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THE RISE AND FALL OF UNIVERSAL JURISDICTION

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ABSTRACT

This article considers the rise and fall of universal jurisdiction over 'gross human rights violations'. I begin by revisiting the unique Zeitgeist of the 1990s and by broaching the actors behind the campaign for universal jurisdiction. Then I discuss how these actors, mainly non-governmental organizations (NGOs), framed the issue and how policy-oriented international lawyers constructed the legal argument. Thereafter I review the (alleged) historical sources of universal jurisdiction and their contemporary (distorted) interpretation. My subsequent examination of post-World War II multilateral treaty practice finds little enthusiasm among states for universal jurisdiction. After that I assess cases of the last fifteen or so years, distinguishing between "hard" cases (in courts) and "virtual" cases (in the media). Next I show in a brief post mortem how a backlash in Africa, the United States, Israel, and China against virtual trials in Europe caused the premature end of universal jurisdiction. In the final section I draw some lessons and ponder its future.

KEY WORDS

Gross Human Rights Violations, Universal Jurisdiction, Human Rights Movement, Advocacy Campaign and Network, Post-Cold War Zeitgeist, Global Civil Society, Issue Framing, Legal Arguments, Policy Oriented School, Circular Arguments, Shallow Historical Roots, Distorted Treaty Interpretation, "Hard" Cases, "Virtual" Cases, Media Trials, NGO Involvement, Mission Civilisatrice, European Countries, Resistance US Hegemony and Israeli Exceptionalism, Backlash, Repeal Universal Jurisdiction Statutes, Grotian International Legal Order, Kantian Cosmopolitanism

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1. INTRODUCTION

For the last two decades most of the international human rights movement has advocated the exercise of universal jurisdiction - civil and criminal - by individual states over "gross human rights violations" wherever committed and regardless of the nationality of the victim or perpetrator. The most spectacular criminal case was the arrest and detention in 1998 of former Chilean President (and dictator) Augusto Pinochet by British authorities at the request of Spain. His arrest and the adoption in the same year of the Rome Statute of the International Criminal Court (ICC) were hailed as global civil society achievements.

But that was then. Pinochet was never extradited and by late 2009 - the time of writing of this article - Spain had *de facto* repealed its controversial universal jurisdiction law and the first trial before the ICC - of a minor actor by all standards in Africa's Great War - continued its slow but rocky course. International criminal justice anno 2009 probably is not what proponents anticipated a decade ago.

This article considers the rise and fall of universal jurisdiction. I begin by revisiting the unique *Zeitgeist* of the 1990s and by broaching the actors behind the campaign for universal jurisdiction. Then I discuss how these actors, mainly non-governmental organizations (NGOs), framed the issue and how policy-oriented international lawyers constructed the legal argument. Thereafter I review the (alleged) historical sources of universal jurisdiction and their contemporary (distorted) interpretation. My subsequent examination of post-World War II multilateral treaty practice finds little enthusiasm among *states* for universal jurisdiction. After that I assess cases of the last fifteen or so years, distinguishing between "hard" cases (in courts) and "virtual" cases (in the media). Next I show in a brief *post mortem* how a backlash in Africa, the United States, Israel, and China against virtual trials in Europe caused the premature end of universal jurisdiction. In the final section I draw some lessons and ponder its future.

I may be useful for the reader to know what prompted me to write this article. In July 1997, I participated in a residential seminar "National Adjudication of International Crimes" organized by the Dutch section of Amnesty International (AI). I was invited as an "expert" because I was preparing a doctoral dissertation on the subject. At the seminar, which brought together experts, activists, and government officials, we brainstormed and strategized on how individuals like Pinochet could be held

accountable outside Chile. The following year Pinochet *was* under arrest. Reflecting back on this memorable event I realize how for a while, through publications and participation in events like the AI seminar, I unwittingly - but not unwillingly - was part of a so-called *transnational advocacy network*.[1] My being part of the network ended, I guess, with my book on universal jurisdiction[2] in which I doubted that *Pinochet* would ever be repeated and concluded that '[i]n the end it may well be that [it was] an aberrant intermezzo between Nuremberg and the ICC'. A decade later I revisit my conclusion and take stock.

Rather than subdivide and limit my examination of the problem I look at the larger picture this time. I reject the tendency of legal scholars to reduce universal jurisdiction to an abstract legal question. On the contrary, it is hard to think of a more *political* question. I consider the issue therefore *non-justiciable* and resist determining whether universal jurisdiction is "legal/permissible" or "illegal/impermissible" under international law, and if none of these, whether it is an "emerging norm". This being said, I do engage in the legal debate and answer the legal arguments but without claim to comprehensiveness. Cases, statutes, and reports cited are cited as mere illustrations.

How and when did it all begin?

2. *ZEITGEIST* AND ACTORS

The end of the Cold War and its coincidence with the countdown towards a new century - and 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'.[3] In this climate the doctrines of just war and humanitarian intervention re-emerged, as did

[1] See the by now classic work by M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics*, Ithaca: Cornell University Press, 1998. The story of the actors behind the Pinochet cases is masterfully told by N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Philadelphia: University of Pennsylvania Press, 2004.

[2] L. Reydams, *Universal Jurisdiction: International and Municipal Legal* Perspectives, Oxford: Oxford University Press, 2003. Other books on the subject include S. Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecuting of Serious Crimes under International Law*, Philadelphia: University of Pennsylvania Press, 2004; M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp & Oxford: Intersentia, 2005; W. Kaleck, M. Ratner, T. Singelnstein, and P. Weiss (eds) *International Prosecution of Human Rights Crimes* (Berlin: Springer Verlag, 2006); W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, The Hague: TMC Asser Instituut, 2006.

[3] As outlined in the *Agenda for Peace* of then UN Secretary-General Boutros Boutros-Ghali.

the concomitant idea of international criminal justice. After all, if military intervention is acceptable to protect human rights then judicial intervention[4] surely is too.

Both ideas, of universal jurisdiction and of an international criminal court, cannot be dissociated from the 'endism' and 'sans-frontièrism'[5] that pervaded 1990s discourses – end of history, end of politics, and end of the Westphalian State.[6] In a post-ideological and increasingly borderless world, deterritorialization of criminal justice became conceivable for "gross human rights violations" (and "terrorism").[7] A globalized world called 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[8] and both states and inter-governmental organizations opened up to them 'on a scale qualitatively different from what went before'.[9] At the Rome Diplomatic *Conference* for an International Criminal *Court, officially accredited NGOs nearly equaled the number of states.*[10] *In this* ever denser and competitive field Amnesty International and Human Rights Watch achieved superpower status with global reach.[11] Like Greenpeace and *Médecins Sans Frontières* they grew into professional, media savvy organizations capable of waging strategic campaigns. One such campaign launched in the 1990s was 'ending impunity for gross human rights violations'.[12] And so it happened *that* in the quasi-criminal extradition proceedings against Pinochet before the venerable House of Lords, Amnesty International and three other NGOs were granted leave to intervene as third-parties.

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[4] The term, I believe, was coined by then US Ambassador-at-Large for War Crimes *David Scheffer* in the context of the ad hoc international criminal tribunals: D. Scheffer, 'International *Judicial Intervention*', *Foreign Policy*, 102, 1996.

[5] It is no coincidence that *Médecins sans Frontières*, the forerunner of all sorts of NGOs 'without borders', was awarded the Nobel Peace Prize in 1998.

[6] See most famously F. Fukuyama, *The End of History and the Last Man*, New York: Free Press, 1992.

[7] I use quotation marks because both are pliable, ill-defined concepts.

[8] J. Smith, 'Exploring Connections Between Global Integration and Political Mobilization', *Journal of World-Systems Research*, vol. X, 1, 2004, 255-85, 266.

[9] M. Kaldor, *Global Civil Society: An Answer to War*, Cambridge: Polity Press, 2003, 115.

[10] A/CONF.183/INF/3 contains the complete list of the 134 accredited NGOs. Available HTTP: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/158/99/PDF/N9815899.pdf? OpenElement. On the role of NGOs at the Rome Conference, see J. Van der Vyver, 'Civil Society and the International Criminal Court', Journal of Human Rights, 2003, vol. 2, 425-39; M. Glasius, *The International Criminal Court: A Global Civil Society Achievement*, London and New York: Routledge, 2005.

[11] Human Rights Watch in particular grew dramatically in the 1990s. As a centralized, non-membership NGO with headquarters in New York and offices in a dozen other world cities, HRW organizationally resembles a multi-national corporation. Its budget ($42 million in 2008) brings HRW nearly on par with Greenpeace International (48€ million in 2008).

[12] Many NGOs would join the campaign and new ones would be created around 'international criminal justice' specifically. The result is an international criminal justice 'cottage industry'.

Nothing better symbolizes the human rights movement's ascendency than this *coup de théâtre*.

3. Issue Framing and Legal Argument

In the long history of transnational activism, the international criminal justice campaign stands out for its extraordinary successful issue framing.[13] There are countless (innocent) victims of gross human rights violations and impunity has been the norm. The juxtaposition of these facts suggests a causal relation; hence fighting impunity - through universal jurisdiction or an international criminal court - becomes a moral imperative.

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.

Once framed in such simple moral and practical terms it became politically difficult to question universal jurisdiction or, for that matter, the idea of an international criminal court. The latter in particular was presented as historically inevitable - in line with the linear progress of history which for international criminal justice - according to the conventional account - begins in 1474 with the trial of *Peter von* Hagenbach. As a long-time advocate put it in 1991: 'The Time Has Come for an International Criminal Court'.[14]

But a moral argument, however powerful, is not a legal argument, nor is something legal because it sounds legal (universal *jurisdiction*). 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 task at hand was to piece together

[13] On successful issue framing by transnational advocacy networks, see Keck and Sikkink, *Activists beyond Borders,* chapter 1.
[14] M. C. Bassiouni, 'The Time Has Come for an International Criminal Court', Indiana International and Comparative Law Review 1, 1991, 1-43.

from this amalgam of sources an international legal 'principle' and then put it into practice.

This task was be undertaken by adepts of *policy oriented* schools of international law, such as the New Haven School, for whom international law is not a fixed set of rules that regulate state behavior but an ongoing process of decision making through which 'the international community' identifies, clarifies, and secures common interests. Scholars and lawyers must *advocate* and *develop* law to address issues of concern to that community.

An example thereof is the Princeton Project on Universal Jurisdiction created 'to contribute to the ongoing development of universal jurisdiction'.[15] The Project's *Principles on Universal Jurisdiction* (2001) 'are intended to be useful to legislators seeking to ensure that national laws conform to international law, to judges called upon to interpret and apply international law and to consider whether national law conforms to their state's international legal obligations, to government officials of all kinds exercising their powers under both national and international law, to nongovernmental organizations and members of civil society active in the promotion of international criminal justice and human rights, and to citizens who wish to better understand what international law is and what the international legal order might become'.

Despite the acknowledgement that the *Principles* are a mixture of *lex lata* and *lex desiderata* the text itself reads like a confident statement of the law:

Principle 1 -- Fundamentals of Universal Jurisdiction

1. For purposes of these Principles, universal jurisdiction is 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.

[15] Available HTTP: http://www.derechos.org/nizkor/icc/princeton.html/ and reprinted in Macedo, *Universal Jurisdiction*, 18-25. Another example is the International Law Association's Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences,' *Report of the 69th Conference of the International Law Association*, 2000, 403-31.

2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.

3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.

4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").

5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

Principle 2 -- Serious Crimes Under International Law

1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.

2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

[**Principles 3 - 11**]

Another example is *Hard Cases: Bringing Human Rights Violators to Justice Abroad – A guide to Universal Jurisdiction* (1999) by the Swiss based International Council on Human Rights Policy.[16] The 72 page report asserts with similar certainty that 'universal jurisdiction is a system of international justice that gives the courts of any country jurisdiction over crimes against humanity, genocide and war crimes, regardless of where or when the crime was committed, and the nationality of the victims or perpetrators. It allows the prosecution of certain crimes before the courts of any country even if the accused, the victim, or the crime, has no link to that country.'[17] Through endless recycling of reports like these, universal jurisdiction - however radical and counter-intuitive - became in no time dogma.

The above statements are presented by their authors as definitions but, in truth, they are *petitii principii*.[18] Proclaiming that any state has broader jurisdiction - subject matter, temporal, territorial - than the ICC is all the more extraordinary because universal jurisdiction originally was explained by the absence of an international criminal court.[19] The possibilities for abuse and conflict in a such free for all system seem obvious, which brings to mind what social writer and philosopher Eric Hoffer wrote in *The True Believer*: '[i]t is the certitude of his infallible doctrine that renders the true believer impervious to uncertainty, surprises and the unpleasant realities of the world around him'.[20] To be sure, there has been no shortage of surprises and unpleasant realities since *Pinochet* and some are discussed in this contribution. First I succinctly consider universal jurisdiction's historical sources and their contemporary interpretation.

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[16] Available HTTP: http://www.ichrp.org/files/reports/5/201_report_en.pdf.

[17] International Council on Human Rights Policy, *Hard Cases*, 4.

[18] An extreme example of begging the question can be found in International Federation of Human Rights, *Position Paper to the United Nations General Assembly at its 64th Session, October 2009*: 'Universal jurisdiction gives a State the competence to prosecute an alleged perpetrator of serious human rights violations or international crimes, regardless of the location of the crime and the nationality of the victim or the perpetrator". Available HTTP: http://www.fidh.org/IMG/pdf/FIDH_Position_Paper_to_the_GA_-_64.pdf.

[19] 'The inability of the world community to reach political consensus on the creation of an international criminal court […] has lead to the furthering of the indirect enforcement system', M.C. Bassiouni 'Penal Characteristics of Conventional International Criminal Law', *Case Western Reserve Journal of International Law*, vol. 15, 1983, 27-7, 34.

[20] E. Hoffer, *The True Believer: Thoughts on the Nature of Mass Movements*, Harper & Row, 1951, 76.

4. HISTORICAL ROOTS AND CONTEMPORARY INTERPRETATION

The claim that universal jurisdiction is time-honored - and therefore not in need of further proof - is based on an appeal to authority and on state practice regarding piracy on the high seas. I start with the argument from authority. Universal jurisdiction has been traced to the first general treatises on modern international law and international relations. Covarruvias in the 16th Century, Grotius in the 17th, and de Vattel in the 18th, these so-called 'founding fathers' all elaborated on the question of crime and punishment in the emerging Westphalian order.

It should be noted, however, that they wrote from a pragmatic sovereign perspective. They wanted to make sovereignty a workable organizing principle and their primary concern was good neighbourship among the new sovereign entities in Western Europe. Note that Grotius (Holland) and de Vattel (Switzerland) were particularly concerned about the interests of small countries like their own; hence the emphasis on reasonableness and reciprocity.

To stay with Grotius, the title of his classic *De Jure Belli ac Pacis* (*On the Law of War and Peace*)[21] reflects the author's pragmatism and realism. (Compare with Kant's *Zum ewigen Frieden* or *Toward Eternal Peace*). The sections on crime and punishment carefully balance the requirements of justice, *ordre public*, and sovereignty:

The matter that necessarily comes next under consideration is the case of those, who screen delinquents from punishment. It was before observed that, according to the law of nature, no one could inflict punishment, but a person entirely free from the guilt of the crime which he was going to punish. But since established governments were formed, it has been a settled rule, to leave the offences of individuals, which affect their own community, to those states themselves, or to their rulers, to punish or pardon them at their discretion. But they have not the same plenary authority, or discretion, respecting offences, which affect society at large, and which other independent states or their rulers have a right to punish, in the same manner, as in every country popular actions are allowed for certain misdemeanors. Much less is any state at liberty to pass over in any of its subjects crimes affecting other

[21] H. Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations,* translated from the original Latin by A.C. Campbell, with an Introduction by D. J. Hill, New York: M. Walter Dunne, 1901. Available HTTP: http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=553&Itemid=28.

independent states or sovereigns, On which account any sovereign state or prince has a right to require another power to punish any of its subjects offending in the above named respect: a right essential to the dignity and security of all governments.

[…]

But as it is not usual for one state to allow the armed force of another to enter her territories under the pretext of inflicting punishment upon an offender, it is necessary that the power, in whose kingdom an offender resides, should – *upon the complaint of the aggrieved party* – either punish him itself, or deliver him up to the discretion of that party. Innumerable instances of such demands to deliver up offenders occur both in sacred and profane history. […] Yet all these instances are to be understood not as strictly binding a people or Sovereign Prince to the actual surrender of offenders, but allowing them the alternative of *either punishing or delivering* them up. [emphasis added]

[…]

What has been said of punishing or giving up aggressors, applies not only to those, who always have been subjects of the sovereign, in whose dominions they are now found, but to those also, who, after the commission of a crime, have fled to some place for refuge.[22]

Thus all Grotius said was that a sovereign cannot shield from punishment somebody who has aggrieved another sovereign. Upon complaint of the latter, the former should either punish or extradite the offender. The underlying idea is that there should be no safe havens for *fugitives*. Saying that any state to which an offender flees must either try or extradite him evidently is not the same as saying that any state can request extradition; much less does it follow that any state can seek arrest and extradition of somebody who is no fugitive at all (like Pinochet).

Why mention then Grotius (or Covarruvias or de Vattel) in a discussion on universal jurisdiction? Some extrapolate from these paragraphs just that, a right for any state to exercise jurisdiction over human rights offences.[23] This is textually and contextually indefensible: textually because punishment (or the alternative, extradition) is something between 'the power, in whose kingdom an offender resides' and 'the *aggrieved* party'; contextually because at odds with the pragmatism of *De*

[22] Grotius, *Law and Peace*, Chapter XXI 'On the Communication of Punishment'.
[23] E.g. D. Hawkins, 'Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality', *Global Governance*, vol. 9, 2003, 347-65.

Jure Belli ac Pacis and with Grotius' other magnum opus *Mare Liberum* (*The Free Sea*).[24]

In the latter Grotius distinguished 'between that jurisdiction which is competent to each in common and that which is competent to each one properly speaking' and went on to say that 'all peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations.'[25] Had Grotius in the above quoted paragraphs from *De Jure Belli ac Pacis* meant a 'jurisdiction which is competent to each in common' he would have said so. The statesman-diplomat who Grotius was probably would cringe at the contemporary interpretation of his words (and so would de Vattel who too was a diplomat).

The second argument starts from state practice regarding the repression of piracy on the high seas and by analogy vests any state with universal jurisdiction ('jurisdiction which is competent to each in common') over modern crimes under international law. But piracy was a *delictum iuris gentium* (and the pirate a *hostis humanis generum*) because, as argued in *Mare Liberum*, the high seas were outside the jurisdiction of any state and belonged to all humanity. The analogy with modern crimes under international is fallacious and the result - putting piracy in the category of "serious crimes under international law", as in the *Princeton Principles*, together with war crimes, crimes against peace, crimes against humanity, genocide, and torture - rather a stretch. This was illustrated recently when no country was willing to try a dozen Somali pirates captured by the Dutch navy. Accordingly, they 'were put back on their own speedboat with some food and fuel'.[26] [27]

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[24] H. Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade*, translated by R. Van Deman Magoffin, New York: Oxford University Press, 1916. Available HTTP: http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=552&Itemid=28.

[25] Ibid.: 'Hugo Grotius's Reply: Defense of Chapter V of the *Mare Liberum* Which had been attacked by William Welwod, Professor of Civil Law, in Chapter XXVII of that book written in English to which he gave the title An Abridgement of All Sea-Lawes'.

[26] 'Suspected Somalia pirates freed by Dutch navy', *BBC News*, 18 December 2009, available HTTP: http://news.bbc.co.uk/2/hi/8420207.stm.

[27] Eugene Kontorovich further elaborates on the 'war criminals, yes; pirates, no' contradiction: '[W]hen the Spanish Navy captured a group of suspected Somali pirates, a judge ordered them released on the grounds that prosecuting a crime that occurred thousands of miles away would be "a bit disproportionate." Just a week before, another Spanish magistrate had launched an investigation into an Israeli strike on a Hamas leader in Gaza in 2002. Ironically, Spain lacked personal jurisdiction over the Israeli officials unlike the pirates. Moreover, the evidentiary and other practical issues seem much more daunting when it comes to discerning what happened years ago in an ongoing conflict between Israel and the Palestinians, a situation in which, unlike piracy, some of the alleged victims are actively involved in the conflict and collecting evidence and testimony is inherently politicized. Additionally, unlike with Gulf of Aden piracy, Spain has not been involved in keeping Gaza safe; its judicial interest is unlinked to enforcement activities. Using universal jurisdiction to prosecute crimes in politically fraught

Even though universal jurisdiction over piracy is uncontroversial today[28] it wasn't when *Mare Liberum* was published in 1609. Until the late middle ages European governments officially or unofficially sponsored piracy but with the broad expansion of European maritime commerce in the sixteenth and seventeenth century[29] the advantages to be derived from stealing from one another was giving way to the greater advantage of stable commercial relations. Early in the seventeenth century, Turkish corsairs began expanding their piratical activities from the Mediterranean to the Atlantic.[30] To the seventeenth century European mind, 'the prospect of infidels carrying Christians into bestial captivity in North Africa[31] gave efforts to eradicate piracy an urgency and crusading zeal which they had previously lacked. In a Europe strongly divided by political and religious differences, the one objective on which all Christian nations were agreed (sic) was the desirability of crushing the Turkish pirates.'[32] 'At the same time, non-European states and even some colonies regarded European efforts against piracy and privateering as unwarranted and unwelcome infringements into local struggles over power and wealth.'[33] Similar complaints, we will see, would be heard four centuries later.

If the claim that universal jurisdiction has deep historical roots is unconvincing what about Nuremberg then, *the* milestone in international criminal law? Proponents of universal jurisdiction draw support from a passage in the Nuremberg judgment that "[t]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, *they have done together what any of them might have done singly*" (emphasis added). The edge of this argument, however, can be taken off by a passage from the Tokyo judgment: 'This is a special tribunal set up by the Supreme Commander under the authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. […]

Gaza while rejecting it for piracy is like a district attorney prosecuting only high-profile celebrity cases, while letting ordinary murder and robbery go unpunished'. E. Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists', *California Law Review,* vol. 89, 1, 2010, 101-33, 130-32.

[28] Universal jurisdiction over piracy is codified in the 1958 (Geneva) Convention on the High Seas (article 19) and in the 1982 (United Nations) Convention on the Law of Sea (article 105).

[29] Demonstrated, for example, by the founding in 1602 of the Dutch East India Company. The latter actually commissioned *Mare Liberum*, which explains its full title: *Mare Liberum*: *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade*.

[30] E. A. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society', *International Organization*, vol. 44, 1990, 479-562, 487.

[31] See R. Davis, Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast, and Italy, 1500-1800*, New York:* Palgrave Macmillan, 2003.

[32] Ibid. quoting C. M. Senior.

[33] Ibid. 489.

In the result, *the members of the Tribunal, being otherwise wholly without power in respect to the trial of the Accused*, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the Accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter'. (emphasis added)

The Allied Powers' rationale for establishing *international* tribunals after World War II can be found in a paragraph in the 1943 Moscow Declaration: 'Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. […] The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.' One could argue that the Allies deliberately avoided any reference to universal jurisdiction and instead pointed to the absence of a "particular geographical localization" of certain crimes as justification for not following the territoriality principle.
In summary, advocates of universal jurisdiction have gone out of their way to invoke historical authority. The founding fathers and defining events like Nuremberg were used to demonstrate that the doctrine was not invented overnight, but the wisdom of ages. A closer look at these sources and events, however, showed that the claim of historical authority does not stand scrutiny.

5. MULTILATERAL TREATY PRACTICE

Having found little historical evidence (yet much contemporary distortion), I now consider whether universal jurisdiction over the "most serious crimes under international law" has any basis in treaty law because, as Grotius said, '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.'

In the course of the twentieth century states indeed have entered into a considerable number of agreements with penal characteristics. Most, however, are "law and order" instruments, aimed at repressing offences typically committed by non-state actors

and in an international context e.g. piracy, terrorism, drug trafficking, and mercenary activities. The suppression of these types of crimes presumably serves parallel state interests; sovereignty and reason of state hardly seem an issue. Gross violations of human rights (and humanitarian law), however, typically are *crimes of state*: by its agents, in its name, and often against its own citizens. Alleged offenders may range from a simply bureaucrat or foot soldier to the commander-in-chief. An interesting question therefore is whether states have consented to universal jurisdiction in human rights or humanitarian law treaties. Put differently, 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 – 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"). I previously pointed out that the Allies, when establishing the Nuremberg and Tokyo Tribunals, conspicuously avoided any reference to universal jurisdiction. After Nuremberg, however, legal scholars almost unanimously took the position – like the drafters of the *Princeton Principles* – that the emerging new category of "international crimes" was subject to universal jurisdiction.

The first draft of the Genocide Convention, prepared by the UN Secretariat with the assistance of international criminal law scholars, reflected their view. Article VII stated: "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."
The then great powers, however, strongly opposed draft article VII. The delegate of the United States called the principle of universal punishment 'one of the most dangerous and unacceptable of principles'; the representative of the Soviet Union , Platon Morozov, stated that it was to be expected that the state where the offence was committed 'jealous of its sovereignty, would not consent to surrender its penal jurisdiction to another state since the principal of universal punishment was even more incompatible with the sovereignty of states than [punishment by an international court]'. 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'.

To give effect to the second option the UN General Assembly, immediately after the adoption of the Convention, invited the International Law Commission to study the desirability of establishing an international judicial organ for the trial of persons charged with genocide. The court envisaged was established on 1 July 2002 when the ICC Statute entered into force.

Despite the unambiguous phrasing of the Genocide Convention some argue that the Convention, much like the ICC Statute, *does not exclude* universal jurisdiction. States parties to these treaties somehow reserved themselves the right to act unilaterally. This brings to mind the implausible interpretation of a bilateral extradition treaty by the United States Supreme Court. In United States v. Alvarez-Machain[34] the court contemptuously held that forcible abduction (by US agents) of a criminal suspect (from Mexico) does not constitute a violation of the US-Mexico extradition treaty - because the treaty *does not prohibit* it.

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. The Conventions and Additional Protocol I apply in international armed conflict, Additional Protocol II governs the protection of victims of non-international armed conflict.
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* [emphasis added], provided such High Contracting Party has made out a *prima facie* case.

[34] United States v. *Alvarez-Machain*, 504 U.S. 655 (1992)

The clause resembles Grotius' formulation that 'it is necessary that the power, in whose kingdom an offender resides, should – upon the complaint of the *aggrieved* party – either punish him itself, or deliver him up to the discretion of that party'.[emphasis added]. An example thus of a try or extradite regime conform to the teachings of the classics.

However, like with Grotius' work, some read universal jurisdiction into the Geneva Conventions - they point to the expression "regardless of their nationality".[35] To accept this interpretation is to believe that the drafters of the Genocide Convention had a complete change of mind on the jurisdiction issue when negotiating the Geneva Conventions less than a year later.[36] This is unlikely. The jurisdiction clause of the Geneva Conventions should be read in light of the recommendations of the United Nations War Crimes Commission during World War II.[37] The Commission acknowledged that there were no fixed rules regarding the surrender of war criminals and that the ordinary rules of extradition were "defective."[38] 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.[39]

Though never adopted, the draft convention and states' official reactions formed the basis for the jurisdiction clause in the Geneva Conventions.[40] 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 displacement and migration of millions and the redrawing of national borders at the end of World

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[35] I earlier shared that opinion but after studying the work of the United Nations War Crimes Commission (see below) I reverse myself.

[36] The Geneva Conference (1946-1949) and the drafting of the Genocide Convention (1946-1948) involved some of the same state representatives. Platon Morozov, for example, simultaneously served as deputy head of the Soviet delegation in Geneva and Soviet representative in the Sixth Committee. The bio of Morozov, later a judge at the ICJ, is available at HTTP: http://www.icj-cij.org/presscom/files/7/9947.pdf/.

[37] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: H.M.S.O., 1948. Available HTTP: http://www.heinonline.org (subscription required for access).

[38] Ibid. Chapter XIII: Arrangements for the Surrender of War Criminals, 392-434.

[39] The text of the draft convention unfortunately is not included in the *History* but a reconstruction is possible on the basis of the commentary.

[40] I cannot prove that the drafters of Geneva Conventions were familiar with the work and recommendations of the UNWCC. The *Pictet* commentary on the Geneva Conventions (see below) mentions a number of sources but not the UNWCC. That being said, it is hard to image that they were not.

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 the involvement of dozens of countries in a war that spanned the entire globe. It is a *non sequitur* to read in this secondary sentence an unqualified right for neutral countries to prosecute grave breaches; one simply cannot seriously believe that the drafters ever contemplated universal jurisdiction.[41] The authoritative article-by-article commentary on the Geneva Conventions[42] – 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' - surely would have mentioned it.[43]

The above review of two important post-Nuremberg instruments shows that states were far less enthusiastic than scholars about universal jurisdiction over "human rights offences".[44] Yet there seems to be one exception. In 1971, the Soviet Union and Guinea together submitted early drafts of a convention to deal with the suppression and punishment of apartheid. [45] Two years later a *divided* UN General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"). The Convention is modeled after the Genocide Convention, except for its jurisdiction clause, which reads: 'Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction'. (article 5).

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41 The members of the UN General Assembly certainly did not at the time of the Geneva Conference. See Resolution 3 (I) of 13 February 1946 "Extradition and Punishment of War Criminals," in which the General Assembly '*recommends* that Members of the United Nations forthwith take all the necessary measures to cause the arrest of […] war criminals […], and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries; *and calls upon* the governments of States which are not Members of the United Nations also to take all the necessary measures for the apprehension of such criminal in their respective territories with a view to their immediate removal to the countries where the crimes were committed for the purpose of trial and punishment according to the laws of those countries'.

42 J. S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva: International Committee of the Red Cross, 1952.

43 The commentary on jurisdiction/extradition clause (article 49 of Geneva Convention I) runs nine pages, 362-370.

44 M.C. Bassiouni deplores states' lack of deference to 'the specialists in international criminal law' in 'Penal Characteristics of Conventional International Criminal Law', *Case Western Reserve Journal of International Law*, vol. 15, 1983, 27-7, 31.

45 For the convention's procedural history see http://untreaty.un.org/cod/avl/ha/cspca/ cspca.html.

Why was universal jurisdiction acceptable - for a majority - when it had failed to gain support in the drafting process of the Genocide Convention? The prospect of establishing an international criminal court which both conventions envisage was much bleaker in 1973 than in 1948 and the prospect of the target countries adhering to the Convention was zero. More importantly, the Apartheid Convention was clearly drafted with three countries in mind, or more accurately three regimes, namely the white minority regimes in the former Rhodesia, Namibia, and the Republic of South Africa. The Convention is in fact tailored to the officials of regimes that were the last vestiges of colonialism in Africa. Therefore, states parties have little reason to fear reciprocity. No (former) apartheid official has ever been prosecuted in a third State. Interestingly, and tellingly, none of the countries that are now in the forefront of universal jurisdiction has signed the convention, let alone ratify. During the drafting Western countries considered the initiative redundant[46] and took issue with the definition of the crime of apartheid (overly broad), its qualification as a crime against humanity - and the jurisdiction clause. [47]

Let us now consider the treaty at issue in *Pinochet*, the United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (UN Torture Convention). Adopted in 1984 in response to the brutal political repression in Chile and other Latin American countries in 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 – like the Genocide Convention protects citizens from genocide by their rulers. Nonetheless, the UN Torture Convention provides that a state on whose territory an alleged torturer "is found" or "is present" must submit the case to its competent authorities for the purpose of prosecution if it does not extradite him. (It is an extreme historical twist of fate that Pinochet was the first to step in this legal trap).

Opposition against a try or extradite regime during the drafting came from a number of Latin American countries – as one could expect – but not from the great powers. The United States, in a complete change from its opposition during the drafting of the Genocide Convention, even advocated the inclusion of a try or extradite clause.

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[46] After the Genocide Convention (1948) and the Convention for the Elimination of All Racial Discrimination (1965).

[47] See audio files of discussions in Third Committee of General Assembly, 2006th meeting, 25 October 1973, available HTTP: http://untreaty.un.org/cod/avl/ha/cspca/cspca_audio.html.

In light of allegations of torture against the United States in the prosecution of its war on terror (after 11 September 2001) it is worth quoting the US delegate's reply to Argentine objections: 'Such jurisdiction was intended primarily to deal with situations where torture is a state policy and, therefore, the state in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the convention to such a state would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against torture which could be brought to bear'.[48] The delegate presciently added that 'it could be utilized against official torturers who travel to other states, a situation which was not at all hypothetical'.[49]

Given the US opposition to the ICC and its pressure on the British not to allow the Law Lord's judgment on Pinochet' extradition to stand, its embrace of "universal jurisdiction" in the UN Torture Convention appears in hindsight almost an accident. One explanation for this apparent lapse may be that the US was not yet the pre-eminent power which it is today.

What the US delegate referred to as "universal jurisdiction" is in fact a typical try or extradite clause. 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) 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.

[48] Quoted in J. H. Burgers and H. Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht: Martinus Nijhoff, 1988, 78-9.
[49] Ibid.

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)

Accordingly, *not contemplated* by articles 5 and 7 – or by any state delegate during the drafting[50] - is the scenario of a state exercising *jurisdiction without its having a link with the offense*. An arrest warrant or extradition request from such a state has no basis in the Convention.

In summary, the Grotian try or extradite formula has been incorporated into the Geneva Conventions and the UN Torture Convention. The more radical (Princeton) view, according to which any state may request arrest and extradition in cases involving "serious crimes under international law," has not been codified in a multilateral treaty. Human rights and "law and order" treaties alike require a meaningful link for the exercise of jurisdiction. The Apartheid Convention, admittedly, is an exception, but also a revealing one.

Perhaps some consistent practice has developed meanwhile that makes the original intent irrelevant and the genuine link requirement superfluous. I shall therefore briefly discuss state practice.

6. STATE PRACTICE

By "state practice" I mean actual "deeds", not the obligatory lofty declarations in multilateral forums.[51] NGOs have reported plenty of deeds but the problem is that they tend to cherry-pick evidence and leave out critical context. A good example of cherry-picking (but also of leaving out context) is the argument that *Eichmann*[52] and *Demjanjuk*[53] are precedents for universal jurisdiction. This ignores Israel's thinly-

[50] See exhaustively, M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford: Oxford University Press, 2008.
[51] E.g. UN General Assembly, Sixth Committee, 21 October 2009, available HTTP: http://www.un.org/News/Press/docs/2009/gal3372.doc.htm. Even if one considers these statements as practice, they are non-committal and inconsistent.
[52] Attorney General of Israel v. Eichmann, Jerusalem District Court (1961) and Attorney General of Israel v. Eichmann, Supreme Court of Israel (1962).
[53] Matter of Extradition of John Demjanjuk, United States District Court, N.D. Ohio, Eastern Division, 15 April 1985, 612 F.Supp. 544.

veiled threats against the use recently of universal jurisdiction against Israeli officials. Or consider 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". […] The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent State, not from the State's relationship with the perpetrator, victim, or act'[54] - but whose government after 9/11 has made clear that other countries *should not even think about* prosecuting US officials.[55] My point is that for any claim of state practice in support of universal jurisdiction, evidence can be adduced that undercuts the original claim.

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. Let us briefly review these links and other relevant contextual elements.

"Hard" Cases

All in all some two dozen individuals have been tried by courts in Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for "war crimes" committed abroad. Without exception the defendants had taken up permanent residence in the forum state - as refugee, exile, fugitive, or immigrant - and resisted being 'sent back to the countries in which their abominable deeds were done'.[56] In most cases the other states concerned acquiesced in or even supported prosecution. 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 (cf. the obligations under the Geneva Conventions). Finally, extradition often was impossible, if not legally then practically.

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54 District Court judgment under section "Israeli Jurisdiction".

55 One can also cite the US pressure on the British government not to allow the Law Lords' judgment on Pinochet's extradition to stand. See G. Hawthorn, 'Pinochet: the Politics', *International Affairs*, vol. 75, 1999, 253-258, 253.

56 Cf. the 1943 Moscow Declaration quoted above in the section 'Historical Roots and Contemporary Interpretation'.

A good example is the *Butare Four* case in Belgium.[57] The defendants had fled Rwanda in the aftermath of the armed conflict and genocide in 1994. They applied for political asylum in Belgium (where three of them had lived before) but were arrested after being denounced by other Rwandan refugees. Extradition to Rwanda was legally impossible under Belgian law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The International Criminal Tribunal for Rwanda (ICTR) declined to take over the proceedings. (In earlier cases the Tribunal had asked Belgium to defer). Belgium was thus faced with a dilemma of granting asylum to so-called *génocidaires*,[58] or prosecuting them.

This, of course, is the kind of impasse Grotius had in mind and for which he proposed an obligation for the asylum state to either punish or deliver the suspect. It is also the scenario covered by the jurisdiction/extradition clauses of the Geneva Conventions and the UN Torture Convention which codify Grotius' proposal (but nothing more). Not so long ago, such individuals would have been left in peace by the authorities of the asylum state for lack of interest, lack of capacity, lack of expertise, lack of a constituency, lack of political will, or a lack of legal basis in domestic law - or expelled.[59] This has changed after nearly two decades of campaigning against impunity for gross human rights violations. The application of the try or extradite principle in the various cases proved Grotius right: justice was done *and* relations between the states concerned were furthered.

Another example, but less typical, is the case of Ephrem Nkezabera, a Rwandan banker, who was prosecuted in Belgium in 2009 at the specific request of the ICTR Prosecutor as part of a strategy to transfer cases involving intermediate- and lower-rank accused to national courts (as demanded by UN Security Council Resolution 1503).[60] Belgium was chosen because it already had conducted three Rwanda genocide trials and Nkezabera was in Belgium at the time of the ICTR request.

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57 I discuss this case at length in *Journal of International Criminal Justice*, vol. 1, 2003, 428-36. A similar case in the Netherlands against a Rwandan is discussed by L. van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts', *Journal of International Criminal Justice*, vol. 7, 2009, 1117-1131.

58 *Génocidaires* is a term used in Rwanda for all people "with blood on their hands". The *Butare Four,* it should be noted, were convicted of war crimes, not genocide.

59 Canada, for example, before the enactment in 2000 of the Crimes Against Humanity and War Crimes Act, would deport foreigners suspected of war crimes. See Reydams, *Universal Jurisdiction*, 122. Now it prosecutes them. See R v Munyaneza (2009 QCCS 2201), available HTTP: http://www.haguejustice portal. net/Docs/NLP/Canada/Munyaneza_Judgement_22-5-2009_EN.pdf.

60 Completion strategy of the International Criminal Tribunal for Rwanda, S/2007/323, para. 7 and 35. Available HTTP: http://www.ictr.org/ENGLISH/completionstrat/s-2007-323e.pdf.

There was thus an objective link *and* a mandate from a legitimate international authority.

In the above cases prosecution (in the forum state) was just and reasonable both from the defendants' perspective and from the perspective of the states concerned. The proceedings unfolded in a sphere of mutual assistance in criminal matters[61] and international law was used to *solve* problems, as it should. This form of jurisdiction is universal *ratione loci* but not *ratione personae* because of the objective pre-existing link between forum and suspect. Yet media[62] and NGO[63] reports lump together these uncontroversial cases of judicial *cooperation* and highly contentious cases of judicial *intervention* under the single rubric of "universal jurisdiction." This is unhelpful and distortive; the former, I submit, have no precedential value for the latter.

"Virtual" Cases

This category refers to the headline-making NGO-driven[64] 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. I call them "virtual" cases because with the exception of *Pinochet* they produced little more than headlines and diplomatic headaches (and fame for a Spanish Judge). Apart from immunity questions, these cases raised the issue of the meaning or definition of "universal jurisdiction".

Many activists – but also the drafters of the *Princeton Principles* – interpret "universal" in universal jurisdiction *literally* and don't seem to accept anything less. Their goal is to enshrine in law a right for any state – or for any judge for that matter because in their worldview the territorial state is obsolete – to exercise criminal jurisdiction over *anybody, anywhere in the world* suspected of "gross human rights

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61 A Finnish court in *Bazaramba* and a Swiss court in *Nyonteze* went to Rwanda to hear evidence. See 'Finnish genocide trial in Rwanda', *BBC News*, 16 September 2009, available HTTP: http://news.bbc.co.uk/2/hi/8258113.stm and '*Nyonteze v.* Public Prosecutor', *American Journal of International Law*, vol. 96, 2002, 231.

62 'The long arm of Universal Jurisdiction', *Radio Nederland Wereldomroep*, 11 November 2009, available HTTP: http://www.rnw.nl/int-justice/article/long-arm-universal-jurisdiction.

63 FIDH and Redress, *Universal Jurisdiction Developments: January 2006- May 2009*. Available HTTP: http://www.fidh.org/IMG/pdf/UJ_Informal_Update_Draft020609.pdf.

64 For an example of NGO strategizing, see Lawyers Committee for Human Rights, 'Universal Jurisdiction: Meeting the Challenge through NGO Cooperation: Report of a Conference Organized by the Lawyers Committee for Human Rights'. Available HTTP: http://www.humanrightsfirst.org/international_justice/w_context/meeting_challenge310502.pdf

violations". It is rather remarkable that professed multilateralists are willing to advocate a free for all.

Two Belgian cases will prove my point. The first concerned an international arrest warrant against the minister of foreign affairs of the Democratic Republic of the Congo, Yerodia Ndombasi. Tired of catching only small fry, the judge responsible for the above mentioned Rwanda dossiers went after an alleged big fish in Africa's Great War. Alas, the prospect of a Congo genocide trial in the colossal palace of justice in Brussels – commissioned by Congo's erstwhile sovereign King Leopold II – ended when the International Court of Justice ruled that a foreign minister enjoys absolute immunity abroad (the court sidestepped the universal jurisdiction question).[65]

The second case targeted 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.[66] In fact, HRW has taken *Pinochet* (which involved rival Amnesty International) a step further.[67] [68] 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.[69] 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:

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[65] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002.

[66] One might therefore also refer to the case as "Human Rights Watch's Pinochet".

[67] Perhaps it is more appropriate to say that Reed Brody has taken *Pinochet* a step further. Brody is Counsel and Spokesperson for Human Rights Watch in Brussels and the main character in the movie *The Dictator Hunter*. 'He hunts dictators for a living as a lawyer for Human Rights Watch. For seven years, Brody has been chasing one former dictator in particular: Hissène Habré, the former leader of Chad, who is charged with killing thousands of his own countrymen in the 1980s. Now Habré lives in Senegal where Brody is attempting to have him brought to trial or extradited' (http://www.thedictatorhunter.com/reedbrody.php).

[68] The HRW website features a detailed chronology of *Habré*: http://www.hrw.org/en/news/2009/02/12/chronology-habr-case.

[69] 'But by then, Brody, Guengueng and their colleagues had already filed charges against Habré in Belgium, whose anti-atrocity law allowed its courts to hear cases from all over the world' (http://www.thedictatorhunter.com/hissenehabre_about.php).

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.[70] 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. Seizing the 'World Court' on behalf of an NGO to vindicate a *repealed* statute, *il faut le faire.*

7. POST MORTEM

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[71] and by putting the issue on the agenda[72] of the UN General Assembly[73] and the African Union -European Union (AU-EU) Ministerial Troika.[74] Powerful countries like Israel, the United States, and China used other means to stop the "lawfare"[75] against them. The Belgian[76] and Spanish[77] 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.[78] Germany so far maintains the universal jurisdiction provision in its much

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[70] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Earlier in this paper I have argued that an extradition request from a state without any link to the offense has no basis in the Convention.

[71] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) and Certain Criminal Proceedings in France (Republic of the Congo *v.* France).

[72] African Union Assembly Decision on the *Report of the Commission on the Abuse* of the Principle of *Universal Jurisdiction*. Doc. Assembly/AU/14 (XI). Available HTTP: http://www. minec.gov.mz/index2.php?option=com_docman&task=doc_view&gid=12&Itemid=48.

[73] 'The scope and application of the principle of universal jurisdiction', Report of the Sixth Committee, A/64/452. Available HTTP: http://www.un.org/ga/sixth/64/ActionbyGA.shtml.

[74] The AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/1/09 REV1. Available HTTP: http://www.africa-eu-partnership.org/pdf/rapport_expert_ua_ue_competence___universelle_en.pdf.

[75] "Lawfare" is a term used by Israel supporters to denounce the legal 'harassment' of Israel in national and international forums. See e.g. 'Lawfare against Israel', *Wall Street Journal*, 5 November 2008, opinion page. Available HTTP: http://online.wsj.com/article/SB122583394143998285.html.

[76] See L. Reydams, '*Belgium Reneges* on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', *Journal of International Criminal Justice*, 2003, 679-689.

[77] Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. Available HTTP: http://noticias. juridicas .com/base_datos/Admin/lo1-2009.html

[78] 'UK ponders law change after Tzipi Livni arrest warrant', *BBC News*, 15 December 2009, available HTTP: http://news.bbc.co.uk/2/hi/8415161.stm

heralded Code of Crimes against International Law, but then again, it hasn't really used it.[79]

The cases mentioned above showed that universal jurisdiction was anything but universal in practice. As an almost exclusively European affair they represented a curious mixture of *mission civilisatrice and resistance against United States hegemony and Israeli exceptionalism. This dual undercurrent, I submit, ultimately provoked a fatal backlash.*

The cases also showed an interesting "small fry – big fish" dimension. The hard cases concerned mostly small fry swept ashore in Europe whereas the virtual cases targeted the big fish. While understandable – which NGO, judge, or country is willing to spend time, resources and political capital on a virtual case against a minor player? – it would seem that by going after big fish judges in Spain, Belgium, and the U.K. entered the territory of international tribunals.

Also worthy of note is that none of the countries jostling for indicting inaccessible foreign 'war criminals' was willing to try a dozen ragtag Somali pirates captured by the Dutch navy. Few seemed to be outraged by the release of these *hostis humanis generum*.

8. LESSONS AND PROSPECTS

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".[80] Universal jurisdiction was legal lore but

[79] So far all complaints against foreign officials have dismissed. For a critical assessment see, K. Ambos, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?', *Case Western Reserve Journal of International Law*, vol. 42, 2009, 405, 426-32. Recently two longtime residents of Rwandan origin were arrested and charged under the Code of Crimes against International Law. They are accused of leading *from Germany* one of the rebel armies in the Easter Congo. See statement of the German federal prosecutor, available HTTP: http://www.generalbundesanwalt.de/de/showpress.php?themenid=11&newsid=347 and 'Germany Arrests Rwandan War Crimes Suspects', *Spiegel Online,* 18 November 2009, available HTTP: http://www.spiegel.de/international/world/0,1518,661965,00.html.

[80] I am paraphrasing the late Oscar Schachter, '*The Invisible College of International Lawyers*', *Northwestern University Law Review*, vol. 72, 1977, 217-26.

Few noticed – or wanted to notice – that the debate was fraud with circular arguments and flawed analogies, and self-serving.[81]

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.[82]

It is noteworthy that *laissez faire* capitalism and *laissez faire* jurisdiction crashed into reality around the same time and that regulation is the order of the day again. Rather than strengthening international (criminal) law the virtual proceedings in some West-European countries against officials from non-European countries made a mockery of it. There is only so much room for symbolic actions and stunts in a legal system worthy of its name. The thinking probably was that enough "precedents" – no matter how frivolous or controversial – would help "crystallize" a legal norm before the gains could be reversed. Unsurprisingly, that point already has been reached: universal jurisdiction - according to a recent NGO position paper - is now 'firmly enshrined in international treaty and customary law'.[83]

The question of the scope and application of the principle of universal jurisdiction is now on the international judicial and diplomatic agenda. The parties in the ICJ litigation[84] are taking their time to plead their case. In the UN General Assembly Sixth Committee and in the AU-EU Troika legal experts and state representatives continue their semantic disputes about the "universal" in universal jurisdiction, while NGOs

[81] Activists and scholars often dismiss a priori criticism of self-servingness by saying that they defend 'values'- universal values - not 'interests'.
[82] Kai Ambos is similarly critical in 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?', *Case Western Reserve Journal of International Law*, vol. 42, 2009, 405, 443-448.
[83] International Federation of Human Rights, *Position Paper to the United Nations General Assembly at its 64th Session, October 2009*. Available HTTP: http://www.fidh.org/IMG/pdf/ FIDH_Position_Paper_to_the_GA_-_64.pdf.
[84] Certain Criminal Proceedings in France (Republic of the Congo *v.* France); Questions relating to the Obligation to Prosecute or Extradite (Belgium *v.* Senegal).

prepare a counteroffensive.[85] For the UN Sixth Committee it is *déjà vu* all over again sixty years after the negotiation of the Genocide Convention. Bad ideas never die and universal jurisdiction probably is one.

[85] E.g. International Federation of Human Rights, *Position Paper* and Amnesty International, 'International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)', IOR 40/001/200. Available HTTP: http://www.amnesty.org/en/library/info/ IOR40/001/2009/en.

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