

# Three Cheers for Universal Jurisdiction — Or Is It Only Two?

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*Universal jurisdiction has entered upon a dramatic and turbulent period of its long and generally stable history. Once associated primarily with prosecution for piracy or slave trading, it now figures in state-court prosecution of persons accused of international crimes that have been incorporated into state law, particularly genocide, crimes against humanity and war crimes. This new direction has generated serious interstate conflicts, particularly when the acts for which defendants are charged are viewed by some states or regions as criminal and by others as heroic and when the actual or proposed defendants are citizens of a major power. The critical current task is to engage in broad public discussion of these issues in order to build some consensus among many states about the legitimate uses and potential abuses of universal jurisdiction.*

## INTRODUCTION

For centuries, the principle of universal jurisdiction played a modest, stable, and useful role in matters concerning the extraterritorial reach of state law applied by state courts. Given its narrow scope and non-threatening

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application, it appeared relatively unproblematic, hardly the stuff of intense political debate or heated scholarly exchanges. But such it has become.

As examined in this article, universal jurisdiction involves the application by a state judiciary of that state's criminal law to a prosecution bearing no significant relationship to the state's territory, citizens, or security.<sup>1</sup> In its contemporary form, universal jurisdiction involves broadly ranging criminal investigations and prosecutions for the commission of serious international crimes that have been incorporated into state law. For example, the judiciary of state X applies its criminal law to a citizen of state Y in a prosecution based on the charge that this citizen committed a serious international crime in Y against citizens of Y and state Z. In that form, it has made an appearance, perhaps a brief one, on central stage.

The article explores why this has happened. Although referring occasionally to questions of universal jurisdiction's legality in international law, it addresses principally the nature of this controversy, including the dilemmas that it poses for advocates of international human rights (such as myself) who could be expected to welcome this expanded opportunity for criminal prosecutions charging gross human rights violations. Moreover, the article addresses what has thus far been the dominant contemporary use of universal jurisdiction: its application to crimes allegedly committed by state officials or by nonstate actors who have acted within a framework of systematic violations for which the state is responsible. Occasional remarks do refer to the nonstate terrorist as well.

Proponents of universal jurisdiction tend to view its heightened use by state prosecutors and state courts as a large step toward assuring criminal accountability for major violators of international human rights and therefore a serious blow to the entrenched tradition of impunity.<sup>2</sup> Concerned critics

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1 The topic has been the subject of a rich scholarly literature in the last few years, and of extensive commentary by nongovernmental human rights organizations. Two books that I read in manuscript add greatly to historical and current information, analysis, and proposals in this field: Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, forthcoming 2003) (excellent, widely ranging essays on legal, moral and policy aspects of universal jurisdiction); and Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003) (detailed, comprehensive and insightful description of the doctrinal roots of universal jurisdiction and of contemporary doctrine).

2 For example, the websites of Amnesty International *available at* <http://www.amnesty.org> and of Human Rights Watch (<http://www.hrw.org>) contain a great deal of information and advocacy about universal jurisdiction. *See also* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 *Foreign Aff.* 150 (2001).

sharply condemn that heightened use as abusive and dangerous.<sup>3</sup> In general, neither group sees much if any value or virtue in the other's position. States heatedly argue over these issues; those arguments have led to political and economic threats or action. How has this come about? Is there a path out of today's morass?

My responses to such questions rest on the premise that universal jurisdiction has served and will continue to serve valued purposes as a basis for criminal prosecutions. No longer do its precise historical functions and applications, such as trials of pirates or slave traders, remain salient. New purposes growing out of the turbulence of our times claim greater attention. Since World War II, international law in its conventional and customary forms has greatly expanded the scope of its criminalization of individual conduct. Those crimes range from airplane hijacking (an update of the old law on piracy) or traffic in drugs or prostitution to serious violations of the basic international human rights norms that have developed since the Universal Declaration of Human Rights of 1948, particularly those involving the killing, injuring, or persecution of people.

Even in the age of the new International Criminal Court ("ICC") and other international tribunals of limited jurisdiction, the use of universal jurisdiction for state prosecutions may help to reduce the historic impunity of the perpetrators. That will be particularly the case when other, more concerned states will not or cannot prosecute. Universal jurisdiction may then be essential to bringing gross violators to justice.

But its expanded substantive reach brings new difficulties to the scene. A strong consensus among states approved the arrest and conviction of the pirate. That consensus will sometimes but not always obtain with respect to identifying those who should be brought to criminal judgment because of their conduct in authoritarian, repressive regimes or in the many internal and international armed conflicts of the last half-century. The villain or tyrant to some states and peoples may represent the hero to others. One ethnic or ideological group may understand a particular historical record or interpret concrete events radically differently from another. A particular state may be viewed in a bright light by some, but critically by others.

In such circumstances, a criminal prosecution based on universal jurisdiction in a relatively "unconcerned" state may well raise issues of fairness and prejudice and, in the end, raise doubts in other states and peoples about the legitimacy of a trial and conviction. Such attitudes may

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3 Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 *Foreign Aff.* 86 (2001); Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, 132 *Daedalus* 47 (2001).

stem partly from the arbitrary or random identity of the unrelated form, which may gain custody of the defendant and decide to prosecute even in absence of a broad international consensus that the defendant merits prosecution and condemnation. The doubts may arise from concern whether the circumstances in the forum will permit a fair trial. More broadly, will a conviction advance or threaten the reputation and legitimacy of the human rights movement, particularly with respect to its recent expansion of individual criminal responsibility?

The question is not all-or-nothing. It is not a matter of somehow terminating all resort to universal jurisdiction or of letting the "market" in universal jurisdiction function as it will. Neither will happen. Rather, absent some consensus over its appropriate use and some form of regulation by hard or soft law, bitter conflict and the use of one or another measure of economic and political pressure will become frequent if not commonplace, particularly when powerful states object to the trial of their own citizens. The goal ought to be to seek a broad consensus over uses and abuses and to attempt to persuade states to observe the suggested boundary line between the two.

The article explores such questions through a straightforward scheme. It begins with some background to contemporary use of universal jurisdiction and suggests reasons for its near precipitous rise to prominence. I then examine what I believe to be the vexing and serious problems in its present application and distinguish between different categories of cases based on universal jurisdiction. The article concludes by noting possible paths toward negotiation and a broad consensus over what may constitute valued uses and avoidable abuses of universal jurisdiction.

## I. BACKGROUND AND CURRENT CONTEXT

### A. Extraterritorial Application of State Criminal Law

In civil litigation involving extraterritorial events and foreign parties, a court may apply principles of choice of law and may thereby apply to the controversy the substantive law of another state, perhaps the *lex loci delicti*. But this article refers only to criminal prosecutions. Subject to exceptions not here relevant, a court in criminal cases applies the penal law of the forum (*lex fori*), not potentially the penal law of another state. Choice of law does not operate. If there is no basis or justification for application of forum law, the case is dismissed.

Universal jurisdiction can be located on a spectrum of principles

describing the basis for a court's application of its own state's law to the criminal case before it.<sup>4</sup> Those principles identify links between the forum state and the events and parties that explain and perhaps justify why the court applies the forum's criminal law.

The familiar spectrum identifying five or so principles starts with the traditional and almost self-evident territorial principle. If the acts constituting the alleged crime occur within the forum state, that state is likely to be the most concerned state from several perspectives and, hence, the most appropriate forum for prosecution. The two other principles particularly relevant to this article assume extraterritorial application of *lex fori* to events occurring in a foreign state. The more significant of the two principles refers to the nationality of the principal actor(s) responsible for these events — that is, the putative defendant(s). Although well established in many domestic legal systems, recognized by international law, and resting on rooted notions of significant links between a state and its nationals/citizens, this "active nationality" principle can rest on problematic policies that are far from self-evident in the modern world. Surely extraterritorial reach of the criminal law appears justified as applied to citizens' conduct abroad that violates traditional duties to their states — treason, tax fraud, or failure to respond to a court summons, for example. But sometimes it reaches conduct that does not involve basic citizen-state relations or touch basic state interests, such as the murder abroad of a foreign national by a citizen.

The less well-established and often-criticized "passive personality" principle links the forum state to the foreign events through the victim's nationality. For example, a court might apply its state's criminal law to events abroad involving the murder of a citizen by a foreign national, the defendant. In circumstances more typical of today's prosecutions, there might be multiple victims who were citizens and the events abroad might have constituted a serious crime defined by international law, such as a crime against humanity.<sup>5</sup>

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4 See, for example, the principles described in Restatement (Third) of the Foreign Relations Law of the United States §402 (1987).

5 Article 13 of the Israeli Penal Code, 1977, Special Vol. L.S.I. 4 (1977), as amended in 1994, provides an illustration, at once extreme and limited, of the reach of the passive personality principle. It is entitled (unofficial translation) "Violations against the State of the Jewish People." Paragraph (b) states that Israeli criminal law applies to extraterritorial violations against an Israeli citizen (physical security, liberty, property) when the violation occurred because the victim was an Israeli citizen, as well as to extraterritorial violations against a Jew (physical security, liberty, property) when the violation occurred because the victim was a Jew. No prosecutions have been brought under these provisions. Compare the bases for conviction of Adolf

Universal jurisdiction occupies the other pole of the spectrum from the territorial principle. A court can apply forum law even absent any link connecting the forum to the events constituting the alleged crime, to the alleged wrongdoer, or to the victims.<sup>6</sup> Unlike prosecutions based on the territorial principle or on certain applications of the active or passive nationality principles, universal jurisdiction cannot be viewed as resting on self-evident justifications. Where is the justice, what are the policies, supporting a state's application of its own criminal law to events and parties lacking any significant connection to it? How, for example, can one justify the application by the judiciary of state X of the state's criminal law to try and perhaps convict a citizen of state Y for torture committed in Y against citizens of Y and state Z? Y might be thousands of miles distant, part of a distinct civilization and culture. X and Y might have a historical tradition of amity between them or of hostility and violence. Reliance on universal jurisdiction may raise a number of risks, such as inadequate knowledge of officials of X of relevant aspects of the foreign Y culture that might shed light on the conduct of the citizen of Y, inadequate access of X's prosecutor or of the defendants to facts and witnesses far away, or subjecting the defendant to an unknown legal and political culture and procedural system.

But the prospects for a fair prosecution are not as bleak as just suggested. A distinctive feature of universal jurisdiction offers some comfort. Although the forum lacks concrete links to the extraterritorial events, to defendant(s) and to victim(s), its "own" substantive law need not be viewed as arbitrary and beyond anticipation. Ultimately contemporary universal jurisdiction rests on the nature of the criminal charge and, hence, on the character of the norms that the defendant is charged with violating. The norms associated with universal jurisdiction generally describe conduct that is universally condemned and that is defined by international law. That is, the norms constitute international crimes. The crimes that now generally underlie states' provisions for universal jurisdiction are understood to be among the most serious crimes defined by international law.<sup>7</sup> The state criminal law on

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Eichmann as stated in the trial court (District Court of Jerusalem) and in the appellate court (Israeli Supreme Court), set forth in Henry Steiner & Philip Alston, *International Human Rights in Context: Law, Morals, Politics* 1138-42 (2d ed. 2000).

6 Different states and legal traditions use different terms to describe this phenomenon. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States, §402-04 (1987). The title to Section 404 reads: "Universal Jurisdiction to Define and Punish Certain Offenses." Some schemes decompose the concept of jurisdiction itself into prescriptive (i.e. legislative), adjudicatory and enforcement (i.e. executive) jurisdiction. Universal jurisdiction addresses the prescriptive issue.

7 The Princeton Project on Universal Jurisdiction (Stephen Macedo, ed.) convened

which the prosecution rests has incorporated in one or another juristic manner those international crimes.

A characteristic formulation in recent state legislation of criminal offenses subject to universal jurisdiction would include one or all of the international crimes of genocide, war crimes, and crimes against humanity.<sup>8</sup> A crime against peace, or the crime of a war of aggression, was fundamental to the Nuremberg trials after World War II. But it has fallen out of use in the three international criminal tribunals created since Nuremberg, despite its growing contemporary significance.<sup>9</sup> The legislation might incorporate the precise definitions of these crimes that are set forth in one or another treaty — the Genocide or Torture Convention, the Geneva Conventions and their

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a group of scholars and jurists to develop consensus principles. Principle 1(1), (2) and (4) of The Princeton Principles of Universal Jurisdiction (2001) defines universal jurisdiction as "criminal jurisdiction based solely on the nature of the crime," without any connection to the state exercising such jurisdiction. It may be exercised by a competent court of any state "in order to try a person duly accused of committing serious crimes under international law...." Those crimes, as set forth in Principle 2 (1), include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. These Principles thus build on the older historical instances of universal jurisdiction as well as on the contemporary evolution of crimes consisting of violations of international human rights from the 1945 Judgment at the Nuremberg Trial to the Statute of the International Criminal Court. The Principles are set forth on the website of the Princeton Project, *available at* [http://www.princeton.edu/~lapa/unive\\_jur.pdf](http://www.princeton.edu/~lapa/unive_jur.pdf).

<sup>8</sup> See *infra* text accompanying note 22.

<sup>9</sup> The Charter annexed to the London Agreement of Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472 constituting the International Military Tribunal for the Nuremberg trial defined the crimes within the jurisdiction of the Tribunal to include "Crimes against Peace," including the planning or waging of a "war of aggression." Article 2(4) of the UN Charter states that UN members should "refrain in their international relations from the threat or use of force" against the territory or political independence of other states. The Statutes for the International Criminal Tribunals for the Former Yugoslavia and for Rwanda contain no such provision in their statements of crimes within those tribunals' jurisdiction (Statutes reprinted respectively in 14 Hum. Rts L. J. 211 (1993) and 33 I.L.M. 1590 (1994)). Article 5 of the Statute of the International Criminal Court, *reprinted in* 37 I.L.M. 999 (1998), includes "the crime of aggression" among the "most serious crimes of concern to the international community" that are within that Court's jurisdiction. "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted" by parties to the Treaty defining the crime and stating the conditions under which it is to be applied. In view of the intensely politicized aspects of this crime and the radically different views about whether it has been committed in military interventions in Kosovo and Iraq, the odds that parties to the ICC will agree on a definition within a foreseeable future are not strong.

Protocols, and so on — or in other international instruments such as the Security Council-approved Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. On the other hand, it might adopt an earlier formulation of the crimes stated in those Statutes or modify the most recent definitions.

Juristic techniques vary among states about how the treaty or customary norm comes before the court, perhaps by automatic incorporation (self-executing treaties), perhaps by legislative incorporation. In most cases, state courts using universal jurisdiction would apply a domestic statute authorizing such jurisdiction and incorporating or adopting international-law definitions, rather than invoke and apply international criminal law directly. In authorizing universal jurisdiction by statute, the state might be fulfilling a duty imposed on it by virtue of its ratification of a particular treaty — for example, the duty of parties to the Geneva Conventions not only to enact penal legislation covering persons committing any of the "grave breaches" defined in those Conventions, but also to "search for" such persons to bring them before their courts, unless a party prefers to extradite a given person to another concerned state (the famous *aut dedere aut judicare* clause in similar treaties is here reversed to become *aut judicare aut dedere*).<sup>10</sup>

This association between universal jurisdiction and international crimes takes some of the sting out of the charge that resort to such jurisdiction can lead to the application of the law of an unrelated and unanticipated forum that might involve application of an unfamiliar norm. In theory, state courts everywhere could apply the "same" definitions of serious international crimes incorporated in their national legal systems — even, one could

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10 For example, Article 146 of the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, provides that state parties

undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.... Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Scholars differ as to whether the obligation to "search for" persons who committed grave breaches extends only to the national territory, or reaches globally so that it could include, for example, the obligation to seek extradition of such a person found in another state.



imagine, the same prevailing interpretations of these definitions. The forum would become irrelevant to the outcome with respect to the substantive law applied.

From this perspective, universal jurisdiction applied to serious international crimes seems but the modern equivalent of its centuries-old application to pirates doing business on the high seas. Any state that captured the pirate could enforce the international and internal law condemning piracy, even if the state bore no graphic link through nationality to the victims of the piracy or to the pirate. Indeed, the application of universal jurisdiction to today's nonstate terrorist committing, say, a crime against humanity offers an even closer analogy.

In these earlier periods, no international criminal tribunals were available to handle such matters, whereas today several tribunals of limited territorial and temporal reach and one such tribunal of universal reach have enriched the possibilities. To some extent, they stand as alternatives to state prosecutions. But the principle of complementarity of the most significant of these tribunals, the International Criminal Court, cedes priority in prosecutions to state judiciaries, subject to good faith criteria.<sup>11</sup> Moreover, whatever its potential funding and even if its complex jurisdictional requirements based on which states are parties to the treaty are met, that Court cannot be expected to handle the mass of criminal charges that could emerge from systemic violations in one or another country — the former Yugoslavia and Rwanda, to choose obvious illustrations. Nor can it try cases that arose before its Statute's entry into force.

Needs and norms have changed since the days of piracy and slave trading, particularly in the light of a half-century of severe state repression, savage ethnic conflicts, the international human rights movement, and a related

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11 Article 1 of the Statute of the International Criminal Court, *supra* note 9, states that the Court "shall be complementary to national criminal jurisdictions." Article 17 provides that a case is inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution," or if the case has been investigated by such a State which decided not to prosecute, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute...." To determine "unwillingness," the Court considers whether the State proceedings were undertaken "for the purpose of shielding the person concerned from criminal responsibility," whether there has been "unjustified delay... inconsistent with an intent to bring the person concerned to justice," or whether the "proceedings were not or are not being conducted, independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

expansion of the humanitarian laws of war. International criminal courts may be at the threshold of achieving global significance in responding to these new conditions. But at least for the while, their capacity for response is limited, and state judiciaries will often constitute the primary institutions for application of the developing criminal norms in the interests of accountability, justice, and deterrence. Universal jurisdiction adds to the number of possible state forums for a prosecution in any given case.

## **B. The Potential Reach of Universal Jurisdiction**

International law imposes few limits on extraterritorial jurisdiction — the reach or application of forum law to events occurring abroad — in criminal prosecutions.<sup>12</sup> Surely that can be said with respect to universal jurisdiction based on a charge of committing a serious international crime. Part of the current debate about that jurisdiction concentrates on its potential breadth. The breadth becomes apparent from a consideration of: (a) the crimes that may be included; (b) the question of the presence of the accused in the forum state and the related question of extradition; and (c) the manner in which an investigation is launched.

(a) Universal jurisdiction is not thought to embrace prosecution for crimes that may be universally condemned by state systems but that are not international crimes — common crimes like murder or rape, for example. But restricting it to serious crimes defined by international law still leaves available a wide range of criminal offenses. Within the field of human rights treaties, crimes range from genocide to torture and persecution. Outside that field, recent decades have seen a considerable expansion of treaty-defined crimes such as hijacking and the drug trade. There is no reason to think that the process of creating new international crimes and absorbing such crimes into state legislation based on universal jurisdiction has ended or even slowed down.

(b) Whether and when the presence of the potential defendant in the forum state is required has become a pressing issue, at the core of some litigation. A simple requirement of presence leaves open the vital question of the relevant moment. Does presence refer to the time at which an official investigation opens into the putative wrongdoer's involvement in criminal activity? If so, is the requirement satisfied by the transient presence of that person because of a vacation, a business transaction, or medical treatment?

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12 The classic international law decision is the Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.

Or is ongoing residence or domicile to be required? Perhaps only a later stage in the course of events that may lead to a prosecution triggers the requirement of presence in the forum state, such as the issuance of an arrest warrant after the investigation has convinced an investigating magistrate or prosecutor that there is probable cause to initiate a prosecution. The notion of a trial *in absentia* has not figured in the debate; one can assume a broad consensus that the defendant's presence at this final stage is essential.

These are distinctions of great significance. The earlier in the process that presence is required, the smaller the number of jurisdictions that may be potential fora for a prosecution. On the other hand, requiring presence only at the initiation of a trial means that a state prosecutor may start an investigation (which may well, as in the case of Belgium, carry investigators abroad to conduct interviews or produce evidence) without any link of the state to the case and later issue an international arrest warrant or seek extradition from another state.

To take the extreme case, suppose that an internal armed conflict within state X leads to the commission of serious international crimes. A prosecutor in state Y leads a group of trained investigators to X to gather information. The prosecutor concludes that the criteria for initiating a prosecution against a citizen of X are met. State Y then seeks extradition of that person from a third state, Z, to which he has fled. If the request is granted, the prosecution will take place in Y. Although the matter is not entirely clear, the complementarity provision of the ICC can be interpreted to point to prosecution in Y as preferable to investigation of the matter by the ICC Prosecutor.

(c) The processes for starting an investigation or prosecution bear importantly on an assessment of universal jurisdiction, for they indicate how broadly and for what reasons it may be invoked. The vital decision may be taken by a prosecutor on his own motion, perhaps at a local level or perhaps by a central authority in the state government. The decision to prosecute may require issuance of an international arrest warrant or a request to another state for extradition. A broad range of considerations — from availability of witnesses or similar factors related to *forum non conveniens* to political factors including relations with the country where events occurred or the country of defendant's nationality — inevitably inform such decisions. To the extent that political considerations are relevant, a decision to investigate or to prosecute may depend on the degree of judicial independence from the executive in the face of an executive request to, say, drop the case because of potential prejudice to international relations.

But in some states, the process that may lead to prosecution need not originate with a prosecutor. An alternate route may be available. Proceedings

may be initiated also by nonstate actors, perhaps nongovernmental organizations or victims who are resident or transiently in the forum state. Such actors can petition the prosecutor to conduct an investigation and may have recourse to the courts if the prosecutor refuses to act. Through such procedural forms as the Belgian or French *constitution de partie civile*, victims may be able to constitute themselves as a party able to require the prosecutor to initiate a criminal investigation or prosecution and to take part in the criminal proceedings with defined rights of participation.<sup>13</sup> Prosecutions based on universal jurisdiction may then ultimately depend on decentralized decisions by a potentially large number of nonstate actors that have the effect of allowing nonstate actors to bypass prosecutorial discretion.

### C. The Contemporary Burst of Activity in Prosecutions Based on Universal Jurisdiction

Over the last decade, particularly the last five years, universal jurisdiction has drawn far more public attention than during the preceding centuries when its primary targets were nonstate actors like pirates or slave traders. What explains its current dramatic prominence in newspapers as well as political protests, in proliferating state legislation as well as scholarly disputation?

Although causal explanations are rarely convincing for such general phenomena, surely a half-century of the human rights movement must figure among them. Civil and political rights and contemporary evolution of the laws of war — far more likely than economic or social rights to lead states to enact and apply criminal sanctions for their violation — have become part of a universal discourse and form a complex web of multilateral treaty obligations. At least in retrospect, the progression seems inevitable from an almost exclusive stress at the start of the movement on duties of states to individuals, and related stress on sanctions and remedies against states breaking those duties, to heightened attention to the criminal responsibility of individual violators of international norms. After all, the Nuremberg trials were among the key events launching the human rights movement. The violators are generally but not invariably members of the state government or military.<sup>14</sup>

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13 See Reydams, *supra* note 1, at 108; <http://www.justice.gouv.fr/publicat/portezplainte3.htm> (in French).

14 See the provisions defining crimes in the Statute of the International Criminal Court, *supra* note 9. Those provisions underscore the degree to which nonstate actors have come to bear individual criminal responsibility under international law, whether as isolated individuals, members of small groups, or members of nonstate military

One might surmise that the growth of universal jurisdiction in state legislation and judiciaries has been a natural, perhaps inevitable, companion to the implantation of the discourse and institutions of universal human rights. If rights are universal, then any state judiciary could be properly involved in their enforcement. Indeed, universal jurisdiction can be imagined as part of the larger process of globalization and erosion of state boundaries, for the underlying notion is that all state judiciaries bear a common authority and sometimes responsibility to vindicate certain shared international norms.

As suggested, it is not only human rights norms that have so increased. The humanitarian laws of war have themselves experienced both an expansion and more precise articulation in their contemporary formulations. One need only compare the criminal provisions in the Charter annexed to the London Agreement and applied by the International Military Tribunal at Nuremberg in 1946, with the provisions for grave breaches in the Geneva Conventions of 1949 and a later Protocol, the Genocide Convention, and the evolution of the broad category of crimes against humanity. Indeed, the criminal provisions in the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the International Criminal Court fuse in many respects the two avenues of growth: human rights law and the laws of war. All such growth prompted states to make their own contributions to the trend towards individual criminal responsibility.

Not only has international criminal law expanded, but the conflicts generating the serious violations have as well. Coupled with heightened and dramatic media coverage, those conflicts' cruelty and the mounting tolls of civilian life have led to more persistent demands of the victim populations and third parties, as well as nongovernmental human rights organizations, for punishment of at least the most responsible individuals. There are now sufficient precedents imposing individual criminal liability to say that the goal of punishment is in the air, not quite an expectation but surely a strong possibility to be considered for recent or ongoing situations of violence. Indeed, there is hardly a current violent conflict in which preliminary consideration has not been given to the possibility of prosecutions, or the alternative or complementary path of truth commissions, during transitional regimes. It is indeed when prosecution or truth commissions are not realistic

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forces in internal conflict. Note, for example, that nonstate actors can be liable under the Statute for genocide (Art. 6), for many crimes against humanity such as acts of terrorism against civilian populations (Art. 7), and for war crimes when civilians direct combat strategy (Art. 8).

possibilities in states like Congo where violence took place that universal jurisdiction has its particular appeal.

Prosecutions may have a special appeal for certain groups as the preferred way of responding to serious violations — the legal profession or the idealist or legalist school of international relations, for example, all of which stress the vital role of an international rule of law. The criminal process stands in sharp contrast to the politically engaged decisions of intergovernmental organizations or states about what to do, how to reconstruct and rebuild, how to handle a past whose memory so shapes the present. Prosecutions may represent for many a higher ideal, a detached and fair process for reaching judgment, a reaction to violence and abomination through observance of the Rule of Law, a triumph of law over politics and of civilization over mass insanity. To the legal profession, the creation of international tribunals, and the heightened resort to state courts through notions like universal jurisdiction, may represent the ultimate "professionalization" of the human rights movement itself. Courts, law and the rule of law claim their place in a movement that has long been dominated by raw political process.

The best evidence of the heightened attention given to universal jurisdiction lies in the increasing number of states enacting legislation providing for its use, and of course in the litigation based on such legislation. As noted, Belgium is the best known and most discussed state. Indeed the greatest concentration of states with broad provisions for universal jurisdiction and some degree of implementation of those provisions lies in West Europe.<sup>15</sup> Other countries such as the United States have more limited provisions.<sup>16</sup>

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15 Over the last decade, the European states that have enacted universal-jurisdiction legislation or that have opened criminal investigations or sought extradition include Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain, Switzerland, and the United Kingdom. *See* Reydams, *supra* note 1, at 83-219.

16 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 1987, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51(1984) provides in Article 4 that each state party "shall ensure that all acts of torture are offences under its criminal law." Article 5 provides for jurisdiction when the alleged offender is present in the state's territory, independent of the place of torture or nationality of involved persons, unless the state extradites such person. The United States, a party to the Convention, enacted the Torture Convention Implementing Legislation in 1994, 18 U.S.C.A. §2340-2340B (1994). Section 2340A gives courts jurisdiction for torture committed outside the U.S. where the alleged offender is present in the U.S., "irrespective of the nationality of the victim or alleged offender." Thus far there have been no prosecutions under this section.

On the civil side, the U.S. Alien Tort Statute, 28 U.S.C. §1350, provides for the

#### D. Landmark Judicial Decisions

The recent surge of interest in prosecutions based on universal jurisdiction builds on a few major cases, three of which have dramatically expanded the scope of universal jurisdiction with respect to basic human rights violations. Brief descriptions follow of decisions in Israel, the United Kingdom and Belgium, as well as a decision of the International Court of Justice.

The Eichmann case in Israel in 1961 can be understood as a precursor of contemporary expanded universal jurisdiction, particularly in its reach beyond the dominant historical categories, and despite the symbolic and causal links between the Holocaust and Israel.<sup>17</sup> Following Eichmann's abduction from Argentina by Israelis, the prosecution in Jerusalem rested on an Israeli statute, the Nazi and Nazi Collaborators (Punishment) Law. That Law referred to crimes during the Nazi regime "against the Jewish people" and to commission of an "act constituting a crime against humanity."<sup>18</sup> The conviction in the district (trial) court rested on several principles of extraterritorial legislative reach that would justify application of the Law to Eichmann's strategically central participation in the Holocaust that worked its destruction prior to Israel's creation. The district court referred to the "universal character of the crimes in question," but also to their "specific character as being designed to exterminate the Jewish people." It described as self-evident the "effective link" between Israel and the Jewish people.

On appeal, the Supreme Court developed its argument in a different direction. It stressed the violation by Eichmann of deeply rooted and universal moral principles, and noted the overlap among the charges brought against him. All could be grouped within the category of "crimes against humanity," then a far less articulated concept, and all had a common

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jurisdiction of federal courts to hear "all causes where an alien sues for a tort only [committed] in violation of the law of nations." That statute, enacted as part of the Judiciary Act of 1789, has supported abundant litigation in which foreign victims or their relatives seek damages from foreign individuals for violations of human rights occurring abroad that constitute the required "tort." The landmark case of *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980) set the precedent. Paraguayan citizens brought suit under the Statute against a former Inspector General of Police in Paraguay, and alleged that he was responsible for torturing their son to death in Paraguay. The defendant was served with a summons for this civil suit when transiently in the United States. Damages were awarded.

17 The following comments are based on descriptions of the judgments of the District Court in Jerusalem and, on appeal, of the Israeli Supreme Court, *appearing in Steiner & Alston, supra* note 5, at 1138-42.

18 Nazis and Nazi Collaborators (Punishment) Law, 1950, 4 L.S.I. 154, § 1(a) (1949-50).

denominator, a "special universal characteristic" that would include crimes "against the Jewish people." This universal characteristic tied the prosecution to broader conceptions of international law that could support external application of the Israeli law.<sup>19</sup>

The Pinochet litigation in the U.K., culminating in the 1999 judgment of the House of Lords in *Regina v. Bartle*,<sup>20</sup> stands at the threshold of the most active period in the turbulent contemporary career of universal jurisdiction. Spain's request to the United Kingdom in which Pinochet was receiving medical treatment for the extradition of Pinochet to face trial for torture among other serious international crimes — one of a number of such requests issuing from several European states — rested ultimately on the principle of universal jurisdiction as expressed in Spanish law. Although the allegations of the request included at the outset charges of crimes against Spanish citizens in Chile during the months of brutal repression following the army coup against Allende, the request ultimately referred to crimes for which Pinochet was allegedly responsible against non-Spanish citizens, principally Chileans. The decision of the House of Lords to allow the extradition proceedings to continue with respect to torture came to naught when British authorities then allowed Pinochet to return to Chile because of failing health. Nonetheless, the decision caused an enormous stir in many states. It gave impetus to bold thinking of prosecutors and of victims of other instances of state abuse about subjecting those other states' leading figures to prosecution in unrelated states whose courts would apply their forum law under universal jurisdiction.

Belgium became the forum of choice for potential prosecutions. Those prosecutions started with official investigations either initiated by prosecutors or requested of prosecutors by nonstate parties such as victims under the procedure of *constitution de partie civile*. In the most important case to come to judgment, *Public Prosecutor v. the "Butare Four"*,<sup>21</sup> victims or relatives of victims of the Rwandan genocide started proceedings against four Rwandan citizens, including two nuns who had taken up residence in Belgium after participating in the slaughter by assisting Hutus to burn a compound to which many Tutsi had fled. In 2001, the nuns were convicted and sentenced to a prison term in a prosecution based on universal jurisdiction as defined in Article 7 of a Belgian Law of 1993 as amended in 1999, providing that courts were competent to try individuals for violations of laws against

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19 For a perceptive analysis of the differences between the opinions of the trial court and the Supreme Court, see Pnina Lahav, Judgment in Jerusalem 150 (1997).

20 House of Lords, 24 March 1999, [1999] 2 All E.R. 97, [1999] 2 W.L.R. 827 (H.L.).

21 Assize Court of Brussels, verdict of June 8, 2001. The judgment is set forth at [http://www.asf.be/AssisesRwanda2/fr/fr\\_VERDICT\\_verdict.htm](http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm).



genocide, war crimes and crimes against humanity as defined in the Belgian Law, "irrespective of where such violations have been committed."<sup>22</sup> Neither Rwanda nor the International Criminal Tribunal for Rwanda objected to the prosecution. The residence of these defendants in Belgium after their criminal conduct provided some link, but the court did not view that link as a condition to the application of Belgian law. Moreover, Belgium was involved in the Rwandan tragedy — for example, by withdrawing a Belgian military force during the genocide's opening stages. So within a larger context, Belgium was not quite an unrelated state, though the opinion never suggested that the decision would have been different if neither of these factors were present.

During this same period, the International Court of Justice decided the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium),<sup>23</sup> which raised questions about the legality of universal jurisdiction under international law, particularly when the defendant was absent at the time of the investigation and an arrest warrant or extradition request was necessary. The case grew out of an international arrest warrant issued by a Belgian investigating judge and directed against the Minister for Foreign Affairs (Yerodia Ndombasi) of Congo. It sought the Minister's provisional detention pending an extradition request from Belgium to the Congo, based on "serious violations" of international humanitarian law.

Congo sought annulment of the warrant. It argued that Belgium's effort to apply its 1993 Law in the circumstance of this case, which amounted to an assertion of universal jurisdiction, violated (1) principles of sovereign equality of states, and (2) the procedural immunity of the Minister from arrest during his term in office. The judgment of the Court bypassed what some saw as the threshold issue that had to be decided, whether the issuance of the arrest warrant *in absentia* was itself invalid under international law. It decided the case on the second ground, concluding that the Minister enjoyed full (procedural) immunity from criminal jurisdiction while in office, and was protected against any act of authority of another state that would prejudice the performance of his duties.

Several concurring and dissenting opinions did consider the legality of this use of universal jurisdiction under international law. They underscored how divided opinion was about this issue. ICJ President Guillaume argued

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22 1993 Law, June 16, 1993, published Aug. 5, 1993 in *Moniteur Belge*, p. 17751, as amended by 1999 Law, Feb. 10, 1999, published March 23, 1999 in *Moniteur Belge*, p. 9286. For a description of this legislation, see Reydams, *supra* note 1, at 106-07; and the website of Amnesty International, available at <http://www.amnesty.org>.

23 2002 I.C.J., General List No. 121, (Feb. 12), reprinted in 41 *Int'l Leg. Mat.* 536 (2002).

against too expansive an understanding of jurisdiction to prosecute, without a requirement that plaintiffs or victims be present at the time of initiating an investigation or that the relevant events have some connection to the forum. On the other hand, in a joint separate opinion, Judges Higgins, Kooijmans and Buergenthal found no established state practice condemning the conduct of an investigation or the seeking of extradition of an absent defendant, provided certain safeguards in a trial based on universal jurisdiction were in place. Judge Van den Wyngaert concluded that no rule of treaty law said that universal jurisdiction *in absentia* was illegal. He also stated that universal jurisdiction did not violate the complementarity principle of the ICC, for that principle did not limit state prosecution to the few states linked to the parties or events.

## II. ANALYSIS AND EVALUATION

Against this background of increasing resort to universal jurisdiction, Part II describes some difficulties confronted by courts drawing on universal jurisdiction. The discussion then addresses arguments in favor of or critical of universal jurisdiction and suggests that an understanding of current problems would be advanced by thinking of universal jurisdiction cases as falling within one or the other of two categories. Part II also refers to some recent efforts to launch investigations looking toward possible prosecutions, and notes some sharp reversals of the trend toward expanded universal jurisdiction in 2003. It concludes with several contemporary proposals to deal with the problems in the field by "regulating" the use of universal jurisdiction.

### A. Preliminary Considerations

Prosecution of persons accused on adequate grounds of committing the serious international crimes now associated with universal jurisdiction significantly advances the goals of modern international law. Nonetheless it raises questions and concerns. For example, the significance of the recent expansionary trend can be overstated, particularly by a legal professional community educated to the belief that criminal justice administered by independent courts represents a fundamental safeguard and assurance for a humane society. And so it does for many societies that have achieved some degree of openness, respect for human rights, and stability.

But the vital steps forward within a universal human rights regime addressing many societies where authoritarian rule displaces openness,

dehumanization displaces respect, and stability over long periods has been a mirage, are more likely to grow out of the unruly, sometimes turbulent world of politics, whether or not including armed conflict. Courts do not decree and enforce the fundamental political transformations that can amount to human rights revolutions. Only after such revolutions, and particularly within the framework of democratic government, may the judiciary start to perform its vital functions of developing and applying human rights law. Argentina, Russia and South Africa offer classic illustrations. Courts and prosecutions, internally and internationally, may form a vital part of the ongoing processes of educating about and accounting for the past and thereby preparing the society for a different future. But their important contributions should not veil the greater demands put on internal and international political processes. Courts after the event, even effective ones, cannot make up for failures in those processes prior to the event, or alone achieve the deep, essential reform and rebuilding.

We are not anywhere near the realization of international political processes that can effectively prevent or arrest systemic and mass violations of fundamental rights, or effectively intervene to guide diverse societies from authoritarianism to participatory government. In this setting, attention in national and international contexts to individual criminal liability points us toward what we can now achieve. That attention responds to many currents of ideas and opinion, including: prosecutions are a less costly and risky path than strong intervention or other significant political commitments of international organizations and states; they provide a ray of hope given the failures of will to act politically, economically or militarily at an earlier stage with respect to several of the worst ethnic conflicts; they attempt to "depoliticize" and "legalize" and perhaps make more manageable the unruly world of international human rights by setting legal-institutional precedents that move towards the rule of law; and their creation expresses a passionate moral belief that those committing gross abominations should be subjected to legally and fairly imposed punishment. This sense of necessary retribution and justice has probably been at the core from the start. For many victims, criminal responsibility including the availability of a universal-jurisdiction court may constitute the brightest hope for justice.

Such criminal justice following massive violations in large conflicts will always have a somewhat arbitrary character. It will be impossible to prosecute, or even imagine prosecuting, "all" who participated in criminal events. In that sense, the vast majority of the foot soldiers committing the atrocities, and many in intermediate command positions, will escape criminal punishment and enjoy a *de facto* impunity — though other sanctions such as lustration or civil liability may be imposed. Prosecutors and others who

may be involved in launching an investigation will likely concentrate on the leaders, the key figures who animated, planned and directed a course of conflict involving such severe violations. The recent illustrations of universal jurisdiction to which this article will turn so suggest.

As for the deterrent effects of such prosecutions on the potential organizers of future systematic violations, the record is simply too young and unclear. One can at least wonder whether the ideological or theological conviction, arrogance, determination, and even noble-sounding ideals of the key violators make it plausible to assume that they will be influenced to restrain their conduct by some probability of some kind of criminal justice and imprisonment at some time in some place if they "lose." When the group or community or nation acts in a mass and even hysterical way, notions of deterrence may lose some of the efficacy they can claim when addressing deviant individual criminals in a stable society.

The recent history of such conflicts and their terminations has made it difficult to determine what are the best routes to follow after the violence ends. Amnesties, discussed below, may in some circumstances play useful and important roles. Truth commissions may prove to be a preferable path as an alternative or companion to prosecutions. These are troubling issues where we lack a strong consensus about how to proceed and tend to think in very contextual terms. Consequences of following one or the other path depend on so many unknowable circumstances. Needless to say, the role of universal jurisdiction cannot be understood or regulated without consideration of the possible advantages of taking such other paths.

Finally, discussion about the role of universal jurisdiction should not be thought of as an all-or-nothing inquiry. Proponents may stress its contributions to world order and peace or its purposes of retribution and deterrence through prosecutions for serious international crimes. As human rights advocates, they may blink its potential for causing harm to these ends. Antagonists may stress the conflicts that it may breed and its potential for biased judgments, and slight the degree to which it may advance the goal of punishment of serious offenders and achieve some general deterrence. Indeed, at the very least, it "punishes" prospective defendants by intimidating their international travel that might subject them to extradition and legal processes leading to prosecution under universal jurisdiction. What appears necessary is recognition of contemporary caution signals and efforts toward a broad consensus over certain limitations on its use, rather than summary rejection of the entire enterprise.

## B. Recurrent Problems in Universal Jurisdiction Cases

Critics of universal jurisdiction can find ready targets in the parade of problems that are apt to confront legislatures and courts making provision for and applying it. We have noted some among them, such as diverse views about whether and when the presence of the putative defendant should be required by the forum state. Some of these same problems can, however, prove to be equally troublesome for courts not relying on universal jurisdiction but drawing on the well-established principles of extraterritorial jurisdiction such as the territorial or active-nationality principles. Several of them are the subject of academic or professional proposals.<sup>24</sup>

We lack a consensus over these problems that might point toward determinate methods of dealing with them. There may be no alternative to the gradual working out of regulatory principles and of a regulatory consensus, through derivations from extant treaties, the pull and tug of national and international caselaw, state legislation, views of officials or academics, recommendations and declarations of intergovernmental bodies, reports of nongovernmental organizations, diplomatic protests and responses — in brief, the familiar broad range of materials of so-called "hard" law and "soft" law contributing toward the formation of customary and conventional international norms.

### *1. Consistency of Outcome: Laws and Procedures*

One might identify as a criterion of a successful scheme of universal jurisdiction the likelihood that the outcome of a prosecution would be the same no matter what the forum. In theory, as noted above, all state courts could apply the "same" international law crimes if legislators defined them and courts interpreted and applied those definitions in similar ways. In this sense, outcomes could be independent of forum. But we recognize how improbable it is that this aspiration could be realized, for reasons additional to the evident possibility that finders of fact might reach different conclusions about "who did what" on the same evidence. State legislatures vary widely in their incorporation of international crimes, not simply because they may be selective in the provisions that they adopt from a broad category like crimes against humanity. International crimes have gone through a considerable evolution over the last few decades, such that two states might select for incorporation crimes against humanity at different phases of their evolution

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24 *Infra* p. 234.

from the basic judgment at Nuremberg to, say, the contemporary formulation in the Statute of the International Criminal Court.

Even if we assume consistency among state judiciaries in defining and interpreting these serious international crimes, features of criminal prosecutions that differ among states inevitably raise questions about the administration of universal jurisdiction. Even if we can assume that all such variations meet international due process criteria as stated in the International Covenant on Civil and Political Rights,<sup>25</sup> criminal procedure will vary in ways that may affect the outcome of prosecutions: the use of a jury or lay assessors or other methods of fact finding, the rules of admissibility of evidence and burdens or persuasions of proof, the roles of counsel and judges, the methods of preliminary investigations of facts. These are familiar distinctions affecting the likelihood of similar or different outcomes in civil as well as criminal trials that might be held in several countries, even if all the possible fora applied the same substantive law. They may raise concerns about forum shopping to heighten the likelihood of a prosecution and conviction.

On the other hand, difficulties in acquiring information and assuring the presence at trial of witnesses may lead a prosecutor or court to refuse to initiate a prosecution or hear a case on grounds similar to *forum non conveniens*, inevitably a major consideration for courts in states that are unrelated to the controversy or parties. That is, doctrines and mechanisms are in place to assure that considerations such as likely unfairness to a defendant or practical difficulties in a trial may be invoked at early stages to limit the use of universal jurisdiction.

By themselves, the concerns about achieving similar results in different states cannot stand as a decisive objection to universal jurisdiction, given their frequent relevance when state adjudication involves events, material evidence and witnesses in other states.

## 2. Amnesties

Since many of the serious international crimes emerge from internal conflicts, the problems posed by amnesties loom particularly large. The status of amnesties under international law remains much disputed, caught up in the large debate over the possibility of achieving an end to violence through one or another form of amnesty or impunity, at the cost of personal

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25 See Article 14 of the Covenant, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), 999 UNTS 171, reprinted in 6 Int'l Leg. Mat. 368 (1967). That article, for example, refers to independent tribunals, to the presumption of innocence, and to minimum guarantees such as trial without undue delay and the right to have legal assistance assigned to a defendant when the interests of justice so require.

accountability for crimes. Those opposed to the granting of amnesties or their recognition by other states find support for their positions in the duties that many human rights treaties impose on states to ensure or protect rights, to provide effective remedies, and to ensure that granted remedies are enforced.<sup>26</sup> Moreover, some treaties defining crimes require the state parties to extradite or prosecute even when universal jurisdiction is used to allow for the application of forum law. Scholarly or professional comment on amnesties ranges from outright rejection to more qualified judgments that are open to consideration of special circumstances.<sup>27</sup>

In the context of judicial reliance on universal jurisdiction, the problem of the effect to be given amnesties arises in a particularly detached way. By definition, the forum is not the state where the alleged crimes occurred, which is presumably the state that issued the amnesty by executive decree or legislative or constitutional provision. The forum is hardly in the best situation to render a judgment that takes account of the complex range of considerations and perspectives that give shape to an amnesty.

Should a universal-jurisdiction court honor an amnesty? Surely the process for deciding on an amnesty would be one among several relevant considerations. One need only contrast the broad and general Chilean amnesty protecting Pinochet and other members of the military with that of South Africa, where amnesty was granted to specific individuals fulfilling certain requirements. The Chilean amnesty was imposed as a condition to surrender of military authority to a civilian elected government, and had no democratic credentials. It reached broadly to grant impunity to members of the armed forces acting as agents of the repression after Allende's overthrow. The South African amnesties could be granted to individuals for conduct of a political character, after those individuals had appeared before a committee of the Truth and Reconciliation Commission and had given an accurate account of their conduct that may have constituted a serious South African and international crime. This scheme was approved by a parliament that had been democratically elected as part of the transition from apartheid.

In both cases, there were strong reasons for victims of violence and opponents of the prior regimes to support an amnesty. In both cases, refusal

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26 See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991).

27 See Ronald Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 Va. J. Int'l L. 173 (2002); Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 Int'l & Comp. L. Q. 91 (2002).

by a universal jurisdiction court to recognize an amnesty that had been granted to a defendant would interfere with vital decisions of the state involved. But the cases differ in a fundamental respect. The arguments for giving effect to an amnesty gain strength if it was authorized within a democratic process and applied to a person under some *quid pro quo* arrangement, such as the South African requirement that accurate testimony be given to the Truth and Reconciliation Commission. Indeed, every amnesty is granted within distinctive circumstances that require a contextual analysis to determine its effect in courts of another state. Moreover, the choice in the territorial state is not simply between prosecutions and amnesties, but involves truth commissions as well, or some combination thereof. Many states that did not prosecute created truth commissions and sometimes granted an amnesty.<sup>28</sup> When the violence ends, a number of contemporary conflicts — Northern Ireland, the Israeli-Palestinian, and Sri Lanka, for example — could lead to processes of transitional justice that displace or sharply limit prosecutions and that might involve truth commissions and some form of amnesty. Such careful choice among alternative paths by the state where the violence occurred will make more difficult a decision in an unrelated state about whether to forego prosecution because of the amnesty.

The charge that a universal-jurisdiction court refusing to honor an amnesty would be unduly interfering with the forum state on such basic matters cannot alone point to recognition of the amnesty. Pushed to any degree, that argument would undermine much of the human rights movement. The question of interference was much discussed during the early decades of the movement — for example, during the debates over apartheid in the United Nations which South Africa long contended violated the provision in Article 2(7) of the UN Charter denying authority to the UN "to intervene in matters which are essentially within the domestic jurisdiction of any state." Human rights criticism of a state by other states or by intergovernmental institutions will often cut to the core of the criticized state: gender relations, freedoms of speech and association, political pluralism and participation, education system. Indeed, contemporary international pressure to bring democracy to states whose traditional forms of government could not have been more distant from the democratic ideal surely represents an extreme form of "intervention" under a human rights mandate.

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28 For a broad discussion of truth commissions in relation to prosecutions or amnesties, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).



### C. The Arguments for Universal Jurisdiction

A primary argument justifying universal jurisdiction focuses on the contributions of courts relying on it to advance a community interest in punishing the commission of serious international crimes, promoting accountability and dissuading others from threatening peace and world order. In some sense, the state court acts as an international tribunal; it is performing an international function in bringing violators to justice under international norms incorporated in domestic law. At the same time, that court may be the sole avenue of hope for victims who are blocked for one or another reason from other strategies like seeking prosecution in the territorial state or state of defendant's nationality.

This justification reaches well back into history, to resort to universal jurisdiction to curb piracy on the high seas. But this analogy is questionable in one respect. In comparison with piracy, the contemporary use of universal jurisdiction weakens the criticism that the forum is simply advancing its own interests. Such interests are now undifferentiated from the community or global interest in curbing massive and grievous violations, whereas the powerful seafaring nations could literally refer to their concrete and differentiated interests in both punishing the defendant and deterring similar conduct.

For other purposes, however, the analogy to piracy is persuasive. Although the events characterizing contemporary prosecutions occur not on the high seas outside the jurisdiction of any state, but principally within states caught up in internal or international armed conflict, the state where the alleged violations took place (territorial state) is likely to be the most concerned party. It offers the convenience of a trial close to the events, and responds to the state interest in regulating its own territory to achieve peace and order. It gives victims of wrongs and the population at large the opportunity to follow closely and to that extent participate in the narratives and arguments of a prosecution and to experience to some degree the sense of justice done.

But not infrequently the territorial state may also constitute an impossible forum for a prosecution (Congo today), or at least be unavailable (compare Cambodia) for a long period of time after the violence stops. Its judiciary may be destroyed, its internal security insufficient to protect courts and witnesses, its potential for again erupting in massive violence too acute to permit prosecutions, its political situation likely to produce ongoing stalemate over the issue of prosecutions. Moreover, an amnesty in the territorial state may be imposed by the more powerful party without recourse to popular debate and participation in that decision.

In this setting, universal jurisdiction plays a back-up or stopgap role. That role may be less necessary today, given the recent creation of three international

criminal tribunals/court. But if less necessary, it remains significant. The two international criminal tribunals that now function are limited in territorial and temporal terms. The International Criminal Court may hear only disputes arising after its Statute became effective or after a given state has become a party. As significant, its principle of complementarity seeks to keep investigation and prosecution at the state level, emphasizing rather than reducing the need for state courts in this context.

Much depends on the policies to be pursued by its Prosecutor as the ICC becomes operational, particularly with respect to the working out of the principle of complementarity. Encouraging states to prosecute and showing patience in waiting for a state prosecution to commence could sharply limit the ICC's caseload. Although the territorial state where violations occurred would generally appear to be the most appropriate forum from the ICC's point of view, we have seen that this natural "priority" may be impossible to realize for any of a number of reasons. In such circumstances, will the Prosecutor urge other states to consider prosecution under universal jurisdiction, either as a matter of such states' concrete treaty obligations or, for certain crimes, as a general policy in defense of the international community's interest in retribution and justice that may foster peace and stability?

Surely universal-jurisdiction courts could perform here a service of general utility by generating different ideas, which, though hardly "binding" in any formal sense, will enrich an informal system of precedents. The judgment of one state court about issues like the effects of an amnesty, or immunity, or interpreting and applying the broad standards embedded in the definitions of these crimes, will not go unnoticed in other states, whether by scholarly commentators, legislative bodies, advocates or judiciaries. Moreover, in this field more than many international law fields, relatively centralized authority exists. The country-specific international criminal tribunals will surely exert an influence on national judiciaries with respect to the understanding and interpretation of the criminal provisions that their Statutes declare and their judgments apply. Even more so, one might expect, will the judgments of the universal International Criminal Court. Universal-jurisdiction courts may then play their role in interacting with state and international courts in the common effort to elaborate and develop these basic norms.

## **D. Developing Concerns about Universal Jurisdiction**

### *1. Some Recent Decisions*

My arguments in this section, and some of the current debate about universal jurisdiction, can best be understood against the background of recent

pressures for legislative change about its scope, particularly in Belgium, as well as recently launched investigations and judicial decisions. Descriptions of a few of these events follow.

A number of complaints filed in Belgium (some of which were later abandoned) sought to launch investigations or initiate prosecutions (including use of the process of *constitution de partie civile*<sup>29</sup>) under the Law of 1993, as amended in 1999.<sup>30</sup> As noted above, Article 7 of that law provided that persons accused of violations of the relevant criminal norms (war crimes, genocide, crimes against humanity, as defined) could be tried before Belgian courts regardless of where the crimes occurred. Included among these complaints and requests for investigations or prosecutions were a case involving Ariel Sharon, at the time Prime Minister of Israel, for his criminal responsibility for failure to prevent the massacres in Lebanon at the Sabra and Shatilla refugee camps in 1982 when he held the post of Defense Minister, and a case involving a number of high-level Americans including former President Bush and Colin Powell for their responsibility for a bombing of Baghdad during the Gulf War that killed many civilians.

The Sharon case moved forward. Although the complaint was found inadmissible in a decision of a lower court, in 2003 the Belgian Cour de Cassation overruled that decision,<sup>31</sup> which had rested on the view that a Belgian court could not open the investigation against Sharon and other Israeli officials because they were not then present in Belgium. The Cour de Cassation concluded that there was no statutory requirement making a putative defendant's presence a condition to initiating an investigation and taking steps (such as a possible request for extradition) toward prosecution. On the other hand, that Court drew on the recent decision of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000*,<sup>32</sup> to conclude that Sharon himself, as Prime Minister, was immune from such process in Belgium as long as he held that post.

As expected, the reactions from Israel and the United States were strongly critical of the Belgian legislation authorizing these actions and ultimately making it possible that trials be conducted in Belgium if the presence of the defendants could be secured and if immunity did not obtain. Diplomatic relations between Belgium and the United States and Israel deteriorated, and threats of retaliatory measures against Belgium issued from some members

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29 See *supra* note 21 and accompanying text.

30 See *supra* note 22 and accompanying text.

31 Cour de Cassation, Section Française, 2ème Chambre, Numéro de Rôle P.02.1139.F, Feb. 12, 2003.

32 2002 I.C.J., General List No. 121, *supra* note 23.

of the U.S. Congress. Other complaints and requests for investigations in Belgium were directed to present or past leaders like Yasser Arafat and Fidel Castro.

Considerable diplomatic pressure, accompanied by diverse threats, was exerted on Belgium to amend or revoke this legislation. Legislation was enacted that limited the scope of Article 7 of the 1993 Law, as amended. The provisions that sharply curtailed universal jurisdiction appear in the latest such legislation, the August 2003 Law.<sup>33</sup> Its Article 13, for example, prohibits prosecution in case of immunity of the defendant, an immunity that the Law defines to extend to persons invited to Belgium by an international organization that had concluded a Headquarters Agreement with Belgium (such as NATO). Under Articles 14 and 16, persons subject to universal jurisdiction for alleged crimes committed abroad are limited to Belgian citizens and persons with their principal place of residence in Belgium. Foreigners without such residence can be prosecuted for crimes committed abroad against a Belgian citizen or a person who has been legally resident for at least three years in Belgium. The legislation also notes several factors that require a prosecutor to dismiss a case *ab initio*, including criteria related to *forum non conveniens*.

A ruling of the Spanish Supreme Court (Tribunal Supremo)<sup>34</sup> represented a further setback for universal jurisdiction. A case initiated by nongovernmental organizations and individual victims sought the prosecution in Spain of Guatemalan leaders for genocide against the Mayan Indians in Guatemala from 1962-1996. In an 8-7 decision, the Court concluded that Spanish law did not give courts jurisdiction without consideration of where the crimes were committed and of the nationality of the defendants and victims. In brief, the courts could not rely on the pure form of universal jurisdiction. The Spanish laws on the reach of national legislation to cover extraterritorial matters were to be interpreted in light of international-law principles like noninterference with other states' sovereignty. On the other hand, with respect to Spanish citizens who were alleged to have been killed by arson (viewed by the Court as torture) by Guatemalan officials as part of the carnage of this period, a link to Spain existed and the case could continue to prosecution if a request for extradition of the responsible Guatemalans were granted.

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33 Belgian Law on Grave Breaches of International Humanitarian Law, Aug. 5, 2003, published Aug. 7, 2003 in *Moniteur Belge*, p. 40506.

34 *Sentencia del Tribunal Supremo, Sala de lo Penal, 25 Feb. 03, sobre el caso Guatemala por genocidio* [Decision of the Spanish Supreme Court concerning the Guatemala Genocide Case], STS, Feb. 25, 2003 (R.G.D., No. 327/2003) (Sp.), available at <http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html>.

## 2. *Concerns about Universal Jurisdiction*

Before turning to my concerns, I shall note some reasons for not expecting states to resort to universal jurisdiction frequently. First, prosecutions under universal jurisdiction are not easy to mount or pursue. The forum by definition is unrelated and hence relatively uninformed. Prosecutors must manage a careful inquiry that may require a team of trained investigators to spend some time in the state where events occurred and potential witnesses live, possibly a state of radically different traditions and culture about which investigators (to their detriment) may be ignorant. Belgium, for example, has sent investigators to Senegal, where Chad's former leader Hissène Habré lives, to lay the groundwork for a possible extradition request and prosecution. All this requires dedication, and a sense that the prosecution is worth the high cost and extensive time within a larger Belgian criminal justice system that is dominantly concerned with the country's internal life. Few countries will have the required motivation and resources for such purposes. Apart from cases involving well-known defendants who are publicly associated with heinous conduct, it is unlikely that strong public pressure to launch universal-jurisdiction prosecutions will develop.

Second, basing a prosecution on universal jurisdiction may rapidly lead to deteriorating relations with other states — or, more precisely, with other governments if not with such other states' populations. The *Pinochet* case in the U.K. is a classic example, although Chileans reacted both positively and negatively to the prospect of prosecution. The threat of extradition from the U.K. to Spain for a prosecution, and ultimately the return by the U.K. of Pinochet to Chile, shook up that country's political process and stimulated renewed debate about prosecution of Pinochet. As noted above, the efforts in Belgium to launch prosecutions of Israeli Prime Minister Ariel Sharon and of former President George Bush, Colin Powell and other high-level American officials met with angry denunciations by Israel and the United States.<sup>35</sup>

Political costs may then attach to investigations as well as prosecutions. The question for the potential forum state will be whether initiating an investigation is worth such costs, a question requiring careful consideration of the reasons why that state is acting at all. The recent amendments to the

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35 After the August 2003 Law, *supra* note 32, the Belgian Cour de Cassation dismissed the proceedings against Prime Minister Sharon and former President Bush for lack of jurisdiction. Cour de Cassation, Section Française, 2ème Chambre, Numéro de Rôle P031216F, Sept. 24, 2003 (Bush et consorts); Court de Cassation, Section Française, 2ème Chambre, Numéro de Rôle P031217F, Sept. 24, 2003 (Sharon et consorts).

Belgian legislation offer vivid evidence of developing sensitivities to these issues and of the effect of political pressure from other states in shaping the rapidly evolving practice on universal jurisdiction.

What then are my basic concerns about universal jurisdiction? Piracy serves as a useful point of departure. The image of a piracy prosecution is one of condemning an international outlaw, *hostis humani*, a criminal who offends all states and threatens their common interest in a peaceful regime of the high seas for purposes of commerce and transportation. There is no room within this image for divisions among states, for some states being sympathetic to the effects of piracy in the play of interests and power among states (although there was no doubt some historical room, and major seafaring powers were more concerned than other states). There is no place, as it were, for ideological or political divisions, for double images of the pirate as villain and hero.

The same could be said for other crimes subject or potentially subject to universal jurisdiction — for example, the slave trade, or today international crimes like trafficking in women for prostitution or the drug trade. Of course rogue regimes may support the states and nonstate actors that are conducting these activities, and sharp divisions among states may develop about the most effective way of attacking the problems. But criminal prosecutions based on universal jurisdiction are unlikely to generate sharp differences among states about how these activities, engaged in dominantly by nonstate actors, are to be evaluated.

At first glance, today's serious international crimes appear subject to the same description. Prosecutions based on them would seem unlikely to risk divisions of opinion about their legitimacy. A defender of genocide, or a state sympathetic to massive intentional killing of civilians during a war, is unlikely to find many companion states. If universal jurisdiction is appropriate for the slave trader, then it must be appropriate for the planner of a genocide or the political leader authorizing the torture of opponents.

Consider the prosecution and conviction in Belgium of the four alien defendants,<sup>36</sup> including two nuns resident in Belgium, for their activity in Rwanda in the execution of the genocide, a prosecution conducted on the basis of a universal jurisdiction statute with the approval and assistance of Rwandan authorities. The case appears to be a non-threatening and justified use of that jurisdiction. Although the West stood aloof as the genocide developed, and from some perspectives bore a responsibility for it, neither it nor other parts of the world were apologists for the genocide or sympathetic to its Hutu

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36 Assize Court of Brussels, verdict of June 8, 2001, *supra* note 21.

planners and executors. Opinion was not divided on political or ideological grounds. The same would likely be said about Hissène Habré, the former President of Chad, if he is indeed extradited by Senegal to Belgium and there prosecuted. Instigators of massacres in Congo who might be tried under universal jurisdiction would raise little concern in other states. Had there been no International Criminal Tribunal for the former Yugoslavia, many of those bearing responsibility for the Serbian atrocities in Bosnia could likely have been tried under universal jurisdiction without significant international criticism. Even a Pinochet prosecution, had extradition taken place and had Spain proceeded to trial, is possible to imagine with a divided Chile standing almost alone in its strong objections.

I shall refer to the prosecutions mentioned in the preceding paragraph as the first of two categories of universal jurisdiction cases. My discussion now turns to the second category. The difference between the two lies in how the underlying conflicts and their parties may be viewed and evaluated within different states, ideological blocs or cultures. Courts in two states might resolve a given prosecution differently not because of the many variables in the procedural system, variables whose effect on probabilities of one or another outcome might be difficult if not impossible to assess in advance of the trial, but because of factors that are more systematic and foreseeable, and that have a concrete and direct bearing on the case.

I refer to the official and popular climate of opinion about the conflict and parties. Governmental attitudes and policy, deeply influencing and influenced by popular attitudes influencing the orientation of the popular media like radio, television and newspapers, could generate distinct and even polar images of both the conflict and parties in two states. A political leader or military figure could be understood or imagined within one state or group as hero, in another as villain, within one state or group as freedom fighter, in another as terrorist.

In such circumstances, it could be possible to predict with some degree of certainty that a given person would be more likely to be prosecuted and convicted in one state or group than another. Indeed, if this were the case, it is likely that only one state or group would be interested in prosecuting at all. The differences between attitudes in the two states or groups that bear on the probability of prosecution and conviction could stem from a distinctive character of the conflict producing sharp divisions among states and cultures about how it and its parties would be viewed — perhaps the ideological character of the conflict, perhaps the religious or ethnic divisions involved, perhaps the political alliances and traditional relationships between the conflict's parties and a given state or group, perhaps any of a broad range of other factors.

Whatever the explanations that would surely vary from conflict to conflict, the double images of hero and criminal would displace the relatively broad consensus over the pirate as an evildoer. If the putative defendant were a former head of state or high-ranking official, the rift in opinion could grow, for the state itself would symbolically be on trial in a forum that was in a formal sense unrelated, but in a political or ideological sense leaning toward an image of the conflict and defendant that could heighten the likelihood of prosecution and conviction. The goal of protecting the defendant by assuring a fair trial could be prejudiced.

Consider the leading political figures — Ariel Sharon, Yasser Arafat, Fidel Castro and an impressive number of former Presidents including George Bush, Saddam Hussein (Iraq), Hissène Habré (Chad) and Hashemi Rafsanjani (Iran) — who have been the subject of one or another proceeding in Belgium (a number of these cases were not actively pursued). Prosecutions of some of these figures based on universal jurisdiction would provoke different or even polar reactions from different states or groups. Far from representing a common effort of judiciaries everywhere to vindicate common goals, universal jurisdiction could be understood as a partisan enterprise in which states seeing the villain would reach out to prosecute, while those holding the image of hero would not.<sup>37</sup>

Through such cases, universal jurisdiction could take on a politicized character. The cases would stand apart from situations of conflict or internal repression over the last half century (for example, Argentina, Rwanda, former Yugoslavia) where there existed or later developed a broad consensus over who the parties responsible for gross violations were, and a consensus that such parties should face prosecution. They would differ from cases like the Belgian prosecution of the nuns where conviction after a fair trial would be broadly accepted as "crime and punishment," as the welcome realization of international justice through the medium of a state court.

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37 The polar images might stem, for example, from polar evaluations of the broad conduct or strategy that led to the alleged violations. Consider the two elements of legality in a war (and by analogy in internal armed conflicts): *jus ad bellum* and *jus in bello*. In fact, the two may tend to fuse, in the sense that a prosecutor or judge or juror's view of the former would influence the view of the latter, particularly in light of the many open questions and broad standards in the laws of war that are noted below. For example, a favorable view of the NATO intervention led by the United States in Kosovo as justified or legitimate despite its formal illegality would tend to influence issues of interpretation and judgment about war crimes, such as the characterization of the NATO bombing in Belgrade that caused civilian casualties. Similar observations could be made about the Gulf War and the U.S. and U.K. military intervention in Iraq.



In the circumstances here described of "politicized" universal jurisdiction, it is not a matter of the corruption of a judiciary by executive dictation, or of violations of due process through bribery or unfair procedures. Such phenomena would invalidate any prosecution, no matter what its jurisdictional basis. What is here at issue is something less tangible and subject to identification and categorization, but nonetheless possibly as significant in its influence on a trial's outcome. Assume, for example, a trial of Castro (after he left his current position) for violation of a serious international crime, with the trial held in one or another Latin American or European state, or the United States, on the basis of universal jurisdiction. Given the different climates of opinion about the Castro regime and its historical record and effects on Cubans, both among the elites of a given state and among the general population, it is not implausible that a trial outcome could differ for such reasons depending on the forum state, or that a prosecution would only be attempted in those states with a negative view. The climate of opinion could stem from any of a number of historical relationships between a state and Cuba, from ideological considerations that would put different light on the failures or achievements of the Communist regime, and related considerations that would tend to politicize the issue of a prosecution to the degree that any attempt to portray it as an achievement of international legality and stimulus for the rule of law would be prejudiced.

Similar remarks could be made of a trial of Sharon (after leaving his present position in government), which in the Belgian proceedings concerned his role in and responsibility for the Sabra and Shatilla massacres in Lebanon two decades ago. They could be made of a trial of Arafat, whose reputation in official and popular opinion would like Sharon's be influenced by contested views about the Israeli-Palestinian conflict and about the responsibility for violence borne by one or the other side. A prosecution against Bush or Powell for their involvement in the first Gulf War and responsibility for civilian deaths in that war would raise similar issues about the choice of forum, although in this instance the West was far more united in its official and popular judgment. Potential prosecutions under universal jurisdiction growing out of the conflicts and violence in other parts of the world like Kashmir could raise many of the same issues.

The possibility of such ideologically and politically influenced prosecutions stems not only from the background circumstances and divisions of opinion among states or regions or cultures that could influence the characterization of given acts, but also from the open-textured character of many elements of the serious international crimes — genocide, war crimes, crimes against humanity — set forth in the state legislation establishing universal jurisdiction. The choices made in interpreting and applying many of the standards relevant

to application of the Geneva Conventions and Protocols could well lead to different judgments influenced by underlying views of the parties and the conflict — concepts or standards like proportionality, military necessity, or undue risk to civilian population. The Sharon case in Belgium raised numerous complex issues about the conditions for command responsibility, a concept explored in several decisions of the International Criminal Tribunals but still subject to much uncertainty.<sup>38</sup>

An effective and significant system of universal jurisdiction requires an important degree of consensus among states about its reigning principles, and particularly among most of the major powers. Absent that consensus, in a situation where some believe in its possibilities while others denigrate the system as politicized and unfair, universal jurisdiction in its entirety may lose a sense of international legitimacy — in the sense of a broad belief by states in the rightfulness of a prosecution (even if one disagrees with the ultimate outcome), in the justified authority of a universal jurisdiction court to proceed with a prosecution, and in the moral authority of the court and its judgment.

That sense of legitimacy has broadly attached to the judgments of the International Criminal Tribunals; in its absence, the work of those tribunals would not have amounted to much of consequence for the development of human rights and international law. If universal jurisdiction courts are seen as "taking sides," as advancing one or another deeply contested view about highly politicized and ideologically divisive conflicts, they risk being viewed as fully part of political conflict and power rather than as means of strengthening the international rule of law.

Two further observations grow out of this discussion of a politicized category of universal jurisdiction cases. First, to the extent that the problem stems from subjecting the defendant to trial in a given state court that may be part of a culture taking a particular attitude toward the conflict and parties, at least a partial cure would lie in holding the trial before an international tribunal. The International Criminal Court, whose judges are drawn from all parts of the world and not associated with a particular state or culture or ideology, could constitute that tribunal. But a paradox here

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38 See, e.g., *Prosecutor v. Delalic*, IT-96-21-A paras. 239-241 (20 Feb. 2001), available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf>. The effort to prosecute Sharon in Belgium raised the further issue of the effect to be accorded the conclusions of the Israeli Kahan Commission of Inquiry on such questions, particularly by analogy to the provisions for complementarity of the ICC. No matter who the defendant, the open texture of many basic standards or concepts in the bodies of law to be applied heightens the risks of politicized universal jurisdiction.

arises. The principle of complementarity that is fundamental to this Court would give priority to state courts, perhaps including universal-jurisdiction courts. (Moreover, as noted, jurisdiction of the ICC to hear a given criminal case will depend on which states have become parties to the treaty, and on the dates of their becoming parties.)

Second, the illustrations of the two categories of universal-jurisdiction cases did not involve nonstate actors except to the extent (Rwanda) that individuals not generally associated with government were swept into a government-planned and induced scheme. Indeed, contemporary universal jurisdiction has not yet reached to prosecution for crimes committed by nonstate terrorist organizations and individuals associated with them. Should that develop, and in those circumstances, it may be that the concerns expressed about politicized universal jurisdiction would be alleviated, in the sense that the terrorist aiming at civilian targets is more likely to be viewed consensually by many countries and cultures as a criminal, whatever the sympathies may be in a given state or region for the cause for which the terrorist strikes.

### *3. Problems with the Two Categories of Universal Jurisdiction Cases*

The attempted distinction between two categories of universal jurisdiction cases runs into a number of difficulties. It raises troublesome problems of characterization of a conflict or parties within one or another category. Surely opinion will differ in many situations about what the appropriate category is, and surely opinion will change over time about a given conflict. A few illustrations follow.

First, it cannot be that *any* dissent from a prevailing view about the responsibility of a given person for a given crime will generate an effective charge of a politicized use of universal jurisdiction. It would be entirely irrelevant to characterization of the Rwandan genocide that many Hutus believed that it was justified, an act of ethnic and moral purification. Serbs loyal to the goal of a greater Serbia and apologetic about the Milosevich regime could not displace a broad consensus about the criminal character of many events for which Serbs were responsible in Croatia and Bosnia. But the element of international prominence and power cannot here be blinked. The most serious complaints, and related pressures, about an allegedly abusive use of universal jurisdiction will likely come from the powerful Western states, particularly the United States as with respect to its recent controversy with Belgium.

Second, as a practical matter, prosecutions based on universal jurisdiction are more likely to occur in courts of the developed countries. A prosecution is apt to proceed more smoothly when the West is relatively united in

its condemnation of the violence at issue, particularly violence associated with conflicts within the developing world, internal or external, that involve parties from that world. Even in those circumstances, opinion about a given figure like Castro or Arafat may differ among the powerful Western states, and a universal-jurisdiction prosecution will thereby become more likely to breed conflicts among Western states. The risk of sharp protest against a universal-jurisdiction prosecution becomes acute when the interests of those states themselves are engaged, when opinion in the developing and developed world is divided about the actions of Western powers and their leaders. Given these considerations, it may turn out that prosecutions in the first category will dominate and involve the white judges of the West, but perpetrators and victims of color from the developing world, whereas possible prosecutions in the second category will be aborted. The West may thereby come to be viewed as merely continuing to play its colonial role. As a general matter, that lay of the land appears neither just nor desirable, but it is today simply a fact that will shape the course of contemporary universal jurisdiction.

When discussing the Belgian conviction of four Rwandans including two nuns,<sup>39</sup> I referred to the "non-threatening and justified" application of universal jurisdiction. It may be that a "non-threatening" characterization will refer to Western states that are not threatened by the prosecution either in terms of their own conduct, or in terms of their associations with the relevant developing states or their leaders.

### III. ATTEMPTS AT REGULATIONS OF UNIVERSAL JURISDICTION

Several projects by scholars and human rights organizations to spell out principles governing universal jurisdiction have advanced our understanding of a number of problems and put forth proposals that will surely figure in the inevitable public debate. I here describe a few provisions in three of these projects that bear on issues raised in this article.

The Princeton Principles on Universal Jurisdiction<sup>40</sup> seek to make prosecutions "consistent with a prudent concern for the abuse of power." With respect to the time or event when the presence of the (putative) defendant is required, Principle (1) provides that any competent court may try the defendant "provided the person is present before such judicial body." The Principles require observance of international due process norms including

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39 See *supra* note 21.

40 See *supra* note 7.

(Principle 1) the "independence and impartiality of the judiciary." Amnesties (Principle 7) are to be viewed as "generally inconsistent" with states' obligations to provide accountability for serious international crimes, and resort to universal jurisdiction for such crimes is not precluded by "amnesties which are incompatible with the international legal obligations of the granting state." Principle 8 suggests reconciling the demands of competing state jurisdictions<sup>41</sup> by making an "aggregate balance" of certain criteria, including treaty obligations, the territorial state and state of defendant's nationality, other connections between a requesting state and the alleged crime, the good faith and fairness of a requesting state, convenience of all including availability of evidence, and the interests of justice.

Amnesty International has produced a document entitled "Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction."<sup>42</sup> Principle 6 states, "National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries." The commentary bears out the notion of "shield" by referring to "amnesties, sham criminal procedures or any other schemes or decisions," and states that "no national court exercising extraterritorial jurisdiction over such crimes is under an obligation to respect such steps in other jurisdictions to frustrate international justice." Principle 7 bears the title "No political interference." It states that decisions to start or stop an investigation or prosecution should be made "only by the prosecutor, subject to appropriate judicial scrutiny which does not impair the prosecutor's independence, based solely on legal considerations, without any outside interference."

A report on universal jurisdiction by the International Law Association<sup>43</sup> includes a section entitled "Safeguards against the abuse of universal jurisdiction." The section notes that the application of universal jurisdiction "may be accused of jurisdictional imperialism because universal jurisdiction is likely to be exercised in powerful states with regard to crimes committed in less powerful states." That likelihood, the report states, should not be held against such states, which may simply be willing to comply with their international obligations, "especially if they have initiated proceedings for similar offences

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41 See the Pinochet case, *supra* note 20, which offers an illustration.

42 Amnesty International May 1999AI Index: IOR 53/01/99. The text of this document is set forth on the Amnesty International website, *available at* <http://web.amnesty.org/library/index/ENGIOR530011999>, as part of an extended discussion of universal jurisdiction.

43 International Law Association, London Conference (2000), Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, at 19-20.

against their own nationals." The report observes that universal-jurisdiction cases described in an appendix give no indication "that prosecutions were carried out on political or frivolous grounds."

These three documents have much in common with respect to the kinds of issues here discussed and in their insistence on fair process, depoliticized proceedings, and attention to the special needs of foreign defendants who may not have anticipated the particular forum. They provide excellent springboards for further debate. All view the current revival and expansion of universal jurisdiction as a positive development from the point of view of human rights and responses to gross violations. All note certain cautions and qualifications, which in some respects (as with respect to amnesties) vary among them. However, the three projects were prepared before the recent spate of investigations and initiation of prosecutions in Belgium that raised the questions that are central to this article. Those questions do not figure as such in the three documents.

## CONCLUSION

My argument stressed the need to achieve a broad consensus over the character and limits of universal jurisdiction, but it did not sketch a path toward satisfying that need. Indeed, it is difficult to trace that path with any precision. The categories proposed in this article are both porous and evolving. Surely a treaty resolving these questions is not a realizable goal within an immediate future, for ideas are still in a stage of early ferment and our experience with universal jurisdiction is still sparse. Expecting any lucid and reasonably prompt development of customary law to spell out what seem to be necessary limits or at least cautions for universal jurisdiction may well be expecting too much.

Widespread discussion of the useful directions of universal jurisdiction is now imperative—ongoing thought and argument and exchange of ideas among members of the academy and officials or members of governmental, intergovernmental and nongovernmental institutions. What is apt to emerge from these discussions will have more the character of considerations to be taken into account by prosecutors — like, for example, provisions of the Princeton Principles concerning priorities among states — than a set of clear, proposed criteria or restrictions. It would not be the first time in the history of international law that pressing concerns not yet amenable to treaty regulation are ripe for broad and engaged discussion among the concerned communities, and for a range of formal and informal steps toward resolution. Indeed, that process is now underway.