Cedric Ryngaert*

Universal Jurisdiction in an ICC Era

A Role to Play for EU Member States with the Support of the European Union

It is submitted that the international jurisdiction of the ICC, which carries more international legitimacy than national courts, is the final substitute for universal jurisdiction.¹ It has even been argued that the entry into force of the Rome Statute of the ICC prohibits the exercise of universal jurisdiction.² In this note, I will argue that this is a misconception and that the European Union, one of the staunchest supporters of the ICC, should encourage and assist its Member States to exercise universal jurisdiction over crimes against international humanitarian law (hereinafter referred to as ‘IHL’), while continuing its support for the ICC.

After distinguishing between universal jurisdiction as exercised by States (hereinafter referred to as ‘bystander States’) and international jurisdiction as exercised by the ICC (Part 1), I will argue that the ICC might, upon applying the complementarity

---

¹ See, e.g., R. Rabinovitch, ‘Universal Jurisdiction In Absentia’ 28 Fordham Int’l L. J. 500, 525 (2005) (‘[I]t is arguable that if the ICC is successful in bringing criminals to justice, municipal courts and prosecutors will stop exercising universal jurisdiction altogether’). By creating the ICC, States Parties to the Rome Statute expressly agreed to delegate power to the Court. In contrast, States have not for all international crimes expressly delegated the power to exercise universal jurisdiction to bystander States. This may undercut the legitimacy of universal jurisdiction. See G. Bottini, ‘Universal Jurisdiction After the Creation of the International Criminal Court’, 36 N.Y.U. J. Int’l L. & Pol. 503, 512-13 (2004). Compare, before the ICC came into being: I. Sinclair, in Yb. ILC (Vol. I) (1986), 141, para. 55 (‘it is implied that there are two alternatives: universal jurisdiction or an international criminal jurisdiction’).

² ICJ, Arrest Warrant, 14 February 2002, Memorial of the Congo, p. 59 (referring to the ‘obligation de ne pas priver le Statut de la C.P.I. de son objet et de son but’ (Article 18 of the Vienna Convention of the Law of Treaties)).
principle (Part 2), consider yielding to bystander States when the presumed offender can be found in the territory of the State Party to the Statute and when his trial in that State does not raise foreign relations concerns or goes beyond a State’s capacity (Part 3.1). In contrast, central IHL enforcement by the ICC may be preferable over the inherently scattered nature of in absentia national IHL enforcement. However, the door for universal jurisdiction in absentia should remain ajar, as information yielded by preliminary in absentia investigations may often be of particular use to the ICC (Part 3.2).

Refuting objections to the exercise of universal jurisdiction in an ICC era by means of an illustration of its operation in a number of European States, I will argue that national prosecutors and courts are well-placed to prosecute and adjudicate IHL crimes under specific circumstances, and that, accordingly, universal jurisdiction has a lasting role to play in the enforcement of international criminal law (Part 4). In particular, I will reject the criticism that the exercise of universal jurisdiction violates the principle of legality (Part 4.1), that States do not apply a principle of complementarity or subsidiarity (Part 4.2), that they are not impartial (Part 4.3) and that they lack the necessary expertise (Part 4.4).

In a final part (Part 5), I will discuss the role that the European Union could play in strengthening the exercise of universal jurisdiction by its Member States. I will congratulate the EU on the adoption of two decisions relating to the setting up of a network of contact points for the prosecution of IHL crimes (Part 5.1). I will nevertheless argue that Europol and Eurojust might play a more supportive and coordinating role (Part 5.2) and that the Council of the EU could consider the adoption of a Framework Decision on the prosecution of IHL crimes by Member States (Part 5.3).

1. UNIVERSAL JURISDICTION V. INTERNATIONAL JURISDICTION

Universal jurisdiction is not coterminous with international jurisdiction. Universal jurisdiction is national jurisdiction over international crimes, whereas international jurisdiction is jurisdiction over international crimes as exercised by international tribunals. Both types of jurisdiction are however often confused.3 Even the jurisdic-

---