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UNIVERSAL CIVIL JURISDICTION—THE NEXT FRONTIER?

INTRODUCTORY REMARKS BY DONALD FRANCIS DONOVAN*

The principle of universal jurisdiction allows a state to exercise jurisdiction over a limited category of cases when the state has no connection by territory, nationality, or protection with the parties or the conduct in a particular case. Universal jurisdiction was originally exercised over serious crimes, such as piracy, that were difficult to enforce because they occurred beyond state borders, such as the high seas. The modern justification for universal jurisdiction, however, focuses less on the place in which the offence takes place and more on the nature of the offence: some crimes, such as genocide and torture, are so heinous that they are universally condemned, and as a result every state has an interest in their prosecution no matter where they take place.

Universal jurisdiction has traditionally been considered primarily, or even exclusively, in the criminal sphere, and there has been relatively little focus on resort to universal jurisdiction in the civil sphere as a means for victims to seek judgments and compensation for serious violations of international law. Recent developments in the United States and elsewhere, however, provide support for an emerging principle of universal civil jurisdiction, as well as suggest limits on its scope of application.

The main (but not sole) catalyst has been litigation under the Alien Tort Statute (ATS) in the United States, which represents a form of universal jurisdiction because it allows federal courts to hear tort claims by foreign nationals for serious violations of international law, no matter where they occur or by whom they are committed. Prior to *Sosa v. Alvarez-Machain*, few courts and scholars had analyzed the ATS as a form of universal civil jurisdiction or considered whether, and to what extent, the rationale supporting universal jurisdiction in the criminal sphere might also apply in the civil. However, briefs amicus curiae submitted in *Sosa* by the European Commission and Australia, Switzerland, and the United Kingdom raised the issue squarely, and both the Court's opinion and Justice Breyer's separate opinion responded. But the emerging norm of universal civil jurisdiction draws on sources from outside the United States as well, including caselaw from Canada, Italy, and the United Kingdom.

On this panel, we intend to address three questions: whether the exercise of universal civil jurisdiction in the civil sphere is lawful; if so, whether it is advisable; and if so, where lie its appropriate limits. As a starting point for discussion, I propose that the justification for universal jurisdiction in the criminal sphere encompasses its exercise in the civil sphere. If universal jurisdiction is justified by the need to end impunity for serious violations of international law, then tort and criminal remedies provide mutually reinforcing ways of achieving the same goal. Criminal convictions and civil judgments both play an important declarative function by identifying conduct that cannot be tolerated, and judicial decisions—whether civil or criminal—provide victims with an important sense of acknowledgment and closure. International law increasingly recognizes that serious violations of international law require compensation for and rehabilitation of victims, in addition to criminal prosecutions of perpetrators. The close relationship between criminal and civil cases is confirmed by the practice of many civil law states of allowing victims to attach civil claims to criminal prosecutions in the form of the *action civile*. Thus, both practice and principle support the exercise of universal jurisdiction to make available both civil and criminal remedies as a mechanism for ending impunity for serious violations of international law.

UNIVERSAL JURISDICTION IN CONTEXT

by *Luc Reydam's**

UNIVERSAL CIVIL JURISDICTION

When some twenty-five years ago the relatives of a Paraguayan torture (and murder) victim (*Filartiga*) discovered that the perpetrator, a former Paraguayan police officer, was residing in Manhattan, they filed a civil suit against him in a U.S. federal court on the basis of a then little-known domestic statute, the so-called Alien Tort Statute (ATS) of 1789, and won. *Filartiga* came at the end of the Carter administration, which had made human rights a cornerstone of U.S. foreign policy. At the international level, the process of formal criminalization of torture was well underway, precisely in response to brutal repression in Latin America, and the American Convention on Human Rights had just entered into force. It should be noted, however, that a treaty basis for universal civil jurisdiction was then (and still is now) lacking.

Besides a favorable domestic and international climate, plaintiffs in *Filartiga* found in the United States a receptive legal environment; the United States is a famously litigious culture and the United States has resourceful public interest law firms. Finally, the practice of "private" law enforcement, i.e., private litigation in defense of public rights or interests, is possible in the United States because of a combination of characteristics unique to U.S. law: (1) class actions, (2) the powerful evidentiary tool of discovery, (3) jury trials in civil cases, (4) the possibility of punitive damages, and (5) contingency fees for plaintiffs' attorneys. In subsequent ATS litigation against some multinational corporations, this combination of characteristics proved to be enough of a threat or incentive to settle the case.

Last year, the U.S. Supreme Court in *Sosa* essentially upheld twenty-five years of ACTA jurisprudence. The bottom-up precedent-based strategy of ATS litigators was vindicated. *Filartiga*, the first case, was clear-cut and totally unsympathetic: brutal torture and murder of a minor by a police officer, plain absence of local remedies, strong links to the forum at the time of litigation, and a defendant who no longer held any power. In the course of the years, a network of ATS litigators developed, which allowed them to exchange information and expertise, to strategize, and to assert some control over ATS litigation. One of their concerns was to build a body of case law solid enough before a possible review by the U.S. Supreme Court. After the powerless self-exiled former Paraguayan police officer, ATS litigators increasingly took on more powerful defendants to include in the end (former) heads of states, (multinational) corporations, the U.S. government, and foreign governments. When the Supreme Court finally stepped in, it simply put a stop to the broadening of the category of actionable ATS torts beyond the core international crimes (torture, war crimes, genocide, slavery, and crimes against humanity) so that ATS will not apply to, for example, serious environmental destruction and arbitrary arrest, but left intact the principle of universal civil jurisdiction.

Other nations for the most part took a neutral or resigned attitude vis-à-vis ATS, perhaps for lack of leverage over a notably independent judiciary of the most powerful country. International pressure and foreign policy considerations thus hardly bore on ATS litigation. In an amicus brief in *Sosa* the European Union even accepted the exercise of universal civil jurisdiction under ATS.

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Opposition against ATS is primarily domestic. The use of ATS against corporations (and against the U.S. government in *Sosa*) has rallied the business community and the Bush administration against it. Because the outcome of *Sosa* was not what they had hoped for, the next battle over ATS may be expected to be waged in Congress, especially since tort law reform is on the current administration's agenda.

UNIVERSAL CRIMINAL JURISDICTION

Eichmann aside, universal criminal jurisdiction is a fairly recent phenomenon. It is, on the one hand, a byproduct of the establishment of (ad hoc) international or mixed criminal tribunals—with either primary or complementary jurisdiction—and, on the other, the result of a sudden awareness of previously little known penal clauses in some international human rights and humanitarian law treaties. With regard to atrocities committed in the former Yugoslavia and Rwanda, the exercise of concurrent universal jurisdiction by national courts was encouraged by the prosecutor of the competent ad hoc international tribunals and by the UN Security Council. The international (legal) context of the first criminal prosecutions on the basis of universal jurisdiction was different from the context of the early ATS litigation.

Whereas the exercise of universal civil jurisdiction is hitherto concentrated in the United States, criminal investigations/prosecutions on the basis of universal jurisdiction are primarily a Western European phenomenon, involving nearly a dozen countries. Private law enforcement as known in the United States is nonexistent in Western Europe, but in some countries injured parties have the power to trigger a criminal investigation through the mechanism of *constitution de partie civile*. This procedural device turned out to be an important tool to set in motion the criminal justice system in cases unrelated to the events in Rwanda and the former Yugoslavia, most famously in *Pinochet* (Spain) and *Sharon* (Belgium).

Because there now are cases in a dozen or so countries, universal criminal jurisdiction certainly is more truly “universal” than universal civil jurisdiction. Yet, its decentralized nature has proved to be a weakness. This was demonstrated by no less than four competing extradition requests in the *Pinochet* case. From a strategic litigating point of view, decentralization is a serious handicap. There was and is no network to strategize and coordinate litigation. Add to this a lack of public interest litigators and many systems being unfamiliar with the notion of precedent. The results are known: unwise complaints against officials from powerful states, frivolous complaints against others, and risky appeals.

Jurisdiction without an objective and material link is arbitrary and ultimately becomes the jurisdiction of the strongest: the actual exercise purely depends on the power relationship between the states involved. It may be noted that the only cases that have gone to prosecution concern individuals out of power fleeing their home state.

Has universal criminal jurisdiction a future? In cases involving refugees, exiles, or immigrants, the answer is definitely positive. Such individuals can no longer count on (diplomatic) protection from their home states, newly created war crime units in forum states are waiting for work and, if necessary, transnational justice campaigners will hold the feet of officials to the fire. On the other hand, a repeat of *Pinochet* or *Sharon* is highly unlikely. The future of universal jurisdiction in absentia over less powerful defendants may depend on the ICC prosecutor. As an elected organ of the Court, the prosecutor may provide the coordination that has been lacking and could give universal jurisdiction a quasi-conventional basis among states-parties.

CONCLUSION

Universal civil jurisdiction on the one hand and universal criminal jurisdiction on the other are very much the products of specific legal and sociopolitical cultures. They are thus likely to remain concurrent yet (geographically) separate practices.

JUSTICE WITHOUT BORDERS: UNIVERSAL CIVIL JURISDICTION

by *Beth Van Schaack**

Although the concept of universal jurisdiction arose in the criminal context, it is increasingly finding expression in the civil tort context, notably in the United States but also in an ancillary form in Europe and elsewhere. Many commentators seem to assume the existence of a civil analog to criminal universal jurisdiction,¹ but very little conceptual work has been undertaken to consider whether universal civil jurisdiction has the same status and scope under international law and whether it should be subject to greater or lesser restrictions than its criminal counterpart. International law authorizes universal civil jurisdiction, in part because it operates as a less intrusive form of jurisdiction than universal criminal jurisdiction. To the extent that universal civil jurisdiction does impinge more acutely on the prerogatives of state sovereignty, other features of civil litigation mitigate these concerns in practice. In addition, universal civil jurisdiction has an affinity with other doctrinal trajectories in international and human rights law concerned with access to justice and the rights of victims to reparations.

A checklist of factors can be identified to address the question of whether the reach of criminal and civil universal jurisdiction is coextensive under international law. Drawing upon domestic analogies, one might intuit that, in general, exercises of criminal jurisdiction are more acute than exercises of civil jurisdiction. The criminal law carries greater opprobrium and stigma than the civil law. A finding of civil responsibility will result in the award of a money judgment, but if the defendant has no assets in the forum, the ultimate result may be little more than declaratory relief with little practical effect. Under the maxim *qui peut le plus peut le moins*, if universal criminal jurisdiction exists over a particular norm, then so too should universal civil jurisdiction.

This presumed jurisdictional hierarchy may be overturned in the international sphere. For one, universal civil jurisdiction actions are not subject to executive discretion. Private litigants initiate suits based upon their priorities and the amenability of the defendant to suit. Plaintiffs are not attuned, or even equipped, to balance comity, foreign policy, and other prudential concerns that are within the province of the executive acting within the foreign affairs and criminal law realms. As a result, these suits have the potential to generate a form of plaintiffs' diplomacy that may complicate interstate relations.

Given the lack of prosecutorial discretion, the agency theory of universal jurisdiction—which posits that states exerting universal jurisdiction over international law violations are acting as agents of the international community in seeking enforcement of shared norms—is less compelling. Civil suits may primarily vindicate private interests, and the notion of a private attorney general may not translate to the international sphere. The lack of dependency on state prosecutorial mechanisms may be precisely why civil litigation is attractive to victims. Even in Europe where universal jurisdiction is manifested primarily in the criminal

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¹ See, e.g., Restatement (Third) of Foreign Relations Law §404 (1987).

realm, many actions have been initiated by victims constituting themselves as *parties civiles* as part of a transnational anti-impunity advocacy campaign.

Notwithstanding the lower barriers to suit in the civil context, standalone cases of universal civil jurisdiction may be more restrained in practice. As the *Pinochet* case demonstrates, the initiation of criminal proceedings may automatically trigger the operation of an extradition regime that will ensure the presence of the accused in a state where he may have no contacts other than the indictment issued against him. At the close of the ICJ's *Arrest Warrant* case,² it remained an open question whether international law permits the initiation of a universal criminal jurisdiction action *in absentia*. In the civil context, under background principles of personal jurisdiction, the actual or constructive presence of the defendant in some capacity will be a precondition for suit. So, the grasp of a regime of universal civil jurisdiction will reach only as far as the forum state's personal jurisdiction principles. In this way, exercises of universal civil jurisdiction may parallel the reach of existing *aut dedere aut prosequi* treaty regimes governing particular international crimes, which seem to presume the presence of the accused in the forum state at least at the time of arrest. These treaties offer advanced state consent to the prosecutions of nationals when they are found abroad, which could be construed to encompass civil claims as well.

To date, no state has enacted special personal jurisdiction rules to govern exercises of universal civil jurisdiction. Even the Torture Victim Protection Act³ in the United States invokes standard personal jurisdiction rules. Although the effort is now defunct, states indicated a preliminary willingness to consider special personal jurisdictional rules for exercises of universal civil jurisdiction in the context of the Hague Conference on Private International Law's project to develop a comprehensive convention on jurisdiction and the enforcement of foreign judgments.⁴ The draft treaty did not set forth positive rules of personal jurisdiction in the universal civil jurisdiction context, but it did exempt human rights cases from the prohibitions being developed on more "exorbitant" forms of personal jurisdiction. Recognizing the conceptual affinity between civil and criminal universal jurisdiction actions, delegates were thus willing to privilege exercises of universal civil jurisdiction vis-à-vis more standard civil and commercial matters.

Other features of civil procedure act as a substitute for prosecutorial discretion. These include the doctrine of *forum non conveniens*, exhaustion of local remedies requirements, the political question and act of state doctrines, statutes of limitation, and principles of comity as well as the various immunities that attach to states and state actors.⁵ In addition, the enforcement of foreign judgments in forums in which the defendant has assets is always subject to public policy and other defenses to enforcement. Taken together, these doctrines create a reasonableness test for extraterritorial exercises of jurisdiction and protect against the sort of overreaching most criticized in criminal context.

Universal civil jurisdiction may be less likely to provoke interstate friction, because the role of the state in enabling civil claims is more attenuated and passive: the state simply provides a forum, undifferentiated rules of procedure, and a neutral adjudicator. The state's coercive power is at its maximum when it is asked to enforce a judgment to the extent that the defendant has assets in the forum. In contrast to a criminal suit, the executive is not

² Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 ICJ REP. 3 (Feb. 14), reprinted in 41 ILM 536 (2002).

³ 28 U.S.C. §1350 note (1994).

⁴ See generally, Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141 (2001).

⁵ See generally, K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEXAS INT'L L. J. 1 (2004).

initiating or pursuing the action or physically detaining the defendant and may be empowered to submit statements of interest opposed to particular cases. This power of intervention in suits involving foreign relations does, of course, suggest that the fate of such suits is at least partially in control of the executive, which can place the executive in the awkward position of having to justify different responses.

One feature of universal civil jurisdiction that renders such suits potentially more disruptive to interstate relations is the fact that states and their constitutive elements can be sued civilly, whereas they cannot be prosecuted criminally. The Flatow amendment to the U.S. Foreign Sovereign Immunity Act, for example, implements an expanded form of passive personality jurisdiction by withholding immunity for certain designated states in cases arising out of acts of torture, extrajudicial killing, and certain forms of terrorism.⁶ To date, this approach has not been followed by other states, where basic principles of foreign sovereign immunity have operated to bar suits against states.⁷

Universal civil jurisdiction suits also sit at the convergence of several modern and interrelated doctrinal trajectories in international law. Most importantly, all forms of universal jurisdiction reflect the revival in the last decade of the Nuremberg legacy of individual accountability for international law violations. In addition, international law is increasingly concerned with the rights of victims to a judicial remedy and to reparations, not only the punishment of perpetrators. These developments find expression in treaties that call upon states to provide redress and an enforceable right to compensation and also in various "soft law" declarations addressed to the rights of victims. To be sure, these developments do not necessarily postulate a right to pursue a tort remedy for extraterritorial conduct, but there is an affinity between these developments and universal civil jurisdiction. Finally, broader globalizing forces have occasioned an expansion in principles of national jurisdiction generally, giving rise to a greater acceptance of previously controversial principles such as the passive personality principle and the effects doctrine.

We are now in a period of customary international law formation with respect to universal jurisdiction. State universal jurisdiction practice in the criminal context is beginning to converge. Developments in immunity doctrines suggest an increased role for standalone tort suits. In the United States, new guidance from the Supreme Court suggests a more restrained, but still viable, approach going forward. Given the international movement toward individual accountability for rights violations, domestic civil redress provides an important tool in a growing arsenal of mechanisms to enforce international law on the international, regional, and domestic levels. Supranational mechanisms will never supplant domestic proceedings, so domestic courts will continue to play a central role in enforcing international law. Victim-centered civil redress has an important role to play in this increasingly integrated regime of international law enforcement. Because these norms are not over-enforced, we should nurture these alternative avenues of redress, especially in this formative period of international law development.

⁶ 28 USC 1605(a)(7).

⁷ *See, Jones v. Ministry of the Interior Al Mamlaka Al-Arabiya as Sudiya and another*, [2004] EWCA Civ 1394; *but see, Ferrini v. Federal Republic of Germany* (Cass. Sez. Un. 5044/04), 87 *Rivista di diritto internazionale* 539 (2004).

UNIVERSAL CIVIL JURISDICTION: IS IT LEGAL? IS IT DESIRABLE?

by *Menno T. Kamminga**

Universal civil jurisdiction or universal tort jurisdiction may be defined as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern. Domestic laws explicitly enabling courts to exercise jurisdiction on this basis are very rare indeed. The two pieces of U.S. legislation that tend to be cited as examples of laws providing for universal civil jurisdiction in fact do not qualify as such. The Alien Tort Statute (ATS) provides for a cause of action only for aliens and not for U.S. nationals. The 1991 Torture Victim Protection Act (TVPA) does provide for a right for persons of any nationality but it applies only to crimes committed “under actual or apparent authority, or color of law, *of any foreign nation*” (emphasis added). It therefore excludes proceedings against U.S. officials unless they were acting under the authority of another state.

In contrast to the familiar case law under the ATS and the TVPA, in the United States there have been no proceedings based on universal criminal jurisdiction so far. Although U.S. legislation permits the exercise of universal criminal jurisdiction in respect of the crime of torture, none of the numerous foreign perpetrators of torture found on U.S. territory have so far been brought to justice. The United States worked hard to try and find other states willing to try Pol Pot and it cooperated with Israel in the extradition of John Demjanjuk so that he could stand trial in that country. But mostly the United States openly and proudly deports perpetrators of human rights abuses committed abroad found on its territory without any attempt to obtain prior assurances that they will be prosecuted in those foreign states. Through this policy of exporting criminals rather than bringing them to justice on the basis of universal jurisdiction, the United States is in fact sponsoring their continued impunity.

The only other state in which there is anything resembling a practice of civil proceedings based on universal jurisdiction is the United Kingdom. There is therefore an intriguing discrepancy between countries with a common law system and those with a civil law system. In civil law countries, the attention of the authorities and activists alike tends to be focused on the exercise of universal jurisdiction under criminal law. All convictions so far on the basis of universal jurisdiction have occurred in civil law countries (Belgium, Denmark, Germany, the Netherlands, and Switzerland). One reason for this may be the stricter rules of evidence in common law countries. Testimony taken abroad, which is often a crucial element in universal criminal jurisdiction cases, is usually not admissible as evidence in common law jurisdictions.

The idea of universal civil jurisdiction raises two main questions: (1) Is it permitted by international law? and (2) Is it a desirable response to impunity of perpetrators of international crimes?

IS IT LEGAL?

There are longstanding rules of international law permitting or obliging states to investigate and prosecute certain crimes under international law on the basis of universal criminal

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jurisdiction. The duty to investigate and prosecute war crimes on this basis, for example, was codified in the 1949 Geneva Conventions.

But the same cannot be said of universal civil jurisdiction. No rule of international law specifically authorizes let alone obliges the exercise of universal civil jurisdiction in respect of human rights offenders. Article 14(1) of the UN Convention Against Torture provides that a torture victim has a right to fair and adequate compensation. But there is no indication there or anywhere else in the Convention that that right must be enforceable on the basis of universal jurisdiction. In view of the elaborate provisions on universal criminal jurisdiction contained in the Convention, it cannot be assumed that the Convention provides for an implicit obligation to provide for universal civil jurisdiction. Interestingly, even the elaborate Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law that are expected to be adopted by the UN Commission on Human Rights at its 2005 session, do not provide for universal civil jurisdiction.

An important indication, nevertheless, that the exercise of universal civil jurisdiction is not incompatible with international law derives from the fact that states whose nationals or companies have been subjected to alien tort claims in the United States have not objected to this. The European Union, for example, has not hesitated to forcefully criticize the exercise of extraterritorial jurisdiction by the United States in other instances, e.g. to prevent the export of oil and gas equipment to Russia¹ and under the Helms-Burton Act.² But the European Commission (the European Union's executive body) has specifically stated that it is not opposed to the exercise of universal jurisdiction in tort cases even though the Commission obviously realized that this competence enables U.S. courts to exercise jurisdiction over European companies. In its amicus brief in *Sosa v. Alvarez-Machain*, the Commission merely urged that jurisdiction in such cases should be exercised with due respect for the limitations imposed by international law.³

U.S. Supreme Court Justice Breyer, in his concurring opinion in *Sosa v. Alvarez-Machain*, wrote that universal tort jurisdiction would be "no more threatening" to other states than universal criminal jurisdiction because the criminal courts of many nations allow victims of criminal offences to be represented and to recover damages as part of the criminal proceedings. In support of this view he cited footnote 48 of the European Commission's amicus brief. In turn, Breyer's opinion was cited with approval by England's Court of Appeal in *Jones v. Ministry of the Interior of Saudi Arabia*. Surely a fine example of a transatlantic support of the idea of universal civil jurisdiction!

With due respect, however, the recovery of damages as part of a criminal trial is not the same as the possibility to claim damages by way of a freestanding remedy. The reluctance of states to establish a permanent international claims commission for victims of war damage as opposed to an international criminal court indicates that, contrary to conventional wisdom, states do not necessarily consider civil remedies as less intrusive than criminal remedies.

Pursuant to the approach taken by the Permanent Court of International Justice in the *Lotus* case and in the absence of objections from states affected by the exercise of universal civil jurisdiction, it may nevertheless be assumed that it is in principle not contrary to

¹ 21 ILM (1982) 891.

² 35 ILM (1996) 397.

³ It should not be assumed, however, that the commission was speaking for the European Community as a whole. In their joint amicus brief in this case Australia, Switzerland, and the United Kingdom took a more restrictive position and argued that the exercise of universal civil jurisdiction was inconsistent with international law.

international law. It would make sense to assume that the exercise of universal civil jurisdiction is permitted in respect of the same unlawful conduct as universal criminal jurisdiction and that similar conditions apply. Accordingly, civil proceedings would be permitted on the basis of universal jurisdiction in respect of injury arising from genocide, war crimes, crimes against humanity, and torture. Apart from demanding the presence of the defendant it would also make sense, as suggested by the European Commission in its amicus brief, if claimants were required to demonstrate that they had exhausted reasonable remedies in the state where the conduct giving rise to the claim had occurred.

IS IT DESIRABLE?

Since it is still unusual for perpetrators of human rights abuses to be brought to justice at all, one could simply argue, the more remedies the better. This, in my view, would be a misguided approach. It is a widely held view in many if not all legal systems that tort proceedings are no substitute for criminal proceedings. Civil proceedings do not to the same extent reflect the opprobrium associated with serious criminal offences. Moreover, the response to serious crime should not be privatized by leaving it entirely to the victims (even though in some countries victims can play an important role in criminal proceedings as *parties civiles*).

Many states are reluctant, for whatever reasons, to prosecute foreign perpetrators of international crimes found on their territory. In such circumstances it is understandable that victims and their supporters will take advantage of the lower standard of evidence required by bringing tort claims including tort claims in respect of crimes committed abroad. This should not remove the pressure to bring criminal proceedings from the state in which the suspect is found. The U.S. response to human rights violators found on its territory—expulsions and alien tort claims—in my view is not a model that is particularly attractive or one that can easily be exported to other states.

In sum, while I am in favor of the effective implementation of the right to reparation for victims of human rights abuses, I question the wisdom of pursuing this objective through the exercise of universal civil jurisdiction, i.e., through claims without a nexus to the forum state other than the presence of the defendant. Universal jurisdiction is a rough remedy that should remain reserved for criminal proceedings and for civil proceedings directly associated with them. It may very well be that freestanding civil proceedings based on universal jurisdiction constitute an appropriate remedy in countries such as the United States. But in view of the differences in legal cultures, I seriously doubt whether ATS/TVPA type remedies could be usefully transplanted to many other countries.⁴

THE NEED TO RESOLVE THE PARADOXES OF THE CIVIL DIMENSION OF UNIVERSAL JURISDICTION

by Lorna McGregor*

While universal civil jurisdiction does not appear unlawful on its face, the paradox resulting from the actors involved points to potential challenges in its application. Whereas the initiation

⁴ For an opposing view, see Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. OF INT'L LAW 1 (2002).

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of criminal complaints is usually confined to state authorities—the *partie civile* system in some civil law jurisdictions being a notable exception—the survivors of serious violations of international human rights and humanitarian law can bring civil suits themselves.

The involvement of individuals directly affected by the underlying abuse suggests strong prospects for enforcement. Although civil suits are often framed as individualistic and motivated solely by pecuniary gain (and, of course, financial compensation almost always plays a part in the decision to sue for the simple reason that as a result of the abuse endured, survivors may be physically, mentally, or emotionally unable to work), a point often overlooked is that financial compensation usually only forms one aspect of a range of goals pursued through civil suits. From the perspective of survivors, civil suits offer an important reparative process through the opportunity to participate in the initiation and progress of a case and the transformation of survivors from faceless witnesses into substantively involved parties.¹ Beyond the impact on direct survivors, the public acknowledgment of the wrong committed may create public discourse, social reform, and activism as well as acting as a measure of punishment through “public exposure.”² In pursuing similar and overlapping objectives to criminal proceedings, civil suits significantly contribute to an holistic approach to combating impunity for serious violations of international human rights and humanitarian law.³

Although some commentators argue that the recognition of jurisdiction in civil proceedings is less controversial than in criminal proceedings, the wider reach of civil suits over powerful actors, such as states and multinational corporations, has invoked a strong backlash against the application of the civil dimension to universal jurisdiction. As already demonstrated by the experience of the criminal dimension to universal jurisdiction, powerful actors such as states usually concede the prosecution of lower-ranking officials as the employment of the rhetoric of exceptionalism allows a distancing from the state structure itself. In contrast, states routinely object to the prosecution of high-ranking officials as their accountability points to the responsibility of the state system. The possibility of directly pursuing the accountability of the power structures through civil proceedings highlights the way in which the strong prospects for enforcement are countered by a heavy resistance to the civil dimension of universal jurisdiction. As was demonstrated in the *Sosa v. Alvarez-Machain* case,⁴ powerful actors dispute the use of civil proceedings on the basis of national sovereignty, the “unfairness” of suing corporations when states may be procedurally protected by state immunity, the disruption to trade and investment, and even the threat to human rights protection. In this way, the application of universal jurisdiction in civil proceedings reflects the wider conflict between principles of classical international law and newer principles, such as international human rights law.

In almost every case in which the issue of universal civil jurisdiction has been considered, courts have faced the quandary of how to balance the competing issues of traditional and modern international law. In this respect, the three cases of *Sosa v. Alvarez-Machain*, *Bouzari*

¹ See, Beth Van Schaack *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 *VAND. L. REV.* 2305 (2004); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 *MICH. L. REV.* 2031, 2101–2 (1998).

² Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 3, 14 (2002).

³ H. H. Koh, *Symposium: International Law: Article: Transnational Public Law Litigation*, 100 *YALE L.J.* 2547, 2372 (1991).

⁴ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

v. Iran,⁵ and *Ron Jones v. Saudi Arabia*⁶ will be used as illustration of the need for a deeper investigation into the possible ways to address the challenges faced to allow the scope and application of the civil dimension of universal jurisdiction to develop with consistency.

SOSA V. ALVAREZ-MACHAIN

The Supreme Court confirmed the jurisdictional basis of the Alien Tort Statute for aliens seeking to access the courts of the United States to adjudicate allegations of serious violations of international human rights and humanitarian law. However, it attempted to narrow the scope of permissible litigation by interpreting the statute as restricted to a limited category of violations of the law of nations without creating new causes of action. The Court also found that once the jurisdictional question was decided, substantive protections, such as the doctrine of forum non conveniens, should be construed narrowly in order to prevent an opening of the floodgates to claims before U.S. courts. The U.S. District Court’s recent application of *Sosa* to *In re South African Apartheid Litigation* further demonstrates the judiciary’s attempt to find a suitable compromise between the need to provide access to justice and the determination of a framework to limit a surge in claims.⁷ The court interpreted *Sosa* as establishing a four-part test requiring:

- 1) The basis of the claim on a norm recognized in international law.
- 2) The courts should refrain from judicial activism.
- 3) The “courts should be wary of creating private rights of action from international norms because of the collateral consequences such a decision would have.”
- 4) The implications to foreign relations must be taken into account.⁸

BOUZARI V. IRAN

The judgment of the Ontario Court of Appeal highlights the judiciary’s concern to find a midpoint between state immunity and the inability of the appellant to bring suit in Iran, due to the nature of the alleged underlying violation of torture perpetrated by Iranian officials. The court first identified two customary tests for jurisdiction: the test of a “real and substantial connection” between the subject matter of the litigation and the forum and forum non conveniens. The court determined that the forum non conveniens test was inapplicable due to the lack of availability of an alternative forum, in particular Iran. Equally, as a result of its preoccupation with the lack of an alternative forum, the court considered the “real and substantial connection” test as potentially restrictive. However, in the end, the court rejected arguments by both Amnesty International (in favor of the application of universal civil jurisdiction) and by the attorney-general (proposing a more stringent jurisdictional test to reflect the concerns of foreign relations and international comity). Without explaining how a balance would be struck in practice, the court reverted to the “real and substantial connection” test, deeming it to be underpinned by flexibility.⁹

⁵ *Bouzari v. Iran*, Ontario Court of Appeal, O.J. No. 2800, 3169 (2004).

⁶ *Jones v. Ministry of the Interior Al-Mamlaka Al-Arabiya as Sudiya and another; Mitchell v. Al-Dali and others*, EWCA Civ 1394 (2004).

⁷ *In re: South African Apartheid Litigation v. Citigroup Inc. et. al.*, 346 F.Supp. 2d 538 (S.D.N.Y. 2004).

⁸ *Id.* at 22–24.

⁹ *Bouzari*, *supra* note 5 at 21–24.

RON JONES V. SAUDI ARABIA

Finally, the case of *Ron Jones*, which is currently on appeal to the House of Lords in the United Kingdom illustrates the difficulty courts have in dealing with the competing issues. In contrast to *Al-Adsani v. U.K.*, in which the European Court of Human Rights applied a blanket immunity without analyzing why comity and international relations reflected a legitimate aim, the judgment of the Court of Appeal appears to have attempted to strike a balance between the issues involved by upholding the immunity of the state of Saudi Arabia but denying the protection of immunity to the named individual officials.

On the issue of the civil dimension to universal jurisdiction, the Court argued that, “if considerations of proportionality have any relevance to a state’s ability to claim state immunity ... then the nature and extent of any jurisdiction that may exist are likely to be directly relevant factors.”¹⁰ Although the Court quoted Justice Breyer’s opinion in *Sosa* as demonstration of support for the civil dimension to universal jurisdiction, it did not want to go as far in its own judgment. Rather, it found that Article 14 of the Convention Against Torture does not establish “universal tort jurisdiction” but does “offer some encouragement for the view that there is no international consensus to the contrary of such a case.”¹¹ In this respect, the Court then minimized the distinction claimed between criminal and civil jurisdiction and identified the need for limits on the jurisdiction in concluding that the difficulties in finding a balance cannot be resolved by “adopting a principle which simply excludes all jurisdiction.”¹² Although the Court noted that a balancing approach does not equate to universal civil jurisdiction, in obiter it conceded that “it might well in my view be regarded as disproportionate to maintain a blanket refusal of recourse to the civil courts of another European jurisdiction.”¹³

In summary, the experience of the demise of Belgium’s far-reaching law on universal jurisdiction brought about by heavy political pressure by the United States and Israel following controversial cases against prominent serving officials and the decision of the International Court of Justice in the *Arrest Warrant* case¹⁴ indicates the danger of pushing the jurisprudence too quickly. Yet, whatever the challenges arising from the assertion of universal jurisdiction whether in the criminal or civil sphere, they do not justify the continuation of impunity or a failure to hold the perpetrators, especially those in power, accountable. Rather, they indicate a need for a careful consideration of the issues involved. For this reason, safeguards and a careful development of the jurisprudence is required in order to prevent a rejection of universal civil jurisdiction before it has had the opportunity to emerge more fully and effectively.

¹⁰ *Jones*, *supra* note 6 at ¶¶ 29–30.

¹¹ *Id.* at ¶ 60.

¹² *Id.* at ¶¶ 75–81.

¹³ *Id.* at ¶¶ 82–91.

¹⁴ Case Concerning Certain Criminal Proceedings in France (*Congo v. Fr.*), 2003 ICJ REP. 17 (June 2003), reprinted in 42 ILM 852.

ALTERNATIVE PERSPECTIVES ON THE INDEPENDENCE OF INTERNATIONAL COURTS

The panel was convened at 12:30 p.m., Friday, March 31, by its chair, Richard H. Steinberg of the University of California at Los Angeles School of Law, who introduced the panelists: Eric A. Posner of The University of Chicago School of Law; Heiner Schulz of The University of Pennsylvania Department of Political Science; Judge Rosalyn Higgins of the International Court of Justice; and Karen J. Alter of the Northwestern University Department of Political Science.

A MAP OF THE ISSUES

*by Richard H. Steinberg**

Do international courts matter? More specifically, do international courts behave sufficiently independently of the interests of powerful states to have a meaningful effect on state behavior?

Two clear and opposing stances on this question developed in the early 1980s and have framed much of the debate that has followed. The structural realist stance has constituted the null hypothesis. Deducing from regimes theory, this view holds that international institutions and courts cannot act in contradiction to the interests of powerful states. If a court does so, then powerful states will withdraw consent to its jurisdiction, or take other action that will cause the international court to collapse or become irrelevant. Therefore, the argument goes, international courts can have no meaningful independent effect on state behavior. Institutionalists have offered a competing perspective. Using economic logic, some institutionalists argue that international courts may have a meaningful independent effect on state behavior insofar as they solve cooperation problems that would not otherwise be solved. Some other institutionalists, influenced by sociology, argue that courts may meaningfully affect state behavior through the normative or cognitive “pull power” of legitimate decisions.

Three sets of research questions have emerged from this initial framing of the problem. First, what functions are performed by independent international courts? Several functions have been suggested, usually to buttress an institutionalist stance. Commentators have suggested that courts may complete incomplete contracts, clarifying ambiguities and filling gaps in treaties. Others have argued that the establishment of a court and submission to its jurisdiction may demonstrate the credibility of powerful states’ commitment to a treaty. Still others have argued, particularly in the international criminal law context, that courts may help build or spread particular norms or principles embodied or implicit in a treaty.

Second, how should we conceptualize the extent to which international courts are constrained? Most commonly, a strictly formal analysis has been used: treaty rules and procedures are examined to identify the possibility of a check on or correction of a court. However, commentators have increasingly considered informal political factors that may constrain the independence of international courts, such as threats to halt budget contributions that support an allegedly activist court; threats to diminish or deny a court’s jurisdiction; establishing a conservative selection process for judges, such as use of a “litmus test” for their selection; limiting the tenure of judges; refusal to comply with court decisions; and threats to rewrite

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