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Justice Without Borders: Universal Civil Jurisdiction

Beth Van Schaack
Santa Clara University School of Law, bvanschaack@scu.edu

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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, 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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* Professor of Law, Santa Clara University School of Law.
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 the indictment issued against him. At the close of the ICJ’s Arrest Warrant case, 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 Act 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. 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. 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

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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. 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.

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.

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6 28 USC 1605(a)(7).