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Forward

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FOREWORD

Daniel T. Murphy

This year's annual symposium sponsored by the *Richmond Journal of Global Law and Business* is titled "A Collision of Authority: The U.S. Constitution and Universal Jurisdiction." During the symposium spirited presentations were given by three extremely prominent constitutional law and international law scholars: Dean Erwin Chemerinsky, Professor Mary Ellen O'Connell, and Professor Jeremy Rabkin.¹

The doctrine of universal jurisdiction, or the universality principle, is an international law principle supporting a nation state's authority to enact laws asserting criminal jurisdiction over certain conduct when the more usual bases supporting the assertion of jurisdiction are not present. Normally a state regulates or punishes conduct on the basis that the actor or the victim is one of its nationals or when the conduct takes place within its territory or its effects are felt there. The universality principle is generally used to support the assertion of jurisdiction over conduct such as piracy, genocide, or war crimes.² The notion is that such conduct is an affront to humanity in general and that thus any nation state has the right to punish such conduct. The principle thus would support a state's right to enact a statute punishing genocide even though the conduct took place outside of its territory, and neither the victims nor the perpetrators were its nationals.³

¹ Dean Erwin Chemerinsky, School of Law, University of California, Irvine; Professor Mary Ellen O'Connell, Robert & Marion Short Professor of Law and Research Professor of International Dispute Resolution, Law School, Notre Dame University; Professor Jeremy A. Rabkin, School of Law, George Mason University.

² The universality principle itself is not a law or statute punishing such conduct. It is the international law doctrine supporting a nation state's specific statute punishing such conduct. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1986); MALCOLM SHAW, INTERNATIONAL LAW 668 (6th ed. 2008).

³ See The Genocide Convention Implementation (Proxmire) Act of 1987, 18 U.S.C. § 1091 (2009). The jurisdictional provision of the Proxmire Act was amended, effective December, 2009, to read as follows:

- (e) Jurisdiction. – There is jurisdiction over the offenses described in subsections (a), (c) and (d) if -
 - (1) the offense is committed in whole or in part in within the United States; or
 - (2) regardless of where the offense is committed, the alleged offender is -

The focus of the discussion during the symposium was on the application of the universality doctrine to conduct of the United States in the post 9/11 era.

Professor O'Connell centered her remarks on choice of law issues. She clearly explained the international law distinctions among the laws applicable within a country during a period of international armed conflict, a period of armed but not international conflict, and peacetime. In her view there is no conflict between the Constitution and the principle of universal jurisdiction. As an example of universal jurisdiction she noted that a provision common to all four of the Geneva conventions⁴ requires signatory states to investigate and prosecute grave breaches of the conventions including among such breaches willful killing, torture, and unlawful confinement of persons protected under the conventions.⁵ The conflict of law rules determine the proper

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- (A) a national of the United States . . . ;
 - (B) an alien lawfully admitted for permanent residence in the United States . . . ;
 - (C) a stateless person whose habitual residence is in the United States; or
 - (D) present in the United States.

18 U.S.C. § 1091(e). Prior to 2007 the Act only applied to conduct taking place in the United States or to conduct of a U.S. national. *See* Genocide Convention Implementation (Proxmire) Act of 1987, 18 U.S.C. § 1091(d) (2002). In 2007 a new subsection (d)(5) was added to the statute providing that "after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States." *See* Genocide Convention Implementation (Proxmire) Act of 1987, 18 U.S.C. § 1091(d)(5) (2007). The 2009 amendments deleted former subsection (d) and added a new subsection (d) criminalizing attempts and conspiracies to commit the covered offenses and added the new subsection (e) which clarifies the jurisdictional reach of the Act. *See* Genocide Convention Implementation (Proxmire) Act of 1987, 18 U.S.C. § 1091(d), (e) (2009).

Subsection (e)(2)(D) clearly seems to be based on the universality principle. It would allow criminal prosecution of a non-US national for conduct perpetrated outside the United States so long as the person was present in the United States. The language of that subsection is interesting to consider in relation to the Supreme Court's extraordinarily generous deference to governmental conduct in obtaining personal jurisdiction over a defendant in the *Alvarez-Machain* case. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *See generally* STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISHOFF, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* (3d ed. 2009) (discussing state jurisdiction over crimes of genocide).

⁴ *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146 & 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

⁵ The conventions actually first call upon the signatory countries to enact laws criminalizing such conduct. Geneva IV, *supra* note 4, at art. 146. There is an

law to be applied. She maintained that during an international armed conflict the conventions apply to the conduct covered by them to the exclusion of any other law. Since all nations of the world are signatories to these conventions, it is appropriate that statutes in other countries provide for the prosecution of those responsible for the infamous “torture memos” or the rendition of individuals to the custody of governmental agents of countries where they will be tortured. There is nothing in the Constitution inconsistent with another nation’s assertion of jurisdiction in such cases. Her remarks lead easily into those of Dean Chemerinsky.

In Dean Chemerinsky’s view, the notion of the principle of universal jurisdiction and statutes based on it have been part of our constitutional tradition from the earliest days of republic. The Alien Tort Statute,⁶ which is part of the Judiciary Act of 1789,⁷ was given as an example of this sensitivity to international matters. Throughout our history, in times of national distress the Constitution has not always provided the promised protections to its citizens, and correspondingly government officials have been allowed to act in ways inconsistent with those protections. While this is not a new phenomenon⁸, the government’s conduct in the post 9/11 era has certainly provided ample evidence of these deficiencies. In his view, the government’s creation of the class of individuals known as “enemy combatants,” who the government claimed can be detained indefinitely and whose status is not reviewable in any court, created a legal “black hole,” and in this hole the enemy combatants were thrown. Of course, the Supreme Court has reversed many of the government’s positions.⁹ But he argued that nonetheless universal jurisdiction and the possibility that actions of our government agents engaged in conduct amounting to gross abuse of human rights may be reviewable and punished under the criminal law of other nations provides a necessary check on the government’s

argument that statutes enacted by a nation state with respect to punishment of breaches of the law of war are not enacted under the support of the universality principle, but rather they are supported by the treaty and the mutual consent of the treaty signatories. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 306 (7th ed. 2008).

⁶ “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.” 28 U.S.C. §1350.

⁷ Act of Sept. 24, 1789, 1 Stat. 73.

⁸ Among these times of crisis he noted the internment of citizens of Japanese ancestry during the second world war, *Korematsu v. United States*, 323 U.S. 214 (1944), and the excesses of the McCarthy era *United States, Dennis v. United States*, 341 U.S. 494 (1951).

⁹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

tendency to overreact. It is also the means by which the “rule of law” in times of national emergency will prevail.

Professor Rabkin’s presentation was a forceful rejection of Dean Chemerinsky’s and Professor O’Connell’s positions. In his view, reference to the principle of universal jurisdiction is not a long-standing part of our constitutional tradition. In his view, the constitutional power of Congress “to define and punish Piracies and Felonies committed on the high seas and Offenses against the Law of Nations”¹⁰ is not an authorization to enact a statute supported by universal jurisdiction. In his view, the framers in drafting the quoted section of the Constitution had in mind piracies and other offenses on the high seas committed by or against US citizens or their property and offenses against the law of nations committed in the United States.¹¹ Moreover, in his view, the universality principle gloss placed on the Alien Tort Statute is of recent vintage, first manifesting itself in the Second Circuit’s 1980 opinion in the *Filartiga*¹² case. He noted that nations with different sensibilities and cultures may very well have differing interpretations as to what constitutes the grievous offenses punishable as war crimes, etc. and certainly will require different elements of proof of the offense. To allow courts in other countries to judge the legitimacy of decisions taken by government officials here is thought to be inconsistent with the Constitution, and the notion of constitutionalism in general, because it undermines the ability of the courts where the action is taken or whose nationals are involved, and thus have the greatest interest in the matter, to determine for themselves legitimacy of the action. As a

¹⁰ U.S. CONST., art. I § 8 cl. 10.

¹¹ See generally Eugene Kantorovich, *Symposium: Public International Law and Economics: The Inefficiency of Universal Jurisdiction*, 2008 ILL. L. REV. 389 (2008); Eugene Kantorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183 (2004). The Alien Tort Statute was enacted in part in response to assaults in Philadelphia and New York City on foreign diplomats. *Respublica v. DeLongchamps*, 1 U.S. 111 (1784); see generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-717 (2004).

¹² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). Judge Friendly of the Second Circuit has referred to the Alien Tort Act as a “legal Lohengrin” noting that “no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). See Justice Souter’s lengthy exposition of the historical background of the ATA in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–21 (2004).

consequence the doctrine is destabilizing, and instead of contributing to the “rule of law,” it works to undermine that rule.

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