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The Principle of Complementarity: a Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?

Fausto Pocar[*] and Magali Maystre[**]

9.1. Introduction

In 2003, in a provocative remark, Antonio Cassese claimed that "[i]t would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes".[1]

Although universal jurisdiction is not a new phenomenon, it still faces many challenges and obstacles in its application. After addressing the advantages and limits of the traditional grounds of jurisdiction for core international crimes,[2] this chapter examines the origins and content of the principle of universal jurisdiction and clarifies the basic concept. It also highlights and comments on the diversity and complexity surrounding the implementation of the principle of universal jurisdiction in some national jurisdictions.

Despite a wide acceptance of universal jurisdiction by states due to the serious nature of core international crimes, this principle is not applied homogeneously, nor is its application implemented without difficulty. During the past decades, national and international constraints placed on

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[1] Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 589.

[2] In the framework of this contribution, the term "core international crimes" is used to refer to genocide, crimes against humanity and war crimes.

states have too often prevailed over their legal obligation to prosecute alleged perpetrators of core international crimes. Has the bell therefore tolled for the end of universal jurisdiction? This contribution argues the contrary and explores how the goal pursued by universal jurisdiction could be better enforced through the principle of complementarity. In conclusion, this contribution develops ideas on how the International Criminal Court's complementarity principle could induce states to abide by their obligations and exercise universal jurisdiction for core international crimes.

9.2. Universal Jurisdiction and its Origins

Although the topic of universal jurisdiction has been heavily debated in academic literature, clarifying the basic concepts may provide a better understanding of the complexity and limits of the principle. Before turning to this main issue, this chapter first describes the traditional grounds of criminal jurisdiction in international law and, subsequently, assesses briefly the efficacy and difficulties arising from their application to the prosecution of core international crimes.

9.2.1. From the Principle of Territoriality to Universal Jurisdiction

As a preliminary remark, it is important to recall two points. First, jurisdiction can be civil or criminal. However, only universal jurisdiction linked to individual criminal responsibility will be considered in this analysis. Second, jurisdiction has two distinct aspects, namely *jurisdiction to prescribe* – or prescriptive jurisdiction – and *jurisdiction to enforce* or enforcement jurisdiction. The first refers to the state's authority, under international law, to declare the applicability of its criminal law to given conduct through legislation or, in certain states, through judicial ruling. The latter refers to the state's authority, under international law, to implement or apply its criminal law either through the courts or through police and other executive actions.[3] In other words, "jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, inter alia, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so

[3] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, p. 736.

criminalized".[4] Logically, in theory, these two aspects are independent of each other. However, in practice, the prescription of an act and its enforcement are intertwined.[5] Nonetheless, it is worthwhile recalling this distinction when dealing with extra-territorial jurisdiction.

Under international law, each state is free to determine the scope of its criminal law. This liberty rests in its sovereignty.[6] Nevertheless, in exercising their criminal jurisdiction, states must respect international law. In short, the exercise of repressive power can be limited by international law, in particular by the prohibition on interference such as when a state interferes in another state's internal affairs[7] or when a state exercises its competence in violation of a norm of higher rank. Conversely, a state can be under an obligation to exercise its criminal jurisdiction to prosecute certain acts by virtue of a norm in international law.

In 1927, in the celebrated *Lotus* case, the Permanent Court of International Justice stated that "in all systems of law the principle of the territorial character of criminal law is fundamental", although it also added that "[t]he territoriality of criminal law … is not an absolute principle of international law and by no means coincides with territorial sovereignty".[8] It further added:

> … jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law … Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their

4 *Id.*, pp. 736-737.

5 *Id.*, p. 741.

6 Gerhard Werle, *Principles of International Criminal Law* (Second edition), TMC Asser Press, The Hague, 2009, p. 66 and n. 375.

7 Article 2(1) of the United Nations Charter provides: "The Organization is based on the principle of the sovereign equality of all its Members."; Gerhard Werle, *Principles of International Criminal Law*, see *supra* note 6, p. 66 and n. 376.

8 Permanent Court of International Justice, *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, Series A, No. 10, p. 20.

> courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[9]

In other words, "the principle of freedom, in virtue of which each state may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law",[10] also applies with regard to law governing the scope of criminal jurisdiction. Consequently, all that can be required of a state, in these circumstances, is that it does not overstep the limits which international law imposes upon its jurisdiction; "within these limits, its title to exercise jurisdiction rests in its sovereignty".[11] States are therefore free to exercise their criminal jurisdiction under different legal grounds of jurisdiction, unless a rule of international law limits their freedom to extend the criminal jurisdiction of their courts.

The *Lotus* case *dictum* concerns *prescriptive jurisdiction*. In other words, it concerns what a state can do on its own territory when investigating and prosecuting crimes committed abroad, not what a state may do on other states' territory when prosecuting such crimes. Obviously, a state has no *enforcement jurisdiction* outside its territory. Without permission to the contrary, a state cannot exercise its jurisdiction on the territory of another state. While *prescriptive jurisdiction* can be extra-territorial, by way of contrast, *enforcement jurisdiction* is strictly territorial without permission to the contrary.[12]

9.2.1.1. Traditional Grounds of Jurisdiction: Territoriality, Active Nationality and Passive Nationality

In international law, there are a number of traditional grounds of jurisdiction to prescribe, pursuant to which states have asserted the applicability

[9] *Id.*, pp. 18-19.

[10] *Id.*, p. 20.

[11] *Id.*, p. 19.

[12] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 740.

of their criminal law. The first is the principle of territoriality. Pursuant to this principle, the laws of the territory where the act is committed is key.

The principle of territoriality has numerous advantages. First, the *locus commissi delicti* – the place where the crime has allegedly been committed – is usually the *forum conveniens*, that is, the appropriate place of trial since it is easiest to collect evidence and hear witnesses. Second, it is normally the place where the rights of the accused are best safeguarded as he is expected to know the law of the territory, providing he is not a foreigner on a temporary visit. Hence the accused is more likely to be familiar with the criminal law in force as well as with his rights as a defendant in a criminal trial. In addition, he is more likely to know and speak the language in which the trial is conducted. Third, the cathartic process of criminal trials will be more effective if the prosecution and sentence occur on the territory where the crime was committed. Furthermore, the judges, being members of the society where the crimes took place, are conscious of the public's close scrutiny on their administration of justice. Thus, they are more accountable to the community for the manner in which they dispense justice. Finally, by administering justice over crimes perpetrated in its territory, the territorial state affirms its authority over crimes within its boundaries; consequently helping to deter the commission of future offences.[13] The advantages of conducting national prosecutions in the territorial state are of course only valid if they are conducted in an independent, impartial and fair manner.

The principle of active nationality is the other traditional legal ground of jurisdiction, according to which a state may criminalize offences committed abroad by one of its nationals. It is normally implemented in one of two ways. In some states, national courts have jurisdiction over certain criminal conduct committed by their nationals abroad, regardless of whether those offences are criminal under the law of the territorial state. In such cases, the underlying rationale is the will of a state that its nationals comply with its own law, irrespective of where they are and regardless of the laws in the state where the offence is committed. In other states, criminal jurisdiction over crimes committed by nationals abroad is subordinate to the offence being punishable under the law of the territorial state. In these the essential motivation behind the principle is

[13] Antonio Cassese, *International Criminal Law* (2nd edition), Oxford University Press, Oxford, 2008, p. 336, n. 1.

the desire of the state of nationality not to extradite its nationals to the state where the crime has been committed. Thus, the state of active nationality must provide for the possibility of trying the accused, so that he does not escape prosecution altogether.[14] On the whole, states of civil law tradition – many of which do not extradite their nationals – tend to exercise their jurisdiction on this basis more frequently than states of common law tradition.[15]

In addition, the principle of passive nationality – for so long regarded as controversial[16] – now appears generally accepted.[17] By virtue of this principle, states may exercise jurisdiction over crimes committed abroad against their own nationals. Plainly, the motivation underlying the principle is grounded on: (i) the need to protect nationals abroad; and (ii) a substantial mistrust in the exercise of criminal jurisdiction by the territorial state.[18] Normally, whenever the accused is abroad, a "double incrimination" is required by many states for prosecuting a crime, namely that the offence be considered as such both in the state where it was committed and in the state of the victim exercising its jurisdiction. The underlying rationale is intended to avoid prosecuting a person for an act that is not considered a crime by the territorial state where it has been performed. The motivation for this prerequisite may be explained by the general principle of legality, *nullum crimen sine lege*, a general principle of international criminal law, in addition to being common to all national legal sys-

14 *Id.*, p. 337, n. 2.

15 Michael Akehurst, "Jurisdiction in International Law", in *British Yearbook of International Law*, 1972-1973, vol. 46, pp. 152 and 156-157; Dapo Akande, "Active Personality Principle", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 229.

16 The passive nationality principle has been considered controversial, for a long time, mostly because it implies that a state's national carries with him the protection of his national laws and because it exposes others to the application of laws without there being any reasonable basis on which those persons might suppose that such laws apply to their conduct. See Dapo Akande, "Passive Personality Principle", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, see *supra* note 15, p. 451.

17 International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 47; Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 739.

18 Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 337, n. 2.

tems. Furthermore, for extradition, "double incrimination" is usually also a procedural requirement.[19]

Finally, extraterritorial jurisdiction over the crimes of non-nationals has also been exercised, although only with regard to certain offences,[20] under the protective principle, also known as *compétence réelle*. Under this principle, a state exercises its criminal jurisdiction over crimes committed abroad by foreigners where the offence is deemed to constitute a threat to its security or some vital national interests.[21]

9.2.1.2. Traditional Legal Grounds of Jurisdiction and International Crimes

Determining the benefit and the difficulties arising from the application of the above-mentioned legal grounds of jurisdiction to the prosecution of core international crimes, allows understanding the exponential recourse to the principle of universal jurisdiction – with which we will deal later on – in the second half of the 20th century.

First, in the case of core international crimes, there may be a major obstacle to the principle of territoriality. These crimes are often committed by state officials – or military officials – or with their complicity or acquiescence; for example, war crimes committed by servicemen, or torture perpetrated by police officers, or genocide carried out with the tacit approval of state authorities. It follows that state judicial authorities may be reluctant to prosecute state agents or to institute proceedings against private individuals that might eventually involve state organs. A state might be unwilling or unable genuinely to carry out the investigation or prosecute the alleged perpetrators. Further problems may arise when the alleged perpetrator of a crime is a state official enjoying immunity from prosecution under national legislation, for instance the head of state, the

19 *Ibid.*

20 Currency offences, national security offences – such as espionage and treason – and immigration offences are usually crimes covered by the protective principle, as well as some terrorist offences committed or planned abroad which are intended to affect or influence a state. See Dapo Akande, "Protective Principle (Jurisdiction)", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, see *supra* note 15, p. 474.

21 Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 739.

head or a senior member of government, or a member of parliament. Clearly, if this is the case, national courts are barred from instituting criminal proceedings against the accused, because the latter enjoys personal immunity. It may also be that the alleged perpetrator, regardless of his official status, is covered by an amnesty law. The national authorities of the state in which the amnesty was granted may be precluded from taking judicial action. By contrast, a foreign court, assuming it has jurisdiction over the crime, may consider that it does not have to recognise the amnesty, particularly if this law conflicts with international rules of *jus cogens*, the peremptory norms of international law. Thus, whereas national jurisdiction based on the territoriality principle may sometimes fail, other grounds of jurisdictions invoked by foreign courts may prove workable and lead to the prosecution of the alleged culprit.

Among the international treaties providing for jurisdiction over international crimes based on territoriality,[22] the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[23] ("Genocide Convention of 1948") should be mentioned. Its article VI stipulates that "[p]ersons charged with genocide … 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". In other words, according to the Genocide Convention of 1948, the territorial state where an act of genocide has been committed has an international obligation to exercise its criminal jurisdiction to prosecute alleged accused charged with genocide. This rule, however, has almost never been applied,[24] except in Rwanda, where national courts

[22] See, *e.g.*, Article 5(1)(a) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, annexed to UN Doc. A/RES/39/46 (10 December 1984) ("Convention against Torture of 1984"). Article 5(1)(a) provides: "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".

[23] Convention on the Prevention and Punishment of the Crime of Genocide, annexed to UN Doc. General Assembly resolution 260 (III) A (9 December 1948).

[24] William A. Schabas, "National Courts Finally Begin to prosecute Genocide, the 'Crime of Crimes'", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, p. 40, n. 3 stating that: "Cambodia held a show trial for genocide of Khmer Rouge leaders Pol Pot and Ieng Sary in 1979, but under an idiosyncratic definition of the

prosecuted thousands alleged authors of the genocide committed in 1994[25] alongside the international prosecution brought before the International Criminal Tribunal for Rwanda ("ICTR"). This was only possible due to the rare circumstance that the victims of the genocide, the Tutsis, had seized power in Rwanda, and were therefore strongly committed to prosecute those responsible for genocide, not least since the genocide legitimized the minority Tutsi's hold on power.

The second traditional ground of jurisdiction to prescribe is the principle of active nationality. This principle entitles a state to exercise jurisdiction over its nationals even with respect to crimes taking place abroad. The principle of active nationality is normally upheld with regard to war crimes, as well as such crimes as torture. Many states, particularly under pressure from the conclusion of treaties setting out international crimes, have passed legislation providing for jurisdiction based on nationality. The active nationality principle is also laid down in a number of international treaties, which include the Convention against Torture of 1984.[26] Notable application of the active nationality principle are the trials

crimes that corresponds more closely to the concept of crimes against humanity" (internal references omitted).

[25] *Id.*, pp. 40, 45-46 and n. 44.

[26] Article 5(1)(b) of the Convention against Torture of 1984 provides: "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: (b) When the alleged offender is a national of that State". Outside the framework of core international crimes, the active nationality principle is also laid down in various treaties against terrorism, see, *e.g.*, Article 3(1)(b) of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, annexed to UN Doc. General Assembly resolution 3166 (XXVIII) (14 December 1973). Article 3(1)(b) provides: "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 case: (b) when the alleged offender is a national of that State"; Article 5(1)(b) of the International Convention against the taking of hostages, annexed to UN Doc. A/RES/34/146 (17 December 1979). Article 5(1)(b) provides: "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: (b) By any of its nationals […]"; Article 6(1)(c) of the International Convention for the Suppression of Terrorist Bombings of 25 November 1997, annexed to UN Doc. A/RES/52/164 (9 January 1998). Article 6(1)(c) provides: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (c) The offence is committed by a national of that State"; Article 7(1)(c) of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, annexed

instituted in 1902 by US Court Martial against American servicemen who had fought in the Philippines,[27] the "Leipzig trials" against Germans in 1921-1922, imposed upon Germany by the Allies,[28] and the various trials before US Courts Martial for crimes committed in Vietnam.[29] However, in principle, the problems associated with the principle of territoriality also apply to the application of the principle of active nationality. When a core international crime is committed by a state (or military) official, the state of the offender might be reluctant to prosecute him. Alternatively, the offender might enjoy immunity from prosecution or be covered by an amnesty law. Thus, when the state of the offender is unwilling to prosecute its nationals, the principle of active nationality is inadequate to prosecute core international crimes.

The third traditional ground of jurisdiction to prescribe is the principle of passive nationality. By virtue of this principle, a state may exercise its jurisdiction over crimes committed abroad against its own nationals. The passive nationality ground of jurisdiction has frequently been deployed to prosecute war crimes, particularly after the cessation of hostilities, by the victorious state against the vanquished former enemies. More recently, courts have relied upon this jurisdictional ground with regard to crimes against humanity and torture. Significant in this respect are some cases tried *in absentia*: *Alfredo Astiz*, a case brought before French courts concerning an Argentine officer who had tortured two French nuns in Argentina, and was sentenced to life imprisonment,[30] as

to UN Doc. A/RES/54/109 (25 February 2000). Article 7(1)(c) provides: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (c) The offence is committed by a national of that State"; Article 9(1)(c) of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, annexed to UN Doc. A/RES/59/290 (15 April 2005). Article 9(1)(c) provides: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (c) The offence is committed by a national of that State".

27 See Guénaël Mettraux, "US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, pp. 135-150.

28 William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 4.

29 Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 337, n. 3.

30 Alfredo Astiz was sentenced to life's imprisonment. See Cour d'Assises de Paris, *In Re Alfredo Astiz*, Arrêt, No. 1893/89, 16 March 1990; Ellen Lutz and Kathryn Sik-

well as some cases brought before Italian courts against Argentine officers for crimes perpetrated against Italians in Argentina, such as the *Suàrez Masón and others*.[31] This ground of jurisdiction is stipulated in the Convention against Torture of 1984.[32]

kink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", in *Chicago Journal of International Law*, 2001, vol. 2, no. 1, pp. 10-11; Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 337, n. 3.

[31] Suàrez Masón and Riveros were sentenced to life's imprisonment and the five other defendants to twenty-four years of imprisonment each. See Rome Court of Assizes (*Corte di assise*), *Suàrez Masón and others*, 6 December 2000; Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", see *supra* note 30, pp. 21, 23; Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 337, n. 3.

[32] Article 5(1)(c) of the Convention against Torture of 1984 provides: "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: (c) When the victim is a national of that State if that State considers it appropriate". In addition, this ground of jurisdiction has been laid down in national legislation with regard to terrorism, for instance in France, Belgium and the United States. It is also stipulated in a number of international conventions against terrorism. See Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, Oxford, 2004, pp. 246-248. The several anti-terrorist conventions concluded at the international level after 1963 are all based on a similar jurisdictional system, with only slight differences due to experience of shortcomings and emergent political consensus. These conventions provide a series of jurisdictional titles for all the States Parties, among which the principle of passive nationality; see, *e.g.*, Article 5(1)(d) of the International Convention against the taking of hostages, annexed to UN Doc. A/RES/34/146 (17 December 1979). Article 5(1)(d) provides: "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: (d) With respect to a hostage who is a national of that State, if that State considers it appropriate"; International Convention for the Suppression of Terrorist Bombings of 25 November 1997, annexed to UN Doc. A/RES/52/164 (9 January 1998). Article 6(2)(a) provides: "A State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that State"; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, annexed to UN Doc. A/RES/54/109 (25 February 2000). Article 7(2)(a) provides: "A State Party may also establish its jurisdiction over any such offence when: (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State"; Article 9(2)(a) of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, annexed to UN Doc. A/RES/59/290 (15 April 2005). Article 9(2)(a) provides: "A State

The principle of passive nationality has been considered a controversial principle for two reasons. First, it implies that a person carries with him/her the protection of his/her national laws. Second, it exposes other persons to the application of laws without these persons supposing that such laws apply to their conduct.[33] However, in case of core international crimes, these explanations are less justifiable given the need to provide a broad basis for ending impunity of such acts and because persons are supposed to know that core international crimes are prohibited under international law. Still, some scholars find this ground of jurisdiction particularly incongruous in the case of some international crimes such as those against humanity and torture.[34] This is perhaps the reason this ground of jurisdiction is envisaged in international conventions, such as the Convention against Torture of 1984, not as an obligation of contracting states but simply as an authorization to prosecute.[35] Conversely, this ground of jurisdiction may prove appropriate for terrorism as a discrete offence, where the perpetrators will often – but not always – select their victims based on their nationality and will know that the victims' nationality state has a particularly strong interest in preventing such crimes[36] and because the

Party may also establish its jurisdiction over any such offence when (a) The offence is committed against a national of that State".

33 Dapo Akande, "Passive Personality Principle", see *supra* note 16, p. 451.

34 Antonio Cassese, *International Criminal Law*, see *supra* note 13, pp. 337-338, n. 3. According to him, "[b]y definition, these are crimes that injure humanity, […] words our concept of respect for any human being, regardless of the nationality of the victims. As a consequence, their prosecution should not be based on the national link between the victim and the prosecuting state. This is indeed a narrow and nationalistic standard for bringing alleged criminals to justice, based on the interest of a state to prosecute those who have allegedly attacked one of its nationals. The prosecution of those crimes should instead reflect a universal concern for their punishment; it should consequently be better based on such legal grounds as territoriality, universality, or active personality. It follows that, as far as such crimes as those against humanity, torture, and genocide are concerned, the passive nationality principle should only be relied upon as a *fall-back*, whenever no other state (neither the territorial state, nor the state of which the alleged criminal is a national, or other states acting upon the universality principle) is willing or able to administer international criminal justice."

35 Article 5(1)(c) of the Convention against Torture of 1984 provides: "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: (c) When the victim is a national of that State if that State considers it appropriate".

36 Dapo Akande, "Passive Personality Principle", see *supra* note 16, p. 452.

need to protect nationals' interests and concerns acquires greater relevance.[37]

Finally, it is particularly interesting to recall here the most celebrated case – perhaps because the only one – where the protective principle has been invoked as legal ground to justify the prosecution of core international crimes, the *Eichmann* case.[38] As it is well known, Eichmann was a German national, who had been the Head of the section of the Gestapo charged with the implementation of the "final solution of the Jewish question" during the Second World War.[39] In 1960, he was captured in Buenos Aires by individuals who were probably agents of the Israeli government. After being held in captivity in a private house in Buenos Aires for some weeks, he was taken by air to Israel unbeknownst to the Argentinean government.[40]

Eichmann was subsequently charged under an Israeli statute, the Nazis and Nazi Collaborators (Punishment) Law 5710 of 1950 ("Israeli Law of 1950"), of fifteen counts of crimes against the Jewish people, crimes against humanity, war crimes and membership of a hostile organization.[41] Under Section 1(a) of the Israeli Law of 1950, war crimes were punishable if committed "during the period of the Second World War … in an hostile country"; other crimes were punishable if done "during the period of the Nazi regime in an hostile country".[42]

In the District Court of Jerusalem and on appeal,[43] the Court considered challenges to its jurisdiction based on international law by the

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37 Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 338, n. 3.

38 District Court of Jerusalem, *Attorney General of the Government of Israel v. Eichmann*, Case No. 40/61, Judgment in the Trial of Adolf Eichmann, 15 December 1961, ("*Eichmann* Judgement"). For a discussion of the case, see J.E.S. Fawcett, "The *Eichmann* Case", in *British Yearbook of International Law*, 1962, vol. 38, pp. 181-215; L.C. Green, "The Eichmann Case", in *Modern Law Review*, 1960, vol. 23, no. 5, pp. 507-515.

39 Vanni E. Treves, "Jurisdictional Aspects of the Eichmann Case", in *Minnesota Law Review*, 1962-1963, vol. 47, no. 4, p. 558.

40 J.E.S. Fawcett, "The *Eichmann* Case", see *supra* note 38, p. 182.

41 *Ibid*.

42 *Eichmann* Judgement, see *supra* note 38, para. 4.

43 The Supreme Court of Israel sitting as a Court of Criminal Appeal fully concurred, without hesitation or reserve, with the District Court of Jerusalem's conclusions and reasons, see Supreme Court of Israel, *Adolf Eichmann v. The Attorney General*, Criminal Appeal No. 336/61, Judgment, 29 May 1962, paras. 5, 7, 13.

defence which argued that the Israeli Law of 1950 "by inflicting punishment for acts committed outside the boundaries of the [S]tate and before its establishment, against persons who were not Israeli citizens, and by a person who acted in the course of duty on behalf of a foreign country … conflicts with international law and exceeds the powers of the Israeli legislator".[44]

The District Court of Jerusalem rejected the argument, holding that, in fact, Israel's right to punish had two valid bases of jurisdiction. First, universal jurisdiction – due to the universal character of the crimes in question[45] – which will be discussed later and, second, the protective principle.[46] The District Court held that the protective principle is not limited to only those foreign offences which threaten the vital interests of a state, but also invoke jurisdiction when there is a "linking point"; in other words, when an act or an accused concerns a state more than they concern other states.[47] As a result, the Court held that:

> … The "linking point" between Israel and the Accused (and for that matter between Israel and any person accused of a crime against the Jewish People under this law) is striking in the "crime against the Jewish People," a crime that postulates an intention to exterminate the Jewish People in whole or in part. Indeed, even without such specific definition - and it must be noted that the draft law only defined "crimes against humanity" and "war crimes" … – there was a subsisting "linking point," since most of the Nazi crimes of this kind were perpetrated against the Jewish People; but viewed in the light of the definition of "crime against the Jewish People," as defined in the [Israeli] Law [of 1950], constitutes in effect an attempt to exterminate the Jewish People, or a partial extermination of the Jewish People. If there is an ef-

[44] *Eichmann* Judgement, see *supra* note 38, para. 8.

[45] *Id.*, para. 11.

[46] *Id.*, para. 30 provides: "The State of Israel's 'right to punish' the Accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault its existence. This second foundation of penal jurisdiction conforms, according to the acknowledged terminology, to the protective principle (the competence réelle)."

[47] *Id.*, paras. 31-32.

> fective link (and not necessarily identity) between the State of Israel and the Jewish People, then a crime intended to exterminate the Jewish People has an obvious connection with the State of Israel. …
>
> The connection between the State of Israel and the Jewish People needs no explanation. The State of Israel was established and recognized as the State of the Jews. …
>
> [T]his crime very deeply concerns the vital interests of the State of Israel, and pursuant to the "protective principle," this State has the right to punish the criminals. … [T]he acts in question referred to in this Law of the State of Israel "concern Israel more than they concern other states," and therefore … there exists a "linking point." The punishment of Nazi criminals does not derive from the arbitrariness of a country "abusing" its sovereignty, but is a legitimate and reasonable exercise of a right in penal jurisdiction.[48]

Beside the many problematic issues involved in the *Eichmann* case, it is necessary here to underline how unusual it was to invoke the protective principle in such a case, considering that vital interests of a state, as a ground for jurisdiction, have been always identified with respect to a limited number of criminal offences, such as counterfeiting national currency or planning attacks on a state's security. The District Court of Jerusalem referred to the protective principle and 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 the Israeli Law of 1950 that includes genocide and crimes against humanity whenever committed against the "Jewish people", wherever they may be. Israel's jurisdictional reach is, under its law, universal, but it is based on a nationality connection – it may be more accurate to say on a religious connection – to the victim that places such jurisdictional basis under the principle of passive nationality. 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 jurisdictional theory relied upon, rather than its jurisdictional basis.

[48] *Id*., paras. 33-35.

9.2.2. Universal Jurisdiction and its Expansion in the Second Half of the 20th Century

During the second half of the 20th Century, following the establishment of crimes under international law, states also started to deal with them under the principle of universal jurisdiction. The *Eichmann* case is just one example in which the principle was invoked, in concert with the principle of protective principle.

9.2.2.1. Definition and Content of the Principle of Universal Jurisdiction

The principle of universal jurisdiction empowers – or requires in certain cases – a state to bring to trial persons accused of certain international crimes, regardless of the place of commission of the crime and irrespective of the nationality of the perpetrator and the victim[49] at the time of the commission of the crime.[50] This principle therefore derogates from the ordinary grounds of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.[51] While other forms of extra-territorial jurisdiction are grounded in some nexus between the fo-

[49] Xavier Philippe, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?", in *International Review of the Red Cross*, 2006, vol. 88, no. 862, p. 377 and references cited therein; Florian Jessberger, "Universal Jurisdiction", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, see *supra* note 15, p. 555; Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 746; Antonio Cassese, *International Criminal Law*, see *supra* note 13, p. 338, n. 4; Theodor Meron, "International Criminalization of Internal Atrocities", in *American Journal of International Law*, 1995, vol. 89, no. 3, p. 570.

[50] This last part is extremely significant. See Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, p. 812, n. 2: "The point in time by reference to which one characterizes the head of prescriptive jurisdiction relied on in a given case is the moment of alleged commission of the offence: a foreigner's presence on the prescribing state's territory or his or her assumption of its nationality, etc, after the commission of the offence cannot turn universal jurisdiction into jurisdiction based on territoriality, nationality, and so on".

[51] Xavier Philippe, "The principles of universal jurisdiction and complementarity how do the two principles intermesh?", see *supra* note 49, p. 377.

rum state and the crime, universal jurisdiction requires no such nexus.[52] Instead it finds its basis in the notion that certain *jus cogens* and other peremptory norms of international law are so widely and universally endorsed, and that their violations are so harmful, that they constitute a profound attack not just on the immediate victims or to the state community to which victims are related, but on the international community as a whole. As a result of this offence to the international community, the theory of universal jurisdiction asserts that all states have a legitimate interest and are entitled – and even obliged in some circumstances – to bring proceedings against the perpetrators, even if there is no link between the forum state and the crime.[53] Universal jurisdiction allows for the trial of international crimes committed anywhere in the world by and against anybody. In many respects, it is an unprecedented mechanism empowering states to prosecute and try alleged perpetrators of core international crimes.

Traditionally, the *ratio legis* of universal jurisdiction is justified by two main ideas. First, as stated, some crimes are so grave that they harm the entire international community. Second, the gravity of these crimes implies that no safe haven should be available for those who commit them. Although these justifications may not always appear realistic, they clearly explain why the international community or individual states intervene by bringing proceedings and prosecuting the perpetrators of such crimes.[54]

Here, it is important to recall two points. First, that "to the extent that a title to prescriptive universal criminal jurisdiction exists under customary international law, a state that has exercised this title must be presumed to have the jurisdiction title to adjudicate the matter by way of

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[52] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, pp. 745-746 and references cited therein.

[53] Xavier Philippe, "The principles of universal jurisdiction and complementarity how do the two principles intermesh?", see *supra* note 49, p. 377.

[54] International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Dissenting opinion of Judge *ad hoc* Van den Wyngaert, para. 46; Georges Abi-Saab, "The Proper Role of Universal Jurisdiction", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 597; Philip Grant, "Les poursuites nationales et la compétence universelle", in Robert Kolb, *Droit international pénal*, Bruylant/Helbing and Lichtenhahn, Bruxelles/Bâle, 2008, p. 454; Florian Jessberger, "Universal Jurisdiction", see *supra* note 49, p. 556.

investigation and, where applicable, prosecution and trial, unless this title is restricted by an applicable international rule stating the contrary".[55] The application of this principle is important for the controversy on the so-called universal criminal jurisdiction *in absentia*, as will be shown subsequently. Second, universal jurisdiction for international crimes is primarily based on customary international law, but can also be established under a multilateral treaty.[56] However, some argue that, by definition, a multilateral treaty-based jurisdiction regime only apply *inter partes* and, therefore, cannot *stricto sensu* be considered universal in nature[57] except for the four Geneva Conventions of 1949,[58] which have been universally ratified. Defining universal jurisdiction as "any" state, or "every" state, having the authority to criminalize international crimes can therefore be unintentionally misleading, "in so far as [the use of these terms] might be mistaken to suggest that universal jurisdiction can never be grounded in treaty law".[59] In fact, the jurisdiction mandated by the relevant treaty provisions is universal jurisdiction; in other words, that is, prescriptive jurisdiction in the absence of any other traditional jurisdictional nexus.

Though its modern application has evolved only recently, historically, universal jurisdiction has its roots in the longstanding criminal law approach to piracy and slavery.[60] Piracy is a crime that takes place in a

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55 Claus Kreß, "Universal Jurisdiction over International Crimes and the *Institut de Droit International*", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, p. 565.

56 *Id*., p. 566.

57 *Ibid*.

58 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 ("First Geneva Convention of 1949"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 ("Second Geneva Convention of 1949"); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ("Third Geneva Convention of 1949"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ("Fourth Geneva Convention of 1949").

59 Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 746.

60 Georges Abi-Saab, "The Proper Role of Universal Jurisdiction", see *supra* note 54, p. 600; Michael Akehurst, "Jurisdiction in International Law", see *supra* note 15, p. 160; Cherif Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, University of Pennsylvania

space, the high seas, where there is an absence of territorial sovereignty.[61] This criminal conduct was at its peak during a period in which the vast bulk of commercial activity among nations occurred through maritime operations. The lawless acts of the perpetrators directly impacted that global market, harming states indiscriminately. As such, crimes of piracy were considered crimes against the global community, and thus a concern for all nations "in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries".[62] For this reason, no nexus between the crime and the forum state was considered necessary to establish jurisdiction and initiate prosecution.

Slave-traders were thought to fall into a similar category. Although the slave trade did not threaten commerce or other interaction among nations in the same way as piracy, the severity of its infringement on individual liberty was considered uniquely atrocious, so much so that it deserved international condemnation as a crime against the global community. Again, a nexus between the crime and the forum state was considered unnecessary to justify the invocation of jurisdiction over slave-traders. However, it was for the slave trade on the high seas that universal jurisdiction was implemented in treaty provisions.[63] We will not dwell on these crimes, although both have recently come to the attention of the international community in different contexts.[64]

Press, Philadelphia, 2004, pp. 48, 49 and n. 62; Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", in *Virginia Journal of International Law*, 2001, vol. 42, no. 1, p. 99; Philip Grant, "Les poursuites nationales et la compétence universelle", see *supra* note 54, p. 454; Xavier Philippe, "The principles of universal jurisdiction and complementarity how do the two principles intermesh?", see *supra* note 49, p. 378; Fausto Pocar, "Droit pénal et territoire", in Francis Delpérée *et al*. (eds.), *Droit constitutionnel et territoire*, Académie internationale de droit constitutionnel, 2009, pp. 178-179.

61 Georges Abi-Saab, "The Proper Role of Universal Jurisdiction", see *supra* note 54, p. 599.

62 *Ibid*.

63 Cherif Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", see *supra* note 60, p. 49.

64 For example, in the contexts of the recent incidents of piracy off the coast of Somalia and human trafficking as a modern incarnation of slave trade. See Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights", in *International and Comparative Law Quarterly*, 2010, vol. 59, no. 1, pp. 141-169; Fausto Pocar, "Human Trafficking: A Crime Against Humanity", in Ernesto U. Savona and Sonia Stefanizzi

In contrast to the longstanding approach to the crimes of piracy and slavery, the evolution of universal jurisdiction into a mechanism for prosecuting perpetrators of atrocities such as war crimes, crimes against humanity and genocide has been a relatively recent phenomenon. However, unlike universal jurisdiction with respect to piracy, universal jurisdiction in these realms has been grounded in the particularly atrocious nature of the crimes in question, which are prohibited under *jus cogens* international norms. The critical and unifying point with respect to core international crimes that fall within the remit of universal jurisdiction is that the perpetrators are considered *hostes humani generis* or the enemies of all mankind.[65] Precisely because of the nature of this justification, a further expansion of the scope of universal jurisdiction's application to other areas of criminal law is unlikely.

In any event, the implementation of the principle of universal jurisdiction remains controversial.[66] Indeed, as will be shown subsequently, some of the states that have exercised universal jurisdiction, such as Belgium and Spain, have been submitted to substantial international political and legal pressure to curtail their national laws on universal jurisdiction.

9.2.2.2. The 1949 Geneva Conventions and their Historical Legacy for the Expansion of Universal Jurisdiction for Core International Crimes in the Second Half of the 20th Century

The expansion of universal jurisdiction for core international crimes to its contemporary scope has its origins in the dramatic development of inter-

(eds.), *Measuring Human Trafficking: Complexities and Pitfalls*, Springer, New York, 2007, pp. 5-12.

65 Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", see *supra* note 60, p. 96 and n. 56.

66 International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Dissenting opinion of Judge *ad hoc* Van den Wyngaert, paras. 44-45: "There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways. […] Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning and its legal status under international law". See also, *e.g.*, George P. Fletcher, "Against Universal Jurisdiction", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, pp. 580-584; International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Separate opinion of President Guillaume, Declaration of Judge Ranjeva and Separate opinion of Judge Rezek.

national criminal law and human rights consciousness in the aftermath of the Second World War. Through the establishment of the International Military Tribunals and the adoption of conventions containing explicit, or implicit, norms on universal jurisdiction, the idea of universal jurisdiction for international crimes gained ground.[67] Indeed, as the House of Lords recognised in its landmark universal jurisdiction judgement on the extradition of Chilean General and former President Augusto Pinochet:

> Since the Nazi atrocities and the Nuremberg trials, international law has recognized a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states.[68]

Supplementing the legacy of Nuremberg in this respect have been key developments in international human rights and humanitarian law. International law not only recognised the authority but, in certain circumstances, mandated states to prosecute international crimes.[69] Starting with the Genocide Convention of 1948, states have adopted several instruments at the international level that have been widely recognised as contributions to the development of universal jurisdiction.[70] The parties to the Genocide Convention of 1948 undertook to prevent and punish genocide as a "crime under international law".[71] Even though the Genocide Convention of 1948 only provides for territorial jurisdiction,[72] it has been consistently argued that customary international law developed itself in a way to confirm the freedom of states to exercise universal jurisdiction

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67 Xavier Philippe, "The principles of universal jurisdiction and complementarity how do the two principles intermesh?", see *supra* note 49, p. 378.

68 House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, (HL(E)) [2000] 1 AC, 147, p. 189 by Lord Browne-Wilkinson.

69 Xavier Philippe, "The principles of universal jurisdiction and complementarity how do the two principles intermesh?", see *supra* note 49, pp. 378-379.

70 See the acknowledgement of these developments by the ICJ, in International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, para. 59.

71 Article I of the Genocide Convention of 1948 provides that the "Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

72 See Article VI of the Genocide Convention of 1948, see *supra* section 9.2.1.2.

with regard to the crime of genocide.[73] The International Court of Justice admitted in a judgement delivered in 1996:

> … the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.[74]

This *dictum* was also recognised by the practice of international tribunals and courts[75] as well as by national courts.[76]

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[73] Gerhard Werle, *Principles of International Criminal Law*, see *supra* note 6, p. 67 and n. 380; Philip Grant, "Les poursuites nationales et la compétence universelle", see *supra* note 54, p. 457, n. 43 and references cited therein. Philip Grant is of the opinion that customary international law developed itself in a way to *authorize* states to exercise universal jurisdiction with regard to the crime of genocide; William A. Schabas, "National Courts Finally Begin to prosecute Genocide, the 'Crime of Crimes'", see *supra* note 24, pp. 42-43, n. 22-23 and references cited therein, see also p. 60 stating that: "Be that as it may, if in 1948 States were generally hostile to universal jurisdiction for genocide, the situation has clearly changed"; Theodor Meron, "International Criminalization of Internal Atrocities", see *supra* note 49, p. 569 and n. 83-84.

[74] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Preliminary Objections*, Judgement, I.C.J. Reports 1996, para. 31.

[75] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62 provides: "[…] universal jurisdiction being nowadays acknowledged in the case of international crimes […]"; International Criminal Tribunal for Rwanda, *The Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999, provides: "WHEREAS, that said, the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law"; European Court of Human Rights, *Jorgić v. Germany*, Application No. 74613/01, Judgment, 12 July 2007, paras. 69-70 provides: "The Court observes in this connection that the German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights) and by the Statute and case-law of the ICTY. It notes, in particular, that the Spanish *Audiencia Nacional* has interpreted Article VI of the Genocide Convention in exactly the same way as the German courts [… T]he principle of universal jurisdiction for genocide has been expressly acknowledged by

Shortly after the adoption of the Genocide Convention of 1948, the adoption of the four Geneva Conventions of 1949 represented a landmark in the evolution of universal jurisdiction for the prosecution of graves breaches.[77] The four Geneva Conventions of 1949 provide that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.[78]

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the ICTY […] and numerous Convention States authorize the prosecution of genocide in accordance with that principle […]. The Court concludes that the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide." Mr. Jorgić, a national of Bosnia-Herzegovina of Serbian ethnicity, was alleging that the German courts had not had jurisdiction to convict him of genocide for acts committed in Bosnia-Herzegovina in 1992.

[76] See, *e.g.*, in Germany: *Nikolai Jorgić*, Higher Regional Court (*Oberlandesgericht*), Dusseldorf, 26 September 1997, IV-26/96 (a Bosnian Serb convicted of genocide and sentenced to life imprisonment); *Maksim Sokolović*, Higher Regional Court (*Oberlandesgericht*), Dusseldorf, 29 November 1999, and his appeal dismissed: Federal Court of Justice (*Bundesgerichtshof*), Third Criminal Senate, 21 February 2001, 3 StR 372/00 (a Bosnian Serb convicted of genocide 1992 and sentenced to a nine-year term of imprisonment); *Kjuradj Kusljić*, *Bayerisches Oberstes Landesgericht*, 15 December 1999, 6 St 1/99, and his appeal dismissed: Federal Court of Justice (*Bundesgerichtshof*), 21 February 2001, BGH 3 Str 244/00 (a Bosnian Serb convicted of genocide and sentenced to life imprisonment); in Austria: *Duško Cvjetković*, *Oberste Gerichtshof Wien*, 13 July 1994, 15 Os 99/94-6; *Duško Cvjetković*, *Oberlandesgericht Linz*, 1 June 1994, AZ 9 Bs 195/94 (GZ 26 Vr 1335/94-30); *Duško Cvjetković*, *Landesgericht Slazburg*, 31 May 1995, 38 Vr 1335/94, 38 Hv 42/94 (a Bosnian Serb prosecuted for genocide and eventually acquitted for lack of evidence. Significantly, however, it had been earlier agreed that Austrian courts had jurisdiction to try the case); in France: Cour de Cassation, Chambre criminelle, *Wenceslas Munyeshyaka*, Arrêt, 6 janvier 1998 (ongoing proceedings against a Rwandan accused of genocide); see also William A. Schabas, "National Courts Finally Begin to prosecute Genocide, the 'Crime of Crimes'", see *supra* note 24, pp. 49-50.

[77] Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction", see *supra* note 50 , p. 811.

[78] Article 49 of the First Geneva Convention of 1949; Article 50 of the Second Geneva Conventions of 1949; Article 129 of the Third Geneva Convention of 1949; Article 146 of the Fourth Geneva Convention of 1949.

The grave breaches regime of the Geneva Conventions of 1949 constitute the first treaty-based incarnation of an unconditional universal jurisdiction applicable to all States Parties.[79] As it was particularly well explained:

> [T]he obligation imposed by the grave breaches provisions is not dependent on any prescriptive nexus of nationality, territoriality, passive personality or the protective principle (or, indeed, any other internationally lawful head of jurisdiction). That is, according to their ordinary meaning, the grave breaches provisions posit an obligation to exercise criminal jurisdiction over persons alleged to have committed, or to have ordered the commission of, grave breaches of the relevant Convention in the absence, where necessary, of any other accepted ground of jurisdiction to prescribe. (*A fortiori*, a [State Party] must exercise criminal jurisdiction in respect of grave breaches allegedly committed on its territory or by one of its nationals.) In short, these identical provisions posit an obligation to exercise, where necessary, universal criminal jurisdiction over alleged grave breaches.[80]

As the Commentary on the Geneva Conventions of 1949 states, the obligation on States Parties to search for persons alleged to have committed graves breaches "imposes an active duty on them. As soon as a [State Party] realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed".[81] It further adds that "[t]he necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State".[82] Article 85(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Pro-

[79] Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction", see *supra* note 50, pp. 811, 819.

[80] *Id*., p. 814 (internal reference omitted).

[81] Oscar Uhler and Henri Coursier, "Commentary: Geneva Convention relative to the protection of civilian persons in time of war – vol. IV", in Jean Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary*, International Committee of the Red Cross, Geneva, 1958, p. 593.

[82] *Ibid*.

tection of Victims of International Armed Conflicts[83] ("Additional Protocol I of 1977") provides for the same obligation for the graves breaches it enounces. Other international humanitarian law treaties provide for similar obligation.[84] Universal jurisdiction under customary international law for war crimes committed in international armed conflicts is also acknowledged[85] and has been recognised by national courts.[86] With regard

[83] Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (8 June 1977) ("Additional Protocol I of 1977").

[84] See, *e.g.*, Articles 16(1)(c) and 17(1) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999. Article 16(1)(c) provides: "Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases: (c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory". Article 17(1) provides: "The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law"; Articles 9(2) and 12 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989. Article 9(2) provides: "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 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". Article 12 provides: "The State Party in whose territory 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, 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".

[85] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 57 provides: "This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind. As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held: "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one. [...] The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be. [...] Crimes

to war crimes committed in non-international armed conflicts, it has been proved that an *aut dedere aut judicare* international customary rule has recently come into existence[87] or, at least, states are free under international law to adopt universal jurisdiction for these crimes.[88]

against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in Rivista Penale 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation). […]". *Ibid.*, para. 62 states: "[…] one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes […]"; Gerhard Werle, *Principles of International Criminal Law*, see *supra* note 6, p. 67 and n. 380.

86 On 14 October 2005, The Hague District Court sentenced two Afghan asylum seekers for their role and participation in the torture of civilians during the Afghan War of 1978-1992. The Court held in both cases that it had universal jurisdiction over violations of Common Article 3 of the Geneva Conventions of 1949 and that the accused were guilty of "torment" (*foltering*) and torture as a war crime (*marteling*). For a critical comment, see Guénaël Mettraux, "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 2, pp. 362-371. See also Liesbeth Zegveld, "Dutch Cases on Torture Committed in Afghanistan: The Relevance of the Distinction between Internal and International Armed Conflict", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 878-880; Ward Ferdinandusse, "On the Question of Dutch Courts' Universal Jurisdiction: A Response to Mettraux", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 881-883; Guénaël Mettraux, "Response to the Comments by Zegveld and Ferdinandusse", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 884-889.

87 Christian Maierhöfer, *Aut dedere – aut judicare: Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, Duncker and Humbolt, Berlin, 2006, p. 217; Claus Kreß, "Universal Jurisdiction over International Crimes and the *Institut de Droit International*", see *supra* note 55, p. 573; Philip Grant, "Les poursuites nationales et la compétence universelle", see *supra* note 54, p. 459 and n. 52 and reference cited therein.

88 Gerhard Werle, *Principles of International Criminal*, see *supra* note 6, p. 67 and n. 381.

With respect to crimes against humanity, it is important to note that there exists no specialized convention. Therefore, one cannot affirm that an international conventional norm providing for universal jurisdiction for crimes against humanity *per se* exists.[89] However, the validity of the principle of universal jurisdiction under customary international law for crimes against humanity is generally acknowledged.[90] Indeed, though not enshrined in treaties with universal jurisdiction clauses, crimes against humanity have now attained clear *jus cogens* status, such that their punishment is similarly mandatory even without explicit codification.[91]

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[89] Cherif Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", see *supra* note 60, p. 52.

[90] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 58 provides: "[…] It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal: "[...] by reason of their nature, the crimes against humanity [...] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. *(Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie*, 78 *International Law Reports* 125, 130 (Cass. crim.1983).) […]"; Indonesian Ad Hoc Tribunal for East Timor, Human Rights Ad Hoc Court at Central Jakarta District Human Rights Court, Defendant *Eurico Guterres*, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST, Judgment, 25 November 2002, provides: "Considering, that the punishment on a perpetrator of the violation against humanity should absolutly [sic] be implemented, so through various instruments of international law, court judgments, or through developed doctrines of international law, the international community has included the international crime within the universal jurisdiction in which each perpetrator can be brought to trial anywhere and anytime regardless the *locus* and *tempus delicti*, and regardless the perpetrator's and the victim's citizenship. It means to show that there are no safe places in the world for a perpetrator of this crime (no safe haven principle)", available at (last visited 30 March 2010): http://www.legal-tools.org/en/doc/bb47f7/; Gerhard Werle, *Principles of International Criminal Law*, see *supra* note 6, p. 67 and n. 380; Theodor Meron, "International Criminalization of Internal Atrocities", see *supra* note 49, p. 589 and n. 82 and references cited therein.

[91] Although there is no convention directly addressing crimes against humanity, and thus no textual requirement for punishment, the crimes were first codified at Nuremberg, and have since been codified in each of the international and hybrid criminal tribunals, such that there is now a *jus cogens* norm upholding their universal crimi-

Under the Convention against Torture of 1984, each State Party shall take necessary measures to establish its jurisdiction over acts of torture whenever the alleged perpetrator is present on any territory under its jurisdiction and it does not extradite him to another state.[92] It is an obligation.[93] Article 7(1) further provides for an obligation for the state to submit the case to its competent authorities for the purpose of prosecution, if the alleged perpetrator is not extradited.[94] In addition, according to a common view, the authority to exercise jurisdiction over torture under customary international law has been confirmed in the case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The ICTY recognised that:

> … one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis

nalization. See, *e.g.*, Mark A. Summers, "International Court of Justice's Decision in *Congo v. Belgium*: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?", in *Boston University International Law Journal*, 2003, vol. 21, no. 1, p. 74 and n. 55; Gerhard Werle, *Principles of International Criminal Law*, see *supra* note 6, p. 67 and n. 380 and references cited therein; Philip Grant, "Les poursuites nationales et la compétence universelle", see *supra* note 54, p. 460; Florian Jessberger, "Universal Jurisdiction", see *supra* note 49, p. 556.

92 Article 5(2) of the Convention against Torture of 1984 provides: "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 I of this article".

93 Philip Grant, "Les poursuites nationales et la compétence universelle", see *supra* note 54, p. 460.

94 Article 7(1) of the Convention against Torture of 1984 provides: "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".

> for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.[95]

This development in the codification of the principle of universal jurisdiction for core international crimes on the back of the Nuremberg trials and the post Second World War flourishing of human rights consciousness has been powerful. Nonetheless, it took some time before state practice started to reflect the international legal developments that had begun in the 1940s. Despite the absence of a general practice of states to exercise universal jurisdiction, many states have adopted legislation permitting their courts to do so.

9.3. Application and Effectiveness of Universal Jurisdiction as a Contemporary Mechanism for Prosecuting Those Responsible of Core International Crimes

This second part highlights and comments on the diversity and complexity surrounding the implementation of universal jurisdiction in some national jurisdictions. The cases of Spain and Belgium are particularly emphasised. Although these states cannot be deemed representative of the entire international community, they have been among the most active in exercising universal jurisdiction. Outlining the obstacles these states have met in so doing allows a better assessment of the challenges and limits states face in their exercise of universal jurisdiction.

9.3.1. Diversity in Implementing Universal Jurisdiction

At the forefront of state action with respect to the expansion of universal jurisdiction have been, *inter alia*, Belgium and Spain. In 1993, Belgium passed the Act Concerning Grave Breaches of International Humanitarian Law,[96] thereby granting Belgian courts jurisdiction over twenty grave breaches of the Geneva Conventions of 1949 and their Additional Proto-

[95] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 156.

[96] Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, 5 August 1993, Moniteur Belge, 5 August 1993, p. 17751 ("Act of 1993").

cols,[97] irrespective of the nationality of the offender, the nationality of the victim, or the place where the criminal offence had been committed.[98] The Act of 1993 did not require the defendant's presence in Belgium in order to initiate an investigation. Moreover, because of the system of *partie civile*, Belgian courts' universal jurisdiction could be triggered by a victim acting as complainant, regardless of the prosecutor's desire to pursue the case.[99] The Act of 1993 was amended in 1999 to include crimes against humanity and genocide.[100] Additionally, Article 5(3) of the Act of 1999 further denied that immunities could apply to genocide, crimes against humanity and war crimes.[101]

Similarly, Article 23(4) of Spain's *Ley Orgánica del Poder Judicial* (Organic Law of Judicial Power), incorporated into Spanish criminal law in 1985, allows for the prosecution of certain crimes committed outside Spain by non-Spanish nationals which may, according to Spanish law, qualify as genocide, terrorism and any other crimes which under international treaties should be prosecuted by Spain.[102] Like the Belgian law, the Spanish provision at its inception was an example of universal jurisdiction allowing investigations to begin without the presence of the accused in Spain. Also like the Belgian law, Article 23(4) of the Law of 1985 could be invoked by civil parties who, upon convincing the investigating magis-

[97] Article 1 of the Act of 1993. It is interesting to note that the Act of 1993 does not follow the traditional distinction in international humanitarian law between international and non-international armed conflicts for the purpose of defining grave breaches as the Act of 1993 extends its protection to persons or objects protected by Additional Protocol II of 8 June 1977, see Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", in *Leiden Journal of International Law*, 2002, vol. 15, no. 3, p. 689.

[98] Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, pp. 689-690.

[99] Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 692.; Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", in *Leiden Journal of International Law*, 2004, vol. 17, no. 2, p. 376.

[100] Loi relative à la répression des violations graves du droit international humanitaire, 10 février 1999, Moniteur Belge, 23 March 1999, p. 9286 ("Act of 1999"); see Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 689.

[101] Article 5(3) of the Act of 1999 provides: "L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi".

[102] Ley Orgánica 6/1985 del Poder Judicial, 1 July 1985 ("Law of 1985").

trate that a valid case existed, were able to force a full investigation even without the endorsement of the public prosecutor.[103]

Article 23(4) of the Law of 1985 was first used in the context of core international crimes in 1996 in cases against Argentine and Chilean military officers and civilians involved in those countries' respective military dictatorships.[104] Most famously, the Spanish courts attempted to instigate the extradition of General and former President Augusto Pinochet from the U.K. – where he was receiving medical care – to Spain with the intention of prosecuting him for crimes of genocide, terrorism and torture allegedly committed during his notorious rule over Chile and the infamous Operation Condor.[105] The case was initiated by the complaint of a civil party, without the support of the public prosecutor. Indeed, prior to the extradition request, the public prosecutor had appealed to the *Audiencia Nacional*, questioning Spain's jurisdiction to try Pinochet. The *Audiencia Nacional* heard the jurisdictional challenges and in November 1998 found that Spain could properly hear the cases under Spain's universal jurisdiction law.[106] Though there was a case for passive personality jurisdiction, as some of Pinochet's alleged victims were Spanish, the holding did not rest on this basis, but was instead based on an assertion of Spain's universal jurisdiction under Article 23(4) of the Law of 1985.

This put the matter in the hands of the British courts, which needed to determine whether an ex-president could be questioned or prosecuted for crimes committed outside U.K. borders. On 25 November 1998, reversing a decision by the High Court that held that Pinochet was protected by sovereign immunity, a specially constituted Appellate Committee of the House of Lords, acting in its capacity as Britain's highest court of appeal, granted the extradition request on the ground that Pinochet did not enjoy immunity in relation to crimes committed under international

[103] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", in *Leiden Journal of International Law*, see *supra* note 99, p. 377.

[104] *Id*., p. 376.

[105] Richard A. Falk, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?", in Macedo, Stephen (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, see *supra* note 60, p. 107.

[106] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 377 and n. 4.

law.[107] This initial judgement by the House of Lords was set aside due to the alleged bias of one of the Lords, Lord Hoffman, who had links to Amnesty International. Nonetheless, on 24 March 1999, a new panel of the House of Lords also reversed the High Court decision, thus endorsing the extradition of Chile's longstanding President to a forum state with no real nexus to the alleged crimes.[108] However, Pinochet was never extradited, because Jack Straw determined in March 2000 that the former President's health, specifically his mental fitness to stand trial, militated against an extradition order.[109] Under a storm of controversy, Pinochet was returned to Chile shortly thereafter.

Though Spain's attempt to assert universal jurisdiction over Pinochet was ultimately frustrated by practical obstacles, it was a landmark case in that universal jurisdiction found judicial support in both Spain and the U.K. Unsurprisingly, then, a number of other complaints under the universal jurisdiction provisions of Spanish law ensued. Adolfo Scilingo, an Argentine naval officer and a member of the infamous Argentinean Naval School of Mechanics ("ESMA"), was accused of participating in 'death flights' in which people who had been abducted were thrown out of the aircraft, naked and unconscious, into the ocean thousands of metres below. Scilingo was arrested when he voluntarily travelled to Spain in 1997 in order to give testimony concerning these events and was eventually convicted on 19 April 2005 for crimes against humanity and sentenced to a 640-year term of imprisonment,[110] increased to 1,084 years on 4 July 2007 by the Spanish Supreme Court. A similar indictment against Ricardo Miguel Cavallo, another ESMA naval officer accused of genocide, terrorism and torture, led to an extradition request to Mexico, where

[107] Richard A. Falk, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?", see *supra* note 105, p. 111.

[108] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte (No. 3), 24 March 1999.

[109] Michael Byers, "The Law and Politics of the Pinochet Case", in *Duke Journal of Comparative and International Law*, 2000, vol. 10, no. 2, p. 438.

[110] For a discussion of the case, see Christian Tomuschat, "Issues of Universal Jurisdiction in the *Scilingo* Case", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 5, pp. 1074-1081; Alicia Gil Gil, "The Flaws of the *Scilingo* Judgment", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 5, pp. 1082-1091; Giulia Pinzauti, "An Instance of Reasonable Universality: the *Scilingo* Case", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 5, pp. 1092-1105.

Cavallo was arrested and ultimately extradited to Spain.[111] Further complaints were raised during the ensuing years as a new era of international criminal justice appeared to dawn.

In the late 1990s and into the new millennium, Belgium's universal jurisdiction law was similarly mobilized by civil parties seeking to assert Belgium's jurisdiction over the alleged perpetrators of gross human rights abuses. Investigations were opened against a range of high-profile defendants, including political and military leaders from Chile, Rwanda, Chad, Iran, Ivory Coast, Morocco, Israel, Palestine, Cuba, Iraq, and the United States. Some of these cases were quickly dismissed.[112] On 8 June 2001, the *Butare Four* case,[113] however, led to the first convictions under Belgium's universal jurisdiction law.[114] The case involved complaints against four Rwandan citizens for their participation in a series of crimes committed during the Rwandan genocide in 1994. Vincent Ntezimana, Alphonse Higaniro and the two nuns, Sister Consolata Mukangango and Sister Juli-

[111] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 378. Ricardo Miguel Cavallo was eventually extradited to Argentina on 28 February 2003.

[112] Investigations were opened against high-profiles figures such as Augusto Pinochet (former President of Chile), Paul Kagame (President of Rwanda), Hissène Habré (former Chadian President), Akbar Hashemi Rafsanjani (former Iranian President), Robert Guéï (former Ivory Coast Ruler), Laurent Gbagbo (Ivory Coast President), Emile Boga Doudou (former Ivory Coast Minister of State for the Interior), Moïse Lida Kouassi (former Ivory Coast Minister of Defence), a former Moroccan Minister of International Affairs, Ariel Sharon (former Israeli Prime Minister), Yasser Arafat (former President of the Palestinian National Authority), Fidel Castro (former Cuban President), Saddam Hussein (former Iraqi President) and George Bush Senior (former US President), see, *e.g.*, Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 693; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 2, pp. 407-408; Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, pp. 383-384.

[113] Assize Court of Brussels (Cour d'Assises de Bruxelles), *Public Prosecutor v. the 'Butare Four'*, Arrêt, 8 June 2001.

[114] On 22 May 2001, the Attorney-General, in his opening statement at trial, made it very clear that he represented the international community who has the right and the duty not to tolerate the commission of barbarous acts such as war crimes, wherever they may be committed, see Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 687 and n. 1.

enne Mukabutera, were each accused of having murdered Rwandan citizens in the Butare area or having incited the killings.[115] These crimes were qualified as breaches of the Geneva Conventions of 1949 and their Additional Protocols of 1977 and thus met the requirements of the Act of 1993.[116] The 1999 amendment of the Act of 1993 was not applicable in this case as the acts occurred in 1994. Following a short but thorough jury trial, the "*Butare Four*" received sentences of between twelve and twenty years in prison.[117] The guilty verdicts of the Brussels' Assize Court represented a watershed moment for universal jurisdiction and its advocates.

Despite these impressive strides towards universal jurisdiction in Spain and Belgium, at this early stage, there remained significant questions. Among them were questions surrounding the role of civil parties in initiating such cases, the issue of sovereign and head of state's immunity, and the question of whether universal jurisdiction was tenable. The question arose whether the perpetrator should, at minimum, be within the territory or custody of the forum state in order to be indicted, even in the absence of any other nexus between the forum state and the crime.

It is important to note, in this regard, that Belgium and Spain were not the only states moving towards universal jurisdiction. Others were also advancing in that direction, though not necessarily at the same pace or with the same ultimate ambition. Indeed, a number of states have enshrined in legislation their capacity to assert universal jurisdiction as long as they have custody of the perpetrator. However, some states, such as Germany,[118] do not impose such a requirement. These provisions are de-

[115] For the detailed official charges, see Luc Reydams, "Belgium's First Application of Universal Jurisdiction: the *Butare Four* Case", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 2, pp. 430-432; Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, pp. 693-694.

[116] Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 694.

[117] Luc Reydams, "Belgium's First Application of Universal Jurisdiction: the *Butare Four* Case", see *supra* note 115, p. 433; Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 694; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, p. 405.

[118] The German Criminal Code (*Strafgesetzbuch*), for example, provides for the application of German law to acts committed by non-nationals abroad against "Internationally Protected Legal Interests" (see Strafgesetzbuch ("StGB"), para. 6.) regardless of

fined and applied in different ways by different states. Some states emphasise international *jus cogens* norms and treaty obligations, such as Belgium in its extradition request for Pinochet[119] and the U.K. in its affirmation of Spain's extradition request with respect to the same individual.[120] Others, however, emphasise domestic implementing legislation, such as Spain in its extradition request for Pinochet.[121] Indeed, different states assert universal jurisdiction with respect to different crimes in various ways. Moreover, some allow civil parties to instigate prosecution, while others limit that right to prosecutors and, in some cases, even require political authorization to proceed.

Interestingly, some states appear reluctant to assert universal jurisdiction without supplementing it with some form of a nexus with the crime even when that nexus is, ostensibly, independently and purely reli-

whether they are criminalized at the place of commission. Such "Interests" include, in much the same form as the Spanish law, "genocide" and "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" (see StGB, para. 6(1) and (9)). Perhaps more importantly, the full range of German criminal law can be made to apply to a non-national who perpetrates a crime that is forbidden at its location, if the perpetrator was later "found to be in Germany and, although the Extradition Act would render such an extradition possible, is however not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable" (see StGB, para. 7). On the basis of this universal jurisdiction legislation, German courts have convicted several perpetrators of crimes in the war in the former Yugoslavia. In addition, on 30 June 2002, the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) entered into force establishing the principle of universal jurisdiction for genocide, crimes against humanity and war crimes in its "pure" form and establishing an obligation – the discretion of the prosecutor being no longer left – to investigate and prosecute for these crimes. The Prosecutor only keeps full discretion whether or not to prosecute when the alleged perpetrator is neither present nor expected to enter German territory; Gerhard Werle and Florian Jessberger, "International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law", in *Criminal Law Forum*, 2002, vol. 13, no. 2, pp. 191-192, 212-213 and 214-223 in Annex for the whole reproduction of the Code of Crimes Against International Law; Steffen Wirth, "Germany's New International Crimes Code: Bringing a Case to Court", in *Journal of International Criminal Justice*, 2003, vol. 1 no. 1, pp. 151-153, 157-160.

[119] Richard A. Falk, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?", see *supra* note 105, p. 109.

[120] *Id.*, pp. 113-118.

[121] *Id.*, p. 107.

ant on the legal basis of universal jurisdiction. Both France[122] and Spain[123] took this route in making extradition requests for Pinochet during his stay in the U.K. – each including passive personality as an alternative justification for jurisdiction. Thus, even in states that appear to have the capacity for universal jurisdiction, practical or political constraints may sometimes limit its application to cases in which less controversial models of extraterritorial jurisdiction would also apply.

9.3.2. Complexity in Implementing Universal Jurisdiction: the Limits of the Principle

Thus, although the 1990s and early millennium witnessed an impressive growth in the assertion and application of universal jurisdiction in a number of states, serious questions remained with respect to the appropriate limits of the concept. It was not long before Belgium and Spain came under pressure to retreat somewhat from the vanguard of universal jurisdiction.

In Belgium, the pressure came from both legal and political sources. The first major factor in the curtailment of Belgium's universal jurisdiction law came in the shape of a ruling by the International Court of Justice ("ICJ"). A civil party complaint filed in November 1998 by Belgians and Congolese nationals who had sought refuge in Belgium charged Abdulaye Yerodia Ndombasi ("Yerodia"), who was at the time the Minister for Foreign Affairs of the Democratic Republic of the Congo ("DRC"), with grave breaches of the Geneva Conventions of 1949 and crimes against humanity.[124] The civil parties complained that, as part of the efforts of Laurent Kabila's government to expel an ethnically Tutsi rebel force in the eastern part of the DRC, senior officials including Yerodia had publicly called for acts of violence against the "invaders" and incited racial hatred.[125] Following a year of investigation, on 11 April 2000, Judge

[122] *Id.*, p. 108.

[123] *Id.*, p. 106 and n. 19.

[124] Damien Vandermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, pp. 406-407; Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, pp. 694-695.

[125] Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 695; Naomi Roht-

Vandermeersch issued an international arrest warrant against Yerodia as the author or co-author of war crimes in violation of the Geneva Conventions of 1949 and their Additional Protocols of 1977 and with crimes against humanity.[126] Judge Vandermeersch noted that "while under the Belgian law there was no reason to preclude the ability of the courts to try the case, the execution of any arrest warrant had to be stayed while the suspect was a state representative on an official visit."[127]

In response to the Belgian international arrest warrant, the DRC filed an application instituting proceedings against Belgium before the ICJ on 17 October 2000, in which it made two core claims. First, it claimed that Belgian universal jurisdiction constituted a violation of the principle of sovereignty of states and of the principle that a state may not exercise its authority on the territory of another state. Second, it asserted diplomatic immunity for the accused.[128] Ultimately, the first claim was dropped and the ICJ decided only upon the issue of diplomatic immunity.[129] In this regard, the Court found, by a majority of thirteen votes to three, that Belgium had violated diplomatic immunity from criminal jurisdiction and the inviolability that Yerodia enjoyed.[130] However, while universal jurisdiction was not officially an issue for determination by the Court, it loomed large in the separate and dissenting opinions of the judges. While most of the judges indicated support for universal jurisdiction's grounding in in-

Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 384.

126 International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, para. 13; Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 695; Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 384.

127 Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 384.

128 International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, paras 17, 41; Damien Vendermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, p. 407.

129 International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, para. 21; Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 695.

130 International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, para. 78(2).

ternational law,[131] there was considerably more controversy over universal jurisdiction *in absentia*, that is universal jurisdiction asserted despite the absence of the accused from the forum state's territory or custody. President Guillaume, supported in this regard by Judges Ranjeva and Rezek and Judge *ad hoc* Bula-Bula, wrote in his separate opinion that "universal jurisdiction *in absentia* is unknown to international conventional law".[132]

However, treating universal jurisdiction *in absentia* as a distinct head of jurisdiction whose lawfulness is to be proved on its own right is misplaced. Such an approach confuses a state's jurisdiction to prescribe its criminal law with the way of that law's enforcement.[133] As previously shown, universal jurisdiction is a manifestation of jurisdiction to prescribe. Like all grounds of jurisdiction to prescribe, universal jurisdiction may be exercised in a manner with the alleged perpetrator present in court, following his or her arrest in the territory of the prosecuting state. It may also be exercised after the alleged perpetrator is arrested and extradited from a foreign state. As an alternative, universal jurisdiction – like all heads of jurisdiction to prescribe – might as well be exercised without the alleged perpetrator present in court or *in absentia.* In other words, jurisdiction to prescribe is logically independent and distinct of jurisdiction to enforce. "On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*".[134] Consequently, as rightly expressed by Judges Higgins, Kooijmans and Buergenthal:

[131] However, President Guillaume argued that "international law knows only one true case of universal jurisdiction: piracy", see International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Separate Opinion of President Guillaume, para. 12.

[132] International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Separate Opinion of President Guillaume, para. 12; Declaration of Judge Ranjeva, paras. 6 and 7 stating: "These legal developments did not result in the recognition of jurisdiction *in* absentia"; Separate Opinion of Judge Rezek, paras. 6, 10; Separate Opinion of Judge Bula-Bula, para. 75.

[133] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 749.

[134] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 750.

> Some jurisdictions provide for trial *in absentia*; others do not. If it said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.[135]

Accordingly, under international law, if universal jurisdiction is authorized, as a logical consequence its exercise *in absentia* is also authorized. As it has been recognised, "[w]hether it is desirable is, needless to say, a separate question".[136]

Though the ICJ judgement pertained directly only to the issue of sovereign immunity, the Court's ruling reopened a much broader debate in Belgium on the status of the country's universal jurisdiction legislation, and the question of how it should be amended or retracted. At the core of this debate was the lingering question of whether Belgium should remain the "criminal judge of the world".[137]

Pressure on Belgium increased due to the political fall-out following civil party-induced investigations against then-Prime Minister Ariel Sharon and Director-General of the Israeli Defence Ministry, Amos Yaron, for genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949 allegedly committed at Sabra and Shatilla during Israel's 1982 invasion of Lebanon at the time they were respectively Minister of Defence and Division Commander of the Israeli Army.[138] The General Prosecutor sought an interlocutory ruling on Belgium's ability to proceed and the case's admissibility. In its decision is-

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[135] International Court of Justice, *Arrest Warrant of 11 April 2000*, see *supra* note 17, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 56.

[136] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", see *supra* note 3, p. 750.

[137] Tom Ongena and Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", see *supra* note 97, p. 688; It is interesting to note that this question was given particular attention in view of the creation of the International Criminal Court, which many considered a more appropriate forum for the prosecution of core international crimes. Indeed, to some, Belgium's pioneering role at the forefront of universal jurisdiction smacked of neo-colonialism. It was not lost on such critics that universal jurisdiction forums tended to be located in the global north, while the targets of prosecution tended to come from the global south.

[138] Antonio Cassese, "The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 2, pp. 437-438.

sued on 26 June 2002, the *Chambre de mises en accusation* – the pre-trial Chamber of the Belgian Court of Appeal – reaffirmed the validity of universal jurisdiction, but insisted that courts could only exercise that jurisdiction if the alleged perpetrator was already present on Belgian territory, therefore finding the prosecution not admissible.[139] The court found this requirement in an 1878 criminal procedure code, which remained in effect. Finding no direct contradiction of the provision in the Act of 1993 law or its 1999 amendment, and no obligation to assert universal jurisdiction *in absentia* in Belgium's treaty commitments, the Court of Appeal found no reason why this 1878 limitation should not hold.[140] However, in a never-ending saga, the Belgian Court of Cassation held, on 12 February 2003,[141] that a proper interpretation of the Belgian laws does not require – at the time criminal proceedings are instituted for genocide, crimes against humanity and war crimes – the presence of the alleged perpetrator on Belgian territory.[142]

However, unable to resist the combination of pressures, Belgium's new government – a multiparty coalition[143] – soon modified the law on 23 April 2003.[144] The Act of 2003 creates a dual system "with numerous procedural filters and political exists to thwart 'abuses'".[145] First, it tightens the nexus requirements unless a treaty requires Belgium to exercise

[139] *Id.*, p. 438 and n. 3 (referring to p. 22 of the decision of 26 June 2002).

[140] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 386.

[141] Cour de Cassation, *Abbas Hijazi et al. v. Sharon et al.*, Decision, 12 February 2003.

[142] Antonio Cassese, "The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case", see *supra* note 138, p. 438 and n. 4; Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, pp. 680-681 and n. 8.

[143] For this reason, the new law has been said to be the result of a compromise, see Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, p. 681.

[144] Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire, 23 April 2003, Moniteur Belge, 7 May 2003 ("Act of 2003").

[145] Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, p. 684; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, p. 402.

jurisdiction. For the cases with a link to Belgium, a civil party or a local public prosecutor acting on a complaint could initiate criminal proceedings. For the purposes of the Act of 1993, a "link" to Belgium was understood to be the presence of the alleged offender on Belgian territory or the residence of a minimum of three years of a foreign victim.[146] The latter requirement was aimed at ending the practice of "forum shopping" by foreign victims.

Second, the prosecution of cases without any links to Belgium became the prerogative of the Office of the Federal Prosecutor. In principle, upon receipt of a complaint, the Federal Prosecutor has the duty to submit the case to an examining magistrate. However, two exceptions are provided by the Act of 2003, such as a manifestly unfounded complaint and a *forum non conveniens* exception.[147] According to the latter, the prosecutor must not proceed with cases that should be brought either before an international court or – assuming the possibility of a fair and impartial trial – before a national court. Here, a national court could be the one: (i) of the place where the crimes were committed; (ii) where the suspect is found; or (iii) of the state of which the alleged perpetrator is a citizen.[148] In addition, for cases without any links to Belgium, other political and judicial filters are possible. They could involve no less than seven bodies.[149]

[146] Antonio Cassese, "The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case", see *supra* note 138, p. 439 and n. 6; Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, pp. 681-682. In addition, for the purposes of the Act of 1993, "link" to Belgium was also understood as territoriality, Belgian nationality of the offender or the victim. But in these cases, we cannot speak of universal jurisdiction any more.

[147] A *forum non conveniens* decision can be appealed by a complainant before the *Chambre de mises en accusation* (the pre-trial Chamber of the Belgian Court of Appeal).

[148] Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, p. 682.

[149] Namely, the Federal Prosecutor, the *Chambre de mises en accusation* (the pre-trial Chamber of the Belgian Court of Appeal), the Minister of Justice, the Cabinet of Ministers, the Court of Cassation, the International Criminal Court and foreign authorities. For more details, see Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, pp. 683-684.

The final nail in the coffin of Belgium's vanguard universal jurisdiction law came in the form of powerful international political pressure following the filing of civil party complaints in March 2003 against former U.S. President George H.W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell, and retired general Norman Schwarzkopf for bombing an air raid shelter in Baghdad in the first Gulf War.[150] In May of the same year, General Tommy Franks and other U.S. officials were accused in another complaint of war crimes committed during the 2003 invasion of Iraq.[151] Such was American anger at these cases that US Secretary of Defense Donald Rumsfeld even suggested he might remove the North Atlantic Treaty Organization ("NATO") headquarters from Brussels.[152]

Under the pressure of several countries whose leaders had been targeted by complaints filed in Belgium, a new legislative proposal repealing the Act of 1993 was adopted on 5 August 2003.[153] It incorporates the Act of 1993's provisions in ordinary Belgian Criminal Code and Code of Criminal Procedure, while significantly limiting universal jurisdiction with regards to genocide, crimes against humanity and war crimes.[154] The application of the *partie civile* system to universal jurisdiction cases was removed.[155] Belgian courts can now only exercise universal jurisdiction over international crimes if: (i) the alleged accused is Belgian or has his primary residence in Belgium; (ii) the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or (iii) Belgium is required by treaty to exercise jurisdiction over the case.

[150] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 387.

[151] *Ibid*.

[152] Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, p. 685; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, p. 403, n. 9; Cedric Ryngaert, "Applying The Rome Statutes Complementarity Principle: Drawing Lessons From The Prosecution of Core Crimes by States Acting Under the Universality Principle", in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 169.

[153] Loi relative aux violations graves du droit international humanitaire, 5 August 2003, Moniteur Belge, 7 August 2003.

[154] Damien Vandermeersch, "Prosecuting International Crimes in Belgium", see *supra* note 112, p. 402.

[155] Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", see *supra* note 142, p. 687.

Furthermore, the decision whether or not to proceed with any complaint rests entirely with the Federal Prosecutor. Finally, the latter must reject a complaint if the case should be brought either before an international court, the court of the state of which the alleged accused is a national, the court of the state where the crime was committed or where the alleged accused is found, so long as that court is independent and impartial.[156] Together these reforms represent a significant retreat from the advances of the late 1990s.

Spain eventually also curtailed its universal jurisdiction by legislative amendment after series of judicial decisions. On 2 December 1999, the Nobel Peace Prize winner Rigoberta Menchù and other victims, joined later by more than twenty NGOs, filed a civil party complaint against a number of former Guatemalan officials[157] for crimes against humanity and genocide committed during the civil war in Guatemala between 1962 and 1996 against members of the Mayan ethnic group.[158] In its decision on 13 December 2000,[159] however, the *Audiencia Nacional* decided that "at this moment" the Spanish courts had no jurisdiction over the alleged crimes as Guatemalan law permitted prosecution for genocide, and that the case should be closed.[160] The *Audiencia Nacional* reasoned that the Genocide Convention of 1948 imposes a duty to prosecute only upon the territorial state in which the crime is committed. It therefore inferred that universal jurisdiction ought to be subsidiary to territorial jurisdiction. Hence, the *Audiencia Nacional* implied that an exhaustion of domestic remedies is required to justify the assertion of universal jurisdiction.[161]

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[156] Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", see *supra* note 99, p. 388.

[157] The suspects included five generals, two police chiefs and a colonel; a group that included former presidents and defence and interior ministers.

[158] Hervé Ascensio, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 691.

[159] Audiencia Nacional, Sala de lo Penal, Pleno, Asiento no. 162.2000, Rollo apelación no. 115/2000, 13 December 2000.

[160] Hervé Ascensio, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*", see *supra* note 158, p. 692; Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", in *American Journal of International Law*, 2006, vol. 100, no. 1, p. 208.

[161] Hervé Ascensio, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*", see *supra* note 158, p. 694.

Domestic remedy could be denied *de jure* by a legal impediment to prosecution – for instance where a state had instituted an amnesty law – or *de facto* – where for example state judges were intimidated into denying recourse to the courts. The *Audiencia Nacional* found that there was no *de jure* obstacle and that Guatemala's transition to peace had occurred recently to pass judgment on whether there were *de facto* obstacles to domestic prosecution.[162] As such, Spain had no jurisdiction "for the moment".

The plaintiffs appealed and, on 25 February 2003, the Spanish Supreme Court, acting as a Court of Cassation, overturned in part the *Audiencia Nacional*'s decision by a majority of 8 to 7. However, in so doing, it significantly curtailed Spain's universal jurisdiction law as it held that only cases with clear tie to Spain could proceed.[163] The Spanish Supreme Court reopened the case, but only to pursue investigations in which there were Spanish victims, because they triggered passive personality jurisdiction. However, it did not re-open the case for genocide, terrorism or torture charges, because, even though Spaniards died in the course of these crimes, they were not directed at Spanish victims *per se*. Ultimately, the court held that only cases with a tie to Spain could proceed under Spain's universal jurisdiction law.[164] This did not completely eviscerate Spanish universal jurisdiction, because the court held that the presence of the accused in Spanish territory constituted an adequate tie between the forum and the crime. However, it did mean the preclusion of universal jurisdiction *in absentia*. A year later, on 8 March 2004, a panel of the Spanish Supreme Court reaffirmed this standard in a case involving Chilean General Hernán Brady.[165]

Finally, after the elections of 2004 and the change in the government, on 26 September 2005, in its judgement, the Spanish Constitutional

[162] Hervé Ascensio, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*", see *supra* note 158, p. 692; Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", see *supra* note 160, p. 208.

[163] Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", see *supra* note 160, p. 208.

[164] *Id.*, p. 208.

[165] Tribunal Supremo (Sala de lo Penal), *Hernán Brady Roche*, Judgement No. 319/2004, 8 March 2004; Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", see *supra* note 160, p. 210.

Court reversed the previous decision and reinstated the complaint in its entirety, issuing a ringing endorsement of broad universal jurisdiction.[166] It found that "no nexus or tie to Spain – nor the presence of the defendant, the nationality of the victims, or Spanish national interest – was needed to initiate a complaint".[167] The idea that, in order to proceed, plaintiffs needed to show that a trial in the territorial state was not possible was also rejected. Hence, it rejected the prioritization of the grounds of jurisdiction under international law.[168] Accordingly, the exercise of universal jurisdiction by Spanish courts was more likely than ever before. However, it did not last for long. The broad interpretation of the exercise of universal jurisdiction was subsequently curtailed. In 2009, a legislative reform of Article 23(4) of the Law of 1985 limited the exercise of universal jurisdiction to cases where: (i) the alleged perpetrator is present in Spain; (ii) the victims are of Spanish nationality; or (iii) there is some demonstrated relevant link with Spain. In any event, Spanish courts will only have jurisdiction if there is no other competent state or international court where proceedings have been initiated that constitute an effective investigation and prosecution of the same crimes. The criminal process initiated before Spanish courts will be provisionally superseded when there is proof that the same crimes are tried by the state where they were committed or by an international court.[169]

Although the legislation and implementation of universal jurisdiction by Belgium and Spain cannot be deemed representative of the entire international community, they have been among the most active states in exercising universal jurisdiction. However, the enforcement of the principle of universal jurisdiction remains difficult. The way in which the principle of universal jurisdiction is implemented in practice is influenced by the inherent differences between legal systems. International law seems to leave states to determine the means to enforce this principle and does not

[166] Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", see *supra* note 160, pp. 207, 210.

[167] *Id.*, pp. 207, 210-211.

[168] Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment No. STC 237/2005", see *supra* note 160, pp. 207, 211; Cedric Ryngaert, "Applying The Rome Statutes Complementarity Principle: Drawing Lessons From The Prosecution of Core Crimes by States Acting Under the Universality Principle", see *supra* note 152, p. 161.

[169] Ignacio de la Rasilla del Moral, "The Swan Song of Universal Jurisdiction in Spain", in *International Criminal Law Review*, 2009, vol. 9, no. 5, p. 804.

provide precise guidelines or criteria for its implementation. From a comparative law perspective, the principle of universal jurisdiction is either implemented extensively, narrowly or not at all. In other words, the exact scope of the principle, when it is enforced, is difficult to assess. Its application varies from one country to another. Therefore, universal jurisdiction currently defies homogeneous application and "[i]t is therefore difficult to gain a clear picture of the overall situation".[170] In this regard, it would perhaps be more accurate to refer to multiple grounds of "universal jurisdictions" instead of a principle of universal jurisdiction. Moreover, the principle of universal jurisdiction still remains more theoretical than practical in many states. Notwithstanding positive developments in some states, in practice, several core international crimes remain unpunished despite international obligations to prosecute the perpetrators. Unfortunately, political interests and interference have prevailed over legal arguments in a number of cases.[171] The question therefore arises how universal jurisdiction can gain greater legitimacy and be better and more pragmatically implemented. In other words, through which mechanism might states be encouraged to increase the investigation and prosecution of core international crimes and exercise universal jurisdiction?

9.4. The Principle of Complementarity: an Enforcement Tool of the Principle of Universal Jurisdiction?

9.4.1. The Principle of Complementarity in the Rome Statute and its Relationship with National Courts Exercising Universal Jurisdiction

The Rome Statute of the International Criminal Court ("ICC") is based on the principle of complementarity, which governs the ICC's exercise of jurisdiction. Its Preamble affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[172] It further

[170] Xavier Philippe, "The principle of universal jurisdiction and complementarity: how do the two principles intermesh?", see *supra* note 49, p. 379.

[171] *Id.*, pp. 376, 380.

[172] Paragraph 4 of the Preamble of the Rome Statute of the International Criminal Court (17 July 1998) ("Rome Statute").

recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[173] The duty to prosecute core international crimes is therefore clearly stated.

Paragraph 10 of the Rome Statute's Preamble and Article 1 emphasise that the ICC "shall be complementary to national criminal jurisdictions". According to this principle, further developed by Article 17 of the Rome Statute, the ICC will only exercise its jurisdiction if "a State which has jurisdiction" over a case involving core international crimes is "unwilling or unable genuinely to carry out the investigation or prosecution".[174] Article 17(2) and (3) of the Rome Statute defines in detail when it may be assumed that a state is "unwilling or unable" in a particular case.[175] Thus, contrary to the ICTY or the International Criminal Tribunal

[173] Paragraph 6 of the Preamble of the Rome Statute.

[174] According to Article 17(1)(a) and (b) of the Rome Statute, the ICC will not conduct proceedings when: "(a) [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [or] (b) [t]he case has been investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". In addition, according to Articles 17(1)(c) and 20(3) of the Rome Statute and in accordance with the principle *ne bis in idem*, the ICC will not exercise its jurisdiction when a domestic jurisdiction has already tried the person concerned for conduct which is the subject of the complaint unless (a) it was done with the purpose of shielding the person concerned from criminal responsibility or (b) the proceedings were not conducted independently or impartially in accordance with the norms due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. Finally, the Court will determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court, according to Article 17(1)(d) of the Rome Statute.

[175] Article 17(2) of the Rome Statute reads as follows: "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Article 17(3) of the Rome Statute provides that: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its na-

for Rwanda ("ICTR"),[176] primacy responsibility for enforcing criminal liability for violations of core international crimes rests on the national criminal jurisdictions of States Parties to the Rome Statute. In other words, the ICC acts as a safety net. It will only be engaged where states do not fulfil their obligations under international law by exercising effective criminal jurisdiction over the crimes set out in the Rome Statute. In this sense, the principle of complementarity respects the principle of state sovereignty in international law and the principle of primacy of action regarding criminal prosecutions.[177]

In the context of concurrent jurisdictions between the ICC and national jurisdictions over the crimes embodied in the Rome Statute, it seems pertinent to discuss various possible scenarios.

First of all, if there is no doubt that states exercising territorial or active national jurisdiction have primacy of criminal jurisdiction over the ICC, do states also have priority over the ICC when exercising universal jurisdiction? The Rome Statute does not provide an explicit answer. One scholar pointed out:

> [O]ne could indeed argue that the coming into existence of the ICC makes the establishment of universal jurisdiction obsolete with regard to crimes committed by a national or on the territory of a State party to the Rome Statute. In these cases, the ICC would fill the void that underlies the concept of universal jurisdiction. This latter aims at ensuring the enforcement of meta-national values by prosecuting perpetrators if States with a *nexus* based on traditional jurisdictional

tional judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

[176] Article 9(2) of the ICTY Statute provides: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal". Similarly, Article 8(2) of the ICTR Statute reads as follows: "The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda".

[177] Xavier Philippe, "The principle of universal jurisdiction and complementarity: how do the two principles intermesh?", see *supra* note 49, p. 388.

> principles are unwilling or unable to do so. As such, the exercise of universal jurisdiction is conceived as an act on behalf of the international community, which, lacking any enforcement organs of its own, relies on national courts. However, since the entry into force of the Rome Statute, the international community has for the first time established a permanent enforcement organ for (some of) the crimes for which universal jurisdiction had initially been developed. An argument can therefore be made that the ICC, rather than national courts exercising universal jurisdiction, would be the proper organ to act on behalf of the international community. In fact, the ICC would probably do so with greater authority than national courts and be better equipped to adjudicate such cases. In contrast, universal jurisdiction over offences that do not fall within the jurisdiction of the ICC, for example because they are neither committed on the territory nor by a national of a State party or committed prior to the entry into force of the Statute, remains crucial in order to ensure that crimes of international concern do not go unpunished. If States were to implement such a jurisdictional regime they could do so by differentiating between cases that are subject to the ICC's jurisdiction and those that are not, confining the establishment of universal jurisdiction to the latter category.[178]

This argument is not tenable as it would lead to impunity gaps through which alleged perpetrators could escape prosecution for various reasons, contrary to the goal of the Rome Statute.[179] Indeed, even though the ICC would have jurisdiction in particular cases, the Court would not be able to investigate or prosecute all core international crimes that are not prosecuted by states with a *nexus* based on traditional grounds of criminal jurisdiction. This is especially true for the prosecution of lower-level perpetrators. In addition, not all cases of core international crimes would meet the gravity threshold embodied in Article 17(1)(d) of the

[178] Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, p. 108.

[179] Paragraph 5 of the Preamble of the Rome Statute stresses the States Parties' determination "to put an end to impunity for the perpetrators" of the most serious crimes of concern to the international community.

Rome Statute for the ICC to find a case admissible.[180] Therefore, many perpetrators of core international crimes would remain unpunished.

The ordinary meaning of the terms[181] of Article 17 of the Rome Statute makes it clear that the Rome Statute gives primacy of criminal jurisdiction not only to the territorial state where the crimes were committed, but to "a State which has jurisdiction". This terminology does not impose any limitation on the criteria to which a state may assert its jurisdiction. This basically leaves the door open to any State Party to the Rome Statute, including states exercising their criminal jurisdiction in accordance with the principle of universal jurisdiction.

The first part of this contribution established that states, under either conventional or customary international law, are free or, in certain circumstances, under an obligation to exercise universal jurisdiction over all the crimes set out in the Rome Statute, namely genocide, crimes against humanity and war crimes.[182] Therefore, if a state has jurisdiction in accordance with the principle of universal jurisdiction, it also has primacy of criminal jurisdiction over the ICC and the ICC must respect it. As a matter of principle, there is no reason why universal jurisdiction exercised by national courts would not fall within the general principle of complementarity. It is worth noticing that, while implementing the Rome Statute of the ICC in their national legislation, some states took the approach to establish universal jurisdiction.[183] In this sense, the principle of

[180] Article 17(1)(d) of the Rome Statute provides that the ICC shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court.

[181] According to Article 31(1) of the Vienna Convention on the Law of Treaties (23 May 1969), "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and its light of its object and purpose".

[182] Article 5(1)(d) of the Rome Statute also gives jurisdiction to the ICC for the crime of aggression. However, according to Article 5(2) of the Rome Statute, the ICC will only be able to exercise its jurisdiction over this particular crime once a provision is adopted defining the crimes and setting out the conditions under which the ICC shall exercise jurisdiction with respect to this crime. Considering the framework of this contribution, the crime of aggression is not included in this analysis.

[183] See, *e.g.*, Germany, Canada, New Zealand, South Africa, Australia; Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", see *supra* note 178, p. 107, n. 100; Juliet Hay, "Implementing the ICC Statute in New Zealand", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 196.

complementarity can be conceived as a means of improving implementation of the principle of universal jurisdiction. Indeed, it places the primary burden of the responsibility to prosecute core international crimes on all States Parties owing to the fact that all states are free or under an obligation, in certain cases, to exercise universal jurisdiction. Similarly, universal jurisdiction can also be regarded as a means to implement the principle of complementarity rather that an obstacle to achieving its goals.

The question may nonetheless arise which state has primary responsibility if both a state exercising universal jurisdiction and having custody over an alleged offender and the state where the crimes were committed (or the state of nationality of the offender) is willing and able genuinely to carry out the investigation or prosecution. Is there an obligation for a state exercising universal jurisdiction to defer to a state with an intimate connection to the crimes? From a policy point of view, there is little doubt that this should be the case. Based on the recognition of a legitimate interest of those states that are directly linked with the crime in question, deference should be exercised towards these states. Whether there is also an international legal obligation to do so is a different question.[184] It is impossible to identify through the current practice and *opinio juris* of states exercising universal jurisdiction an international customary rule obliging those states to defer to the territorial or national state. Nonetheless, states might be under a conventional international obligation to do so, for example because an extradition treaty includes such a requirement.

A more interesting scenario is where the territorial state, or the national state, of the commission of the crimes (state A) is unwilling or unable genuinely to carry out the investigation or prosecution and the state on which the alleged perpetrator is found (state B) has jurisdiction over the crimes under the principle of universality. Would state B in this case be under any incentive to investigate or prosecute the case?

On the one hand, states with jurisdiction under the principle of universal jurisdiction may have a less obvious interest in investigating or prosecuting the case. On the other hand, one can assume that States Par-

[184] On this issue, see, *e.g.*, Cedric Ryngaert, "Applying The Rome Statutes Complementarity Principle: Drawing Lessons From The Prosecution of Core Crimes by States Acting Under the Universality Principle", see *supra* note 152, pp. 153-180; Claus Kreß, "Universal Jurisdiction over International Crimes and the *Institut de Droit International*", see *supra* note 55, pp. 579-580.

ties to the Rome Statute will desire to investigate and prosecute core international crimes for which they have jurisdiction, including under the principle of universal jurisdiction, rather than deferring to the competence of the ICC.[185] Indeed, states in the position of state B might have an interest, political or not, in avoiding the scrutiny of the ICC and the embarrassment of being pigeonholed as "unwilling" to carry out investigation or prosecution[186] or "unable" owing to the absence or inadequacies of substantive national implementing legislation. As such, the principle of complementarity may act as an incentive, first, to enforce criminal jurisdiction for core international crimes, including through the exercise of universal jurisdiction[187] and, second, to adopt adequate national implementing legislation.[188]

9.4.2. Proposal Towards a More Pragmatic Enforcement of Universal Jurisdiction Through the Principle of Complementarity

The fact that states exercising jurisdiction under the principle of universality have priority over the ICC is a positive development in the application of the principle of universal jurisdiction. By recognising such primacy, the ICC gives greater legitimacy to states exercising universal jurisdiction who are, otherwise, under enormous political constraints and pressure. Furthermore, if the principle of complementarity acts as an in-

[185] Louise Arbour, "Will the ICC have an Impact on Universal Jurisdiction?", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 586.

[186] If state B is passive in bringing the person concerned to justice, the ICC is competent in this specific scenario pursuant to the complementarity principle and Article 17(2)(b) of the Rome Statute, providing that the other criteria of admissibility are fulfilled.

[187] Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", see *supra* note 178, pp. 87-89. Kleffner envisages the principle of complementarity as a "carrot-and stick mechanism" where the ICC will retain the stick to take over such investigations and prosecutions if states fail in their endeavour to create and enforce a legislative framework for the effective investigation and prosecution of core international crimes.

[188] Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", see *supra* note 178, pp. 88-94; Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, pp. 473-474. However, both authors recognise that the Rome Statute does not provide for an explicit obligation to implement its substantive law.

centive for states to exercise universal jurisdiction in order to avoid the scrutiny of the Court, this development is also welcome.

Nonetheless, more can – and should – be done in order to reduce existing impunity gaps. In this sense, a positive or proactive vision of the principle of complementarity must be implemented and encouraged. A "carrot-and-stick" based understanding of the principle of complementarity, while efficient, is not a sufficient means to enforce the goal pursued by universal jurisdiction. It is fundamental to explore new avenues as to how international criminal justice can interact better and more effectively with national courts.

Whether state B in the above-mentioned scenario will decide to exercise its jurisdiction over a case under the principle of universality will largely depend on the ICC and how its Prosecutor will be successful in encouraging states with universal jurisdiction to proceed on this basis rather than to undertake the prosecution if no state is willing to do so. It will also depend on the ICC's deliberate policy choice to encourage States Parties' expansion of their universal jurisdiction. Cooperation must therefore be seen in two ways; cooperation of states with the Court, but also the ICC's cooperation with domestic jurisdictions. Strengthening a reverse form of cooperation from the Court to national courts should be part of the ICC and its Prosecutor's policy. Promoting legal empowerment of domestic jurisdictions, including those exercising universal jurisdiction, should be encouraged by the ICC and its Prosecutor.

Some scholars have advocated that such a policy direction could come in the Assembly of States Parties, where a consensus could develop if states encourage universal jurisdiction for economic and efficiency reasons rather than fully fund the ICC.[189] Regardless of these reasons, a discussion among States Parties to promote a more harmonized approach towards universal jurisdiction would also be welcome. Indeed, the Assembly of States Parties, in consultation with its members, could develop common criteria or guidelines to improve the implementation of universal jurisdiction. Another proposal would be for regional organization, in consultation with its member states, to foster a better harmonization of universal jurisdiction among its member states in order to ensure that core international crimes do not remain unpunished.

[189] Louise Arbour, "Will the ICC have an Impact on Universal Jurisdiction?", see *supra* note 185, p. 587.

Another scenario is where an alleged perpetrator is in the custody of the ICC, after an arrest warrant has been issued and enforced, but the ICC does not have the financial or human resources to deal with all cases within its limited funding. The question therefore arises whether the ICC may request that another state with jurisdiction under the principle of universality deal with the case. Encouraging cooperation under the auspices of the ICC to transfer a case to a state more suited to deal with it does not seem to be explicitly addressed by the Rome Statute.[190] As the Court will hardly be able to deal with all cases within its limited available resources, the exercise of universal jurisdiction by states would assist in filling a gap and represent a form of cooperation with the Court in the performance of its functions. Whether such cooperation may already be due under the Rome Statute or would require an amendment is questionable. Although Article 86 of the Rome Statute[191] imposes on States Parties a general obligation to cooperate with the Court, the scope of such cooperation seems limited to the other provisions explicitly listed in the Rome Statute.[192] Thus, an amendment is likely to be necessary. A development in this direction appears highly desirable, and even more desirable if the exercise of universal jurisdiction would occur under the control or coordination of the Court itself. Indeed, the ICC may be entitled by amendment to its Statute to make use of referral procedures to national courts of states that have adopted national legislation on universal jurisdiction, as experienced by the ICTY and the ICTR under Rule 11*bis* of their Rules of Procedure and Evidence.[193]

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[190] If a state which has jurisdiction can challenge the admissibility of a case before the ICC "[i]n exceptional circumstances, […] at a time later than the commencement of the trial" according to Article 19(4) of the Rome Statute, then one must assume that the ICC is empowered to transfer the alleged perpetrator to the a state which successfully challenges its jurisdiction, even if not envisaged explicitly in the Statute. However, this does not give the ICC the right to transfer a person to a state which has not challenge the admissibility of a case before the Court.

[191] Article 86 of the Rome Statute provides: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court".

[192] Claus Kreß, "Article 86 General obligation to cooperate", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 1053.

[193] Fausto Pocar, "UN Approach to Transitional Justice", Statement given on 2 December 2009 during the Dialogue with Member States on rule of law at the international

Obviously, all these proposals would require closer consideration. Nonetheless, they have the advantage of using already existing mechanisms and the institutions to give concrete effect to the goal pursued by universal jurisdiction, namely that core international crimes do not remain unpunished and that the perpetrators of these crimes are brought to justice.

9.5. Conclusion

Having recourse to traditional grounds of jurisdictions for prosecuting core international crimes has numerous advantages. However, in many cases, this is not always possible due to various political and legal impediments at a national level. The purpose of the principle of universal jurisdiction is to avoid loopholes in the prosecution of core international crimes. Although the principle seems well established both in conventional and customary international law as a ground of jurisdiction to prescribe, its application remains controversial and difficult. Indeed, in theory, states are free, or under a legal obligation, under international law to implement universal jurisdiction in their national legal systems. In practice, however, states exercising such jurisdiction continue to face substantial international political pressure. The gap between the existence of the principle and its application remains quite wide. As a result, national and international constraints placed on states have too often prevailed over their legal obligation to prosecute alleged perpetrators of core international crimes. Does this mean the end for universal jurisdiction? No, however, it does indicate that universal jurisdiction has certain limits.

From both a legal and policy perspective, the implementation of the principle of universal jurisdiction is welcome. This remains true even with the creation of the ICC. Indeed, the concept of "unwillingness" and "inability" should not serve too easily as a pretext for the sole intervention of the ICC. Remedies for dealing with perpetrators of atrocities should come at the domestic rather than at the international level. Justice cannot be entirely removed from the domestic to the international level; not only for organizational or financial reasons. The primary responsibility for prosecuting core international crimes rests with states and their judiciaries, as affirmed by the Preamble of the Rome Statute. Ensuring the existence and

level organized by the Rule of Law Unit, available on http://www.unrol.org/doc.aspx?d=2917 (last visited on 27 April 2010).

enhancing the operational capacity of independent and impartial domestic courts with a view to establishing a legal framework based on the rule of law remains the main challenge for international criminal justice. States should therefore be encouraged to investigate and prosecute core international crimes and to exercise criminal jurisdiction, by virtue of the traditional grounds of jurisdiction and by recourse to universal jurisdiction as appropriate.

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.

Nonetheless, certain risks must not be disregarded. First, the principle of universal jurisdiction can be open to potential abuses, especially if used in a complete discriminatory manner, for revenge or for responding to exigencies of foreign policy. Second, having recourse to universal jurisdiction can create a large number of competing claims from various states exercising their jurisdiction under different grounds, and potentially causing conflict among states. Although these dangers must be taken seriously, the excessive prosecution of core international crimes has not yet occurred. Thus, this is not a reason to relinquish the principle of universal jurisdiction.

The principle of complementarity and the ICC may induce states to abide by their obligations to exercise universal jurisdiction for core international crimes and therefore avoid loopholes in the prosecution of core international crimes. In addition, universal jurisdiction implemented under the ICC's umbrella would likely induce greater legitimacy in the application of the principle.

While the principle of complementarity will not remedy all the inadequacies of the implementation of universal jurisdiction, it may assist its enforcement in a more pragmatic and homogenous manner. The primary responsibility for investigating and prosecuting core international crimes rests with states and their judiciaries. Enhancing a more pragmatic and homogenous implementation of the principle of universal jurisdiction remains the main challenge for international criminal justice. Positive and proactive implementation of the principle of complementarity, as well as cooperation of states with the Court and of the Court with states, must be

encouraged and strengthened. A mechanism of transfer of cases from the Court to domestic courts exercising universal jurisdiction should also be envisaged. Only concerted efforts will lead to a better enforcement of the goal pursued by universal jurisdiction; namely to ensure that core international crimes are punished and their perpetrators are properly prosecuted.

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Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes

Morten Bergsmo (editor)

This book concerns the relationship between the principles of complementarity and universal jurisdiction. Territorial States are normally affected most strongly by core international crimes committed during a conflict or an attack directed against its civilian population. Most victims reside in such States. Most damaged or plundered property is there. Public order and security are violated most severely in the territorial States. It is also on their territory that most of the evidence of the alleged crimes can be found. There are, in other words, obvious policy and practical reasons why States should accord priority to territoriality as a basis of jurisdiction.

But is there also an obligation for States to defer exercise of universal jurisdiction of core international crimes to investigation and prosecution of the same crimes by the territorial State? What – if any – is the impact of the principle of complementarity in this respect? These are among the questions discussed in this anthology.

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