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Expanding the Scope of Universal Jurisdiction through Municipal Law: From Piracy to the Crime of Aggression via the Eichmann Trial

Seta Makoto*

7.1. Introduction

Under contemporary international law, the concept of universal jurisdiction has been established and used extensively in the manner defined by the Princeton Principles. According to Principle 1.1,

> 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.[1]

Although universal jurisdiction is sometimes defined so as to include the jurisdiction exercised by international criminal tribunals,[2] in this chapter universal jurisdiction means exclusively the competence of states. Therefore, international bodies such as the post-Second World War Nuremberg Military Tribunals cannot exercise universal jurisdiction in the sense used

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1 Stephen Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, NJ, 2001, p. 28.

2 For example, Leila Nadya Sadat divides universal jurisdiction into two categories. One is "universal inter-state jurisdiction", the competence of states; and the other is "universal international jurisdiction" which is exercised by the international community. Leila Nadya Sadat, "Redefining Universal Jurisdiction", in *New England Law Review*, 2001, vol. 35, no. 2, p. 246.

in this chapter.[3] Although some commentators describe the Nuremberg Military Tribunals as American tribunals,[4] this is legally incorrect given the fact that their jurisdiction stemmed from the Allied Control Council.[5] As a result, the judgments of the Nuremberg Military Tribunals are not regarded as a precedent to exercise universal jurisdiction.

While there has not been any dispute over the origins of universal jurisdiction, that is, piracy, the current scope of the jurisdiction, specifically which crimes are subject to universal jurisdiction, is controversial. For example, in the *Arrest Warrant* case heard before the International Court of Justice ('ICJ'), the Democratic Republic of Congo contested the legality of the exercise of universal jurisdiction by Belgium. It argued that the arrest warrant against its incumbent Minister of Foreign Affairs, which alleged gross human rights offences, was issued without any grounds. Because the Democratic Republic of Congo changed its strategy and did not argue the above point in the final submission, the ICJ did not answer this question.[6] However, some judges in their separate opinions criticised the decision of the majority for failing to examine whether Belgium could exercise universal jurisdiction over crimes against humanity.[7] Moreover, as a result of the Review Conference on the Rome Statute of the International Criminal Court ('Kampala Review Conference') in 2010, universal jurisdiction over the crime of aggression has become highly controversial.

Against this background, this chapter does not aim to clarify which concrete crimes are subject to universal jurisdiction, because this question may rely on practice and not theory. Rather, it proposes to analyse how

3 Although Michael P. Scharf examines whether the Nuremberg Tribunals exercised universal jurisdiction, his definition of universal jurisdiction is different from the one used in this chapter. Michael P. Scharf, "Universal Jurisdiction and the Crime of Aggression", in *Harvard International Law Journal*, 2012, vol. 53, pp. 374–79.

4 August von Knieriem, *The Nuremberg Trials*, trans. by Elizabeth D. Schmitt, Henry Regnery, Chicago, 1959, p. 100.

5 See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, pp. 109–18.

6 International Criminal Court ('ICJ'), *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000*, Judgment, 14 February 2002, paras. 45–46 (https://www.legal-tools.org/doc/c6bb20/).

7 ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, para. 16 ('Arrest Warrant case') (https://www.legal-tools.org/doc/23d1ec/).

municipal law works as the origins of universal jurisdiction. More specifically, the chapter delineates how municipal law can contribute to enlarging the scope of targeted crimes of universal jurisdiction under international law. To answer this question, the discussion addresses the Eichmann Trial, which is arguably the most important municipal trial and regarded as the historical origin of universal jurisdiction over gross human rights offences. Sections 7.3. and 7.4. examine the enlargement of the scope of universal jurisdiction in and after the Eichmann Trial, from both the substantive and procedural perspectives.

7.2. The Eichmann Trial

Adolf Eichmann was a member of German Nazi *Schutzstaffel* (SS) and played a role in the Holocaust and the Final Solution to systematically eliminate the Jewish population of Europe during the Second World War. After the war, Eichmann lived in Argentina under a false name, Ricardo Klement. However, on 11 May 1961 he was arrested and taken by Israel's intelligence service, Mossad, to Israel where eventually he faced execution.[8] During his criminal proceedings, Eichmann was prosecuted for offences under the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950 ('1950 Law'), including genocide, crimes against humanity and war crimes.[9] Before this trial, some courts of other states exercised jurisdiction over gross human rights offences on the basis of the universality principle. For example, British courts exercised universal jurisdiction over war crimes. That the Eichmann Trial was so unprecedented is due to the fact that the tribunal pursued criminal responsibility for all three crimes – genocide, crimes against humanity and war crimes – that are currently provided for in Articles 6, 7 and 8 of the ICC Statute, respectively.[10] Furthermore, due to this fact, the Israel's courts had to elaborate the "piracy analogy". The Jerusalem District Court sentenced Eichmann to death on 12 December 1961, and the Supreme Court of Israel denied his appeal and upheld the death sentence on 29 May 1962. In both

[8] For the chronology of the trial process, see Deborah E. Lipstadt, *The Eichmann Trial*, Schocken, New York, 2011, pp. 223–33.

[9] Israel, Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, 4 LSI 154. See "The Zyklon B Case", in United Nations War Crimes Commission (ed.), *Law Reports of Trials of War Criminals*, vol. 1, His Majesty's Stationery Office, London 1947, p. 103.

[10] Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Arts. 6, 7 and 8 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

judgments, Eichmann challenged the criminal jurisdiction of Israel's courts from the perspective of international law.

7.2.1. Protective Principle

While the District Court of Jerusalem relied on the protective principle,[11] the Supreme Court merely referred to the reasoning of the District Court and did not elaborate on it.[12] When confirming its jurisdiction based on the protective principle, the District Court postulated that states may exercise their jurisdiction when there is a connection or link between states and the offences in question. The District Court found the connection between the offences committed by Eichmann and Israel, because the offences were directed at the Jewish people, and there was a special relationship between the Jewish people and Israel. The District Court further stressed the fact that Israel was more concerned with the offences under the 1950 Law than other states, with reference to Georg Dahm's theory that the most concerned states may exercise jurisdiction if they do not violate international law.[13]

Moreover, the District Court carefully responded to the argument that only an existing state may exercise jurisdiction based on the protective principle; in other words, Israel, which did not exist when Eichmann committed the offences, could not rely on the protective principle. The District Court raised two counterarguments. First, it argued that the non-existence of Israel at the time Eichmann committed the offences would be problematic if the retroactive application of the 1950 Law were prohibited. However, according to the District Court, under international law there was no rule that prohibited retroactive application at that time. Isra-

[11] For the basic understanding of the protective principle, see Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, Dartmouth, Aldershot, 1994, pp. 2–3.

[12] Supreme Court of Israel, *Adolf Eichmann v. Attorney General*, Judgment, Criminal Appeal No. 336/61, 29 May 1962, para. 12 ('Supreme Court, Eichmann case'). In its judgment, the Supreme Court emphasised the passive personality principle as much as the protective principle. However, as far as the judgment of the District Court is literally analysed, this understanding is not correct. Dominic Lasok adopts similar view. According to him, "The Court concluded that […] the right of the State of Israel to punish the offenders is clearly derived from the protective principle"; Dominic Lasok, "The Eichmann Trial", in *International and Comparative Law Quarterly*, 1962, vol. 11, no. 2, p. 868.

[13] District Court of Jerusalem, *Attorney General of the Government of Israel v. Adolf Eichmann*, Judgment, Criminal Case No. 40/61, 12 December 1961, paras. 32–35 ('District Court, Eichmann case') (https://www.legal-tools.org/doc/aceae7/).

el's non-existence therefore did not prevent it from applying the 1950 Law. Second, the District Court stressed the continuity of the Jewish community. Since the United Kingdom exercised its jurisdiction over Palestine on the basis of a League of Nations Mandate, Jewish people continued to constitute a Jewish community, which was then in Israel. Considering this continuity, the District Court concluded that Israel was eligible to exercise its jurisdiction over offences under the 1950 Law.[14]

Certainly, it might be difficult to assert that the principle of *nullum crimen sine lege, nulla poena sine lege* (the legality principle) was a part of customary international law that restricted sovereign states at that time. Moreover, some commentators, including Hans W. Baade, assert that the 1950 Law may be retroactive in procedure but not in substance; therefore, it did not violate the legality principle.[15] However, apart from its legality, to enhance the legitimacy of the criminal proceedings, this principle should have clearly been observed. Further, the argument on the continuity of the Jewish community is dubitable. As James Fawcett indicates, an internal legal continuity may be confirmed.[16] However, considering the legal personality of British Mandate for Palestine under international law and the discontinuity between the Mandate and Israel, the reasoning of the District Court is unclear. Whether the Supreme Court recognised this lack of clarity is not obvious; it basically elaborated the universality principle and did not rely heavily on the protective principle.

7.2.2. Universality Principle

Concerning the universality principle, the District Court merely referred to the authority of the *forum deprehensionis* and historical exercise of jurisdiction over piracy. However, it did not delineate the rationale for this principle.[17] On the other hand, the Supreme Court analysed this principle deeply. According to the Supreme Court, while the existence of universal jurisdiction over piracy *jus gentium* is widely agreed, the scope of this jurisdiction is in dispute. Moreover, the Supreme Court surveyed the dif-

[14] *Ibid*., paras. 36–38.

[15] Hans W. Baade, "The Eichmann Trial: Some Legal Aspects", in *Duke Law Journal*, 1961, vol. 10, no. 3, pp. 412–13.

[16] James E.S. Fawcett, "The Eichmann Case", in *British Year Book of International Law*, 1962, vol. 38, pp. 190–92.

[17] District Court, Eichmann case, paras. 12–13, see *supra* note 13.

ference among four distinct theories on the universality principle, and concluded that this principle is applied to the offences committed by Eichmann irrespective of the theory adopted.[18]

To support its conclusion, the Supreme Court identified the rationale for universal jurisdiction over piracy in the following way: "the interest to prevent bodily and material harm to those who sail the seas and to persons engaged in trade between nations, is a vital interest common to all civilized States".[19] Therefore, if there is a vital interest of the international community, universal jurisdiction can be justified not only in the context of piracy but also in that of other crimes. Consequently, in the Supreme Court's words:

> It was not the capacity of universal jurisdiction to try and punish the person who committed "piracy" that from a practical point of view justified bestowing upon this act the character of an international crime *sui generis*, it was the agreed vital interest of the international community that made the exercise of such jurisdiction justifiable.[20]

In this way, the Supreme Court relied on the so-called piracy analogy when making gross human rights offences subject to universal jurisdiction. In fact, Eugene Kontorovich asserts that "the Court justified its exercise of universal jurisdiction almost exclusively on the basis of the piracy analogy".[21] Thomas Mertens also indicates that the decision on the jurisdiction of Israel's courts stressed the similarity "between 'crimes against humanity' and the well-known 'crime of piracy'".[22] As the piracy analogy – as reasoned by the Supreme Court – is theoretically elaborated, it prevails and is quoted in a variety of contexts. For example, Miriam Cohen argues that human trafficking should be subject to universal jurisdiction, because this crime is analogous to piracy.[23]

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18 Supreme Court, Eichmann case, para. 12, see *supra* note 12.

19 *Ibid.*

20 *Ibid.*

21 Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", in *Harvard International Law Journal*, 2004, vol. 45, no. 1, p. 196.

22 Thomas Mertens, "Memory, Politics and Law – The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence", in *German Law Journal*, 2005, vol. 6, p. 419.

23 Miriam Cohen, "The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction", in *Buffalo Human Rights Law Review*, 2010, vol. 16, pp. 201–35.

7.3. Substantive Aspect of Development of Universal Jurisdiction

7.3.1. From Piracy to Gross Human Rights Offences

7.3.1.1. Expansion of the Interest of the International Community: Advantages of the Piracy Analogy

The piracy analogy has a theoretical defect that derives from the difference between piracy and gross human rights offences. To rely on the piracy analogy, the Supreme Court extracted the character of both piracy and gross human rights offences, and concluded that they are similar in that they violate the common interest of the international community. Currently, it is true that both are supposed to violate the interest of the international community. However, the content of interest violated by piracy and by gross human rights offences cannot be equated.

On the one hand, piracy violates the interest of free navigation on the high seas which is essential for contemporary maritime transportation. Considering the nature of this interest, it can be characterised as a pragmatic interest of the international community. It is true that some academics view piracy as so heinous that they believe it to be subject to universal jurisdiction.[24] However, going back to the definition of piracy currently stipulated in Article 101 of the United Nations Convention on the Law of the Sea ('UNCLOS'),[25] piracy is not always heinous. In the recent *Gua-*

[24] For example, see Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, Leiden, 1991, p. 270.

[25] United Nations Convention on the Law of the Sea, 10 December 1982, Art. 101 provides:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> 1. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> 2. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

nabara case, Japan's first case on piracy under its Anti-Piracy Act, nobody was killed or injured. Therefore, it is difficult to regard the case as being heinous, though the Japanese courts characterised the illegal activities in the case as piracy.[26] Furthermore, various states have not punished pirates severely, which demonstrates that they have not regarded their crimes as grave and heinous.[27]

On the other hand, gross human rights offences shock the conscience of the international community; they violate the moral not pragmatic interests of the international community.[28] Therefore, it can be said that, irrespective of whether intentionally or unintentionally, the Eichmann Trial enlarged the scope of the interest of the international community from a pragmatic interest to a moral one, for the purpose of justifying universal jurisdiction over gross human rights offences.

7.3.1.2. Generating a Misunderstanding about Piracy: Disadvantages of the Piracy Analogy

Due to the piracy analogy described above, the Supreme Court of Israel succeeded in justifying to some extent its jurisdiction over the crimes committed by Eichmann. However, this judgment led to a misunderstanding about the nature of piracy, namely that piracy is grave and heinous, because the judgment put piracy into the same category as gross human rights offences which are clearly grave and heinous. More precisely, in its judgment, the Supreme Court did not characterise piracy as grave and

[26] On the *Guanabara* case, see Kentaro Furuya and Jun Tsuruta, "The *Guanabara* Case: The First Prosecution of Somali Pirates under the Japanese Piracy Act", in *International Journal of Marine and Coastal Law*, 2013, vol. 28, no. 4, pp. 719–28. See also Shuichi Furuya, Makoto Seta and Kenta Hirami, "Case Concerning a Violation of the Japanese Act on the Punishment of and Measures against Piracy", in *Waseda Bulletin of Comparative Law*, 2015, vol. 33, pp. 84–88.

[27] In terms of municipal law of the Unites States and Russia, Joshua Goodwin points out: "The United States punishes piracy under the law of nations with life in prison. […] In Russia, piracy is punished with a prison sentence of five to ten years if there are no weapons involved"; Joshua Michael Goodwin, "Universal Jurisdiction and the Pirate: Time for an Old Couple to Part", in *Vanderbilt Journal of Transnational Law*, 2006, vol. 39, pp. 996–97.

[28] Similarly, Nahal Kazemi provides two characterisations for universal jurisdiction: pragmatic and moralistic; Nahal Kazemi, "Justifications for Universal Jurisdiction: Shocking the Conscience is Not Enough", in *Tulsa Law Review*, 2013, vol. 49, p. 31; see also Makoto Seta, "Book Review: Criminal Jurisdiction over Perpetrators of Ship-Source Pollution", in *Yearbook of International Environmental Law*, 2014, vol. 24, pp. 648–50.

heinous, but only referred to the heinous character of international crimes, including piracy.[29] In the meantime, piracy had been denounced as *hostis humani generis* since the Roman era, and sometimes it had been regarded as being heinous even before the Eichmann Trial.[30] That being said, heinousness in this context had the meaning of atrociousness in a general sense and did not have any special meaning of atrociousness as it relates to the character of crimes violating the moral interest of the international community. Nevertheless, due to the fact that the Eichmann Trial put piracy into the same category as gross human rights offences, this description of heinousness in both a general and a specific sense became equated.[31] As a result, the misunderstanding that piracy is a grave and heinous crime became established.[32]

If the Eichmann Trial were not highly valued as a precedent for the exercise of universal jurisdiction this misunderstanding might not have been accepted.[33] But the Eichmann Trial is esteemed, probably because other states and international organisations did not officially object to it for two primary reasons. First, it is politically difficult to make an objection against Israel – whose citizens comprise Jewish people who are Holocaust victims – in terms of its exercise of jurisdiction over the perpetrator of atrocities. It is especially difficult for the most interested state, Germany, where Eichmann, a German national, contributed to the Holocaust, to oppose the trial's findings. In fact, Germany assisted Israel when

29 Supreme Court, Eichmann case, para. 11, see *supra* note 12.

30 Edwin D. Dickinson, "Is the Crime of Piracy Obsolete?", in *Harvard Law Review*, 1925, vol. 38, p. 338.

31 For example, Kenneth C. Randall describes both piracy and other crimes including torture as heinous; Kenneth C. Randall, "Universal Jurisdiction under International Law", in *Texas Law Review*, 1988, vol. 66, no. 4, pp. 791, 794, 826.

32 From the perspective that "grounds of jurisdiction" are nothing but a topic of academic discussion and "do not correspond with any positive rule of international law", as Jean d'Aspremont says, this misunderstanding is not serious at all. However, considering the fact that grounds of jurisdiction currently become a point of contention in criminal proceedings against pirates, these grounds must be rooted in the positive rules of international law; see Jean d'Aspremont, "Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction", in *Israel Law Review*, 2010, vol. 43, no. 2, p. 311.

33 Actually, some authors argue that the Eichmann Trial cannot be a precedent because it is too unique. See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed., Columbia University Press, New York, 1979, p. 276.

it examined the witnesses on German territory.[34] Second, as shown above, since bases of jurisdiction other than the universality principle, such as the protective principle, are invoked, the objection against the universality principle itself is not vital even if those objections were made against this trial. Besides, in academic theory, the Eichmann Trial is introduced as a precedent to exercise universal jurisdiction over gross human rights offences. For instance, as Mitsue Inazumi notes: "The Eichmann Trial is considered to be the most prominent precedent for universal jurisdiction over genocide".[35]

This misunderstanding about the character of piracy was strengthened in the drafting history of Vienna Convention on the Law of Treaties by the International Law Commission ('ILC'). In this history, Mustafa Kamil Yasseen, a member of the ILC, argued that no two states can legally make a bilateral treaty to permit piracy in order to demonstrate the existence of *jus cogens*.[36] Accepting this argument, some members of the ILC argued that "a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide" is against the rules of *jus cogens*.[37] It may be true that a treaty that authorises piracy cannot be in conformity with contemporary international law, as Yasseen indicated. In this regard, the conclusion that the authorisation of piracy is inconsistent with *jus cogens* seems appropriate. On the other hand, the ILC did not clarify the reason for the authorisation of piracy being regarded as such at all. In the case of genocide, since its rationale that universal jurisdiction stems from gravity and heinousness, there is no doubt that this rationale is linked to the norm of *jus cogens*.[38] However, considering the

[34] Georg Schwarzenberger, *International Law and Order*, Stevens, London, 1971, p. 242; Schwarzenberger also indicates that "by acquiescence or approbation, Germany waived claim in tort she might have had against Israel".

[35] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Antwerp, 2005, p. 63.

[36] International Law Commission, *Yearbook of the International Law Commission 1966*, vol. I, part I: *Summary Records of the Eighteenth Session, 4 May–19 July 1966*, United Nations, New York, 1967, p. 38.

[37] International Law Commission, *Yearbook of the International Law Commission 1966*, vol. II: *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly*, United Nations, New York, 1967, p. 248.

[38] Christopher Joyner elaborates the relationship between *jus cogens* and the universality principle; Christopher C. Joyner, "Arresting Impunity: The Case of Universal Jurisdiction

nature of piracy, its character is not different from ordinary crimes such as murder or armed robbery. Hence, the reason for piracy being connected to *jus cogens* is unclear.

Since the rationale for *jus cogens* does not fall within the scope of this chapter, it is not fully considered here.[39] However, based on its definition, piracy is only a form of murder or armed robbery on the high seas and does not have a grave or heinous character at all. Given this fact, the rationale behind the authorisation of piracy being considered contrary to *jus cogens* should be explained in a different manner to the case of genocide. In fact, the ICL, some members of which put piracy into the same category as genocide in the context of *jus cogens*, excludes the authorisation of piracy from the category of *jus cogens* when drafting articles on responsibility of states for internationally wrongful acts, while putting genocide or slavery into this category.[40] Furthermore, M. Cherif Bassiouni lists two requirements for a norm to be *jus cogens*: first, threatening the peace and security of humankind, and second, shocking the conscience of humanity. According to him, although at one time piracy might have satisfied these two requirements, currently it does neither of them.[41]

Despite the fact that piracy is not different from ordinary crimes with regard to its character, piracy has been misidentified as a grave or heinous crime because such misidentification is essential to justify the

in Bringing War Criminals to Accountability", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 169. See also Michel Cosnard, "La compétence universelle en matière pénale" [Universal Jurisdiction in Criminal Matters], in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff, Leiden, 2006, p. 358; Antonio Cassese, "Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?" [Is There an Insurmountable Conflict between Sovereignty and International Criminal Justice?], in Antonio Cassese and Mireille Delmas-Marty (eds.), *Crimes internationaux et juridictions internationales* [International Crimes and International Jurisdictions], Presse Universitaires de France, Paris, 2002, p. 20.

39 Alexander Orakhelashvili researched and published a monograph wholly on *jus cogens* under international law. According to him, a peremptory norm must have "a moral or humanitarian connotation". Based on this understanding, he excludes piracy from examples of *jus cogens*; Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2006, pp. 50–66.

40 International Law Commission, *Yearbook of the International Law Commission 2001*, vol. II, part II: *Report of the Commission to the General Assembly on the Work of its Fifty-third Session*, United Nations, New York, 2007, p. 85.

41 M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligation Erga Omnes*", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, pp. 69–70.

universal jurisdiction over gross human rights offences, as in the Eichmann Trial. At the time of the trial, when there were no state practices and *opinio juris* supporting such universal jurisdiction, it was difficult to confirm the establishment of customary international law that allowed states to exercise that jurisdiction. Hence, the piracy analogy was essential and played a vital role to justify the Israeli exercise of universal jurisdiction. As a result of that analogy, piracy had to be put into the same category as genocide.[42] Therefore, if this misidentification of piracy is still essential to support the exercise of universal jurisdiction over gross human rights offences, that misidentification still has a *raison d'être*.

However, from the perspective of both state practices and the theoretical aspect, universal jurisdiction over gross human rights offences is currently explained and justified without relying on the piracy analogy. In fact, in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, the International Law Association argues that universal jurisdiction over gross human rights offences is widely accepted under customary international law.[43] Moreover, in some reports, such as the AU-EU Expert Report on the Principle of Universal Jurisdiction[44] and the Report of the UN Secretary-General on the Scope and Application of the Principle of Universal Jurisdiction,[45] it is confirmed that most states accept universal jurisdiction over gross human rights offences.

If the piracy analogy is not needed to justify universal jurisdiction over gross human rights offences, there is no reason to maintain this analogy, which mislabels the character of piracy as being grave or heinous. Rather, considering the fact that recently piracy has been widely prosecut-

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42 Kelley A. Gable evaluates this piracy analogy to support universal jurisdiction over gross human rights offences; Kelley A. Gable, "Cyber–Apocalypse Now: Securing the Internet against Cyberterrorism and Using Universal Jurisdiction as a Deterrent", in *Vanderbilt Journal of Transnational Law*, 2010, vol. 43, no. 1, pp. 109–10.

43 See International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, London, 2000, pp. 5–7.

44 Council of Europe, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Brussels, 16 April 2009, 8672/1/09 REV.1, para. 9.

45 United Nations General Assembly, The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, 29 July 2010, UN doc. A/65/181, para. 28 ('Secretary General's Report').

ed and punished based on the universality principle,[46] and that jurisdiction is a point of contention in most criminal proceedings,[47] piracy and universal jurisdiction over it should be evaluated as objectively as possible. Furthermore, if piracy is objectively evaluated, it is just an ordinary crime and neither grave nor heinous.

7.3.2. From Gross Human Rights Offences to the Crime of Aggression

After the Kampala Review Conference of the Rome Statute, held in 2010, controversy arose about whether the crime of aggression is subject to universal jurisdiction. This is because at that conference, the Kampala Amendment, which defines the crime of aggression and provides individual responsibility over this crime, was adopted.[48] Against this back-

[46] The report submitted by the Secretary-General summarised the criminal proceedings over piracy in UN member states. See United Nations Security Council, Report of the Secretary–General on Specialized Anti–Piracy Courts in Somalia and Other States in the Region, 20 January 2012, UN doc. S/2012/50, p. 5.

[47] Furuya *et al.*, 2015, pp. 85–86, see *supra* note 26. Furthermore, universal jurisdiction over suspects who facilitate piracy from land is currently controversial. See Jon Bellish, "Breaking News from 1932: Pirate Facilitators Must Be Physically Present on the High Seas", in *EJIL:Talk!* 19 September 2012.

[48] See International Criminal Court, *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010: Official Records*, Secretariat, Assembly of States Parties, International Criminal Court, The Hague, 2010. Concerning the details of the Kampala Conference, see Claus Kreß and Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1179–1217. According to ICC Statute, Art. 8*bis*, see *supra* note 10, the crime of aggression is defined as follows:

> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however tem-

ground, some ambitious states have tried to prosecute and punish the perpetrators of the crime of aggression based on the universality principle.

In terms of state jurisdiction, two paragraphs of the Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression ('Understandings') were adopted at the Kampala Review Conference. According to paragraph 4 of the Understandings:

> It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.[49]

Moreover, paragraph 5 states: "It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic

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porary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

[49] ICC, Review Conference of the Rome Statute, Conference Room Paper on the Crime of Aggression. Annex III: Understands regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 10 June 2010, RC/8 ('Understandings') (https://www.legal-tools.org/doc/100228/).

jurisdiction with respect to an act of aggression committed by another State".[50]

Interpreting these two sentences together, it can be concluded that whether the crime of aggression can be subject to universal jurisdiction is not regulated by those Understandings. Moreover, considering the lack of a treaty that provides universal jurisdiction over the crime of aggression, states must rely on rules of customary international law while exercising such universal jurisdiction.[51] At this point, most commentators are not of the view that universal jurisdiction over the crime of aggression is accepted under customary international law. For example, Dapo Akande notes: "There is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression".[52] Similarly, Beth Van Schaack argues: "current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, *a fortiori* pursuant to universal jurisdiction".[53] In a more modest expression, Carrie McDougall suggests: "at this state it can only be concluded that an exercise of universal jurisdiction over the crime of aggression would be controversial".[54]

States stipulate universal jurisdiction over the crime of aggression. According to a survey of the UN General Assembly, Azerbaijan, Belarus and Bulgaria have established universal jurisdiction over the crimes against peace,[55] and moreover, Estonia and Lithuania do so over the crime of aggression.[56] Furthermore, though Moldova does not use the term "aggression", it stipulates universal jurisdiction over the crime to plan, pre-

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50 *Ibid*.

51 Meagan Wong argues in a similar manner; Meagan Wong, "Germany and Botswana Ratify the Kampala Amendments on the Crime of Aggression: 7 ratifications, 23 more ratifications to go!", *EJIL:Talk!*, 10 June 2013.

52 Dapo Akande, "Prosecuting Aggression, the Consent Problem and the Role of the Security Council", Working Paper, Oxford Institute for Ethics, Law and Armed Conflict, May 2010.

53 Beth Van Schaack, "*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 1, p. 144.

54 Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2013, p. 320.

55 Secretary General's Report, p. 29. see *supra* note 45.

56 United Nations General Assembly, The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, 20 June 2011, UN doc. A/66/93, p. 33.

pare, unleash or wage war, if the criminal proceeding against the perpetrator in question has not been convicted in a foreign state.[57]

As previously noted, it is not the aim here to examine whether the crime of aggression is subject to universal jurisdiction. However, that legislation is expected to compose state practices with *opinio juris* sufficient to establish the rules of customary international law that allow states to exercise universal jurisdiction over the crime of aggression in the future. This is because the number of states ratifying the Kampala Amendment is increasing, and some of them legislate and will legislate universal jurisdiction over the crime of aggression. Hence, it is important to deliberate in advance on the rationale for such jurisdiction.

Generally speaking, the rationale for universal jurisdiction is a violation of the interest of the international community which is divided into two categories: pragmatic interest and moral interest. The crime of aggression would probably violate the latter type of interest. Crimes such as genocide and crimes against humanity that are regarded as violating moral interest are strongly related to the violation of human rights, including the right to life. Therefore, if the crime of aggression always accompanies human rights violations, it is likely to violate the moral interest of the international community. From this perspective, the right to peace, which is intensely debated, deserves detailed consideration, because the crime of aggression would necessarily violate this right.[58] Unlike some human rights, such as the right to life, the concept of the right to peace has not been established, and its nature is still vague.[59] Although this right is provided for in the Draft Declaration on the Right to Peace which was written by the United Nations Human Rights Council Advisory Committee, most states are not content with the Declaration. For example, the United States criticises the declaration as covering "many issues that are, at best, unre-

[57] Criminal Code of the Republic of Moldova, Law No. 985-XV, 18 April 2002, Arts. 11(3) and 139 (https://www.legal-tools.org/doc/4dbae0/).

[58] According to William A. Schabas, the right to peace and the crime of aggression can work together for the sake of *jus ad bellum* which has not been traditionally articulated in the context of international human rights law as well as international criminal law. William A. Schabas, "Freedom from Fear and the Human Right to Peace", in David Keane and Yvonne McDermott (eds.), *The Challenge of Human Rights: Past, Present and Future*, Edward Elgar, Cheltenham, 2012, pp. 36–51.

[59] Regarding the historical evolution of the right to peace, see Cecilia M. Bailliet, "Untraditional Approaches to Law: Teaching the International Law of Peace", in *Santa Clara Journal of International Law*, 2014, vol. 12, no. 2, pp. 5–18.

lated to the cause of peace and, at worst, divisive and detrimental to efforts to achieve peace".[60] In addition, some commentators argue that the draft provides not only *lex lata* but also *lex ferenda*.[61]

Nevertheless, based on this declaration, the Human Rights Council adopted a resolution on Promotion of the Right to Peace and decided "to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft United Nations declaration on the right to peace".[62] Therefore, as Cecilia M. Bailliet correctly indicates, it can be said that the declaration "is still subject to evaluation at present".[63] Given the current enigmatic status of the right to peace, it is difficult to argue that the crime of aggression always violates moral interest by violating the right to peace. Yet, in future this argument may be tenable.

In theory, it is true that the crime of aggression itself does not necessarily infringe on any other human rights other than the right to peace, or cause harm to the life or body of human beings.[64] To illustrate, if a president of state A plans the bombardment of the territory of state B, even if the bombardment is never realised, this president can be regarded as committing the crime of aggression, in accordance with the definition provided by Article 8*bis* of the ICC Statute.[65] In this sense, it can be said that the character of the crime of aggression is different from gross human rights offences. However, considering the reason for emergence of the concept of aggression, the crime of aggression can be linked to a violation of the moral interest, and, in other words, it infringes on human rights and causes harm to a human life or body. This is because the aggression was originally prohibited for the purpose of eliminating war and armed con-

60 United States Mission to the United Nations, U.S. Explanation of Vote: Resolution on Promotion of the Right to Peace Sponsored by Cuba, Human Rights Council, 20th Session, 29 June 2012, Geneva.

61 See Cecilia M. Bailliet and Kjetil Mujezinović Larsen, "Nordic Expert Consultation on the Right to Peace: Summary and Recommendations", in *Nordic Journal of Human Rights*, 2013, vol. 31, no. 2, p. 163.

62 United Nations General Assembly, Promotion of the Right to Peace, resolution adopted by the Human Rights Council, 17 July 2012, A/HRC/RES/20/15, para. 1.

63 Bailliet, 2014, p. 18, see *supra* note 59.

64 Understandings, see *supra* note 49.

65 In terms of the individual responsibility for planning and preparation of aggression, see Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, London, 2013, pp. 201–2.

flict, which inevitably infringe human rights and cause damage to human beings.[66]

Moreover, apart from the interest of the international community under international law, the legal interest of municipal criminal law (*Rechtsgut*) must be considered, especially if a state tries to criminalise and punish the perpetrator of the crime of aggression by its own municipal criminal system. Of course, each municipal law should have its own justification consistent with its whole legal system. Therefore, each justification can vary from state to state. However, if a state exercises its jurisdiction over the crime based on the universality principle, some kind of harmonisation would likely be expected.

7.4. Procedural Aspect of Development of Universal Jurisdiction

7.4.1. *Ex injuria jus non oritur* under International Law

Although the Eichmann Trial is theoretically elaborated and no other states oppose it, this trial could not have become a precedent if the principle *ex injuria jus non oritur* were strictly applied.[67] Unlike the laws in other fields, under international law whether the principle *ex injuria jus non oritur* is established is controversial. According to Hans Kelsen, this principle is applied only partially or exceptionally under international law.[68] For example, it is well known that under traditional international law, war started against *jus ad bellum* sometimes created new rights and obligations.[69] Moreover, it is often said that unilateral measures would create new law. Michael Byers describes the way in which municipal legislation that is not firmly based on the existing international law develops,

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66 On the emergence of the concept of aggression and its prohibition, see Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, pp. 1–112.

67 *Ex injuria jus non oritur* is translated as "a right does not arise from wrongdoing"; Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford University Press, Oxford, 2008, p. 94.

68 For example, Hans Kelsen states: "There are, however, serious restrictions to the operation of the principle *ex injuria jus non oritur* in international law"; Hans Kelsen, *Principles of International Law*, 2nd ed., ed. by Robert W. Tucker, Holt, Rinehart and Winston, New York, 1967, p. 88.

69 See Robert Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, Manchester, 1961, pp. 52–55.

maintains or changes customary rules.[70] Capturing these aspects of international law, Rosalyn Higgins notes: "One of the special characteristics of international law is that violations of law can lead to the formation of new law".[71]

Meanwhile, in his report on the law of treaties made in 1953 for the International Law Commission, Hersch Lauterpacht argues: "That principle – *ex injuria jus non oritur* – recognised by the doctrine of international law and by international tribunal, including the highest international tribunal, is in itself a general principle of law".[72] Further, G.J.H. van Hoof criticises the idea that customary international law is changed by practices which deviate from this law. He is of the view that "[i]t must be quite an extraordinary system of law which incorporates as it main, if not the only, vehicle for change the violation of its own provisions".[73] According to van Hoof, accepting such a position would support John Austin's conclusion that international law is not really law.[74]

Moreover, the ICJ seems to regard *ex injuria jus non oritur* as a principle of international law. In its judgment on the *Gabčikovo-Nagymaros Project* case, the ICJ explained that its finding does not contradict with this principle.[75] Furthermore, in its advisory opinion on the *Palestinian Wall* case, the ICJ denied the traditional argument as shown above that the war against *jus ad bellum* would create new rights as a result of prohibiting the threat or use of force by Article 2(4) of the UN Charter.[76] Although the ICJ itself does not clarify the reason for its denial,

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70 Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, Cambridge, 1999, pp. 90–101.

71 Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, Oxford University Press, Oxford, 1994, p. 19.

72 International Law Commission, *Yearbook of the International Law Commission 1953*, vol. II: *Summary Records of the Fifth Session, including the report of the Commission to the General Assembly*, United Nations, New York, 1959, p. 148.

73 G.J.H. van Hoof, *Rethinking the Sources of International Law*, Kluwer, Deventer, 1983, p. 99.

74 *Ibid*.

75 The ICJ stated: "The principle *ex injuria jus non oritur* is sustained by the Court's finding"; ICJ, *Hungary v. Slovakia (Case concerning the Gabčikovo–Nagymaros Project*), Judgment, 25 September 1997, p. 7, para. 133 (https://www.legal-tools.org/doc/5c99a1/).

76 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, p. 136, para. 87 (https://www.legal-tools.org/doc/e5231b/).

according to Judge Elaraby, this conclusion derives from the principle *ex injuria jus non oritur*, which is "well recognized in international law".[77]

Even given the ICJ's position on this, considering the actual circumstances of international law, it is still not clear whether *ex injuria jus non oritur* is firmly established and entirely applied under international law. However, for the purpose of making international law more legal, the principle should be established or, at the very least, be on its way to being established. Meanwhile, customary international law is already required to change rapidly enough to keep up with a changing society. Therefore, international law scholars are currently expected to create the methodology to allow customary international law to develop and change in harmony with the principle *ex injuria jus non oritur*. To put it differently, from the perspective of international relations, it can be said that international lawyers are required to take a balance between stability and change.[78]

Here the distinction of the types of jurisdiction is worth noting. Basically, under international law, jurisdiction is categorised into three types according to its function: legislative jurisdiction, executive jurisdiction and judicial jurisdiction.[79] The latter two types of jurisdiction are collectively referred to as enforcement jurisdiction.[80] In the Eichmann Trial, Israel exercised not only legislative jurisdiction but also both executive and judicial jurisdiction. Therefore, a legal dispute arose and Argentina as well as Eichmann himself argued against this exercise of jurisdiction. However, it must be noted that the lawfulness of the exercise of jurisdiction by Israel was not reviewed by any international judicial organ such as the ICJ. A determination by the ICJ that Israel illegally exercised its jurisdiction would greatly change the import and impact of the Eichmann Trial.

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77 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Elaraby, 9 July 2004, para. 3.1 (https://www.legal-tools.org/doc/912eff/).

78 See Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", in *International Organization*, 1998, vol. 52, no. 4, p. 894.

79 Michael Akehurst, "Jurisdiction in International Law", in *British Year Book of International Law*, 1972, vol. 46, p. 145.

80 Frederick Alexander Mann, "The Doctrine of Jurisdiction in International Law", in *Recueils des cours*, 1964, vol. 111, pp. 127–29.

7.4.2. The Role of International Courts: Making Law or Stunting its Development?

So far the contribution of international courts to the making and development of international law has been emphasised and favourably accepted. The authors of *The Making of International Law*, Alan Boyle and Christine Chinkin, allocate one chapter to "Law-Making by International Courts and Tribunals". There, they conclude that international courts and tribunals "are also part of the process for making" the law.[81] Some judges of the ICJ also point out that the clarification of international law by the ICJ has developed international law.[82]

In the meantime, the development of international law would be stunted by international courts and tribunals because of the impact of their judgments. For example, the judgment of *Jurisdictional Immunities of the State* rendered by the ICJ might halt the development of the law of state immunities. In this case, the ICJ concludes that under contemporary international law, the violation of *jus cogens* does not affect the jurisdictional immunities enjoyed by Germany, from both perspectives of theory and state practice.[83] This conclusion is generally supported by commentators.[84] However, aside from whether this conclusion of the judgment is legally correct, it leads to a situation in which individuals are deprived of the opportunities to obtain judicial relief before national courts. In this vein, Judge Cançado Trindade states:

> As to national legislations, pieces of sparse legislation in a handful of States, in my view, cannot withhold the lifting of

[81] Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, Oxford, 2007, p. 310.

[82] For example, Hersch Lauterpacht says "the Court has made a tangible contribution to the development and clarification of the rules and principles of international law". See Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens, London, 1958, p. 5; Higgins, 1994, p. 202, see *supra* note 71.

[83] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, p. 99, para. 97 ('Jurisdictional Immunities case') (https://www.legal-tools.org/doc/674187/).

[84] For examples, see Markus Krajewski and Christopher Singer, "Should Judges be Front-Runners? The ICJ, Sate Immunity and the Protection of Fundamental Human Rights", in *Max Planck Yearbook of United Nations Law*, 2012, vol. 16, p. 24; François Boudreault, "Identifying Conflicts of Norms: The ICJ Approach in the Case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*", in *Leiden Journal of International Law*, 2012, vol. 25, no. 4, pp. 1011–12.

> State immunity in cases of grave violations of human rights and of international humanitarian law. Such positivist exercises are leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind so widespread in the legal profession, such as, *inter alia*, the counterpositions of "primary" to "secondary" rules, or of "procedural" to "substantive" rules, or of obligations of "conduct" to those of "result".[85]

Actually, the dispute between Italy and Germany, which has now become a conflict between Italy and the ICJ, has not yet been settled. Placing emphasis on the aspect of human rights, especially the right to judicial protection that Article 24 of the Italian Constitution provides, the Italian Constitutional Court denies accepting what the ICJ ruled.[86] Moreover, the Constitutional Court stresses the role of domestic courts to evolve the norm of immunity under customary international law and asserts that the present judgment "may also contribute to a desirable – and desired by many – evolution of international law itself".[87] However, it is now difficult for most states to lift the immunity of other states with a view to pursuing the responsibility for violating *jus cogens*, mainly because of the judgment delivered by the ICJ.[88] In addition, the judgment also makes it difficult for the ICJ itself to make a different conclusion in similar cases.[89]

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85 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge Cançado Trindade, 6 July 2010, para. 294 (https://www.legal-tools.org/doc/502924/).

86 Italy, Constitutional Court, Judgment No. 238/2014, 22 October 2014.

87 *Ibid.*, para. 3.3. Roger O'Keefe argues: "The role of domestic courts as agents of development of the international law of jurisdiction is by no means negligible". Roger O'Keefe, "Domestic Courts as Agents of Development of the International Law of Jurisdiction", in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 558.

88 Regarding an example of the disadvantages for states that violate the immunity of other states, Robert Kolb raises the possibility that "Italy would have to compensate Germany for all the sums of money to which Germany would be condemned as against the war crimes–claimants, and also for all expenditure". Robert Kolb, "The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court", in *Questions of International Law*, 2014, p. 14.

89 See Pasquale De Sena, "The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative

Canada also recognised the negative impact of the judgment of the international courts. For instance, Canada legislates and operates both the Arctic Waters Pollution Prevention Act ('AWPPA') and the Coastal Fisheries Protection Act ('CFPA'), which led to the adoption of Article 234 of the UNCLOS and the conclusion of the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks respectively.[90] When legislating the AWPPA, in order to avoid being reviewed by the ICJ Canada modified its reservations in its declaration to accept the compulsory jurisdiction of the ICJ. For the purpose of justifying that modification, Prime Minister Pierre Trudeau indicated that there was a "very grave risk that the world court would find itself obliged to find that coastal states cannot take steps to prevent pollution".[91] The strategy to modify its reservations in declaration to accept the compulsory jurisdiction of the ICJ was also taken when legislating CFPA.[92]

From this point of view, the judicial strategy of the Democratic Republic of Congo and the decision of the ICJ in the *Arrest Warrant* case should be highly valued not only for the states involved but also from the perspective of the development of international law. As previously explained, in the course of the proceeding, the Democratic Republic of Congo changed its strategy and did not challenge the legality of Belgium's exercise of universal jurisdiction. As some judges observed, the question of whether Belgium had the authority to issue an arrest warrant must be answered before answering whether the arrest warrant in question breached the immunity enjoyed by the Democratic Republic of Congo.[93] Therefore, the Court might and could have answered the question of the legality of the exercise of universal jurisdiction. As shown above, the customary international law that allows a state to exercise universal jurisdiction over gross human rights offences is now strongly supported. Howev-

Analysis under International Law", in *Questions of International Law*, 16 December 2014, p. 28.

90 Byers, 1999, pp. 90–101, see *supra* note 70.

91 Pierre E. Trudeau, "Canadian Prime Minister's Remarks on the Proposed Legislation", in *International Legal Materials*, 1970, vol. 9, pp. 600–4; Richard B. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", in *Michigan Law Review*, 1970, vol. 69, no. 1, p. 18.

92 International Court of Justice, *Yearbook 1994–1995*, No. 49, International Court of Justice, The Hague, 1995, p. 85.

93 Arrest Warrant case, see *supra* note 7.

er, it is not clear whether this customary international law existed in 2002 when the ICJ made its judgment in the *Arrest Warrant* case. If the ICJ had said there was no such law, the current situation might be different.

7.4.3. Municipal Legislation as a Practice to Change Customary International Law

If a state applies its law to the concrete case based on the universality principle, as Israel did in the Eichmann Trial and Belgium did in the *Arrest Warrant* case, an interstate conflict would occur. Recently, the exercise of universal jurisdiction, especially so-called exercise *in absentia*, is one reason for interstate conflicts. For example, when Spain issued an arrest warrant based on the universality principle, alleging that former Chinese leaders committed human rights abuses in Tibet, China naturally contested it. Partly because of this contestation, Spain is considering changing its policy to exercise universal jurisdiction.[94]

In this context, it must be noted that recently the number of judgments delivered by international courts and tribunals has been increasing. For instance, as frequently pointed out, the ICJ deals with many more cases than it usually dealt with in the past. As Mariko Kawano says: "It is the indisputable phenomenon that the Court has become much busier since the 1980s and, in particular, since the turn of the century".[95] Considering the fact that international courts and tribunals can stunt the development of international law, states are required to refrain from exercising universal jurisdiction. Of course, there may be some powerful states that do not mind what international courts and tribunals say. However, recently, major powers such as the United States and Russia have shown a tendency to follow what courts or tribunals say even when they do not fully comply with the findings of those courts.[96] A situation could arise in

[94] For the current discussion on universal jurisdiction in Spain, see Soeren Kern, "Spain Rethinks Universal Jurisdiction", Gatestone Institute, 31 January 2014 (http://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction).

[95] Mariko Kawano, "The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes", in *Recueils des cours*, 2011, vol. 346, p. 35.

[96] As for the violation of the Vienna Convention on Consular Relations, the United States tried to comply with the judgment rendered by the ICJ especially after the *Avena* case. See A. Peyro Llopis, "Après *Avena*: l'exécution par les États-Unis de l'arrêt de la Cour internationale de Justice" [After *Avena*: Execution by the United States of the Judgment of the International Court of Justice], in *Annuaire français de droit international*, 2005, vol. 51, no. 1, pp. 140–61. Also Russia does not fully comply with the order of the International Tri-

which no states ever exercise universal jurisdiction, which might be contrary to the existing rules of customary international law, for fear of being labelled a violator of international law.

If so, then, how will customary international law on universal jurisdiction evolve? If the customary international law *status quo* is the ideal and does not need reform, this situation might be fine. However, such law does not appear to exist anywhere in the world. From one side of the argument, customary international law is expected to allow states to exercise universal jurisdiction overs some new crimes, such as the crime of aggression or human trafficking.[97]

One proposed method to develop customary international law on universal jurisdiction is in a manner that mainly relies on legislative jurisdiction and not enforcement jurisdiction. In other words, states are expected to make a new law on universal jurisdiction on some specific crimes and never enforce this new law. Only after state practices of similar legislation accumulate sufficiently to persuade international courts and tribunals to recognise the emergence of new rules of customary international law that authorise states to exercise universal jurisdiction over those crimes, then states ought to fully enforce that legislation. Some commentators might challenge the qualification of legislation itself as state practices that lead to the creation of customary international law.[98] However, as confirmed in the *State Immunity* case before the ICJ, under contemporary international law the legislating practices are a part of state practices that establish customary international law.[99]

bunal for the Law of the Sea, but released all seafarers of MV *Arctic Sunrise*, who allegedly violated the Russian Criminal Code. See "Updates from the Arctic Sunrise Activists", Greenpace International, 1 August 2014 (http://www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/).

97 From the other side of the argument, customary international should not allow states to broadly exercise universal jurisdiction which would infringe other states' sovereignty.

98 Van Hoof, 1983, p. 110, see *supra* note 73. See also Michael Akehurst, "Custom as a Source of International Law", in *British Year Book of International Law*, 1974, vol. 47, no. 1, pp. 1–11.

99 Jurisdictional Immunities case, p. 28, para. 56, see *supra* note 83. O'Keefe indicates: "For expression or reflections of a state's belief as to the content of international jurisdictional rules, it is by and large to that state's legislature that one should look"; O'Keefe, 2013, p. 541, see *supra* note 87.

Furthermore, under municipal laws the legality of that policy might be doubted, because generally prosecutors have to prosecute conduct as defined as crimes by the legislation and have little discretion to refrain from exercising this prosecuting power. Therefore, even if no problems arise in the context of international law, this policy might be problematic in the sphere of municipal law. On this point, the recent French legislation on the Law on the Fight against Piracy and the Exercise the Police Powers of the State at Sea deserves attention.[100] This new law was adopted to prosecute piracy which does not have any nexus to France.[101] According to Article 1 of the new legislation, "*lorsque le droit international l'autorise*" (when international law authorises) some provisions of the French Criminal Codes are applied to piracy which is committed on the territorial waters of other states. As a matter of principle, states cannot prosecute the crimes that occur within the territorial waters of the other states. However, where the Security Council authorises or coastal states give their consent, non-coastal states also may prosecute these crimes. This new legislation is designed to respond to these circumstances.

Unlike authorisation by the Security Council and consent of coastal states, it is not clearly confirmed when the new rules of customary international law on universal jurisdiction have been established. However, by embedding the condition of "when international law authorises" into its municipal law, states can legislate universal jurisdiction but not exercise it in accordance with municipal law, unless that exercise would be consistent with international law. In this context, not only legislators and judges but also prosecutors are expected to contribute significantly to the development of international law.

It might be doubted that the ICJ would allow the states that do not have any damage from an internationally wrongful act to bring the case before it. Furthermore, in such cases, the policy as delineated above would not work. Certainly, the ICJ seems to change the precedent of the *South West Africa* case which denied *locus standi* of non-injured states, and to accept this standing. In the case relating to the *Obligation to Pros-*

[100] Republic of France, Loi no. 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'État en mer [Law No. 2011-13 of 5 January 2011 on the Fight against Piracy and the Exercise the Police Powers of the State at Sea].

[101] United Nations Security Council, Note verbale dated 15 October 2009 from the Permanent Mission of France to the United Nations addressed to the President of the Security Council, 22 October 2009, UN doc. S/2009/549, p. 6.

ecute or Extradite, the ICJ manifestly recognised the concept of "obligations *erga omnes partes*" and accepted the *locus standi* of Belgium without referring to whether it was injured.[102] Moreover, in the *Antarctic Whaling* case, the ICJ allowed Australia, which had not proved to have suffered from the violation of individual interest, to bring the case before the Court.[103] However, as elaborated in the *Obligation to Prosecute or Extradite*, the *locus standi* of non-injured states seems to be limited to the case concerning the violation of multilateral treaties that they ratify. Therefore, without any relevant multilateral treaties, it is unrealistic that the ICJ will deal with the case of legislation based on the universality principle and judge that legislation as illegal.

7.5. Conclusion

At present, international criminal tribunals do not have any police power. In this regard, Antonio Cassese describes the International Criminal Tribunal for the former Yugoslavia as "a giant without arms and legs".[104] Moreover, it has become well known that generally international criminal tribunals are not cost effective.[105] Against this background, with a view to enforcing international criminal law more effectively, municipal courts are expected to share a burden and exercise their jurisdiction. When doing so, most courts are required to delineate the reason why they can exercise jurisdiction, especially if they rely on the universality principle.[106] As this

[102] ICJ, *Belgium v. Senegal (Questions relating to the Obligation to Prosecute or Extradite)*, Judgment, 20 July 2012, paras. 68–70 (https://www.legal-tools.org/doc/18972d/).

[103] On this point, see Hironobu Sakai, "After the *Whaling* Case: Its Lessons from a Japanese Perspective", in Malgosia Fitzmaurice (ed.), *Whaling in the Antarctic: The Judgement and Its Implications*, Brill, Leiden, 2015 (forthcoming), pp. 2–3.

[104] Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, vol. 9, no. 1, p. 13.

[105] See David Wippman, "The Costs of International Justice", in *American Journal of International Law*, 2006, vol. 100, no. 4, p. 880.

[106] Fausto Pocar and Magali Maystre note: "Universal jurisdiction provides for the possibility of decentralized prosecution of international crimes by states, creating a comprehensive framework of jurisdictional claims for core international crimes. This markedly improves the chances of ending, or at least reducing, impunity for such crimes". Fausto Pocar and Magali Maystre, "The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?", in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 302.

chapter has shown, municipal legislation and its enforcement can become a source for the further development of universal jurisdiction under international law. In order to realise this development, states are required not only to aggressively exercise it but also to refrain from exercising it in accordance with the existing law. To put it generally, *lex ferenda* as well as *lex lata* must be taken into consideration when trying to change and develop the rules of customary international law.

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Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

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In his foreword, Wegger Christian Strømmen notes that the four-volume project "draws our attention to the common legacy and interests at the core of international criminal law. By creating a discourse community with more than 100 scholars from around the world, [CILRAP] has set in motion a wider process that will serve as a reminder of the importance of the basics of international criminal law".

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