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# 'Sadder but Wiser'?

## NGOs and Universal Jurisdiction for International Crimes

Harmen van der Wilt\*

### Abstract

*The author focuses on the approach various NGOs have taken regarding the prosecution of international crimes under the universality principle by analysing their reports on the topic. The author detects a paradigm shift: At first NGOs took a rather political and pugnacious attitude, exaggerating states' obligations to prosecute, underestimating the practical and legal problems of prosecuting and trying perpetrators of international crimes, and using legally flawed rhetoric. Of late, however, the approach has generally become more cautious and realistic. NGOs have acknowledged the complexities of international crime prosecutions and trials and shifted their attention to criminal law problems.*

### 1. Introduction

It is an incontrovertible fact that non-governmental organizations (NGOs) have become key players in the field of international criminal justice. Prior to the enactment of the Rome Statute they joined forces in the NGO Coalition for an International Criminal Court (ICC) and at the Rome Conference they frequently raised their voices, influencing major decisions on the structure and competences of the ICC.<sup>1</sup> Many NGOs have focused their attention on the possibilities of the exercise of universal jurisdiction. Some of them, like Amnesty International (AI) and Human Rights Watch (HRW), have actively sought to trigger prosecution of high placed suspects of international crimes in (mainly) European countries. Whether such actions are likely to succeed depends to a

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1 Compare W.R. Pace, 'The Relationship between the International Criminal Court and Non-Governmental Organizations', in H. von Hebel, J. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, 1999) 189–211.

large extent on the question whether the state allows civil parties to initiate criminal proceedings. While civil law jurisdictions are generally indulgent towards *parties civiles*, common law states have traditionally acknowledged the monopolist powers of prosecutorial authorities. However, in case of universal jurisdiction for international crimes the tables appear recently to have been turned.<sup>2</sup> The *locus standi* of NGOs is furthermore conditional upon the question whether courts are inclined to accept that they have a genuine legal interest to engage in an *actio popularis*.

In this brief essay I do not intend to pursue the interesting issue of NGOs' participation in criminal proceedings.<sup>3</sup> I rather wish to reflect on NGOs' analyses of the possibilities and pitfalls of universal jurisdiction in their reports on the topic. Initially, these publications were pervaded by an optimistic and pugnacious attitude. The line of reason was familiar. International crimes are committed at the instigation of, or at least condoned by, states. So it would be rather naïve to expect those states embarking seriously on the prosecution of those crimes. States' involvement in international crimes is precisely the reason why international criminal tribunals and the ICC are authorized to intervene, in vindication of victims' rights and on behalf of the international community, in order to end rampant impunity. However, international courts are only able to deal with a limited number of cases. Therefore the NGOs require the assistance of domestic jurisdictions which, acting as proxies of the international community, are at least permitted, but often even obliged, by (customary or conventional) international law, to exercise universal jurisdiction.

Of late, the approach has generally become more cautious. Faced with some disappointing experiences, NGOs have demonstrated an increased sensitivity for the real complexities of prosecuting and trying perpetrators of international crimes who committed their heinous crimes on distant shores. I will briefly highlight and discuss some aspects of this change of tune. My hypothesis is that NGOs at first underestimated the criminal law obstacles, while greatly exaggerating the international obligations pertaining to states. This approach prompted some of them to confound genuine legal problems with political unwillingness, lumping the two together and attributing both to a general lack of commitment or even bad faith. Recent publications strike a more realistic note.

It is my intention to fairly address and — when necessary — criticize opinions held by NGOs. However, the succinct scope of this contribution allows me to only discuss a limited number of reports and issues.<sup>4</sup> I will broach some

2 Human Rights Watch, *Universal Jurisdiction in Europe; The State of the Art* (2006) (hereafter HRW-Report), at 7–10.

3 For an interesting analysis of the prospects of NGOs litigating before the European Court of Human Rights, see M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights; Beyond Amicus Curiae Participation?' in T. Treves et al. (eds), *Civil Society, International Courts and Compliance Bodies* (T.M.C. Asser Press, 2005) 57–65, at 60–65.

4 I have chosen the following reports for my small research: Amnesty International, *Ending Impunity; Developing and Implementing a Global Action Plan Using Universal Jurisdiction* (2009) (hereafter AI-Report); HRW-Report, *supra* note 2; Australian Red Cross and Mallestons Stephen

topics and opinions that most or all of these NGOs hold in common, making a distinction between international law and criminal law aspects and policies. And I will comment on these opinions right away.

## 2. Permissive or Obligatory (Universal) Jurisdiction? The State of the Art in International Law

All NGO-reports agree that international law at least permits — and sometimes obliges — states to exercise universal jurisdiction in respect of international crimes.<sup>5</sup> The extent to which states can freely decide on the scope of their criminal jurisdiction is still a controversial issue, as it hinges on the relevance one is inclined to attach to the famous *Lotus* case of the Permanent International Court of Justice. It kept the judges in the International Court of Justice (ICJ) *Arrest Warrant* case divided, as they either opted for the position that the establishment and exercise of universal jurisdiction required an explicit licence under international law, or, reversely, held that states are free to determine the boundaries of extra-territorial jurisdiction, unless prohibited to do so by international law.<sup>6</sup> In this connection, some reports emphasize the relevance of customary international law, allowing states to exercise universal jurisdiction in case of 'core crimes'.<sup>7</sup> While one can certainly agree that there is an increasing *opinio juris* sustaining the idea that states would be allowed to exercise universal jurisdiction, state practice is much more controversial.<sup>8</sup>

As far as the obligation to apply universal jurisdiction is concerned, reports refer routinely to the 'grave breaches' provisions in the Four Geneva Conventions

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Jacques Humanitarian Law Perspectives Project, *Topic 2(a): The Principle of Universal Jurisdiction* (2010) (hereafter: Red Cross-Report), and Fédération Internationale des Ligues des Droits de l'Homme (FIDH), *A Step by Step Approach to the Use of Universal (Criminal) Jurisdiction in Western European States* (2009) (hereafter FIDH-Report).

- 5 HRW-Report, *supra* note 2, at 3: 'The exercise of universal jurisdiction is commonly authorized, or even required, by an international convention to which the state is a party.' FIDH-Report, *supra* note 4, at 4: 'Consequently, all states have a right and at times an obligation to hold perpetrators of such crimes (id est genocide, crimes against humanity, war crimes, torture and enforced disappearances) accountable ...'. AI-Report, *supra* note 4, at 12 (distinguishing between 'permissive universal jurisdiction' and obligatory *aut dedere, aut judicare*).
- 6 Compare the discussion in the separate and dissenting opinions in the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports (2002) 3, §§ 12–16 (Judge Guillaume) and §§ 61–65 (Judges Higgins, Kooijmans and Buergenthal).
- 7 Red Cross-Report, *supra* note 4, at 8: 'Customary international law has an important role in determining the scope and application of universal jurisdiction ...'. FIDH-Report, *supra* note 4, at 5: 'It is further widely recognized that international customary law at least permits (rather than obliges) the exercise of universal jurisdiction for genocide and crimes against humanity.'
- 8 Compare L. Reydam's, *The Rise and Fall of Universal Jurisdiction*, Leuven Centre for Global Governance Studies, Working Paper No. 37, January 2010, at 21–26 who mirrors the 'hard cases' with the NGO-driven 'virtual cases' where the good intentions did not materialize in real prosecutions.

of 1949 and Additional Protocol I (1977) and to the UN Anti-Torture Convention of 1984.<sup>9</sup> While all these conventions indeed stipulate that states are under a duty to consider prosecution whenever they do not extradite a suspect of war crimes or torture (*aut dedere, aut judicare*), the scope of these obligations is restricted and the provisions are more ‘mellow’ than meets the eye. First of all, the ‘duty’ to prosecute only pertains to states on whose territory the suspect resides and who can therefore exercise physical power over him or her.<sup>10</sup> The conventions do not permit — let alone prescribe — a blanket call for extraditing suspects of international crimes, ‘to all whom it may concern’. Secondly, NGOs are inclined to exaggerate the scope and strictness of these obligations. Reydams asserts that the grave breaches provisions on *aut dedere, aut judicare* reflected the reality at the time, in the wake of the Second World War, of millions displaced and homeless persons scattered all over the world and adds that full-fledged universal jurisdiction was never seriously contemplated.<sup>11</sup> And Kontorovich correctly points out that the obligation to ‘submit a case to its competent authorities for the purpose of prosecution’, as formulated in Article 7 of the UN Convention against Torture, does not vitiate the prosecutorial discretion to abstain from prosecution.<sup>12</sup> Moreover, NGOs are sometimes inaccurate in their representation of the law on immunities. Amnesty International simply lumps the according of immunity to officials and former officials together as an ‘improper obstacle for prosecution’, whereas the ICJ has made a clear distinction between these categories in the *Arrest Warrant* case.<sup>13</sup> The *Fédération Internationale des Ligues des Droits de l’Homme* (FIDH) rebukes the ICJ for having maintained the immunity *ratione personae* for incumbent officials, as this would run counter to Article 27 of the ICC Statute excluding immunity for anyone suspected of having committed ‘core crimes’.<sup>14</sup> However, this position confounds the vertical system of criminal law enforcement with the horizontal inter-state system of cooperation, where personal immunities of sitting heads of states, etc. still persist.

Another contested issue concerns the legal consequences of a state’s failure to exercise universal jurisdiction. If one adheres to the position that some conventions establish solid obligations, it makes sense to argue in favour of state responsibility for their flouting of treaty obligations. However, Amnesty International contends rather bluntly that states would have to extradite or prosecute international crimes, in order to avoid *complicity* in these crimes.<sup>15</sup>

9 The FIDH-Report, *supra* note 4, mentions Art. 9(2) of the Convention on the Protection of all Persons from Enforced Disappearances as well.

10 That is explicitly stated in the words ‘where the alleged offender is present in any territory under its jurisdiction’ (Art. 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and follows implicitly from the ‘obligation to search for persons alleged to have committed grave breaches’ in Arts 49, 50, 129 and 146 of the Four Geneva Conventions.

11 Reydams, *supra* note 8, at 17–18.

12 E. Kontorovich, ‘The Inefficiency of Universal Jurisdiction’, *University of Illinois Law Review* (2008) 389–418, at 409–411.

13 AI-Report, *supra* note 4, at 25.

14 FIDH-Report, *supra* note 4, at 15.

15 AI-Report, *supra* note 4, at 16 (emphasis added).

Now complicity in the context of state responsibility is a notoriously difficult topic and even a cursory discussion would extend beyond the scope of this brief essay.<sup>16</sup> However, one sees immediately that this qualification is far-fetched, if not plainly wrong. After all, it would be very difficult to construe a causal relationship between the commission of the international crimes and the *ex post facto* failure to prosecute those crimes, unless one would be inclined to argue that any diminished prospect of prosecution would be conducive of the commission of international crimes.<sup>17</sup> NGOs would be well-advised to abstain from using such loose and colloquial expressions when referring to legally charged concepts.

On the other hand, one can have some sympathy for these efforts to influence the law *de lege ferenda*. By their very nature, NGOs have an activist disposition. Their constituency will expect them to 'push the law', especially when it is in limbo, as in the case of assessing the proper limits of universal jurisdiction.

All these contested issues have in common that they pertain to the realm of international law and international relations. Critics of universal jurisdiction argue that the very concept impinges upon the (territorial) state's prerogatives, while advocates of universal jurisdiction assert that state sovereignty is abused to shield the perpetrators of heinous crimes. As both sides tend to accuse each other of selective indignation and bias, the discussion is inevitably 'tainted' by politics. Until quite recently the specifically criminal law dimensions have been ignored. It is to this topic that I will now turn.

### 3. Universal Jurisdiction and Criminal Law and Procedure

The exercise of universal jurisdiction — and for that matter, any form of extra-territorial jurisdiction — is not a stroll in the park.<sup>18</sup> Some problems derive from the fact that by definition several criminal law systems are involved. Others belong to the realm of truth finding. Obviously these aspects overlap to a large degree.

One impediment that is frequently mentioned is the fact that a previous prosecution might block later efforts of prosecution in another state, because

16 The topic is covered by Art. 16 of the International Law Commission's Articles on State Responsibility: Aid or assistance in the commission of an internationally wrongful act; for the authoritative commentary see J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), at 148–152.

17 The question is reminiscent of the discussion on the causal relationship between the commission of crimes by military forces and the omission of the (military) superior to repress those crimes (compare Art. 28 ICCSt.), but in that case an aggravated responsibility rests on the function of the military commander.

18 This is acknowledged by Human Rights Watch in their Report, *supra* note 4, at 13: 'The challenges posed by investigating an international crime that occurred outside the state where the prosecution occurs are myriad.'

of the double jeopardy doctrine or *non bis in idem* principle. States may thus, by holding a sham trial, effectively thwart any later prosecution on the basis of extraterritorial jurisdiction. Amnesty International, by and large correctly, points out that such reasoning would be flawed, as *non bis in idem* applies only within national legal systems.<sup>19</sup> Interestingly, Fletcher calls attention to the detrimental effect of international *non bis in idem* from a diametrical opposite perspective. He observes that an acquittal in a state exercising universal jurisdiction — because of its inability to obtain the necessary evidence — may create an obstacle for prosecution in a state with stronger claims.<sup>20</sup>

The process of truth-finding, arguably the overarching function of criminal procedure, is fraught with difficulties in case of universal jurisdiction. For obtaining evidence, the forum state is obviously dependent on the cooperation of the state where the crime has allegedly been committed. Mutual Legal Assistance Treaties (MLATs) stipulate that parties are to provide each other assistance in criminal matters, but such treaties are rather scarce. Moreover, the states that are expected to perform these procedural services are reluctant or downright unwilling to prosecute the international crimes themselves, a factor that considerably diminishes the chances of success. Such quandaries have frequently been observed in the context of cooperation between international criminal tribunals and states, but the problem in the horizontal context is aggravated by the fact that states do not have the edge over their peers.

The hearing of witnesses engenders particular problems. Usually, states will not have the legal authority to summon witnesses, residing abroad, to appear before their national courts. Such courts may request the foreign authorities to perform the hearing of witnesses themselves, preferably in the presence of a legal representative of the forum state. In order to comply with the principle of equality of arms, it may be necessary to allow defence counsel to attend the hearing as well. Such arrangements are costly and require meticulous organization. But even if the procedure meets fair trial standards, the method of truth finding may fall short of exacting demands in respect of the immediate production of evidence at the trial. Moreover, how will the forum state be able to guarantee protection of witnesses if any inculpatory evidence puts their lives or the safety of their dear ones at risk?

Alternatively, witnesses may decide to appear voluntarily before foreign courts in order to give testimony. While cultural differences may hamper the process of truth finding, courts are increasingly acquiring experience and thus become more sophisticated in handling such difficulties. A special complication that has come to the fore during procedures at the ICC, that witnesses request asylum, claiming that they will face a real risk of being exposed to flagrant violations of their human rights when they return to their home country.

19 AI Report, *supra* note 4, at 17–18: ‘By and large correct’, because international conventions increasingly provide for international *ne bis in idem*.

20 G.P. Fletcher, ‘Against Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 580–584, at 583.

Such developments will probably deter states to 'invite' witness to render testimony.

These practical obstacles in the exercise of universal jurisdiction have all been widely acknowledged and commented on in legal literature. What is relatively new however, is that NGOs are gradually taking stock of these aspects, turning away from their former political rhetoric. The HRW-Report, for instance, identifies all the procedural problems that have been briefly mentioned above. It welcomes the establishment of specialized units within police and prosecutorial departments in several countries that have gained experience in investigations and prosecutions on the basis of the principle of universal jurisdiction.<sup>21</sup> Moreover the HRW-Report contains an addendum of 8 (European) Country Case Studies that systematically address, amongst other issues, the role and rights of victims and witnesses in criminal procedure and the efforts that have been made to improve the fairness of the trial. In this way, NGOs are making headway in serving as an intermediary between interested parties, like witnesses and victims, and the public authorities. This may ultimately benefit the prospects of universal jurisdiction and the quality of the criminal procedure.

#### 4. Final Comment

Efforts to boost the application of universal jurisdiction are often hampered by political opposition, sovereign qualms and criminal law problems. These aspects should not be confounded. While criminal law impediments may be advanced as a pretext to conceal political 'unwillingness', that need by no means be the case. NGOs have traditionally focused on the political antagonism by those who have perhaps most to fear from universal jurisdiction. Only recently, some of them have more sharply distinguished between the various obstacles and have tended to shift their attention to the criminal law problems.<sup>22</sup> In my view, that is a good development. Political resistance can only to a limited degree be countered. And criminal law problems are real enough, while NGOs, well versed in law, have arguably more possibilities to remedy them. By arranging their reports as scenarios for victims' and witnesses' involvement in criminal procedures and informing the general public realistically on the possibilities and limitations of universal jurisdiction, NGOs can contribute to the improvement of the practice.

21 HRW-Report, *supra* note 2, at 10–24.

22 Although the differences between NGO reports in this respect are considerable. The Red Cross Report, *supra* note 4, dedicates only a few lines to criminal procedure (at 12), noting that '[g]athering evidence, appointing appropriately qualified judges and reinforcing appropriate rights for the accused ... are all obstacles that a prosecuting State must overcome if its process is not to amount to a mere show-trial.' Most of the Report is taken up by (generally solid) analysis of international law and political problems.