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EXAMINING UNIVERSAL JURISDICTION

SONDRA ANTON

*“Until recently, it seemed that if you killed one person, you went to jail,
but if you slaughtered thousands, you usually got away with it.”
-Reed Brody, Spokesperson for Human Rights Watch¹*

This paper considers the heightened debate over the role of universal jurisdiction within international law, and concludes it should not be judged based on the appropriateness or foundation set by remote precedents. Given the clear disregard for physical integrity rights repeatedly demonstrated by even the most “democratic” of modern governments, it is more pressing than ever to develop universal jurisdiction and ensure the norm’s institutionalization in practice.

¹ Reed Brody, “Milosevic, Saddam, Taylor: Who’s Next?” *The New York Times*, March 31, 2006.

THE MODERN DOCTRINE OF UNIVERSAL JURISDICTION

According to a 2009 report by Human Rights Watch, universal jurisdiction is “the ability of the domestic judicial systems of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals.”² In layman’s terms, universal jurisdiction represents the idea that the most serious crimes may potentially be prosecuted in any court, anywhere, at any time.

There are three central motivations behind the doctrine of universal jurisdiction that underpin its relevance both to the system of international human rights law today. The first of these principles deals with the issue of sovereignty and the preference for territorial jurisdiction for the prosecution of serious crimes. Widely defined as the “supreme authority within a territory,” sovereignty is

² "Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly," *Human Rights Watch*. <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

meant to foster the autonomy and independence of individual governments.³ In order effectively to establish and enforce law and order within a society, and appropriately advocate for a given citizenry, traditional diplomacy holds the preservation of state sovereignty in high esteem. In regards to the prosecution of crimes, this arrangement allows for states to exercise jurisdiction over crimes that take place on their territories or against their people.

Still, universal jurisdiction does not allow states to immediately bypass the principal authority of domestic courts to prosecute abuses that took place on their soil, nor does it necessarily suggest an attempt to hinder national efforts to provide justice for crimes committed on their territory, or upon their citizens. If a country is unable or unwilling to prosecute its own for such serious human rights abuses, only *then* may foreign courts step in by

³ *Stanford Encyclopedia of Philosophy*, Summer 2014 ed., s.v. "sovereignty." Accessible at: <http://plato.stanford.edu>.

asserting universal jurisdiction. The application of universal jurisdiction serves as a metaphorical safety net for justice, as there is no excuse, not even the preservation of state sovereignty, which can justify the perpetration of certain heinous crimes.

The most important reason that state sovereignty is a central principle of international law is that, at its core, the doctrine is designed to enhance the protection of civilians. Taking measures to preserve the authority of governments that represent their people facilitates this process. Although this principle of the ultimate legitimacy of a grounding in popular sovereignty is often forgotten amidst the politics of international law, state sovereignty protects the people, not the rulers. Therefore, in a debate over priorities, human rights must always be valued above state sovereignty.

Secondly, at least since the mid-20th century, the doctrine of universal jurisdiction draws much of its energy from the phenomenon of mass atrocities. As mentioned earlier, the nature of the underlying crime—or, more

specifically, its severity—is a crucial factor to weigh in determining the need for universal jurisdiction. As outlined most recently in the 1998 Rome Statute of the International Criminal Court, such crimes fall into the categories of genocide, crimes against humanity, war crimes, and the crime of aggression. The unmitigated brutality of these crimes means that regardless of who is responsible for carrying them out is insignificant; in other words, there can be no justification for the abuses themselves and therefore no defensible application of immunity. According to universal jurisdiction, the perpetration of one of these crimes is not simply an offense against an individual, but the entirety of the human world; in essence, this principle converts such heinous transgressions into crimes that cross all sovereign boundaries, classifying them as “crimes without borders.”⁴ This characterization does not apply to lesser offenses.

⁴ Laura Secor, “The Year in Ideas: A to Z.; Justice Without Borders,” *The New York Times*, December 9, 2011.

Then again, why would judicial processes not proceed on a national level, given the severity of these crimes and the state's inherent responsibility to protect its people? How could it be so difficult to achieve justice in one's own country? Most often, judicial inaction has to do with the status of the accused suspected of the crime, which brings us to the final motivation behind universal jurisdiction: the need to tackle impunity for the powerful perpetrators that human rights prosecutions threaten most.⁵

Indeed, universal jurisdiction is often the only recourse in order to prosecute crimes committed by the state itself against its own citizens. Domestic courts are often rendered useless when states undergo "pacted" transitions, which are premised on the understanding that the outgoing executive will continue to maintain a degree of influence in the new government. For this reason,

⁵ Piracy is an outlier in this model, but will be discussed in a later section in this chapter.

certain regimes may affect policy and even potentially limit the performance of certain governmental bodies, such as the judiciary, even after the end of their mandate.⁶ In comparison, in a “ruptured” transition, there is a complete collapse of the previous regime and no negotiated agreement between the former authoritarian government and new administration.⁷ More often than not, these societies are credited with achieving a greater degree of post-conflict reconciliation, particularly through justice and accountability initiatives.

THE ORIGINS OF UNIVERSAL JURISDICTION

Universal jurisdiction has long been traced back to piracy. Before former dictators such as Augusto Pinochet ever traveled freely around Europe in private jets, pirates such as Blackbeard sailed the oceans, operating with a similar sense of impunity. Indiscriminately attacking and

⁶ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton & Co., 2011), 32.

⁷ Sikkink, *The Justice Cascade*, 33.

robbing those they encountered at sea before navigating away to assault their next victims, these brigands cultivated a climate of fear that was worsened by the collective uncertainty that hung over the debate about appropriate accountability for such crimes. If the seas belonged to everyone, who would have the authority to prosecute these criminals?

By the 1700s, international legal scholars had linked the crime of piracy to the concept of *hostes humani generis* (“enemy of mankind”) in order to address this jurisdictional quandary. By the 1800s, slave traders had been added to this category. Pirates, hijackers and slave traders who terrorized the oceans were to be granted no legal sanctuary; crimes committed at sea fell under the purview of all of humanity, and so could be prosecuted by any given nation.

In examining the origins of universal jurisdiction, scholars have often cited early admiralty law. In many ways, this is a valid analogy: efforts to prosecute both piracy and serious crimes such as torture or genocide have

been designed to force pirates and tyrants alike to held accountable to a higher judicial power, instead of continuing to live freely without punishment for their grave transgressions. Indeed, the primary issue facing the patrolling of ocean spaces and the reining in of state abuse may be categorized by the fact that in the past, both types of transgressors seemed ultimately answerable to nobody—whereas pirates were protected by the vastness of the seas, modern dictators have often insulated themselves from prosecution by hiding behind the constraints of state sovereignty or diplomatic immunity.

A VALID COMPARISON?

Do the past and present theories of universal jurisdiction maintain the same objectives beyond a prima facie discussion of accountability?

Although piracy is understandably considered a serious offense, the driving force in fixing it to the notion of *hostes humani generis* (“enemy of mankind”) was not necessarily the severity of the crime itself. In other words,

piracy was emphasized not so much as a universal crime, but as a universally *prosecutable* crime. Whereas offenses such as piracy, slave trading, and banditry were clearly more prevalent before the industrial and technological revolutions, it is hard to conceptualize piracy as a crime comparable in severity to the mass slaughter of tens of thousands of men, women, and children based on their ethnicity or even to the institutionalized and widespread state practice of torture that existed under Latin American dictatorships of the 1970s and 80s. Overall, jurisdictional concerns drove the interest in universalizing the crime of piracy; for today's "core crimes," however, the organizing idea is the heinousness of the transgressions themselves.

Furthermore, heads of state were never the central perpetrators of piracy, and thus had very little to lose by making crimes on the high seas easier to prosecute. Whereas the early concept of universal jurisdiction actually expanded the state's powers, today it threatens to limit them. Perceived threats to this hierarchy of norms became

a serious point of contention following Pinochet's arrest as a former head of state in October 1998. By contrast, changes in admiralty laws in the 1700s actually allowed for countries to lay claim to the oceans when needed, bolstering the potential reach of their sovereign power. Although lawless bandits were the initial targets of universal jurisdiction, the device of making piracy a "universal" offense now seems to have been more a tool of prosecutorial convenience rather than a revolutionary precedent for a judicial attack on sovereignty.

Instead of analyzing the origins of universal jurisdiction as stemming from piracy, I propose tracing the concept to an even earlier moment—the creation of Magna Carta, or the "Great Charter," over 800 years ago in England. It is perhaps noteworthy that the very nation that set this historic precedent, establishing in writing that no one, not even the King, was above the law, would also be hailed, centuries later, for challenging the impunity to

which powerful heads of state had long become accustomed.

As outlined above, the modern doctrine of universal jurisdiction revolves around three important dimensions of a purported crime: perpetration, nature, and location. Although Magna Carta does not address the latter two features, as the first official declaration against impunity for heads of state, the centuries-old treaty is logically connected to the idea of universal jurisdiction.⁸ Given the similarities between the brutality and disregard for human life demonstrated by King John and his predecessors in feudal England, and the institutionalized policies of state terror that became commonplace in Chile during the 1970s and 80s, it should be similarly infuriating to note the

⁸ The Magna Carta and the doctrine of universal jurisdiction (as codified in international treaties such as the Convention against Torture, etc.) also share many weaknesses: for example, both have been difficult to enforce and often not taken seriously by signatories, and considered overly idealistic by critics.

privilege afforded Pinochet to act as if he were above the law in the late 20th and early 21st centuries.

The Magna Carta set the baseline for democracy, and theorized the importance of “a government of laws and not of men.” In perhaps the most enduring and influential section of the treaty to modern governance, chapter 39 established that:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.⁹

By limiting the power of the King, the Magna Carta forever redefined the relationship between the sovereign and the subject. This ideology inspired the American Bill of Rights in 1791, the 1948 Universal Declaration of Human

⁹ “Chapter 39: English Translation of Magna Carta (1215),” *British Library*. Available at: <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

Rights, and, today, the modern doctrine of universal jurisdiction.

Universal jurisdiction has the potential to become the Magna Carta of the 21st century. In the continued efforts to limit impunity, both serve as a fount of norms in legitimizing practices of justice and accountability. Nonetheless, in order to promote a greater respect for human rights law not only in principle, but also in practice, enforcement must be the point of divergence between the past and present. Ultimately, there is no dearth in the historical record marking the evolution of universal jurisdiction as a theoretical concept, whether in response to piracy in the 1700s or royal lawlessness in feudal England. More importantly, after Augusto Pinochet's detention in the United Kingdom in 1998, there is no longer a lack of legal precedent for the application of modern universal jurisdiction, either.

FROM THEORY TO PRACTICE

It is considered common knowledge that people who commit crimes, regardless of severity, are expected to face a trial or to be held accountable to some form of justice. With this in mind, why, even if accused of innumerable and seemingly indefensible abuses of human rights, is it still the norm that rulers are granted a “get out of jail free” card that allows them to bypass the rules of international law?

Many influential analysts, such as Henry Kissinger, have argued that universal jurisdiction has little legal backing, and thus cannot legitimately be translated into practice. The only validity to such argument would lie in an approach that merely involved tracing the emergence of the practice of referring to such a concept by the label “universal jurisdiction.” Indeed, universal jurisdiction, although not explicitly labeled as such, was codified within the Geneva Conventions of 1949. In the language of

Chapter IX (Repression of Abuses and Infractions), Article
49 of the first convention:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and *shall bring such persons, regardless of their nationality, before its own courts....* [or] hand such persons over for trial to another High Contracting Party concerned...¹⁰

Although the term “universal jurisdiction” is not explicitly used, the concept is clearly laid out in contemporary treaty law. Perhaps the real problem lies with the assumptions of officials such as Kissinger that these documents are more of a formality than a legitimate obligation. Therefore, it must be understood that universal jurisdiction is not so much

¹⁰ Emphasis added. International Committee of the Red Cross, *The Geneva Conventions of 1949 and Their Additional Protocols*, originally adopted 12 August 1949.

acting beyond one's purview, but actually enforcing existing commitments in conventions.¹¹

Still, those who view international law from a “realist” perspective often see universal jurisdiction in a similar light: although perhaps desirable in principle, it is too quixotic and abstract of a concept to be effectively translated into practice. As discussed earlier, the same nations that dominated entire continents at the onset of the colonial project have not only maintained, but in some instances strengthened, their control over the hegemonic discourse of law and rights for centuries. Therefore, keeping this history in mind, why would these same superpowers willingly loosen their grip on world politics? History has proven that international politics are not governed by a concern for the greater good, but a desire for dominance—therefore, to believe that those at the top of the hierarchy would willingly loosen their authority by

¹¹ Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs* 80:5 (Sep/Oct 2001), 150-154.

embracing and enforcing the doctrine of universal jurisdiction is, to many, simply naïve.

Then again, this is exactly what revolution is: rebelling against the status quo that benefits the elite at the expense of the many. History has shown that progress is driven by those who challenge hierarchical standards even in the face of seemingly insurmountable odds. At its core, progress is the legitimation of a reality that was once only fantasy—take, for example, the earlier conversation surrounding the Magna Carta. What is revolutionary today may well be the status quo tomorrow, as long as society is willing and dedicated to the pursuit of change.

Ultimately, the most daunting obstacle to institutionalizing universal jurisdiction is not the role of the powerful, but rather the difficulty of conceptualizing justice as a basic human right in and of itself. In order to transform universal jurisdiction from theory to practice, society must first recognize that “the grapes are ripe and beyond our reach; that they are desirable and unreachable; that there

are problems that we cannot solve, but neither can we stop posing them.¹² In other words, idealism must not be an excuse for inaction in the pursuit to institutionalize the doctrine of universal jurisdiction in international law.

CONCLUSIONS

At its core, the doctrine of universal jurisdiction is not novel. Although historical milestones such as the signing of the Magna Carta and the adoption of piracy laws set the stage for the development of this concept into the way it has been conceived today, the heightened debate over the role of universal jurisdiction within international law should not be judged based on the appropriateness or foundation set by such remote precedents. Instead of analyzing its independent evolution free of context, we must look to its growth as a historical phenomenon arising in response to serious violations of basic human rights.

¹² Rupert de Ventos, "Kant responde a Habermas," 65, quoted in Norbert Lechner, "A Disenchantment Called Postmodernism," in *The Postmodernism Debate in Latin America*, eds. John Beverley, Michael Aronna, Jose Oviedo, 164 (Durham, NC: Duke University Press, 1995).

Indeed, recent history has been plagued by previously unfathomable levels of violence and abuse: one must look no further than the past century to realize that instances of genocide, crimes against humanity, war crimes, and torture, are not simply past events, but continuing threats to the basic tenets of democracy and modern society.

Furthermore, universal jurisdiction is not abstract. It is not the invention of legal scholars or intellectuals, but is instead the logical extension of some of the most basic principles of governance. In many ways, this concept is the product of simple deduction: at the onset, the state is meant to govern and protect the people. The executive and its officials receive protections in international law for the purpose of maintaining the integrity of the state institution, which in turn must effectively advocate for the collective benefit. Ultimately, the citizens are the most important subjects of the state. Therefore, while leaders benefit from certain stipulations in order to appropriately carry out their responsibilities, the global system of governance is, first

and foremost, meant to aptly administer and protect the people, not their leaders. Still, given the clear disregard for physical integrity rights repeatedly demonstrated by even the most “democratic” of modern governments, it is more pressing than ever to develop this concept and ensure the norm’s institutionalization in practice.