction.

For a *permanent* and *universal* court (with tendentiously comprehensive membership) such as the ICC to operate under such conditions requires a delicate – and fragile – balance between the dictates of *realpolitik* and *judicial integrity*. In view of the above-described dilemma, particularly as regards a *modus operandi* designed not to discourage prospective States Parties, this is in itself an acknowledgment of the impossibility of separating law from politics in a precise manner.

For *ad hoc* courts – first and foremost those created by the Security Council – to try, in good faith, to realize the principles of universal jurisdiction is simply a *mission impossible* because those courts operate by way of negation of those very principles: they have been set up on a *selective* basis with the criteria of jurisdiction essentially being determined by political

considerations of the Security Council's permanent members or other states and entities (as in the case of the "hybrid" arrangements for Sierra Leone and Cambodia). In view of the selectivity of their mandate, they do not meet the universality requirement in any way.

Thus, the observer of the ambitious project of international criminal justice is faced with a crucial question: will the beauty of a philosophical idea – similar to that of Immanuel Kant's notion of "perpetual peace" – withstand the test of political reality? Will universal jurisdiction survive the "reality check" in an international system which is characterized by the absence of a balance of power? In other words: will this fragile idea be practicable under the harsh conditions of power-driven international politics?

How can a concept that, essentially, requires a supranational organizational structure be implemented in an environment which is still characterized by the interaction among sovereign nation-states? Those dealing with the intricacies of a constitution for the European Union are well aware of the enormity of the task, insofar as they have to reconcile supranational with intergovernmental decision-making.

Has the notion of "universal jurisdiction" eventually arrived too early on the global scene? What makes us think twice about the viability of the entire project is the fact that, so far, universal jurisdiction has almost exclusively been rendered in the form of victor's justice.

In all efforts at establishing a viable system of criminal justice on the basis of universal jurisdiction, one is confronted with the fundamental question – an answer to which would, at least for the philosopher of international law, be tantamount to squaring the circle: how does, in an international context that is determined by the politics of national interest, state power go along with a system that is based on the *taming* of that very power? The long-term prospects of the International Criminal Court – and the fate of supranational law enforcement in general – will depend on the answer to that very question. Almost four years since the coming into the force of the Rome Statute of the International Criminal Court, there is still no definitive answer as to whether the *ideal of universal jurisdiction* can be reconciled with the *reality of a unipolar world* – a reality which is painfully obvious in the fact that the global hegemon has not only chosen not to endorse, but to actively oppose that doctrine.