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## **THE RISE AND FALL OF UNIVERSAL JURISDICTION**

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For the last two decades most of the international human rights movement has advocated the exercise of universal jurisdiction by individual states over 'gross human rights violations' wherever committed and regardless of the nationality of the victim or perpetrator. The most spectacular case was the arrest and detention in 1998 of former Chilean President Augusto Pinochet by British authorities at the request of Spain. Many considered *Pinochet* a harbinger of the world to come. But that was then. Pinochet was never extradited and in 2009 Spain buried its controversial universal jurisdiction statute. This brief commentary seeks to explain the sudden rise of universal jurisdiction in the 1990s and its inevitable fall a decade later. I argue that poor legal underpinnings and political naiveté precipitated the quick unraveling of an idea whose time – it was believed – had come.

The end of the Cold War and its coincidence with the countdown towards a new millennium triggered a flurry of writing about a New World Order. The main ingredients thereof would be great power cooperation, nuclear disarmament, multilateralism, and 'preventive diplomacy, peacemaking and *peace-keeping*'. In this climate the doctrines of just war and humanitarian intervention re-emerged, as did the concomitant idea of international criminal justice. If military intervention is acceptable to protect human rights then judicial intervention surely is too. A post-ideological globalized world was ready for global jurisdiction over universal wrongs.

But *Zeitgeist* alone does not explain the spectacular advances in the 1990s of the international criminal justice project. Actors to push it forward were needed too. During the 1990s the number of international human rights NGOs grew exponentially and both states and inter-governmental organizations opened up to them on a scale qualitatively different from what went before. *In this* ever denser and competitive field Amnesty International and Human Rights Watch became superpowers in their own right, capable of waging strategic campaigns. One such campaign launched in the 1990s was 'ending impunity for gross human rights violations'.

While creating a legitimate international criminal court requires a substantial number of states, universal jurisdiction can be exercised by *any state* with the necessary courage and will, *right now*. The idea was so obvious, so simple, and so readily accessible that it appeared brilliant. What was demanded was a leap of faith, and if things would not work out as hoped, the flaws would be in the world (self-interest, indifference, parochialism) – not in the doctrine.

The legal argument went as follows: universal jurisdiction was legal lore, it had always existed 'out there' – scattered in the writings of publicists or legal-philosophers and in criminal codes, judicial dicta, and treaties here and there. The

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task at hand was to piece together from this amalgam of sources an international legal 'principle' and then put it into practice. This task was undertaken by adepts of *policy oriented* schools of international law for whom international law is an ongoing process of decision making through which 'the international community' identifies, clarifies, and secures common interests. They invoked the authority of international law's 'founding fathers' and of Nuremberg to demonstrate that the doctrine was not invented overnight, but the wisdom of ages. A closer look at these sources, however, does not support such a claim.

Contrary to the prevailing view, it also appears that multilateral human rights and humanitarian law do *not* provide for universal jurisdiction. The Grotian 'try or extradite' formula has been incorporated into a number of conventions but the radical view, according to which any state may request arrest and extradition in cases involving 'serious crimes under international law, has not.

As for state practice, NGOs have reported plenty of cases in the last twenty years but the problem is that they tend to cherry-pick. Consider, for example, the United States where a federal court in *Demjanjuk* once held that 'Israel's assertion of jurisdiction over the respondent based on the Nazi statute conforms with the international law principle of universal jurisdiction' but whose government after 9/11 has made clear that other countries *should not even think about* prosecuting US officials. The second problem with NGO reports is that they leave out of critical context. In nearly all 'hard' cases (actual trials) there appear – upon closer examination – to be significant links between offender and forum. *Without exception*, the two dozen or so individuals tried in Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for 'war crimes' committed abroad, had taken up permanent residence in the forum state – as refugee, exile, fugitive, or immigrant – and resisted being deported or sent back. Not to overlook also is the fact that the majority of these cases concerned atrocities committed in the former Yugoslavia and in Rwanda; the prosecutor of the ad hoc international criminal tribunals for these countries and the UN Security Council had encouraged all states to search for and try suspects on their territory. Finally, extradition often was impossible, if not legally then practically.

Headline-making NGO-driven cases against a host of (former) senior officials, from Pinochet in 1998 to Tzipi Livni in 2009 – and in between Fidel Castro, Yerodia Ndombasi, George H. Bush, Ariel Sharon, Amos Yaron, Hissène Habré, Donald Rumsfeld, Paul Kagame, and many others belong to the category of 'virtual' cases because with the exception of *Pinochet* they produced little more than headlines and diplomatic headaches. Apart from immunity questions, they raised the issue of the meaning or definition of "universal jurisdiction". Many activists interpret 'universal' in universal jurisdiction *literally* and don't seem to accept anything less.

A good illustration thereof is the Belgian court case against Chad's former president Hissène Habré – or 'Africa's Pinochet' according to Human Rights Watch which has speared no means in its pursuit of the deposed ruler. In fact, HRW has taken *Pinochet* a step further. After failed attempts to bring charges in Senegal where Habré lives since 1990, HRW showed three Chadians the way to the palace of justice in Brussels. Acting upon their complaint a Belgian rogatory mission visited Chad in 2002. The following year, however, the Belgian parliament, under US and Israeli pressure, repealed the famous universal jurisdiction statute, thereby effectively scuttling all cases – except one. A mysterious transition clause sneaked into the new law appeared to be tailored to *Habré*, thus saving the investigation. In 2005 then, the Belgian government officially requested Habré's extradition on charges of genocide, crimes against humanity, war crimes, and torture. For whatever reasons, by 2009 Habré was still in Senegal. What followed then is a real *coup* for an

NGO because it involved the highest Belgian echelons: Belgium instituted proceedings against Senegal before the International Court of Justice on the grounds that Senegal is in non-compliance with its try or extradite obligation under the UN Torture Convention. After Amnesty had its day in the House of Lords, Human Rights Watch will have its day in the International Court of Justice – albeit through a proxy.

*Habré* showed how after *Pinochet* all kinds of actors – sometimes from opposing sides – found their way to courts in Europe where things quickly escalated. African countries countered by petitioning the International Court of Justice to reign in European judges and by putting the issue on the agenda of the UN General Assembly and the African Union – European Union (AU-EU) Ministerial Troika. Powerful countries like Israel, the United States, and China used other means to stop the ‘lawfare’ against them. The Belgian and Spanish governments obliged and repealed their controversial universal jurisdiction statutes and the British government at the time of writing was reconsidering its law after a UK court issued an arrest warrant for former Israeli foreign minister Tzipi Livni who was believed to be on a visit.

With the benefit of hindsight, I submit that universal jurisdiction was essentially a post-Cold War discourse and self-feeding hype generated by NGOs, activist lawyers and judges, academic conferences and papers, and mass media. Truly amazing was the degree of consensus and self-imposed political blindness within the ‘invisible college of international (criminal) lawyers’. Universal jurisdiction was legal lore but few noticed – or wanted to notice – that the debate was fraud with circular arguments and flawed analogies, and self-serving.

Perhaps it is time to admit that ‘universal jurisdiction’ is an unhelpful misnomer. Just like ‘free market’ does not refer to an absolute freedom of markets, ‘universal jurisdiction’ does not refer to an absolute right for individual states to prosecute gross human rights violations committed abroad. It simply cannot because limitations on states’ jurisdiction are the logical precondition for the existence of a multi-state system. Universal jurisdiction as advocated by true believers belongs to the realm of cosmopolitanism. Trying to reconcile a Kantian idea with the Grotian international legal order is like trying to square the circle.



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