
Solidarity in a Disaggregated World

Universal Jurisdiction and the Evolution of Sovereignty

CARLY NYST*

I. INTRODUCTION	36
II. THE DEVELOPMENT OF UNIVERSAL JURISDICTION	39
1. FROM PIRATES TO PINOCHET	39
2. UNIVERSAL JURISDICTION TODAY: RETREAT OR RESURGENCE?	43
III. INTERNATIONAL LAWYERS IN A DISAGGREGATED WORLD.....	47
1. CONCEPTUALIZING SOVEREIGNTY: FROM EROSION TO EVOLUTION	47
2. THE DISAGGREGATION OF STATE AND TRANSNATIONAL ADVOCACY NETWORKS	49
3. INTERNATIONAL LAWYERS AS NORM ENTREPRENEURS.....	52
4. THE DISAGGREGATION OF SOVEREIGNTY?	55
IV. FROM SOVEREIGNTY TO SOLIDARITY	56
V. CONCLUSION.....	59

A country isn't a rock. It's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult! Before the people of the world, let it now be noted that here, in our decision, this is what we stand for: justice, truth, and the value of a single human being.

— Judge Dan Haywood, played by Spencer Tracy, delivering the Court's verdict in *Judgment at Nuremberg* (1961)

I. Introduction

The norm of state sovereignty has enjoyed a lengthy, albeit precarious, tenure as the *grundnorm* of the international system.¹ Since the Peace of Westphalia in 1648, the protections flowing from claims of state sovereignty have been the jealous preserve of states, serving to insulate both sinister and benevolent rulers alike. While challenges to traditional conceptions of sovereignty have always existed alongside claims to its pre-eminence, the

* Carly Nyst is the Head of International Advocacy at Privacy International. She is a qualified lawyer and holds an LLB and a BA (International Relations) from the University of Queensland, Australia, and an MSc (International Relations) from the London School of Economics.

¹ See William Aceves, "Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation" (2001-02) 25 *Hastings Int'l & Comp L Rev* 261; Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment" (2002) 43 *Harv Int'l L J* 1.

invocation of sovereignty by states and sovereignty's constitutive nature in the international system have become increasingly contested notions.²

One of the more considerable challenges to the primacy of the sovereignty norm has been the development and entrenchment of international law. Despite the arguments of predominantly realist theorists to the contrary,³ this paper proceeds on the assumption that international law today both regulates and constitutes interstate relationships.⁴ Such relationships are more than crude systemic interactions—they are part of a distinctive social practice, in which actors' identities both shape, and are shaped by, international legal norms.⁵ This process is indicative of the existence of an international society,⁶ whereby actors "conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions."⁷ The twentieth century saw the fortification of international law as a key institution, and the latter half of the century witnessed the emergence of international law's most important, yet controversial, embodiments—human rights and duties—and individual criminal responsibility for their violation. Unlike earlier conceptions of international law, human rights and international criminal law go further than regulating the relations between states—they engage the rights and duties of individuals. They undermine what Hedley Bull labels "[t]he basic compact of coexistence between states, expressed in the exchange of recognition of sovereign jurisdictions ... a conspiracy of silence entered into by governments about the rights and duties of their respective citizens."⁸ The norms of human rights and international criminal law exist in defiance of the norm of state sovereignty.⁹

² See Stephen D Krasner, *Sovereignty: Organised Hypocrisy* (Princeton, NJ: Princeton University Press, 1999); Jean L Cohen, "Whose Sovereignty? Empire versus International Law" (2004) 18 *Ethics & Int'l Affairs* 1; Thomas G Weiss and Jarat Chopra, "Sovereignty under Siege: From Intervention to Humanitarian Space," in Gene M Lyons and Michael Mastanduno, eds, *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: John Hopkins University Press, 1995); Austin Sarat and Stuart Scheingold, eds, *Cause Lawyering and the State in a Global Era* (Oxford: Oxford University Press, 2001); Gene M Lyons and Michael Mastanduno, "State Sovereignty and International Intervention: Reflections on the Present and Prospects for the Future," in Lyons and Mastanduno, *ibid* at 250; Jack Donnelly, "State Sovereignty and International Intervention: The Case of Human Rights," in Lyons and Mastanduno, *ibid* at 115. ³ Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

⁴ Nardin, *Law, Morality and the Relations of States* (Princeton, NJ: Princeton University Press, 1983); Thomas Risse, Stephen C Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

⁵ Caroline Fehrl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches" (2004) 10 *Eur J Int'l Relations* 357.

⁶ David R Mapel and Terry Nardin, eds, *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1998).

⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave, 1977) at 13.

⁸ *Ibid* at 80.

⁹ The relationship between the disciplines of international law and international relations is a complex one, which is more appropriately addressed elsewhere. To begin, see Gerry Simpson, "Duelling Agendas: International Relations and International Law (Again)" (2004-2005) 1 *J Int'l L & Int'l Rel* 61; and Anne-Marie Slaughter-Burley, "International Law and International

A number of offences under international criminal law purport to attract universal jurisdiction, the principle by which every state has jurisdiction over an offence recognized as being of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended.¹⁰ The doctrine is as heavily contested as it is widely advocated, and its successful invocations (most notably, the attempt to extradite former Chilean president Augusto Pinochet from the United Kingdom to stand trial in Spain) have been as spectacular as those that have failed, including multiple aborted attempts to try high-ranking members of the Bush administration in courts throughout Europe. Ten years after the House of Lords' decision in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3) (*Ex Parte Pinochet*), lawyers, academics, and states continue to engage in heated debate about the legal foundation of the doctrine, its legitimate usage, and its potential exploitation.¹¹ Even as increasing numbers call for its abandonment, attempts by lawyers to commence prosecutions founded in the doctrine proliferate.¹²

The doctrine of universal jurisdiction poses substantial conceptual and practical challenges to widely held notions of sovereignty in international relations. This article seeks to place the doctrine in the context of debates about the changing nature of the norm of sovereignty. The article is comprised of three sections. First, the history of the doctrine of universal jurisdiction will be surveyed in order to ascertain the extent of its establishment within states. Particular attention will be given to the way in which universal jurisdiction illustrates the tensions between order and justice, in the sense addressed by Hedley Bull.¹³ Second, this study will look at the changing contours of the norm of sovereignty. Anne-Marie Slaughter's disaggregation thesis will be analyzed and applied to the networks of international lawyers who are driving universal jurisdiction.¹⁴ The article will propose that Slaughter's disaggregation thesis provides an appropriate lens through which to analyze the role of international lawyers, working as transnational advocacy networks, in promoting normative change. Finally, this study will seek to join the solidarist-pluralist debate within the English

Relations Theory: A Dual Agenda" (1993) 87:2 Am J Int'l L 205.

¹⁰ Kenneth C Randall, "Universal Jurisdiction under International Law" (1987-88) 66 Texas L Rev 785 at 788.

¹¹ *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), [2000] 1 AC 147. This article will provide only a brief overview of these debates for it is primarily concerned with universal jurisdiction as a concept and practice, rather than its legal contours and insufficiencies. It will provide a broad understanding of how the universal jurisdiction came to be in order to ascertain how it fits into international relations today.

¹² Diane Morrison and Justus Reid Weiner, "Curbing Enthusiasm for Universal Jurisdiction" (2010) 4 Berkeley J Int'l L Publicist 1, online: <http://bjil.typepad.com/publicist/vol-4-spring-2010/>; Alan M Dershowitz, *The Hypocrisy of 'Universal Jurisdiction'*, Hudson New York Institute (6 October 2009), online: <http://www.hudson-ny.org/848/the-hypocrisy-of-universal-jurisdiction>; Luc Reydam, "The Rise and Fall of Universal Jurisdiction," in William A Schabas and Nadia Bernaz, eds, *Routledge Handbook of International Criminal Law* (London: Routledge, 2010) at 33.

¹³ Bull, *supra* note 7.

¹⁴ Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

School, by questioning whether the continued application of universal jurisdiction through the pursuits of international lawyers is sufficient evidence to support a contention that international society is moving towards greater solidarity.

This study seeks to conduct a nuanced, albeit brief, examination of the doctrine of universal jurisdiction, the norms with which it engages, the way in which such norms evolve, and the implications for international society. It will contend that the continued existence of universal jurisdiction constitutes compelling evidence that the fundamental concepts underpinning the doctrine—human rights and individual criminal responsibility—have become constitutive of modern sovereignty. It is further argued that universal jurisdiction is a clear example of the way in which non-state actors can fundamentally alter the principles and dynamics of international society and the norms by which it is constituted. Finally, this article will propose that the doctrine of universal jurisdiction provides an appropriate platform upon which to analyze the pluralist-solidarity debate in international relations.

II. The Development of Universal Jurisdiction

1. *From Pirates to Pinochet*

The House of Lords' watershed decision in *Ex Parte Pinochet* that "crimes prohibited by international law attract universal jurisdiction under customary international law" subject to certain conditions, prompted a great deal of cautious optimism among proponents of human rights and international criminal responsibility.¹⁵ Advocates, activists, and academics dedicated to advancing such causes saw the decision as "a real step forward in international human rights law," which constituted "a quite remarkable challenge to the norms of the Westphalia System."¹⁶ To the extent that this "was a moment when international law seemed to plunge forward rather than advance at its more usual lumbering pace,"¹⁷ many observed it as the fulfilment of a project that began at Nuremberg, one directed at pulling back the "curtain of sovereignty" to hold individuals accountable for their actions.¹⁸ Yet restraint was the order of the day. There was a sense not only

¹⁵ *Ex Parte Pinochet*, *supra* note 11 at 275 (per Lord Millet). However, it is recognized that the House of Lords judgment must be considered, at best, opaque. No obvious *ratio decidendi* was apparent in the judgment, and the Lords did not take a unified stance the issue of universal jurisdiction. For example, Lord Browne-Wilkinson concluded that universal jurisdiction was applicable in Great Britain with respect to the crime of torture only by virtue of relevant statutory authorities (at 200).

¹⁶ Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002) at 218.

¹⁷ Diane F Orentlicher, "Universal Jurisdiction after Pinochet: Prospects and Perils" (Paper delivered at the UC Irvine as part of the Symposium Series Prosecuting Perpetrators: International Accountability for War Crimes and Human Rights Abuses 21, February 2003) [unpublished], online: http://www.cgpac.uci.edu/files/cgpacs/docs/2010/working_papers/diane_orentlicher_universal_jurisdiction.pdf.

¹⁸ Henry T King, Jr, "Realities, Prospects, War Crimes and Crimes against Humanity: The

that universal jurisdiction stood “poised to become an integral, albeit supplemental, component of the emerging international justice system”¹⁹ but also that it was still in its nascent stages, ripe for exploitation and abuse.²⁰ Nevertheless, the effective invocation of the doctrine of universal jurisdiction in *Ex Parte Pinochet* represented a monumental breakthrough.

According to Madeline Morris, this breakthrough has been constructed by international lawyers in the pursuit of “a vaulting ambition,” hastily created by overlooking facts or drawing exaggerated and flawed analogies.²¹ Others, too, have analyzed at length the arguably flawed foundations of the doctrine, drawing from this analysis their criticism of its current application. Commentators point to the misinterpretation and misappropriation of work by Grotius and Vattel, whom Luc Reydam's notes in fact “wanted to make sovereignty a workable organised principle” and “would cringe at the contemporary interpretation of [their] words.”²² The conceptual divergences between Grotius and Vattel are relevant: while both observed the existence of a moral community of mankind, only Grotius believed that community should be given priority over the community of states.²³ This difference undermines appeals to the well-established authority of the doctrine, that “universal jurisdiction was legal lore, it had always existed ‘out there’—scattered in the writings of ... legal-philosophers.”²⁴ In fact, the development of the doctrine was influenced by these understandings—or misunderstandings—of writings on natural law. The categorization by Vattel of pirates as *hostis humani generis* (the enemies of all humanity), who were thus excluded from the principle that “the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories,” was transposed onto those committing war crimes, crimes against humanity, and genocide.²⁵ This transposition disregarded Vattel's own position in opposing the application of universal jurisdiction outside the context of piracy,²⁶ and employed shaky analogous reasoning between piracy and international crimes, the former only applying to private acts and excluding the official acts of states.²⁷

Nevertheless, it was upon these dubious foundations that the principle of universal jurisdiction materialized to form the basis of the jurisdiction exercised by the International Military Tribunal (IMT) at Nuremberg—an

Nuremberg Precedent” (2001) 35:2 New Eng L Rev 282.

¹⁹ Bruce Broomhall, “Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law” (2000-01) 35:2 New Eng L Rev 399.

²⁰ Madeline H Morris, “Universal Jurisdiction in a Divided World: Conference Remarks” (2000-01) 35 New Eng L Rev 337.

²¹ *Ibid* at 339.

²² Reydam's, *supra* note 12 at 341-42.

²³ Andrew Linklater and Hidemi Suganami, *The English School of International Relations: A Contemporary Reassessment* (Cambridge: Cambridge University Press, 2006) at 63.

²⁴ Reydam's, *supra* note 12 at 339.

²⁵ Emerich de Vattel, *Law of Nations or the Principles of Natural Law*, Book 1: Of Nations Considered in Themselves (1758) at para 233.

²⁶ Eugene Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations” (2004) 45 Harvard Int'l L J 1.

²⁷ Morris, *supra* note 20 at 345.

advancement captured in chief American prosecutor Robert Jackson's declaration before the court that "the real complaining party at your bar is civilisation."²⁸ The court itself held that in establishing the IMT, the signatory powers had "done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."²⁹ The UN secretary-general later considered whether this statement implied that the signatory powers' jurisdiction was premised on the protective principle—to the extent that relevant crimes threatened the security of each of them—but concluded that "it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state."³⁰ A number of other post-war trials subsequently affirmed this approach to crimes committed during World War II, including the *Amelo Trial* (*Trial of Otto Sandrock and Three Others*) before the British Military Court for the trial of war criminals in the Netherlands,³¹ the *General Wagener case* the Supreme Military Tribunal of Italy,³² the trial of *Klauss Barbie* in the French Criminal Court of Cassation,³³ and *Attorney General of Israel v Eichmann* before the Supreme Court of Israel, which held that the application of universal jurisdiction "has for some time been moving beyond the international crime of piracy" and consequently was "logically applicable also to all such criminal acts of commission or omission which constitute offences under the laws of nations."³⁴

This post-war gradual crystallization of universal jurisdiction and human rights norms saw the doctrine's positivist foundations laid in the form of the 1949 Geneva Conventions, which 194 states have now ratified.³⁵ (The inclusion of universal jurisdiction in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide was met with resistance from a number of states, and, as such, the convention instead

²⁸ *Ibid.*

²⁹ *International Military Tribunal (Nuremberg) Judgments and Sentences* (London: Her Majesty's Stationary Office, 1946) at 216.

³⁰ *The Charter and Judgement of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Do A/CN.4/5 (1949) at 38.

³¹ The court stated, "under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed." *Amelo Trial* (*Trial of Otto Sandrock and Three Others*), British Military Court for the Trial of War Criminals in the Netherlands, held at the Court House, Amelo, Holland, on 24-26 November 1945, Case no 3, Law Reports on Trials of War Criminals, United Nations War Crimes Commission.

³² The tribunal stated: "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one ... The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be." *Rivista Penale*, Supreme Military Tribunal, Italy (1950) 753 at 757.

³³ Judgment of 6 October 1983, Cass Crim (1984) DS Jur 113, GP Nos 352-54 at 121 (18-20 December 1983).

³⁴ *Attorney General of Israel v Eichmann*, 1962 SC Isrl, 26 ILR 277.

³⁵ *Geneva Conventions*, 12 August 1949, 1125 UNTS 3.

provides for the jurisdiction of an international penal tribunal.³⁶) Today, a large majority of states are party to, and have ratified, a number of treaties that provide for universal jurisdiction, including the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the 1977 Protocol Additional to the Geneva Conventions, the 1982 Convention on the Law of the Sea, the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and a number of the terrorism treaties enacted throughout the 1970s and 1980s.³⁷ Although the Rome Statute of the International Criminal Court (Rome Statute) does not explicitly incorporate universal jurisdiction (an omission that arguably creates a statutory gap precluding a truly global international criminal justice system), most states parties have provided for universal jurisdiction to some extent as part of implementing the provisions of the statute at the national level.³⁸

Although the United States currently only recognizes universal criminal jurisdiction in its own courts with respect to piracy,³⁹ slavery,⁴⁰ and torture,⁴¹ the principle of universal jurisdiction was incorporated in 1987 in the *Third Restatement of the Foreign Relations Law of the United States*.⁴² The US approach to the doctrine since this time has been characterized by varying degrees of tolerance. The Clinton administration exerted considerable effort to encourage foreign governments with universal jurisdiction legislation to exercise their powers with respect to former Cambodian leader Pol Pot, Kurdish rebel leader Ocalan, and senior leaders of Saddam Hussein's Iraqi leadership,⁴³ yet it vigorously opposed the incorporation of universal jurisdiction into the Rome Statute at the Rome conference in 1998.⁴⁴ The Bush administration, itself the subject of numerous universal jurisdiction prosecution attempts,⁴⁵ criticized the politicized use of the doctrine in

³⁶ *Convention for the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

³⁷ Morris, *supra* note 20; *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243; *Protocol Additional to the Geneva Conventions of 12 August 1949*, 8 June 1977, 1125 UNTS 3; *UN Convention on the Law of the Sea*, 21 ILM 1261 (1982); *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

³⁸ Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool* (2010), online: <http://www.amnesty.org/en/library/asset/IOI53/015/2010/en/72ab4ccf-4407-42d3-8cfb-46ad6aada059/ior530152010en.pdf>. Rome Statute of the International Criminal Court, 1 July 2002, UN Doc A/CONF.183/9 (2002).

³⁹ *United States v Smith*, 18 US (5 Wheat) 153 at 162 (1820).

⁴⁰ *United States v La Jeune Eugenie*, 1822 CCD Mass, 26 Fed Case 832 at 843.

⁴¹ *Extraterritorial Torture Statute*, 1994, 18 USC (1994) at ss 2340 and 2340A.

⁴² *Third Restatement of the Foreign Relations Law of the United States* (1987) at para 404: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present."

⁴³ David Scheffer, "Opening Address" (2000-01) 35 New Eng L Rev 233.

⁴⁴ Bartram S Brown, "The Evolving Concept of Universal Jurisdiction" (2000-01) 35:2 New Eng L Rev 383.

⁴⁵ This includes attempts to prosecute Dick Cheney and Colin Powell in Belgium (2003); Donald Rumsfeld (2004) and Alberto Gonzales (2006) in Germany; and Donald Rumsfeld in France

Belgium⁴⁶ but hosted the prosecution, under universal jurisdiction, of Charles "Chuckie" Taylor, the son of former Liberian president Charles Taylor, for the crime of torture and actively supported the international criminal tribunals in Rwanda and Yugoslavia.⁴⁷ Early in the Obama presidency the administration reiterated its commitment, in principle, to individual accountability for atrocities, and since that time has continued to facilitate and sustain the work of the International Criminal Court in Uganda, Kenya and Libya.⁴⁸

2. Universal Jurisdiction Today: Retreat or Resurgence?

Following the success, for universal jurisdiction proponents, in *Ex Parte Pinochet*, there was a renewed interest in the potentialities of universal jurisdiction. In 2001, the Princeton Principles on Universal Jurisdiction were endorsed by scholars and jurists convening at Princeton University.⁴⁹ In the decade since then, complaints and prosecutions in Belgium, Spain, the Netherlands, Argentina, France, Germany, Senegal, New Zealand, and the United Kingdom have sought to establish criminal responsibility for crimes committed in, *inter alia*, the former Yugoslavia,⁵⁰ Rwanda,⁵¹ Iraq,⁵² Mauritania,⁵³ Chad,⁵⁴ Afghanistan,⁵⁵ Congo Brazzaville,⁵⁶ Zimbabwe,⁵⁷

(2007). See Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008" (2009) 30 Michigan J Int'l L 927.

⁴⁶ Andreas Fischer-Lescano, "Global Constitutional Struggles," in Wolfgang Kaleck, Michael Ratner, Tobias Singelstein and Peter Weiss, eds, *International Prosecution of Human Rights Crimes* (Berlin: Springer-Verlag, 2007) at 22.

⁴⁷ Pursuant to the *Extraterritorial Torture Statute*, *supra* note 40 at ss 2340 and 2340A. See Elise Keppler, Shirley Jean, and J Paxton Marshall, "First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr." (26 August 2008), online: Human Rights Watch, http://www.hrw.org/pub/2008/ij/HRB_Chuckie_Taylor.pdf.

⁴⁸ Stephen Kaufman, *New U.S. Cooperation on International Criminal Court* (US Department of State, Bureau of International Information Programs, 2010) at 1, online: <http://www.america.gov/st/peacesec-english/2010/June/20100602160754esnamfuak0.7448694.html&distid=ucs>; David Scheffer, "America's Embrace of the International Criminal Court," *Jurist – Forum*, 2 July 2012, online: <http://jurist.org/forum/2012/07/dan-scheffer-us-icc.php>.

⁴⁹ *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, 2001, online: <http://lapa.princeton.edu/hosteddocs/univ JUR.pdf>.

⁵⁰ From 1999 to 2003, German practitioners investigated 128 cases of crimes committed in the former Yugoslavia. See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (2006), online: <http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe> (D).

⁵¹ Including the Butare Four case in Belgium (2001); the "Rwandan Generals" case in Spain (2005); Etienne Ntazonimana and Samuel Ndashyikirwa in Belgium (2005); Ignace Murwanashyaka and Straton Musoni in Germany (2009); Wencelas Munyeshyaka in France (ongoing); Callixte Mbarushimana in France (ongoing).

⁵² Nizar Khazraji in Denmark (2002); George HW Bush, General Norman Schwarzkopf, and General Tommy Franks in Belgium (2003).

⁵³ Ely Ould Dah in France (2005).

⁵⁴ Hissene Habre in Senegal (2005 to 2008).

⁵⁵ Faryadi Zardad in the United Kingdom (2005), the "Afghan Generals case" in the Netherlands (2005).

⁵⁶ Jean-Francois Ndengue in France (2004).

⁵⁷ Robert Mugabe in France (2003).

Algeria,⁵⁸ Tunisia,⁵⁹ Peru,⁶⁰ Argentina,⁶¹ Guatemala,⁶² Tibet,⁶³ the United States,⁶⁴ and the Occupied Palestinian Territories.⁶⁵ Yet concurrent to the proliferation of complaints and prosecutions have been a number of state initiatives that have suggested an uncertainty towards universal jurisdiction akin to that of the United States. Multiple prosecutions have been discontinued due to concerns about the diplomatic ramifications.⁶⁶ After incurring the wrath of Donald Rumsfeld in 2003, Belgium repealed its extensive universal jurisdiction legislation, incorporating international crimes into the Belgium Criminal Code, thereby restricting the jurisdiction exercisable by Belgian courts to active and passive personality.⁶⁷ Spain introduced similar legislation in 2010,⁶⁸ and, in April 2010, Spanish Judge Baltazar Garzón, a man congratulated and criticized by many for breathing life into universal jurisdiction legislation in Spain, was indicted for commencing an investigation into atrocities committed under the Franco dictatorship, acts that are covered by a 1977 amnesty law.⁶⁹ In late 2008, the African Union-European Union (AU-EU) Ministerial Troika commissioned an expert report on the principle of universal jurisdiction discussing the calls by African states for the discontinuation of European prosecutions of African offenders under the principle of universal jurisdiction. The doctrine has also been the subject of controversy in the United Kingdom after an arrest warrant was issued in Britain for Israel's former foreign minister, Tzipi Livni, days before she was due to fly to London in 2010.⁷⁰ Consequently, the British government commenced a consultation process aimed at generating legislative restrictions on the use of the doctrine, and, in September 2010, Parliament passed the Police Reform and Social Responsibility Act,

⁵⁸ Khaled Nezzar in France (2001).

⁵⁹ Khaled Ben Said in France (2001).

⁶⁰ Alberto Fujimori in Spain (2009) and Adolfo Scilingo in Spain (2005).

⁶¹ Richardo Miguel Cavallo in Spain (2006).

⁶² The "Guatemalan Generals case" in Spain (2005).

⁶³ The "Tibetan Genocide case" in Spain (2006).

⁶⁴ The "Bush Six case" in Spain (2009).

⁶⁵ Ariel Sharon in Belgium (2001-03), Moshe Ya'alon in New Zealand (2006); Shaul Mofaz (2004), Dono Almog (2005), Ehud Barak (2009), and Tzipi Livni in the United Kingdom (2009); Salah Shehade in Spain (2010).

⁶⁶ Naomi Roht-Arriaza, "The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction," in Kalek et al, *supra* note 46.

⁶⁷ Active personality jurisdiction applies when a national is accused of an extraterritorial crime; passive personality jurisdiction applies when a national is the victim of a territorial crime. *Criminal Code of the Kingdom of Belgium*, Article 7.

⁶⁸ *United States v Smith*, (1820) 18 US Wheat (5th) 153 at para 162.

⁶⁹ Marlise Simons, "Spain's Attorney General Opposes Prosecutions of 6 Bush Officials on Allowing Torture," *New York Times* (16 April 2009), online: <http://www.nytimes.com/2009/04/17/world/europe/17spain.html>. In May 2010, Garzón was suspended from judicial duties pending the outcome of his trial on the charges. Subsequently, the General Council of the Judicial Power of Spain granted a request from the International Criminal Court (ICC) for Garzón to be assigned as a consultant to the ICC for six months. See Hermione Gee, "Garzón Suspended, Will Move to ICC," *Radio Netherlands Worldwide* (14 May 2010).

⁷⁰ Natalie Hanman, "DPP May Get Veto Power over Arrest Warrants for War Crime Suspects," *The Guardian* (22 July 2010), online: <http://www.guardian.co.uk/law/2010/jul/22/dpp-veto-arrest-warrants-war-crime>.

containing provisions that require the consent of the director of public prosecutions prior to the issuance of an arrest warrant in a private prosecution under universal jurisdiction.⁷¹

These developments, for the most part, reflect concerns about the problems inherent in the application of universal jurisdiction. Such problems are the subject of extensive legal and theoretical debate that will not be fully documented in this article.⁷² The debate is primarily a normative discourse about the proper relationship between law and politics. Universal jurisdiction's detractors, hailing overwhelmingly from the realist camp, fret about a doctrine that allows "legal principles to be used as weapons to settle political scores,"⁷³ amounting to "the judgement of one state's policies ... in the courts of another state"⁷⁴ and thereby contravening the principle of sovereign equality inherent in the dictum *par in parem non habet imperium*.⁷⁵ The increased application of universal jurisdiction reflects a renewed commitment to "[t]he kind of idealism that Carr understood to be so damaging to international peace and stability in the interwar years," exemplifying a "failure to take seriously the contested nature of international norms, the importance of power, and the possibility of abuse exacerbated by the absence of democratic accountability."⁷⁶ Universal jurisdiction has the potential to be exploited by "ideologues and antagonists" intent on committing "lawfare" against countries such as the United States and Israel.⁷⁷ It connotes a preference for order over justice, promising to "lead to

⁷¹ *Police Reform and Social Responsibility Act*, 2011 c 13.

⁷² See, for example, Georges Abi-Saab, "The Proper Role of Universal Jurisdiction" (2003) 1 J Int'l Crim J 596; Jörg Arnold, "Protection of Human Rights by Means of Criminal Law: On the Relationship between Criminal Law and Politics," in Kalek et al, *supra* note 46; Broomhall, *supra* note 19; Brown, *supra* note 44; Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1:3 J Int'l Crim J 589; Dershowitz, *supra* note 12; Benjamin B Ferencz, "A Nuremberg Prosecutor's Response to Henry Kissinger" (2001-2002) 8 Brown J World Aff 178; Fischer-Lescano, "Global Constitutional Struggles," *supra* note 46; Jack Goldsmith and Stephen D Krasner, "The Limits of Idealism" (2003) 132:1 Daedalus 47; King, *supra* note 18; Henry A Kissinger, "The Pitfalls of Universal Jurisdiction" (2001) 80:4 Foreign Aff 86; Kontorovich, *supra* note 26; Eugene Kontorovich, "The Inefficiency of Universal Jurisdiction," University of St Gallen Law School, Law and Economic Research Paper Series, Working Paper No 2007-14 (2007); Morris, *supra* note 20; Morrison and Weiner, *supra* note 12; Orentlicher, *supra* note 17; Randall, *supra* note 10; Reydams, *supra* note 12; Roht-Arriaza, *supra* note 66; Kenneth Roth, "The Case for Universal Jurisdiction" (September/October 2001) 80:5 Foreign Aff 150; Leila Nadya Sadat, "Redefining Universal Jurisdiction" (2000-2001) 35 N Eng L Rev 241; Scheffer, *supra* note 43; JD van der Vyver, "Universal jurisdiction in international criminal law" (1999) 24 S African Yearbook Int'l L 107; Michael Verhaeghe, "The Political Funeral Procession for the Belgian UJ Statute," in Kalek et al, *supra* note 46.

⁷³ Kissinger, *ibid* at 88.

⁷⁴ Morris, *supra* note 20 at 354.

⁷⁵ An equal has no power over an equal. The principle was discussed in *Ex Parte Pinochet*, *supra* note 11 (per Lord Millet): "The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; *par in parem non habet imperium*. States were obliged to abstain from interfering in the internal affairs of one another."

⁷⁶ Goldsmith and Krasner, *supra* note 72.

⁷⁷ Michael Chertoff, "The Responsibility to Contain: Protecting Sovereignty under International

more chaos in the international system.”⁷⁸

However, contrary to observations that “the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes,” the doctrine has proved resilient.⁷⁹ International chaos has yet to ensue despite a clear proliferation of complaints and prosecutions under the doctrine.⁸⁰ An increasing number of states have introduced universal jurisdiction for genocide, crimes against humanity, and war crimes, most through implementing legislation adopted as part of the ratification of the Rome Statute.⁸¹ By 2004, more than 100 states had domestic legislation authorizing universal jurisdiction, fourteen states had initiated cases, and high-level courts in twelve of those states had upheld the authority of the doctrine.⁸² The 2009 AU-EU Ministerial Troika, which called for the tempering of the application of universal jurisdiction, nevertheless agreed that “all states should strive to put an end to impunity for genocide, crimes against humanity, war crimes and torture, and prosecute those responsible for such crimes.”⁸³ In considering the scope and application of the doctrine in its sixty-fifth session in September 2009, the UN General Assembly reiterated its commitment to the responsible and judicious application of universal jurisdiction consistent with international law and resolved to remain seized of the matter in forthcoming sessions.⁸⁴ Organizations such as the Madrid-based Asociación Pro Derechos Humanos de España (APDHE), the Paris-based Ligue des Droits de L’Homme (FIDH), the Berlin-based European Centre for Constitutional and Human Rights (ECCHR), Human Rights Watch, and Amnesty International remain engaged in universal jurisdiction litigation and activism, and universal jurisdiction prosecutions continue to proliferate.

Hedley Bull contends:

Law” (2009) 88:1 Foreign Aff 130; Morrison and Weiner, *supra* note 12; Dershowitz, *supra* note 12; Anne Herzberg, *Laufare: Exploitation of Courts in the Arab-Israeli Conflict*, NGO Monitor Reports (7 December 2010).

⁷⁸ Scheffer, *supra* note 43.

⁷⁹ Cassese, *supra* note 72.

⁸⁰ It is accepted that many such complaints are dismissed and prosecutions discontinued due to political considerations and even executive interference. The scope of this article does not include an examination of the accuracy of claims about the politicized nature of the doctrine or the manipulation of universal jurisdiction to achieve other ends, although such claims do warrant further research: “In most of its modern applications, universal jurisdiction has functioned essentially as intended” (Morris, *supra* note 20 at 357). For the purposes of this article, it is accepted that the intended use of the doctrine is as stated by its proponents: to protect human rights through individual criminal accountability.

⁸¹ For example, Germany adopted the *German Code of Crimes against International Law*, and South Africa adopted the *Implementation of the Rome Statute of the International Criminal Court Act*, both of which came into force on 30 June 2002.

⁸² Darren Hawkins, “Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms” (2004) 48 Int’l Studies Q 779.

⁸³ Council of the European Union, *AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction Report*, Doc 8672/1/09 REV 1 (Brussels, April 2009), online: http://www.ulb.ac.be/droit/cdi/Site/Accueil/52A70C06-DF54-4A45-B69D-B82CFF0E8C3D_files/Rapport_UA_UE_ENG.pdf at 40.

⁸⁴ UN General Assembly Resolution 65/33 on the Scope and Application of the Principle of Universal Jurisdiction (10 January 2011).

If international society were really to treat human justice as primary and coexistence as secondary ... then in a situation in which there is no agreement as to what human rights are or in what hierarchy of priorities they should be arranged, the result could only be to undermine international order.⁸⁵

Universal jurisdiction has persevered in the face of a norm that should dispense with it—state sovereignty. The result has not been disorder but, rather, the increased entrenchment of the norms of human rights and international criminal responsibility. This development is part of a movement that puts into question the absoluteness of Bull's order and justice paradigm. How can we understand the continued existence and application of universal jurisdiction, a principle with the pursuit of justice at its core, alongside order? It is the contention of this study that the entrenchment of universal jurisdiction serves as evidence that the norms of human rights and international criminal justice have become, like state sovereignty, constitutive of international society. The process by which this transformation has occurred will be the focus of the next section.

III. International Lawyers in a Disaggregated World

1. *Conceptualizing Sovereignty: From Erosion to Evolution*

The contested nature of the norm of sovereignty is, perhaps, its only feature that is widely agreed upon.⁸⁶ Arguments about the contours of sovereignty and its relationship with other norms are so well worn in the disciplines of international relations and international law that it is neither practicable nor necessary to canvass them here.⁸⁷ This article accepts that the ever-increasing challenges to traditional conceptions of the norm of sovereignty are reflective of the changing nature of the norm, which is indicative of its status as a rule that both constitutes and is constituted by international society. Thus, this article rejects Stephen Krasner's argument that the international system has no such constitutive rules.⁸⁸ It is contended that the norm of sovereignty is so widely accepted within international society that it is constitutive of its identity, which is so taken for granted that "it is easy to overlook the extent to which [it is] both presupposed by and an ongoing artefact of practice."⁸⁹ Far from being a result of rationalist calculations or embedded social structures, sovereignty "exists by virtue of the intersubjective meanings that conjure it into existence."⁹⁰

Adopting such a constructivist approach reorients the sovereignty

⁸⁵ Bull, *supra* note 7.

⁸⁶ Alexander Wendt and Robert Duvall, "Sovereignty and the UFO" (2008) 36:4 Political Theory 607.

⁸⁷ Sarat and Scheingold, *supra* note 2.

⁸⁸ Krasner, *supra* note 2.

⁸⁹ Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 Int'l Organization 391 at 413.

⁹⁰ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000) at 22.

debate away from a binary discourse of Westphalian sovereignty contrasted against a post-Westphalian cosmopolitan community. This stance eschews the more ingrained formations of sovereignty as autonomy that have come to characterize the discipline of international relations. To the extent that autonomy was ever a part of the contours of state sovereignty, it is no longer “fundamental, nor adequate as a justification of either the supposedly derivative principles of non-intervention and self-determination or the moral objections to imperialism and economic dependence.”⁹¹ Thus, as “[t]he rights of sovereign states, and of sovereign peoples or nations, derive from the rules of the international community or society and are limited by them,” this evolution of sovereignty reflects a change in the rules of the international community.⁹²

It does not necessarily follow, of course, that sovereignty loses its meaning or force—that meaning has simply changed under the influence of other rules, such as international law. The existence of transnational and supranational jurisdictional claims does not warrant a conclusion that autonomy is excluded from the range of rights a state can claim by virtue of its sovereignty but, rather, that autonomy is now only one among a number of such claims. Accordingly, it is no longer fruitful to cast the norms of sovereignty and human rights in a simple dichotomous relationship. Rather,

we must sever political autonomy from the idea of comprehensive jurisdiction and realise that the apparent antinomy between sovereignty and human rights or between state sovereignty and multiple sources of international law is based on an anachronistic conception of the former as absolute.⁹³

This reconceptualization of sovereignty helps to overcome a primary failure of rationalist international relations theory, that “it does not have a motor of change, or that the motor of change—such as state self-interest, or changing power capabilities—is impoverished, and cannot explain the sources or nature of ... international change.”⁹⁴ Sovereignty is “a shared set of understandings and expectations about state authority that is reinforced by practices”; as these practices and understandings have changed so too have the common conceptualizations of sovereignty.⁹⁵ Thus, the introduction and expansion of the norms of human rights and individual criminal responsibility, rather than eroding sovereignty, have induced its evolution. Bull’s observation that “carried to its logical extreme, the doctrine of human rights and duties is subversive of the whole principle that mankind should be organised as a society of sovereign states,”⁹⁶ is based on an assumption

⁹¹ Charles R Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979) at 69.

⁹² Hedley Bull, *Justice in International Relations: The Hagey Lectures* (United Kingdom: University of Waterloo Publications Distribution Service, 1984) at 11.

⁹³ Cohen, *supra* note 2 at 16.

⁹⁴ Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998) at 213.

⁹⁵ *Ibid* at 37.

⁹⁶ Bull, *supra* note 7 at 13.

that the two norms are mutually exclusive. When viewed, instead, as the subject of a communicative process through which they are continually defined, “[i]nternational human rights norms ... become constitutive for modern statehood; they increasingly define what is meant to be a ‘state’ thereby placing growing limits on another constitutive element of modern statehood, ‘national sovereignty.’”⁹⁷ Rather than there being a “zero-sum” contest between sovereignty and human rights, “the discussion can become about the contestable boundaries that define and exclude ‘legitimate’ actions that can be performed by sovereign entities.”⁹⁸

The evolved nature of sovereignty is vividly illustrated and evidenced by the widespread acceptance and application of universal jurisdiction. The fundamental concepts underpinning universal jurisdiction are antithetical to a traditional understanding of sovereignty as autonomy. In a world where the former exists, the latter logically cannot. Whereas states previously may have rejected, and reacted with force to, any attempt by an outsider to exercise jurisdiction over matters within their territory, now a majority of states accept—at least in principle—that international law mandates such infringements upon their sovereignty. This is a telling sign that the norms of human rights and individual criminal responsibility have indeed reached prescriptive status, such that they are “a standard of appropriate behaviour for any state which seeks to view itself, and be viewed by others, as a respected member of the international community.”⁹⁹ States now allow and support universal jurisdiction because it represents the manifestation of norms and values that form the contours of international society.

2. *The Disaggregation of the State and Transnational Advocacy Networks*

It is impossible to understand how these norms have come to be constitutive of international society unless we extend our conception of the actors that participate in international relations. A fruitful framework for such analysis is Anne-Marie Slaughter’s reconceptualization of the unitary state as disaggregated. By viewing international society through the framework of disaggregation, new international networks can be perceived—networks that are driving the development of new norms and principles reshaping international relations. Slaughter contends that the forces of globalization—and its correlative effects on communication and technology—have greatly increased the connectedness and impact of horizontal and vertical government networks, the former linking together regulatory, judicial, and legislative officials from different states and the latter connecting sub-state actors with supranational institutions.¹⁰⁰ This complex web of actors has the potential to harness the coercive power of the state and aid in the evolution of the norm of sovereignty. Horizontal judicial

⁹⁷ Risse, Ropp and Sikkink, *supra* note 4 at 236.

⁹⁸ David Jason Karp, “The Utopia and Reality of Sovereignty: Social Reality, Normative International Relations and ‘Organised Hypocrisy’” (2008) 34:2 *Rev Int’l Studies* 313 at 332.

⁹⁹ Fehl, *supra* note 5 at 372.

¹⁰⁰ Slaughter, *supra* note 14.

networks, for instance, are facilitating the growth of an increasingly global constitutional jurisprudence through, *inter alia*, constitutional cross-fertilization, private transnational litigation, and face-to-face meetings of judges from around the world. These networks are constructing a global community of human rights law that has the potential to effect norm socialization. Slaughter sees vertical networks as having an even greater impact on conceptions of state sovereignty, as they “pierce the shell of state sovereignty by making individual governmental institutions—courts, regulatory agencies, or even legislators—responsible for the implementation of rules created by a supranational institution.”¹⁰¹

In restricting her focus to government networks, Slaughter misses a unique opportunity to take her thesis further and explore the role of non-state actors in the disaggregation of the state. Furthermore, Slaughter confines herself to an exploration of the ways in which networks contribute to order in international society, neglecting the question of how networks contribute to understandings of international society itself. In this sense, Slaughter’s disaggregation thesis is not developed to its logical conclusion—that if the state is disaggregated, and if sovereignty is re-imagined as status, membership, or “connection to the rest of the world and the political ability to be an actor within it,” then sovereignty also can be disaggregated.¹⁰² She gives fleeting attention to such a possibility, recognizing that “[i]f sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist, then its devolution onto ministers, legislators and judges is not so difficult to imagine.”¹⁰³

This article recognizes the pertinence of Slaughter’s disaggregation thesis and contends that its perspective should be broadened to take into account the transnational advocacy networks of non-state actors. Such networks possess influence, organization, and power equivalent to Slaughter’s government networks and are equally able to “pierce the shell of state sovereignty.”¹⁰⁴ Moreover, they play an even more vital role in the process of socialization whereby identities, values, and norms are the subject of argumentation and persuasion and, thus, have greater potential to change the nature of government institutions and thereby the identity of the state.

Joseph Nye and Robert Keohane were among the first to evaluate the role and impact of “transnational actors” in international relations. Their observation that non-state actors can “become actors in the international arena and competitors of the nation-state” is supported, to some degree, by Bull, who, in his seminal work *The Anarchical Society: A Study of Order in World Politics*, accepts that the state system is part of a wider world political system, a series of world-wide interactions encompassing networks of states

¹⁰¹ *Ibid* at 132.

¹⁰² Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 27.

¹⁰³ Slaughter, *supra* note 14 at 268.

¹⁰⁴ *Ibid* at 132.

and other political actors both above and below the state.¹⁰⁵ Within this world political system, argues Bull, non-state actors form relationships not only with the state but also with other non-state actors, such that these actors “have their being partly within the transnational nexus that bypasses the level of state-to-state relations.”¹⁰⁶ However, while Bull believes that the role of transnational actors must inform, in part, the study of international relations, he reiterates that the existence of such phenomena is not indicative of the decline of the state system or the emergence of a cosmopolitan world society. For Bull, transnational relationships have made inroads into the state system in an uneven fashion, and it is impossible to derive from their continuation “any sense of common interest and common values, on the basis of which common rules and institutions may be built.”¹⁰⁷ As such, the international relations discipline should continue to focus its analysis at the international society level.

Building on Nye and Keohane’s analysis, and refuting Bull’s conclusion, Margaret Keck and Kathryn Sikkink’s groundbreaking examination of transnational advocacy networks reveals that “enough evidence of change in the relationships among actors, institutions, norms and ideals exists to make the world political system rather than an international society of states the appropriate level of analysis.”¹⁰⁸ They see these networks as motivated by values rather than material concerns or professional norms, able “to mobilise information strategically to help create new issues and categories and to persuade, reassure and gain leverage over much more powerful organisations and governments.”¹⁰⁹ By doing so, transnational advocacy networks bring new norms and discourses into policy debates and pressure actors to adopt new policies, acting as “norm entrepreneurs.”¹¹⁰ They form part of the socialization process, engaging governments in discursive processes of argumentation and persuasion.¹¹¹ These processes are a means of redefining traditional understandings of sovereignty, for “[w]hen a state recognises the legitimacy of international interventions and changes its domestic behaviour in response to international pressure, it reconstitutes the relationship between the state, its citizens, and international actors.”¹¹²

¹⁰⁵ Joseph S Nye, Jr, and Robert O Keohane, “Transnational Relations and World Politics: An Introduction” (1971) 25:3 *Int’l Org* 329 at 330; Bull, *supra* note 7.

¹⁰⁶ Bull, *supra* note 7 at 267.

¹⁰⁷ *Ibid* at 269.

¹⁰⁸ Keck and Sikkink, *supra* note 94 at 212.

¹⁰⁹ *Ibid* at 2.

¹¹⁰ Hawkins, *supra* note 82.

¹¹¹ Risse, Ropp and Sikkink, *supra* note 4.

¹¹² Keck and Sikkink, *supra* note 94 at 37.

3. *International Lawyers as Norm Entrepreneurs*

The promotion of the norms of human rights and individual criminal responsibility by international lawyers through universal jurisdiction prosecutions is a clear example of a transnational advocacy network promoting normative change and contributing to “the process of disaggregating and reconfiguring state power.”¹¹³ Like other forms of transnational advocacy networks examined by Keck and Sikkink, international lawyers working on universal jurisdiction litigation and advocacy prefer “principled ideas or values in motivating their formation.”¹¹⁴ They share an ideological commitment to human rights and individual criminal responsibility and a belief in the pre-eminence of laws and legal processes as vehicles for norm socialization. Mirroring Slaughter’s horizontal governmental networks, this network of international lawyers shares ideas, theories, academic and legal writings, and a set of professional norms and understandings and holds conferences, symposia, and awards ceremonies.

The advocacy efforts and actions of international lawyers that precipitated the arrest of Augusto Pinochet in October 1998 vividly illustrate the way in which lawyers act as a transnational advocacy network. In her comprehensive book *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Naomi Roht-Arriaza describes how the prosecution of Pinochet was a culmination of the efforts of Chilean lawyers both in Chile and in exile, of lawyers connected to the Chilean and Argentinean diasporas, and of lawyers working in, or associated with, non-governmental organizations and the United Nations.¹¹⁵ Action began almost immediately following the 1973 coup in Chile, as human rights abuses were documented and publicized by lawyers working with organizations such as the Comité Pro-Paz (later replaced with the Vincana de la Solidaridad). Domestic human rights lawyers, encountering closed channels in Chile, turned to the international stage, disseminating information through international advocacy campaigns, agitating for action with lobbying efforts at the Inter-American and UN commissions on human rights, and ultimately attempting to access the domestic judiciaries of foreign countries.¹¹⁶ Pre-existing professional associations and networks served to facilitate knowledge sharing, enabling the lawyers to operate like an epistemic community, hosting conferences and strategy sessions. Lawyers with connections to the Chilean and Argentinean diasporas, and judges who had studied or attended conferences overseas, became entwined in the advocacy efforts. The network’s focus on using legal processes to encourage change facilitated a prevalent role for lawyers and judges, which in turn encouraged other lawyers and judges to become involved and push cases forward. In this way, Roht-Arriaza opines, the actions of international lawyers clearly fit within

¹¹³ Sarat and Scheingold, *supra* note 2 at 10.

¹¹⁴ Keck and Sikkink, *supra* note 94 at 1.

¹¹⁵ Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005).

¹¹⁶ *Ibid* at 210.

the “boomerang” framework described by Keck and Sikkink in relation to transnational advocacy networks, whereby change is spiral-like.

The Pinochet prosecution thus gave birth to a transnational advocacy network of international lawyers, committed to the doctrine of universal jurisdiction, which played a significant role in socialising the norms of human rights and individual criminal responsibility. Today, this network continues to thrive: there are dense exchanges of information and services, spearheaded by Amnesty International (which operates a universal jurisdiction project called No Safe Haven, documenting the status of universal jurisdiction in every state), the European Centre for Constitutional and Human Rights (which institutes and directs strategic universal jurisdiction litigation in German courts), and the US-based Center for Constitutional Rights (which operates an International Law and Accountability project). Lawyers from these organisations have been involved in significant universal jurisdiction cases such as *Ex Parte Pinochet* and a number of complaints against Bush Administration officials. The Princeton Project on Universal Jurisdiction, populated by renowned international lawyers and scholars such as Stephen Macedo, Garry Bass, William Butler, Richard Falk, M Cherif Bassiouni, and Diane Orentlicher, devised and published the Princeton Principles, intended to clarify the doctrine and guide lawyers and judges in its application. Well-known lawyers such as German Wolfgang Kalek, and Britons Michael Mansfield, Geoffrey Robertson, and Phillipe Sands, are bound by a common discourse and shared values with scores of other private and government lawyers and NGOs across the world. In a unified effort, they attempt to influence the terms and nature of the debate through instituting complaints, investigations and prosecutions, and publicising their activities.¹¹⁷ They have also honoured and been honoured for the efforts of their peers: in 2011 Chadian lawyer Jaqueline Moudeina was awarded the Right Livelihood Award for her efforts to have former President of Chad Hissène Habré prosecuted under the universal jurisdiction doctrine in Senegal and Belgium.¹¹⁸ Similarly, Spanish Judge Balthazar Garzón was awarded the inaugural Abraham Lincoln Brigade Archives/Puffin Foundation Award for his commitment to advancing the doctrine.¹¹⁹

¹¹⁷ See, for example, Michael Mansfield, “Government’s move to curb universal jurisdiction sends wrong message,” *The Guardian* (27 July 2010), online:

<http://www.guardian.co.uk/law/2010/jul/27/universal-jurisdiction-law>; Geoffrey Robertson, “Put the Pope in the Dock,” *The Guardian* (2 April 2010), online:

<http://www.guardian.co.uk/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law>; Philippe Sands, *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); Geoffrey Robertson, “Dictator in the Dock,” *The Guardian* (1 April 1999), online:

<http://www.guardian.co.uk/world/1999/apr/01/pinochet.chile>.

¹¹⁸ See the Right Livelihood Award, 2011, online:

<http://www.rightlivelihood.org/moudeina.html>.

¹¹⁹ See the Puffin Foundation, First Annual ALBA/Puffin Award for Human Rights Activism, 2011, online: http://www.puffinfoundation.org/index.php?option=com_content&view=article&id=313&Itemid=142.

Lawyers have claimed “ownership of the human rights problem and have succeeded in establishing a virtual monopoly of knowledge (how the subject is framed) and power (what strategies of intervention are used).”¹²⁰ They have identified universal jurisdiction as the most fruitful legal means of exploiting the disaggregation of the state. Through compiling and exchanging information, internationalizing actors and resources, and convening conferences and other arenas for the strengthening of ties, international lawyers have come to resemble a transnational advocacy network. Theirs is a collective attempt to redefine the shared norms and practices of states with regard to sovereignty, human rights, and international criminal responsibility. Moreover, the work of international lawyers on universal jurisdiction is yielding tangible results: the extradition and indictment of both former and sitting heads of state, the continued expansion of the doctrine of universal jurisdiction to the crime of torture, the proliferation of legislation implementing universal jurisdiction, and the acceptance of its legitimacy in the statements and policies of state leaders. The deterrent effect of the doctrine is not easily quantified, nor appropriate to be canvassed in this article, but further research on this subject is warranted.

Slaughter proposes that government networks impact world order through three distinct mechanisms—convergence, compliance, and cooperation. International lawyers, as a transnational advocacy network, pursue similar practices. Like government networks, they “promote *convergence* of national laws and regulations” by promoting the adoption of universal jurisdiction laws and disseminating information about universal jurisdiction prosecutions.¹²¹ For example, Amnesty International’s No Safe Haven project documents the extent of the adoption of universal jurisdiction laws, in every country, across standardized categories, providing a platform for local lawyers and activists to draw from in undertaking domestic advocacy campaigns. International lawyers “foster *compliance* with existing treaties and other international agreements” by driving the prosecution of cases under international laws, and testing the legitimacy of principles of international law in domestic courts, of which *Ex Parte Pinochet* is a pertinent example.¹²² Finally, international lawyers “improve the quality and depth of *cooperation* across nations.”¹²³ They overcome problems of inaction in the international system by seeking to address the sources of disorder and disharmony with a bottom-up approach and, thus, assist states in overcoming political and practical obstacles to the enforcement of human rights.

¹²⁰ Stanley Cohen, *Denial and Acknowledgment: The Impact of Information about Human Rights Violations* (Jerusalem, Israel: Center for Human Rights, Hebrew University, 1995) at 5.

¹²¹ Slaughter, *supra* note 14 at 169 [emphasis added].

¹²² *Ibid* at 169 [emphasis added].

¹²³ *Ibid* [emphasis added].

4. *The Disaggregation of Sovereignty?*

Applying Keck and Sikkink's framework of transnational advocacy networks to Slaughter's disaggregation thesis enhances our understanding of the role of international lawyers in promoting the norms of human rights and individual criminal responsibility through universal jurisdiction. Moreover, it highlights that non-state transnational advocacy networks, such as government networks, are increasingly adopting the attributes of the state itself, to the extent that they, too, can be viewed as possessing "the capacity to participate in cooperative regimes in the collective interest of all states."¹²⁴ This development is especially evident if sovereignty is defined, as Abram Chayes and Antonia Handler Chayes do, as a "connection to the rest of the world and the political ability to be an actor within it."¹²⁵ Like Slaughter's governmental networks, international lawyers exercise both hard and soft power and exercise their functions through the legal systems of states that possess a sovereignty that is characterized, in part, by an acceptance of the norms of human rights and individual criminal responsibility. If judges, regulators, and legislators might derive separate sovereignty from participating in a similar process—exercising their functions through the institutions of a sovereign state—as Slaughter contemplates, why can transnational advocacy networks not do the same?

Such a proposition is of far greater impact and reach than can be adequately tested in a contribution of this scope. Yet if sovereignty today is no more than "a shared set of understandings and expectations about state authority that is reinforced by practices," then gradual alterations in the practices of non-state actors *vis-à-vis* the state will ultimately necessitate a consideration of whether sovereignty could indeed reside in transnational advocacy networks.¹²⁶ In the meantime, the very possibility of this transformation adds weight to the contention that transnational advocacy networks today play an integral role in the entrepreneurship of norms in international society. This conclusion poses further questions that are also relevantly illustrated through the study of the doctrine of universal jurisdiction. What inferences can be drawn from the successful efforts of international lawyers to promote the norms of human rights and individual criminal responsibility? Is there sufficient evidence to support a contention that states are moving away from a pluralist international society and towards a solidarist one? The following section will endeavour to address these questions.

¹²⁴ Anne-Marie Slaughter, "Sovereignty and Power in a Networked World Order" (2003) 40:2 *Stan J Int'l L* 283 at 327.

¹²⁵ Chayes and Chayes, *supra* note 102 at 27.

¹²⁶ Keck and Sikkink, *supra* note 94 at 37.

IV. From Sovereignty to Solidarity

To the extent that the English School of International Relations can be characterized as a cohesive body of international relations scholars,¹²⁷ its members are sharply divided on one central issue: whether international society is a practical or purposive association.¹²⁸ This doctrinal split is between the pluralists, who see international society as one of coexistence, allowing for a plurality of norms and values, and the solidarists, who hold that there exists a degree of consensus among states as to the content of such norms and values. The respective positions are defined by empirical judgments about the amount of solidarity existing among states and whether the degree of solidarity is sufficient to “make effective a relatively demanding system of international law.”¹²⁹ A conclusion that international society is tending towards solidarism could only be reached if it were to be established that there exists an adequate global consensus on core norms. These norms would be those that preference loyalties to the community of humankind over loyalties to the state or nation.¹³⁰ Thus, the difference between solidarism and pluralism is that “the former gives moral priority to individual human persons whereas the latter ... considers states to have moral priority.”¹³¹

Bull first illustrates the conceptual divide with reference to the positions of Grotius and Oppenheim, whom Bull sees to be in diametric opposition on issues such as the place of war, the sources of law, and the status in society of individual human beings.¹³² Bull observes that, for Oppenheim, “[i]ndividuals can and do have rights and duties in other systems of rules; but in the conversation among the Powers there is a convention of silence about the place in their society of their human subjects, any interruption of which is a kind of subversion.” In contrast, for Grotius, “[t]he conception of a society formed by states and sovereigns is present in his thought; but its position is secondary to that of the universal community of mankind, and its legitimacy derivative from it.”¹³³ In his earlier works, Bull prefers the

¹²⁷ Contrast Linklater and Suganami, *supra* note 23 at 65.

¹²⁸ Christian Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

¹²⁹ Linklater and Suganami, *supra* note 23 at 64-65.

¹³⁰ Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

¹³¹ Linklater and Suganami, *supra* note 23 at 64. A number of fundamental problems with the solidarist-pluralist conversation arise and, to the extent that they have been documented elsewhere, they are not canvassed in this article. (See, for example, Alex Bellamy, *International Society and Its Critics* (Oxford: Oxford University Press, 2005); Hedley Bull, “The Grotian Conception of International Society,” in Herbert Butterfield and Martin Wight, eds, *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen and Unwin, 1966); Bull, *supra* note 7; Tim Dunne, “The New Agenda,” in Bellamy, *ibid*, 65; Reus-Smit, *supra* note 125; Christian Reus-Smit, “The Constructivist Challenge after September 11,” in Bellamy, *ibid*.) However, it is important to highlight the way in which solidarist and pluralists too frequently fail to distinguish between their normative and descriptive claims. When this occurs, the two sides of the argument are unable to confront each other on equal footing.

¹³² Bull, *supra* note 128.

¹³³ *Ibid* at 68.

pluralist approach, as it places only minimal demands on international law and, thus, "seeks not to burden international law with a weight it cannot carry."¹³⁴ Bull sees the conception of a universal community of mankind as potentially destructive to international society in the absence of widespread consensus. States are united only with respect to the primary goals of avoiding violence, preserving property, and ensuring promises are kept. In this position, he is joined by Robert Jackson, who contends that while "states who are in a position to pursue and preserve international justice have a responsibility to do that whenever and wherever possible," they also "have a fundamental responsibility not to sacrifice or even jeopardise" international order and stability in the process.¹³⁵ Terry Nardin takes an even more restrictive view, seeing states as "associated with one another, if at all, only in respecting certain restrictions on how each may pursue his own purposes."¹³⁶ Hence, the pluralist position is firmly rooted in a conception of sovereignty as it relates to autonomy and is oriented around preferences of order over justice and loyalty to state over responsibility to humankind.

The solidarist camp eschews such preferences, holding that "individuals, not states, are the appropriate moral referent; empirically, they question the boundaries between international and world society, and they see evidence in contemporary international politics and law of the cosmopolitanisation of international society."¹³⁷ A solidarist society is one that develops forms of collective agency to move beyond the identification of practical rules to the identification and pursuit of collective goals.¹³⁸ Solidarism rejects the pluralist view that international society and law are a discrete social realm, in which "non-state actors do not fundamentally alter the basic principles and dynamics of the society of sovereign states,"¹³⁹ and, instead, perceives a "deep interpenetration of the society of states by non-state actors and processes, with profound implications ... for state-society relations across the world."¹⁴⁰ This is the view that Bull comes to hold in his later writings, less than twenty years after his pronouncement that a Grotian conception of a solidarist world could be "said to be a scheme set over and against the facts."¹⁴¹ Bull observes that, within the system of states, "the idea of rights and duties of the individual person has come to have a place, albeit an insecure one, and it is our responsibility to seek to extend it."¹⁴²

Universal jurisdiction is a convenient point around which to assemble pluralist and solidarist arguments because, like humanitarian intervention (the issue of choice for those participating in this debate), it harnesses the

¹³⁴ *Ibid* at 72.

¹³⁵ Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) at 291.

¹³⁶ Nardin, *supra* note 4 at 9.

¹³⁷ Reus-Smit, *supra* note 128 at 92.

¹³⁸ Bellamy, *supra* note 127 at 291.

¹³⁹ Reus-Smit, *supra* note 128 at 90-1.

¹⁴⁰ *Ibid* at 90.

¹⁴¹ Bull, *supra* note 128 at 67.

¹⁴² Bull, *supra* note 92 at 12.

norms of human rights and international criminal responsibility to justify the deprioritization of claims to sovereign autonomy, thereby posing “the conflict between order and justice in international relations in its starkest form.”¹⁴³ The existence and continued usage of universal jurisdiction is persuasive evidence in favour of the solidarist cause. Unlike humanitarian intervention, with respect to which “solidarists have found it virtually impossible to demonstrate anything other than the faintest recognition that sovereign rights may be trumped,” a study of universal jurisdiction complaints and prosecutions provides countless examples of the abridgement of traditional restrictions of territorial jurisdiction in the name of a community of humankind.¹⁴⁴ Universal jurisdiction allows for—indeed, is premised upon—the involvement of non-state actors, the extent of which is detailed earlier. Thus, a pluralist approach that ignores the way in which non-state actors affect the basic principles and dynamics of international society loses resonance and is unable to explain the development of the norms of human rights and individual criminal responsibility through the entrepreneurship of international lawyers. If the international criminal tribunals and the International Criminal Court, which derive their legal force through treaty and the Charter of the United Nations, “have greatly strengthened the solidarist vision of the universal culture of human rights,” then the expansion of a doctrine that seeks to apply individual criminal accountability directly to individuals to protect the human rights of individuals must surely be construed as having crystallized that vision.¹⁴⁵ And where “[t]he normative foundation for the pluralist conception of the society of states is the assumption that states uphold plural conceptions of the good life,” then a conscious and principled effort by states to impose restrictions on that plurality, through universal jurisdiction, must weigh in favour of a solidarist conception instead.¹⁴⁶

This conclusion—that the principle of universal jurisdiction is evidence of international society moving towards greater solidarity—has important implications for the transnational advocacy networks of international lawyers who advance the cause. It strengthens the legitimacy of the doctrine and the norms that underlie it. Moreover, it has interesting implications for the solidarist-pluralist divide within the English school, giving weight to the solidarist contention that order and justice do not have to be viewed as locked in perennial tension but, rather, can be approached as mutually interdependent.¹⁴⁷ It assists in overcoming the deficit of agency that characterizes the solidarist-pluralist debate, such that “[s]tates might not have a choice between acting in pluralist or solidarist ways; rather, the question becomes one of how such norms are transmitted and

¹⁴³ Nicholas J Wheeler, “Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention” (1992) 21:3 *Millennium: J Int'l Studies* 463 at 463.

¹⁴⁴ Bellamy, *supra* note 127 at 290.

¹⁴⁵ Linklater and Sukanami, *supra* note 23 at 141. *Charter of the United Nations*, (1945) 39 *AJIL* 190.

¹⁴⁶ Wheeler, *supra* note 143 at 486.

¹⁴⁷ Wheeler, *supra* note 90.

internalised.”¹⁴⁸ Those advancing the solidarist cause can look to the experience of international lawyers in transmitting and internalizing solidarist norms. Furthermore, using the doctrine of universal jurisdiction as a focal point might assist in responding to Andrew Linklater and Hidemi Suganami’s concern that “the key issue here seems to be the legitimacy of the chosen means. This needs to be brought into the conception of solidarism to protect it against its possible degeneration into a self-serving doctrine.”¹⁴⁹ To the extent that it is a widely accepted and expanding principle, universal jurisdiction may provide an example of a consensual, legitimate means of nurturing “those potentialities, perceptible in the world, which, when realised, will make it a more orderly and just place.”¹⁵⁰

Finally, a conclusion that universal jurisdiction can be equated with a solidarist development supports a “juridical,” rather than “empirical,” view of sovereignty.¹⁵¹ Whereas for the empirical approach, surrender of states to shared norms, rules, and institutions would endanger “the very quality that defines them as states,” a juridical approach is more akin to the one adopted in this article.¹⁵² From a juridical perspective, “sovereignty is more of a social contract than an essentialist condition, and the terms in which it is understood are always open to negotiation,” such that “there is no contradiction between development of human rights and sovereignty.”¹⁵³ In the face of inescapable evidence of greater solidarity, the juridical approach allows for the retention of sovereignty, casting it as evolved rather than eroded. In doing so, it militates against an approach that considers human rights as threatening to the state and reveals the constitutive nature of its relationship with sovereignty.

V. Conclusion

The entire civilized world will follow closely what we do here. For this is not an ordinary trial by any means of the accepted, parochial sense. The avowed purpose of this tribunal is broader than the visiting of retribution on a few men. It is dedicated to the reconsecration of the temple of justice. It is dedicated to finding a code of justice the whole world will be responsible to.

— Counsel for the defendant Herr Rolfe, played by Maximilian Schell, delivering his opening address in *Judgment at Nuremberg* (1961)

This quote from *Judgment at Nuremberg*, a penetrating fictionalization of *The Judges’ Trial*¹⁵⁴ conducted by the International Military Tribunal in 1947,

¹⁴⁸ Tim Dunne, *supra* note 128 at 74.

¹⁴⁹ Linklater and Suganami, *supra* note 23 at 271.

¹⁵⁰ *Ibid* at 271.

¹⁵¹ Barry Buzan, *From International to World Society?: English School Theory and the Social Structure of Globalisation* (Cambridge, UK: Cambridge University Press, 2004).

¹⁵² *Ibid* at 48.

¹⁵³ *Ibid* at 49.

¹⁵⁴ *The United States of America vs Josef Altstotter et al* 3 TWC 1 (1948), 6 LRTWC 1 (1948), 14 Ann Dig 278 (1948).

movingly illustrates both the promise and peril of prosecutions under universal jurisdiction. Such trials are brimming with the potential for transformation and unification, loyal to the task of protecting the community of humankind in the face of incomprehensible horrors. Yet, equally, they embody darker possibilities, for they seek to exploit the legitimacy of the law in pursuit of aims that are wider than, and foreign to, the law. In the name of a common morality, they defy the protections that for centuries have been the structure upon which a stable international order is built. In the absence of clear and universal consensus, universal jurisdiction prosecutions rest on no more than the faith that allegiances to the value of individual human beings run deeper than the strictures and spoils of that which the state most prizes—its sovereignty.

It is beneath this shadow that universal jurisdiction has, against all odds, persevered. Today it is recognized and legislated by a majority of states and forms part of the developing international criminal justice system. It is driven by a highly organized transnational advocacy network of international lawyers, who conceive of and institute prosecutions, conduct trials, and publicize their actions. Through the mechanisms of the state, these lawyers are influencing the development of state policy, shaping the relations and discussion of states, and contributing to the maintenance of international order through the enforcement of international law. They have identified the global consensus that war crimes, genocide, and crimes against humanity constitute crimes against all of humankind, and they have harnessed that consensus to overcome antiquated conceptions of territoriality and sovereignty to which states have long clung.

The resilience of universal jurisdiction, therefore, is indicative of the increasingly widespread acceptance of the norms of human rights and individual criminal responsibility. Universal jurisdiction is confirmation that sovereignty and human rights are no longer usefully conceived of as mutually exclusive. Rather, human rights have become constitutive of sovereignty. As the state has become disaggregated, power—and perhaps also sovereignty—has come to reside in both state and non-state actors, which are increasingly working through horizontal and vertical networks to effect the socialization of norms. International lawyers, working as transnational advocacy networks, represent one of the more effective manifestations of this phenomenon.

The role of lawyers in influencing the entrenchment of human rights and individual criminal responsibility suggests that international society is gradually forming consensus on norms and values, such that a higher degree of solidarity is emerging among states. Yet the development of consensus around norms, symbolized by universal jurisdiction, is hardly surprising when universal jurisdiction is equated with rejecting the murder of six million Jews in Europe, the imprisonment and torture of 30,000 Chileans by the Pinochet regime, or the killing and forced disappearance of 200,000 people in Guatemala. Agreement that such crimes so offend the community of humankind that they should be prosecuted in spite of traditional conceptions of sovereignty is increasingly commonplace. The challenge for

universal jurisdiction advocates is to seek to extend the doctrine to less visible and more contested human rights; the challenge for states will be to find consensus on the content of these rights. This is the next obstacle for universal jurisdiction, and it is one that will define both the fate of the doctrine and the potential for solidarity in international society in the decades to come.