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The Authority of Universal Jurisdiction

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Abstract

The aim of this article is to flesh out the implications of seeing universal jurisdiction as a claim to authority. While the idea that jurisdiction is an exercise of authority may seem obvious, the article invites attention to the 'claim' inherent within it, particularly where the exercise of jurisdiction intrudes upon or displaces competing claims. Legal scholars and practitioners tend to focus on the legal source of authority to exercise universal jurisdiction. The consequence is a tendency to think in binary terms; a court either has jurisdiction, in which case the matter will proceed without further attention to the question of jurisdiction, or it does not, in which case the whole matter is at an end. Jurisdictional thinking invites attention to the need for those asserting such a claim to take responsibility for these claims to authority, encouraging responsiveness to the normative communities that such claims put into relation and the potential need to rethink conventional modes of operation. The article proceeds in two parts. Part 1 examines the deficiencies in the dominant 'legal source' narrative on universal jurisdiction. Part 2 assesses the value of understanding the legal-political dimension of universal jurisdiction as a claim to authority that must be understood, and justified, with attention to its purpose and the community (or communities) it is intended to serve.

For students of law, the question of a court's 'jurisdiction' can often seem prosaic and technical. The question of jurisdiction is most often regarded as a preliminary issue, to be disposed of before moving to the heart of the case. Yet, in a world of rival jurisdictions, questions of jurisdiction can disguise what is, in essence, a mode of political engagement. Acceptance or dismissal of a case on 'jurisdictional grounds' can mask a violent political contest, imposing a particular form of political authority on others or denying recognition to rival claims to authority.[1] The problem is that the ritual performance of jurisdiction in the case of rival claims can lead judges and other legal

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1 Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', 1(1) *London Review of International Law* (2013) 63; S. Dorsett and S. McVeigh, *Jurisdiction* (2012).

actors to make the assumption that, so long as 'normal' rules are applied in court, the legal process can escape the political conflicts of a pluralistic society. The aim of this article is to focus judicial attention on the (contestable) claim to authority inherent in jurisdictional claims, inviting consideration of the purpose and beneficiaries of judicial authority, not as a mere preparatory issue but as an omnipresent question for a court.

The case for rethinking judicial means and modes is particularly strong in the context of claims by states to exercise universal jurisdiction. On 3 August 2016, a verdict handed down in an English courtroom made front-page news in Nepal, though it was barely reported in the United Kingdom (UK) press.[2] The trial of Kumar Lama, a colonel in the Royal Nepalese Army, took place in the Old Bailey in London from June to July 2016. Colonel Lama was charged with two counts of torture under section 134 of the Criminal Justice Act, relating to incidents that had allegedly occurred between April and May 2005 at the Gorusinghe Army Barracks in Nepal.[3] The Criminal Justice Act vests British courts with 'universal jurisdiction' over the offence of torture, meaning the offence can be prosecuted in the UK whatever the nationality of the offender and wherever the alleged torture was committed. Little mention was made of the jurisdictional basis at trial, save for the prosecutor's acknowledgement to the jury in his opening statement that 'this trial in a far-off land may seem a bit alien'.

When the term 'universal jurisdiction' was mentioned in passing during the questioning of a witness on the ninth day of the trial, a juror passed up a note asking the judge to explain its meaning. The judge explained that, while usually jurisdiction of courts is confined to geographical territory, universal jurisdiction means there are certain crimes that any court can prosecute regardless of where they happened and that 'torture is one of those'. The parties had nothing to add. For the presiding judge, and, indeed, for the parties, the question of the court's jurisdiction, being based in statute, was uncontroversial and merited little attention. It was nevertheless with some consternation that the judge told the jury at the end of the trial: '[I]t is relatively rare for so many witnesses to require interpreters and indeed for so many problems to arise in one case.'

The concern driving this article is that the question of jurisdiction is not simply something to be 'disposed of', particularly in cases implicating rival claims to authority. In such cases, jurisdiction is appropriately a question that should orient, inform and influence the entire trial and its conduct. To orient oneself through jurisdiction is to give primacy to questions of authority and to how the authorization

[2] In the United Kingdom (UK) print news, the one exception was a story appearing on page 12 of *The Times* newspaper.

[3] *R v. Kumar Lama*, Case no. 2013/05698 (Central Criminal Court, London, 2016). The author observed the trial with Dr Mara Malagodi (City Law School, University of London), a linguistically informed expert in Nepalese law and politics. All quotes are based on notes taken at trial (on file with the author). An impression of the trial is available at www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction/.

of lawful relations takes place.[4] While the idea that jurisdiction is an exercise of authority may seem obvious, this article invites attention to the 'claim' inherent within it, particularly where the exercise of jurisdiction intrudes upon or displaces competing claims. Jurisdictional thinking invites attention to the need for those asserting such a claim to take responsibility for these claims to authority, encouraging responsiveness to the normative communities such claims put into relation and the potential need to rethink conventional modes of operation. As Shaunnagh Dorsett and Shaun McVeigh observe, '[t]hinking with jurisdiction invites more concern with means than with ultimate ends'.[5]

The aim of this article is to flesh out the implications of seeing universal jurisdiction as a claim to authority. Legal scholars and practitioners tend to focus on the legal source of authority to exercise universal jurisdiction. The consequence is a tendency to think in binary terms; a court either has jurisdiction, in which case the matter will proceed (without further attention to the question of the court's jurisdiction), or it does not, in which case the whole matter is at an end. Yet, by reducing the question of universal jurisdiction to an 'is/is' not dichotomy, positivism proves itself to be an inarticulate code of conduct. Law is effective at telling us 'what' to do or 'what' not to do, though it is less effective at telling us 'how', 'why' or 'on whose behalf'.[6] In relation to universal jurisdiction, understanding its legitimate aim (the 'why') will have implications for the 'how', including evidentiary and procedural rules, and ensuring that any limitations placed upon its scope are proportionate in terms of the aim these limitations pursue. The question 'on whose behalf' is particularly pertinent in this context as it alerts us to the notion that universal jurisdiction, by its nature, does not operate within the parameters of an existing, bounded or defined jurisdictional community. The boundaries of authority are not settled, but emerging. In section 1, I examine the deficiencies in the dominant 'legal source' narrative on universal jurisdiction. In section 2, I assess the value of understanding the legal-political dimension of universal jurisdiction as a claim to authority that must be understood, and justified, with attention to its purpose and the community or communities it is intended to serve.

1 Source as Artifice: Universal Jurisdiction and Positivism

Law is a source-based enterprise.[7] It is therefore natural and appropriate that judges and legal scholars commonly address the question of jurisdiction by looking to its legal source. Case law and influential scholarship reflect that the establishment of universal jurisdiction is most often centred on an inquiry as to whether the principle exists in

[4] Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction', 2(2) *Law and Humanities* (2008) 213.

[5] Dorsett and McVeigh, *supra* note 1, at 23.

[6] J. Shklar, *Legalism: Law, Morals and Political Trials* (1964), at 1; L. Fuller, *Law in Quest of Itself* (1966), at 65.

[7] Schauer, 'Law's Boundaries', 130 *Harvard Law Review* (*HLR*) (2017) 2434, at 2435–2436.

positive law, either domestic or international.[8] An appeal to positive law enables a claim to objectivity on the basis that the law applied is developed with the consent of the domestic legislature (domestic law) or domestic executive in association with the community of states (international law). As Kevin Heller decrees in his recent study of the nature of international crimes, '[f]or good or for ill, we are (almost) all positivists now'.[9]

According to a positivist analysis, the valid law of a community is identifiable based on its source and not its content – its 'pedigree', as Ronald Dworkin describes it, in a recognized authoritative source.[10] The sources of law are not boundless, but are defined within a 'legal system', which is a term H.L.A. Hart uses as short-hand to refer 'to a number of heterogeneous social facts' that operate 'in a given country or among a given social group'.[11] Positivists would accept that law developed within the parameters of the Nepalese legal system would not be authoritative in English courts because the social facts underwriting the validity of Nepalese law differ from those underwriting the validity of English law. Legal communities are neither transferable nor interchangeable. Following this logic, difficulty emerges when we try to justify the exercise of universal jurisdiction using a positivist hermeneutic. When we take off our positivist blinkers and look at the social facts, it becomes apparent that the boundaries of the relevant legal community on behalf of whom, or with respect to which, universal jurisdiction is exercised are far from clear. To explain the problem in more concrete terms, it is helpful to turn to the sources relied upon by courts to justify the exercise of universal jurisdiction in regard to foreign torture.

A *Domestic Law*

In the two universal jurisdiction torture trials held in the UK to date, it has been accepted without further challenge that universal jurisdiction with respect to torture was clearly vested by a UK statute.[12] Indeed, section 134 of the Criminal Justice Act provides that '[a] public official … whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties'.

[8] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at 63; L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004), at 4 ('Content and Methodology'); Cosnard, 'La compétence universelle en matière pénale', in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006) 361, at 364; Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (*TLR*) (1987–1988) 785; Cherif Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law', in S. Macedo (ed.), *Universal Jurisdiction and the National Prosecution of Serious Crimes* (2004) 39, at 39.

[9] Heller, 'What Is an International Crime? (A Revisionist History)', 58(2) *Harvard International Law Journal* (*HILJ*) (2017) 353, at 414.

[10] R. Dworkin, *Taking Rights Seriously* (1977), at 17; H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 264.

[11] Hart, *supra* note 10, at 112.

[12] *R. v. Faryadi Sawar Zardad*, [2007] EWCA Crim. 279 (7 February 2007); *Kumar Lama*, *supra* note 2.

One of the preliminary challenges posed by this article is whether it is adequate to regard the issue as being settled by positive domestic law. The challenge here is not to the decision to accept jurisdiction on the basis of a domestic statute but, rather, to the notion that this statutory basis can in itself be an adequate justification. When an English judge asserts jurisdiction over a foreign national alleged to have committed a crime with no connection to the UK, is there not something objectionable about regarding this as a matter over which the domestic court (or legislature) can claim to be the single objective authority?

It is clear that the claim to universal jurisdiction is not made against those within the domestic legal community but, instead, is a claim to authority in relation to states, individuals and normative communities external to it. The effect of the positivist analysis is to fence legal thinking off from the developing social and political context within which it is intended to apply. There seems little foundation for the assumption that judges can shield themselves or their courtrooms from the normal political conflicts of a pluralistic society.[13] Judges are not mindless bureaucrats or mere conveyor belts of domestic legislative mandates incapable of understanding the broader normative context within which they operate.[14] The challenge of the modern world is that such a claim to authority, where exercised in an insular way, risks confusing domestic statutory interpretation with political domination.[15] The objectivity at the heart of the positivist analysis threatens to become specious where it is used as a device to enable one legal community to impose its laws upon another. Creating legal justification in this context requires not merely insular commitment but also the objectification of that to which one is committed.[16]

B *International Treaty Law*

The positivist international lawyer might argue that such objectification can be found in international law. Section 134 of the Criminal Justice Act is not a contrivance of the British Parliament but, rather, an enactment to implement the UK's obligations under the Convention against Torture.[17] A range of treaties, including those related to counterfeiting, drug-trafficking, safety of United Nations (UN) personnel, the financing of terrorism and torture, include an obligation upon member states to 'prosecute or extradite' individuals found in their territory for certain offences regardless of the nationality of the offender or the location of the crime.[18] Yet, is the fact of entering

[13] Shklar, *supra* note 6, at xiii.

[14] J. Stone, *Legal System and Lawyers' Reasoning* (1964), at 209–298; L. Fuller, *Anatomy of the Law* (1968), at 94.

[15] Cover, 'Foreword: Nomos and Narrative', 97(4) *HLR* (1983) 4, at 43.

[16] *Ibid.*, at 45.

[17] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) 1984, 1465 UNTS 85.

[18] For a full list of treaty provisions, see Annex to UN Secretary-General, Survey of Multilateral Conventions Which May Be of Relevance for the Work of the International Law Commission on the Topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', UN Doc. A/CN.4/630, 18 June 2010.

into a treaty in itself adequate to justify taking jurisdiction over persons and conduct with no connection to the prosecuting state?

One basis of justification is that all states parties to the relevant treaties have effectively consented to the exercise of jurisdiction by the courts of another state party in the event an offence covered by the treaty is committed by their nationals or within their territory. However, it is notable that, when courts apply such provisions, the question as to whether the state of nationality or state in whose territory the alleged offence occurred is a state party to the relevant treaty does not appear to be a material question. For example, in the *Pinochet* case, where the UK was considering the extent of its jurisdiction to prosecute former Chilean head of state Augusto Pinochet, the UK House of Lords gave no attention to when or whether Chile had ratified the Convention against Torture.[19] In *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice (ICJ) upheld Belgium's claim that Senegal was obliged under the Convention against Torture to prosecute the former president of Chad, Hissène Habré, for alleged acts committed since the Convention entered into force for Senegal, without consideration of when or whether Chad itself had ratified the Convention.[20]

Some may argue that the fault here lies not with positivism but, instead, with the courts' misguided application of it such that both courts were wrong not to consider whether the state of nationality or territoriality had consented to the third state's assumption of jurisdiction. Even taking this argument into account (an argument that contemplates a fairly significant oversight by both the ICJ and the UK House of Lords), surely we miss something fundamental about the principle of universal jurisdiction if we conflate it simply with delegated jurisdiction. For example, if Saudi Arabia, Pakistan, Somalia, Taiwan and the Philippines were to enter into a treaty agreeing to prosecute anyone found in their territory suspected of adultery regardless of the nationality of the offender or the state in which the conduct occurred, would the existence of the treaty obligation between these states render the prosecution of a UK citizen for adultery committed in the UK justifiable? One is tempted to answer 'no'. However, the only basis upon which we can distinguish this from the torture example is by looking to the underlying nature of the crime. The source of jurisdiction does not derive ultimately from the treaty obligation but from a deeper sense that certain crimes are justifiably of broader concern such that third states are justified in prosecuting them. Even for positivists, this invokes the 'disquieting idea that no conception of an international crime … may be able to completely escape the specter of naturalism'.[21]

[19] Chile ratified the Convention against Torture, *supra* note 17, on 30 September 1988. The willingness of the UK House of Lords to exercise jurisdiction over conduct committed on 29 September 1988 demonstrates that Chile's consent was not considered pertinent – what a difference a day makes. *R v. Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet (No. 3)*, [1999] 2 All ER 97.

[20] Judgment, 20 July 2012, ICJ Reports (2012) 422, para. 102.

[21] Heller, *supra* note 9, at 4.

C *Customary International Law*

The positivist argument proves limited, not only in providing justification for the exercise of universal jurisdiction but also in any determination that its exercise is not lawful. While the stability of the positivist foundations of universal jurisdiction in domestic statute or international treaty law are open to question, the real problems for the positivist analysis occur in the absence of such foundations where it becomes necessary to rely on alternative sources of law. Notable treaty codification gaps exist in cases of genocide and crimes against humanity, in relation to which there are no treaty provisions imposing an obligation on states to exercise universal jurisdiction. According to the positivist analysis, customary international law here serves to provide the general default rules.[22]

The problem is that universal jurisdiction and customary international law are uneasy bedfellows. As is well known, in the *Arrest Warrant* case before the ICJ, Judges Higgins, Kooijmans and Buergenthal conducted a textbook positivist survey of national legislation, case law, treaties and the writings of eminent jurists to determine whether the principle of universal jurisdiction existed under customary international law.[23] The result of their 'dispassionate analysis of State practice and Court decisions' was that 'no general rule of positive international law can as yet be asserted' and that 'the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy'.[24] The customary international law yardstick – requiring proof of state practice and *opinio juris*, where the relevant state practice must be 'widespread and representative, as well as consistent'[25] – proves a difficult measure in the case of universal jurisdiction.

In their review of the writings of eminent jurists, many of whom had previously declared universal jurisdiction to be a principle of customary international law, Judges Higgins, Kooijmans and Buergenthal (in a polite, though clear, rebuke) remarked that these writings, 'important and stimulating as they may be', 'cannot serve to substantiate an international practice where virtually none exists'.[26] Nevertheless, some 15 years after the judges issued this opinion in the *Arrest Warrant* case, the tide of legal scholarship is once again turning towards recognition of universal jurisdiction as a principle of customary international law.[27] One scholar, writing in the 2014 edition of

[22] Fourth Restatement on Foreign Relations Law (2017), Commentary to § 211, at 43.

[23] *Arrest Warrant*, *supra* note 8.

[24] *Ibid.*, paras 44, 52, 54, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; see also paras 5, 12, Separate Opinion of President Guillaume.

[25] 'Text of the Draft Conclusions on Identification of Customary International Law Adopted by the Commission', in *Report of the International Law Commission at Its 68th Session*, UN Doc. A/71/10 (2016), at 77, Conclusion 8.

[26] *Arrest Warrant*, *supra* note 8, para 44.

[27] Fourth Restatement on Foreign Relations Law (2017), at 217; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2010), at 51; Colangelo, 'The Legal Limits of Universal Jurisdiction', 47 *Virginia Journal of International Law* (*VJIL*) (2006–2007) 149, at 151–152; Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', 4 *Journal of International Criminal Justice* (*JICJ*) (2006) 561, at 562, 576; Institut de droit international, *Universal Jurisdiction with Respect to the Crimes of Genocide, Crimes against Humanity and War Crimes* (2005), para 2; Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *JICJ* (2003) 589, at 591–592.

a leading textbook, declares that '[u]niversal jurisdiction has undergone something of a renaissance in recent years'.[28] Yet, has state practice changed so markedly since the *Arrest Warrant* case? According to my own survey, the results of which are tabulated in the Appendix at the end of this article, there has been a total of 52 completed universal jurisdiction trials worldwide since the *Eichmann* trial in 1961.[29] Universal jurisdiction trials have run to completion in only 16 states, 15 of which are in the 'Western European and Others' regional grouping, which is hardly reflective of a representative international practice.[30] It is also significant that over 30 of the 52 completed trials involve prosecutions for war crimes and torture, with the judgments in these trials reflecting that jurisdiction was exercised pursuant to domestic legislation implementing a treaty 'obligation to prosecute' rather than a belief that the right to exercise universal jurisdiction exists independently under customary international law.[31]

Some argue that the requisite widespread and consistent state practice can be found in domestic legislation. In 2012, Amnesty International published a survey of national legislation, reporting that '147 (approximately 76.2%) out of 193 states have provided for universal jurisdiction' over either genocide, crimes against humanity, war crimes or torture.[32] While this statistic suggests widespread acceptance of universal jurisdiction, it also fails to record the significant limitations built into domestic legislation, which affects the consistency of the practice. It is interesting to compare the Amnesty International survey results to the notes submitted by 57 states to the UN Secretary-General in connection with the UN General Assembly's consideration of the topic 'the scope and application of the principle of universal jurisdiction', which has been an

[28] Staker, 'Jurisdiction', in M. Evans, *International Law* (4th edn, 2014) 309, at 322.

[29] Supreme Court of Israel 336/31, *Attorney General v. Eichmann*, 36 ILR 28.

[30] See Appendix 1 for a list of states in which universal jurisdiction trials have proceeded to completion. It is notable that the only state falling outside this group, Senegal, was pressured into exercising universal jurisdiction when Belgium (a Western European and others state) took it to the International Court of Justice (ICJ) to enforce the obligation to prosecute. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422.

[31] Indeed, in two cases in which courts accepted jurisdiction over war crimes charges, they declined jurisdiction over genocide charges on the express basis there was no relevant treaty obligation. District Court of the Hague, Case no. 09/750009-06 and 09/750007-07, *Public Prosecutor v. Joseph Mpambara*, Interlocutory Decision (24 July 2007); Swiss Tribunal Militaire de Cassation, *Niyonteze v. Public Prosecutor* (27 April 2001), discussed in Reydams, '*Niyonteze v Public Prosecutor*', 96(1) *American Journal of International Law* (*AJIL*) (2002) 231. It is interesting that, even in those cases where the relevant courts accepted jurisdiction to decide genocide charges, some courts sought a treaty basis, with the Austrian Supreme Court finding jurisdiction in the 'object and purpose' of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948, 78 UNTS 277. See Beschluss des Obersten Gerichtshofs Os 9994–6, *Dusko Cvjetkovic* (13 July 1994), discussed in Marschik, 'European National Approaches to War Crimes', in T. MacCormack and G. Simpson, *The Law of War Crimes: National and International Approaches* (1997) 65. In French law, jurisdiction over genocide and crimes against humanity cases was based on the need to bring French law into line with the Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, 32 ILM 1159 (1993). Permanent Mission of France to the United Nations, 'The Scope and Application of the Principle of Universal Jurisdiction', available at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf.

[32] Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World: 2012 Update* (2012).

annual item on the agenda of the Sixth Committee since 2010.[33] These notes reveal that, of the 55 states in relation to which Amnesty International recorded legislative support for universal jurisdiction over one or more crimes, almost half of them make the exercise of universal jurisdiction conditional on authorization by a governmental or state official, including in some cases the Attorney-General, the minister of justice or the minister of foreign affairs.[34] In such cases, it is surely relevant in reviewing state practice holistically to assess the number of cases in which official authorization is granted and the reasons for which it is refused.

The Amnesty International survey also fails to articulate the basis for the national legislation. According to Heller's assessment of the Amnesty International survey, 65 of the states who have implemented legislative acceptance of universal jurisdiction only do so when formally required to do so by a treaty.[35] A curious aspect of the survey is its recognition that 91 states have provided their courts with universal jurisdiction over ordinary crimes, including assault. Yet there is no suggestion, for example, that international law recognizes universal jurisdiction in relation to assault. The purpose for which states recognize universal jurisdiction is significant in defining its scope. The lack of detail in the legislative survey renders it a blunt tool by which to forge customary international law.

Essentially, the customary international law inquiry creates at least two problems in the case of universal jurisdiction. First, the exercise of universal jurisdiction is, by definition, a default jurisdiction and, far from being customary, is and should be rare. Second, universal jurisdiction is a mechanism intended not to promote state interests but, rather, to disrupt state machinery where state officials act contrary to certain fundamental norms. Given that universal jurisdiction is generally practised against state officials, it will be met by reluctance from state officials to approve its exercise and opposition from state officials against whom it is exercised. Both these factors heighten the paradox that exists in any event in relation to the creation of custom. Any rule navigating the difficult path from 'becoming' to 'being' faces the paradox that customary legal rules will only be recognized where a critical mass of states are willing to engage in practice, but, until the point it achieves such widespread acceptance, such practice is unsupported by law.[36] This paradox is complicated further where we must rely chiefly on judicial organs to provide the state practice; until courts engage in the

[33] The state notes submitted to the UN Secretary-General are available under Agenda Item 86 for each session of the Sixth Committee of the UN General Assembly. E.g., the notes submitted at the 75th session are available at www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml.

[34] E.g., state notes evidence requirements for the consent or authorization of the attorney-general (Australia, Canada, Israel, New Zealand and UK); minister of justice (Iraq, Italy and Malta); minister of foreign affairs (Lithuania); director of public prosecutions or federal prosecutor (Belgium, Botswana, Cameroon, Czech Republic, Denmark, Finland, Germany, Hungary, Norway, Spain and USA); the government (Sweden) or an official request from the territorial state in which the crime was committed (Azerbaijan and Cuba).

[35] Heller, *supra* note 9, Appendix.

[36] 'Every recognition of custom as evidence of law must have a beginning some time.' Glueck, 'The Nuernberg Trial and Aggressive War', 59 *HLR* (1946) 396, at 418.

practice, it will not be lawful, yet, as long as the practice it is not lawful, courts will not engage in the practice. As Hannah Arendt notes, '[i]n consequence of this unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of or beyond the limitation set upon them through positive posited laws. For the judge, this may be a predicament.'[37]

It is interesting that in the *Eichmann* case – one of the very few cases in which a domestic court has expressly relied on universal jurisdiction – the Supreme Court of Israel rejected the utility of positivism, declaring that 'the rules of the Law of Nations are not derived solely from international treaties and from crystallized international usage'.[38] Quoting from a number of scholars, including Hersch Lauterpacht, Julius Stone, Sheldon Glueck and Oliver Wendell Holmes, the Supreme Court reflected the position that '[d]uring the early stage (or a particularly disturbed stage) of any system of law – and international law is still in a relatively undeveloped state – the courts must rely a great deal upon non-legislative law' and 'may proceed … by a consideration of the larger needs of the international community'.[39] The 'is/is not' dichotomy that is the hallmark of the positivist hermeneutic does not easily accommodate the phase in international law between 'becoming' and 'being'. To the extent that it is necessary to rely on customary international law for justification, universal jurisdiction threatens to remain a promise that is perpetually unredeemable.

D *Conclusion*

This discussion is not intended to undermine the importance of the positivist inquiry into the valid legal source of a domestic court's jurisdiction. It is far from an appeal to judges to ignore prescribed jurisdictional boundaries. Rather, the intent is to expose the limitations of a purely positivist approach to jurisdiction by judges and practitioners in universal jurisdiction cases. As a legal tradition developed on the basis of traditional notions of sovereignty, positivism serves as a 'conservatizing institution' working to reinforce an inherent preference for existing state authority and structures.[40] However, in many respects, universal jurisdiction challenges the traditional positivist parameters of state sovereignty and state authority. While the positivist architecture is built on the foundations of a defined political community, universal jurisdiction throws into question the very issue as to what the boundaries of political community are. Does a court exercising universal jurisdiction derive its authority from the domestic community within which its acts; the community of states; the international community more broadly or individual victims within the community of the foreign state in relation to which it acts? A court claiming to exercise universal jurisdiction over a foreign state official in relation to an offence that bears no direct relation to the prosecuting state does not operate above the political world but in its

[37] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), at 274.
[38] *Eichmann*, *supra* note 29, para. 11.
[39] *Ibid.*
[40] Shklar, *supra* note 6, at 10.

very midst.[41] Here, the question of the justification of this authority assumes broader significance with potential normative and institutional design implications.

2 Universal Jurisdiction as a Claim to Authority

The value of a fresh inquiry into the notion of jurisdiction in light of shifting notions of state sovereignty has been recognized by leading practitioners and scholars. Sir Daniel Bethlehem, former UK Foreign Office Legal Adviser, has criticized current concepts of jurisdiction as 'rooted in analyses of the 1930s that have developed little since then'.[42] His invitation is to reconceive notions of jurisdiction 'beyond geography and towards purpose'.[43] David Luban equally resists traditional notions of jurisdiction, defining jurisdiction as 'the study of the interests that create a legitimate stake in prescribing and enforcing the law'.[44] Both descriptions focus attention on the purpose and interests served by the exercise of jurisdiction.

Whether justified in terms of domestic statute, international treaty, or customary international law, universal jurisdiction rests on rickety and potentially ruinous foundations. Common recourse to ancient underpinnings in the crime of piracy demonstrates that, at best, the foundations of universal jurisdiction are in need of modernization. In the following section, I discuss four schools of thought about the legitimate aims and interested communities that universal jurisdiction is intended to serve. The discussion could be seen as tracing the evolution of the principle of universal jurisdiction, from its traditional basis in state sovereignty (serving domestic interests), to interstate comity (serving the interests of the community of states), to the idea of the conscience of humanity (serving the interests of the international community as a whole), before proposing the idea of universal jurisdiction as a human right of access to justice (serving the interests of victims). The discussion takes place against the backdrop of a survey of completed universal jurisdiction trials that have taken place since the *Eichmann* trial in 1961, the results of which are tabulated in the Appendix. The aim is to understand the source of a domestic court's legitimate authority to exercise universal jurisdiction and thereby reposition the understanding of universal jurisdiction, a step away from traditional grand narratives to a position more in line with contemporary theory and practice.

41 G. Simpson, *Law, War and Crime* (2007), ch. 1.

42 Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', 25(1) *European Journal of International Law* (*EJIL*) (2014) 9, at 22.

43 *Ibid.*, at 22.

44 Luban, 'A Theory of Crimes against Humanity', 29 *Yale Journal of International Law* (2004) 85, at 91, 139.

A *Universal Jurisdiction as Sovereignty (Domestic Community)*

According to classical doctrine, jurisdiction is regarded as an 'aspect' or 'manifestation' of sovereignty.[45] Sovereignty flows from statehood, which, in turn, is connected to control over territory.[46] The first edition of Lassa Oppenheim's book, published in 1905, notes that 'states possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like'.[47] At the height of this approach in the *Lotus* case, the Permanent Court of International Justice declared that a state's jurisdiction was essentially discretionary, such that 'all that can be required of a State is that it should not overstep its limits which international law places upon its jurisdiction; within these limits, *its title to exercise jurisdiction rests in its sovereignty*'.[48]

With the passage of time, this expansive view of sovereignty has been overtaken by other tendencies.[49] A more recent edition of Oppenheim's text recognizes that states' rights are not 'unlimited' and that '[a]lthough there are extensive areas in which international law accords to states a large degree of freedom of action … it is important that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community'.[50] The problem with the *Lotus* approach was that it emphasizes the sovereign rights of the state exercising jurisdiction without taking account of the adverse effects of the jurisdictional assertion upon other states.[51] The effect was to leave resolution of conflicting jurisdictions to extra-legal factors, principal among these being the relative power of concerned states.[52] The contemporary focus of jurisdictional principles is therefore on the 'allocation of competence' between states that might potentially claim jurisdiction – without which, as Rosalyn Higgins declaims, 'all is rancour and chaos'.[53]

Instead of recognizing plenary jurisdiction as an aspect of sovereignty, contemporary international law on jurisdiction requires states to identify some form of sovereign nexus between the case over which jurisdiction is asserted and the state asserting jurisdiction. According to accepted contemporary doctrine, jurisdiction is understood as the rightful authority to speak the law within a state's territory where there is 'a genuine connection between the subject-matter of jurisdiction and the territorial base

45 C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015), para. 1.3; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 456; Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 53 *British Yearbook of International Law* (*BYIL*) (1982) 1, at 1.

46 *Island of Palmas Case (Netherlands v. USA)*, Award of Tribunal, 4 April 1928, reprinted in (1928) 2 UNRIAA 838.

47 L. Oppenheim, *International Law* (1905), ch. 1, s. 143.

48 *The Case of S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 19 (emphasis added).

49 *Arrest Warrant*, *supra* note 8, para. 51, per Judges Higgins, Kooijmans and Buergenthal.

50 L. Oppenheim, *International Law*, edited by R. Jennings and A. Watts (9th edn, 1992), vol. 1, at 12.

51 C. Ryngaert, *Jurisdiction in International Law* (2008), at 6.

52 Mills, 'Rethinking Jurisdiction in International Law', 84(1) *BYIL* (2014) 187, at 193.

53 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 56.

or reasonable interests of the state in question'.[54] Rather than recognizing a right to exercise jurisdiction unless prohibited by international law, international law now recognizes a number of permissive principles. It is well accepted that states may claim jurisdiction over crimes committed on their territory or by their nationals ('territoriality' or 'nationality' jurisdiction), and there is further support for jurisdictional principles that entitle states to claim jurisdiction where their nationals have been victims of a crime ('passive personality' jurisdiction) or their fundamental state interests are threatened ('protective' jurisdiction).[55]

If jurisdiction is founded in some nexus to state sovereignty, the justification threatens to become unhinged in claims to exercise 'universal jurisdiction'. Here, the absence of sovereign nexus is immanent in its very definition. According to the Princeton Principles on Universal Jurisdiction, 'universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.[56] Justifying universal jurisdiction on the basis of sovereignty is unpersuasive and arguably provokes unnatural contortions of both principles. For example, in a courageous effort to reconcile universal jurisdiction and sovereignty, Anthony Sammons makes the argument that, when heinous crimes occur on a state's territory, the territorial state cedes some of its sovereignty to the international community and becomes, in effect, *terra nullius* for the purposes of criminal jurisdiction.[57]

We might interpret the 'no safe haven' justification sometimes given for universal jurisdiction as a justification based on sovereign nexus. Under the 'no safe haven' universal jurisdiction conception, states may exercise universal jurisdiction to avoid becoming a refuge for participants in core international crimes. This may be interpreted as an exercise of jurisdiction that responds primarily to a domestic interest to keep out 'undesirables'. For example, in the 1980s, commissions of inquiry were established in Australia, Canada and the UK in response to widespread domestic public concern that Nazi war criminals had gained admittance to these countries and were living there.[58] In the case of Australia and Canada, the allegation was that domestic governmental officials had been complicit in enabling their entry. In each case, one response was to enact legislation to enable domestic courts to prosecute Nazi war crimes.

[54] Crawford, *supra* note 45, at 456. See also I. Brownlie, *Principles of Public International Law* (5th edn, 1998), at 303.

[55] Crawford, *supra* note 45, at 457–464.

[56] Princeton Principles on Universal Jurisdiction (2001), available at https://lapa.princeton.edu/hosted-docs/unive_jur.pdf.

[57] Sammons, 'The Under-Theorization of Universal Jurisdiction', 21 *Berkeley Journal of International Law* (2003) 111.

[58] A. Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (1987) (Australia); J. Deschênes, *Commission of Inquiry on War Criminals* (1986) (Canada), available at http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-52-1986-1-eng.pdf; T. Hetherington and W. Chalmers, *Report of the War Crimes Inquiry* (1989) (UK).

In more recent times, fear of terrorists entering states pretending to be refugees has intensified among domestic populations. States are assisted in their capacity to prevent this by Article 1F of the Refugee Convention, which provides a right to states to deny refugee status to individuals where there are serious reasons for considering that they have committed a crime against the peace, a war crime or a crime against humanity.[59] It follows that an increasing connection has developed between the processing of asylum applications and war crimes investigations. Some states such as the Netherlands, Denmark and the UK have developed formal arrangements for notification and cooperation between immigration authorities and prosecutorial authorities.[60]

However, it is one thing to recognize this connection between immigration and prosecution and quite another to conflate the functions of domestic immigration restrictions and universal jurisdiction prosecutions. It is not appropriate to regard the 'no safe haven' justification as primarily responsive to domestic concerns. Deportation would be the obvious solution for a state simply wishing to ensure those suspected of international crimes were denied entry to, or residence in, a state. Indeed, this was the approach taken by the USA in the *Demjanjuk* case, where the strategy of the Immigration and Naturalization Service was to deploy evidence supplied by Israeli investigators that John Demjanjuk was a Nazi collaborator to denaturalize him, then deport him.[61] In circumstances where states opt to prosecute on the basis of universal jurisdiction rather than deport, it is difficult to construe this primarily in terms of domestic interests. A successful conviction has the potential to have the converse effect to deportation, leading to the accused being imprisoned in the prosecuting state at the taxpayer's expense, potentially for life, while the risk of an unsuccessful prosecution is that recourse to Article 1F may no longer be available.[62] In the case of Nazi war crimes prosecutions, the reports and official statements reflect that the relevant states were prompted to act, not in response to any effects within or upon domestic constituencies but, rather, because they shared 'the abhorrence felt by all civilized nations for the serious criminal activities committed in the course of the Second World War'[63] and believed such crimes are 'so monstrous they cannot be condoned'.[64] In the case of the UK, the concern was that failure to take action would 'taint the United

[59] Exclusion under Article 1F does not require any preceding conviction under criminal law. A. Zimmerman, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (2011), at 592. Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

[60] Human Rights Watch, 'Universal Jurisdiction in Europe: State of the Art', 27 June 2006, at 7, available at www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art.

[61] L. Douglas, *The Right Wrong Man* (2016), at 37. In re *Extradition of Demjanjuk*, 612 F. Supp. 544 (ND Ohio 1985).

[62] Indeed, even in the case of asylum seekers who are prosecuted, '[i]t is not clear that the fact of having prosecuted such an individual will undercut the basis for their non-removability' where outweighed by likelihood of persecution if returned to their country of origin. Rikhof, 'Prosecuting Asylum Seekers Who Cannot Be Removed: A Feasible Solution?', 15 *JICJ* (2017) 97, at 112.

[63] G. Evans, 'Government Response to Menzies Report on Nazi War Criminals', Ministerial Statement, 24 February 1987, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1987-02-24%2F0035%22.

[64] Hetherington and Chalmers, *supra* note 58, para. 9.18.

Kingdom with the slur of being a haven for war criminals'.[65] The concern was not so much with the domestic audience but more with an international one. Scholars such as Máximo Langer express the clear view that prosecuting states exercising 'no safe haven' jurisdiction do so as a representative of the international and not the domestic community.[66]

Ultimately, the problem with sourcing universal jurisdiction in sovereignty rests in the fact that sovereignty is a many-sided concept. For the state whose official or national may be subject to prosecution by another state, universal jurisdiction does not advance its sovereignty but is instead an affront to it. In response to Belgium's zealous pursuit of universal jurisdiction cases, the Universal Jurisdiction Rejection Act was introduced into the US House of Representatives, declaring in its preamble that universal jurisdiction 'is an assault on the internationally accepted concept of state sovereignty' and based in part on the position that '[i]mplicit within the very concept of universal jurisdiction is a threat to the sovereignty of the United States'.[67] The Bill was not ultimately passed, though it was part of a series of initiatives by the USA that led Belgium to roll back the reach of its universal jurisdiction legislation. It goes too far to say that universal jurisdiction has nothing to do with sovereignty. However, it cannot explain the principle's foundation.

B *Universal Jurisdiction as Interstate Comity (Interstate Community)*

A justification that does more to accommodate interstate relations is the interstate comity approach. According to this account of universal jurisdiction, the exercise of jurisdiction is justified based on the fact that it advances the interests of the community of states considered collectively. The seminal universal jurisdiction crime of piracy has been justified on such grounds. For as long as jurisdictional principles have existed, any nation could try any pirates it caught, regardless of the pirates' nationality or where on the high seas they were apprehended.[68] This recognition of universal jurisdiction resulted from the perceived need for interstate cooperation, or 'sea-policing', to stem a common threat to 'the commercial interests which needed protection against those dangerous common enemies'.[69] To qualify as piracy, the plunder must take place on the high seas – that is, outside the territorial waters of any state. It is this factor that provides the primary motivation for vesting universal jurisdiction over piracy. As recognized in Oppenheim's 1928 text, '[p]iracy in territorial coastal waters has as little to do with International Law as other robberies within the territory of a State … Piracy is, and always has been, a crime against the safety of traffic on the open

[65] *Ibid.*

[66] Langer, 'Universal Jurisdiction Is Not Disappearing', 13 *JICJ* (2015) 245, at 249.

[67] Universal Jurisdiction Rejection Act of 2003, 9 May 2003, para. 2(14), available at www.govtrack.us/congress/bills/108/hr2050.

[68] Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *HILJ* (2004) 183, at 190.

[69] Harvard Research in International Law, 'Draft Convention on Piracy with Comments' ('Harvard Draft'), 36 *AJIL* (Supplement) (1932) 749, at 764–765.

sea, and therefore, it cannot be committed anywhere else than on the open sea'.[70] While the crime is to some extent a relic of a previous era, recognition of universal jurisdiction over piracy has persisted because '[n]otwithstanding the more effective policing of the seas in modern times, the *common interest* and *mutual convenience* which gave rise to the principle have conserved its vitality as a means of preventing the recurrence of maritime depredations of a piratical character'.[71]

The problem with the interstate comity account is that it has the effect of significantly narrowing the boundaries of universal jurisdiction. Treaty provisions recognizing universal jurisdiction over terrorism, drug trafficking and, potentially, other transnational crimes can be justified on this basis (though, notably, there is no suggestion that universal jurisdiction exists over such crimes in customary international law). However, it is another thing to extend such a justification more broadly to 'modern' incarnations of universal jurisdiction in relation to crimes with their origins, not in state rights but in human rights. It is a common (though, I would suggest, flawed) move to recognize piracy as the progenitor to the modern extension of universal jurisdiction to crimes such as genocide, crimes against humanity and, indeed, torture.[72] The pirate – the original *hostis humani generis* – is often regarded as part of an unbroken genealogy related in turn to the modern genocidaire, the despotic perpetrator of crimes against humanity or torturer. As the Second Circuit of the US Court of Appeals stated in *Filártiga*: '[T]he torturer has become – like the pirate and slave-trader before him – *hostis humani generis*, an enemy of all mankind.'[73] In the *Eichmann* case, the Supreme Court of Israel held that 'the substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy also justifies its exercise in regard to the crimes with which we are dealing in this case'.[74] The Princeton Principles on Universal Jurisdiction (described by one scholar as 'a sort of "Restatement" of universal jurisdiction')[75] describe piracy as 'crucial to the origins of universal jurisdiction'.[76]

However, closer examination reveals that the foundations for universal jurisdiction over piracy are quite different from those supporting universal jurisdiction over genocide.[77] As Judge Moore determined in the *Lotus* case, '[p]iracy by law of nations, in

[70] L. Oppenheim, *International Law*, edited by A.D. McNair (4th edn, 1928), s. 277.

[71] 'Harvard Draft', *supra* note 69, at 552 (emphasis added).

[72] See, e.g., Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *VJIL* (2001) 81, at 108, 151–152; Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59(4) *Law and Contemporary Problems* (1996) 153, at 166, 171; Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 2537, at 2556–2557; Randall, 'Universal Jurisdiction under International Law', 66 *TLR* (1988) 785, at 788, 798; Cowles, 'Universality of Jurisdiction over War Crimes', 32(2) *California Law Review* (1945) 181; G. Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943), at 92, 98–99.

[73] *Filártiga v. Peña-Irala*, 630 F. 2d 876 (2nd Cir. 1980), para. 54. See also *Demjanjuk*, *supra* note 61, at 556.

[74] *Eichmann*, *supra* note 29, para. 12.

[75] Kontorovich, *supra* note 68, at 185.

[76] 'Commentary to the Princeton Principles on Universal Jurisdiction', in S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 30. Princeton Principles, *supra* note 56.

[77] Kontorovich, *supra* note 68.

its jurisdictional aspects, is *sui generis*'.[78] The traditional distinctive characteristics of piracy were (i) commission on the high seas; (ii) by persons who reject state or other equivalent authority.[79] Importantly, in the case of piracy, it is not the heinousness of the conduct that attracts universality. As made clear in Oppenheim's statement above, it was never imagined that piracy committed in territorial waters would be subject to universal jurisdiction. Universal jurisdiction over piracy is granted out of necessity to protect fundamental state interests (namely, international trade) against perpetrators who routinely act outside state boundaries with no connection to a state. The contrast between piracy and crimes to which universal jurisdiction has more recently been extended is clear. Crimes such as genocide, crimes against humanity and torture are committed within the boundaries of sovereign states and, very often by definition, are committed by public officials or in the exercise of state policy. Universal jurisdiction in its modern incarnation has not developed out of the need to protect and preserve state structures and interests but, rather, is a novel (and still controversial) means to penetrate and disrupt the machinery of the state where state officials act contrary to certain fundamental norms.

Instead of serving as a device to preserve interstate comity, it is arguable that one of the objects of universal jurisdiction is to disrupt interstate comity, enabling states to prosecute certain offences even over the objection of the territorial state or state of nationality.[80] As Justice Story observed in relation to an attempt to assert universal jurisdiction in *United States v. La Jeune Eugenie*, 'rarely can a case come before a court of justice … more likely to excite the jealousies of a foreign government, zealous to assert its own rights'.[81] The significance of this realization is twofold. First, by recognizing that universal jurisdiction is not exercised in the service of interstate comity, the fact that its exercise interferes with interstate relations should not be a basis for its rejection but merely a factor to be weighed in the balance in determining whether the exercise of universal jurisdiction is proportionate to other legitimate state aims.[82] Second, it is clear we must look elsewhere to understand its motivating rationale.

C *Universal Jurisdiction as 'Conscience of Humanity' (International Community)*

Ultimately, it makes little sense to explain universal jurisdiction in terms of sovereignty or interstate comity. Rather than trying to shoehorn the principle into a traditional state-centred account, it makes more sense to see universal jurisdiction as part of a broader shift recognizing a rival account of the international.[83] It is common to hear

[78] *Lotus* case, *supra* note 48, at 70, para. 249.

[79] Blackstone, 'Of Offences against the Law of Nations', in W. Blackstone, *Commentaries on the Laws of England* (1765), Book 4, ch. 5, at 71.

[80] H. Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs* (July/August 2001), at 86.

[81] 26 F. Cas. 832, 841 (D. Mass. 1822) (No. 15,551).

[82] E.g., legal principles on immunity and extradition law are available to mitigate the impact of universal jurisdiction on interstate comity.

[83] Dorsett and McVeigh, *supra* note 1, at 119.

universal jurisdiction explained on grounds that certain international crimes are so heinous that they 'shock the conscience of humanity' such that those who commit them are truly *hostis humani generis* (in the sense of enemies of humanity rather than enemies of the state, as in the case of pirates or terrorists), justifying the idea that anyone may exercise jurisdiction over them.[84] In her report on the *Eichmann* trial, Hannah Arendt spoke forcefully of the need to treat crimes against the comity of nations and crimes against the human status as distinct. For similar reasons, she also staunchly defended the need to distinguish the crime of murder from the crime of genocide: 'The point of the latter is that an altogether different order is broken and an altogether different community is violated'. Arendt agreed with philosopher Karl Jaspers that 'the verdict can be handed down only by a court of justice representing all mankind'.[85] Although Arendt and Jaspers considered that only an international court would do in the case of crimes against humanity, others have defended the exercise of universal jurisdiction by domestic courts as a form of de-centralized enforcement of universal values, wherein the courts of a particular state stand in for the international community.[86]

It is appropriate to view this account of universal jurisdiction as a contemporary one, forming part of a broader movement to re-imagine the concept of sovereignty in international law. It is an account less related to the tradition of piracy and more related to emerging doctrines and frameworks such as international human rights law, international criminal law and even the responsibility to protect doctrine, which envisages a responsibility on the part of the international community to protect populations from egregious human rights abuse by their own governments. Taking a longer view, it signals a return to a notion of non-territorial or 'universal authority' that potentially has deeper historical roots than (what we think of as) the 'traditional' notion of sovereignty. Anne Orford reminds us that medieval legal thought was shaped by the idea that the Holy Roman emperor and pope claimed authority as supranational bodies descended from the Roman Empire, and both alleged that this legacy gave them universal jurisdiction, understood as the power to state what is lawful for the whole world.[87] The demise of the Holy Roman Empire and triumph of the modern state

[84] E.g., the Princeton Principles, *supra* note 56, at 23, present universal jurisdiction as a tool for vindicating 'the fundamental interests of the international community as a whole'. See also Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, preamble, Art. 5; M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1999); Abi-Saab, 'The Concept of International Crimes and Its Place in Contemporary International Law', in J. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 141, at 147; *Eichmann*, *supra* note 29, para. 10.

[85] For Arendt and Jaspers, only an international court would do: 'Insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it.' Arendt, *supra* note 37, at 269 (quoting a radio interview with Karl Jaspers, later published in *Der Monat*).

[86] Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political', 6(1) *Transnational Legal Theory* (*TLT*) (2015) 89, at 93.

[87] Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect', 30(3) *Michigan Journal of International Law* (2009) 981, at 988.

marked the end not of a competition between 'universal' jurisdiction and state sovereignty but, instead, of the recognition that state sovereignty was more effective at ensuring effective protection of the safety of the people. Even the father of legal positivism, Thomas Hobbes, recognized that this interpretation of sovereignty, entailing an obligation on subjects to obey the sovereign, would last 'as long, and no longer, than the power lasteth, by which he is able to protect them'.[88]

Events of the 20th century provided an emphatic rebuttal of the presumptive link between state sovereignty and protection of the population. However, the grip of sovereignty over contemporary international law has been slow to release. Despite the conscience of humanity having been pricked by the state-deployed barbarism of the Holocaust and World War II, there was still no discernible shift from state to international jurisdiction. As Luban has argued, 'there was something anti-cosmopolitan about Nuremberg'.[89] Although US Chief Prosecutor Robert Jackson opened the trial at Nuremberg observing that 'the real complaining party at your bar is civilization',[90] the Nuremberg tribunal based its authority not on universal jurisdiction but on the territorial jurisdiction of the occupying powers.[91] The Genocide Convention, adopted in 1948, did not recognize universal jurisdiction over genocide. While the convention clearly envisages a form of international jurisdiction, it only places an obligation to prosecute on the territorial state.[92] It is clear from the *travaux preparatoires* of the Genocide Convention that most states were strongly opposed to the idea of providing universal jurisdiction over genocide at the time of the convention's drafting.[93]

The position has changed gradually over the decades.[94] It is clear that the international legal order can no longer be understood as being based exclusively on state sovereignty. The international legal order is progressively moving from a

88 T. Hobbes, *Leviathan* (1996 [1651]), at 147, cited in Orford, *supra* note 87, at 990.

89 Luban, 'The Legacies of Nuremberg', 54(4) *Social Research* (1987) 779, cited in Simpson, *supra* note 41, at 48. As Cassese recognized, the Nuremberg tribunal was not set up for the victims of crimes but, more accurately, was 'created primarily to try Axis war criminals for the crimes committed against the Allied Nations and their nationals'. Cassese, 'The International Criminal Tribunal for the former Yugoslavia and Human Rights', 4 *European Human Rights Law Review* (1997) 329, at 330.

90 The French chief prosecutor also invoked the conscience of mankind regularly in his pleadings, which 'evolved from his status as a human being'. M. Francois de Menthon's Presentation of France's Case: Transcript, reprinted in *Nuremberg Trial Proceedings*, 17 January 1946, vol 5, at 367, 371, 387, 406, 422.

91 International Military Tribunal (Nuremberg), Judgment of 1 October 1946, reprinted in *Nuremberg Trial Proceedings*, vol 22, at 218.

92 Genocide Convention, *supra* note 31, preamble, Art. VI.

93 States including the Egypt, France, the Soviet Union, the UK and the USA opposed the principle of universal jurisdiction during the drafting process, and an Iranian amendment proposing universal jurisdiction was rejected 29 votes to six, with 10 abstentions. Algeria, Burma and Morocco made express reservations to the Genocide Convention, *supra* note 31, affirming their opposition to universal jurisdiction. See further P. Gaeta, *The UN Genocide Convention: A Commentary* (2009).

94 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, para. 31; ECtHR, *Jorgic v. Germany*, Appl. no. 74613/01, Judgment of 12 July 2007, para. 68; Judgment, *Prosecutor v. Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, para. 156.

sovereignty-centred to an individual-oriented system.[95] Yet, as Christian Tomuschat recognized in his Hague Academy lectures, '[t]he transformation from international law as a State-centred system to an individual-centred system has not yet found a definitive new equilibrium'.[96] As international law bequeathed state jurisdiction, so in turn are states beginning to bequeath international law with a form of international jurisdiction. However, it is a development that has not yet been fully realized. This is a development that has its source in natural law, rather than in positive state action, and is undermined by difficult problems that also afflict the natural law account.

One basic problem is that the relevant community – that of humanity – has not yet adequately established its existence, let alone its parameters.[97] As far as laws should express the political will of a people, 'there is no such people as humanity'.[98] The interests of 'humanity' are difficult to quantify in legal terms, let alone define. As Luban notes, the very idea of 'humanness' is deeply suspect and ultimately 'too contestable to anchor our intuitions about what makes humans special – all the more if these intuitions are supposed to be shared across confessions and cultures'.[99] Ideals such as 'humanity' are ultimately a category of very little shape that can give rise to irresolvable normative controversies. Those who rely on humanity as the basis of jurisdiction often draw the related implication that the relevant crimes are somehow extrinsic to it; that perpetrators of such crimes are 'enemies of humanity'. This ignores irrefutable and important evidence that even the most heinous crimes, such as war crimes, crimes against humanity and genocide, find their source within, rather than outside, humanity. In Adolf Eichmann, Hannah Arendt saw, not an inhuman monster, but 'the déclassé son of a solid middle class family', with 'the personality of a common mailman', certified by the psychologists who examined him as 'normal', 'more normal, at any rate, than I am after having examined him'.[100] As Mahmood Mamdani reminds us, '[c]lose on the heels of priests and doctors as prime enthusiasts of the [Rwandan] genocide were teachers, and even some human rights activists'.[101] Famous experiments demonstrate that individuals subject to relatively mild pressure to carry out brutal commands will do so in relatively high numbers, even where this conflicts with their sincerely stated moral convictions expressed outside the situation.[102] Treating

[95] Peters, 'Humanity as the ∂ and Ω of Sovereignty', 20 *EJIL* (2009) 513; R. Teitel, *Humanity's Law* (2011); K. Parlett, *The Individual in the International Legal System* (2011); Decision on Jurisdictional Appeal, *Prosecutor v. Tadic* (IT-94-1-T), Appeals Chamber, 2 October 1995, para. 97.

[96] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1999) 9, at 162.

[97] *Ibid.*, at 126. M. Bourquin, *L'etat souverain et l'organisation internationale* (1959), at 17.

[98] Luban, *supra* note 44, at 126. See also Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck United Nations Yearbook* (2002) 1, at 11.

[99] Luban, *supra* note 44, at 109.

[100] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), at 25, 145.

[101] M. Mamdani, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda* (2002), at 171.

[102] Luban, 'The Ethics of Wrongful Obedience' in D. Rhode (ed.), *Ethics in Practice: Lawyers' Role, Responsibilities and Regulation* (2000), at 94; Luban, 'Integrity: Its Causes and Cures', 72 *Fordham Law Review* (2003) 279.

these crimes as alien to humanity does not engender greater understanding of their causes or assist in their future deterrence.

The second basic problem with this model lies in its weak explanatory force. This account simply does not explain in any holistic fashion what states do. While the *Eichmann* case has been described as a 'major precedent' for universal jurisdiction, it is difficult to find many examples of cases that have actually followed it.[103] Practically, there is scant evidence that the driving force behind universal jurisdiction is state zeal to vindicate the concerns of humanity's conscience. As Frédéric Mégret notes, 'humanity' largely fails to tell us why universal jurisdiction is used in some cases and not others, 'a decision that must surely be based in something else than pure universalist good citizenship'.[104] Itamar Mann determines rightly that any theory of universal jurisdiction must explain 'the gap between the symbolic recognition that a crime has been committed and the ignition of prosecutorial action'.[105] The gulf between theory and practice renders this account vulnerable, in turn threatening to undermine the principle of universal jurisdiction as artificial and therefore illegitimate.[106]

That is not to say that the 'conscience of humanity' can never exist as a foundation for universal jurisdiction. However, as things stand, in order for this practice to gain normative traction, this form of universal jurisdiction requires the service of Robert Cover's 'daring' judge (or, indeed, daring investigator, prosecutor or legislator) to perform the difficult tightrope act of shifting the law from becoming to being.[107] The current position is that, at best, any principle of universal jurisdiction based on the conscience of humanity is a narrow one. The heinousness of the crimes must be severe indeed in order to 'shock the conscience of mankind' sufficiently to vest universal jurisdiction. In the rare example in which such jurisdiction was recognized on this basis, the Supreme Court of Israel in the *Eichmann* trial determined that universal power was vested in every state to prosecute Eichmann's crimes on the basis that '[n]ot only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations'.[108]

While recognition of jurisdiction based in humanity raises the traditional ceiling of jurisdiction, it also raises the floor.[109] In *Pinochet (No. 3)*, Lord Millett recognized a distinction between 'widespread and systematic use of torture as an instrument of state policy' and 'isolated and individual instances of torture', recognizing that only the former would attract universal jurisdiction under customary international law.[110]

[103] R. Teitel, *Humanity's Law* (2011), at 53.

[104] Mégret, *supra* note 86, at 94.

[105] Mann, 'The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the "Court of Critique"', 1(4) *TLT* (2010) 485, at 489.

[106] Mégret, *supra* note 86, at 94.

[107] Cover, 'The Folktales of Justice: Tales of Jurisdiction', 14 *Capital University Law Review* (1985) 179, at 191.

[108] *Eichmann*, *supra* note 29, para. 12. See also *Polyukhovich v. Commonwealth*, (1991) 172 CLR 501, paras 34, 35, Opinions of Brennan J and Toohey J.

[109] This language of jurisdictional floor and ceiling is borrowed from Mills, *supra* note 52, at 209–210.

[110] *Pinochet*, *supra* note 19, para 328, per Lord Millett.

What is clear is that, where a domestic court exercises this form of universal jurisdiction, the community it acts on behalf of is 'humanity', perhaps more commonly referred to as the 'international community', a political community whose interests may differ from that of the community of states, the community of victims or any particular state or individual.[111]

As the survey of universal jurisdiction trials discussed below reflects, there has been a recent upsurge in cases in which domestic courts could be said to be conducting prosecutions on behalf of the international community rather than at the behest of domestic or interstate communities; with Germany, Sweden, Finland, the Netherlands, the UK and Israel each completing trials commenced on this basis. The recent upsurge in such cases comes on the heels of the establishment of specialized War Crimes Units in a variety of states.[112] The creation of these specialized units brings together the necessary resources, staff and expertise, enabling more focused and effective investigation and prosecution of grave international crimes.[113] In a novel development, Germany has taken this a step further and has become the first state to initiate 'structural investigations' that focus not on specific suspects but, rather, on whole situations or conflicts. Given the large number of refugees escaping conflicts, Germany has recognized a unique opportunity through cooperation between immigration and criminal justice authorities to be proactive in gathering information and evidence and identifying potential victims and witnesses for future criminal proceedings. This stems from the recognition that it is easier to collect evidence during the conflict or soon after the events as opposed to years later.[114]

Since 2011, the office of the federal prosecutor is thought to have opened several structural investigations, although the only publicly known examples are those relating to Libya and Syria. In the Syrian investigation, German authorities have been alerted to more than 2,800 crimes committed in Syria, taking testimony from 200 witnesses, leading to the initiation of 22 investigations against 28 suspects.[115] Two German nationals have already been tried and imprisoned for war crimes committed in Syria,[116] and universal jurisdiction trials have been commenced against at least two

[111] Princeton Principles, *supra* note 56, at 23.

[112] These countries include Belgium, Canada, Croatia, Denmark, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, the UK and the USA. Denmark and the UK have personnel dedicated to grave international crimes within larger units handling a range of international crimes, including terrorism and financial crimes. Human Rights Watch, The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands, September 2014, available at www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf.

[113] *Ibid.*, at 6.

[114] *Ibid.*

[115] Kaleck and Kroker, 'Syrian Torture Investigations in Germany and Beyond', 16 *JICJ* (2018) 165, at 180–181.

[116] The trials of Aria L and Abdelkarim El B are discussed in Kroker and Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany', *EJIL Talk!* (12 August 2016), available at www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/.

others.[117] Germany's motivations in launching such structural investigations are not domestic or interstate but international. Information gathered is earmarked for use not merely in domestic courts but also in other countries or before international criminal tribunals and paves the way for enhanced international cooperation and mutual legal assistance in bringing suspects to justice.[118] Germany may be the only country to have launched these structural investigations, but it establishes a model for other states wishing to serve the interests of a broader international fight against impunity. The European Union Genocide Network, established in 2002 as a network of investigators and prosecutors from member states to increase cooperation in cases of grave international crimes, has the potential to strengthen legal developments along these lines, already serving as a valuable forum for national investigators and prosecutors to develop additional expertise, share best practices and exchange information on specific cases.[119]

D *Universal Jurisdiction as Access to Justice (Victim Community)*

One of the main problems with these standard accounts of universal jurisdiction is that they proceed from 'grand narratives' rather than working with the contemporary practice of universal jurisdiction.[120] If we allow ourselves to break out of traditional interpretations of jurisdiction, and indeed universal jurisdiction, we give ourselves licence to consider what actually drives universal jurisdiction prosecutions. An important revelation of my survey of universal jurisdiction trials over recent decades was to provide a window into the role of victim communities and victim-support organizations as key agents motivating universal jurisdiction trials, including preparing case files and galvanizing prosecutions. The insight is that the exercise of universal jurisdiction is primarily victim driven.[121] States are not, by and large, valiant global enforcers of individual criminal accountability for international crimes, either individually in defence of domestic or international interests or out of a sense of comity to each other. Indeed, as Verònica Michel and Kathryn Sikkink note in the Latin American context, since human rights violations usually involve crimes committed by state officials, the state very often has a conflict of interest when it comes to human rights prosecutions.[122] For the most part, states are pressured into commencing universal

[117] See further details in reports from Trial International 'Suliman Al-S' (2 August 2017), available at https://trialinternational.org/latest-post/suliman-al-s/; 'Ibrahim Al-F' (23 May 2017), available at https://trialinternational.org/latest-post/ibrahim-al-f/.

[118] Human Rights Watch, *supra* note 112, at 60.

[119] The Genocide Network comprises national authorities from member states of the European Union and their counterparts from Canada, Norway, Switzerland and the USA. It also liaises closely with representatives of the European Commission, Eurojust, Europol, the International Criminal Court and ad hoc international criminal tribunals, the International Committee of the Red Cross, Interpol and civil society organizations. See Genocide Network, available at www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/Genocide-Network.aspx.

[120] Mégret, *supra* note 86, at 92.

[121] This was also one of Luc Reydams' conclusions. Reydams, *supra* note 8, at 221.

[122] Michel and Sikkink, 'Human Rights Prosecutions and the Participation Rights of Victims in Latin America', 47(4) *Law and Society Review* (2013) 873, at 874.

jurisdiction prosecutions by victims or victim-support groups who fight for individual criminal accountability within states or sometimes globally.[123] Organizations such as the Simon Wiesenthal Centre (Jewish human rights organization); the Collectif des Parties Civiles pour le Rwanda; the Association for International Justice in Rwanda; Advocacy Forum (Nepal); the Association of the Victims of Crimes and Political Repression in Chad; the Revolutionary Association of the Women of Afghanistan; the International Truth and Justice Project (Sri Lanka), sometimes assisted by global human rights organizations such as the European Centre for Constitutional and Human Rights; the Féderation Internationale des Ligues des Droits de l'Homme and Human Rights Watch have as part of their mandate the initiation and support of litigation against perpetrators of international crimes. Getting a case off the ground is almost invariably a process of inter-dependence between state authorities and victims, with the latter very often bearing the burden of initiating the complaints and providing the authorities with essential information, including the location of the suspect, the nature of the accusations and the names of potential witnesses living in the host state or overseas.[124]

Despite the significant role of victims in initiating and sustaining universal jurisdiction prosecutions, it is clear that the legal framework is presently structured so that state interests not merely outweigh but also often trump the interests of victims of international crimes. The recent *Nait-Liman* judgment issued by the Grand Chamber of the European Court of Human Rights is one in a line of cases demonstrating that, while the legitimate aims of states in refusing jurisdiction are well understood, the aim or aims in recognizing universal jurisdiction are not.[125] Although the *Nait-Liman* case concerned universal civil jurisdiction rather than universal criminal jurisdiction, it remains instructive. In brief, the case concerned the refusal by Swiss courts to examine the applicant's civil claim for compensation arising out of his alleged torture in Tunisia in 1992 on the orders of A.K., the then Tunisian minister of the interior. The applicant was a Tunisian national who fled to Switzerland in 1993 where he was granted political asylum and eventually Swiss citizenship. Relying on Article 6(1) of the European Convention on Human Rights, the applicant alleged that the refusal by the Swiss courts to examine his civil claim infringed his right of access to a court.[126] By a strong majority, the Grand Chamber of the European Court of Human Rights rejected his application, holding there had been no violation of Article 6(1).

[123] In the universal jurisdiction context, it is less apparent that the motivating force is the 'abstract victim' described by Sarah Nouwen in her critique that 'the victims that are the alpha and omega of the international criminal justice movement are not concrete persons of flesh, blood and water, with individual names and individual opinions, but deity-like abstraction that is disembodied, depersonified, and most of all, depoliticized'. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 327, at 340.

[124] African Rights and REDRESS, Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes, November 2008, at 78, available at www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf.

[125] ECtHR, *Nait-Liman v. Switzerland*, Appl. no. 51357/07, Judgment of 21 June 2016.

[126] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

In this case, the Court had the potential to render a judgment clarifying the appropriate balance between the legitimate concerns of states arising out of the exercise of universal jurisdiction and the legitimate interests of victims of international crimes in obtaining access to justice. Instead, the Court structured the proportionality analysis in such a way that state interests did not merely outweigh, but essentially displaced, those of the victims. As is widely recognized, the core of the proportionality doctrine is the balancing stage, which requires the right in question to be balanced against competing rights or interests.[127] No such balancing occurred in the present case. Instead, while acknowledging it was clear the applicant's right of access to justice had been restricted, the Grand Chamber recognized that limitations on this right would be lawful if (i) the limitations pursued a legitimate aim and (ii) the limitations deployed were reasonably proportionate to the achievement of that aim. As can be seen from the way the Court structured the analysis, the interests of individuals in achieving access to justice were not weighed in the balance but, instead, dropped out of the equation entirely.

In applying the test, the only interests considered by the Court were state interests. In terms of 'legitimate aims', the Court was satisfied that the impugned restriction was justified in the interests of 'the proper administration of justice and maintaining the effectiveness of domestic judicial decisions'. Specifically, it accepted Switzerland's contention (without seemingly engaging in any independent inquiry) that an action such as the applicant's would pose considerable problems in terms of evidence and enforcement, would encourage forum shopping by victims of torture leading to an 'excessive workload for domestic courts' and would entail potential diplomatic difficulties in terms of Swiss/Tunisian relations.[128] Turning to the question whether the restriction was proportionate, the Court's sole concern was whether other legal obligations existed that bound Switzerland to open its courts to the applicant, including, *inter alia*, a principle of universal civil jurisdiction for torture.[129] In reasoning to its decision that no such obligations existed, including under the law relating to universal civil jurisdiction, the Grand Chamber assumed the perfect judicial poise from a positivist perspective. Referring to Article 38 of the Statute of the International Court of Justice, the Court held that the question was whether Switzerland was bound to recognize universal civil jurisdiction for acts of torture by virtue of an international custom or of treaty law.[130]

[127] Möller, 'Proportionality: Challenging the Critics', 10(3) *International Journal of Constitutional Law* (2012) 709, at 710; Rivers, 'Proportionality and Variable Intensity of Review', 65(1) *Cambridge Law Journal* (2006) 174, at 176; Alexy, 'Constitutional Rights, Balancing and Irrationality', 16(2) *Ratio Juris* (2003) 131; see also *Sporrong and Lönnroth v. Sweden*, (1983) 5 EHRR 35, at 52.

[128] *Nait-Liman*, *supra* note 125, paras 122–128.

[129] Notably, this was not a case like *Al-Adsani* where there was a conflicting principle of international law (e.g., state immunity), which prohibited access to a court in the relevant circumstances. In *Al-Adsani*, the Court's reasoning was subtly different where the Court appeared to infer a presumption of proportionality on the basis that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction'. *Al-Adsani v. UK*, (2002) 34 EHRR 273 (ECHR 2001), para. 56.

[130] Statute of the International Court of Justice 1945, 59 Stat. 1031.

In terms of custom, the Court concluded that 'those States which recognize universal civil jurisdiction … are currently the exception'.[131] The Court further held that international treaty law 'also fails to recognize universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State'.[132] On this basis, the Court held that 'the Swiss courts' refusal to examine the applicant's action seeking redress for the acts of torture to which he was allegedly subjected pursued legitimate aims and was not disproportionate to them'.[133] In other contexts, the European Court of Human Rights has appropriately favoured an interpretive approach encouraging consistency between principles of international law, yet has generally used this approach as a means to bring other legal regimes more into line with human rights law.[134] By contrast, in the case of the right of access to justice for victims of torture, the Court clearly considered that the human rights muscle was not strong enough to swim against the tide of state interests.

The role of human rights law in international criminal trials is appropriately contested, particularly to the extent that overplaying the rights of victims can interfere with the criminal defence rights of the accused.[135] However, when it comes to determining the scope of jurisdiction of domestic courts, the relevant contest is not between the victim and the accused[136] but, rather, between the rights of states and the rights of victims.[137] Given that victims have a recognized legal interest in the prosecution of international crimes,[138] it is appropriate that this interest should be balanced against the competing interests of states. Here, the human rights framework provides an effective balancing mechanism. The problem is that it is clear that some courts, including human rights courts, continue to think of jurisdiction as a state prerogative based in state sovereignty. In this article, I have sought to show that such framing perpetuates an outdated conception of jurisdiction. To construe universal jurisdiction

[131] *Nait-Liman*, *supra* note 125, para. 187.

[132] *Ibid.*, para. 188.

[133] *Ibid.*, para. 217.

[134] ECtHR, *Golder v. United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1971, para. 35; ECtHR, *Neulinger and Shuruk v. Switzerland*, Appl. no. 41616/07, Judgment of 6 July 2010, paras 131–133; ECtHR, *Nada v. Switzerland*, Appl. no 10593/08, Judgment of 12 September 2012, para. 169; ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Appl. no. 18030/11, Judgment of 8 November 2016, para. 138.

[135] Robinson, 'The Identity Crisis of International Law', 21(4) *Leiden Journal of International Law* (2008) 925.

[136] Among the rights of defence recognized, there is no suggestion that the accused has the right to choose the legal jurisdiction to which he or she is subject or to choose the forum in which he or she is prosecuted.

[137] Cécile Aptel talks about the need for prosecutors of international crimes to serve 'two constituencies', the victims of the crimes and states. Aptel 'Prosecutorial Discretion at the ICC and the Victims' Right to Remedy', 10 *JICJ* (2012) 1357, at 1373–1375.

[138] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, GA Res 60/147, 16 December 2005; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 55/89, 4 December 2000; F. Francioni, *Access to Justice as a Human Right* (2007), at 37.

as an aspect of sovereignty serving primarily domestic interests, or as an act of interstate comity catering predominantly to the interests of other states, or even as an act of international conscience is to misconstrue the self-evident position that universal jurisdiction is most often exercised at the behest of, and in the interests of, victims.

Recognition of a normative shift from jurisdiction as a state right to recognition of jurisdiction in some circumstances as an individual right would not be revolutionary. To a large extent, it merely maps onto the jurisdictional terrain the long-standing recognition that international law is no longer merely concerned exclusively with state rights, or obligations owed between states, but is also concerned with human rights, or obligations owed to individuals. As Alex Mills recognizes, what is perhaps most surprising is that much of the work on jurisdiction has been quarantined from these developments for so long.[139] In his article on 'Rethinking Jurisdiction in International Law', Mills contrasts the 'relatively static' account of the rules of jurisdiction with fundamental changes in international law – in particular, through the recognition of individuals as bearers of human rights.[140] He not only acknowledges the traditional view of jurisdiction as a state right but also introduces the notion that failure to exercise jurisdiction could deny an individual's right of access to justice. He argues that this individual right has implications for the idea of jurisdiction in international law, implying that 'jurisdiction is no longer exclusively a right of states, but is at least to some extent a matter of individual right, that is, an obligation owed to individuals'.[141] Mills concludes that international rules on jurisdiction are 'ripe for reconceptualisation' so as to reflect the shift in the status of individuals from passive objects of international jurisdictional rules to active rights holders.[142]

Frédéric Mégret disrupts the notion that the state obligation owed to individuals to provide access to justice should be interpreted narrowly and confined to the state in whose territory the crime occurred.[143] In *Nait-Liman*, the Grand Chamber accepted the determination by the Swiss courts that there was no sufficient connection to Switzerland, despite the fact that the victim was a Swiss national, on the basis that the victim's obtaining of Swiss nationality was 'a fact subsequent to the events of the case'.[144] Mégret reconceptualizes the geography of access to justice, recognizing that the body of the victim 'describes the "place" of crime much better than, say, the territory of a state'.[145] He recognizes the role of 'victim diasporas' in the evolving practice

[139] Mills, *supra* note 52, at 212.

[140] *Ibid.*, at 188.

[141] *Ibid.*, at 229.

[142] *Ibid.*, at 235.

[143] Mégret, *supra* note 86.

[144] By contrast, the Court did not consider itself foreclosed from referring to subsequent developments in the Tunisian political and justice system. While noting the impossibility of lodging an action in Tunisia at the relevant time, the Court included a section on 'Subsequent developments' in which it noted that, following the ousting of Ben Ali's regime in the 2011 revolution, a Truth and Dignity Commission was established in 2013, giving victims of the former regime until 15 June 2016 to apply to the commission. The Court further noted that 'it was foreseen that selected cases would be transmitted to the courts at a later stage in the investigation process'. *Nait-Liman*, *supra* note 125, paras 31–36.

[145] Mégret, *supra* note 86, at 100.

of universal jurisdiction, which '"bring the crime" to the forum state, sensitise it to its existence and, often, demand some form of recognition'. He identifies the 'long tail' of mass crime and the capacity for diasporas to 'reconstitute in the forum country some of the very tensions and polarities that were characteristic of the state of origin, and therefore some of the conditions that created criminality'.[146] Mégret's argument is not that the right of access to justice should be geographically unlimited. Rather, he exposes the deception that universal jurisdiction is invariably exercised by a state with no connection to the crime, observing that universal jurisdiction 'almost always follows existing patterns of transnational interaction between states'.[147] In response, Mégret proposes a normative theory of universal jurisdiction that takes seriously the role of diasporas in precipitating exercises of universal jurisdiction. He proposes reframing universal jurisdiction as an exercise in creating a safe, welcoming, hospitable society and – building on Immanuel Kant's universal duty of hospitality – imagines the contours of a 'transnational right to an effective remedy'.[148]

I concur with Mégret's conclusion that a state's exercise of universal jurisdiction has the potential to provide a mechanism through which to provide victims of international crimes with a right of access to justice. As recognized in the European human rights context, this right is not absolute; however, it should be strong enough to place a burden on states declining to exercise jurisdiction to demonstrate that an exercise of universal jurisdiction would disproportionately threaten other legitimate aims and state interests in any particular case. Just as importantly, this proportionality analysis would provide a formula through which states can justifiably limit the scope of universal jurisdiction. For example, many states include a condition that the accused must be present on their territory, a limitation that could be justified on the basis that 'universal jurisdiction *in absentia*' places a disproportionate burden on the justice system relative to the limited sense of justice for the victim. The effect of this argument is to bring into question Roger O'Keefe's persuasive thesis that the category of 'universal jurisdiction *in absentia*' mistakenly elides the distinction between prescriptive and enforcement jurisdiction.[149] My argument is that greater understanding of the aims of universal jurisdiction will have implications for the principle's legitimate scope and limitations. Stephen Ratner's insightful analysis of Belgium's universal jurisdiction prosecution of the Butare Four concludes that the trial's benefits to human rights and public order outweighed its costs, attributing its success to a number of factors including the presence of the accused, the strength of the evidence against them and the absence of an effective judiciary in the place the atrocities took place.[150] The UK has also made an attempt to identify relevant factors to be weighed in the balance in determining whether to assume extraterritorial jurisdiction, including, notably, the

[146] *Ibid.*, at 106, 100.
[147] *Ibid.*, at 99.
[148] *Ibid.*, at 106–112, referring to I. Kant, *Practical Philosophy* (1999), at 330.
[149] O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *JICJ* (2000) 735.
[150] Ratner, 'Belgium's War Crimes Statute: A Post-Mortem', 97 *AJIL* (2003) 888.

vulnerability of the victim and the danger that such offences would not otherwise be prosecuted.[151]

3 Conclusion

The aim of this article is to draw attention to the claim to authority inherent in the exercise by domestic courts of universal jurisdiction. To do so is to underscore that the judicial authority exercised in universal jurisdiction trials derives from a distinctly different source than that exercised in domestic criminal trials. Where a foreign national is prosecuted for a crime that has no connection to the prosecuting state, a positivist claim to authority by the prosecuting authority expressed purely in terms of its domestic law comes off as parochial and unconvincing. Moreover, by carrying on with 'business as usual', a domestic court risks disregarding the distinctive purpose of the trial and the normative communities most closely affected by it. This article recounts that sovereignty, interstate comity and the conscience of humanity have all been proposed as justifications for the exercise of universal jurisdiction. However, on the basis of a detailed survey of universal jurisdiction trials and a critical interrogation of traditional accounts, I propose a shift in theoretical paradigm, at least for what is termed 'modern universal jurisdiction'.[152]

While the foundation of universal jurisdiction trials may differ depending on the nature of the crime, universal jurisdiction is best understood as being based in an individual's right of access to justice for victims of serious international crimes. This insight is important not only because of its descriptive accuracy but also because of its normative implications.[153] With greater awareness of the purpose and community served by universal jurisdiction trials, courts can be more responsive to important questions of normative and institutional design, including the constitution of the jury, issues of translation, the significance of non-governmental organizations, the importance of public judgment, the role of victims and the geographical reach of the 'public' gallery. The question of jurisdiction is not merely a preliminary question to be disposed of but, rather, a question that should orient, inform and influence the entire trial and its conduct. All parties to the trial, including authorizing government officials, barristers and domestic judges must take responsibility for the authority claimed in such trials and the normative communities it puts into relation. Otherwise, courts such as the Old Bailey in the *Kumar Lama* trial, risk becoming just another site where – in an age of internationalism – staunch reliance on local road maps results in global disorientation.

[151] Other factors included (i) seriousness of the offence; (ii) availability of witnesses and evidence; (iii) international consensus as to the reprehensible nature of the crime and (iv) impact on standing and reputation of the UK. UK Home Office, Review of Extra-territorial Jurisdiction: Steering Committee Report (1996).

[152] Kontorovich, *supra* note 68.

[153] Mills, *supra* note 52, at 237.

Appendix 1: Key Community Motivating Universal Jurisdiction Prosecutions

State	Domestic: Primary motivation (secondary)	Interstate: Primary motivation (secondary)	International: Primary motivation (secondary)	Victim: Primary motivation (secondary)	Total
Australia			1	(1)	1
Austria		(1)		1	1
Belgium				4	4
Canada			1	2	3
Denmark				1	1
Finland	(3)	(1)	3	1	4
France				5	5
Germany	2		4(1)	1	7
Israel			(1)	2	2
Netherlands	3	1(1)	1	2	7
Norway		(2)		2	2
Senegal			(1)	1	1
Spain			1		1
Sweden		(2)	6(1)	2	8
Switzerland				2	2
UK			2	1(2)	3
Total	5(3)	1(7)	19(4)	27(3)	52

Notes: The survey deals only with universal jurisdiction trials that proceeded through to a verdict between 1961 and December 2017: 52 cases were identified. Based on publicly available information, the aim was to identify the primary community (and secondary if relevant) motivating the initiation of each prosecution, classifying the relevant communities as domestic community, interstate community, international community and victim community. *Sources:* websites for Trial International and the International Crimes Database, relevant articles and books, including, in particular, A. Cassese (ed), *Oxford Companion to International Criminal Justice* (2009); L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004); Langer, 'The Diplomacy of Universal Jurisdiction', 105 *American Journal of International Law* (2011) 1; reports on universal jurisdiction by Amnesty International, European Centre for Constitutional and Human Rights, the Féderation Internationale des Ligues des Droits de l'Homme, Human Rights Watch and REDRESS; newspaper articles and other media reports.