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The application of universal jurisdiction in the fight against impunity

DROI



IN-DEPTH ANALYSIS

The application of universal jurisdiction in the fight against impunity

ABSTRACT

Most international lawyers and liberal internationalists agree that universal jurisdiction *exists*, but everyone has a different understanding of what it *means*. Enormous amounts of time and resources have been expended over the last two decades by learned bodies, intergovernmental and non-governmental organisations to ‘study and clarify’ the principle of universal jurisdiction. Even more resources have been expended to put it into practice. Yet to this day, less than two dozen trials have been conducted on the basis of universal jurisdiction, all but one in Western Europe. Thus after twenty years of ‘fighting impunity’ for gross human rights violations through universal jurisdiction, the results are meagre at best and far from ‘universal’ in any meaningful sense. This study examines not only what went wrong and why, but also which role, if any, the European Union (EU) can play to improve the principle’s application amongst EU Member States and third countries.

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Author: Luc REYDAMS, Professor of Law, Catholic University of Lublin, Poland, and Associate Professional Specialist, Department of Political Science of the University of Notre Dame, USA

Official Responsible: Anete BANDONE

Editorial Assistant: Liina BAHBOUT

Editor: Trans European Policy Studies Association (TEPSA), Belgium

Feedback of all kind is welcome. Please write to: anete.bandone@europarl.europa.eu.

To obtain copies, please send a request to: poldep-expo@europarl.europa.eu

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Executive summary

The European Parliament's (EP) Subcommittee on Human Rights requested a study that would feed into the debate on the application of the universal jurisdiction principle. The goal of this study is to help the European Parliament form opinions and make decisions in this respect whilst at the same time providing practical recommendations to the European Union (EU) on ways to improve the application of the principle in its Member States and third countries.

This study comes at a time when discussions in the Sixth Committee of the United Nations General Assembly (UNGA) about the scope and application of the universal jurisdiction principle enter their seventh year, with no agreement in sight. The central thesis of this study is that the debate about universal jurisdiction, as waged in the 2000s when the issue was referred to the Sixth Committee, has been overtaken by legal and practical developments. States that were at the forefront of universal jurisdiction, and whose actions prompted the referral, have drastically reduced its scope and application to jurisdiction over refugees and migrants suspected of having committed international crimes in their home country. The uncontroversial 'no safe haven' version of universal jurisdiction has prevailed over the utopian 'global enforcer' version.

Section 2 argues that universal jurisdiction is a hollow concept which defies definition and that the debate as waged since the 1990s is premised on false analogies and historical misconceptions.

Section 3 briefly reviews the EU's political and material support since the late 1990s for universal jurisdiction and international criminal justice more generally. It shows that the EU has invested significantly in 'the fight against impunity' through the International Criminal Court and the exercise of universal jurisdiction by states. Political support for universal jurisdiction has, nevertheless, been mixed. At the same time, the EU has generously funded non-governmental organisations (NGOs) campaigning for its implementation.

Section 4 examines whether or not states have consented in conventions to universal jurisdiction over any of the 'core international crimes', viz. genocide, crimes against humanity, war crimes and torture. It concludes that qualified universal jurisdiction over genocide was proposed but rejected; war crimes and torture, conversely, were made subject to the obligation of trying or extraditing, if a meaningful link exists between the offence and the state requesting extradition.

Section 5 consists of two parts. The first considers legislative state practice and takes issue with a recent survey by Amnesty International. The second is a contextual analysis of all the known cases involving universal jurisdiction over the core international crimes that led to a trial. It shows that context is everything and that the debate about universal jurisdiction cannot be waged in the abstract.

Section 6 describes in a nutshell the legal and political battles during the 2000s over universal jurisdiction in Belgium, France, Germany, Spain and the United Kingdom. It shows that NGOs, and not rogue prosecutors, are primarily responsible for the politicisation of universal jurisdiction in these countries. The section recounts how, under pressure from high-leverage countries, Belgium, France, Spain and the United Kingdom amended their laws to the point that they are anything but universal. It also shows that Germany, which in 2002 enacted one of the most ambitious universal jurisdiction statutes, systematically dismisses all cases that lack a strong and objective link with that state.

Section 7 on immunities argues that, reduced to its proper scope and application, viz. denying safe havens to fugitives, universal jurisdiction does not raise problems regarding foreign officials' immunity.

Section 8 argues that the debate about ICC complementarity and universal jurisdiction has become purely academic. States have retreated from universal jurisdiction since the establishment of the ICC. No state party has claimed universal jurisdiction over events in another state party and moreover it is highly

unlikely that this will ever happen. State parties simply do not have any incentive to do the job of the ICC prosecutor.

Section 9 submits that the 'global enforcer' version of universal jurisdiction, promoted by NGOs, has failed every practice test and that, conversely, the 'no safe haven' version is there to stay. It also questions whether or not the EU's financial support of NGOs has had any significant impact on the 'fight against impunity' through universal jurisdiction.

Section 10 ends the study with the following recommendations:

1. The EU should monitor Member States' compliance with Council Decision 2003/335/JHA of 8 May 2003 regarding migrants and asylum seekers suspected of having committed international crimes before coming to the EU.
2. The EU and its Member States should be willing to support universal jurisdiction trials in third countries, if so requested.
3. The EU should reconsider its support for 'global enforcer' universal jurisdiction. This version has failed every practice test and has been abandoned by the few states that have practiced it in the past.

1 Introduction

Universal jurisdiction is like obligations *erga omnes*, that other nebulous concept in international law. Most international lawyers and liberal internationalists agree that it *exists*, but everyone has a different understanding of what it *means*. Enormous amounts of time and resources have been expended over the last two decades by learned bodies, as well as intergovernmental and non-governmental organisations (NGOs) to ‘study and clarify’ the principle of universal jurisdiction. Even more resources have been expended to put it into practice. Yet to this day, less than two dozen trials have been conducted on the basis of universal jurisdiction, all but one in Western Europe. Without exception, the individuals on trial were ‘low-cost’ defendants from third world countries washed up one way or another on the shores of Europe or Canada. Thus after twenty years of ‘fighting impunity’ for gross human rights violations through universal jurisdiction, the results are meagre at best and far from ‘universal’ in any meaningful sense. States that were at the forefront of active support for the principle have retreated one by one. The pipedream of many international criminal lawyers and human rights activists seems to have evaporated. Or to paraphrase Judge Bruno Simma, universal jurisdiction, ‘like a flower grown in a hot-house’, did not survive ‘the much rougher climate of actual state practice’ (Simma, 1995: 217). This study examines not only what went wrong and why, but also which role, if any, the European Union (EU) can play to improve the application of the principle in the EU Member States and third countries.

Section 2 deals with the problem of defining universal jurisdiction and presents a short review of its historical roots. Section 3 briefly recounts the EU’s past policy regarding universal jurisdiction. Section 4 considers multilateral treaty provisions and their (mis)interpretations. Section 5 reviews domestic statutes and ‘best prosecutorial practices’. Section 6 describes the overreach and backlash in some European countries. Section 7 deals with immunity of foreign officials. Section 8 discusses complementarity of universal jurisdiction with international prosecutions. Finally, Section 9 comprises an assessment and the conclusion, whilst Section 10 offers recommendations.

2 Definition and history

The problem with universal jurisdiction starts with the definition. It is often cited as ‘criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction’ (Princeton Principles on Universal Jurisdiction, 2001). The definition is very broad and leaves so much undefined that one must wonder how it can satisfy the requirement of legal certainty in criminal law. Even proponents of universal jurisdiction seem to realise this.

To address the problem, learned bodies, intergovernmental organisations and NGOs have devoted enormous amounts of time and resources to ‘study and clarify’ the ‘principle’ of universal jurisdiction. In chronological order, there are: Amnesty International’s *14 Principles on the Effective Exercise of Universal Jurisdiction* (1999); the International Law Association’s *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000); the *Princeton Principles on Universal Jurisdiction* (2001); Africa Legal Aid’s *Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* (2002); the Institute of International Law’s 2005 Resolution *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*; the AU-EU *Expert Report on the Principle of Universal Jurisdiction* (2009); and the *Madrid-Buenos Aires Principles of Universal Jurisdiction* (2015).

However, seven reports and perhaps as many PhD theses later (e.g. Henzelin, 2000; Reydam, 2003a; Inazumi, 2005), enough ambiguity remained for the issue to be referred in 2009 to the (Legal) Sixth

Committee of the United Nations General Assembly. A summary of the first meeting shows that states agree on little else other than that universal jurisdiction 'exists' and that is 'important'.

'In their general observations, most delegations affirmed that the principle of universal jurisdiction was enshrined in international law and constituted an important tool in the fight against impunity for serious international crimes. Several delegations, however, stated that caution should be exercised in addressing this topic, as there were still many ambiguities and inconsistencies in its application. [...]

Delegations expressed differing views as to the scope of universal jurisdiction. Some delegations stated that it was uncertain whether the principle had become part of customary international law, whereas some other delegations held that that was the case. With regard to the crimes covered under the principle of jurisdiction, some delegations considered that the principle covered crimes both under treaty law, such as war crimes and torture, and other international crimes, such as genocide and crimes against humanity. Some other delegations cautioned against an unwarranted expansion of the crimes covered under universal jurisdiction. Delegations also expressed differing views as to whether the principle required that there be a link between the offender and the State exercising jurisdiction (such as presence in the territory of the State). Several delegations emphasized universal jurisdiction should be exercised in a subsidiary manner, when the State in which the alleged crimes took place was unable or unwilling to prosecute the offenders.

With regard to the application of the principle, delegations expressed the view that universal jurisdiction should always be exercised in good faith and in accordance with other principles of international law, including the rule of law, the sovereign equality of States and immunity of State officials. Several delegations expressed concern with regard to the possible politicization of the principle, and the possibility of a unilateral and selective approach in its application. Concern was expressed for the possible application of the principle in cases where there was little understanding of a fragile political situation, and for its selective and unilateral application, which may hinder the development of African States and constitute an infringement of their sovereignty.' (United Nations General Assembly, 2009).

The records of subsequent meetings indicate that little progress has been made since. States still disagree about the most fundamental issues, such as the extent to which universal jurisdiction exists in customary international law; whether or not such jurisdiction exists in treaty law and whether such jurisdiction is permissive or obligatory; the crimes that are subject to universal jurisdiction; and the rationale of universal jurisdiction (United Nations General Assembly, 2015). The sterile debate echoes the discussion of the Sixth Committee in 1948 during the drafting of the Convention for the Prevention and Punishment of the Crime of Genocide (see section 4 below). There is no reason to think that what was unacceptable then will be acceptable now, especially since the ever-critical superpowers have been joined by a chorus of sceptical African countries. Alternatively, so many conditions and restrictions may be attached that 'universal jurisdiction' loses all its meaning and should be called something else.

This study submits that today's controversy about universal jurisdiction originates from a misreading of history. In the short popular version, piracy on the high seas was the first 'violation of the law of nations' subject to universal jurisdiction (17th century), then came war crimes (at the end of World War II), torture (in the 1980s), and finally, in the 1990s, also genocide and crimes against humanity. The rationale for expanding universal jurisdiction to war crimes and torture was that as with piracy they were 'heinous'. Once these two crimes became subject to universal jurisdiction, genocide and crimes against humanity inevitably had to follow because they are regarded as even more 'heinous'. Thus 'heinousness' became the criterion for deciding whether or not universal jurisdiction should apply.

However, recent scholarship rejects the analogy between piracy and today's 'core international crimes'. Historical research by Eugene Kontorovich shows that piracy existed side-by-side with privateering, a form of state-licensed piracy that was entirely legal under the law of nations and never regarded as significantly more heinous than robbery is today. Kontorovich, therefore, dismisses 'the generally-accepted view that piracy became a universally cognisable offense because of its heinousness, and by extension, the notion that piracy law can provide a valid precedent or model for the NUJ [new universal jurisdiction].' (Kontorovich, 2004: 186)

Other historical research questions whether or not piracy is subject to universal jurisdiction at all. Matthew Garrod persuasively argues that jurisdiction over piracy 'is better understood under the protective principle, which arose out of the necessity of maritime Powers [...] to protect certain of their vital interests, not least their colonial trade routes and overseas settlements.' The idea that piracy is subject to universal jurisdiction, Garrod writes, 'is due largely to the persistent reliance upon tentative secondary sources or the use of primary sources wholly out of context'. (Garrod, 2014: 199)

In another article, Garrod adduces a massive amount of archival evidence to debunk the myth that the trials by the Allies of thousands of enemy war criminals at the end of World War II were somehow based on universal jurisdiction. He convincingly demonstrates that jurisdiction belonged to the injured state and that the trials were self-interested exercises of protective jurisdiction (Garrod, 2012). The author of this study agrees with Garrod¹ and Kontorovich that the 'new universal jurisdiction' (i.e. jurisdiction over genocide, crimes against humanity, war crimes, and torture) has shallow historical roots and that today's debate is wrongly postulated.

This section has shown that universal jurisdiction is a hollow concept which defies definition. The current debate in the Sixth Committee of the United Nations General Assembly underscores Judge Van den Wyngaert's observation in the *Arrest Warrant* case that 'There is no generally accepted definition of universal jurisdiction in conventional or customary international law' (Van den Wyngaert, 2002). This section has also suggested that the debate about universal jurisdiction is premised on false analogies and historical misconceptions. Section 6 of this study will show that the debate has also been overtaken by legal and practical developments. The next section briefly recounts the EU's past policy regarding universal jurisdiction.

3 Past EU policy

Any recommendations for the future should consider past EU policy and assess its effectiveness. This section briefly reviews the EU's political and material support since the late 1990s for universal jurisdiction and international criminal justice more generally.

Despite lacking criminal jurisdiction of its own, the EU has been a real actor in international criminal justice. First, EU diplomacy was instrumental in convincing Serbia, after many years, to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Peskin, 2009). Second, the EU has financially supported hybrid tribunals. The Special Court in Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers in the Senegalese Courts, and the Special Tribunal for Lebanon have all received significant EU funding (Bekou and Chadwick, 2011; Davis, 2014: 5). In all these instances, the EU acted in partnership with the United States of America (USA). Third, and this is where the EU-US partnership ended, the EU has been an advocate of 'universal justice' through universal ratification of the International Criminal Court (ICC) and the exercise of universal jurisdiction by individual states.

¹ Garrod's articles on jurisdiction over war crimes and piracy were awarded the Neil Rackham prize for best paper by an early career researcher in 2013 and 2015 respectively.

EU political support for universal ratification of the ICC Statute is expressed *inter alia* in: the adoption of an official common position on the ICC in 2001 (Council of the European Union, 2001); the inclusion of an 'ICC clause' in its trade and development agreement with the African, Caribbean and Pacific (ACP) Group of States as well as in various agreements with third countries; and more than two-hundred and seventy-five pro-ICC demarches in over one-hundred countries (Council of the European Union, 2008).

Political support for universal jurisdiction by states, conversely, has been rather patchy, at least if one defines universal jurisdiction as 'the competence of *any* state to prosecute certain heinous crimes, without the crime having *any* link with the state' (Rosalyn Higgins as quoted in Ryngaert, 2008: 126).

The Council of the European Union, one of the core EU decision-making bodies, has not commented about universal jurisdiction as such, but it has issued a decision regarding *migrants and asylum seekers* suspected of having committed international crimes before coming to the EU. Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes provides:

[...]

(6) Member States are being confronted on a regular basis with persons who were involved in such crimes and who are *trying to enter and reside in the European Union*.

(7) The competent authorities of the Member States are to ensure that, where they receive information that *a person who has applied for a residence permit* is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law.' (emphasis added, Council of the European Union 2003)

Thus under current EU law, Member States are obliged to establish jurisdiction over international crimes by *non-EU citizens who are seeking to enter and reside* in the EU.

The European Commission, the EU's executive organ, took position in a case before the US Supreme Court. *Kiobel v. Royal Dutch Petroleum Co.* (Supreme Court of the United States, 2013) concerned a *civil suit for damages* under the Alien Tort Statute (ATS) by Nigerian citizens against a major European corporation. The Commission's *amicus* brief 'in support of neither party' elaborates on universal civil jurisdiction and in *passim* also discusses universal criminal jurisdiction (Supreme Court of the United States, 2012a). 'The United States can assume universal [civil] jurisdiction over a narrow category of the most grave international law violations involving conduct of universal concern so long as the ATS claimant demonstrates that those States with a nexus to the case are unwilling or unable to provide a forum and no international remedies are available' (Supreme Court of the United States, 2012a: 4). As for universal criminal jurisdiction, the brief states that it 'permits a State to prosecute universally condemned international crimes even when committed by aliens against aliens in the territory of another sovereign' (Supreme Court of the United States, 2012a: 14). The brief then adds, somewhat bizarrely, that 'International acceptance of universal criminal jurisdiction is bolstered by the fact that such prosecutions remain rare and, therefore, do not upset comity between nations' (Supreme Court of the United States, 2012a: 16).

However, for the purposes of this study, it is important to note that the Commission recognises both forms of universal jurisdiction, but with a limitation. The brief constantly links universal civil jurisdiction to universal criminal jurisdiction. The implication is that the former exists only if the conduct in question amounts to an international crime subject to universal criminal jurisdiction. Because under contemporary international law only natural persons can commit international crimes and be held liable, the Commission implicitly sided with Royal Dutch Petroleum. The latter, supported by the Dutch and British governments, had argued that international (criminal) law does not recognise corporate liability. Thus, the unstated view of the European Commission is that only individuals, not corporations, can be

prosecuted and/or sued on the basis of universal jurisdiction. The Commission's commitment to 'universal justice' may be more ambivalent than it seems.

The same can be said of the European Parliament (EP). On three occasions the Parliament has expressed political support. A 1998 Resolution congratulated 'the Spanish and British judicial authorities for their effective cooperation in the arrest of [former Chilean President] General Augusto Pinochet' and reaffirmed the Parliament's commitment 'to the principle of universal justice to protect human rights' (European Parliament, 1998). When in 2006 a Spanish judge issued an international warrant for the arrest of seven former Guatemalan dictators and military officers accused of genocide, torture and illegal detention, the Parliament welcomed 'the progress made in the application of the principle of universal jurisdiction in respect of crimes against humanity, genocide and torture' (European Parliament, 2006a). In 2006, the EP called on Senegal to 'try or extradite' former Chadian President Hissène Habré (European Parliament, 2006b). Equally significant, or perhaps even more, is that the EP remained silent in the many 'universal jurisdiction cases' in Belgium, Germany, and Spain against US, Chinese, Iranian and Israeli officials (see below).

Besides offering strong political support for universal ratification of the ICC Statute and mixed support for the exercise of universal jurisdiction by states, the EU has also been the 'invisible hand' in the NGO campaign for 'universal justice'. The European Commission, through the European Instrument for Democracy and Human Rights (EIDHR), has since 1995 provided over EUR 40 million to NGOs for projects aimed at supporting the ICC and the fight against impunity generally (Lochbihler, 2011: 9). Major recipients have been the Coalition for the International Criminal Court (CICC), No Peace Without Justice, Parliamentarians for Global Action, Redress, *Avocats Sans Frontières* and the *Fédération Internationale des ligues des Droits de l'Homme (FIDH)*. The latter three have been especially active on the universal jurisdiction front, from lobbying for universal jurisdiction statutes to filing criminal complaints. It is fair to say that 'grassroots' support for universal jurisdiction (and the ICC) within and outside Europe has been partially underwritten by the EU. The EU-NGO partnership in this matter is further exemplified by the 15th EU-NGO Human Rights Forum (Brussels 2013): 'The theme of this year's NGO Forum – accountability – reflects the EU's strong commitment to ensure that where human rights violations occur, victims have access to justice and redress.' (European External Action Service, 2013)

This section has briefly examined the role of the EU in shaping international criminal justice and promoting universal jurisdiction specifically. It has shown that the EU has invested significantly in 'the fight against impunity' through the ICC and the exercise of universal jurisdiction by states. Political support for universal jurisdiction has, nevertheless, been mixed. At the same time, the EU has generously funded NGOs campaigning for its implementation. How much impact that support has had will become clear in sections 5 and 6.

The next section reviews the most often cited treaties in universal jurisdiction literature and cases.

4 Multilateral treaty provisions

The Dutch scholar-diplomat Hugo Grotius, whose work is sometimes mentioned in discussions about universal jurisdiction, wrote that 'jurisdiction over a person results either from the institution of the state itself, as that of the supreme power over subjects, or from agreement over allies' (Wright, 1928: 203). This section examines whether or not states have consented in conventions to universal jurisdiction over any of the 'core international crimes', viz. genocide, crimes against humanity, war crimes and torture.²

² This section draws on Reydams, 2010.

A considerable number of multilateral agreements with penal characteristics have been adopted over the course of the past century. Most of them are 'law and order' instruments, aimed at repressing offences typically committed by non-state actors and in a transnational context, e.g. piracy, terrorism, drug trafficking and mercenary activities. The suppression of these types of crimes presumably serves parallel state interests.

Gross violations of human rights and humanitarian law, conversely, are typically crimes of state. Alleged offenders may range from a simple bureaucrat or foot soldier to the commander-in-chief. An interesting question, therefore, is whether or not states have consented to universal jurisdiction in human rights or humanitarian law treaties. Have they accepted that crimes of state can be prosecuted by any other (contracting) state?

The first human rights treaty adopted by the United Nations (UN) – and the first convention to use the term 'crime under international law' – was the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 ('Genocide Convention'). The initial draft stated in article VII: 'The High Contracting Parties pledge themselves to punish *any offender* under this Convention *within any territory under their jurisdiction*, irrespective of the nationality of the offender or the place where the offence has been committed.' This clause would have recognised the 'universal jurisdiction' of the state in whose territory the suspect is present.

However, the United States and the Soviet Union strongly opposed this qualified form of universal jurisdiction and the proposal was decisively rejected by vote. The final clause on jurisdiction and punishment (article VI) reads as follows:

'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' (Convention for the Prevention and Punishment of the Crime of Genocide, 1948)

Less than a year after the Genocide Convention, states adopted the Geneva Conventions Relating to the Protection of Victims of Armed Conflicts ('Geneva Conventions'). The Conventions were supplemented in 1977 by two Additional Protocols. Together they make up the core of international humanitarian law. A jurisdiction/extradition clause common to the Conventions and Additional Protocol I provides, in part, as follows:

'The High Contracting 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 defined in the following Article. 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.' (emphasis added, Geneva Conventions, 1949)

This is a classic example of the 'try or extradite' regime found in many 'law and order' conventions as well as bilateral extradition treaties. The clause should be read in light of recommendations by the United Nations War Crimes Commission during World War II (United Nations War Crimes Commission, 1948). The Commission acknowledged that there were no fixed rules regarding the surrender of war criminals and that the ordinary rules of extradition were 'defective' (United Nations War Crimes Commission, 1948: 392-434). Besides this general problem, it feared that Axis war criminals might thwart attempts to hold them accountable by fleeing to a neutral country. To avoid a repeat of history – after World War I the German

Kaiser found safe haven in the neutral Netherlands which had no obligation to extradite or try him – the Commission prepared a draft convention for the extradition of Axis war criminals from neutral countries. Though never adopted, the draft convention and states' official reactions formed the basis for the jurisdiction clause in the Geneva Conventions.

The obligation for all countries, including neutral ones, to search for persons suspected of grave breaches of the Conventions 'regardless of their nationality' is a reference to the displacement and migration of millions and the redrawing of national borders at the end of World War II. An alternative to the obligation to prosecute a suspect found within one's territory is handing over to another High Contracting Party *concerned* which has made out a *prima facie* case. This corollary refers to dozens of countries' involvement in a war that spanned the entire globe.

It is a *non sequitur* to read into this secondary sentence an unqualified right for neutral countries to prosecute grave breaches. The authoritative article-by-article commentary on the Geneva Conventions – by staff of the International Committee of the Red Cross 'who [...] were closely associated with the discussions of the Diplomatic Conference of 1949 and the meetings of experts which preceded it' (Pictet, 1952) – would surely have mentioned it. Furthermore, the Geneva Conventions and the Genocide Convention were negotiated simultaneously and involved some of the same diplomats. It would be highly unlikely that, for example, Soviet delegate Platon Morozov would have accepted in Geneva what he opposed in New York.

Let us now consider the United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ('Torture Convention'). Adopted during 1984 in response to the brutal political repression in Chile and other Latin American countries during the 1970s, the Convention outlaws the intentional infliction of severe pain and suffering 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Because no international element is required, the Convention basically protects the right of citizens to be free from torture by their own officials.

Article 7.1 provides that

'[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall *in the cases contemplated in article 5*, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.' (emphasis added, Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984)

Which are the cases contemplated in article 5?

'Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - b) When the alleged offender is a national of that State;
 - c) When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.' (emphasis added, Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984)

Accordingly, not contemplated by articles 5 and 7 – or by any state delegate during the drafting – is the scenario of a state exercising jurisdiction without having an objective link with the offence. An arrest warrant or extradition request from such a state has no basis in the Convention. As with the Geneva Conventions, the UN Torture Convention provides for qualified universal jurisdiction.

Thus, of the four ‘core international crimes’, three are covered by a multilateral treaty (crimes against humanity are not). Qualified universal jurisdiction over genocide was proposed but rejected; war crimes and torture, on the other hand, were made subject to the obligation to try or extradite, *if a meaningful link exists* between the offence and the state requesting extradition. States have not accepted, therefore, that crimes committed in their name can be prosecuted by *any* state.

Nonetheless, many international criminal lawyers and human rights activists read universal jurisdiction into the respective treaties. (Liberal interpretation is part of a trend towards *market expansion* within international criminal justice [Schwöbel, 2014]). They argue that the respective treaties *do not exclude* universal jurisdiction. This brings to mind the interpretation by the United States Supreme Court of the US-Mexico extradition treaty. In *United States v. Alvarez-Machain* (Supreme Court of the United States, 1992), the court held that abduction of a criminal suspect from Mexico by US agents did not constitute a violation of the extradition treaty – because the treaty *does not prohibit* it. The opinion was sharply criticised at the time in human rights circles.

The final argument of universal jurisdiction proponents is that the drafting histories of these treaties, or even the treaties themselves, no longer matter because universal jurisdiction over the core international crimes is now customary international law. A consequence would be that a prosecutor in Andorra or Angola would have more power than the ICC’s prosecutor. This is manifestly absurd, but also serious because if a prosecutor in these countries has universal jurisdiction, then a prosecutor in the United States surely has too. International criminal law is generally seen as a constraint on state power, but here the effect would be to enhance the power of the already powerful. Is the human rights community willing to accept such an outcome?

5 Legislative state practice and ‘best prosecutorial practices’

For the purposes of this study, a distinction is made between legislative state practice (prescriptive jurisdiction) and prosecutorial state practice (enforcement jurisdiction). The former refers to the enactment of domestic statutes providing for ‘universal jurisdiction’ over the four core international crimes; the latter refers to the actual enforcement of such statutes, from launching a criminal investigation to a trial and judgment.

5.1 Legislative state practice

Amnesty International (AI) recently published a 130-page ‘preliminary survey’ of legislative state practice ‘around the world’, ‘designed to assist the Sixth Committee in its annual discussions of universal jurisdiction’ (Amnesty International, 2012). The findings of its survey indicate that

‘166 (approximately 86 %) of the 193 UN member states have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law. In addition, it appears that 147 (approximately 76.2 %) out of 193 states have provided for universal jurisdiction over one or more of these crimes. [...] In addition, at least 16 (approximately 8.29 %) out of 193 UN member states can exercise universal jurisdiction over conduct amounting to a crime under international law, but only as an ordinary crime (indeed, a total of 91 states have provided universal jurisdiction over ordinary crimes, even when the conduct does not involve conduct amounting to a crime under international law). Thus, a total of 163 states (approximately 84.46 %) can exercise universal jurisdiction over one or more crimes under international law, either as such crimes

or as ordinary crimes under national law. [...] [The survey] is also evidence of *opinio juris* since such legislation indicates that two branches of each state – the legislature and the executive – believe that such legislation is fully compatible with the state’s obligations under international law.’ (Amnesty International, 2012: 2)

The evidence seems overwhelming: 163 out of 193 states have enacted universal jurisdiction statutes. AI’s goal seems clear too: convincing the Sixth Committee of UNGA that universal jurisdiction is ‘enshrined’ in customary international law and that the debate is settled.³ The survey is AI’s second major study on the subject. In 2001, it published a 722-page memorandum: *Universal jurisdiction: The duty of states to enact and implement legislation* (Amnesty International, 2001). As the title suggests, AI’s position was that states are *obliged* to enact universal jurisdiction statutes. However, the respective treaties oblige state parties to *try or extradite* a suspect, and only if a *meaningful link* exists between the offence and the state requesting extradition (see section 4 above). A decade later, AI claims success: ‘approximately’ 84.46 % states are in compliance.

While AI fact finding reports always deserve careful consideration, its advocacy papers should be taken for what they are. The massive ‘memorandum’ of 2001 was a hotchpotch of relevant and less relevant laws taken at face value. Anything that could bolster the argument was included. The new report is more of the same. ‘Would you believe that approximately 76-84 % of all states around the world have enacted universal jurisdiction for at least one serious international crime (such as war crimes or torture)?’ Ryan Goodman of *Just Security* asked (Goodman, 2013).⁴ ‘You would if you read Amnesty International’s major survey. But you shouldn’t’, he concluded.

A cursory reading shows that the numbers are inflated. For example, AI counts as universal jurisdiction situations where a foreigner serving in the armed forces commits a war crime abroad (Greece, Kazakhstan); where a foreigner after committing a war crime abroad (or any serious crime) becomes a citizen and cannot be extradited because that country does not extradite citizens (Mali); where a foreigner after committing a war crime abroad is found on the national territory and cannot be extradited after a request for extradition has been received (Luxembourg); where a stateless person commits a war crime abroad, is found on the national territory and has not been tried by a foreign court (Kyrgyzstan); where a permanent resident commits a war crime against another permanent resident (Malta). Critical comments can be made for almost every country included in the report. And how much weight should be given to the universal jurisdiction claims by ‘nominal’ states such as Somalia and the Democratic Republic of Congo, or micro-states like Andorra, Antigua, Bahamas, Barbados, Comoros, Fiji, Malta, Monaco, Samoa, Saint Kitts and Nevis, Saint Lucia, Seychelles, Tuvalu and Vanuatu?

EU member states score almost 100 % in the survey – that is if one adopts AI’s definition. However, this definition subsumes statutes that their drafters had probably never thought of as providing ‘universal jurisdiction’. The survey also includes EU countries which have decidedly retreated from universal jurisdiction (see section 6).

5.2 Prosecutorial state practice

Máximo Langer has attempted to identify every single universal jurisdiction criminal complaint presented by victims, human rights groups, or any other actor – or universal jurisdiction cases considered by public authorities on their own motion – for one or more of the four core international crimes presented around the world between 1961 (Eichmann trial) and 2011 (Langer, 2011).

³ ‘[Universal jurisdiction] is now part of customary international law’ (Amnesty International, 2012: 7).

⁴ *Just Security* is based at the Center for Human Rights and Global Justice at New York University School of Law.

Langer counted 1 051 criminal complaints or cases considered by public authorities on their own motion. The largest group of complaints is against former Nazi, former Yugoslav, Argentine, Rwandan, US, Chinese and Israeli possible defendants. Out of these possible 1 051 defendants, only 32 (or 3 %) have actually been brought to trial. Of those 32 defendants, 24 were Rwandans, former Yugoslavs and former Nazis. 'These are defendants,' Langer notes, 'about whom the international community has broadly agreed that they may be prosecuted and punished, and whose state of nationality has not defended them.' (Langer, 2011: 5)

Langer's survey also shows that, not counting the trials of former Nazis, all but one of the universal jurisdiction trials took place in Western Europe: one in Austria against a former Yugoslav, four in Belgium against eight Rwandans, one in Canada against a Rwandan, one in Denmark against a former Yugoslav, two in France against a Mauritanian and a Tunisian, four in Germany against four former Yugoslavs, five in the Netherlands against three Afghans, a Congolese and a Rwandan, one in Norway against a former Yugoslav, one in Spain against an Argentine, two in Switzerland against a former Yugoslav and a Rwandan, and one in the United Kingdom (UK) against an Afghan. The total number of universal jurisdiction trials for one or more of the four core international crimes committed since World War II is 23, of which 22 were in 10 West European countries. Belgium, Germany and the Netherlands alone account for 13 trials, or more than 50 %.

If we compare these numbers with the AI survey, we find that trials have taken place in just over 6 % of countries with universal jurisdiction statutes. Or, if we turn Amnesty's statistical argument on its head, we find that 94 % of states with universal jurisdiction statutes have never applied them. How can something so rarely applied be called 'an essential tool of international justice' (Amnesty International, 2012: 1)? And what does it tell us when all but one of the 'hard' cases are concentrated in Western Europe?

An analysis that goes beyond the numbers is also illuminating.⁵ Out of 32 defendants, 29 had taken up *residence* in the country where they were eventually tried. Two of the remaining defendants were in the forum state for an *extended stay*: one had come for military training, the other one served as Vice-Consul for his home country. Both fled and were tried *in absentia*. The third remaining defendant was arrested while on a private *visit*. Thus, in each case a clear and objective link existed with the forum state and in most cases even a very strong one (residence). The same is true for the trials in the early 1990s of former Nazis by Australia, Canada and the United Kingdom; however, the difference was that these defendants belonged to former enemy states and had become Australian, Canadian, and British *citizens* respectively.

Further contextual analysis shows that all Rwandan, Afghan and Congolese defendants were refugees or migrants and, presumably, did not *want* to be sent back to their home countries; that deportation or extradition was *impossible* because of legal and/or practical obstacles; that two of the four former Yugoslav defendants tried in Germany had *resident* status in Germany when they committed crimes in Bosnia; that states prosecuting Rwandan and former Yugoslav defendants acted *in concert* with the International Criminal Tribunal for Rwanda (ICTR) and ICTY; and that the UN Security Council had *urged* all states to arrest and detain Rwandan genocide suspects (UNSC, 1995).

The above cases (with the exception of the French and Spanish) arguably represent best practices of 'universal jurisdiction'. Prosecution was reasonable from the perspective of both the prosecuting state and the defendant. Popular asylum/migration countries have a strong interest in not becoming safe havens for foreign war criminals or *génocidaires*. Prosecuting them is in fact the flip side of liberal asylum/migration policies. Prosecution also complied with the letter and/or spirit of the applicable treaties and was respectful of other states' sovereignty. Prosecution was a last resort because extradition

⁵ This and the next paragraphs are based on Reydamas, 2003a and 2003b and Langer, 2011.

or deportation was impossible. Finally, in the case of former Nazis, former Yugoslavs and Rwandans, prosecution was embedded in multilateral accountability efforts.

Prosecution was also fair and reasonable from the defendants' perspectives. They chose to leave the countries where they committed their abominable acts. They had (strong) ties with the prosecuting state which in several cases predated their crimes. None were arrested by or extradited to a random country, as 'universal jurisdiction' may suggest ('the competence of *any* state to prosecute certain heinous crimes, without the crime having *any* link with the state' [Roselyn Higgins as quoted in Ryngaert, 2008: 126]). In fact, the more one reflects on these cases, the more 'universal jurisdiction' appears to be a misnomer. Nevertheless, given the lack of a better term we continue to use it for the purposes of this study.

If this section has made one thing clear, hopefully, it is that in the universal jurisdiction debate context is everything. The next section discusses cases where the context was completely different and which forced states that were at the forefront of support for universal jurisdiction to reconsider their views.

6 Overreach and backlash

Universal jurisdiction would not be controversial and probably would not have been put on the agenda of the African Union-European Union (AU-EU) Troika and the Sixth Committee of the UN General Assembly if it were not for the overreach by a few European states. This section reviews the rise and fall of universal jurisdiction in Belgium, France, Germany, Spain and the United Kingdom.

Nearly a dozen *ad hoc* international or hybrid criminal tribunals have been established since World War II. The most contentious issue during the negotiations of their charters was jurisdiction – temporal, territorial and subject matter (Reydams, 2012). In 1998, a permanent international criminal tribunal (ICC) was established. In the negotiations leading up to its establishment, the two most contentious issues were *jurisdiction and the power of the prosecutor*, viz. whether the court's jurisdiction would be 'universal' or limited to the territory of state parties, and whether the ICC prosecutor would be able to open an investigation on her own initiative (*proprio motu*), or only after a referral by a state party or the UN Security Council (Reydams, 2012). Ultimately, universal jurisdiction was rejected, but the prosecutor was given *proprio motu* power, subject to judicial approval. For the United States and presumably also Russia as well as China, the independence of the prosecutor was (is) the main reason for their not joining the ICC.

To this day, any prosecutor anywhere in the world, from Afghanistan to Zimbabwe, has more jurisdiction than the prosecutors of any international⁶ or hybrid criminal tribunal, including the ICC. Not bound by time or geography, any national prosecutor could have investigated – and still can investigate – war crimes committed in conflicts around the world, from the Korean, Vietnam and Iraq wars to the Algerian, Falkland and Gaza wars, together with the 'dirty wars' in Chile, Argentina and Turkey. At least this is what NGOs, human rights activists and a fair number of academics claim. The respective treaties (Genocide Convention, Geneva Conventions, Torture Convention and ICC Treaty), they argue, establish obligations without affecting the sovereign *right* of states to exercise universal jurisdiction. Additionally, because the ICC does not have universal jurisdiction and can handle only so many cases, it is imperative that states do their share. However, why states who have not joined the ICC with its checks and balances – and even those who have joined – would submit to the universal jurisdiction of a national court has never been explained.

⁶ Except for the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), ICTY and ICTR, that had primacy over national jurisdictions.

What do Augusto Pinochet (Chili), Efraín Ríos Montt (Guatemala), Fidel Castro (Cuba), Robert Mugabe (Zimbabwe), Hissène Habré (Chad), Laurent Kabila (Democratic Republic of Congo), Paul Kagame (Rwanda), Denis Sassou N'Gusso (Congo), Laurent Gbagbo (Ivory Coast), Yasir Arafat (Palestine), Hashemi Rafsanjani (Iran), Saddam Hussein (Iraq), Ariel Sharon, Ehud Barak, Tzipi Livni (Israel), Jiang Zemin, Li Peng, Hu Jintao (China), Donald Rumsfeld, George H. W. Bush and Dick Cheney (USA) have in common? They have all been threatened with criminal prosecution in Belgium, France, Germany, Spain or the United Kingdom.

As the list of names suggests, universal jurisdiction over (former) foreign officials is more to do with politics than law. This is a direct consequence of the fact that the flimsiest of links suffices to establish jurisdiction and that NGOs or any private party can trigger (preliminary) criminal proceedings. The 'political economy' of universal jurisdiction provides strong incentives for NGOs to engage in litigation against high profile individuals: the possible returns in terms of publicity are enormous whereas the (financial and political) costs are borne by the state. Máximo Langer counted 1 051 criminal complaints or cases considered by public authorities on their own motion (see section 5 above). However, it is clear from his article that NGOs are behind most proceedings. If we consider the 'headline cases' against the persons listed above, it appears that nearly all of them involved NGOs.⁷ Thus not rogue prosecutors but NGOs acting as pseudo-prosecutors are primarily responsible for the politicisation of universal jurisdiction.

It is not possible to recount in this study the legal and political battles over universal jurisdiction in Belgium, France, Germany, Spain and the United Kingdom. One would need a book just to tell the sagas in Belgium or Spain. What follows is a very short summary of something that spanned two decades and five countries. The summary borrows Langer's distinction between low-cost, middle-cost, and high-cost defendants (Langer, 2011). The first can entail little or no international relations, political, economic, or other costs for potential prosecuting states; the second can impose some costs; and the third can inflict substantial costs. Whether a defendant is low-, middle- or high-cost depends *inter alia* on the leverage of his or her state of nationality.

Universal criminal jurisdiction was 'discovered' during the 1990s as a result of two developments. In 1990, long-time Chilean dictator Augusto Pinochet abdicated after losing a referendum. Three years earlier, the UN Torture Convention with its 'try or extradite' regime had come into force. Pinochet's abdication was for Amnesty International and some Spanish NGOs the signal to start thinking about using the Torture Convention against him. The other development was the influx into Western Europe of refugees from the former Yugoslavia and Rwanda. In order to arrest and detain the 'bad guys' among them, as the UN Security Council had urged (UNSC, 1995), authorities in Belgium, Denmark, France, Germany and Switzerland sought and found legal bases in the Genocide, Torture and Geneva Conventions and/or in domestic statutes.

The defendants in these first cases of universal jurisdiction were what Langer calls 'low-cost defendants' whose states of nationality did not defend them and about whom there was international agreement that they should be prosecuted. These uncontroversial cases showed NGOs the way to the most accessible and receptive venues. Belgium and France with their systems of *partie civile* and independent examining magistrates were particularly attractive. Germany also held prospects as a venue for litigation after the German Constitutional Court refused to rule out that a link was necessary (Federal Constitutional Court of Germany, 1998).

⁷ A possible exception is the case against Paul Kagame in Belgium in the late 1990s. That case may have been opened at the request of the prosecutor in Brussels.

Then former Chilean President Augusto Pinochet was arrested while on a private visit in London, pursuant to a Spanish warrant. For Amnesty International, which had helped draft the Torture Convention, the arrest of the person who symbolised right-wing political repression was a major coup. In Spain AI had found a vaguely worded statute and a receptive examining magistrate, in Britain a sympathetic government and House of Lords. The European Parliament congratulated the British and Spanish authorities for their cooperation in the arrest (see section 3 above). Belgium, France and Switzerland also jumped on the Pinochet bandwagon and requested extradition (Statement of UK Home Secretary Jack Straw on the release of General Pinochet, 2000). However, even though he was no longer President, Pinochet still had many supporters abroad and at home (he had lost the plebiscite by a narrow margin). He was, in Langer's scheme, a 'middle-cost defendant'. After 16 months of house arrest in the UK, the costs of extraditing him to Spain began to outweigh the political benefits both countries had reaped from his arrest. The legal-political drama ended when Pinochet was released on 'medical grounds'.

However, as a precedent, *Pinochet* could count: a former head of state arrested in a third country for alleged torture committed during his presidency. Universal jurisdiction was no longer an activist's pipedream. It had been upheld by one of the most venerable courts in the world. For the human rights community, *Pinochet* and the adoption of the ICC Statute in 1998 heralded a new era. However, the ICC would not be established until 2002 and its jurisdiction would be neither retroactive nor universal. Large and small NGOs, therefore, began flooding the criminal justice systems of Belgium, France and Spain, and later Germany as well as the United Kingdom, with criminal complaints against middle-cost and high-cost defendants for crimes dating back as far as the 1980s.

Belgium, which in 2000 had brazenly issued a warrant for the arrest of the acting Foreign Minister of the Democratic Republic of Congo (International Court of Justice, 2002), was the first country to capitulate. In 2003 it first amended, then hastily repealed its famous Act Concerning the Repression of Grave Breaches of International Humanitarian Law (Reydam's, 2003b). Under a new statute, serious violations of international humanitarian law committed outside Belgium can be prosecuted in Belgium if the presumed perpetrator is a Belgian national or a person who resides in Belgium, or if the victim at the time of offence is a Belgian national, a recognised refugee living in Belgium, or any other person who has lived legally in Belgium for at least three years. The repeal of the Act was a response to strong pressure from two high-leverage countries. The United States had threatened to move the North Atlantic Treaty Organization (NATO)'s headquarters outside Belgium if the country did not repeal the Act and drop any plans to investigate possible US war crimes in Iraq. Israel had recalled its Ambassador after a complaint was lodged against its then Prime Minister Ariel Sharon.

The Spanish universal jurisdiction saga is very similar to the Belgian, except that it lasted much longer. In 2009, under pressure from Israel, the United States and China, the Spanish legislature restricted application of the universal jurisdiction statute (article 23.4 of the *Ley Orgánica del Poder Judicial*) to crimes with a 'relevant link' to Spain. However, the amendment did not prevent the *Audiencia Nacional* from indicting the former Chinese President Hu Jintao in 2013 for genocide against Tibetans. China sent a high-level delegation to Madrid and a few months later the *Ley Orgánica del Poder Judicial* was amended again. (Langer, 2011). The new article 23.4(a) provides that genocide, crimes against humanity or war committed outside Spain can be prosecuted in Spain if the alleged perpetrator is a Spanish citizen, a foreigner who habitually resides in Spain, or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite.

French judicial authorities also received a fair number of universal jurisdiction complaints, including one against former US Secretary of Defence Donald Rumsfeld for torture in Guantanamo and Iraq. The complaint was dismissed on grounds of immunity. In 2010, a new article 689-11 of the French Criminal Procedure Code became law. As with the Belgian and Spanish laws, article 689-11 *de facto* abrogates

universal jurisdiction over core international crimes. For French courts to have extraterritorial jurisdiction, three conditions must be fulfilled. First, the alleged perpetrator must become a resident in France after the crime. Second, the crimes have to count as such in the State where they were committed (double criminality requirement) or the State in question has to be a party to the ICC Statute. Third, the prosecutor may initiate formal proceedings only if no other international or national jurisdiction requests the submission or extradition of the alleged offender.

In addition to restricting the scope of their respective statutes drastically, Belgium, France and Spain have also curtailed the powers of examining magistrates and abolished the possibility of private parties initiating criminal proceedings for crimes committed abroad. It must be noted, though, that the revised statutes comply with the Council Decision 2003/335/JHA (see section 3 above).

The United Kingdom, which arrested Pinochet at the request of Spain, has been less popular with universal jurisdiction shoppers than Belgium, France, or Spain, for three simple reasons. Firstly, the Geneva Conventions Act (1957) and the International Criminal Court Act (2001) limit extraterritorial jurisdiction to foreigners who are either residents at the time of the offence or become residents thereafter. Secondly, the Criminal Justice Act (1988) provides for universal jurisdiction over torture if the suspect is voluntarily *present* in the UK. Thirdly, the executive branch retains absolute discretion over *prosecutions* under any of these Acts. Despite these limitations, diplomatic incidents ensued because the attorney general's consent was not needed to *arrest* a person under these Acts. Lawyers acting for Palestinians demanded and obtained warrants for the arrest of two senior Israeli officials who were believed to be in Britain. However, British police allowed Major General Doron Almog to leave unhindered and the warrant against Tzipi Livni, the former Minister of Foreign Affairs, was withdrawn when it became clear that she was not in the United Kingdom (Langer, 2012). After these incidents, UK officials promised Israel that they would change the law. The Police Reform and Social Responsibility Act (2011) states that no warrant shall be issued without the consent of the Director of Public Prosecutions for crimes committed outside the UK.

In 2002, Germany enacted a comprehensive Code of Crimes against International Law (CCAIL), which provides for universal jurisdiction – nothing more, nothing less.⁸ Together with the original Belgian War Crimes Act, the Code is one of the very few domestic war crimes statutes enacted with the clear intent of its being applied to crimes committed abroad by foreigners. As such, the Code was/is an invitation for NGOs to file complaints in Germany, especially after Belgium repealed its statute. Some 14 years later, the ambitious CCAIL is still on the books in its original version. Why does Germany seem to be an exception? Unlike Belgium, France and Spain, in Germany the executive branch always had a high degree of control over universal jurisdiction cases. Decisions of the federal prosecutor, who belongs to the executive branch, are not reviewable. Over 60 complaints were submitted to the Office of the Federal Prosecutor between 2002 and 2011 and every single one was dismissed (Langer, 2011).

Only once has the German federal prosecutor brought charges himself. The defendants were two Rwandans who were long-time *residents*.⁹ They were accused and convicted (after a trial that lasted four years) of leading *from Germany* the murderous *Forces démocratiques de libération du Rwanda* (FDLR) militia in the Eastern part of Democratic Republic of Congo (DRC). Most certainly, both were low-cost defendants. The decision to prosecute them, it should be noted, was part of a *coordinated multilateral effort* to dismantle the FDLR and stabilise Eastern DRC. German prosecutors could count on the cooperation of the Congolese authorities and MONUC, the UN peacekeeping mission in DRC. Germany

⁸ Article 1, part 1, section 1: 'This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.'

⁹ The case is not included in Langer's tally of trials.

may not have repealed the universal jurisdiction provision of the CCAIL (yet), but its experience illustrates the enormous gap between ambition and reality.

The rise and fall of universal criminal jurisdiction in Europe mirrors the rise and fall of universal civil jurisdiction in the United States. Beginning in 1979, NGOs representing foreign victims of human rights abuses committed outside the USA brought civil suits in the USA against foreign perpetrators on the basis of the Alien Tort Statute (ATS) of 1789. The ATS grants jurisdiction to federal district courts 'of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States.' The first claims targeting low-cost individual respondents were upheld. As plaintiffs aimed higher and began targeting corporations, (political) resistance grew, until the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co* decided that the ATS does not apply extraterritorially (Supreme Court of the United States, 2013).

This section has shown that the debate about universal jurisdiction, as currently held in the Sixth Committee of the UNGA, has actually been overtaken by legal and practical developments in the countries that triggered the debate in the first place. Belgium, France, Spain and the United Kingdom have all amended their laws to the point that they are anything but universal, whilst Germany systematically dismisses all cases that lack a strong and objective link with that state. The gilded age of universal civil jurisdiction in the United States has also come to an end.

Grown in an academic hot house, universal jurisdiction has not survived 'the much rougher climate of actual state practice' (paraphrasing Simma, 1995). The concept has been reduced to jurisdiction over refugees and migrants who cannot and often do not want to be extradited, the scenario that the Council of the EU had in mind when it adopted Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes (see section 3 above). Now that millions are seeking asylum or better opportunities in Europe, law enforcement authorities will probably have their hands full for a long time with investigating accusations that will inevitably be brought against some of them. This may be less spectacular than trying to arrest (former) African, Chinese, Latin-American and US Presidents, but it is certainly more realistic and fiscally more responsible.

7 Immunities

Reduced to its proper scope and application, viz. denying safe havens to *fugitives*, universal jurisdiction does not raise problems regarding foreign officials' immunity. Any official fleeing his/her country and trying to enter and reside in another loses *ipso facto* his/her official status. Moreover, any immunity belongs to the state, not the individual, and can always be waived by the former. It is highly unlikely that a state will insist that an official who fled should be immune from prosecution abroad. The Chadian government, for example, waived the immunity of former President Hissène Habré who is currently on trial in Senegal (Human Rights Watch, 2002).

Under a broader interpretation of universal jurisdiction, viz. one that would allow the exercise of jurisdiction based on a suspect's transient presence, it would still be unacceptable to arrest a person on an *official visit*. Official visits, even of low-level agents, are always cleared in advance through diplomatic channels. Arresting someone after approving her visit would be unconscionable, unless the official *wants* to be arrested. This bizarre scenario happened in 2008 when Germany, acting on a French warrant, detained a senior Rwandan official after warning her that she would be arrested if she travelled to Germany as planned (Wikileaks, 2008). The goal of the Rwandan government was to score politically (neo-colonialism!) and gain access to the French dossier against members of President Paul Kagame's inner circle.

8 Complementarity

Another issue that deserves brief consideration is complementarity of universal jurisdiction with international prosecutions. The preamble in the Statute of the International Criminal Court recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for genocide, crimes against humanity as well as war crimes, and that the ICC shall be complementary to national criminal jurisdictions. The states most concerned and, therefore, most competent are the state where the crime was committed and the state of nationality of the offender and/or victim. National criminal jurisdictions arguably also include the state that has granted asylum or residency to a suspect. Such a state has an objective link with the offender and a clear interest in not becoming a safe haven for suspects of international crimes. There is one known case in which the ICC 'encouraged' an asylum state to exercise primary jurisdiction. The suspects were two Rwandans residing in Germany. Their trial has been the only trial so far under the Germany's Code of Crimes Against International Law (see section 6 above).

Proponents of universal jurisdiction could argue again that the ICC Statute, as with the Genocide Convention and Geneva Conventions, does not exclude universal jurisdiction and that states should be willing, or even encouraged, to exercise it. Thus ICC jurisdiction would be complementary to the jurisdiction of the states concerned and the universal jurisdiction of all other states. However, the debate about ICC complementarity and universal jurisdiction has become purely academic. States have retreated from universal jurisdiction since the establishment of the ICC, although for unrelated reasons (see section 6 above). In the 14 years of ICC existence, no state party has claimed universal jurisdiction over events in another state party and it is highly unlikely that this will ever happen. A state party simply does not have any incentive to do the job of the ICC prosecutor. The political cost to itself and the ICC could be considerable.

The question of complementarity of universal jurisdiction with prosecutions by *ad hoc* international tribunals is also largely moot because there are very few states left with universal jurisdiction statutes as well as very few *ad hoc* tribunals, and it is unlikely that new ones will be established.

9 Assessment and conclusions

This study has argued that the debate about the 'new universal jurisdiction' (Kontorovich, 2004) was wrongly postulated from the beginning, was premised on false analogies together with historical misconceptions, and has been overtaken by recent legal as well as practical developments. It agrees with Máximo Langer that universal jurisdiction has failed to establish, and never will establish, 'a minimum international rule of law in the sense of either holding a substantial share of perpetrators of international crimes accountable, or being applied equally across defendants' (Langer, 2011: 45). The 'global enforcer' version¹⁰ of universal jurisdiction, promoted by NGOs, has failed every practice test. The 'no safe haven' version, conversely, is uncontroversial and is there to stay. As mobility and migration increase, so will the number of situations in which states are confronted with the presence among refugees and migrants of international crime perpetrators. Prosecution is the flipside of liberal asylum and immigration policies. However, speaking of 'universal jurisdiction' in such cases is unhelpful and causes misunderstanding. A better term should be coined for jurisdiction over refugees and migrants.

The EU has generously sponsored NGOs campaigning for universal ratification of the ICC Statute and the exercise of universal jurisdiction by states. This study has suggested that the 'political economy' of universal jurisdiction provides strong incentives for NGOs to file criminal complaints against high-profile

¹⁰ 'Global enforcer' and 'no safe haven' are terms borrowed from Langer, 2011.

individuals. However, all such complaints were ultimately dismissed or dropped, often after prolonged and costly litigation. In the less than two dozen cases that have gone to trial (cases involving refugees and migrants), NGOs played a minor role or no role at all. It can be asked, therefore, whether or not the EU's financial support of NGOs has had any significant impact on the 'fight against impunity' through universal jurisdiction. It should be noted in this regard that EU law already obliges Member States to investigate and, when justified, prosecute refugees and migrants suspected of having committed international crimes. What more the EU can do in the field of international criminal justice is unclear.

When projects fail to deliver the hoped for results, funders have three options: redouble efforts and spend more in the hope that things will eventually improve; accept the *status quo*; or cut losses and redirect energy and funds to other projects. Increasing spending would be justified if there were real prospects for improvement. However, it seems unrealistic to expect that what did not work in the best of geopolitical circumstances (1990s and 2000s) will work in a time of resurgent nationalism and Cold War, Chinese expansion and EU crisis. Accepting the *status quo* is the most common response because it threatens no interests; cutting losses and redirecting funds is the most difficult, for the opposite reason. The EU after 20 years has an important 'international criminal justice constituency'. Whether sustaining that constituency is in the EU's best interest is for the EU to decide.

10 Recommendations

This study has concluded that the debate about universal jurisdiction as it was waged in the 2000s has since been overtaken by legal and practical developments. Consequently, many of the questions that the author was asked to address have become moot. The author can offer only very modest recommendations regarding the question of what the EU can do to improve the application of the principle in the EU Member States and third countries:

1. The EU should monitor Member States' compliance with Council Decision 2003/335/JHA of 8 May 2003 regarding migrants and asylum seekers suspected of having committed international crimes before coming to the EU. The EU and its Member States have a clear interest in not becoming a safe haven for perpetrators of international crimes.
2. The EU and its Member States should be willing to support universal jurisdiction trials in third countries, if so requested. The case that comes to mind is the trial of Hissène Habré in Senegal.
3. The EU should reconsider its support for 'global enforcer' universal jurisdiction. This version has failed every practice test and has been abandoned by the few states that practiced it. 'Global enforcer' jurisdiction should be left to the UN Security Council and the ICC.

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