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Universal Jurisdiction for International Crimes:

Historical Perspectives and Contemporary Practice*

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I. INTRODUCTION

Universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes.¹ While there is no doubt that it is a useful and, at times, necessary technique, it also has negative aspects. The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity, and genocide; however, there may be other international crimes for which an applicable treaty provides for such a jurisdictional basis, as in the case of terrorism.²

Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes.³ Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.

Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes. It must also be harmonized with other jurisdictional theories.⁴ Furthermore, it should be noted that private international law has not yet developed rules or criteria of sufficient clarity to consider priorities in the exercise of criminal jurisdiction whenever more than one state claims jurisdiction.

1. See generally *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, HUMAN RIGHTS WATCH UPDATE (Human Rights Watch), Sept. 2000 [hereinafter HUMAN RIGHTS WATCH]; *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction* (Amnesty International) [hereinafter *Universal Jurisdiction: 14 Principles*]; *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide* (Redress), June 1999 [hereinafter *Universal Jurisdiction in Europe*].

2. See *infra* notes 166-187 and accompanying text.

3. See *infra* notes 237-239 and accompanying text.

4. See *infra* note 238 and accompanying text.

The theories of jurisdiction evidenced in treaties and in the customary practice of states are essentially territorial and based on nationality, whether that of the perpetrator or the victim. Consequently, jurisdictional conflicts between states have been few. Nevertheless, as evidenced by the *Lockerbie* case,⁵ lack of clarity in treaty obligations concerning the precedence of the duty to prosecute over the duty to extradite leads to tensions between the interested states and a jurisdictional stalemate. In *Lockerbie*, these problems lasted for almost ten years, until a negotiated solution involving a change of venue was reached.⁶

Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations,⁷ profess it to be. These organizations have listed countries, which they claim rely on universal jurisdiction; in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented.⁸

Because universal jurisdiction has been infrequently relied upon in national judicial decisions, its relationship with other international legal issues has yet to be clarified. Among them, for example, is the question of whether heads of state and diplomats can invoke immunity as a bar to the exercise of universal jurisdiction.⁹ With respect to certain

5. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.) (Feb. 27, 1998), at http://www.icj/cij.org/icjwww/idocket/iluk/ilukjudgment/iluk_ijudgment_980227.htm; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Feb. 27, 1998), 37 I.L.M. 587; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14).

6. See Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L LAW 289 (2000); Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT'L & COMP. L. 355, 356-57 (2000).

7. See *supra* note 1 and *infra* note 54.

8. See surveys contained in publications listed *supra* in note 1. The most recent example of this unfortunate phenomenon is the lengthy *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* Sept. 2001. Such efforts, however, only lead to false expectations and disappointment.

9. For example, there is a misconception that the *Pinochet* case was predicated upon universal jurisdiction, when, in fact, the decision by the House of Lords was based upon the construction of English law and the Torture Convention, which the United Kingdom had ratified. See *infra* notes 21-25 and accompanying text.

international crimes, the substantive defense of immunity has been eliminated since the Nuremberg Charter and the judgments of the International Military Tribunal at Nuremberg (IMT).¹⁰ Such removal of substantive immunity means that a defendant cannot rely on his or her status as a head of state or diplomat to interpose as a substantive defense resulting in exoneration from criminal responsibility for these crimes. However, so far, there is no treaty or customary law practice that removes the temporal immunity of heads of state or diplomats while they are in office, with the exception of the indictment of Slobodan Milosevic by the ICTY while he was head of state.¹¹

For example, Article 27 of the Rome Statute of the International Criminal Court (ICC)¹² provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a

10. The IMT at Nuremberg and the International Military Tribunal for the Far East (IMTFE) removed substantive immunity for crimes against peace, war crimes, and crimes against humanity. Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 59 Stat. 1544, 8 U.N.T.S. 279 [hereinafter IMT Charter]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 at 3, amended Apr. 26, 1946, art. 6, T.I.A.S. No. 1589 at 11 [hereinafter IMTFE Amended Charter].

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) removed substantive immunity for genocide, crimes against humanity, and war crimes. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993), annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808 (1993), U.N. Doc. S/2-5704 & Add. 1 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

11. See *infra* notes 19-20 and accompanying text.

12. The Rome Statute of the International Criminal Court removed substantive immunity for genocide, crimes against humanity, war crimes, and, eventually, aggression, when defined and adopted by the assembly of state parties. Rome Statute of the International Criminal Court, Jul. 17, 1998, art. 27, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], reprinted in 37 I.L.M. 999 (1998). It should be noted that Article 27 is in Part III, which has the heading "General Principles of Law;" however, although Part IX contains no reference to immunity, Article 98 seems to allow for immunities. See *id.* art. 98, reprinted in 37 I.L.M. 999 (1998). For a discussion of this issue, see *infra* notes 13-20 and accompanying text.

Thus, one can conclude that substantive immunity has been removed for some crimes and by certain legal instruments. A progressive development position can justifiably be that the removal of such immunity for genocide, crimes against humanity, and war crimes is part of customary international law. Opponents of the progressive view will argue that its removal is connected to certain legal instruments and legal processes that do not reflect the customary practice of states.

government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹³

Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."¹⁴ It was pursuant to this provision that Slobodan Milosevic was indicted by the ICTY while he was head of state of the Federal Republic of Yugoslavia. Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda¹⁵ (ICTR) utilizes the same language as that contained in Article 7(2) of the ICTY Statute.

The statutes of the ICTY and ICTR, however, do not address the issue of procedural immunity, *viz.*, whether heads of state or diplomats may still benefit from procedural immunity while in office and, for the latter, while accredited to a host country. Under existing customary international law, heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction. However, if brought to trial, they cannot raise immunity as a substantive defense to the crime charged if it is one of the crimes listed above or if it is a crime for which a treaty specifically disallows such a defense, as is the case with respect to the ICC's Article 27. As to diplomats accredited to a host country, they have the benefit of the Vienna Convention on the Law of Diplomatic Immunity, which provides them with procedural but not substantive immunity.¹⁶ It is for these reasons that the statutes of the ICTY and ICTR probably do not address these questions.

13. *Id.* art. 27.

14. ICTY Statute, *supra* note 10, art. 7(2).

15. ICTR Statute, *supra* note 10, art. 6(2).

16. Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. *See also* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see generally* EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* (2d ed. 1998); LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* (1999).

Notwithstanding Article 27 of the ICC Statute, Article 98 of the Statute provides for the primacy of other multilateral treaties in assessing immunity:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.¹⁷

Presumably, this language applies to Status of Forces Agreements and to diplomats covered by the Vienna Conventions on Diplomatic Relations and Consular Relations.¹⁸ Thus, pursuant to Article 98, a head of state, diplomat, or other official covered by immunity under a treaty or pursuant to customary international law could still invoke procedural immunity, if applicable.

It is noteworthy that the ICTY did indict Slobodan Milosevic while a head of state in office and sought his extradition, which the Republic of Serbia conceded on June 28, 2001.¹⁹ Belgium, relying on universal jurisdiction, recently indicted the Democratic Republic of Congo's acting Minister of Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi for inciting to genocide in the Congo.²⁰ Subsequently, the accused

17. ICC Statute, *supra* note 12, art. 98.

18. For an overview of the nature of Status of Forces Agreements, see M. Cherif Bassiouni, *Law and Practice of the United States*, in 2 INTERNATIONAL CRIMINAL LAW 191, 216-18 (M. Cherif Bassiouni ed., 2d ed. 1999).

19. See *Prosecutor v. Milosevic (Indictment)* (24 May 1999), at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>. The first trial of a head of state for genocide and crimes against humanity was *Prosecutor v. Kambanda*, case no. ICTR-97-23-S, September 4, 1998; *Prosecutor v. Kambanda*, case no. ICTR-97-23-I, October 19, 2000. Jean Kambanda was former Prime Minister of Rwanda, and acting President at the time of the Hutu slaughter of the Tutsis.

20. See *Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Order)* (Dec. 8, 2000), at

became Minister of Education, but that change of position did not moot the issue, which is why the ICJ is still considering the case. The accused is not a citizen of Belgium, and was indicted while he was in the Congo. Since there were no links to Belgium, this case is to be distinguished from that of four Rwandan defendants charged under the same Belgian law and convicted for crimes committed in Rwanda: they were all domiciled in Belgium and physically present on Belgian territory at the time of their arrest.

In *Pinochet I*²¹ an Appellate Committee of the House of Lords held by a margin of three to two that former Chilean President Augusto Pinochet was not immune with respect to crimes under international law.²² In *Pinochet III*,²³ an expanded panel of the House of Lords, in construing the scope of section 134 of the Criminal Justice Act of 1988, ruled that a head of state cannot claim immunity for torture, as it cannot constitute an official act.²⁴ The Law Lords, however, held that Senator Pinochet was protected by immunity for the charges of murder and conspiracy to murder.²⁵

Universal jurisdiction can be relied upon by a state in its power to prescribe. But when a state relies upon universal jurisdiction for its power to enforce, a state necessarily has to be subject to certain international legal obligations, such as procedural immunity for heads of state and diplomats, and also to be subordinated to the jurisdictional claims of other states seeking to exercise their criminal jurisdiction when such claims are based on weightier interests and are sought to be exercised effectively and in good faith.

Another impediment to the exercise of universal jurisdiction is the application of national statutes of limitations, even though such limitations have been removed with respect to war crimes and crimes against humanity.²⁶ Unfortunately, the 1968 U.N. Convention on the

http://www.icj-cij.org/icjwww/idocket/icobe_iorder_provisional_measure_20001208.htm. For a discussion of this case, see *infra* notes 223-227 and accompanying text.

21. *R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 1), 3 WLR 1456 (H.L.(E.) 1998).

22. Christine M. Chinkin, *United House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 93 AM. J. INT'L L. 703, 704 (1999).

23. *R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 2 WLR 827 (H.L.(E.) 1999).

24. Chinkin, *supra* note 22, at 708.

25. *Id.*

26. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL

Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity²⁷ has only been ratified by 43 states. The more recent European Convention on Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European)²⁸ has just two ratifications. Under the circumstances, it is valid to ask whether the existence of these two conventions (and other manifestations of international *opinio juris*) constitutes an expression of customary international law, or whether the limited number of ratifications reveals the insufficiency of national support.

Lastly in this introduction, but foremost in the legal analysis of universal jurisdiction, is its rationale. In the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis*.²⁹ The exercising state acts on behalf of the international community because it has an interest in the preservation of world order as a member of that community. That state may also have its own interest in exercising universal jurisdiction. But if those interests were jurisdictionally based, that state would be exercising its own criminal jurisdiction on the basis of a theory of jurisdiction other than universality, *viz.*, extended territoriality, active personality, passive personality, or protected economic interest.

As an *actio popularis*, universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing state. The basis is, therefore, exclusively the nature of the crime³⁰ and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes. Precisely because a state exercising universal jurisdiction does so on behalf of the

LAW 224-27 (2d ed. 1999) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY].

27. 26 Nov. 1968, 754 U.N.T.S. 73 [hereinafter U.N. Convention on the Non-Applicability of Statutes of Limitations].

28. Europ. T.S. No. 82 [hereinafter European Convention on Non-Applicability of Statutory Limitations].

29. See MARC HENZELIN, L'E PRINCIPE DE L'UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL (2000); see also *infra* note 56 and accompanying text.

30. This is one of the issues presently pending before the International Court of Justice in the dispute between the Democratic Republic of the Congo and Belgium. See Arrest Warrant of 11 April 2000 (Congo v. Belg.), at 19 (Order) (Dec. 8, 2000), at http://www.icj-cij.org/icjwww/idoc.../icobe_iorder_provisional_measure_20001208.htm. See also *supra* note 20, and *infra* notes 223-227 and accompanying text.

international community, it must place the overall interests of the international community above its own. This article explores the historical evolution of universal jurisdiction, as well as its existence and appreciation in international and national laws. It assesses the status of universal jurisdiction as a recognized international theory and the extent to which it is embodied in national laws and applied in national judicial decisions.

II. EXTRATERRITORIAL CRIMINAL JURISDICTION AND WORLD ORDER CONSIDERATIONS

The term jurisdiction, whether it applies to civil or criminal matters, includes the powers to prescribe, adjudicate, and enforce. It also includes the means by which the exercise of jurisdiction is obtained over a person. In the post-Westphalian state-centric system of international law predicated on sovereignty, these powers have been reserved to states.³¹ By implication, these powers include an entity exercising some of the attributes of sovereignty.³² A sovereign state or a legal entity that has some sovereign attributes can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces.³³

31. The power to enforce is a corollary to the power to prescribe, but the exercise of these two powers are not necessarily co-extensive. Each of these powers can be exercised without the other. In addition, just because a state may prescribe for the possibility of its exercise of universal jurisdiction does not mean that it can exercise its prerogative in all circumstances. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

32. See OPPENHEIM'S INTERNATIONAL LAW 462-88 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Entities exercising some of the attributes of state sovereignty include: military forces legitimately occupying foreign territories in accordance with international humanitarian law in their lawful exercise of jurisdictional power over such territories and persons on these territories; state-like entities exercising legitimate attributes over certain territories and its inhabitants which are under their dominion and control; and the United Nations in its exercise of jurisdictional power over certain territories and its inhabitants pursuant to a mandate of the Security Council. See Clive Parry, *The Trusteeship Council*, in THE UNITED NATIONS: THE FIRST TEN YEARS 47-58 (1957).

33. International criminal law prescribes certain conduct which states are bound to enforce, particularly those prescriptions arising out of general customary international law of *jus cogens*. See M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW 3-126 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, *Sources and Content*]; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Ergo Omnes*, 59 LAW & CONTEMP. PROBS. 4, 63 (1996) [hereinafter Bassiouni, *Jus Cogens Crimes*].

The powers to prescribe, adjudicate, and enforce derive from sovereignty; thus, the exercise of national criminal jurisdiction has historically been linked, if not limited, to the territory of a state and, by extension, to the territory under the dominion and control of a given legal authority exercising *de jure* or *de facto* sovereign prerogatives.³⁴

Sovereignty and prescriptive jurisdiction are inextricably linked, but adjudicative and enforcement jurisdiction are not necessarily linked to sovereignty.³⁵ The reason for that contextual limitation is to avoid jurisdictional conflicts between states, which can threaten the stability of the international legal order. It also provides consistency and predictability in the exercise of the jurisdictional functions of states so as to avoid potential denial of rights and abuse of judicial processes by exposing persons to multiple prosecutions for the same conduct. Linking jurisdiction to territoriality, though allowing it to extend extraterritorially in cases of a valid legal nexus to the enforcing state, is the most effective way to achieve these results. That is why private international law provides some rules for the resolution of jurisdictional conflicts between states.³⁶ This is also why exceptions to territoriality

34. Territorial jurisdiction is referred to as a principle because of its universal recognition. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7), reprinted in 2 MANLEY O. HUDSON, *WORLD COURT REPORTS* 20 (1935). Other jurisdictional bases are referred to as theories because they are not universally recognized, but their recognition is sufficiently well established to warrant their acknowledgment as constituting part of customary international law. For a discussion of theories of jurisdiction, see Christopher Blakesley, *Extraterritorial Jurisdiction*, in 2 *INTERNATIONAL CRIMINAL LAW* 33-105 (M. Cherif Bassiouni ed., 2d ed. 1999); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* 295-382 (3d ed. 1996) [hereinafter BASSIOUNI, *EXTRADITION*].

35. States can be required to adjudicate or enforce by treaty obligations, or they can delegate their powers to adjudicate or enforce to another state or to an international body. See *European Convention on the Transfer of Proceedings in Criminal Matters*, May 15, 1972, *Europ. T.S. No. 73*; Julian Schutte, *The European System*, in 2 *INTERNATIONAL CRIMINAL LAW* 643-59 (M. Cherif Bassiouni ed., 2d ed. 1999); EKKEHART MÜLLER-RAPPARD & M. CHERIF BASSIOUNI, *EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS* (2d ed. 1991); see also ICC Statute, *supra* note 12, art. 14; M. Cherif Bassiouni, *Observations on the Structure of the (Zutphen) Consolidated Text*, 13bis *NOUVELLES ÉTUDES PÉNALES* 5, 15 (1998) (discussing the subject of complementarity under the ICC Statute).

36. Most writers on private international law barely touch on conflicts of criminal laws. The same is true of U.S. writers on conflicts of law. See, e.g., ALBERT A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* (1962); ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* (1965). For conflict of criminal law, see the seminal early work of HENRI DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL* (1928). See also MAURICE TRAVERS, *LE DROIT PÉNAL INTERNATIONAL* (5 vols. 1920-1922).

are subject to certain limitations. This is particularly true of universal jurisdiction when exercised without territorial links.³⁷

Sovereignty does not limit the exercise of criminal jurisdiction to single states; rather, it can be extended to collective state action. This concept was applied in connection with the establishment by the WWII Allies of the IMT³⁸ in 1945 and the International Military Tribunal for the Far East sitting at Tokyo³⁹ (IMTFE) in 1946. The power that the Allies exercised collectively was based on the power they could have exercised singularly.

The IMT judgment expressly stated this idea:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have 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.⁴⁰

In both the IMT and IMTFE, the states in question exercised their powers to enforce international criminal law on a territorial jurisdictional basis because they exercised *de facto* sovereign prerogatives over the occupied territories where these tribunals were established. Subsequently, in 1993 and in 1994, the Security Council established, pursuant to its powers under Chapter VII of the United Nations Charter,⁴¹ the ICTY⁴² and the ICTR,⁴³ respectively. In these two

37. For example, states with a territorial connection should be accorded priority whenever they seek, in good faith, to prosecute a person accused of the same crime for which another state relying on universality also seeks to prosecute. Where, however, it is found that the state seeking to exercise universal jurisdiction may be the more effective forum, the question should be dealt with as one of conflict of jurisdiction in which the aggregate weighing of factors will determine the most appropriate forum. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS]. Cf. H.D. Wolswijk, *Locus Delicti and Criminal Jurisdiction*, 46 NETH. INT'L L. REV. 361 (1999) (commenting on the interplay between *locus delicti* and extraterritorial jurisdiction).

38. IMT Charter, *supra* note 10.

39. IMTFE Amended Charter, *supra* note 10.

40. IMT Judgment, Sept. 30, 1946, *reprinted in* 22 TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBURG 411, 444 (1950).

41. U.N. CHARTER ch. 7.

42. ICTY Statute, *supra* note 10. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL*

instances, the Security Council assumed a quasi-sovereign prerogative applicable to a territorial context.⁴⁴ The Council enunciated substantive legal norms, which are extant in international criminal law, and provided for their territorial enforcement through these two ad hoc tribunals.⁴⁵ The ICC, however, acts pursuant to a delegation of jurisdictional power granted by the state parties to its establishing treaty, and it is therefore only applicable to state parties. This, however, does not mean that nationals of non-parties cannot be subject to the ICC's jurisdiction if they committed a crime within the ICC's jurisdiction: in the territory of a state party or against citizens of a state party, and are found in the territory of a state party or in the territory of a non-party willing to cede jurisdiction to the ICC.

Until the 1920s the practice of states, both with respect to the power to prescribe and the power to enforce, preserved the connection between state sovereignty in its territorial context and the judicial exercise of national criminal jurisdiction. Judge Altamira, in his dissenting opinion in the *Lotus* case, stated:

It is certain that amongst the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction. . . .

. . . I should have much difficulty in recognizing as well founded an attempt for instance on the part of a court, on the basis of a municipal law, to exercise jurisdiction over a foreigner, who resided on board a vessel flying the flag of his own country and

TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (2 vols. 1995).

43. ICTR Statute, *supra* note 10. See VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998) (highlighting the significance of the ICTR).

44. These Security Council decisions are, however, described by United Nations and government legal advisers, as well as by some publicists, as different from the exercise of sovereignty. Since the outcome is the same with respect to the legal aspects of jurisdiction, one cannot help but refer to a non-legal authority, William Shakespeare, who expressed so gracefully a universal popular wisdom: "What's in a name? That which we call a rose [b]y any other word would smell as sweet." WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act. 2, sc. 2, ll. 43-44, in THE RIVERSIDE SHAKESPEARE 1058, 1068 (1974).

45. The establishment of these two tribunals evidenced a new concept in the exercise of judicial jurisdiction by an organ of the United Nations. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 78 (1994).

did not land with the intention of remaining ashore, and that for an alleged offence committed outside the territory of the country which claimed to exercise jurisdiction over him. Such an extension of the exceptions hitherto accepted in respect of the principle of territorial and national jurisdiction appears to me to be altogether unwarranted.⁴⁶

During this time, neither the legislation nor the practice of states, save for few exceptions, included extraterritorial criminal jurisdiction except with respect to the conduct of their citizens under the theory of "active personality."⁴⁷ Under this theory, however, a connection exists between the sovereign power of a state to prescribe conduct and its

46. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 95-96 (Sept. 7) (Altamira, J., dissenting), reprinted in 2 MANLEY O. HUDSON, *WORLD COURT REPORTS* 20, 83-84 (1935). Judge Altamira also pointed out:

In regard to criminal law in general, it is easy to observe that in municipal law, with the exception of that of a very small number of States, jurisdiction over foreigners for offences committed abroad has always been very limited: It has either (1) been confined to certain categories of offences; or (2) been limited, when the scope of the exception has been wider, by special conditions under which jurisdiction must be exercised and which very much limit its effects.

Id. at 99, reprinted in 2 MANLEY O. HUDSON, *WORLD COURT REPORTS* 20, 86 (1935). See Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 *HASTINGS INT'L & COMP. L. REV.* 177 (1997). For judicial applications of the "passive personality" doctrine, see *United States v. Layton*, 509 F. Supp. 212, 215-16 (N.D. Cal.), appeal dismissed, 645 F.2d 681 (9th Cir. 1981); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984); *United States v. Yunis*, 681 F. Supp. 896, 901-03 (D.D.C. 1988); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 37, § 402 cmt. g. *Cf.* Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (1994 & Supp. IV 1998); Act for the Prosecution of Terrorist Acts Abroad Against United States Nationals, 18 U.S.C. § 2331 (1994); 18 U.S.C. § 7(1), 7(8) (1994); 18 U.S.C. § 1653 (1994) (delineating limitations on the exercise of criminal jurisdiction by the United States).

47. This is evidenced in the *Harvard Research in International Law: Jurisdiction with Respect to Crime*, 29 *AM. J. INT'L L.* 443 (Supp. 1935). See also RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 37, § 402; DONNEDIEU DE VABRES, *supra* note 36. Under the active personality theory, a state may prosecute a person who committed a crime in another state provided that the crime in question also constitutes a crime in the state of nationality. That is referred to as "double criminality." See BASSIOUNI, *EXTRADITION*, *supra* note 34, at 346; Blakesley, *supra* note 34, at 43. In such cases, however, the enforcing state relies on its own law, but that is essentially because of ease and consistency in application. States are not, however, obligated to require "double criminality." National enforcement may require that international legal prescriptions are enacted into national legislation depending on national constitutional requirements and other national laws. This is the case with respect to states that follow the "dualistic" approach to national application of international legal obligations, and also with respect to "monistic" states in connection with non-self-executing treaties.

nationals to which it is extraterritorially applicable.⁴⁸

Since the 1920s, however, states developed national legislation applicable extraterritorially whenever some territorial link existed between the prescribed conduct and its harmful impact within the territory of the state seeking to exercise its criminal enforcement jurisdiction, or whenever the harmful conduct occurred against their citizens. This was based on the theories of "protected interest," also referred to as the theory of "objective territoriality,"⁴⁹ and "passive personality."⁵⁰ After the end of World War II, states expanded their power to proscribe, particularly in economic areas, whenever the extraterritorial conduct had a territorial impact and also as a means of protecting their citizens abroad. These extraterritorial jurisdiction theories reflect a territorial connection or a connection between the proscribing and enforcing powers of a state and its nationals.

The reach of a state may be universal with respect to the extraterritorial jurisdictional theories described above, but in all of them there is a connection or legal nexus between the sovereignty and territoriality of the enforcing state, the nationality of the perpetrator or victim, or the territorial impact of the extraterritorially proscribed conduct. Thus, the universal reach of extraterritorial national jurisdiction does not equate with universal jurisdiction. Nor does the fact that conduct that is universally condemned necessarily imply that universal jurisdiction is applicable to such conduct.

The indiscriminate use of the term "universal" as a spatial and temporal characterization of legal concepts such as jurisdiction, and also in connection with moral concepts and expressions of condemnation caused terminological confusion evident in the writings of some jurists and in some judicial opinions.⁵¹ Advocates of international criminal

48. States, however, rely on extradition as a means of securing *in personam* jurisdiction in order to subject a national to their enforcing jurisdiction. BASSIUNI, EXTRADITION, *supra* note 34.

49. *Id.* at 353; Blakesley, *supra* note 34, at 50.

50. BASSIUNI, EXTRADITION, *supra* note 34, at 349; Blakesley, *supra* note 34, at 54-55. This is based on the notion that states have a right to protect their citizens when a criminal act harms them irrespective of the locus of the criminal conduct's occurrence. But that presupposes that the criminal act is proscribed by the enforcing state or the territorial state. That theory is based on a connection between the enforcing state and the victim of the proscribed conduct.

51. See, e.g., Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5, 34 (Jm. D.C., 1961), *aff'd*, 36 I.L.R. 277 (Isr. S. Ct. 1962) (confusing universal condemnation with the right to exercise universal jurisdiction). For a discussion of the *Eichmann* opinions, see *infra* notes 198-

accountability see universal jurisdiction as the most effective means to accomplish their goal. Frequently, however, they rely on certain judicial opinions and legal writings as support for the proposition that unbridled universal jurisdiction is not a mere *desideratum*, but established law. The reliance on such sources, however, is often unjustified or stretched too far.^{51a} Thus, they cross the line between the *lex lata* and *de lege ferenda*. Conversely, major scholarly organizations dedicated to the same goal have preserved this important legal distinction between what is and what ought to be. Among them are the International Association of Penal Law and the International Law Association, which have long expressed the *desideratum* that states exercise universal jurisdiction over certain international crimes, but without making unfounded claims as to its current existence.⁵² Summarizing this *desideratum*, the late Professor Donnedieu de Vabres (who was also a judge at the IMT and a founder of the *Association Internationale de Droit Penal*) aptly stated:

Il est dès lors inutile de pénétrer le détail des spéculations philosophiques par lesquelles on a voulu l'étayer utile-internationalement, universellement utile-et juste, cette compétence répond aux *desiderata* don't s'inspire, pour organiser la répression, la doctrine neo-classique, fondement de presque toutes les législations positives.⁵³

... 204 and accompanying text.

51a. A recent symposium on universal jurisdiction, held at the New England School of Law, whose proceedings were published in 35 *NEW ENG. L. REV.*, 227-470 (2001), evidence this point, except for the realistic positions of David Scheffer, *id.* at 233, and Alfred Rubin, *id.* at 265. Scheffer in particular says, "I hope to dispel the notion that the mere existence of a crime of universal jurisdiction means that in fact it can be prosecuted universally, in any court, and under any circumstances and in accordance with globally accepted principles of international criminal law. Universal jurisdiction is not a broadly adhered-to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has mostly been a rhetorical exercise since WWII." *Id.* at 233.

52. See Resolution of the Third International Congress of Penal Law (Palermo 1933), in 10 *REVUE INTERNATIONALE DE DROIT PÉNAL* 144, 157 (1933); International Law Association, Report of the 34th Conference 378, 383-384 (1926); Resolution of the International Congress of Comparative Law (The Hague, 1932); International Conference for the Unification of Criminal Law, Article 7 (Warsaw, 1927). The International Law Association in 2000 issued a report on universal jurisdiction. Princeton University also published a report, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* (2001).

53. DONNEDIEU DE VABRES, *supra* note 36, at 69. "L'attribution d'une compétence très subsidiaire au juge du lieu d'arrestation donne satisfaction à un besoin de sécurité, à un sentiment élémentaire de justice." *Id.* at 445. See also MAURICE TRAVERS, 1 *LE DROIT PÉNAL INTERNATIONAL* § 73 (1920); MERCIER, *RAPPORT, ANNUAIRE DE L'INSTITUT DE DROIT*

III. THE THEORETICAL FOUNDATION OF UNIVERSAL JURISDICTION

The theory of universal jurisdiction⁵⁴ is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty. In addition, the exercise of universal jurisdiction displaces the right of the accused to be tried by the “natural judge,” a hallmark of the traditional exercise of territorial jurisdiction.⁵⁵ The rationale behind the exercise of such jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community. In other words, a state exercising universal jurisdiction carries out an *actio popularis* against persons who are *hostis humani generis*.⁵⁶

Two positions can be identified as the basis for transcending the concept of sovereignty. The first is the universalist position that stems from an idealistic *weltanschauung*. This idealistic universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community and thus transcending the singularity of

INTERNATIONAL 87, 136 (1933).

54. See HAYS BUTLER, *UNIVERSAL JURISDICTION: A COMPILATION OF DOCUMENTS* (3 vols. 2000); see also, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI & MICHAEL SCHARF ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 2000); STEVEN RATNER & JASON ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2001); *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* (Committee on International Human Rights Law and Practice, International Law Association), 2000, at 20-21 [hereinafter *Universal Jurisdiction in Respect of Gross Human Rights Offenses*] (concluding that states are entitled to exercise universal jurisdiction with respect to genocide, crimes against humanity, war crimes, and torture, but recommending that “[g]ross human rights offenders should be brought to justice in the state in which they committed their offences”).

55. See, e.g., European Convention on Human Rights, Nov. 4, 1950, art. 13, Europ. T.S. No. 5, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, art. 25, O.A.S.T.S. No. 36; 1144 U.N.T.S. 123.

56. For a discussion of the circumstances under which a state may proceed *actio popularis* as a result of a breach of *obligatio erga omnes*, see Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 299-301 (2000). See also MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997); ANDRE DE HOOGH, *OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES* (1996); cf. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (defining obligations *erga omnes*).

national interests. The second position is a pragmatic policy-oriented one that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.

These two positions share common elements, namely: (a) the existence of commonly shared values and/or interests by the international community; (b) the need to expand enforcement mechanisms needed to counter the more serious transgressions of these values/interests; and (c) the assumption that an expanded jurisdictional enforcement network will produce deterrence, prevention, and retribution, and ultimately will enhance world order, justice, and peace outcomes. Under both positions, the result is to give each and all sovereignties, as well as international organs, the power to individually or collectively enforce certain international proscriptions. This theory applies when the proscription originates in international criminal law and not in the national law of a given state. In other words, crimes under exclusive national law cannot give rise to universal jurisdiction.

The universalist and the policy-oriented positions differ as to: (a) the nature and sources of the values/interests that give rise to an international or supranational prescription; (b) what constitutes the international community and its membership; and (c) the nature and extent of the legal rights and obligations incumbent upon states.⁵⁷

The universalist position can be traced to metaphysical and philosophical conceptions arising in different cultures and at different times, but converging in some aspects. For example, in the three monotheistic faiths of Judaism, Christianity, and Islam, full sovereignty rests with the Creator, and transgressions of the Creator's norms confer the power to enforce by the religious community, irrespective of any limitations in space or time.⁵⁸

57. These issues are discussed in M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW* 3-69 (1995). The case for an international *civitas maxima* supporting the duty to prosecute or extradite is valid; it is doubtful, however, that it includes universal jurisdiction other than a subsidiary jurisdictional basis to enforce the attainment of these goals. In fact, *aut dedere aut judicare* may well be argued as the substitute for a theory of universal jurisdiction. In this writer's opinion, universal jurisdiction complements *aut dedere aut judicare* in that whenever a state does not extradite and proceeds to prosecute it may need to rely on universality.

58. This is why the Ayatollah Khomeini in 1989 issued an edict of death for blasphemy against author SALMAN RUSHDIE for his book *THE SATANIC VERSES* (1988). The majority of the world's states reacted negatively to the extraterritorial reach as did many scholars. See M. Cherif

Western jurists and philosophers, as of the fifteenth century, in part based on Christian concepts of natural law, developed an idealist universalist position. But, contrary to the views of some contemporary authors who refer to them, these early jurists and philosophers did not extend their universalist views of certain universal wrongs to universal criminal jurisdiction to be exercised by any and all states.⁵⁹ Cesare Beccaria in his 1764 pamphlet, *Dei Delitti e Delle Pene*,⁶⁰ expressed an idealist universalist view that there exists a community of nations sharing common values to which all members of the international community are commonly bound to the enforcement of these values, collectively and singularly. But he did not extend it to universal jurisdiction. He expressed his views as follows:

There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men.⁶¹

Later, Hugo deGroot Grotius, in his two volumes *De Jure Belli Ac Pacis*, first published in 1625, argued from the same philosophical

Bassiouni, *Religious Discrimination, and Blasphemy*, Address Before the 83rd Annual Meeting of the American Society of International Law in PROCEEDINGS OF THE ANNUAL MEETING AMERICAN SOCIETY OF INTERNATIONAL LAW 432-35 (1989); Hurst Hannum, *Religious Discrimination, and Blasphemy*, Address Before the 83rd Annual Meeting of the American Society of International Law in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 427-28 (1989); Virginia Leary, *Religious Discrimination, and Blasphemy*, Address Before the 83rd Annual Meeting of the American Society of International Law in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 428-30 (1989); Ved Nanda, *Religious Discrimination, and Blasphemy*, Address Before the 83rd Annual Meeting of the American Society of International Law in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 430-31 (1989). This is an example of why universal jurisdiction should be carefully circumscribed. There have nevertheless been many contrary positions expressed by Muslim writers in the West, as well as in the Muslim world, which have taken a position in support of the Ayatollah's *fatwa*, thus in fact advocating universal jurisdiction.

59. For a synopsis of the views on this point, including those of Grotius, Heineccius Burlamaqui, Vattel, Rutherford, Kent, and others, see HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 181 (R.H. Dana ed., 8th ed. 1866).

60. CESARE BECCARIA-BONESANA, *AN ESSAY ON CRIMES AND PUNISHMENT* (Academic Reprints ed. 1953) (1819).

61. *Id.* at 135; BASSIOUNI & WISE, *supra* note 57, at 27.

premise but relied on a pragmatic policy-oriented approach of pursuing *hostis humani generis* on the high seas. Grotius' premise was the notion of *mare liberum*, which was not necessarily a new doctrine, but under which he posited the right of freedom of navigation on the high seas. Because the right of freedom of navigation on the high seas was applicable universally, it followed that an infringement upon that right by pirates would be universally punished. It is that doctrine that became the foundation of the modern theory of universal jurisdiction for certain international crimes.

For the naturalist, a concept of universal wrongs can be identified with reference to natural law,⁶² while for the legal positivist, it cannot.⁶³ Thus, the evolution of legal concepts, such as *nullum crimen sine lege*, *nulla poena sine lege*,⁶⁴ whose genesis is in the writings of Montesquieu,⁶⁵ but later reflected in the positivism of criminal law of the 1800's European criminal codifications,⁶⁶ flew in the face of the abstract notion of universal wrongs identified by reference to natural law.⁶⁷ These codifications embodied the principles of legality in criminal law and made it difficult for the continued recognition of the universalist position expressed by a few earlier jurists and philosophers.

Many legal scholars since the nineteenth century have advocated the theory of universal jurisdiction without necessarily clarifying the philosophical foundation of that theory or its legal elements. Instead they argue much like the early universalists that certain international crimes imply that all states, irrespective of any existing national

62. For different expressions of natural law, see THE NATURAL LAW READER (Brendan F. Brown ed., 1960) (expressing natural law on the basis of Catholicism); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987). See also Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 551 (July 8) (Weeramantry, J., dissenting); Saul Mendlovitz & Merav Datan, *Judge Weeramantry's Grotian Quest*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 401 (1997).

63. For these different philosophies of law, see BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 26, at 89-122.

64. *Id.* at 123-67.

65. 2 CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS, OEUVRES COMPLÉTES (Roger Cailliois ed., 1951). The maxim derives from Roman law.

66. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 26, at 123-67. The modern European origin for the "principles of legality" is attributed to Paul Anselm von Feuerbach, who first explicated them in his LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS (1801). See also Giuliano Vassalli, *Nullum Crimen Sine Lege*, in 5 NOVISSIMO DIGESTO ITALIANO: APPENDICE 292 (1987).

67. BASSIOUNI, *supra* note 26, at 123-67.

legislation, and even contrary to national legislation, have the power to prosecute, irrespective of any territorial connection to the crime, or any connection to the nationality of the perpetrator or the victim. Perhaps the most articulate expression of the question was made in 1924 by Donnedieu de Vabres, who stated:

Dans sa notion élémentaire et son expression absolue, le système de *la répression universelle*, ou de *l'universalité du droit de punir* est celui qui attribue vocation aux tribunaux répressifs de tous les Etats pour connaître d'un crime commis par un individu quelconque, en quelque pays que ce soit.

L'Etat qui, se prévalant de cette doctrine, exerce sa compétence universelle, ne revendique nullement un droit de souveraineté qui lui serait propre, soit à l'égard de l'acte qu'il réprime, soit vis-à-vis de son auteur. Il n'agit pas pour la défense de ses intérêts. Il intervient, à défaut de tout autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse. Il suit de là que son intervention a un caractère très subsidiaire. Elle ne se manifeste que si l'Etat qui juge a le délinquant en sa possession.

Tel qu'on vient de le définir, le système de l'universalité du droit de punir a sa modeste origine dans un texte du Code de Justinien, C. III, 15, *Ubi de criminibus agi oportet*, 1, qui, déterminant le ressort, en matière pénale, des gouverneurs de l'Empire, donne à la fois compétence au tribunal du lieu de commission du délit, et à celui du lieu d'arrestation du coupable (*judex deprehensionis*). L'interprétation tendancieuse des glossateurs substitua au *judex deprehensionis* le *judex domicilli*.

Néanmoins, il fut admis pendant tout le moyen âge, dans la doctrine italienne, et dans le droit qui gouvernait les rapport des villes lombardes, qu'à l'égard de certaines catégories de malfaiteurs dangereux—*banniti*, *vagabundi*, *assassini*,—la simple présence, sur le territoire, du criminel impuni, étant une cause de trouble, donnait vocation à la cité pour connaître de son crime. Au XVI^e siècle, Doneau rétablit la véritable signification du texte fondamental, C. III. 15. 1, favorable au *forum deprehensionis*. Ayrault écrit, à la même époque: "Il semble que, franchement et volontairement, nous nous rendions sujets aux lois de la patrie dont nous corrompons le repos." Au XVII^e siècle,

cette idée se fait jour dans les écrits du Hollandais Paul Voët, au XVIII^e siècle, dans ceux de l'Allemand Henricus de Cocceji. Elle pénètre jusqu'à notre époque, où elle est fréquemment reproduite. Il en résulte que la commission de certains crimes, d'une exceptionnelle gravité, est une source de compétence universelle.

Il appartient à Grotius qui fut, à l'aube du XVII^e siècle, le grand vulgarisateur, sinon le fondateur du droit international, d'attacher à la théorie de la compétence universelle toute sa valeur philosophique. A l'heure où les grandes unités politiques, de constitution récente, se dressaient les unes contre les autres, il formula, comme un précurseur, la loi de la solidarité humaine. Il existe, dit-il, une société universelle des hommes, *societas generis humani*. Le crime, envisagé comme une violation du *droit naturel* qui la régit, droit non écrit, mais gravé dans la conscience individuelle, est une offense à l'humanité tout entière. L'obligation de punir qu'il engendre est universelle. Elle se traduit, pour l'Etat dans le pouvoir duquel le criminel est tombé, par l'alternative fameuse d'extrader ou de punir: *aut dedere, aut punire*. L'influence de Grotius peut s'observer dans la doctrine de ses successeurs hollandais, scandinaves ou allemands. On la rencontre au XVIII^e siècle, et dans la période révolutionnaire, où la pure tendance individualiste et humanitaire résiste au socialisme, à l'étatisme issu du *Contrat social*. On la retrouve, au cours du XIX^e siècle, dans les écrits de nombreux théoriciens, et dans quelques législations positives.⁶⁸

This doctrinal view, which is essentially a policy-oriented one despite being grounded in natural law philosophy, has received increasing support among legal scholars in the twentieth century,⁶⁹ but it has not been supported by the practice of states. In fact, there are only a few reported cases known to scholars in which such an unfettered universal jurisdiction doctrine has been applied without the existence of a link to the sovereignty or territoriality of the enforcing state.⁷⁰

68. DONNEDIEU DE VABRES, *supra* note 36, at 135-36 (footnotes omitted).

69. See BUTLER, *supra* note 54.

70. Most of them relating to piracy. See ALFRED RUBIN, *THE LAW OF PIRACY* (2d ed. 1998). Some cases reported by scholars refer to post-WWII prosecutions, but could not be found by this writer. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES*

A 1990 Report of the Council of Europe aptly summarizes the contemporary situation of the law and practice of states:⁷¹

There are considerable differences of opinion among member states concerning the purpose of the principle of universality, according to which criminal jurisdiction is exercised over offences committed abroad, without the requirements underlying the previously mentioned principles of jurisdiction necessarily being present.

Some states are only prepared to apply the principle to certain offences if they are authorised or obliged to do so under international law. Some conventions authorise the assertion of universal jurisdiction, others require such jurisdictional action so as not to leave certain offences unpunished. The majority of states have felt at liberty to introduce the principle in their national legislation without any such authorisation or obligation. Nevertheless, many of the latter group have evidently tried to keep in line with existing international agreements when establishing universal jurisdiction. However, there are also a number of states that have reserved a considerable degree of universal jurisdiction over offences not covered by any agreement. They assume that any conflict of competence with other states, which may arise from their extensive claims, can be avoided in practice by a broad application of the principle of discretionary jurisdiction, or by imposing conditions for prosecution, such as the requirement for authorisation from a central body or for the presence of the suspect. The latter requirement is, for that matter, imposed by all states on the exercise of jurisdiction based on this principle, at least in practice.

Some conventions would seem to permit the assertion of universal jurisdiction in relation to offences covered therein. The Red Cross Conventions of 1949 would be examples, though not

360-68 (2000). For a discussion of contemporary state practice, see *infra* notes 188-227 and accompanying text.

71. *Extraterritorial Criminal Jurisdiction: Report of the European Committee on Crime Problems*, Council of Europe (1990). The report was prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set on by the European Committee on Crime Problems (CDPC) in 1984.

all states party to these conventions have asserted universal jurisdiction under these instruments. The 1961 Single Convention on Narcotic Drugs and the amending Protocol of 1972, and the 1971 Convention of Psychotropic Substances are also examples. Some states have established jurisdiction based on universality in respect of offences covered by these treaties.

Other conventions clearly envisage or require the taking of universal jurisdiction: treaties on counterfeiting, piracy, hijacking and actions endangering the safety of civil aviation afford examples. Virtually all states have established universal jurisdiction over such offences. Comparable conventions envisaging the taking of universal jurisdiction are those relating to the combat against terrorism, the prevention of torture, the protection of diplomatic staff, the physical protection of nuclear material and the taking of hostages.

The maxim *aut dedere aut judicare* is reflected in an increasing number of conventions, although the way it is translated into national legislation and its effect differ from state to state and even from category to category of offence within a single country.

There is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based, such as the "representation" principle or the principle of protection. There are often differences of opinion as to which principle should form the basis of a particular term of extraterritorial jurisdiction. It has also been shown that, under special circumstances, forms of jurisdiction have been established which cannot be classified under any of the traditional principles of jurisdiction described above. These can be found, for example, in military law, in certain emergency laws and in legislation regarding taxes and customs duties.

The difficulty of categorising these different forms of extraterritorial legislative criminal jurisdiction can perhaps be explained by the fact that they do not always have a sound theoretical basis. The committee considered it its task to study the theoretical basis for such jurisdiction and, where possible, to

describe it or develop it further.⁷²

Universal jurisdiction has indeed been frequently confused with other theories of extraterritorial criminal jurisdiction. But, as discussed below, with few exceptions, the legislation and practice of states overwhelmingly evidences a connection between the crime and the enforcing state based on the crime's territorial impact or because of the nationality of the perpetrator or the nationality of the victim. As discussed below, explicit or implicit recognition of the theory of universal jurisdiction in conventional international law has been limited to certain international crimes. Nevertheless, the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction. Instead, universal jurisdiction for certain international crimes is a theory of jurisdiction that is predicated on the policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations, and also in pursuit of its own national interest. But that does not mean that this enforcing exercise supplants the enforcing interests of other states, or for that matter, of international organs like the ICTY, ICTR, and ICC. That is why a balancing test must be applied in the exercise of universal jurisdiction.

Scholars, including this writer, support the proposition that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes. The premises for such a theory are both the historic idealistic universalist position and the pragmatic policy position mentioned above.⁷³ In order to support such a theory, however, it is necessary to have an understanding of the historical evolution of that theory and its contemporary content and application. Furthermore, it is indispensable to have guidelines for the application of this theory in order to avoid jurisdictional conflicts, disruptions of world order, abuse and denial of justice, and to enhance predictability of jurisdictional priorities and consistency in jurisdictional disputes and the outcomes.

72. *Id.* at 14-16.

73. *See supra* note 68 and accompanying text.

IV. UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW

The primary sources of substantive international criminal law are conventions and customs that resort to general principles of law and the writings of scholars essentially as a means to interpret conventions and customs.⁷⁴ Conventional international law is the better source of substantive international criminal law insofar as it is more apt to satisfy the principle of legality, *nullum crimen sine lege, nulla poena sine lege*.⁷⁵ But that does not exclude customary international law or general principles of law as sources of substantive international criminal law, provided they meet the standard of specificity equivalent to that of conventional international law.

The inquiry into universal criminal jurisdiction and its application⁷⁶ must be made by reference to: (1) national legislation to determine whether it exists in most national legal systems representing the families of the world's major criminal justice systems;⁷⁷ and (2) conventional international criminal law to determine the existence of international legal norms that provide for the application of universal jurisdiction by national criminal justice systems and by internationally established adjudicating bodies.⁷⁸

The research of scholars as to national legislation evidences that very few states have provisions allowing their legal systems to exercise universal jurisdiction over anyone who has committed a *jus cogens* international crime, irrespective of the time and place of the crime's

74. Bassiouni, *Sources and Content*, *supra* note 33, at 3-126.

75. See *supra* notes 64-66 and accompanying text. For a discussion of the process of establishing customary international law, see *infra* notes 188-194 and accompanying text.

76. "In its classic statement, however, the universality theory encompasses acts committed beyond any country's territorial jurisdiction, the paradigm offense being piracy on the high seas." Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 303 (1987) (citing 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE ch. 6, § 6 (1983)). See *id.* at 303 n.161 ("The justification for the universality principle lies in the fact that without such jurisdiction, no country could prosecute the offender.").

77. M. Cherif Bassiouni, *General Principles of International Law*, 11 MICH. J. INT'L L. 768-818 (1990); see also RÉNÉ DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 22-32 (5th ed. 1973). For a review of national legislation purporting to authorize universal jurisdiction, see Appendix to the present work.

78. M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (1997) [hereinafter BASSIOUNI, ICL CONVENTIONS]. For a discussion of contemporary state practice with respect to universal jurisdiction, see *infra* notes 188-227 and accompanying text.

occurrence, its impact upon the territory of the enforcing state, its commission by one of its nationals, or its commission against one of its nationals.⁷⁹ The judicial practice of states is also limited. To the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.

The collective practice of states in establishing international judicial organs since the end of WWI, including five international investigating commissions and four international ad hoc criminal tribunals, evidences that none of them has been based on the theory of universal jurisdiction.⁸⁰ The Statute of the ICC also does not establish universal jurisdiction for "situations" referred to it by states but only a universal scope as to the crimes within the jurisdiction of the Court.⁸¹ These crimes are: genocide, crimes against humanity, and war crimes, which are *jus cogens* international crimes.⁸² Since "referrals"⁸³ to the ICC are made by a state party,⁸⁴ or by a non-party state,⁸⁵ it is difficult to argue that the ICC's jurisdiction flows from the theory of universal jurisdiction. However, "referrals" by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction because they can transcend the territoriality of a state party.⁸⁶ Such a provision could be interpreted as allowing the Security Council to refer a "situation" to the ICC, even when it applies to crimes occurring outside the territory of a state party and involving the responsibility of nationals from non-parties.

International criminal law evidences the existence of twenty-seven crime categories.⁸⁷ These twenty-seven categories are evidenced by 276

79. See *supra* note 8 and accompanying text.

80. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

81. See ICC Statute, *supra* note 12, art. 14; see also M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (1998).

82. ICC Statute, *supra* note 12, arts. 6, 7 and 8.

83. *Id.* art. 14.

84. *Id.* Germany, New Zealand, and Canada are examples of countries that have recently passed national implementing legislation.

85. *Id.* art. 12(3).

86. *Id.* art. 14.

87. See BASSIOUNI, *ICL CONVENTIONS*, *supra* note 78. That research refers only to 25 categories since two more were added since 1997.

conventions concluded between 1815 and 1999.⁸⁸ Some of these conventions include penal provisions that distinguish them from other conventional international law. These international crimes are: aggression, genocide, crimes against humanity, war crimes, crimes against the UN and associated personnel, unlawful possession and/or use of weapons, theft of nuclear materials, mercenarism, *apartheid*, slavery and slave-related practices, torture, unlawful human experimentation, piracy, aircraft hijacking, unlawful acts against civil maritime navigation, unlawful acts against internationally protected persons, taking of civilian hostages, unlawful use of the mail, nuclear terrorism, financing of international terrorism, unlawful traffic in drugs and dangerous substances, destruction and/or theft of national treasures and cultural heritage, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting of currency, unlawful interference with submarine cables, and bribery of foreign public officials.⁸⁹ Among the penal provisions contained in these conventions there are provisions on criminal jurisdiction, and, of these, only thirty-two conventions contain a reference to a jurisdictional theory⁹⁰ and among them only a few, discussed below, can be construed explicitly or implicitly as reflecting universal jurisdiction. Conversely, ninety-eight provisions reflect the obligation to prosecute and sixty-eight to extradite, evidencing the legislative choice of this enforcement technique over that of conferring universal jurisdiction to any and all states.⁹¹

Because conventional and customary international criminal law overlap with respect to certain crimes, it is useful to examine whether universal jurisdiction vis-à-vis *jus cogens* international crimes arises under any of the sources of international criminal law. What follows is an assessment of the evolution of universal jurisdiction with respect to *jus cogens* international crimes based on conventional and customary international law sources. These *jus cogens* international crimes are:

88. *Id.* at 20-21, which refers only to 274 since two new conventions were adopted between 1997 and 1999.

89. *Id.*

90. *Id.* at 5, 20-21.

91. *Id.* at 20-21. While *aut dedere aut judicare* is advocated as a *civitas maxima*, it should be noted that the formula is more prevalent in conventions dealing with drugs and terrorism. See BASSIOUNI, ICC CONVENTIONS, *supra* note 78, at 789-842, 893-1018; BASSIOUNI & WISE, *supra* note 57, at 11-19.

piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, *apartheid*, and torture.⁹²

It is noteworthy that several international criminal law conventions that apply to crimes that have not risen to *jus cogens* contain a provision on universal jurisdiction. This evidences the recognition and application given to this theory.

The *jus cogens* international crimes discussed below in the order of their emergence in international criminal law are: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against humanity; (5) genocide; (6) *apartheid*; and (7) torture.

A. Piracy

Piracy is deemed the basis of universal criminal jurisdiction for *jus cogens* international crimes, but that was not always the case. The term piracy has its origins in Greek literature as *peirates* and is reported in Homer's *ILIAD*⁹³ and *THE ODYSSEY*,⁹⁴ as well as in THUCYDIDES, *HISTORY OF THE PELEPONNESIAN WAR*.⁹⁵ It then appeared in Roman literature, notably in the writings of Cicero, who referred to pirates as *pirata* and *praedones* (land-based predators, later referred to as brigands and bandits).⁹⁶ Cicero is also credited with the notion that *pirata* and *praedones* are *hostis humani generis*.⁹⁷ Grotius, relying on Aristotle and Cicero, elaborated on the theory of *hostis humani generis* and its application in time of war, which was the context in which piracy was viewed at that time.⁹⁸

92. Bassiouni, *Jus Cogens Crimes*, *supra* note 33.

93. HOMER, *THE ILIAD* (A.T. Murray trans., 1971).

94. HOMER, *THE ODYSSEY* (A.T. Murray trans., 1960).

95. THUCYDIDES, *THE PELEPONNESIAN WAR* (C.M. Smith trans., 1969).

96. CICERO, *CONTRA VERRES II* (L.H.G. Greenwood trans., 1953). *See also* CICERO, *DE OFFICII* (L.H.G. Greenwood trans., 1953); CICERO, *DE RE PUBLICA* (C.W. Keyes trans., 1928).

97. Coleman Philippon re-traces that historical evolution, both as to its substantive meaning and as to exercise of jurisdiction in Greece and Rome. 2 COLEMAN PHILIPPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE & ROME* (1911).

98. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (Francis W. Kelsey trans., 1925) (1625). Grotius also relied on the Old and New Testaments and on Aristotle and Cicero for a universal perspective. *See* CICERO, *DE RE PUBLICA*, *supra* note 96, at 211 (bk. III, XXII):

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to

The early history of defining piracy was not, however, linked to universal jurisdiction as it was in the nineteenth and twentieth centuries. Professor Alfred Rubin authoritatively documents this history up to contemporary times.⁹⁹ Alberigo Gentili¹⁰⁰ and Balthasar de Ayala¹⁰¹ adopted the universalist view of piracy and its universal punishment by all states because it was dictated by *ius gentium*. But their application of piracy was essentially in the context of war as the phenomenon was then seen. Grotius, however, whose approach was more pragmatic, saw the problem of dealing with pirates as part of his view of a certain order on the high seas. From a jurisdictional perspective, Grotius, an advocate of freedom on the high seas, *mare liberum*, posited the principle that ships on the high seas were an extension of the flag state's territoriality. Thus, the flag state could exercise its jurisdiction over non-national ships and persons for acts of piracy. It was not, therefore, an application of universal jurisdiction whereby any and all states could exercise their jurisdiction over any and all pirates. Instead, it could be said that it was the recognition of the universal application of the flag state's jurisdiction in its right to defend against pirates and eventually to pursue them as both a preventive and punitive measure.

The early law of piracy and its jurisdictional applications developed in the national laws and practices of the major sea-faring nations

abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

Id. See also BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 26, at 108 n.71.

99. RUBIN, *supra* note 70.

100. GENTILI, DE IURE BELLICIS LIBRI TRES (J.C. Rolfe trans., 1933) (1612). See, for example, Gentili's work DE IURE BELLI (1612), reprinted in CLASSICS OF INTERNATIONAL LAW (1933); GROTIUS, *supra* note 98. For a brief assessment of these works, see Peter Hagggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS ch. 4 (1992) [hereinafter GROTIUS AND INTERNATIONAL RELATIONS]; G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas About War*, in GROTIUS AND INTERNATIONAL RELATIONS, *supra*, ch. 5.

101. BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI (J.P. Bate trans., 1912) (1581). See BALTHAZAR AYALA, THREE BOOKS, ON THE LAW OF WAR, AND ON THE DUTIES CONNECTED WITH WAR, AND ON MILITARY DISCIPLINE 88 (J. P. Bate trans., 1912) (1597).

between the 1600s and 1800s. Though they developed along separate legal concepts and legal techniques, the results were similar. The reason is probably their commonality of interests in securing themselves from the perils of piracy. These developments were based on the recognition of the flag state's power to seize and punish pirates who committed that crime, as it was defined by national law. This was particularly the case with England and in the early years of the United States of America.¹⁰² As Rubin posits the evolution of the jurisprudence, statutory enactments and the writings of scholars were based on a misunderstanding of the term piracy.¹⁰³ Nevertheless, universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international

102. See RUBIN, *supra* note 70.

103. *Id.* at 124. He includes in that category Sir William Blackstone, whose COMMENTARIES ON THE LAWS OF ENGLAND (vol. 4, 1769) influenced American law and jurisprudence. The Constitution in Article 1, Section 8, Clause 10 refers to "Piracies," and the Judicature Act of 24 September 1789, *An Act to Establish the Judicial Courts of the United States*, ch. 20, § 9, 1 Stat. 73, 76-77, gives each of the thirteen original "district courts" exclusive jurisdiction for such crimes. The first time, however, that piracy was deemed a crime of universal jurisdiction arose under Jay's Treaty of 1794, Nov. 19, 1794, art. 21, 8 Stat. 116, 12 BEVANS 13, 27. Joseph Story, however, did not embrace the universalist view of piracy and slavery in his seminal work, COMMENTARIES ON THE CONFLICT OF LAWS (1834); instead, he argued for the same result from a positivistic perspective. Chief Justice John Marshall, also a positivist, recognized the universal reach of United States law whenever the acts of piracy were against a U.S. vessel and U.S. nationals. See *U.S. v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818). In *U.S. v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820), Chief Justice Marshall wrote:

[T]he Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the eighth section [of the act of 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatsoever, is within the meaning of this act, and is punishable in the Courts of the United States. *Persons of this description are proper objects for the penal code of all nations*; and we think that the general words of the Act of Congress applying to all persons whatsoever, though they ought to not be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; *but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.*

Id. at 152 (emphasis added). The certificate issued by the Supreme Court concludes: "That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels." *Id.* at 153 (emphasis added).

All other U.S. cases involving piracy had a "contact" with U.S. law, either because the acts of piracy were committed against a U.S. vessel or against U.S. nationals.

law as the international crime *par excellence* to which universality applies.

Positive international law in the twentieth century has clearly established universal jurisdiction for piracy.¹⁰⁴ The 1958 Geneva Convention on the Law of the High Seas¹⁰⁵ includes two provisions on jurisdiction over piracy. Article 18 states:

A ship or aircraft may retain its nationality, although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.

Article 19 states:

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith.

This Article clearly establishes universal jurisdiction.

Then, in 1982, the Montego Bay Convention on the Law of the Sea¹⁰⁶ reiterated Article 19 of the 1958 Geneva Convention by incorporating the text verbatim into Article 150:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the

104. This may be due to the fact that piracy has for all practical purposes disappeared as of the nineteenth century, and during the twentieth century there is only one instance that occurred in the Western world. Thus, the international community found it more readily acceptable to recognize universal jurisdiction for piracy. See Thomas Franck, *To Define and Punish Piracies; The Lessons of the Santa Maria: A Comment*, 36 N.Y.U. L. REV. 839 (1961). Conversely, there have been many manifestations of piracy in Southeast Asia. See GERHARD O.W. MULLER & FREIDA ADLER, *OUTLAWS OF THE OCEAN* (1985).

105. Apr. 25, 1958, 1 U.S.T. 2312, 450 U.N.T.S. 82.

106. United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122.

penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Thus, universal jurisdiction for the crime of piracy is firmly established in positive international law.

B. Slavery

Slavery has been associated with piracy since 1815 when the Declaration of the Congress of Vienna equated traffic in slavery to piracy. Since then, there has been a gradual development in the positive international law of slavery and slave-related practices based on the same type of universal condemnation that existed with respect to piracy. Nevertheless, universal condemnation, which is evident in twenty-seven conventions on the subject of slavery and slave-related practices from 1815 to 1982, did not, as discussed below, always produce the resulting universality of jurisdiction.¹⁰⁷ There are also forty-seven other conventions between 1874 and 1996 relating to slavery,¹⁰⁸ which, like piracy, is deemed part of *jus cogens*.¹⁰⁹

An analysis of the text of these conventions reveals that only a few establish universal jurisdiction or allow a state to exercise it.¹¹⁰

107. BASSIOUNI, ICL CONVENTIONS, *supra* note 78, at 637-734.

108. *Id.*

109. M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445 (1991).

110. *See* Treaty for the Suppression of the African Slave Trade, *signed at London* 20 December 1841, arts. VI, VII, X, and Annex B, pt. 5, 2 Martens Nouveau Recueil (ser. 1) 392. The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (General Act of Brussels), Jul. 2, 1890, 27 Stat. 886, 17 Martens Nouveau Recueil (ser. 2) 345, states in Article V:

The contracting powers pledge themselves, unless this has already been provided for by laws in accordance with the spirit of the present article, to enact or propose to their respective legislative bodies, in the course of one year at the latest from the date of the signing of the present general act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offenses against the person, to the organizers and abettors of slave-hunting, to those guilty of mutilating male adults and children, and to all persons taking part in the capture of slaves by violence; and, on the other hand, the provisions relating to offenses against individual liberty, to carriers and transporters of, and to dealers in, slaves. . . .

Guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offenses have been committed shall be arrested either on communication of the incriminating evidence by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the power in

Conventions concerning the suppression of the traffic in women and children and "white slave traffic"¹¹¹ and other slave-related practices do not contain specific provisions on universal jurisdiction, nor does the Forced Labor Convention.¹¹²

It may be significant that, with respect to traffic in slavery on the high seas, universal jurisdiction is more evident in treaty provisions insofar as that traffic has been equated to piracy. In this situation, universal jurisdiction is necessitated by the medium used by traffickers, namely, the high seas, since it is the most effective way to combat such traffic. However, with respect to sexual exploitation of persons, it seems that the conventions have left it to the states to decide what jurisdictional theories they would rely upon. This may be explained in part by the fact that these practices are conducted by means of transiting through the territory of states and that the ultimate stage of such trafficking is exploitation on the territory of a state. As a result, a state could exercise territorial criminal jurisdiction to combat this international crime without the need for universal jurisdiction. This neutral position on universal jurisdiction is expressed in the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,¹¹³ which in Article 11 states "[n]othing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law."

Whenever slavery and slave-related practices are committed within the context of an armed conflict, it is subject to international humanitarian law and becomes a war crime. But in such cases, even

whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them.

Id. art. 5. See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature at Lake Success, New York* Mar. 21, 1950, art. 11, 96 U.N.T.S. 271 ("Nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law.").

111. International Agreement for the Suppression of the "White Slave Traffic," March 18, 1904, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415.

112. Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

113. Mar. 21, 1950, 96 U.N.T.S. 271.

though the crime is international and is part of *jus cogens*, the jurisdictional theory relied upon is usually territoriality.¹¹⁴

The provisions contained in all the treaties relevant to slavery and slave-related practices characteristically require the signatory states to take effective measures to prevent and suppress slavery, and also provide specific obligations as to criminalization and punishment, extradition, and mutual legal assistance. All of these provisions can best be characterized as reflecting the concept of *aut dedere aut judicare*. This is even true with respect to the more recent treaty provisions that link slavery to piracy. For example, the 1958 Geneva Convention on the Law of the High Seas¹¹⁵ provides in Article 13 that:

every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.

The 1982 Montego Bay Convention on the Law of the Sea adopted an almost identical provision in Article 99.¹¹⁶

As in the case of piracy, slavery has all but disappeared in the twentieth century, and that may well have made it possible for states to recognize the application of the theory of universal jurisdiction to what has heretofore been essentially universally condemned. While customary international law and the writings of scholars recognize slavery and slave-related practices as a *jus cogens* international crime, the practice of states has not evidenced the fact that universal criminal jurisdiction has been applied to all forms and manifestations of slavery and slave-related practices.¹¹⁷

114. See discussion of war crimes *infra* notes 120-131 and accompanying text.

115. See *supra* note 105.

116. See *supra* note 106.

117. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva Oct. 11, 1933, 53 U.N.T.S. 13; Annex to the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva Oct. 11, 1933; International Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, amended Nov. 12 1947, 53 U.N.T.S. 39; International Convention for the Suppression of the Traffic in Women of Full Age concluded at Geneva Oct. 11, 1933, Nov. 12, 1947, 53 U.N.T.S.

It is also significant that the dramatic increase in the traffic of women and children for sexual exploitation, which has taken place in the last two decades, has only recently been the subject of a specialized convention: the Protocol on International Traffic in Women and Children, which is part of the Convention on Organized Crime of December 2000.¹¹⁸ With respect to this category of *jus cogens* international crimes, it was essentially the writings of scholars that has driven the notion that universal criminal jurisdiction extends to all manifestations of this category of international crimes.¹¹⁹

C. War Crimes

Of all international crimes, the war crimes category has the largest number of instruments that include a wide range of prohibitions and regulations.¹²⁰ Many of these instruments specifically embody, codify, or evidence customary international law. The four Geneva Conventions of 1949¹²¹ and their two Additional Protocols¹²² are the most

49; Annex to the Protocol Amending the Agreement for the Suppression of the White Slave Traffic, May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910; International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, amended May 4, 1949, 2 U.S.T. 1997, 92 U.N.T.S. 19; International Convention for the Suppression of White Slave Traffic, May 4, 1910, amended May 4, 1949, 98 U.N.T.S. 101; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3. See BASSIOUNI, ICL CONVENTIONS, *supra* note 78.

118. See Protocol on International Traffic in Women and Children to the Draft United Nations Convention on Organized Crime, U.N. Doc. A/AC.254/4/ Add.3/Rev.6 (2000). That Protocol does not, however, contain a provision on universal jurisdiction.

119. See *supra* note 109.

120. BASSIOUNI, ICL CONVENTIONS, *supra* note 78, at 285; see also Yoram Dinstein, *The Universality Principle and War Crimes*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 17-37 (Michael N. Schmitt & Leslie C. Green eds., 1998); Willard B. Cowles, *Universal Jurisdiction over War Crimes*, 33 CAL. L. REV. 177 (1945).

121. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

122. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, *opened for signature at Berne* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, *opened for signature at Berne* Dec. 12,

comprehensive codifications of prohibitions and regulations, and their provisions include the most specific and wide-ranging penal norms.¹²³ The so-called “Law of Geneva” overlaps with the so-called “Law of the Hague,”¹²⁴ much of the latter having been incorporated into the former. The “Law of Geneva” has become part of the customary law of armed conflicts.¹²⁵ The violations of the Geneva Conventions and the so-called “Laws and Customs of War” constitute war crimes and are *jus cogens* international crimes.

With respect to the four Geneva Conventions of 1949, the “grave breaches” are contained in Articles 50, 51, 130, and 147, respectively.¹²⁶ With respect to Protocol I, “grave breaches” are contained in Article 85.¹²⁷ There are, however, no provisions in these Conventions that specifically refer to universal jurisdiction. One can assume that the penal duty to enforce includes implicitly the right of the State Parties to exercise universal jurisdiction under their national laws. This arises out of the obligation to prevent and repress “grave breaches” and also out of the provisions of Articles 1 and 2, which are common to the four Geneva Conventions, to wit:

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the

1977, U.N. Doc. A/32/144, Annex II.

123. BASSIOUNI, ICL CONVENTIONS, *supra* note 78, at 416-45, 457-94.

124. Convention with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803. See M. CHERIF BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (M. Cherif Bassiouni ed., 2000) [hereinafter BASSIOUNI, MANUAL ON INTERNATIONAL HUMANITARIAN LAW].

125. BASSIOUNI, ICL CONVENTIONS, *supra* note 78, at 286.

126. First Geneva Convention, *supra* note 121, art. 50; Second Geneva Convention, *supra* note 121, art. 51; Third Geneva Convention, *supra* note 121, art. 130; Fourth Geneva Convention, *supra* note 121, art. 147.

127. Protocol I, *supra* note 122, art. 85; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987).

state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.¹²⁸

While no convention dealing with the law of armed conflict contains a specific provision on universal jurisdiction, it is nevertheless valid to assume that the 1949 Geneva Conventions and Protocol I provide a sufficient basis for states to apply universality of jurisdiction to prevent and repress the “grave breaches” of the Conventions. But none of the other conventions dealing with the law of armed conflict contain a provision on universal jurisdiction.

Customary international law as reflected in the practice of states does not, so far, in the judgment of this writer, warrant the conclusion that universal jurisdiction has been applied in national prosecutions.¹²⁹ There are a few cases in the practice of states that are relied upon by some scholars to assert the opposite,^{129a} but such cases are so few and far between that it would be incorrect to conclude that they constitute practice. Nevertheless, it can be argued that customary international law can exist irrespective of state practice if there is strong evidence of *opinio juris*, which is the case with respect to war crimes.

The recognition of universal jurisdiction for war crimes is essentially driven by academics’ and experts’ writings, which extend the universal reach of war crimes to the universality of jurisdiction over such crimes. The 1949 Geneva Conventions require state parties to “respect and ensure respect,” while the “grave breaches” provisions of the

128. See *supra* note 121 and accompanying text. For particular provisions regarding the enacting of legislation by contracting parties for the repression of grave breaches, see First Geneva Convention, *supra* note 121, art. 49; Second Geneva Convention, *supra* note 121, art. 50; Third Geneva Convention, *supra* note 121, art. 129; Fourth Geneva Convention, *supra* note 121, art. 146.

129. For a discussion of contemporary state practice with respect to war crimes, see *infra* notes 188-227 and accompanying text.

129a. See *infra* notes 196-97 and accompanying text.

Conventions and Protocol 1 require enforcement. This has been interpreted by some not only as giving parties the right to adopt national legislation without universal jurisdiction, but also as creating an obligation to do so. There is, however, some confusion arising out of collective enforcement mechanisms, such as the IMT, IMTFE, ICTY, and ICTR. The IMT and IMTFE was collective action based on the inherent powers of the involved states as participants in the respective armed conflicts and also on the basis of territoriality.¹³⁰ The ICTY and the ICTR are forms of collective enforcement derived from the power of the Security Council under Chapter VII of the United Nations Charter, but these tribunals' jurisdiction is territorial. In all of these situations, criminal jurisdiction is based on territoriality, and, with respect to the IMT and IMTFE, it could be said to have also relied on "passive personality." As stated above, the ICC does not have universal jurisdiction, though its reach is universal, except insofar as "referrals" from the Security Council to the ICC, which are based on the theory of universality.¹³¹

Notwithstanding the above, there is nothing in the Law of Armed Conflict that prohibits national criminal jurisdiction from applying the theory of universality with respect to war crimes. It can even be argued that the general obligations to enforce, which include the specific obligations to prevent and repress "grave breaches" of the 1949 Geneva Conventions and Protocol I, allow states to expand their jurisdiction to include the theory of universality.

D. *Crimes Against Humanity*

Crimes against humanity were first defined in positive international criminal law in Article 6(c) of the Nuremberg Charter as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious

130. See *supra* note 86 and accompanying text.

131. Following World War II, Allied military tribunals referred to the exercise of universality with respect to war crimes and crimes against humanity. See Boed, *supra* note 56, at 307-08 & n.51 (citing Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 807-10 (1988)). But these cases were prosecuted pursuant to Control Council Law No. 10 which gave the four major Allies "sovereignty" over their respective zones of occupation. Thus, the tribunals exercised national jurisdiction.

grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.¹³²

Similarly, Article 5(c) of the IMTFE Charter¹³³ and Article 2(c) of Control Council Law No. 10¹³⁴ provided for the prosecution of “crimes against humanity.” In prosecutions under all three instruments, however, jurisdiction was territorial in nature, though it can also be argued that it extended to “passive personality.” Jurisdiction over “crimes against humanity” as provided for in Article 5 of the ICTY,¹³⁵ Article 3 of the ICTR,¹³⁶ and Article 7 of the ICC is likewise territorial except insofar as “referrals” to the ICC by the Security Council, in which case the jurisdiction is universal.¹³⁷

It is also important to note that there is no specialized convention for “crimes against humanity.”¹³⁸ As a result, one cannot say that there is conventional law providing for universal jurisdiction for “crimes against humanity.”¹³⁹ The writing of scholars essentially drives that proposition. A few States have adopted national legislation allowing domestic prosecution of “crimes against humanity” even when committed outside the State’s territory and even when committed by or against non-nationals. But these States have also added some additional jurisdictional links as prerequisites for the exercise of such jurisdiction as discussed below. As a *jus cogens* international crime, “crimes against humanity” are presumed to carry the obligation to prosecute or extradite, and to allow States to rely on universality for prosecution, punishment, and extradition.

132. IMT Charter, *supra* note 10, art. 6(c).

133. IMTFE Amended Charter, *supra* note 10, art. 5(c)

134. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, art. 2(c), *reprinted in* BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980).

135. ICTY Statute, *supra* note 10, art. 5.

136. ICTR Statute, *supra* note 10, art. 3.

137. *See supra* note 86 and accompanying text.

138. *See* M. Cherif Bassiouni, “Crimes Against Humanity”: *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457-94 (1994); BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 26.

139. For a discussion of contemporary state practice with respect to crimes against humanity, *see infra* notes 188-227 and accompanying text.

E. Genocide

The *jus cogens* crime of genocide did not exist before the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹⁴⁰ In fact, genocide was assumed to be the successor of “crimes against humanity,” but its scope is in effect narrower. Article VI of the Convention states:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of *the State in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.¹⁴¹

It is clear from the plain meaning and language of this provision that jurisdiction is territorial and that only if an “international penal tribunal” is established and only if state parties to the Genocide Convention are also state-parties to the convention establishing an “international penal tribunal” can the latter court have universal jurisdiction.¹⁴² However, such universal jurisdiction will be dependent upon the statute of that “international penal tribunal,” if or when established.

Since the adoption of the Genocide Convention, two international ad hoc criminal tribunals were established, namely, the ICTY¹⁴³ and the ICTR,¹⁴⁴ in 1993 and 1994, respectively. In 1998, the Statute for the ICC was opened for signature.¹⁴⁵ All three statutes contain a provision making genocide a crime within the jurisdiction of the court. But that, in itself, does not give these tribunals universal jurisdiction.

Article IV of the ICTY,¹⁴⁶ and Article II of the ICTR define genocide in much the same way as Articles II and III of the Genocide Convention.¹⁴⁷ The jurisdiction of both tribunals is territorial; their

140. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added).

141. *Id.* art. 6 (emphasis added).

142. *Cf.* John F. Murphy, *International Crimes*, in 2 UNITED NATIONS LEGAL ORDER 993, 1010 (Oscar Schachter & Christopher C. Joyner eds., 1995) (“[T]he Convention does not create a system of universal jurisdiction.”).

143. ICTY Statute, *supra* note 10.

144. ICTR Statute, *supra* note 10.

145. ICC Statute, *supra* note 12.

146. ICTY Statute, *supra* note 10, art. 4.

147. ICTR Statute, *supra* note 10, art. 2.

competence extends only to crimes committed within the territory of the former Republic of Yugoslavia and Rwanda, respectively. As for the ICC, Article 6 defines genocide in almost the same terms as Article II of the Genocide Convention.¹⁴⁸ The jurisdiction of the ICC, as stated above, is essentially territorial as to the parties; though the parties can refer cases to the ICC for crimes that did not occur in their territory and are obligated to surrender persons within their territory, whether nationals or non-nationals. Thus, while the reach of the ICC is universal as to “referral” by State Parties under Article 14 and non-State Parties under Article 12(3), “referrals” by the Security Council have a universal scope and also represent a theory of universal jurisdiction.

Notwithstanding the fact that Article VI of the Genocide Convention hardly justifies the contention that it reflects the theory of the universality of jurisdiction,¹⁴⁹ commentators argue consistently that customary international law has recognized universality of jurisdiction for genocide even though there is no state practice to support that argument. As Professor Meron states, “[I]t is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state.”¹⁵⁰

Notwithstanding the absence of support in conventional international law and in the practice of states¹⁵¹ for the unqualified assertion that genocide ipso facto allows universal jurisdiction, the ICTY’s Appeals Chamber in the *Tadic* case, in connection with genocide, stated that “universal jurisdiction [is] nowadays acknowledged in the case of

148. ICC Statute, *supra* note 12, art 6.

149. See SCHABAS, *supra* note 70, at 353-78; Matthew Lippman, *Genocide, in 1 INTERNATIONAL CRIMINAL LAW* 589-613 (M. Cherif Bassiouni ed., 2d ed. 1999).

150. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 569 (1995). *But see* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 159-60 (1996); Jordan J. Paust, *Congress and Genocide: They’re Not Going to Get Away with It*, 11 MICH. J. INT’L L. 90, 91-92 (1989); Randall, *supra* note 131, at 837. These and other authors, including this writer, have consistently asserted that universal jurisdiction applies to genocide as a *jus cogens* international crime. It is because of scholars’ influence that the *Restatement of the Foreign Relations Law of the United States* explains: “Universal jurisdiction to punish genocide is widely accepted as a principle of customary law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 37, § 404, reporter’s note 1.

151. For a discussion of contemporary state practice with respect to genocide, see *infra* notes 188-227 and accompanying text.

international crimes."¹⁵² Similarly, the ICTR held in the case of *Prosecutor v. Ntuyahaga* that universal jurisdiction exists for the crime of genocide.¹⁵³

F. *Apartheid*

The crime of *apartheid* did not come into existence until 1973 when the United Nations adopted the Convention on the Suppression and Punishment of the Crime of Apartheid.¹⁵⁴ The Convention provides in Article IV, in pertinent part, as follows:

The States Parties to the present Convention undertake:

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.¹⁵⁵

Article V of the Convention states:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.¹⁵⁶

There is clearly a departure in the text of these two articles from the jurisdictional provision contained in the Genocide Convention,¹⁵⁷ since Articles IV and V of the Apartheid Convention provide unambiguously

152. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 62 (Oct. 2, 1995).

153. *Prosecutor v. Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999).

154. G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter *Apartheid Convention*]. See Roger S. Clark, *Apartheid*, in 1 INTERNATIONAL CRIMINAL LAW 643-62 (M. Cherif Bassiouni ed., 2d ed. 1999). A draft statute was prepared by this author in 1979.

155. *Apartheid Convention*, *supra* note 154, art. 4.

156. *Id.* art. 5.

157. See *supra* note 140 and accompanying text.

for universal jurisdiction.¹⁵⁸ However, it seems that after the demise of the *apartheid* regime in South Africa and the lack of prosecutions for apartheid under this convention by the new regime, that the convention may have fallen into desuetude. For the convention to have any future validity, it should be amended to apply to *apartheid*-like practices.

G. Torture

Torture was established in conventional international law in 1984 in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁵⁹ Article 5 of the Convention provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

158. It should also be noted that 101 states have ratified the *Apartheid* Convention, which is significantly less than the 185 member states of the United Nations. See *Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, U.N. Doc. E/CN.4/1426 (1981); M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

159. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, draft reprinted in 23 I.L.M. 1027 (1985) [hereinafter *Torture Convention*]. See Daniel H. Derby, *Torture*, in 1 INTERNATIONAL CRIMINAL LAW 705-49 (M. Cherif Bassiouni ed., 2d ed. 1999); J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1988).

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.¹⁶⁰

The premise of the enforcement scheme in this Convention is the concept *aut dedere aut judicare*.¹⁶¹ Throughout the Convention there are several references to the jurisdiction of the enforcing state, and Article 7.1 of the Convention states:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.¹⁶²

But Article 7.1 is more a reflection of *aut dedere aut judicare* than it is of universal jurisdiction.¹⁶³ It establishes the duty to extradite, and only in the event that a person is not extradited is a state obligated to prosecute, by implication, in reliance on universal jurisdiction.

In the *cause célèbre* case, *In re Pinochet*, which reached the House of Lords, there was indeed reference to genocide and other international crimes. In the rehearing there was also a reference to universal jurisdiction as a concomitant to international crimes:

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the Courts of other states is another. It is significant that in respect of serious breaches of 'intransgressible principles of international customary law' when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide convention provides only for jurisdiction before an international tribunal of the Courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its

160. Torture Convention, *supra* note 159, art. 5.

161. See BASSIOUNI & WISE, *supra* note 57.

162. Torture Convention, *supra* note 159, art. 7.1.

163. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 64-65 (1994).

jurisdiction to future acts.¹⁶⁴

Notwithstanding this dicta, the issue was whether the courts of the United Kingdom were competent to decide on the extradition request of Spain for the criminal charge of torture, and whether extradition should be granted in accordance with the treaty obligation of the United Kingdom toward Spain and in accordance with United Kingdom law. The United Kingdom is bound by the United Nations' Torture Convention¹⁶⁵ and is obligated thereunder to prosecute or extradite. Spain, also a state party to the Convention, sought extradition for torture, relying on its passive personality jurisdiction because its nationals were the victims of the alleged crimes of torture. Thus the *Pinochet* case, in the opinion of this writer, does not stand for the proposition of universal jurisdiction, nor for that matter is the extradition request from Spain for torture based on universal jurisdiction. The Torture Convention, however, does implicitly allow for universal jurisdiction.

H. *Other International Crimes to which Universal Jurisdiction Applies*

There are several international crimes that have not yet risen to the level of *jus cogens* but whose founding instruments explicitly or implicitly provide for universal jurisdiction. The 1963 Hijacking Convention provides in Article III(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."¹⁶⁶ It therefore implicitly allows national legislation to provide for universal jurisdiction. Similarly, the 1970 Hague Hijacking Convention states in Article IV(3): "This Convention does not exclude any criminal

164. *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1998] 4 All ER 897, 3 WLR 1456 (H.L.(E.) 1998). See REED BRODY & MICHAEL RATNER, THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN; HUMAN RIGHTS WATCH, *supra* note 1; *When Tyrants Tremble: The Pinochet Case* (Human Rights Watch). See also *The Prosecution of Hissène Habré—An "African Pinochet,"* in HUMAN RIGHTS WATCH, *supra* note 1, at 11-12. Cf. HUMAN RIGHTS WATCH, *supra* note 1, at 4 (citing the *Filartiga* case for the proposition that "the torturer has become like the pirate and slave trader before him *hostis humanis generis*, an enemy of all mankind."). Habré, the former dictator of Chad, was arrested in Senegal, but efforts to bring him to trial on the basis of universality failed, and he was released after a final ruling by the *Cour de Cassation* of Senegal.

165. See *supra* note 159.

166. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Hijacking Convention), Sept. 14, 1963, art. 3(3), 20 U.S.T. 2941, 704 U.N.T.S. 219.

jurisdiction exercised in accordance with national law.”¹⁶⁷ Article VII further provides:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.¹⁶⁸

The 1971 Montreal Hijacking Convention states in Article V(3): “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”¹⁶⁹ In addition, the 1988 Montreal Convention on Hijacking provides in Article III:

In Article 5 of the Convention, the following shall be added as paragraph 2 *bis*:

“2 *bis*. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 *bis*, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article.”¹⁷⁰

All the treaty provisions mentioned above implicitly allow for universal jurisdiction if national legislation provides for it. The following treaty provisions make it more explicit.

The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation states in Article 7(4, 5):

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the

167. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), Dec. 16, 1970, art. 4(3), 22 U.S.T. 1641, 860 U.N.T.S. 105.

168. *Id.* art. 7.

169. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention), Sept. 23, 1971, art. 5(3), 24 U.S.T. 564, 974 U.N.T.S. 177.

170. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, adopted by the International Civil Aviation Organization, Feb. 24, 1988, art. 3, 27 I.L.M. 627.

territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.¹⁷¹

Article X(1) of this Convention further provides as follows:

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.¹⁷²

The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf provides in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when the offence is committed:

- (a) against or on board a fixed platform while it is located on the continental shelf of that State; or
- (b) by a national of that State.

2. A State Party may also establish its jurisdiction over any such

171. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done at Rome* 10 March 1988, art. 7(4, 5), 27 I.L.M. 668.

172. *Id.* art. 10(1).

offence when:

- (a) it is committed by a stateless person whose habitual residence is in that State;
- (b) during its commission a national of that State is seized, threatened, injured or killed; or
- (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Protocol does not exclude any criminal jurisdiction exercised in accordance with national law.¹⁷³

The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents states in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:

- (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
- (b) when the alleged offender is a national of that State;
- (c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

173. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, art. 3, 27 I.L.M. 685.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the states mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.¹⁷⁴

The 1979 Convention Against the Taking of Hostages states in Article V:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

(a) in its territory or on board a ship or aircraft registered in that State;

(b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;

(c) in order to compel that State to do or abstain from doing any act; or

(d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.¹⁷⁵

The 1994 Convention on the Safety of United Nations and Associated Personnel takes the same jurisdictional approach of the Convention on Internationally Protected Persons. Article X of the United Nations

174. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), *opened for signature at New York* Dec. 14, 1973, art. 3, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

175. International Convention Against the Taking of Hostages, *concluded at New York* Dec. 17, 1979, art. 5, 18 I.L.M. 1456.

Personnel Convention states:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:
 - (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State.
2. A State Party may also establish its jurisdiction over any such crime when it is committed:
 - (a) By a stateless person whose habitual residence is in that State;
 - (b) With respect to a national of that State; or
 - (c) In an attempt to compel that State to do or abstain from doing any act.
3. Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.
4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.
5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.¹⁷⁶

The 1961 Single Convention on Narcotic Drugs provides in Article 36(4) that “[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.”¹⁷⁷ Article

176. Convention on the Safety of United Nations and Associated Personnel, *opened for signature at New York* Dec. 15, 1994, art. 10, U.N. Doc. A/49/742 (1994).

177. Single Convention on Narcotic Drugs (Single Convention), *signed at New York* Mar. 30, 1961, art. 36(4), 18 U.S.T. 1407, *referenced in* 14 I.L.M. 302. For an amendment to Article 36,

22(5) of the 1971 Convention on Psychotropic Substances employs identical language to the 1961 Single Convention.¹⁷⁸

The 1954 Hague Convention for the Protection of Cultural Property explicitly provides for universality in Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."¹⁷⁹ The 1970 UNESCO Cultural Convention states in Article 12: "The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories."¹⁸⁰

The 1923 Convention on Obscene Materials provides in Article II:

Persons who have committed an offence falling under Article 1 shall be amenable to the Courts of the Contracting Party in whose territories the offence, or any of the constitutive elements of the offence, was committed. They shall also be amenable, when the laws of the country shall permit it, to the Courts of the Contracting Party whose nationals they are, if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories.

Each Contracting Party shall, however, have the right to apply the maxim *non bis in idem* in accordance with the rules laid down in its legislation.¹⁸¹

see Article 14 of the Protocol Amending the Single Convention on Narcotics Drugs, 1961, Mar. 25 1972, 26 U.S.T. 1430, 976 U.N.T.S. 3.

178. Convention on Psychotropic Substances (Psychotropic Convention), Feb. 21, 1971, art. 22(5), T.I.A.S. No. 9725, 1019 U.N.T.S. 175. See also *id.* art. 27 (regarding territorial application).

179. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 28, 249 U.N.T.S. 240.

180. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Cultural Convention), Nov. 14, 1970, art. 12, 823 U.N.T.S. 231.

181. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, *opened for signature at Geneva* 12 September 1923, art. 2, 27 L.N.T.S. 213, 7 Martens Nouveau Recueil (ser. 3) 266. See also International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Sept. 12, 1923, amended by the Protocol,

The 1929 Convention on the Suppression of Counterfeiting states in Article 17: "The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law."¹⁸²

The 1884 Submarine Cables Convention provides in Articles 1, 8, and 9 as follows:

Article 1

The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties.

Article 8

The court competent to take cognizance of infractions of this Convention shall be those of the country to which the vessel on board of which the infraction has been committed belongs.

It is, moreover, understood that, in cases in which the provision contained in the foregoing paragraph cannot be carried out, the repression of violations of this Convention shall take place, in each of the contracting States, in the case of its subjects or citizens, in accordance with the general rules of penal competence established by the special laws of those States, or by international treaties.

Article 9

Prosecutions on account of the infractions contemplated in articles 2, 5 and 6 of this Convention, shall be instituted by the State or in its name.¹⁸³

Lastly, the Mercenaries Convention states in Article 9(2, 3):

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3, and 4 of the present Convention in cases where

Nov. 12, 1947, art. 2, 46 U.N.T.S. 169.

182. International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, art. 17, 112 L.N.T.S. 371.

183. Convention for the Protection of Submarine Cables, Mar. 14, 1884, arts. 1, 8, 9, 24 Stat. 989, 11 Martens Nouveau Recueil (ser. 2) 281.

the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law.¹⁸⁴

The Inter-American Convention on Forced Disappearance of Persons sets forth the doctrine of *aut dedere aut judicare* in Article 4, while Article 6 provides for qualified universal jurisdiction by implication:

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.¹⁸⁵

Article 6.1 of the Draft International Convention on the Protection of All Persons from Forced Disappearance states:

1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances: (a) When the offence of forced disappearance was committed within any territory under its jurisdiction; (b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.¹⁸⁶

184. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *adopted at New York Dec. 4, 1989*, art. 9(2, 3), 29 I.L.M. 89.

185. Inter-American Convention on Forced Disappearance of Persons, *adopted at Belem Do Para, Brazil June 9, 1994*, art. 6, at <http://oas.org/juridico/english/Sigs/a-60.html>.

186. Draft International Convention on the Protection of All Persons from Forced Disappearance, art. 6.1, E/CN.4/Sub.2/1998/19, Annex (Aug. 19, 1998).

Most of the conventions cited above relate to what is commonly termed “terrorism” and international drug trafficking, which are usually crimes committed by individuals and small groups, and are not usually state-sponsored. Consequently, it is easier for states to recognize and apply the theory of universality and other enforcement modalities to these types of actors, than to do so with respect to those who carry out state policy. This explains why, notwithstanding the extensive harm caused by genocide and crimes against humanity, states have been reluctant to have the same enforcement obligations apply as they have provided, for example, with respect to “terrorism” and international drug trafficking. It is this writer’s contention, for obvious self-serving political reasons, that international criminal law conventions whose subjects are those persons engaging in State action or carrying out State policy, contain less effective enforcement mechanisms than other similar international conventions.¹⁸⁷

I. *Contemporary State Practice*

Two criteria are necessary to establish customary international law, viz., the existence of a sufficient state practice and *opinio juris sive necessitatis*.¹⁸⁸ As stated by the International Court of Justice: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”¹⁸⁹

Sufficient state practice is established when the principle at issue has duration, uniformity, consistency, and generality.¹⁹⁰ State practice consists of: (1) specific legislation enacting the provisions for universal jurisdiction; (2) legislative enactments that authorize the application of universal jurisdiction; and (3) state judicial practice, whether based on national legislation or international conventions.^{190a} In the *Military and Paramilitary Activities* case, the ICJ noted that:

187. See Bassiouni, *Sources and Content*, *supra* note 33, at 27-31.

188. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-9 (5th ed. 1998); 1 GEORGE SCHWARZENBERGER, *INTERNATIONAL LAW* 41 (3d ed. 1957); 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 25-27 (8th ed. 1955).

189. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (June 3).

190. DAVID H. OTT, *PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD* 15-16 (1987).

190a. See BROWNLIE, *supra* note 188, at 5.

[t]he mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom “as evidence of a general practice accepted as law”, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.¹⁹¹

Opinio juris is the external acceptance by states that a practice is recognized as being obligatory.¹⁹² To establish *opinio juris*, states must behave in such a manner that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.”¹⁹³ The conduct of states, however, need not be “in absolutely rigorous conformity” with the rule:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.¹⁹⁴

Bearing in mind that there are 189 member states of the United

191. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97-98 (June 27).

192. *See* OTT, *supra* note 190, at 15.

193. *North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20).

194. *Military and Paramilitary Activities*, 1986 I.C.J. at 98.

Nations and 195 countries, it is necessary to assess whether the relatively recent enactments of a few states are sufficient to establish a principle of customary international law of universal jurisdiction over war crimes, crimes against humanity, and genocide, to single out the three crimes within the jurisdiction of the ICTY, ICTR, and ICC, and which all writers supporting universality maintain are the three crimes that call for universal jurisdiction. To this writer, piracy, slavery and slave-related practices, torture and *apartheid* should also be included in this category. This writer is nevertheless doubtful that the small number of divergent national enactments purporting to apply universal jurisdiction are sufficient to satisfy the elements of consistent state practice necessary to constitute customary international law.¹⁹⁵

V. SOME MISCONCEPTIONS ABOUT NATIONAL STATE LAW AND PRACTICE

A number of states have enacted laws with extraterritorial jurisdictional reach. Most of these laws however extend national legislative reach to situations involving their nationals, or whenever their nationals are the victims of certain crimes. Some extend their extraterritorial reach to crimes committed abroad, but whose impact affects the interests of the enforcing state. Among these national laws are those that provide universal jurisdiction based on national law whenever it is permissible or required by an international treaty. In all of these cases, except in the case of Belgium¹⁹⁶ and Spain,¹⁹⁷ which are discussed below, national legislation as applied requires that the accused

195. Some states have universal jurisdiction for specific crimes like genocide. Others may have near universal jurisdiction for crimes against humanity and war crimes. Still other states, like Germany, have universal jurisdiction plus a linking connection. No country has universal jurisdiction for all these crimes. It is therefore difficult to say anything more than universal jurisdiction exists sparsely in the practice of states and is prosecuted in only a limited way.

196. See *infra* note 221.

197. *Ley Del Poder Judicial*, Article 65 (1985), and *Ley Organica*, Article 23 (1985), which was applied in connection with Spain's extradition request to England for Augusto Pinochet. Naomi Roht-Arriza *the Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENGLAND L. REV.*, 311 (2001). This was also applied in connection with Spain's request to Mexico for the extradition of Ricardo Miguel Cavallo, an Argentine citizen, sought for prosecution in Spain for crimes committed in Argentina during the "dirty war" of the 70's. See *Juan E. Mendez and Salvador Tinajero-Esquivel, The Cavallo Case: A New Test for Universal Jurisdiction* in *HUMAN RIGHTS BRIEF*, Vol. 8, issue 3 (Spring 2001) published by American University, Washington College of Law, p. 8.

be present on the territory of the enforcing state. Scholars however do not give sufficient weight to these distinctions and surmise that the possible application of universal jurisdiction without regard to the need for a nexus to the enforcing state is sufficient to conclude that there is sufficient state practice to warrant the conclusion that universal jurisdiction is part of customary international law. There is no doubt that the existence of such national legislation evidences some recognition of the existence of universal jurisdiction. But whether it is sufficient in and of itself to rise to the level of customary international law is questionable. In addition, there are various national judicial decisions that apply universal jurisdiction or refer to it in dicta. Here again, scholars tend to construe these cases as evidencing the application of universal jurisdiction in national judicial decisions. But, as discussed below, there are only two cases known to this writer, namely Belgium and Spain, in which universal jurisdiction was applied without any nexus to the enforcing state. Two cases are illustrative of this misconception.

In *Attorney General of Israel v. Eichmann*,¹⁹⁸ the Israeli district court referred to universal jurisdiction in dictum, but relied on Israel's national legislation conferring upon its courts jurisdiction over "crimes against the Jewish people," based on a law it passed in 1950 that includes genocide and crimes against humanity whenever committed against the "Jewish people," wherever they may be.¹⁹⁹ Israel's jurisdictional reach is, under its law, universal,²⁰⁰ but it is based on a nationality connection to the victim that places such jurisdictional basis under the "passive personality" theory. Admittedly, that law purports to apply to acts which took place before the establishment of the sovereign state of Israel in 1948, but that does not alter the basis of the theory relied upon. Furthermore, there is no historical legal precedent for such a retroactive application of criminal jurisdiction based on nationality, but that goes to the issue of the law's international validity and the

198. 36 I.L.R. 5, 6-57 (Jm. D.C., 1961), *aff'd* 36 I.L.R. 277 (Isr. S. Ct. 1962).

199. See Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, 4 L.S.I. No. 64, at 154. For a discussion of the unique characteristics of this law, see *Honigman v. Attorney General*, 18 I.L.R. 542, 543 (Isr. S. Ct. 1953).

200. Cf. D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 BRIT. Y.B. INT'L L. 1, 12 (opining that "the exercise of jurisdiction by Israel in the *Eichmann* case stands out as highly unusual, and probably unfounded").

jurisdictional theory relied upon, rather than its jurisdictional basis.²⁰¹ In its judgment, the district court stated:

All this applies to the crime of genocide (including the "crime against the Jewish people") which, although committed by the killing of individuals, was intended to exterminate the nation as a group . . . The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations.²⁰²

In affirming the district court's judgment, the Supreme Court of Israel, while noting full agreement on the protective principle of jurisdiction, insisted upon the universal jurisdiction argument, as this applied not only to Jews, in whose name Israel claimed to exercise protective jurisdiction, but also to Poles, Slovenes, Czechs, and gypsies.²⁰³ The Supreme Court further stated, "The State of Israel . . . was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."²⁰⁴

In *Demjanjuk v. Petrovsky*,²⁰⁵ the United States Court of Appeals for the Sixth Circuit referred to universal jurisdiction over crimes of genocide and crimes against humanity, but relied on the same Israeli law that was based on the theory of passive personality. The Sixth Circuit noted that

Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does

201. See Robert K. Woetzel, *The Eichmann Case in International Law*, in INTERNATIONAL CRIMINAL LAW 354 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965); Telford Taylor, *Large Questions in the Eichmann Case*, N.Y. TIMES, Jan. 22, 1961, § 6 (Magazine), at 11.

202. *Eichmann*, 36 I.L.R. at 57 (para. 38).

203. Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 277, 304 (para. 12) (Israel S. Ct., 29 May 1962).

204. *Id.*

205. 776 F.2d 571, 582-83 (6th Cir. 1985).

not deprive Israel of authority to bring him to trial.²⁰⁶

VI. NATIONAL STATE LAW AND PRACTICE

Several states have enacted national legislation in connection with “grave breaches” of the Geneva Conventions, while others have provided for universal jurisdiction in connection with other international conventions, mostly dealing with genocide and terrorism. Some states have enlarged upon the “grave breaches” of the Geneva Conventions by including other violations of the laws and customs of war. Some states have also provided for universal jurisdiction in the case of crimes against humanity, based on their national legislation. In all of these cases, the application of national legislation has always been with respect to situations in which the accused was in the custody of the enforcing state. Thus, national state law and judicial practice has always required at least the presence of the accused in the territory of the enforcing state or whenever the victim or perpetrator is a national of the enforcing state. A brief discussion of these national laws and judicial opinions follows.

The French Penal Code is an example of national legislation that provides for universal jurisdiction if required by treaty and if domestic implementing legislation is in place, but none has been adopted except for the ICC treaty whose statute, as discussed above, allows for universal jurisdiction when a situation is referred to it by the Security Council. France’s Criminal Code defines genocide and crimes against humanity but does not specifically provide for universal jurisdiction, though by implication it is possible for French law to provide for it.²⁰⁷

206. *Id.* at 582. See YORAM SHEFTEL, DEFENDING “IVAN THE TERRIBLE”: THE CONSPIRACY TO CONVICT JOHN DEMJANJUK (1996).

207. CODE PÉNAL art. 212-1 (Daloz ed. 2000). For a discussion of France’s three major prosecutions of Barbie, Touvier, and Papon, see Leila Sadat Wexler, *The French Experience*, in 3 INTERNATIONAL CRIMINAL LAW 273-300 (M. Cherif Bassiouni ed., 2d ed. 1999). See also Brigitte Stern, International Decision, *Universal Jurisdiction over Crimes Against Humanity Under French Law*, 93 AM. J. INT’L L. 525 (1999); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 270-76 (1997); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOC. INQUIRY 191 (1995); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289 (1994).

The French Cour de Cassation, in a 1998 judgment (Cass. crim., 6 Jan. 1998, *Bull. crim.*, no.

France's criminal jurisdiction has extraterritorial reach based on territorial impact, national security, protection of currency against counterfeiting, nationality of victim or perpetrator. For "active personality," the condition of "double criminality" is required. Article 113-8 of the French Penal Code²⁰⁸ prohibits the exercise of jurisdiction in cases of prior conviction or acquittal. The public prosecutor acting pursuant to a victim's complaint must commence all criminal actions.²⁰⁹ Article 113-11 (1) extends jurisdiction for crimes on board of, or against, aircrafts, whenever the aircraft lands in French territory. Thus, other than the presence of the aircraft in its territory, that jurisdiction is universal. Article 113-12 extends jurisdiction on the high seas without any connection to territory or nationality link or protected interest impact, whenever international conventions and French law provide for it. That too can be viewed as a form of universality of jurisdiction. No specific provision in the jurisdiction article refers to *jus cogens* international crimes whose definitions are contained in Book II of the Code Pénal.

Book II of the Code Pénal deals with crimes against persons. It starts with Article 211-1, *Du Genocide*, and Article 212-1, *Des Autres Crimes Contre l'Humanité*. These articles define the two crimes respectively, but do not include any reference to jurisdiction. In the Code's structure, jurisdiction is covered in Article 113, as referred to above. But there is no legislative provision that established universal jurisdiction for these crimes. Frédéric Desportes and Francis Le Gunehec state:

« 194.—Les insuffisances du dispositif législatif. Les crimes contre l'humanité relevant des règles ordinaires de compétence et de procédure. Si, effectivement, le particularisme ne se justifie pas en la matière, il est possible en revanche de regretter en d'autres domaines quelques insuffisances dans le dispositif

2, Rép pén. Dalloz 2000), considered that universal jurisdiction was applicable in the case of genocide in accordance with Article 689-2 of the French Code of Criminal Procedure. The question was also raised as to whether or not torture should be subject to universal jurisdiction. Commentators also take the position that there would be universal jurisdiction as part of France's obligations to implement Security Council Resolution 827, which established the ICTY, and Resolution 955, which established the ICTR. Based on this reasoning, it could also be assumed that France's implementation of the ICC Statute would justify its exercise of universal jurisdiction.

208. YVES MAYAND, *Code Pénal; Nouveau code pénal, ancien code pénal* (87th ed. Dalloz 2000).

209. *See Id.*, Art. 113-8.

législatif.

Ainsi, il n'a été prévu aucune disposition particulière concernant l'application de la loi française et la compétence des juridictions françaises pour le jugement des crimes commis à l'étranger. En pareil cas, la répression n'est possible, selon les règles générales, que si les crimes ont été commis par un français ou sur la personne d'un français. Cette limitation s'accorde assez mal avec la nature des crimes contre l'humanité. Il aurait été convenable et conforme au droit international de conférer en la matière, comme en bien d'autres, une compétence universelle aux juridictions françaises;

On peut se demander toutefois si les dispositions des Conventions de Genève du 12 août 1949 ne leur ont pas donné directement une telle compétence pour un certain nombre « *d'actes graves* ». En effet, ces conventions comportent une disposition ainsi rédigée « chaque partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis, ou d'avoir ordonné de commettre, l'une ou l'autre de ces infractions graves et elle devra les déférer à ses propres tribunaux, quelle que soit leur nationalité. Elle pourra aussi, si elle le préfère (. . .) les remettre pour jugement à une autre Partie contractante ». La chambre d'accusation de Paris, saisie par des ressortissants bosniaques rescapés des camps de détention serbes, n'a pas consacré cette interprétation, estimant que les Conventions de Genève étaient dépourvues d'effet en droit interne et qu'elles ne pouvaient des lors recevoir application en l'absence de texte portant adaptation de la législation française à leurs dispositions (Ch. Acc. Paris, 24 nov. 1994, Javar et autres, inédit). Il serait cependant possible, pour retenir la compétence des juridictions françaises, de se fonder sur la Convention contre la torture de New York du 10 décembre 1984, à condition toutefois que l'auteur soit « trouvé en France » (et sur l'ensemble, Cl. Lombois, *De la compétence territoriale*, R.S.C., 1995, p. 399) ». ²¹⁰

Thus, France does not provide for universal jurisdiction for genocide

210. Frédéric Desportes & Francis Le Guehec, in *LE NOUVEAU DROIT PÉNAL: DROIT PÉNAL GENERAL* (4th ed., 1997).

and crimes against humanity, and that also appears to be the case under French military law for war crimes.²¹¹

Legislation that provides for universal jurisdiction only if there is a territorial connection can be seen in the domestic enactments of Canada and Germany. Among the number of states that have enacted national legislation of a universal reach, Canada's 1985 law (Can. Criminal Code § 7(3.71),²¹² which allows for retrospective jurisdiction over the crimes of genocide, crimes against humanity, and war crimes, provides that, at the time of the crime, the conduct constituted a crime under international law as well as under Canadian law, the defendant was within the territorial jurisdiction of Canada, Canada was at war with the country when the crime occurred, and the crime occurred in the territory of that country or was committed by one of its citizens. All of this points to a territorial or sovereign connection that does not exactly make Canada's jurisdiction truly universal. As the Canadian Supreme Court noted in *Regina v. Finta*:

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil *only when the conditions specified in s. 7(3.71) are satisfied*. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the *nature* of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute individuals such as Imre Finta is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity. As Cherif Bassiouni has very properly observed, a war crime or a

211. See, however, GILBERT AZIBERT, CODE DE PROCÉDURE PÉNAL 2000, at 459 *et seq.* (12th ed. LITEC 2000), where he comments on extraterritorial jurisdiction, but does not refer to universal jurisdiction. Nevertheless, the Code permits universal jurisdiction if it is included in an international convention that France has ratified, provided that the crime in question is also a crime under French law. This is provided for in Articles 689-2 to 689-7 of the CODE DE PROCÉDURE PÉNAL. *Id.*, AZIBERT at 313-14. See also R. Koering-Joulin, "Jurisclasseur de Procédure Pénale" fasc. 20, No. 91. See, e.g., CLAUDE LOMBOIS, LE DROIT PÉNAL INTERNATIONAL (1979); ANDRÉ HUET & RENÉE KOERING-JOULIN, LE DROIT PÉNAL INTERNATIONAL (1994).

212. Criminal Code § 7(3.71) (Can.).

crime against humanity is not the same as a domestic offence.²¹³

Section 6 of the German Criminal Code has frequently been referred to as providing for universal jurisdiction.²¹⁴ It provides that “German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad: (1) genocide”²¹⁵ In 1999, however, the German Federal Supreme Court required a “legitimizing connection” before jurisdiction in Germany would attach.²¹⁶ This connection could take the form of a familial link or former domicile. The German judiciary introduced this requirement based upon concerns that the exercise of such jurisdiction would interfere with the sovereignty of other states.

In addition, Section 6(9) of the German Criminal Code allows for the application of German criminal jurisdiction for acts covered by “an international agreement binding on the Federal Republic of Germany . . . if they are committed abroad.”²¹⁷

213. *Regina v. Finta*, [1994] 1 S.C.R. 701, 811 (Cory, J.) (first emphasis added) (citation omitted).

214. Section 6, which is entitled “Acts Abroad Against Internationally Protected Legal Interests,” provides as follows:

German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

genocide (Section 220a); serious criminal offenses involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310; assaults against air and sea traffic (Section 316c); trafficking in human beings (Section 180b) and serious trafficking in human beings (Section 181); unauthorized distribution of narcotics; dissemination of pornographic writings in cases under Section 184 subsection (3) and (4); counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152a subsections (1) to (4)), as well as their preparation (Sections 149, 151, 152 and 152a subsection (5)); subsidy fraud (section 264); acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

§ 6, *StGB*.

215. *Id.* § 6 (1).

216. German *Bundesgerichtshof*, Urteil vom. 30, Apr. 1999, 3StR 215/98. See Article 211 for genocide and Article 212 for crimes against humanity. France’s 1996 criminal code has a similar provision. See also M. Cherif Bassiouni, *Crimes Against Humanity*, in 1 INTERNATIONAL CRIMINAL LAW 521, 584-86 (M. Cherif Bassiouni ed., 2d ed. 1999).

217. § 6(9), *StGB*; see also § 7, *StGB*. Section 7, which is entitled “Applicability to Acts Abroad in Other Cases,” states:

German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

Italy's criminal code, Article 7, also provides for extraterritorial criminal jurisdiction, but requires a nationality or territorial connection.²¹⁸ Switzerland adopted legislation extending universal jurisdiction over the three crimes of genocide, crimes against humanity, and war crimes.²¹⁹

Switzerland's *Code Pénal Militaire*, enacted by the Federal law of 13 June 1927 and amended up to 29 February 2000, contains a jurisdictional basis for universal jurisdiction in Article 9, which states in paragraph 1: "Le présent code est applicable aux infractions commises en Suisse et à celles qui ont été commises à l'étranger." Chapter 6, Articles 108-109 are also a basis for universal jurisdiction for "infractions commises contre le droit des gens en cas de conflit armé." But more conclusive is Article 6 *bis* of the *Code Pénal*, which states:

1. Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit que la Confédération, en vertu d'un traité international, s'est engagée à poursuivre, si l'acte est réprimé aussi dans l'Etat où il a été commis et si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger. La loi étrangère sera toutefois applicable si elle est plus favorable à l'inculpé.
2. L'auteur ne pourra plus être puni en Suisse: s'il a été acquitté

German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

- was a German at the time of the act or became one after the act; or
- was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.

StGB, § 7. On February 12, 2001, the Constitutional Court of Germany affirmed a judgement convicting a Bosnian Serb for Genocide in Bosnia in accordance with § 200a StGB, the German Penal Code. See also Article 6-1 of the German criminal code; HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHT ALLEGEMEINES TEIL*, 170 (5th ed., 1996). As to Spain, see Article 23 of the Spanish criminal code; RODRIGUEZ DEVESEA AND ALFONSO SERRANO GOMEZ, *DERECHO PENAL ESPANOL: PARTE GENERAL*, 226 et. seq. (17th ed. 1994).

218. See 3 *CODICE PENALE: ANNOTATO CON LA GIURISPRUDENZA* 103-14, arts. 7, 8, 9 (and commentary) (S. Beltrani, F. Caringella & R. Marino eds., Oct. 1996). See also ANTONIO PAGLIARO, *PRINCIPI DE DIRITTO PENALE: PARTE GENERALE*, 145-46 (7th ed., 2000); FERRANDO MANTOVANI, *DIRITTO PENALE*, 951 et. seq. (4th ed. 2001).

219. See CHRISTIAN FAVRE, MARC PELLET & PATRICK STOUDEMANN, *CODE PENAL ANNOTE* (1997). Cf. Didier Pfitter, *The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes*, 32 *CORNELL INT'L L.J.* 499 (1999) (discussing Switzerland's Elements proposal on war crimes).

dans l'Etat où l'acte a été commis, pour le même acte par un jugement passé en force; s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite.

On the basis of that law, Switzerland recently prosecuted and convicted a former Rwandan mayor for war crimes.²²⁰ A number of states have legislation with extra-territorial reach, including universal jurisdiction. Australia has two statutes; the Geneva Conventions Act (1957), whose § 6 and 7 provide for universal jurisdiction for "grave breaches," while the War Crimes Act (1945) (Cth), No. 48, also has universal jurisdiction which resulted in the case of *Polyukhovich v. Commonwealth of Australia and Another*.^{220a}

Austria's Penal Code, Article 64, as well as 65.1.2 provides for universal jurisdiction for *aut dedere aut judicare*. It applied its jurisdiction in the case of a crime committed in the conflict in the former Yugoslavia, where the accused was present in Austria, *Republic of Austria v. Cvjetkovic*.^{220b} Denmark's Penal Code Art. 8(5) is similar to that of Austria's, and has been applied in a similar case, *Director of Public Prosecutions v. T.*^{220c}

Belgium²²¹ probably has the most far-reaching legislation, which has been described as follows:

Belgium probably provides for the most extensive exercise of universal jurisdiction over human rights crimes of any country. Belgian courts can try cases of war crimes (internal or international), crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium. As a practical matter, however, courts are not likely to pursue an

220. See Coupable de crimes de guerre et d'assassinat, le maire rwandais est condamné à la perpétuité, *Le Temps*, May 1, 1999.

220a. [1991] 172 C.L.R. 501 (Austl.).

220b. The 1994 case is discussed in Chandra Lekha Sriram, *Contemporary Practice of Universal Jurisdiction: Disjointed and Disparate, Yet Developing*, in PRINCETON PROJECT ON UNIVERSAL JURISDICTION (Princeton Univ., forthcoming 2001).

220c. E. High Ct., 3d Div. Den. 1994. The case, which involved defendant Refic Saric, is discussed in Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341-42 (1999).

221. Act Concerning the Punishment of Serious Violations of International Humanitarian Law § 7 (Belgium).

investigation unless Belgium has a real connection to the case.²²²

The first application of this new law was in March 2001 in the Court of Assises. The accused were two Benedictine sisters, a former professor at the National University of Rwanda (since then at the Catholic University of Louvain), and a former businessman and Minister (husband of the daughter of the personal doctor of the President Habiarimana). All four have been tried and convicted, but all four were physically present in Belgium at the time they were charged with these crimes.

This was not the case, however, when on April 11, 2000, Belgium issued an international arrest warrant against Mr. Abdoulaye Yerodia Ndombasi, the Democratic Republic of Congo's acting Minister of Foreign Affairs.²²³ The warrant was issued by Mr. Vandermeersch, examining judge at the Brussels Tribunal of first instance, pursuant to Belgium's amended Article 7, and sought his extradition for alleged "grave violations of international humanitarian law."²²⁴ On October 17, 2000, Congo filed an Application with the ICJ requesting that the Court annul Belgium's arrest warrant. Congo challenged Belgium's assertion of extraterritorial jurisdiction, as well as the propriety of Article 5 of the Belgian law, which negates an official immunity.

On December 8, 2000, the ICJ issued an order denying the Congo's request for provisional measures because, as a result of Mr. Yerodia's reassignment from his former position as Minister of Foreign Affairs, the Congo was unable to demonstrate irreparable injury.²²⁵ The court, however, unanimously rejected Belgium's request that the case be removed from the docket.²²⁶ The case before the ICJ raises two related

222. HUMAN RIGHTS WATCH, *supra* note 1, at 8.

223. Press Release, Congo v. Belgium (Oct. 17, 2000), at http://www.icj-cij.org/icjwww/ipre...ipresscom20002000-32_COBE_20001017.htm.

224. *Id.*

225. Arrest Warrant of 11 April 2000 (Congo v. Belg.), at 19 (Order) (Dec. 8, 2000), at http://www.icj-cij.org/icjwww/idoc.../icobe_iorder_provisional_measure_20001208.htm.

[F]ollowing the Cabinet reshuffle of 20 November 2000, Mr. Yerodia Ndombasi ceased to exercise the functions of Minister of Foreign Affairs and was charged with those of Minister of Education, involving less frequent foreign travel; . . . it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures.

Id.

226. *Id.* at 20.

but separate issues. The first is whether Belgium's universal jurisdiction without any connection to that state is a valid exercise of what may be viewed as a form of extraterritorial jurisdiction. The second is whether the exercise of such universal jurisdiction contravenes the 1969 Vienna Convention on Diplomatic Relations.

With respect to the first issue, this case is, for all practical and legal purposes, a case of first impression as there has never before been a state with such extraterritorial jurisdictional reach. One way of considering this issue is to balance the positive effects of such legislation on the enforcement of international criminal law with respect to *jus cogens* crimes against the negative effects of potentially disrupting the stability, and predictability of the international legal order and its potential for infringing upon human rights because of the possibilities of politically motivated, vexatious prosecutions, and its potential for multiple prosecutions (in light of the non-applicability of *non bis in idem* to prosecutors by separate sovereigns).

A solution that would preserve the positive effects and mitigate the negative ones is to recognize a state's right to enact such legislation, but not to recognize a state's power to seek to enforce such legislation beyond that state's territory, unless a nexus can be shown to exist with the enforcing state, such as the physical presence of the accused in that state. The result would be that Belgium's law would be declared not to be in violation of international law, but that its attempt to secure the arrest of the accused outside its territory would be invalid unless it can be shown for enforcement purposes that a nexus to the enforcing state exists.

With respect to the second issue, the 1969 Vienna Convention on Diplomatic Relations is not only binding upon Belgium as a treaty obligation, but is also binding upon it as customary international law insofar as the Convention codifies customary international law, which has not been derogated by any state.

In summary, there is no other country that allows for the exercise of such universal jurisdiction.²²⁷ There are, however, a number of

227. Cf. HUMAN RIGHTS WATCH, *supra* note 1, at 9-10.

Following the genocides in the former Yugoslavia and Rwanda, a number of European countries brought perpetrators to trial on the basis of universal jurisdiction. In **Belgium**, a Rwandan, Vincent Ntezimana, was arrested and charged with genocide. In **Germany**, the Bavarian High Court sentenced a Bosnian Serb, Novislav Djajic, to five years imprisonment in 1997 under the Geneva Conventions for aiding and abetting the killing of fourteen Muslim men in

contemporary national enactments that provide for expanded extraterritorial criminal jurisdiction with respect to its nationals, or when its nationals have been the subject of criminal violations, or when conduct abroad has had a domestic impact deemed to be criminal.

The sum total of national experience, whether in legislative or judicial practice, does not evidence that the application of universal jurisdiction in state practice has risen to the level of customary international law.

International law sources and national law sources must be assessed to determine whether each category offers sufficient evidence of *opinio juris* and practice at the international or national levels to justify the assertion that universal jurisdiction, with or without the existence of a nexus to the enforcing state, is part of customary international law.

As stated above, a number of conventions provide, implicitly or explicitly, for universal jurisdiction with respect to certain international crimes, some of which are deemed part of *jus cogens*. With respect to the latter category, there exists a legal obligation embodied in the maxim *aut dedere aut judicare*, to prosecute or extradite, and where appropriate to punish those accused, charged or convicted of *jus cogens* crimes. This is an inderogable obligation incumbent upon all states as a consequence of the *jus cogens* character of these crimes. Thus, it is an

Bosnia in 1992. A former leader of a paramilitary Serb group, Nikola Jorgic, was convicted on eleven counts of genocide and thirty counts of murder, and sentenced to life imprisonment by the Düsseldorf High Court. A third case is pending against a Bosnian Serb charged with genocide before the Düsseldorf High Court. In Denmark, Bosnian Muslim Refik Saric is currently serving an eight-year sentence for war crimes, charged under the Geneva Conventions with torturing detainees in a Croat-run prison in Bosnia in 1993. In April 1999, a Swiss military court convicted a Rwandan national of war crimes[,] but held it had no jurisdiction over genocide and crimes against humanity. A Bosnian Serb was indicted but acquitted of war crimes. The Netherlands is prosecuting a Bosnian Serb for war crimes before a military court. France is currently prosecuting a Rwandan priest, Wenceslas Munyeshyaka, for genocide, crimes against humanity, and torture. In addition, in July 1999, French police arrested a Mauritanian colonel, Ely Ould Dah, who was studying at a French military school, on the basis of the U.N. Convention against Torture, when two Mauritanian exiles came forward and identified him as their torturer. Ould Dah, free on bail, slipped out of France in March 2000, however. In February 2000, a Senegalese court indicted the exiled dictator of Chad, Hissène Habré, on torture charges. In 1997, the United Kingdom arrested a Sudanese doctor residing in Scotland for alleged torture in Sudan, but later dropped the charges, apparently for lack of evidence. In August 2000, Mexico arrested Ricardo Miguel Cavallo, a former Argentine military official. Judge Garzón of Spain has filed an extradition request for Cavallo based on the torture and "disappearance" of over 400 people. *Id.* See *Universal Jurisdiction in Respect of Gross Human Rights Offenses*, *supra* note 1, at 22-29; *Universal Jurisdiction in Europe*, *supra* note 1, at 16-47.

obligation *erga omnes* that is binding even upon states that refuse to recognize such an obligation.

It may appear tautological to add that such an obligation exists because it arises also under customary international law, but it is not because it is customary international law that it is elevated to the level of *jus cogens*. In addition, “general principles of law” also have also been the basis for the elevation of certain international crimes to the level of *jus cogens*. Furthermore, the writings of the most distinguished publicists also support the proposition that *jus cogens* crimes require the application of universal jurisdiction when other means of carrying out the obligations deriving from *aut dedere aut judicare* have proven ineffective. In fact, it could be argued that the establishment of international investigative and judicial organs since WWII, such as the IMT, IMTFE, ICTY, ICTR and ICC embody the very essence of *aut dedere aut judicare* with respect to *jus cogens* crimes. There is no doubt that each one of these sources of international law is by itself insufficient to establish the proposition that universal jurisdiction applies to *jus cogens* crimes, but it is the cumulative effect of these sources that does. This proposition may run contrary to a purist theory of international law that requires each source of law to rise to a certain level of legal sufficiency in order to achieve the status of binding international law. But if the proposed theory of cumulating sources of international law that have not, each in their own right, achieved the level of legal sufficiency is accepted, then it can be concluded that universal jurisdiction is at the least recognized with respect to *jus cogens* crimes, if not required.

The other category that needs to be assessed is that of national law including both national legislation and judicial practice. Both of these, however, reveal that only a few states have universal jurisdiction, and only two have universal jurisdiction without any nexus to the enforcing state, and that only four judicial decisions have been rendered that support universal jurisdiction, whether with or without means to the enforcing state. On the other hand, many states have extraterritorial criminal jurisdiction that reaches those who commit international crimes, whether *jus cogens* or not, and this represents in practice the maxim *aut dedere aut judicare*. Here, again, the international law purist can challenge this proposition by arguing that the existence of extraterritorial criminal jurisdiction does not necessarily evidence the *opinio juris* of states in respect of the maxim. The answer to that may be

reminiscent of a sophist's argument, namely: if not that, then what? But a more prosaic argument is: if states extend their national criminal jurisdiction extra-territorially to prosecute more persons charged with international crimes, is that not in itself evidence of their intentions to enforce international criminal law? Granted, most of these national laws are aimed at prosecuting nationals who commit crimes abroad, or non-nationals who commit crimes abroad against the nationals of the state having such legislation, or at nationals and non-nationals who, while abroad, commit acts which have a national impact or effect deemed to be criminal under national legislation. But does that change the impact of that extraterritorial national legislation which also reaches these very same persons when they also commit international crimes?

National legislation and national judicial practice is presently insufficient to establish an international customary practice with respect to universal jurisdiction. But, that limited practice combined with the large number of states that have extraterritorial criminal jurisdiction that also reaches persons accused of international crimes may constitute a sufficient legal basis to conclude that there exists at least a duty to prosecute or extradite, and, where appropriate, to punish persons accused, charged or convicted of international crimes. If that proposition is accepted, then it follows that when available jurisdictional means are ineffective, universal jurisdiction should apply. Once again, this argument may not sit well with the international law purist, but at the risk of raising a sophist's argument: if that is not the case, then what?

I would add that it would be a valid argument to propose that the cumulative weight of international law sources and national legislation and judicial practices can be deemed sufficient to find the existence of universal jurisdiction for *jus cogens* and even other international crimes.

Lastly, I propose what international law's progressive thinkers would call a policy argument. That argument simply put, is that in the era of globalization, international compensation is necessary to combat crime, whether international crimes or domestic crime, and the only way by which this is achievable is through the obligation to prosecute or extradite and where appropriate to punish persons accused, charged or convicted of a criminal offense, whether it be international or domestic. To implement such a policy requires the closing of certain jurisdictional gaps consistent with the preservation of the international legal order and respect for and observance of international human rights law. The

closing of such gaps is through universal jurisdiction. Thus, one way of reaching the recognition of universal jurisdiction is through the obligation of *aut dedere aut judicare*. This does not, however, diminish the recognition of universal jurisdiction as *actio populares* or on any other legal or policy bases.

VII. CONCLUSION

The historical evolution of *jus cogens* international crimes from their recognition as being offensive to certain values to their universal condemnation and finally to their universal proscription developed in different ways. But, the distinctive historical evolution of each of these *jus cogens* international crimes is no different than that of other international crimes.²²⁸ The emergence, growth and inclusion in positive international criminal law of international crimes went through different stages and gestational periods.²²⁹ Piracy, slavery and war crimes have evolved over centuries through declarative prescriptions and later in enforcement proscriptions,²³⁰ while some crimes like genocide, *apartheid*, and torture did not. They became international crimes by virtue of their separate embodiment, each in a single convention adopted in 1948, 1973, and 1984 respectively, without prior gestation in other stages of evolution.²³¹ Crimes against humanity, however, had a short gestational period between 1919, when the crime was first proposed and almost accepted, and 1945, when it was embodied in positive international criminal law in the Nuremberg Charter.²³² Since then it has been included in the statutes of the ICTY, ICTR, and ICC, but there is still no specialized convention on that category of crimes as there is with war crimes, genocide, *apartheid*, and torture.²³³ But the

228. See Bassiouni, *Sources and Content*, *supra* note 33, at 46-100.

229. M. Cherif Bassiouni, *Enforcing Human Rights Through International Criminal Law and Through an International Criminal Tribunal*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 347 (Louis Henkin and Lawrence Hargrove eds., 1994).

230. The category of war crimes continues to be augmented to reflect different practices and more detailed regulations, slave-related practices have not, as mentioned above. See *supra* notes 107-131 and accompanying text.

231. See *supra* note 33.

232. For that historical evolution, see BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 26.

233. The only logical method of dealing with these problems of uneven development of international criminal law is to codify it, but it regrettably appears that governments do not support this proposition, consequently international criminal law will continue to suffer from a

conventions relative to those crimes do not all have clear provisions, and in some cases, no provisions at all, on universal jurisdiction. It is their status as *jus cogens* crimes that implies that universal jurisdiction exists.

Universal jurisdiction, as discussed above, resembles a checkerboard. Some conventions recognize it and some national practices of states demonstrate its existence, but it is uneven and inconsistent. Most of all, the practice of states does not evidence its consistent or widespread application.

The confusion about universality is that it has at least five meanings:

- (1) universality of condemnation for certain crimes;
- (2) *universal reach* of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others;
- (3) extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation);
- (4) *universal reach* of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and
- (5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.

The diverse meanings attributed to universal jurisdiction have probably been among the reasons why confusion has surrounded its legal significance. Similarly, the diverse theories of extra-territorial jurisdiction that were applied by international and national judicial bodies have also contributed to this confusion. But the writings of scholars added to the confusion when they expressed in *lex lata* terms what may have been *de lege ferenda* or only expected *desiderata*.

What truly advanced the recognition and application of universal jurisdiction has been the acceptance of the maxim *aut dedere aut judicare* as an international *civitas maxima*. The duty to prosecute or extradite and, where appropriate, to punish persons accused of or convicted of international crimes, particularly *jus cogens* crimes

number of legislative and other deficiencies. See, e.g., M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

because of their heinous nature and disruptive impact on peace and security, necessarily leads to the recognition of universal jurisdiction as a means of achieving the goals of *aut dedere aut judicare*.

The writings of scholars have driven the recognition of the theory of universal jurisdiction, particularly for *jus cogens* international crimes. These writings reflect idealistic universalistic views, as well as pragmatic policy perspectives.

The combination of international and national sources of law has produced a cumulative effect sufficient to warrant the recognition of universal jurisdiction for *jus cogens* crimes. Universal jurisdiction is the most effective method to deter and prevent international crimes by increasing the likelihood of prosecution and punishment of its perpetrators. This approach to international criminal accountability is also believed to be a factor in reducing impunity for the perpetrators of these crimes.²³⁴

A dynamic interaction exists between: (1) international and national norms of international criminal law; (2) international and national processes for the enforcement of international criminal law; and (3) state and non-state actors' cooperation in the development of norms and processes and in their implementation. This dynamic interaction is

234. See Jennifer L. Balint, *The Place of Law in Addressing International Regime Conflicts*, 59 *LAW & CONTEMP. PROBS.* 103 (1996); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 *LAW & CONTEMP. PROBS.* 9 (1996); Bassiouni, *Jus Cogens Crimes*, supra note 33; Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 *LAW & CONTEMP. PROBS.* 29 (1996); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 *LAW & CONTEMP. PROBS.* 197 (1996); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 *LAW & CONTEMP. PROBS.* 181 (1996); Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 *LAW & CONTEMP. PROBS.* 173 (1996); Joyner, supra note 150; Neil J. Kritz, *Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 127 (1996); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 *LAW & CONTEMP. PROBS.* 81 (1996); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 75 (1996); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 *LAW & CONTEMP. PROBS.* 93 (1996); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 *LAW & CONTEMP. PROBS.* 41 (1996); see also *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference*, 17-21 September 1998, in 14 *NOUVELLES ÉTUDES PÉNALES* (Christopher C. Joyner, ed., 1998); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L. REV.* 2537 (1991).

breaking down traditional compartmentalization between international and national law.²³⁵ As a result, hybrid norms and processes have developed that include both international and national characteristics and incorporate the combined supportive roles of state and non-state actors in the development of norms and processes, as well as in their implementation. This dialectical relationship, which some call “complementarity,” is, however, even more complex. It is an amorphous and changing process that is difficult to define, predict, or assess, other than to recognize that it is both growing and evolving. The fact that it is, in part, the product of contingent circumstantial and occasional factors does not diminish its continued growth.

The policy-based assumptions and goals of universal jurisdiction are that such a jurisdictional mechanism, when relied upon by a large number of states, can prevent, deter, punish, provide accountability, and reduce impunity for some international crimes, and that can enhance the prospects of justice and peace. Irrespective of the checkered nature of the recognition and application of universal jurisdiction in international and national law and practice, the policy arguments advanced in its favor, particularly in light of the historic record of impunity that has benefited so many of the perpetrators of these crimes for so long, support its application. But universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of the international legal processes.²³⁶ If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denial of justice. In addition, there is the danger that universal jurisdiction may be

235. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 707 (1988).

The international system of states is fundamentally different from any national community of persons and of corporate entities. It is not helpful to ignore those differences or to cling to the reifying notion that states are “persons” analogous to the citizens of a nation. Some of the differences are of great potential interest. In a nation, Machiavelli noted, “there cannot be good laws where there are not good arms.” In the international community, however, there are ample signs that rules unenforced by good arms are yet capable of obligating states and quite often even achieve habitual compliance.

Id. (footnote omitted).

236. This highlights a significant reason why universal jurisdiction should not be exercised over all international crimes.

perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.

To avoid these and other negative outcomes, while enhancing the positive outcomes of an orderly and effective application of universal jurisdiction, it is indispensable to arrive at norms regulating the resort by states and international adjudicating bodies to the application of this theory.²³⁷ At first, guidelines should be developed that in time may garner consensus among scholars and, ultimately, among governments. At that stage, an international convention should be elaborated so that these guidelines can become positive international law:

The history of contemporary international law is replete with examples of scholarly and NGO initiatives that have set in motion a process that ripened into conventional international law. The Princeton Project on Universal Jurisdiction, whose Principles on Universal Jurisdiction are attached, is one of these instances, and hopefully it will result in an international convention on universal jurisdiction for *jus cogens* and other international crimes that includes jurisdictional priorities, provides rules for resolving conflicts of jurisdiction, and minimizes the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice.²³⁸

237. The series of Restatements of certain aspects of U.S. law is an interesting model. However, since there is no Restatement on criminal law, the closest analogy is the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, which, in Section 6, includes a policy-oriented approach to choice-of-law. It states:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 at 10 (1971). While such a choice-of-law approach can work in a federal system linked by a Constitution that contains a “full-faith and credit” clause, U.S. CONST. art. IV, § 1, it may not work effectively at the international law level. Consequently, a more hard-fast normative approach may be more appropriate in the international context.

238. While this writer strongly supports this outcome, it must be noted that a similar effort undertaken in 1967 by the International Association of Penal Law resulted in the adoption of the

As the French philosopher Pascal once said, "Every custom has its origin in a single act," and in this case, there is ample evidence of many such acts. However, it is their cumulative effect which gives weight to the proposition that universal jurisdiction is part of customary international law. Nevertheless, the fact that there is a customary international law recognition of universal jurisdiction does not imply that it can be exercised with respect to all international crimes or that it can be exercised by all states without limitations. The question of to which crimes universal jurisdiction applies is still an unsettled question, though there is more generalized agreement that it includes piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, and by convention, torture and some international terrorism crimes. In addition, customary international law has not yet settled the issue of whether there needs to be a nexus to the enforcing state, such as the presence of the accused on its territory. There are also other issues that remain unresolved, such as the temporal immunity of heads of states and diplomats, a number of issues pertaining to the rights of the individual to prevent vexatious and multiple prosecutions, as well as how to ensure due process and fairness in the course of proceedings based on universal jurisdiction. Consequently, it can be said that the recognition of universal jurisdiction in customary international law is in its first stage of evolution, and that it has to be followed by other stages needed to clarify the rights and obligations of states in the exercise of this form of extra-territorial jurisdiction in order to maximize the benefits of universal jurisdiction and eliminate its potential for abuses.

1968 U.N. Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity. See U.N. Convention on the Non-Applicability of Statutes of Limitations, *supra* note 27. Forty-three states ratified it. See 37 REVUE INTERNATIONALE DE DROIT PÉNAL (1966). It can thus be assumed that at most the same number of states would support a Convention on universal jurisdiction. The more recent European Convention on Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European) has only a disappointing 2 ratifications. See European Convention on Non-Applicability of Statutory Limitations, *supra* note 28.

VIII. APPENDIX

THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION*

THE PARTICIPANTS IN THE PRINCETON PROJECT ON UNIVERSAL JURISDICTION PROPOSE THE FOLLOWING PRINCIPLES FOR THE PURPOSES OF ADVANCING THE CONTINUED EVOLUTION OF INTERNATIONAL LAW AND THE APPLICATION OF INTERNATIONAL LAW IN NATIONAL LEGAL SYSTEMS:

Principle 1 — Fundamentals of Universal Jurisdiction

1. For purposes of these principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such a judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle

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2(1), provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.

4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

Principle 2 — Serious Crimes Under International Law

1. For purposes of these principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

Principle 3 — Reliance on Universal Jurisdiction in the Absence of National Legislation

With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.

Principle 4 — Obligation to Support Accountability

1. A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or

convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and undertaking such other necessary and appropriate measures as are consistent with international norms and standards.

2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms.

Principle 5 — Immunities

With respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 6 — Statute of Limitations

Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1).

Principle 7 — Amnesties

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle in 2(1).
2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Principle 8 — Resolution of Competing National Jurisdictions

Where more than one state has or may assert jurisdiction over a

person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its national judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

- a) multilateral or bilateral treaty obligations;
- b) the place of commission of the crime;
- c) the nationality connection of the alleged perpetrator to the requesting state;
- d) the nationality connection of the victim to the requesting state;
- e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
- f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- g) the fairness and impartiality of the proceedings in the requesting state;
- h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- i) the interests of justice.

Principle 9 — Non Bis In Idem/Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.
2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial

body or a competent international judicial body exercising such jurisdiction, in accordance with international due process norms.

3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of *non bis in idem* in opposition to any further criminal proceedings.

Principle 10 — Grounds for Refusal of Extradition

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.
2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

Principle 11 — Adoption of National Legislation

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

Principle 12 — Inclusion of Universal Jurisdiction in Future Treaties

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

Principle 13 — Strengthening Accountability and Universal Jurisdiction

1. National judicial organs shall construe national law in a manner that is consistent with these Principles.
2. Nothing in these principles shall be construed to limit the rights and obligations of a state to prevent or punish, by lawful means recognized under international law, the commission of crimes under international law.
3. These principles shall not be construed as limiting the continued development of universal jurisdiction in international law.

Principle 14 — Settlement of Disputes

1. Consistent with international law and the Charter of the United Nations states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice.
2. Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person's eventual appearance before the national judicial organs of the state seeking to exercise its jurisdiction.