Rethinking Universal Criminal Jurisdiction: Toward a Multidimensional Framework

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Universal criminal jurisdiction (UJ) has had an impressive, even turbulent, career during the last two decades. From a historical oddity dealing with piracy, it has recently made its way to the forefront of the prosecution of the most serious international crimes – including genocide, crimes against humanity, and war crimes. Nowadays not a week goes by without news about another UJ case being opened or another UJ judgment being rendered. Despite its recent upsurge, many questions about the nature, legitimacy, and administration of universal criminal jurisdiction remain unanswered – and partly even *unasked*.

One main reason is that UJ finds itself at the multidimensional "crossroads"[1] of multiple legal sub-disciplines (international vs. criminal law), spheres (international vs. domestic law), domains (substantive vs. procedural law), and rationales of attribution (state vs. individual responsibility). While UJ has been mainly scrutinized by international law theorists, the materialization of universal jurisdiction in a growing number of ongoing cases challenges both domestic criminal justice systems and the international legal order. We should seize this opportunity to comprehensively address UJ in legal scholarship, connect international and domestic debates, and develop a systematic and multidimensional approach for questioning and conceptualizing the phenomenon of UJ for international crimes.

What Is Universal Jurisdiction?

Universal criminal jurisdiction is a complex, multifaceted concept. Currently, there is "no generally accepted definition of universal jurisdiction."[2] The concept remains highly controversial, especially in terms of scope and preconditions of application. The 6th Committee of the General Assembly of States of the United Nations (UN-GA) has continuously discussed the matter since 2009.[3] The International Law Commission, noting the limited progress made by the 6th Committee, added the issue of UJ to its long-term agenda in 2018[4] – yet as of now, no significant outcomes have been achieved. For present purposes, UJ will refer to universal criminal jurisdiction *sensu stricto* – the exercise of extraterritorial jurisdiction over international core crimes in the absence of any traditional jurisdictional link such as territory or personality.[5]

Legitimacy *in International Law*

So far, questions about the *whether* of UJ in the current international legal order have dominated the debate. In cases such as the Pinochet case in the UK (1998) or the Arrest Warrant case before the International Court of Justice (2000), the question of legitimacy has been posed mainly as a question of inter-sovereign relations. The scholarly discourse also often goes straight to international law, to matters of sovereignty, non-intervention, and immunity of state officials.[6] Undoubtedly, all these issues are critical and need to be addressed in every effort to understand and conceptualize UJ. Nevertheless, without expanding the ambit of our inquiry, the picture of UJ will remain incomplete; UJ also poses significant challenges to our intuitive understanding of criminal law and punishment.

A unique feature of UJ seems to be its innate link to a specific set of crimes. The question of what conduct and which crimes fall under the umbrella of UJ has often been combined with the question of its legitimacy. In the case of traditional jurisdictional principles, on the contrary, international law does not limit the jurisdictional scope to certain crimes, once it has been established that a situation falls under the general ambit of a state's prescriptive jurisdiction.[7] Therefore, one core issue prompting examination is how to determine and justify the substantive scope of UJ. Certain fault lines between different styles and traditions of legal thinking become visible in this context: Public international lawyers focus on state practice, *opinio iuris*, and international conventions – they tend to ask formal questions about legal *status*. Domestic and international criminal lawyers, on the other hand, often approach the question of UJ's legitimacy as a problem of legitimate criminalization and are concerned with the question of what makes international crimes special – they tend to ask questions about *substance*.[8] How both types of questions – and the underlying inductive and deductive approaches[9] – interact and interrelate deserves more attention, especially in the context of UJ.

That is because, as previous cases have shown, domestic and international prescriptive authority concerning the definition of international crimes might conflict. For example, German courts have included the cultural destruction of a protected group in the definition of genocide in a UJ case and thereby diverged from the jurisprudence of international criminal tribunals.[10] This inevitably provokes certain follow-up questions: Are domestic courts in administering UJ strictly bound by the definition and interpretation of international crimes under international law? Or do they have complete, or at least some, interpretive leeway?[11] The issue boils down to a fundamental "choice of law" determination for UJ cases. Do domestic courts apply domestic law, which is territorially extended in scope in accordance with international law or do they directly apply international law, which merely has been incorporated into a domestic legal system?[12] While the former view is in line with the traditional understanding of jurisdiction in international law, the latter might find support in a criminal law oriented analysis of UJ.

Legitimacy *in Criminal Law*

In contrast to traditional issues in international law, the more general question of why punishment based on UJ can be legitimized vis-à-vis the accused individual has gained much less attention. First, international law is traditionally concerned with states, not humans, as its primary legal subjects. Second, domestic theories of punishment, as justifications of certain state behavior, often exclude or sideline the issue of "jurisdiction" as a merely technical and practical matter. They often assume a homogenous community that agrees on a set of norms and punishes any community member who subsequently violates these norms to either reaffirm the norm or deter other community members. As a result, these theories regularly neglect non-paradigmatic cases, such as the extraterritorial punishment of foreigners, in favor of an idealized setting for criminal law theorizing.

Obviously, things are more complicated in UJ cases. One might ask, for example, how the forum state's claim to rightfully judge and punish a foreign national without any prior relationship can be justified. Upon closer inspection, it becomes apparent that the normative right to punish and the normative standing of the punishing entity vis-à-vis the accused individual as discussed in philosophical accounts of criminal law are more closely connected to the issue of jurisdiction than often assumed.[13] Instead of taking jurisdiction for granted, UJ challenges criminal law theorists to rethink their underlying assumptions about the power and competence to punish in non-ideal—i.e., extraterritorial—cases. Focusing on the question of the relevant sovereign in the penal relation of UJ[14] might also, in turn, require rethinking the traditional and widely shared assumption in international legal scholarship that UJ is concerned with the extraterritorial *extension* of domestic penal power. The acknowledgment that legitimizing punishment vis-à-vis a person requires at least some pre-established connection between the accused and the punishing polity/sovereign might lead to the conclusion that UJ needs to be understood as a *derivative* right.[15] In this view, the forum state is vicariously enforcing the *ius puniendi* of the international community, of which the accused was a member at the time of commission.

Jurisdiction and Procedure

Furthermore, the question of *how* UJ should be administered procedurally is no more straightforward. Although there is a general consensus that, as a baseline, domestic courts apply domestic procedural law in UJ trials, past and ongoing trials have exposed problems with this approach. For example, victim communities and members of the affected society criticized the lack of outreach efforts and language accessibility of UJ trials in Germany, leading to debates about changing procedural norms specifically for UJ proceedings.[16] Also, the collection and analysis of evidence and witness testimonies, often in a foreign country and language, proves difficult. As a result, multiple European states have introduced units that specialize in investigating extraterritorial crimes and engage in transnational evidence sharing.[17]

To argue that there is a connection between the jurisdictional basis of a case and the proper way of adjudicating it is not as odd as it might sound at first. If understood as a special form of vicarious jurisdiction for and in the name of

the international community, UJ might not only affect the choice of applicable substantive law – e.g., in the sense that only international crimes as recognized and defined in customary international law may be applied. It may also require adapting domestic criminal procedure to serve the interests of the international community – e.g., in terms of information about the trial and its outcomes. Legal scholarship will need to critically examine ongoing trials to analyze the specific challenges and dynamics of UJ procedure and offer potential solutions. The coming years will be crucial for developing best practices for the administration of UJ.

A Call to Action

After a previous "rise and fall"[18] and a "quiet expansion,"[19] we are currently observing an unprecedented upsurge in UJ proceedings – predominantly, but not exclusively, in Europe. Only time will tell whether it is justified to frame this development as a "rebirth"[20] or a "new era"[21] of UJ. In any case, legal scholarship should take an active role in these developments by monitoring and critically analyzing the rise of UJ trials.[22] Legal academia's main function will be to bridge the gaps between disciplines, domains, and debates to prevent the fragmentation of UJ into a series of random iterations of extraterritorial jurisdiction labelled "universal jurisdiction."

Powerful new tools facilitate critical engagement with the question of UJ for international crimes: the NGO "Trial International" has created an interactive online map tracking all UJ cases worldwide and the "Justice Beyond Borders" mapping tool displays the domestic implementation of international criminal law and the legal conditions for exercising extraterritorial jurisdiction over each crime across jurisdictions.

It is high time we put them to use.

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[1] Cf. *N. Rosen*, Evaluating the Practice of Universal Jurisdiction Through the Concept of Legitimacy, Journal for International Criminal Justice, Vol. 19 No. 5 (2021) 1–31 (4).

[2] International Court of Justice, Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000, Judgement of 14 February 2002, diss. op. *van den Wyngaert*, ICJ Reports 2002, 137-187 (165, para. 44).

[3] Cf. UN-GA, The scope and application of the principle of universal jurisdiction, Resolution adopted by the General Assembly on 7 December 2023, A/RES/78/113, 11 December 2023.

[4] Cf. *C. Jalloh*, Universal Criminal Jurisdiction, Yearbook of the International Law Commission 2018, Annex I

(https://legal.un.org/ilc/reports/2018/english/annex_A.pdf).

[5] Cf. *Council of the European Union*, AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/1/09 REV 1 ANNEX, 16 April 2009, § 8-9.

[6] Cf. *M. Dubber*, Criminal Jurisdiction and Conceptions of Penality in Comparative Perspective, University of Toronto Law Journal, Vol. 63, No. 2 (Spring 2013), pp. 247-277 (273-4).

[7] Cf. *A. Colangelo*, Universal Jurisdiction as an International "False Conflict" of Laws, Michigan Journal of International Law, Vol. 30 No. 3 (2009), 881-925 (882, 885-92).

[8] For a critical account, cf. *K. Heller*, What Is an International Crime? (A Revisionist History), Harvard International Law Journal, Vol. 58 No. 2 (2017), 353-420.

[9] Cf. *M. Koskenniemi*, From Apology to Utopia – The Structure of International Legal Argument, Reprint, Cambridge 2007, 59-60.

[10] Cf. European Court of Human Rights, Jorgic v. Germany, Application No. 74613/01, Judgement, 12 July 2007, para. 66-72.

[11] Cf. *H. van der Wilt*, Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections, Israel Law Review, Vol. 46 No. 2 (2013), 207-231.

[12] Cf. *A. Colangelo*, Universal Jurisdiction as an International "False Conflict" of Laws, Michigan Journal of International Law, Vol. 30 No. 3 (2009), 881-925 (891).

[13] Cf. *M. Dubber,* Criminal Jurisdiction and Conceptions of Penality in Comparative Perspective, University of Toronto Law Journal, Vol. 63, No. 2 (Spring 2013), 247-277 (275-6).

[14] Cf. *K. Ambos,* Punishment Without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law, Oxford Journal of Legal Studies, Vol. 33, No. 2 (2013), 293-315.

[15] Cf. *F. Jeßberger*, Towards a "Complementary Preparedness" Approach to Universal Jurisdiction: Recent Trends and Best Practices in the European Union, European Parliament: Workshop: Universal Jurisdiction and International Crimes: Constraints and Best Practices, 2018, 2-3 (https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)60

[16] Cf. *S. Aboueldahab* and *F-J. Langmack*, Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice, Minnesota Journal of International Law, Vol. 31 No. 2 (2022), 1-34 (20-31).

[17] Cf. *E. Baker* et al., Joining Forces: National War Crimes Units and the Pursuit of International Justice, Human Rights Quarterly, Vol. 42 No. 3

(2020), 594-622.

[18] *L. Reydams*, “The Rise and Fall of Universal Jurisdiction”, in W. Schabas and N. Bernaz (eds), Routledge Handbook of International Criminal Law (Routledge, 2011), 337-354.

[19] *M. Langer* and *M. Eason*, The Quiet Expansion of Universal Jurisdiction, European Journal of International Law, Vol. 30 No. 3 (2019), 779–817.

[20] *D. Ahdab*, “The Rebirth of Universal Jurisdiction: How the Syrian Conflict Has Led to the Expansion of the Use of Universal Jurisdiction.” Columbia Journal of Transnational Law: The Bulletin, 61, 2023, 85-123.

[21] *Y. Dutton*, Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?, Case Western Reserve Journal of International Law, Vol. 55 No. 1 (2023), 391-422.

[22] See, e.g., the ERC funded “Joined-Up-Justice” project at the University of Tilburg led by *E. Sliedregt* (https://www.tilburguniversity.edu/current/press-releases/erc-advanced-grant-research-improving-domestic-prosecution-international-crimes).