

Applying Universal Jurisdiction to Civil Cases:
Variations in State Approaches to Monetizing Human Rights Violations

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Abstract:

The principle of universal jurisdiction allows a state to exercise jurisdiction over a category of cases when the state has no connection by territory, nationality or other interest with the parties. While the concept of universal jurisdiction is not new, it has been almost exclusively applied to criminal matters. There has been relatively little focus the application of universal jurisdiction in the civil sphere as a means for victims to seek judgments and compensation for serious violations of human rights. This paper examines the theoretical distinction made by courts in the application of universal jurisdiction to civil cases and explores why the emerging norm of universal jurisdiction has been focused almost exclusively on criminal matters. The paper surveys the status of universal civil jurisdiction in US and European courts, examines how jurisdiction is limited by courts, and assesses the arguments for and against a civil basis of universal jurisdiction.

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During the 1990s and into the 2000s, there was a great deal of optimism among human rights advocates that notions of universal jurisdiction would be enforced in national and eventually international courts. In 1993, Belgium passed a law on universal jurisdiction which allowed Belgian courts to try individuals accused of crimes including genocide, war crimes and crimes against humanity. In 2001, four Rwandan citizens were convicted for their actions during the country's genocide (Reydams 2003). This court victory opened the door to a flood of criminal cases against government officials including Ariel Sharon, Yasser Arafat and George H. W. Bush. Confronted by significant pressure from the international community, the Belgian parliament in 2003 amended the law to restrict jurisdiction to only those cases involving Belgian citizens. This retreat should not be surprising as even the often-cited Pinochet case did not reflect a full expression of universal jurisdiction as the case was brought by a Spanish Court on behalf of Spanish nationals that died during the Caravan of Death and subsequent disappearances in the 1970s (Roht-Arriaza 2005). Moreover as Amnesty International notes in its global survey of universal jurisdiction "the mere existence of universal jurisdiction legislation does not mean that the state can effectively act as an agent of the international community to enforce international criminal law. All too often, the legislation contains numerous obstacles to the effective use of this tool of international justice" (Amnesty International 2012).

Ironically while universal *criminal* jurisdiction during the 2000s suffered several setbacks, US cases involving universal *civil* jurisdiction continued unabated. While the US Supreme Court in *Sosa v. Alvarez-Machain* developed a test for whether a claim under the Alien Tort Statute (ATS)¹ could be litigated, the issue of whether claims of universal civil jurisdiction could proceed was left unexamined. During the 2000s and 2010s, a large number of cases were launched by plaintiffs using the ATS including such high profile cases as *Doe v.*

¹ The ATS is also known as the Alien Tort Claims Act (ATCA).

Unocal and *Wiwa v. Shell*. One of the significant differences in the application of universal criminal and civil jurisdiction has been the ability of plaintiffs in civil cases to sue corporations. However as in the case of the Belgian parliament in 2003, the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* (2013) and subsequent rulings including *Daimler AG v. Bauman* (2014) greatly limited the scope of extraterritorial jurisdiction as well as jurisdiction over legal persons so that much of the “universality” has been lost.²

Virtually all of the human rights and political science literature examines universal jurisdiction either implicitly or explicitly as criminal in nature. *The Princeton Principles* is an excellent case in point. While a number of noted scholars contributed to the volume, there are less than two pages in a close to 400-page treatment on universal civil jurisdiction. However, the legal community has engaged in a robust discussion of whether international law provides for universal civil jurisdiction and the various forms that it can take. Why is there this difference in the way in which these communities define and understand universal jurisdiction? Much of the disconnect stems from the fact that for core crimes, the notion that these crimes could be monetized and viewed essentially as a tort is repugnant to many in the human rights community (Stephens 2002). However for over fifty years, the European Court of Human Rights has engaged in this very practice of providing a forum for civil redress for citizens of Council of Europe member-states involving allegations of torture and other gross violations of human rights.

In this paper, we explore the design and the logic of universal jurisdiction and its criminal and civil application. We begin with a general discussion of the principle of universal jurisdiction, the nature of the crimes and enforcement issues, focusing on normative

² Mullenix (2014) refers to cases of universal civil jurisdiction as “F-cubed” in which the defendants and plaintiffs are foreigners and the acts in questions occurred on foreign soil.

developments. Then, we examine the application of criminal and civil universal jurisdiction and pose the question of whether these forms of jurisdiction are part of the same norm just expressed differently or whether norm creation and enforcement are fundamentally different for each of these forms of jurisdiction (Finnemore and Sikkink 1998). The final part of the paper compares state approaches to these two forms of jurisdiction which allows us to speculate as to future of universal jurisdiction more broadly.

Conceptualizing Universal Jurisdiction

In order to understand the complexity of universal jurisdiction, we begin with a discussion of the types of jurisdiction that national courts can have over offenses that are committed on a state's territory and abroad. O'Keefe defines jurisdiction as the authority of a state under international law "to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law" (2004, 736). Under international law, there are three generally forms of jurisdiction: Territorial, national, protective and universal jurisdiction. National courts have always had jurisdiction over offenses that take place on their soil (territorial jurisdiction). In its simplest form, a crime committed by any national on the territory of a state is covered under that state's laws. However with increases in communication and trans-border activities, the idea of territorial jurisdiction has expanded to include both a subjective and objective component: The subjective principle asserts that a state can exercise jurisdiction over a crime when the act starts within its territory, regardless of where the act culminates. Under objective territoriality, a state can apply its domestic laws to a crime when the act culminates within its territory even if the conduct began in a different state. The nationality (personality) principle recognizes that a state adopts laws which apply to its nationals no matter where their citizens reside. Citizens are bound by their state's law. The principles of territoriality

and nationality as norms are well-recognized under customary international law as the strongest basis for states claiming jurisdiction.³

It is against the backdrop of these jurisdictional claims, with linkages to notions of state sovereignty, that the principle of universal jurisdiction must be understood and norm development must be evaluated. In one of the most comprehensive efforts by scholars and jurists to date, *The Princeton Principles* defines universal jurisdiction as “criminal jurisdiction based solely on the nature of the crimes, without regards 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” (*The Princeton Principles of Universal Jurisdiction* 2001). Some have referred to this form of jurisdiction as “absolute universal jurisdiction” (Arajärvi 2011, 5). There are two important components to this definition: First, the nature of the crimes and second the jurisdictional principle for enforcing the laws.

While a discussion on the development of a norm of universal jurisdiction must focus on which crimes are included, the other area of norm development is the reach of this jurisdictional principle. As enunciated by *The Princeton Principles*, absolute universal jurisdiction covers crimes that are committed by non-nationals, against non-nationals on foreign soil where the state exercising jurisdiction does not have a security or other type of interest. Universal jurisdiction rejects the other forms of jurisdiction by excluding principles of state sovereignty. Before we proceed with this discussion, it is important to examine universal jurisdiction as a norm, including an outline of the process of norm development.

³ Other forms of jurisdiction such as passive personality and protection are more contentious.

Universal Jurisdiction as a Norm

Finnemore and Sikkink define a norm as “a standard of appropriate behavior for actors with a given identity” (1998, 891). They argue that the existence or life-cycle of a norm can be understood as a three-stage process. Norm emergence begins when entrepreneurs try to convince a critical number of states to embrace the new norm. These entrepreneurs must frame an issue in such a way that will discredit what has been considered the appropriate behavior in the past. A norm cascade occurs when there is imitation by other states due to pressures for conformity, a desire to enhance international legitimacy and self-esteem issues of leaders. Norm internalization occurs when norms acquire a taken-for-granted quality and are no longer a matter of broad public debate. Between the first and second stage, there is what they call a “tipping point” in which norm entrepreneurs are able to convince states to conform to the norm. If a tipping point is not reached, the norm is not accepted by the international community and remains subject to the vagrancies of state action.

If universal jurisdiction is an internalized norm, we argue that exercising universal jurisdiction would be the appropriate behavior by states that value human rights by adjudicating cases and imposing sanctions. Norms, in most cases, must be first “institutionalized in specific sets of international rules and organizations” (Finnemore and Sikkink 1998, 900). In other words, norms must eventually either be codified (treaty-based) or rise to the level of behavioral acceptance by states (customary international law). In the following discussion, we will keep in mind the normative framework that is presented by Finnemore and Sikkink (1998) to evaluate universal jurisdiction.

While the principle of universal jurisdiction attracted international attention with the 1998 arrest of former Chilean President Augusto Pinochet in London, the principle has been in

existence for over three centuries. The original intent of universal jurisdiction was to address piracy on the high sea which occurred in international waters outside the territorial jurisdiction of any state thus requiring “universality.” Since pirates did not belong to any particular state, the personality principle of jurisdiction could not be applied. However, norm entrepreneurs have outlined a new form of universal jurisdiction that involves a broader set of *hostes human generis* (enemies of the human race) who have committed not only piracy but other serious violations of international law (Kontorovich 2004). While there is an assumption in much of the literature that so-called “core crimes” constitute the crimes covered by universal jurisdiction, there is a great deal of debate as to which elements of core crimes are part of this form of jurisdiction and indeed whether other crimes should be included. Two sources of international law have been used to try to identify the list of these core crimes: Customary international law and treaties between states.

Customary international law concerns international obligations arising from established state practice and can thus be considered standards of appropriate behavior. States generally accept in principle the existence of customary international law; although, there are differing opinions as to what practices are accepted by most, if not all states. This naturally has implications for identifying the crimes that fall under universal jurisdiction and what crimes might be part of the norm. The problem is that there are conflicting interpretations of which crimes have become part of customary international law related to universal jurisdiction. According to Bassiouni (1996), universal jurisdiction based on state behavior includes the crimes of slavery, torture, genocide, war of aggression and crimes against humanity. *The Princeton Principles* list seven crimes which are part of universal jurisdiction based on state practice including piracy, slavery, war crimes, crimes against the peace, crimes against humanity, genocide and torture. Donovan and Roberts, who represented the European Commission as

amicus curiae in *Sosa*, list only “genocide, torture, some war crimes and crimes against humanity” in their brief describing accepted state practice (2006, 143). In short while there is general acceptance of core crimes, there is still a great deal of variation in which crimes are covered under universal jurisdiction.

Like customary international law, treaties also do not provide us with a clear inventory of which crimes fall under universal jurisdiction. Roth (2001) points out that there are clauses in treaties requiring signatory states to pass national laws granting universal jurisdiction for specific crimes. Considered as some of the most important treaties on war crimes, the four Geneva Conventions place a duty on states to protect victims of warfare and bring violators of the laws of war to justice under the “grave breaches” provision common to all the Conventions. According to the Conventions, there are duties (*erga omnes*) attached to the prosecution of crimes include willful killing, torture, unlawful confinement of protected civilians, and unlawful deportation of protected citizens. In addition, the Convention against Torture of 1984 and the Inter-American Convention to Prevent and Punish Torture of 1985 oblige states to submit alleged torture cases to their prosecuting authorities for the purposes of prosecution or to extradite that person. The 1973 Convention on Apartheid also defines apartheid as a crime against humanity and provides for the application of universal jurisdiction. These conventions provide a clearer definition of war crimes, apartheid and torture while imposing a duty on states to invoke universal jurisdiction; however, no other treaties impose such a duty. For example the Genocide Convention, which contains a clear definition of the crime, does not have a universal jurisdiction clause. The Statute of the International Criminal Court defines war crimes, crimes against humanity, genocide and aggression but does not provide for universal jurisdiction of these crimes. In one of the few empirical studies on the crimes that are subsumed under universal

jurisdiction, Hawkins (2003) looks at treaty language and the degree of ratification. He concludes that serious war crimes (grave breaches of the Geneva Conventions) and torture are crimes that fall under universal jurisdiction while genocide, slavery, crimes against humanity and other forms of war crimes do not.

As previously mentioned, when considering norm creation, it is important to have a clear understanding of what constitutes the norm. Finnemore and Sikkink correctly point out that “norms prompt justification for action and leave an extensive trail of communication among actors” (1998, 891). We have seen a great deal of debate on the principle of universal jurisdiction, what it entails, and how it should be exercised. In this sense, we can argue that there has been a process of norm emergence. However, conceptual clarity has not yet occurred when defining the crimes in which universal jurisdiction is applied. There has not been agreement among norm entrepreneurs including lawyers, the scholarly community and interested states to provide clarity to what aspects of a norm of universal jurisdiction needs to be internalize.

Internalization of Universal Jurisdiction

While international law does not prohibit the exercise of universal jurisdiction, states have debated the extent to which they can invoke universal jurisdiction as well as the conditions that apply to accepting cases that involve claims of universal jurisdiction. International customary law and treaty language has to be incorporated into national laws in order for states to clearly identify to their courts which crimes merit a claim of universal jurisdiction, and how those crimes will be penalized. In addition, the incorporation of language explicitly granting absolute universal jurisdiction gives power to national courts. In an updated survey of legislation around the world, Amnesty International (2012) documents that 166 countries have defined *one or more* of four core crimes (*e.g.*, war crimes, crimes against humanity, genocide and torture) as

crimes in their national law. In addition, 147 countries have enacted universal jurisdiction laws for *at least one* of these crimes to ensure that their national courts are able to investigate and prosecute non-nationals suspected of committing these crimes against non-nationals on foreign soil. While Finnemore and Sikkink acknowledge that there is not a clear rule as to how many states must accept a norm to “tip” the process, they argue that empirical studies point to at least one third of the states in the international system adopting the norm (1998). Taking this rule-of-thumb into account, only forty-four states have adopted domestic universal jurisdiction laws which have criminalized *all four crimes*. If the norm of universal jurisdiction involves at least these four crimes, then a tipping point has not been reached.

Indeed, it is important to note that Amnesty International also acknowledges that many of the definitions of these four crimes in national laws do not meet international law standards and that war crimes and crimes against humanity, in particular, should encompass more than one crime which is not reflected in many national laws.⁴ Langer (2011) argues that states engage in a cost benefit analysis when deciding to adopt universal jurisdiction laws and engage in prosecutions and trials. Hawkins (2003) points out that norm internationalization requires more than just treaty ratification or national legislation. Norms must be supported by actions through sustained activity as well as bureaucratic and judicial practices—thus, it is important to move from conceptualization of the norm to implementation of the norm. We proceed to discuss the actual prosecution by states of universal jurisdiction crimes incorporated into national law focusing on the distinctions between criminal and civil procedures.

State Variation in Enforcing Universal Jurisdiction

Universal jurisdiction relies on national authorities to internalize and thus enforce international prohibitions. The enforcement of the norm can take place either through criminal or

⁴ In many national laws, only one crime against humanity or war crime has been codified into domestic law.

civil proceedings. Both forms of jurisdiction deal with the same crimes in which extraterritoriality is the key jurisdictional requirement to create universality.⁵ Efforts to document either domestic criminal or civil proceedings using universal jurisdiction presents enormous challenges. As previously mentioned, almost all of the social science discourse on the application of universal jurisdiction in domestic courts has focused on criminal proceedings.⁶

Universal Criminal Jurisdiction

As one of the organizations advocating the adjudication of universal jurisdiction laws within national courts, Amnesty International (2009) reports that least eighteen states have opened criminal investigations based on universal jurisdiction since World War II and trials have taken place in almost all of these states including Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Israel, the Netherlands, New Zealand, Norway, Spain, Senegal, Sweden, Switzerland, the UK and the US. In one of the most ambitious recent empirical studies of criminal prosecution under universal jurisdiction, Langer (2011) documents 1051 complaints or cases in twenty-two states between 1961-2010. Of these, he finds that only thirty-two cases in thirteen states went to criminal trial, with most of them involving Rwandan, Yugoslavian and Nazis defendants (See Table 1). He maintains that if we look at the defendants, there are certain types of individuals that states have agreed can be considered *hostes human generis*, repudiated by their own nationals. However even on the issue of enforcement, there is still debate over

⁵ In *Sosa*, the US Supreme Court ruled that civil jurisdiction only covers those international norms (crimes) that are obligatory, universal and specific. The set of claims is limited to those defined as prohibited norms under the law of nations.

⁶ The social science literature has rarely examined civil proceedings. That said within the legal community, there has been a robust discussion of the contours and limitations of universal civil jurisdiction as it relates to the ATS with hundreds of law review articles devoted to the Statute.

which countries have actually invoked universal criminal jurisdiction with Hawkins (2003) including Luxembourg while Langer (2011) includes Norway.⁷

In addition, a closer examination of Langer's thirteen states that have engaged in trials based on universal criminal jurisdiction reveals that nine of these countries had implemented laws and assigned universal jurisdiction to war crimes, crimes against humanity, genocide and torture. Of the other four countries, Germany, Israel and Switzerland have not codified or granted universal jurisdiction to torture. Austria has only specifically codified and granted universal jurisdiction to genocide (Amnesty International 2012). Therefore, there is no consensus among the countries that have ratified universal jurisdiction provisions as to the crimes which they should enforce.

More importantly, recent legislation in a number of European countries that are considered to be at the forefront of universal criminal jurisdiction has greatly curtailed the reach of the principle. In the case of Spain, a new law promulgated in March 2014 instructed Spanish judges that they could pursue crimes against humanity committed abroad but that the suspect must be a Spanish national or a foreign resident of Spain. As previously mentioned, Belgium's 1993 universal jurisdiction law, which permitted victims to file complaints in Belgium for atrocities committed abroad was changed in 2003 to allow jurisdiction over international crimes only if the accused is Belgian or has lived in Belgium for a period of time.

Table 1 about here

Universal Civil Jurisdiction

Donovan and Roberts argue that "although international law recognizes universal criminal jurisdiction, it does not 'recognize universal *civil* jurisdiction for any category of cases

⁷ Equally important, Langer does not consider that countries such as Finland, Mexico, Senegal or the US have had trials based on universal criminal jurisdiction.

at all, unless the relevant states have consented to it in treaty or it has been accepted in customary international law” (2006, 147). We have identified only two countries that have exercised universal civil jurisdiction (*e.g.*, the US and the Netherlands). The review of country legislation by Amnesty International (2012) indicates that the Netherlands has implemented laws and assigned universal jurisdiction to four crimes (*e.g.* war crimes, crimes against humanity, torture and genocide), while the United States has not codified a specific list crimes subject to the ATS. In addition, the Netherlands has awarded damages in only one civil proceeding while the US has had close to 200 cases in various federal courts (Ku 2011). Thus, we proceed with a more in-depth discussion of the US given that in the area of universal civil jurisdiction, its national courts can be considered norm entrepreneurs. Ironically while the US is a pioneer in universal civil jurisdiction, it has played a minimal role in the area of universal criminal jurisdiction.

In the application of universal civil jurisdiction by US courts, universality is not a function of an international norm either through custom or treaty but domestic legislation (ATS). The ATS traces its origins to the 1789 Judiciary Act and reads that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” For most of its history, this statute was not part of any international human rights litigation. The modern day use of the ATS in human rights cases began with the Second Circuit Court decision in 1980 *Filártiga v. Peña-Irala*. In this case, the Filártiga family, Paraguayan nationals in the US, filed suit against former Paraguayan police officer, Américo Peña-Irala, for torturing their son. Peña-Irala was on a visa in the US so the Filártiga family was able to serve process. The question before federal courts was whether the ATS provided jurisdiction to US courts to apply the law of nations to cases outside of the US involving plaintiffs and defendants who were not US citizens. The Second Circuit Court found

that the ATS did provide a basis for jurisdiction and claims that torture violated the law of nations (Stephens 2002). Thus, ATS cases represent an interesting combination of domestic and international law. In principle, the jurisdictional element of the ATS does not permit US law to be imposed on other countries. Instead “when a state exercises universal jurisdiction, it does not extend solely national law extraterritorially to foreign conduct but rather acts as a decentralized enforcer of the law of nations already applicable to the conduct when and where it occurred” (Colangelo 2013, 1334).

Kamminga (2005) notes that the ATS specifically only provides a cause of action for aliens not US citizens, and ATS cases typically involve conduct and parties with no connection to the US (Donovan and Roberts 2006). In this sense, ATS cases represent an absolute form of universal jurisdiction. Early on, the Supreme Court identified the possible jurisdiction of crimes that applied to ATS (for example, torture, genocide and war crimes) while leaving the principle of universal civil jurisdiction intact (Reydams 2005). Moreover, early ATS cases involved exclusively natural persons as defendants such as Peña-Irala.

Since *Filártiga* in 1980, Ku (2011) notes that US courts have issued 173 opinions in cases involving ATS claims. In almost all of those cases, the plaintiffs claimed violations of customary international law and the law of nations. While the foreign element of ATS cases remained consistent after *Filártiga*, cases eventually shifted to suits against legal persons (*e.g.*, corporations). *Doe v. Unocal* in 1996 was the first ATS case to involve corporate defendants and this type of case has two advantages over previous cases involving natural persons. First, shifting to corporate defendants limited the issue of sovereign immunity as well as increased the possibility of actually recovering monetary damages. This is not surprising as early ATS cases rarely resulted in enforceable monetary judgments (Roht-Arriaza 2004). Indeed, the vast

majority of ATS cases since *Doe* involve suits against corporations.⁸ The problem with suing these corporations as a matter of the law of nations is that these defendants are generally not alleged to have committed the human rights abuses directly but under the theory of secondary liability (aiding and abetting). However, international law has no customary definition of aiding and abetting, and thus ATS cases began to resemble an interesting mix of US domestic law standards in the application of the law of nations. As Childress (2012) notes “many of the recent decisions restricting the use of the ATS are driven by concerns about applying a US federal statute to foreign conduct” (732). Ultimately, ATS cases over the past thirty-five years have evolved from the first cases such as *Filártiga* involving foreign plaintiffs suing foreign defendants under the “color of law” in which as an agent of the state, defendants could be sued to cases involving foreign plaintiffs suing foreign *private* defendants (including corporations⁹ as well as private natural persons).

From 1980 through the mid-2000s, there were a number of different interpretations of the ATS without any consistency between federal courts. Finally, in *Sosa*, the Supreme Court took up the issue of whether the ATS permits private individuals to bring suit against foreign citizens for crimes committed in other countries in violation of the law of nations or treaties of the US. In *Sosa*, Justice Souter writing for the majority ruled that the ATS only provides courts jurisdiction over those violations accepted by the civilized world and defined with specificity comparable to the features of the 18th century. The Court ruled that the ATS provides jurisdiction for those international norms that are (1) obligatory, (2) universal and (3) specific. However as Bellinger (2009) notes, the problem that the *Sosa* test creates is knowing when an international law norm is

⁸ Childress (2012) finds that approximately 160 cases invoking ATS have been filed against corporations.

⁹ In two recent rulings, the Supreme Court has effectively ended the ability of plaintiffs to sue corporations. Both the *Daimler* and the earlier *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) decisions restricted the ability of plaintiffs to sue corporations that did not have a home physical presence in the US. While corporations may be sued, the Supreme Court has limited the situations in which the establishment of “home” can be determined.

accepted (universal) and specific. Therefore even after *Sosa*, there were still a number of different federal court interpretations regarding which crimes rise to the level of an international norm for ATS jurisdictional purposes.

In *Kiobel*, the Supreme Court once again examined the scope of jurisdiction which the ATS affords plaintiffs. In a unanimous ruling, Chief Justice Roberts wrote that there is a strong presumption against statutory extraterritoriality which applies to claims under the ATS. In his concurring opinion, Justice Breyer explicitly considered international jurisdictional norms in developing the scope of the ATS. Justice Breyer did not advocate the application of universal civil jurisdiction but rather the limited form which occurs when the crime occurs either on US soil, at the hands of US nationals or when important US interests are at stake. These requirements involve a return to the more traditional jurisdictional claim of territoriality and nationality. Stewart and Wuerth argue that “in the end, Justice Breyer might be best understood as endorsing civil universal jurisdiction with a kind of subsidiarity requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendants’ residence there” (2014, 619). However, this formulation of universal civil jurisdiction essentially erodes the principle of universality and requires a connection between the state and the crime which calls into question not only the norm of universal civil jurisdiction but more profoundly universal jurisdiction as a principle.

Universal Civil Jurisdiction as a Norm: State Practices

Given that universal civil jurisdiction proceedings have been applied in only two states, we proceed to discuss the likelihood that norm entrepreneurs might be able to convince other states to support norm emergence in this area. Van Schaack (2005) argues that the agency theory of universal criminal jurisdiction in which states exercise the right to jurisdiction as agents of the

international community based on shared norms is less compelling in the context of civil litigation involving private actors. Indeed, the European Commission has noted that the principle of universal civil jurisdiction is not well-established in international law and that it should be applied narrowly within the context of universal criminal jurisdiction. For example, the European Commission's *amicus* brief in the *Sosa* case stated that many civil law traditional countries allow the attachment of a tort action to a criminal claim. Countries such as Spain, Germany and France permit universal civil jurisdiction through the use in civil law systems of *action civiles*. However, there are a number of differences between *action civiles* suits and those under the ATS in the US. First because *action civiles* are civil actions attached to criminal proceedings, the scope of the state is larger than in ATS claims (Roberts 2011). Second, many countries do not allow criminal suits against legal persons and therefore *action civiles* claims are limited against legal persons. Third, an *action civiles* will not be successful against a person unless the underlying criminal case is successful. Thus, the burden of proof in these cases is higher than in ATS cases.

What explains that norm emergence in the area of universal civil jurisdiction has almost exclusively been confined to the US while universal criminal jurisdiction has been more widely exercised?¹⁰ One explanation is that the US history of public law litigation combined with procedural rules makes filing under the ATS attractive for plaintiffs and their attorneys. Moreover according to Kamminga "it is a widely held view in many if not all legal systems that tort proceedings are no substitute for criminal proceedings" (2005, 125). Other states have not outright banned the notion of universal civil jurisdiction but have imposed sovereign immunity to quash litigation (*e.g.*, UK).¹¹ One of the concerns of countries such as Australia, Switzerland and even the UK is that extraterritoriality jurisdiction may lead to conflict between states.

¹⁰ As noted in Table 1, universal criminal jurisdiction is primarily a West European phenomenon.

¹¹ Unlike the House of Lords, the Italian Supreme Court in *Ferrini v. Federal Republic of Germany* (2004) found that sovereign immunity was no defense for serious human rights violations alleged in a civil suit.

Ironically, the conflict stems from the fact that in civil matters, political authorities are much more removed from the judicial process than in criminal matters involving the initialization and termination of suits.

However, providing a forum for suits is also very continuous. Because of US tort law, US federal and state courts provide plaintiffs much more favorable rules in the US than elsewhere leading to “forum shopping,” or as Donovan and Roberts argue an “objection to the recognition of universal civil jurisdiction in the civil sphere is the potential for multiple proceedings on the same events” (156). Bellinger argues, pre-*Kiobel*, that “foreign governments do not see the ATCA as an instance of the United States constructively engaging in international law” (2009, 8). Indeed, he argues that the U.S is perceived as creating an “International Civil Court” unilaterally with no consultation. However, Van Schaack (2005) argues that this possible state conflict is ameliorated precisely because the role of the state is passive—the state simply provides a form.

The Future of Universal Jurisdiction

Ultimately, the actual exercise of universal jurisdiction, whether criminal or civil, has been rare. States have yet to consistently decide which crimes should be covered by universal jurisdiction in their domestic courts, and judges have been reluctant to use universal jurisdiction alone as its basis for asserting jurisdiction. Universal jurisdiction can at best be considered a nascent norm where a tipping point and internalization have yet to occur. Arajarvi (2011) argues that the norm of universal jurisdiction has moved away from notions of absolutism to conditional or restrictive forms in which states will only consider jurisdictional issues applying territoriality or nationality. Kontorovich (2014) attributes the global decline of absolute universal jurisdiction to several factors: Opinions by the International Court of Justice in *Belgium v. Congo*,

revisions of statutes by countries at the forefront of universal jurisdiction to limit its reach, criticisms of countries which oppose the permissibility of universal jurisdiction and the fact that more cases are being brought against defendants who reside in the forum state. The implementation of universal jurisdiction can be hampered by nonexistent or inadequate national laws, political pressures and recognition of amnesties or immunities. National laws might not clearly define crimes, statutes of limitations can be imposed, and extradition laws might not be put in place (Hoover 2011). This internalization is what seems to be lacking in the evolution of universal jurisdiction. States have codified into law certain crimes as being appropriate to deal with through universal jurisdiction. However, norm emergence and a “tipping point” with universal jurisdiction is still a hotly contested issue due to the shortage of actual cases being tried. Judge ad hoc Van den Wyngaert goes so far to suggest, in her dissenting opinion in *Arrest Warrants* that “[t]here is no generally accepted definition of universal jurisdiction in conventional customary international law.”

In the case of universal civil jurisdiction, the legal community prior to *Kiobel* opined that if the ATS was significantly curtailed, plaintiffs would file suits in US state courts. However, the statute of limitations provisions in many state codes make these cases less attractive as well as the power of these cases in terms of promoting human rights. If these cases are tried at the state level, then torture becomes battery and extrajudicial killings become wrongful death. Mullenix (2014) argues that because of the *Goodyear* ruling, American state courts cannot assert personal jurisdiction over non-resident foreign corporations which has a direct impact on cases in a post-*Kiobel* environment. If state courts do not have personal jurisdiction on non-resident foreign corporations then corporations cannot be sued for violations in any US forum. Moreover as Ochoa (2005) argues, ATS more generally provided significant benefits by alleviating

enforcement issues which are well-known in international law as well as rectifying a judicial deficit from which many victims suffer as well as draw publicity to human rights violations. Human rights advocates lament the erosion of the ATS precisely for these reasons.

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Table 1: Universal Criminal Jurisdiction (1961-2010)

State where complaint was lodged	Number of trials	Defendant's nationality
Australia	1	Nazi
Austria	1	Former Yugoslav
Belgium	8	Rwandan
Canada	2	Nazi, Rwandan
Denmark	1	Former Yugoslav
France	2	Mauritanian, Tunisian
Germany	4	Former Yugoslav
Israel	2	Nazi
Netherlands	5	Afghan(3), Congolese, Rwandan
Norway	1	Former Yugoslav
Spain	1	Argentine
Switzerland	2	Former Yugoslav, Rwandan
United Kingdom	2	Afghan, Nazi
Total	32	

Data compiled by Langer (2011).