

Navigating the Debate on Universal Criminal Jurisdiction at the Sixth Committee: The Need for an Empirical Assessment?

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Abstract: The principle of universal criminal jurisdiction has been the subject of heated debate at the United Nations General Assembly (UNGA) and its Sixth Committee since 2009. The topic of universal jurisdiction escalated to the UNGA after the African Union had adopted a decision in 2008 accusing certain European States of abusing this jurisdiction by selectively targeting leaders from the continent for politically motivated prosecutions. A careful analysis of the comments made by delegations during the work of the Sixth Committee shows that there is general consensus that universal jurisdiction ‘exists’. On the other hand, no delegation has been able to identify, based on State practice, the existence of universal jurisdiction. There is also considerable confusion and disagreement about the basic concept, the scope and application of “universal jurisdiction”.

After six years of debate at the Sixth Committee and the establishment of a Working Group to undertake a “thorough discussion” of universal jurisdiction, the work of the Sixth Committee has come no closer to conclusion. One of the reasons accounting for this is that delegations have, perhaps unwittingly, adopted an “unproven collective belief”, as it will be described.¹ This belief has developed since the 1990s out of a persistent reliance on scholars, learned bodies and advocacy organisations, such as human rights non-governmental organisations (NGOs), expressing over-exaggerated support for universal jurisdiction and the citation of a few primary materials wholly out of context. According to the narrative of this belief, universal jurisdiction has developed in customary international law over piracy for the past 500 years and expanded to include war crimes at the end of World War II. Moreover, starting with the 1949 Geneva Conventions, universal jurisdiction has been impliedly established in numerous subsequent treaties containing extradite or prosecute obligations. Consequently, there is disagreement on a number of fundamental issues among delegations at the Sixth Committee. These issues include the extent to which universal jurisdiction has, in fact, developed in customary and conventional international law?; the potentially voluminous list of crimes subject to universal jurisdiction and why certain crimes are subject to universal jurisdiction and others are not?; universal jurisdiction’s rationale?; and whether or not the exercise of universal jurisdiction is mandatory or permissive?

This paper builds upon research previously published by the present author in order to challenge the dominant narrative of the collective belief.² It argues that the existence of universal jurisdiction in customary international law, historically and at present, is open to question, while treaty obligations to extradite or prosecute should not be conceptualised as universal jurisdiction or used to infer the existence of universal jurisdiction. Consequently, universal jurisdiction is based on false foundations and has developed as a hollow concept. The current debate on universal jurisdiction is wrongly postulated because it is premised on myths, historical misconceptions and false

¹ This phrase has been borrowed from Daryl Robinson, *The Controversy over Territorial State Referrals and Reflections on ICL Discourse*, 9 JICJ (2011).

² Matthew Garrod, *The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality*, 12 ICLR (2012); Matthew Garrod, *Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law*, 25 *Diplomacy and Statecraft* (2014); Matthew Garrod, *The British Influence on the Development of the Laws of War and the Punishment of War Criminals: From the Grotius Society to the United Nations War Crimes Commission*, in Robert McCorquodale (ed), *Contemporary Perspectives on British Influences on International Law* (forthcoming 2016).

analogies. Therefore, there is a need, perhaps more than ever before, to undertake empirical research of the existence and meaning of universal jurisdiction.