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Dr. Dr. h.c. Hans Köchler
University Professor, Chair, Dept. of Philosophy, University of Innsbruck (Austria)
President of the International Progress Organization

Law and Politics in the Global Order: The Problems and Pitfalls of Universal Jurisdiction

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ABSTRACT

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.

The paper analyzes the different constitutional and statutory arrangements through which universal jurisdiction has been practiced and poses the question as to 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 will be 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.

The paper will further 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.

Another 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 a clear case in point. 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, the paper asks 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 the countries and politicians referred to above.

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. (Among the *ad hoc* courts still in operation, the Yugoslavia Tribunal, by refusing to investigate potential war crimes by non-Yugoslav citizens, has repeatedly failed this credibility test of universal jurisdiction.)

The fate of universal jurisdiction will finally depend on whether the International Criminal Court will be given a fair chance of taming international power politics 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.