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Universal Jurisdiction: State of Affairs and Ways Ahead

A policy paper

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Abstract and caveat from the authors

On 17 September 2010, the International Institute of Social Studies (ISS), Leiden University and ICCO organised an expert meeting at the ISS on universal jurisdiction (UJ). The meeting was chaired in the morning by Professor John Dugard[1] and in the afternoon by Professor Karin Arts[2]. The aim of the meeting was to analyse the possibilities and challenges faced in universal jurisdiction cases, and more broadly, the capacity of national legal jurisdictions to prosecute and/or otherwise hold accountable individuals and companies for (complicity in) international crimes. To that end, the meeting brought together academics and practitioners who have been working in the area of international criminal law and individual and corporate accountability.

This policy paper is a report of the September 2010 meeting, which consisted of two sessions. The morning session covered Dutch jurisprudence concerning universal jurisdiction and focussed on specific cases. The afternoon session highlighted political and social themes and took a more comparative approach. Although the outcomes of the meeting were embedded in the Dutch context, they also reached out to other jurisdictions.

We wish to add a caveat that this policy paper is very much work-in-progress and draws on our personal reflections and impressions from this meeting. It is by no means intended as a verbatim record of the meeting. This policy brief is intended to stimulate critical discussion on this important issue and therefore **no attribution should be implied or assumed on the part of any contributor to this report or the institutions they are affiliated with**, including the principal contributors. We nevertheless welcome your feedback and further contributions.

Keywords

International criminal law, universal jurisdiction, human rights, politics of international law.

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1 Universal Jurisdiction Cases in The Netherlands

1.1 Early cases: retroactive application of universal jurisdiction?

At the expert seminar organised at the ISS on 17 September 2010, *Richard van Elst*[3] presented an overview of the first Dutch cases, including an important case against Desi Bouterse, which was initiated by relatives of the victims of the December killings which occurred in 1982 in Suriname (Zegveld 2001). The Dutch public prosecutor declined to initiate criminal proceedings against Bouterse and subsequently, these relatives addressed the Amsterdam Appeals Court in a procedure provided for in article 12 of the Dutch Code of Criminal Procedure.

According to van Elst, the only jurisdictional ground available to the Appeals Court was universal jurisdiction. The Appeals Court addressed the question whether customary international law, as it existed in 1982, gave the Netherlands competence over a foreign person accused of torture or crimes against humanity committed abroad. The appeals court of Amsterdam answered this question affirmatively and ordered the public prosecutor to prosecute the head of state for the December killings. This decision was unique and far-reaching; until then no criminal proceedings had been initiated before Dutch courts on the basis of universal jurisdiction.

The Attorney General brought the Bouterse case before the Supreme Court. He addressed five legal questions, all from an international law point of view. The Supreme Court, however, took a national approach to each of the five questions. It was striking to note that, apart from citations of the UN Torture Convention 1984, the Supreme Court addressed no international obligation.

After the Supreme Court decision in the Bouterse case, plaintiffs in the criminal complaint against Jorge Zorreguieta focused on the responsibility of the latter for crimes against humanity, allegedly committed in Argentina between 1976 and 1983 while serving as a member of the cabinet of President Videla. However, as neither treaties nor decisions of international organizations (among which the Charter of the Nuremberg tribunal) referred to universal jurisdiction, the Appeals Court stated that it was not at liberty to set aside the national provisions on jurisdiction in case of a conflict with (unwritten) customary international law. In so deciding, the Appeal Court again took a strict, national approach in answering the question of jurisdiction.

The outcome of the Bouterse and Zorreguieta cases is that the legality principle bars retroactive application of any provision on jurisdiction. Furthermore, treaty-based universal jurisdiction cannot be applied directly.

1.2 Cases where the defendant was present

All successful prosecutions in the Netherlands concerned suspects who lived in the Netherlands at the time of the start of the criminal investigation. Some of the suspects were Dutch; some were not. All of the suspects had their *habitat* (legal residence) in the Netherlands.

Larissa van den Herik[4] discussed cases prosecuted in the Netherlands on the basis of the active personality principle. The exercise of extraterritorial criminal acceptance on the basis of the active personality principle has greater acceptance in public international law than the application of universal jurisdiction. The active personality principle has a much longer history and, until the 1648 Treaty of Westphalia, it was the most commonly used jurisdiction principle. While rarely being exercised today, the principle reappears at the international stage, at least where international crimes are concerned.

The inherent intricacies of cases based on either principle (universal jurisdiction or the active personality principle) are to a large extent comparable in character. In particular, both principles involve the collection of evidence abroad and the required legal assistance to do so, as well as the increased complexity for judges to come to a sound assessment of the facts, given that the alleged crimes were committed in a different geographical, social and cultural context.

The case against Guus Kouwenhoven, a Dutch businessman charged among others for war crimes committed in early 2000 in Liberia, is a very clear illustration of the difficulties involved regarding the collection of evidence and mutual legal assistance, and the increased complexity for judges and other actors involved to form a judgment on the facts.

Regarding war crimes, attention should be drawn to the fact that, under Dutch law, every violation of the laws and customs of war can, in principle, amount to a war crime. However, it is questionable whether the Netherlands can indeed exercise universal jurisdiction for violations of international humanitarian law that are not recognized as war crimes at the international level. In the Mpambara judgment, the Hague Court of First Instance acknowledged the importance of international penalization. With reference to the Tadic-criteria, the Hague Court ruled that Dutch courts can only exercise universal jurisdiction for a violation of IHL if international individual criminal responsibility exist in relation to the given violation.

1.3 Cases where the defendant was only briefly present

Under the Dutch International Crimes Act (WIM), presence on home territory is a condition for jurisdiction of the national courts, if neither the suspect nor the victims are Dutch. So, one could question whether true universal jurisdiction in fact exists, as a link with the Netherlands is always required. This may not be a bad thing. The Netherlands cannot realistically be expected to try international crimes where it has no relationship whatsoever with these crimes.

The main issue faced in this context is in the definition of the word *presence*. How long must the presence be and for what kind of jurisdiction presence is a precondition? *Liesbeth Zegveld* discussed this question on the basis of the case against Ayalon.

From 16 to 20 May 2008, the former director of *Shin Bet*, the Israeli General Security Services, in 1999 and 2000, Ami Ayalon, was visiting the Netherlands. At the time of his visit, Ayalon was Minister without Portfolio in the Israeli Government. On 16 May 2008, an application for the arrest of Ami Ayalon was filed for alleged torture in relation to his former position as Director of *Shin Bet*.

The Dutch authorities failed to arrest Mr Ayalon. Once Ayalon had left the Netherlands, the prosecutor decided not to start a prosecution, as Ayalon was no longer present on Dutch territory. The decision not to prosecute Ayalon was subsequently the subject of a legal challenge in the Court of Appeal in The Hague. An Order was sought requiring a criminal investigation, supported by an extradition request or an international arrest warrant. Central to the case before the Court of Appeal was the question of whether Ayalon's presence, however brief, provided the Dutch prosecutor with jurisdiction to investigate the case, and possibly arrest Ayalon.

Unfortunately, Zegveld argued, the ruling of the Court of Appeal was confusing (Handmaker 2010). On the one hand, the Court ruled that presence was indeed a sufficient precondition for jurisdiction. On the other hand, it ruled that presence in and of itself did not actually establish or activate jurisdiction. In the view of the Court, a particular action of the prosecutor was needed in order to activate such jurisdiction. In the particular case of Ayalon, such action by the prosecutor was required because, according to the Court, the file lacked sufficient evidence against Ayalon. A *prima facie* case was thus, in the view of the court, required for jurisdiction to exist.

The puzzling decision of the Court made jurisdiction dependent on a sufficient degree of suspicion against the alleged perpetrator. In deciding so, the Court confused jurisdiction with substantive suspicions against a person. However, jurisdiction is based on the law and independent of any action of the prosecutor (or anyone else for that matter). The presence of the offender – however brief – should have triggered jurisdiction and allowed the Dutch prosecutor to investigate the case, to establish guilt, and possibly to arrest the suspect.

Considerable confusion has surrounded this topic. Legislators and courts often do not specify the precise temporal moment at which any requirement of jurisdiction is supposed to be applicable. Is the presence of the accused within a state required at the time the complaint is issued? Is the presence of the accused required at the time of the decision to prosecute is taken; or at the time of the actual prosecution; or at the time of the actual trial? Unfortunately, the Court of Appeal missed a unique opportunity to clarify the unclear rules and practice on presence of alleged perpetrators on Dutch territory.

According to the Dutch Court in the Ayalon case, there was no jurisdiction for the Dutch prosecutor since there was felt to be insufficient evidence against the accused. But, how can there ever be a *prima facie* case if the prosecutor is denied jurisdiction to investigate a case in the first place? In order to establish a *prima facie* case, which is the duty of the prosecutor rather than of the victim, the prosecutor needs jurisdiction. The only reasonable conclusion can be that the existence of a *prima facie* case is irrelevant for the concept of jurisdiction.

In the case of Ayalon, the Court of Appeal took a step backwards in clarifying the rules on jurisdiction over perpetrators present on Dutch territory. According to Dutch law, presence provides the Dutch authorities with jurisdiction to start investigation of a case, for example pursuant to a complaint by one of the alleged victims. Presence is fulfilled even during a stopover during a flight or a brief visit. Furthermore, jurisdiction continues to exist when the alleged perpetrator has left the country. Would the situation be otherwise, then there would be an incentive for prosecutors to allow a suspect, against whom a complaint has been filed by victims, to depart Dutch territory, so as to be able to claim that the prosecutor lacks jurisdiction.

1.4 Further analysis of Dutch universal jurisdiction cases

André Klip[5] presented a further analysis of universal jurisdiction cases in the Netherlands. The Netherlands has been extraordinary in its practice on universal jurisdiction (Klip and Sluiter 1999-2007). The focus has been on asylum seekers, making use of article 1F of the Refugee Convention that excludes individual asylum seekers from enjoying refuge protection if there are serious reasons for believing that they were involved in international crimes. Furthermore, there is a focus in The Netherlands on promoting *clean business* by Dutch nationals (e.g. Van Anraat and Kouwenhoven).

How is it possible to improve the Dutch approach of jurisdiction over extraterritorial offences? Klip noted that universal jurisdiction created a bystanders effect: everyone is responsible so no one is responsible. States do not make friends when they prosecute international crimes.

A better term to refer to universal jurisdiction would be *decentralized enforcement of international law*. Most international law is enforced through the national courts. Moreover, the starting point should be criminality, not jurisdiction. Klip recommended organizing the provisions on jurisdiction in such a way that an adequate balance is found between the link with the act and the seriousness of the act. In case of serious crimes, the link needs to be less close.

Another problem was selectivity: which cases are picked up and why? It would be better to appoint states on the basis of a shared responsibility model. Such a model would, for example, have helped the ICTY with referrals of cases. The costs and benefits of prosecuting alleged offenders would then also be in balance. Current practice has led to a symbolic, handful of cases. In order to advance such prosecutions, Klip argued, the establishment of an international body competent to oversee national enforcement of international crimes should be considered.

In addition, the provision of trained personnel and adequate funding is more important than the jurisdictional principle. What is decisive is not the jurisdiction over such cases, but the allocation of resources to the criminal justice system. Klip recommended adjusting the jurisdictional provisions to the capacity to investigate, prosecute and to try cases that are available. The capacity to investigate, prosecute and try also needed to be adjusted to the scope of Dutch criminal law.

1.5 Closing comments from the session

Participants stressed that there are many different grounds for the Dutch Courts to claim jurisdiction over international crimes, but relies in all instances on a (political) decision to prosecute by the office of the public prosecutor. Greater efficiency / co-ordination is needed between the judiciary in different countries, on the basis of particular expertise in adjudicating particular types of crimes, or in relation to conflicts / situations in specific countries. Finally, it was noted that, according to Article 93 of the Rome Statute of the ICC, states and the international court have an obligation to prosecute. What happens in government, however, is a reflection of what happens in the streets; in other words, social movements and other civic pressures towards the prosecution of international crimes will *push the political*.

With these additional comments, Professor Dugard drew the morning session to a close and introduced the afternoon session by underlining that international law does not prohibit absolute universal jurisdiction, but that some states (Ed: for political reasons) are more inclined to pursue this than others. For example, in South Africa, attempts have been made to investigate alleged crimes in the aftermath of the Gaza conflict after Israeli soldiers boasted about their experiences on the social networking website *Facebook*.

2 Social and Political Challenges in Pursuing UJ Cases

This section presents the content of discussion that took place in the afternoon session of the 17 September 2010 meeting on various means to hold individuals and, potentially, also corporations accountable at a national level (c.f. Cernic and Van den Herik 2010). Firstly, as discussed in the morning session, it is possible to prosecute an individual or a corporation and/or the management of that corporation in the criminal courts, for example in terms of the Dutch law on international crimes. Second, it is possible to pursue a civil case against an individual or a corporation, for example in terms of the Aliens Torts Compensation Act (ATCA) in the USA. Third, it is possible for a Court to review a decision, or failure by a government to take action (i.e. to regulate) in respect of the behaviour by an individual or a corporation. For example, it is possible in some countries to judicially review the failure of a government to regulate the behaviour of corporations that are complicit in the commission of war crimes or violations of international humanitarian law.

2.1 A critical analysis of universal jurisdiction

Kate Maynard[6] presented an overview of her law firm's experience in bringing universal jurisdiction cases to the attention of the British prosecutors (Machover and Maynard 2006). Up until recently, there have been broad possibilities for bringing such cases to the courts. However, proposed changes to the UK law would require the consent of the Director of Public Prosecutions in the case of those who possessed diplomatic immunity.

Maynard outlined the process by which UJ cases are brought. After establishing the legislative basis for bringing such a case, lawyers then examine whether sufficient evidence for proving an international crime exists. If these criteria are satisfied, then the matter is brought to the attention of the police. If an alleged individual is expected to travel to the UK then an arrest warrant is sought by the lawyers; alternatively, a request is made for a preliminary investigation in preparation for an eventual arrest. There is no dedicated police unit in the UK to handle such cases.

The next stage is to approach the Magistrate Court. If the Court issues a warrant, then the matter goes back to the police. Maynard noted that there is a general reluctance amongst UK Magistrates to issue such a warrant and these kinds of cases are accorded a low priority among prosecutors as well (Ibid). If, however, a warrant is issued, then the suspect is put on a watch list at all UK airports. Cases can, therefore, be prepared long in advance of an alleged perpetrator of international crimes. However, there is an additional tension as well, namely between immigration authorities and prosecuting authorities, which do not co-ordinate with each other very well; the former inclined to reject entry to such individuals, the latter inclined to admit entry to such individuals for the purposes of prosecution or eventual extradition.

2.2 Corporate accountability

Amsterdam-based attorney *Phon van den Biesen*[7] continued the discussion with a focus on civil litigation to address the responsibilities of corporations in relation to international crimes. He stressed that international obligations not to be party to international crimes are not the sole prerogative of states, but also of individuals and corporate legal persons, but also that this is only a partial remedy and that compensation for damages inflicted and orders banning future violations are also important, and universally accepted aspects of any system aiming for the adjudication of justice.

Litigating such cases is far less an academic/ legal exercise than a matter of gathering solid evidence. This being said, legal barriers for pursuing cases against corporations do exist, notably the political questions doctrine that argues such cases should not run counter to domestic interests. However, this doctrine has been subject to legal challenge and in 1984, in the *Cruise Missiles case* the Court of Appeal reversed the doctrine (i.e. there were higher interests at stake). These arguments were rejected by the International Court of Justice in both its Advisory Opinion regarding Nuclear Weapons (ICJ 1996) and in a later Advisory Opinion regarding the construction of the Israeli Wall (ICJ 2004).

A Dutch Civil Society Organization could consider to institute civil law proceedings before a Dutch Court of law against, for example, a Dutch Company that provides the Israeli Government with bricks and concrete to assist with the construction of the Wall, or against a Dutch Timber Company that imports illegally harvested timber from the Congo into the Netherlands, or against a Dutch Retailer that sells products produced in South East Asia which products have been put together by children no older than 10 years old. However, there is a lack of available Dutch case law on this type of litigation.

Assuming that the defendant companies in these examples each have their seat in the Netherlands, the Court in which district the seat is located will, in principle, have jurisdiction. In some circumstances it is also possible for a Dutch Court to have jurisdiction if the seat of the companies would not be in the Netherlands. A Dutch Civil Society Organisation would potentially have standing.

The remedy sought could be (1) a *declaratory judgement* establishing that a certain behaviour or a lack of a certain behaviour constituted a tortuous behaviour towards the plaintiff; (2) a *mandatory judgement* ordering the defendant to take certain steps and/or to refrain from others, which decision may be secured by a substantial fine for not implementing this decision or (3) a judgement ordering the defendant to publish the judgement holding one of or a combination of the two previous sorts of judgements. Obviously, variants of these judgements would depend on the specifics of a particular case.

The next challenge is deciding what type of law to apply (i.e. that the acts were committed in such a way as to have been tortuous had they committed in the Netherlands. For example, if a Dutch arms trader ordered the production of certain rockets in the Netherlands in order to sell those to a Government which was using these rockets to commit genocide on an ethnic minority in that country, it is clear that the acts committed by the Dutch trader would fall squarely under Dutch tort law since they qualify as complicity to genocide.

As the Dutch law is far from clear, human rights law and international humanitarian law could help bridge the gap. As far as human rights law is concerned, by now it may be assumed that this body of law is applied as part of Dutch law, whether directly or indirectly. Horizontal application of these fundamental human rights norms does occur directly, but also indirectly through the general notion of tort law; the tort-law norm prohibiting to act in violation of, what is called, proper social conduct, being the norm that may be interpreted through the very substance of human rights norms. Most of the case law between natural and legal persons in this respect is developed under Article 8 and Article 10 of the European Convention on Human Rights and Fundamental Freedoms. This case law demonstrates that a Dutch corporation may be held accountable for tortuous acts committed against individual citizens.

A more complicated situation arises when acts are committed on non-Dutch territory against non-Dutch citizens. Support for the application of human rights law as part of the foreign national law may be found in case law developed under the European Human Rights Convention, but universal application is still some way off.

This brings us back to the 80% of the job that needs to be done in any sort of litigation: getting the facts straight, providing indispensable evidence and establishing causation. The task that we are facing definitely is not easy, not from the legal point of view nor from the practical point of view.

2.3 The politics and social challenges of international justice

Jeff Handmaker argued that the purpose and nature of legal claims ought not to be taken for granted. As Mutua has noted, the notion of universal jurisdiction, similar to most supranational legal principles, is not a natural phenomenon; it is constructed and in fact rarely regarded as universal, although it has the potential to be (Mutua 2010). This doesn't mean that one shouldn't support the principle of universal jurisdiction. But, in doing so, one must be conscious of the social, political, cultural and historical circumstances in which universal jurisdiction is exercised, if only for the sake of advancing a solid jurisprudence. Mutua insists that 'we must ask ourselves the purposes that such a process (as UJ) will serve', namely: (1) vindication of the rule of law; (2) modifying/deterring behaviour or (3) creating a jurisprudence to judge, regulate and refine conduct.

In other words, UJ is part of broader, extra-territorial efforts to find jurisdiction against *crimes that shock the conscience of humankind*, always aimed at the state, and framed in terms of direct and indirect claims. Direct claims by civic actors confront a state with its international obligations, insisting that states take action and generating a range of responses, either against individuals/corporations within their jurisdiction, or against other states. However, such claims involve a high degree of political will and so most claims by civic actors are indirect, in other words indirectly addressing state accountability through an individual or corporate *agent*. This means that either: criminal claims aimed at individual or corporate perpetrators who were agents of a state or civil claims aim at individuals and corporations who have been active or complicit in gross violations of human rights, war crimes or crimes against humanity.

As Van den Biesen noted, the principal challenges faced by these different kinds of claims are mostly practical in nature, not only in terms of gathering, but also assessing evidence in the absence of expert knowledge of another country's society, political and cultural system. This is in addition to the legal challenges faced, whether in piercing the corporate veil, shielding oneself through claims of immunity, which may be misplaced or exaggerated or requiring the presence of the accused on the territory of a country where a claim is made. However, of utmost concern, Handmaker argued, is the selective – and highly politicised – manner in which the law is applied, depending on the country where the alleged perpetrator is from, as illustrated in the Netherlands in the complaint against Ayalon.

Sarah Nouwen[8] distinguished international justice done by international criminal justice institutions from universal jurisdiction exercised by national courts. She identified at least three possible advantages of the latter over the former. First, she identified the right to a fair trial, observing that international criminal tribunals present themselves as paragons of human rights protection. However, in various aspects, including the duration of trials, equality of arms between the prosecutor and defense, and a pressure to convict, she argued that the states currently exercising universal jurisdiction tend to have higher standards in relation to a fair trial than international tribunals. Secondly, universal jurisdiction is often exercised only if the suspect is on the territory of the state concerned, making it more realistic that court orders, including arrest warrants, are enforced. International tribunals, by contrast, have no enforcement powers, making them more dependent on cooperation from states and are thereby more vulnerable to political influence from governments. Finally, in the case of universal jurisdiction, there is some degree of political oversight, including checks and balances, and in the countries in which it is currently being exercised this oversight is even relatively democratic. Many consider political oversight a disadvantage, arguing that on this point international tribunals do better because of the 'independent' prosecutor. However, political considerations are a fact, both in domestic universal jurisdiction proceedings and in international tribunals. The difference is that in domestic justice systems someone is ultimately accountable (e.g. a Minister of Justice), whereas in international tribunals the political dimension is denied and, in practice, no one is accountable for the actions of the prosecutor.

Nouwen then turned her attention to some problematic features that universal jurisdiction and international tribunals share, as part of the 'international justice project'. The first is, she argued, the doubtful basis of the right to exercise jurisdiction. She conceded that one can find bases in international legal instruments and customary international law. The deeper justification for universal jurisdiction, and thus for these instruments, is often that these crimes have been committed 'against humanity' and that all are therefore victimised and have a right to punish. But, what is the relationship between the physical victim, the directly victimised society and the 'international community'? Is the right to punish on the part of the international community stronger than, for instance, the direct victim or his or her society's right to forgive, if that is the individual's wish or part of the concerned country's transitional-justice policy? Is the international right stronger, even if international punitive justice threatens a country's transition, the consequences of which are felt more directly by the victim and victimised society than the 'international community'? The second problematic feature raised by Nouwen is the way in which the international justice movement monopolises the rich term 'international justice' for the narrow project of the application and enforcement, whether through international tribunals or universal jurisdiction, of international criminal law. This body of law focuses on a few visible crimes that can be reduced to the agency of a view individuals. International justice, in this sense, does not speak out regarding the international injustices of inequality and poverty, the causes of which are to a large extent located in the structure of the same international community in whose name international justice is performed. The problem is not, Nouwen argued, that these injustices are not covered by international criminal law. The problem is that retributive justice for a few individuals has usurped the attention and resources necessary for the fostering of agency and for the realization of a broader vision of justice, one that entails restorative and, even more necessary, distributive justice.

2.4 Additional comments from the session

Additional interventions from the participants stressed the role of activists and broader civic efforts / social movements aimed at ending impunity for international crimes. While some governments show a willingness to prosecute these crimes, others see this as a 'problem' and even advising their nationals / soldiers not to travel abroad. What is very clear, however, is that the issue is firmly in the public debate and irrespective of the legal outcome of a particular case, the campaigns to end impunity for international crimes continue.

Professor Susan Akram[9] explained in some detail the situation in the United States. The US is party to five treaties that relate to universal jurisdiction and has a robust (civil) tort legislation that permits a broad remit to seek and hold individuals and corporations accountable for international crimes. However, treaties in the US are not self-executing and there is a general reluctance towards situations from particular countries / regions, not least with regard to complaints from Palestinians. In other words, there is a clear selectivity in the choice of cases that are heard, let alone prosecuted or adjudicated. Various other legal obstacles include: (1) *sovereign immunity*, which applies in some cases even after retirement and is even applicable to the diplomats of some countries, such as Israel and (2) the *political questions doctrine*, which assumes that such cases are not an appropriate matter for the courts, but for the executive or legislature.

3 Concluding Remarks

Universal jurisdiction and broader legal efforts aimed at ending impunity for international crimes is still a relatively new area of the law, although there have been notable developments in recent years. National courts are now regularly hearing cases on universal jurisdiction. These factors compelled us to critically assess where things stood at this particular juncture although the relative newness of this issues means that any discussion on this topic should be very much be considered as work-in-progress. This policy brief aims to inform this discussion.

There are promising examples of cases prosecuted on the basis of active nationality principle, or cases where the suspect has his permanent habitat in the Netherlands.

There may be good reasons to choose cases based on the grave breaches laid down in the 1949 Geneva Conventions as these rules are widely respected. However, there are also many other international crimes of grave concern, not least torture and inhuman and degrading treatment or punishment, as well as piracy and acts of terrorism, genocide and even the crime of apartheid. The term universal jurisdiction may therefore be rightly replaced by 'international law enforcement', so as to put the emphasis on the applicable material rules that are sought to be enforced.

The Netherlands practice has shown that the presence of the suspect is a prerequisite either in order to investigate or to prosecute, a necessary condition. But, it is also clear in the state practice from other countries (e.g. the United Kingdom and South Africa) that this should not be regarded as a necessary condition, at least not always.

Beyond legal considerations in pursuing cases against individuals and corporations, the complex social and political considerations surrounding such cases suggest that they are a form of 'politics by other means' (Abel 1995). This does not necessarily imply that lawyers should actively engage in political debates, but in light of the above, it does mean that lawyers be acutely conscious of the need for consistency and evenhandedness. Lawyers have operated in a 'narrow, but significant space' that is defined by state interests and conditioned by structural constraints, but lawyers can derive authority from both national and international obligations to investigate and prosecute. As such, it is important neither to under-estimate the potential of law to deliver justice and promote an end to impunity, nor to over-exaggerate its effects. In other words, lawyers must also think strategically.

In a related way, law can be used to enhance other forms of advocacy, strengthening civic campaigns and providing legal backing for states to take action against other states, individuals and corporations. As Larissa van den Herik noted: 'States have a direct interest in regulating and adjudicating the behaviour of their own nationals' (Van den Herik 2009: 225).

3.1 Recommendations

While the decision to prosecute in The Netherlands will in most cases also be political, a number of factors can help reduce the arbitrariness of the international justice system. These include:

(1) clear policies concerning the investigation and prosecution of alleged individuals and corporations ought to be in place;

(2) training of judicial staff members and prosecutors, particularly in the area of cross-cultural issues on gathering and assessing evidence, and the provision of adequate resources is needed;

(3) trans-judicial communication between the international tribunals / courts and national courts, which could assist in promoting more universal standards; and

(4) collaboration with experts who have specific knowledge of a country's social, cultural and political context.

In this way, law and other forms of advocacy can build in a cumulative and deliberate way to strengthen both legal and political mechanisms to investigate, prosecute and adjudicate international crimes in a consistent and even-handed manner, as part of a genuinely universal effort to end impunity.

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Notes

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