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Can the Exercise of Universal Jurisdiction Be Regionalized?

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Can the Exercise of Universal Jurisdiction Be Regionalized?

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Because of the nature of the crimes subject to it, the exercise of universal jurisdiction requires the highest standards of fairness and impartiality. Even if exercised by a domestic judiciary (which is highly problematic in itself), it can only be practiced meaningfully on the basis of an elaborate, fully functional *international* separation of powers which, in turn, requires an international balance of power. The *universality* of the mandate has to be matched by the *universality* of the institutional and procedural framework in which it is fulfilled. This requirement is crucial because, more often than not, international crimes are located in a highly complex web of – constantly fluctuating – "supreme" state interests that are defined in the realm of global power politics.

The practice of universal jurisdiction since after the First World War has made obvious that *regional* arrangements are not compatible with the rationale of universal justice – neither in terms of the doctrine nor practicality. *International*

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criminal law loses its substance when it is practiced as *regional* criminal law. The tribunals set up after the Second World War were international only in name and/or judicial claim, in reality they amounted to regionally limited undertakings by a victorious party in international armed conflict. In spite of their claim to universality (the term "universal jurisdiction" was not yet commonly used at the time), they essentially produced victor's justice – as observed by the then Chief Justice of the Supreme Court of the United States, Harlan Fiske Stone, in regard to the Nürnberg tribunal, or by the Indian Judge Radhabinod Pal in his dissenting opinion on the Judgment of the Tokyo Tribunal, and implicitly also by Hans Kelsen. The basic flaw of these tribunals was that the requirement of the separation of powers could not be met in a setup that was derived from the uneven relationship between victor and vanquished.

Contemporary efforts at "regionalizing" the exercise of universal jurisdiction – i.e. at practicing it in a regional framework while alluding to its universal mission – have been equally unconvincing in terms of legal doctrine. The Security Council's two *ad hoc* tribunals (which, in our analysis, are based on *ultra vires*-decisions of that body) have, from the very beginning, not been able to establish their credibility as genuine courts of law; in the case of the ICTY, the court has acted as political forum, essentially using the law for the purposes of a coalition of states that intervened, politically as well as militarily, in the former Yugoslavia. The only (though legally not valid) provision on the basis of which the Council could claim possessing a mandate for the creation of a court of any kind is to be found in Art. 39 of the UN Charter which, however, spells out a *political*, not a *judicial* competence. It is an iron principle of the separation of powers that the exercise of criminal justice must not be confused with the exercise of executive power, in this particular case: enforcement measures in the field of international peace and security.

In general terms, a *conceptual distinction* has to be made – as regards the regionalization of universal jurisdiction – between (a) the exercise of universal jurisdiction by an *international* (or internationally composed) court for a specific region or country on the basis of the territoriality principle (as in the case of the two *ad hoc* tribunals of the Security Council) or "personal jurisdiction" (as in the case of other *ad*

hoc arrangements such as those for the Khmer Rouge trials), and (b) proceedings under universal jurisdiction by a court the composition of which is itself limited to the respective region. In both instances, the *rationale* of universal jurisdiction is compromised by either the political interests of the Security Council's permanent members or the regional – as distinct from the international – power balance in the framework of which the respective court would have to operate. Unless there exists an advanced form of intergovernmental – ideally supranational – organization in the respective region (as in the case of the European Union), any such court would have to operate in the absence of a separation of powers, i.e. in violation of the most basic principle of the rule of law. This would make the exercise of jurisdiction over international crimes dependent upon a given regional power constellation. "Judicial protectorates" would result from such practice, which would naturally be beneficial to a region's most influential power(s). (In the case of courts created by the Security Council the requirement of the separation of powers is illusory anyway.)

In structural terms, there is no difference between the practice of universal jurisdiction by a *domestic* judiciary or a court created on a regional basis or for a particular region or even a particular case. The *differentia specifica* lies in the distinction of those arrangements from a *permanent* international court with "universal" mandate as well as composition. As experience has shown, in both instances (regional as well as domestic) the proceedings risk getting entangled in a web of political interests related to domestic as well as foreign policy considerations of the respective state(s). The rather erratic practice of universal jurisdiction by the Belgian judiciary on the basis of the 1993 war crimes law – which was disposed of, by way of amendments, rather quickly at the initiative of an embarrassed government – has demonstrated to the most naïve observer of international affairs that the requirements of *global justice* are not compatible with the foreign policy interests of a nation-state.

Similarly, the proceedings of the Scottish Court in the Netherlands (2000-2002) – though not situated, in terms of legal doctrine, within universal jurisdiction – have made obvious that international crimes (if we include acts of international terrorism into that category) cannot be prosecuted in a credible and consistent manner if they are dealt with in a regional – or quasi-regional – set-up. Although the

Lockerbie trial was formally an undertaking of the Scottish judiciary, albeit in an extraterritorial setting, it was set up as a special court following a Chapter VII resolution of the Security Council and reflected an essentially political deal between three governments that were involved in a dispute, *inter alia*, over the interpretation of the Montreal Convention of 1971. Because of the – almost unavoidable – politicization of the proceedings due to this constellation, the trial as well as the appeal court produced highly inconsistent verdicts. (The decision of the appeal court is presently under review by the SCCRC [Scottish Criminal Cases Review Commission].)

The experience with the "Iraqi Supreme Criminal Court" (earlier: "Iraqi Special Tribunal") is not very encouraging either. This tribunal is no court of law because it was set up by fiat of the occupying power in violation of the Third Geneva Convention. However, the rationale behind its creation is that a special (ad hoc) court should deal with the international crimes of the leaders of a defeated country – or members of a deposed government –, whereby the entire operation of the court is under the (direct) control of the leading occupying power the strategic interests of which determine the collection of evidence, selection of suspects, drafting of indictments, etc. (not to speak of the training abroad of all court officials by experts of the main occupying power and its closest ally). In this case, the mixed domestic-regional framework for the operation of the court (that is tied to the actions of a military "coalition of the willing") has proven highly detrimental, if not devastating for the rule of law and the entire project of universal jurisdiction under the conditions of the 21st century's unipolar order. It is no coincidence that the occupying power in Iraq has done everything to prevent the special court from being created outside the mixed domestic-regional framework within which it operates now and which ensures almost total control to the invading country, the self-proclaimed victor in a conflict it provoked – an act for which that country's political and military leaders cannot be held responsible before an impartial international tribunal, namely because of the lack of autonomous jurisdiction of the ICC and the virtual impossibility of a Security Council referral due to the veto privilege enjoyed by the party in question.

In view of these obstacles to fair trial under domestic or regional

circumstances – which are almost unavoidable as long as international relations are based on the sovereign equality of states (something which excludes, *sensu stricto*, an international separation of powers) –, only an entity such as the International Criminal Court may eventually provide an adequate procedural framework for the exercise of universal jurisdiction – if one day the powerful states, including all permanent members of the Security Council, will have acceded to the Rome Statute. Not only is the Court's composition international (with a view of comprising different legal systems), its functioning is shielded, at least up to the extent possible, from the vagaries and fluctuations of international politics. The Court's Statute, however, is imperfect – and not in conformity with the universality of its mission – insofar as it accords a privileged role to the Security Council as regards the referral of situations and deferral of investigations or prosecutions, thus allowing the supreme executive organ of the United Nations an indirect control over the Court's exercise of jurisdiction. This means that the indispensable requirement of a separation of powers is not even met in the Statute of the ICC. The Court's creation was itself based on a compromise with power politics, forcing it to accommodate its mandate to the particular interests of the major international powers – something which, in structural terms at least, is not very different from the political influence on judicial proceedings in a regional setup.

Universal jurisdiction requires a *comprehensive* institutional framework as part of a functional system of checks and balances. This alone ensures strict impartiality in an area of the law where conflict with the "supreme interest" of states is the rule rather than the exception. Historical experience (including the most recent one with the ICC) has demonstrated that this goal can only be achieved by way of approximation. However, the regional practice of universal jurisdiction is most distant from the ideal – unless it would be situated within a kind of *supranational* structure similar to that existing in Europe for human rights jurisdiction. History has also demonstrated that the borderline between impartial proceedings and victor's justice is quickly crossed when the judicial requirement of impartiality is not backed up by institutional independence – something which can only be achieved in an essentially supranational, not merely intergovernmental, framework. Only such arrangements

will ensure that "universal competence" is not abused for the sake of power politics, i.e. the parochial interests of a global hegemon or a regional power.

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