

**A CRITICAL ASSESSMENT OF THE EXERCISE OF
UNIVERSAL JURISDICTION BY SOUTH AFRICAN COURTS**

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Declaration

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Abstract

Universal jurisdiction is a relatively new concept in South Africa and a rather controversial concept in international criminal law. It is often discussed but rarely applied. Universal jurisdiction refers to the power of a State to punish certain crimes irrespective of where they were committed. Such crimes need not be connected to the State in question via the more traditional links of territory, nationality or direct State interest. These crimes are typically the worst crimes in international law such as genocide, war crimes and crimes against humanity. The argument goes that those who commit these types of offences become *hostis humani generis*, or the enemies of all mankind. Therefore just like the pirate of old any nation that captures them is entitled to exercise its jurisdiction over them, on behalf of all mankind. But at the same time a feature and founding principle of international law is the sovereign equality of States. And under international law criminal jurisdiction is a prerogative of sovereign States. States have territorial jurisdiction over crimes committed within their territory, for having control over a territory is essentially what it means to be sovereign. This means that one nation's attempt to exercise jurisdiction over persons that also fall under the jurisdiction of another nation could be perceived as the undermining of the second nation's sovereignty.

It is submitted that a proper understanding of universal jurisdiction internationally, and in South Africa, is vital because the Constitutional Court recently ordered South African authorities to investigate torture committed by Zimbabwean officials against Zimbabwean citizens that was allegedly committed in Zimbabwe. In other words the court ordered South African authorities to exercise universal jurisdiction over Zimbabwean officials. This thesis has as goal to critically examine the claims made, and authorities, cited in support of universal jurisdiction, as it is believed that these are usually theoretical and unpractical in nature. It is submitted that balance and a measure of realism is imperative to this debate. Contrary to popular opinion, it is submitted, that the history of international relations has not favored universal jurisdiction and there is no indication that this situation has fundamentally changed or will change in the near future.

The thesis continues to examine, after a consideration of the likening of pirates to modern international criminals, the claim that old authorities such as Grotius and De Vattel provide support for universal jurisdiction. An analysis follows of the so-called '*Lotus* principle', which is said to mean that any State may exercise jurisdiction over serious offences because there is no rule prohibiting it. The trials of German war criminals by the Allies, in the aftermath of WWII, is also said to have evidenced universal jurisdiction and this claim is critically examined. The same applies to the trial of Adolf Eichmann by Israel.

The examination of provision for universal jurisdiction in international law continues when the jurisdictional provisions of the Genocide, War Crimes and Torture Conventions are examined and specifically applied to South Africa. The drafting process of these Conventions is carefully studied to understand the intention and circumstances prevalent at the time. In the process specific countries and international case law dealing with these Conventions is also considered.

The jurisdictional triggers of the International Criminal Court are surveyed and it is questioned whether it provides for universal jurisdiction and whether it can then be said to support member States in exercising universal jurisdiction on its behalf.

The research findings on universal jurisdiction and the ICC are finally applied to South Africa especially with reference to the Constitutional Court decision on the torture committed in Zimbabwe before conclusions are drawn as to what South Africa's international and domestic duties entail.

Opsomming

Universele jurisdiksie is 'n relatief nuwe konsep in Suid-Afrika en 'n redelik kontroversiële konsep in internasionale strafreg. Dit word gereeld bespreek maar weinig toegepas. Universele jurisdiksie verwys na die bevoegdheid van 'n Staat om sekere misdrywe te straf ongeag waar dit gepleeg is. Die betrokke Staat hoef nie enige van die tradisionele verbindings soos territorialiteit, nasionaliteit of direkte Staatsbelang met sodanige misdrywe te hê nie. Hierdie misdade is tipies van die ergste misdade in internasionale reg, soos volksmoord, oorlogsmisdade en misdade teen die mensdom. Die argument is dat diegene wat hierdie tipe misdrywe pleeg *hostis humanis generis*, of vyande van die mensdom word. Daarom, net soos die seerower van ouds, is enige nasie, wat hulle in hegtenis neem geregtig om sy jurisdiksie, namens die ganse mensdom, oor hulle uit te oefen. Maar terselfde tyd is 'n kenmerk en grondbeginsel van internasionale reg die soewereine gelykheid van State. En onder internasionale reg is strafregtelike jurisdiksie 'n prerogatief van soewereine State. State het territoriale jurisdiksie oor misdade wat binne hul regsgebied gepleeg is, want om beheer oor 'n gebied uit te oefen is in wese wat soewerein wees behels. Dus kan een Staat se poging om jurisdiksie uit te oefen oor persone wat ook onder die jurisdiksie van 'n ander Staat val beskou word as die ondergraving van die tweede Staat se soewereiniteit.

Dit word aan die hand gedoen dat 'n behoorlike begrip van universele jurisdiksie, beide internasionaal, en in Suid-Afrika van uiterse belang is, veral omdat die Konstitusionele Hof onlangs Suid-Afrikaanse owerhede beveel het dat marteling gepleeg in Zimbabwe, deur Zimbabwiese amptenare, teen Zimbabwiese burgers ondersoek moet word. Die hof het dus beveel dat die Suid-Afrikaanse owerhede universele jurisdiksie moet uitoefen oor Zimbabwiese amptenare. Hierdie tesis het ten doel om die gesag gewoonlik genoem, ter ondersteuning van universele jurisdiksie, krities te beskou, veral omdat dit gewoonlik teoreties en onprakties van aard blyk te wees. Hierdie tesis poog om 'n noodsaaklike balans en mate van realisme tot die debat te voeg. Anders as wat algemeen aanvaar word ondersteun die geskiedenis van internasionale betrekkinge nie universele jurisdiksie nie en is daar ook geen aanduiding dat hierdie situasie onlangs fundamenteel verander het, of in die nabye toekoms sal verander nie.

Die tesis beskou voorts, na 'n oorweging van die vergelyking van seerowers met moderne internasionale misdadigers, die bewering dat die ou skrywers soos De Groot en De Vattel hul steun verleen aan universele jurisdiksie. Hierna volg 'n ontleding van die sogenaamde "*Lotus* beginsel", wat glo beteken dat enige Staat jurisdiksie mag uitoefen oor ernstige oortredings, bloot omdat daar geen reël is wat dit verbied nie. Die verhore van Duitse oorlogs misdadigers deur die Geallieerdes, na die Tweede Wêreldoorlog, word ook dikwels as bewys gebruik van universele jurisdiksie en word ook krities bekyk. Dieselfde geld vir die verhoor van Adolf Eichmann deur Israel.

Die voorsiening gemaak vir universele jurisdiksie word verder ondersoek deur te let op die jurisdiksionele bepalinge in die Konvensies oor volksmoord, oorlogsmisdade en marteling en dit word telkens op Suid-Afrika van toepassing gemaak. Daar word veral noukeurig gelet op die opstel proses van hierdie Konvensies ten einde te bepaal presies wat die bedoeling en heersende omstandighede toe was. In die proses word spesifieke lande en internasionale gesag wat met die Konvensies te make het oorweeg.

Die Internasionale Strafhof, en of dit voorsiening vir universele jurisdiksie maak, word ondersoek ten einde te bepaal of dit enigsins gesê kan word dat die Hof lidstate aanmoedig om universele jurisdiksie te beoefen.

Laastens word die bevindings oor universele jurisdiksie en die Internasionale Strafhof toegepas op Suid-Afrika, veral met verwysing na die Konstitusionele Hof beslissing oor die marteling in Zimbabwe, voordat gevolgtrekkings gemaak word oor wat presies Suid-Afrika se internasionale en plaaslike pligte behels.

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List of abbreviations

AI	-	Amnesty International
AU	-	African Union
CC	-	Constitutional Court
DPCI	-	Directorate for Priority Crimes Investigation
DRC	-	Democratic Republic of Congo
EU	-	European Union
GA	-	General Assembly
HPCLU	-	Head of the Priority Crimes Litigation Unit
HRW	-	Human Rights Watch
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the former Yugoslavia
ILM	-	International Legal Materials
IMT	-	International Military Tribunal at Nuremberg
NATO	-	North Atlantic Treaty Organization
NDPP	-	National Director of Public Prosecutions
PCLU	-	Priority Crimes Litigation Unit
MDC	-	Movement for Democratic Change
NGO	-	Nongovernmental Organization
SALC	-	South African Human Rights Litigation Centre
SCA	-	Supreme Court of Appeal
UNWCC	-	United Nations War Crimes Commission
UN	-	United Nations
UNGA	-	United Nations General Assembly
UK	-	United Kingdom
US	-	United States
USSR	-	The Union of Soviet Socialist Republics
WWII	-	World War Two
ZANU-PF	-	Zimbabwe African National Union-Patriotic Front
ZEF	-	Zimbabwe Exiles Forum

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Chapter 1

Introduction

On 29 October 2014 the Constitutional Court confirmed the Supreme Court of Appeal and the North Gauteng High Court in Pretoria's rulings that ordered the South African National Prosecuting Authority and the South African Police Service to investigate the arrest and torture of political opponents of the ZANU-PF that occurred during 2007 in Zimbabwe.¹ While making this order the court declared that South Africa has an international obligation to ... prosecute crimes against humanity.² The court thus found that there is a duty on South African authorities to investigate and prosecute international crimes even if they were committed elsewhere and by foreigners. Or in other words that there is a duty on South African authorities to investigate and prosecute international crimes based on universal jurisdiction. This is a rather new and revolutionary idea. It is rather new because South Africa, like other common law jurisdictions, has traditionally been reluctant to exercise extraterritorial jurisdiction. Immediately questions abound. What exactly is universal jurisdiction? How did we reach this point in international criminal law and South African law where a court makes such an order? Was the court correct and what is now expected of South African authorities when it comes to exercising universal jurisdiction? This thesis is offered as an attempt to critically engage with these vital questions and to provide, what will hopefully be, valuable and timely caution and guidance.

The approach followed throughout this thesis is to critically consider, and determine the validity of, the usual justifications for universal jurisdiction. It is submitted that scrutinizing the history, and examples, of universal jurisdiction is the best way to determine whether the theory is presently capable of practical application.

¹ *South African Litigation Centre and Another v. National Director of Public Prosecutions and Others* [2012] ZAGPPHC 61 (hereafter '*SALC v. National Director of Public Prosecutions*'); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168; 2014 (2) SA 42 (SCA); [2014] 1 All SA 435 (SCA) (27 November 2013) and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30

² *SALC v. National Director of Public Prosecutions* 81

At the outset universal jurisdiction is defined as a State essentially exercising jurisdiction in the absence of any other acceptable base of jurisdiction, especially the territorial principle. That is because sovereign nations jealously guard over their own territories and do not lightly suffer other nations meddling in their internal affairs. This is the very reason that universal jurisdiction is such a controversial concept. The first chapter continues by showing how proponents of universal jurisdiction usually promote it by tracing its roots to the law exercised in ancient days over pirates. They argue that pirates of old were responsible for particularly heinous offences and by committing them they became *hostis humanis generis*, or the enemies of all mankind. The result was that any nation into whose hands these pirates fell was entitled to exercise jurisdiction over them on behalf of all nations.

The analogy between pirates and modern human rights offenders is frequently made and in the same breath certain passages by old writers like Hugo de Groot and Emerich de Vattel are invoked to show how universal jurisdiction is the wisdom of the ages. Chapter 1 ends by contending that it is untenable to use these old writers as support for universal jurisdiction.

Chapter 2 begins with a discussion of the 1927 *Lotus Case*³ and a reflection on the disquieting tendency by supporters of universal jurisdiction to construe this case as a mandate for exercising universal jurisdiction simply because their mantra goes that: “there is no rule prohibiting it.”

At the end of World War II the Nuremberg and Tokyo Tribunals played a significant role in the development of international criminal law. Since the establishment of these tribunals certain crimes have generally been considered ‘international crimes’. These crimes are a violation of international law and are often said to be punishable directly under international law. It is often stated that such crimes may be tried by national courts or international tribunals. Examples of such crimes are: war crimes, piracy, slave trading, genocide, crimes against humanity and torture.⁴ These crimes were

³ *Lotus Case (France v Turkey)* 1927 PCIJ Reports, Series A, no 10

⁴ Gerhard Erasmus & Gerhard Kemp ‘The application of international criminal law before domestic courts in the light of recent developments in international and constitutional law’ 27 *South African Yearbook of International Law* (2002) 65-66; *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277 296; Robert Cryer *et al* ‘An Introduction to International Criminal Law and Procedure’ 2nd edition (2010) Cambridge University Press, Cambridge 51

historically not subject to universal jurisdiction.⁵ Nonetheless many scholars find their justification for the exercise of universal jurisdiction over international crimes in the prosecution of WWII crimes.⁶ The advocates of universal jurisdiction contend that these crimes are crimes against mankind or crimes *contra omnes* with their perpetrators the enemies of all people. They are thus punishable by any state on behalf of the international community.⁷ It is further often stated that the exercise of jurisdiction by the Allies over the Germans provide examples of universal jurisdiction. Like the case was with the pirate so too with the war criminal because it is primarily the similarly heinous nature of their crimes that provide motivation for the exercise of universal jurisdiction⁸. Simple? Yes. Correct? No. Where chapter 1 challenges the equation of pirates with war criminals and the notion that universal jurisdiction was exercised over piracy because of its heinous nature. Chapter 2 will question whether trials in the aftermath of WWII including the trial of Adolf Eichmann provide precedents for the exercise of universal jurisdiction. It will become apparent that the foundation in history for universal jurisdiction is not as sturdy as it is often declared to be.

Chapter 3 analyses the conventions drafted after WWII to deal with some of the most serious crimes under international law. These are the Genocide, Geneva and Torture Conventions. They are also called ‘human rights’ conventions. The jurisdictional provisions of these conventions, in so far as they relate to universal jurisdiction, will be examined and discussed. Under every convention the current position in South Africa is discussed with the lessons learnt from other countries applied here.

⁵ Cedric Ryngaert (Jurisdiction) (*supra*) 110 stating that crimes that traditionally gave rise to universal jurisdiction were crimes against telegraph and telephone cables, counterfeiting, trafficking in Negroes, piracy, trafficking in women and children, and trafficking in obscene publications and toxic drinks.

⁶ *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985) 582; American Law Institute (1987) ‘*Restatement of the Law (Third) of Foreign Relations Law of the United States*’ paragraph 404; Theodor Meron ‘International Criminalisation of Internal Atrocities’ 89 *American Journal of International Law* (1995) 554; Chris C Joyner ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’ 59 *Law and Contemporary Problems* (1996) 155-156, 166, 172; Michael P Scharf ‘Application of Treaty-Based Universal Jurisdiction to Nationals of Non-State Party States’ 35 *New England Law Review* (2000-2001) 369; Madeline H Morris ‘Universal Jurisdiction in a Divided World: Conference Remarks’ 35 *New England Law Review* (2001) 344-345; Maximo Langer ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’ 105 *American Journal of International Law* (2011) 3; Kenneth C Randall ‘Universal Jurisdiction under International Law’ 66 *Texas Law Review* (1988) 802-810

⁷ André Mbata B Mangu ‘States rights versus human and people’s rights in international law: Sovereign immunity and universal jurisdiction before the International Court of Justice’ 15 *Stellenbosch Law Review* (2004) 478

⁸ Cf Neels Swanepoel ‘*The Emergence of a Modern International Criminal Justice Order*’ (2006) Thesis submitted in accordance with the requirements for the degree of Doctor Legum, Faculty of Law, Department of Procedural Law and Law of Evidence, University of the Free State, 36; André Mbata B Mangu (Sovereign Immunity and universal jurisdiction) (*supra*) 485

It will be concluded that universal jurisdiction was expressly excluded in the Genocide Convention. Although there has been a recent tendency to prosecute perpetrators of genocide in foreign countries this involves mainly offenders from the former Yugoslavia and Rwanda who are prosecuted in Europe. This is ascribable to the fact that in both these cases there were Security Council resolutions calling on UN member States to assist the international tribunals in arresting and prosecuting these suspects. The result was that nations could work together and with international backing to curb international crimes and with no fear of a political backlash from the two States in question.

Although the phrase ‘universality of jurisdiction for grave breaches’ appears in the Geneva Conventions there is a gaping gulf between the theory and the practice of how few universal jurisdiction prosecutions have actually taken place for war crimes and grave breaches. It is argued that the provision for ‘universality’ was made to solve the logistical nightmare in the wake of WWII. Until then jurisdiction over war criminals had traditionally belonged to belligerents. But keeping jurisdiction limited to belligerents in the aftermath of WWII would have meant that war criminals could escape to neutral countries and those they had wronged would then be precluded from punishing them. A system of extradite or try was put in place to make sure that those most harmed by war criminals were able to obtain custody of their enemies and even if they couldn’t manage that, the nation where they were hiding would be obliged to punish them. Under the Geneva Conventions we will consider the position in Belgium, in its case against the Democratic Republic of Congo in the *ICJ* and its War Crimes Act as well as similar legislation in Spain.

The Torture Convention expressly incorporates the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer. Yet in practice almost no one ever exercises universal jurisdiction over torturers. It is argued that the famous *Pinochet* case involving allegations of torture committed in Chile and coming under scrutiny in the U.K. is not an example of universal jurisdiction. The example of the *Zardad* case is also used as a practical illustration of the difficulties inherent in the exercise of

universal jurisdiction. In conclusion the *ICJ* torture case of *Belgium v. Senegal* is considered.

In Chapter 4 the jurisdictional provisions and triggers of the International Criminal Court are considered. The principle of complementarity, meaning that the ICC relies primarily on member States for prosecution, is explained. It is then shown that the ICC does not provide for universal jurisdiction. In the light of its narrow jurisdictional provisions it is also argued that the ICC cannot be said to provide incentive to member States to exercise universal jurisdiction.

Chapter 5 considers the position of international law in South Africa. Domestic legislation providing for cooperation with the ICC and for universal jurisdiction is considered. The *SALC* case is then analyzed and critically discussed. The discussion involves a study of comparative State practice and the position of prosecutions in terms of universal jurisdiction in terms of customary international law.

Chapter 5 ultimately concludes with this thesis finding that the “evidence” for the acceptance of universal jurisdiction in practice is very scarce and not well settled in law at all. The earliest arguments that pirates were subject to universal jurisdiction right through to the recent arguments that the ICC implicitly calls for the exercise of universal jurisdiction are usually unpersuasive, shallow and driven by rhetoric. Publicists on the issue all use the same examples, usually taken out of context, without critically examining them and then try to make their arguments persuasive by proliferating examples and quoting others who do the same as authority.

Definition of, Rationale for and Historical Development of Universal Jurisdiction

1.1 Definition and demarcation of the concept of universal jurisdiction

To understand what universal jurisdiction is it might be helpful to start with as short a meaning as possible of what jurisdiction under international law means. The Oxford dictionary defines jurisdiction as the territory that a legal authority extends over.⁹ Cedric Ryngaert in his book on the topic defines jurisdiction as somehow relating to sovereignty, that in a world where States are equally sovereign they give shape to their sovereignty by adopting laws relating to persons, activities or legal interests. Jurisdiction gains an international element when a State in pursuance of its sovereign interests abroad adopts laws that are not only of purely domestic concern. The public international law of jurisdiction is then tasked with balancing the sovereignty-based assertions of one State with that of another. Its purpose in this is to ensure a peaceful co-existence between States through upholding the principles of non-intervention and the sovereign equality of States.¹⁰

For a practical definition of universal jurisdiction one may have regard to the Institute of International Law that in 2005 adopted a resolution which resolves that certain crimes under international law may be prosecuted by any State whatever, having no connection at all with the offence, and in the absence of any other bases of jurisdiction recognized by international law.¹¹ The Princeton Principles on Universal Jurisdiction similarly state that ‘Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction’.¹² As to the nature of

⁹ The Concise Oxford Dictionary of Current English (8th ed.) Clarendon Press, Oxford

¹⁰ Cedric Ryngaert *Jurisdiction in International Law* (2008) Oxford University Press, Oxford, 5-10

¹¹ Institut de Droit International, *Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes, adopted in Krakow, 2005*, <www.idi-iiil.org/idiF/resolutionsF/2005_kra_03_ft.pdf>; See also: Luc Reydamas *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford, New York: Oxford University Press) (2003) 5; Johan D Van der Vyver ‘Universal Jurisdiction in International Criminal Law’ 24 *South African Yearbook of International Law* (1999) 114-115; Kenneth Randall (Universal Jurisdiction) (*supra*) 788

¹² The Princeton Principles On Universal Jurisdiction (23 July 2001), Principle 1 (available at www.princeton.edu/~lapa/unive_jur.pdf)

the crime MC Bassiouni writes that the exercise of universal jurisdiction 'ought generally to be reserved for the most serious international crimes such as genocide, crimes against humanity and war crimes'.¹³

As to the other bases of jurisdiction recognized by international law, and to better understand where universal jurisdiction fits in, one may look to the authoritative research conducted in 1932 by the Harvard Law School.¹⁴ The research determined that five main principles of jurisdiction exist.

- First was the principle of territoriality whereby a State exercises jurisdiction over an offender because the offence was committed on the territory of that State. This principle could be extended to cases where only a part of the offence was committed on the territory of the State concerned.
- The next was active nationality, whereby a State that exercises jurisdiction over an offender does so on the basis that the offender is a national of the State concerned.
- The next base was the inverse of active nationality namely passive nationality, which means that a State exercises jurisdiction over an offender on the basis that the victim of the offence is a national of the State concerned.
- There was also the protective principle in terms of which a State exercises jurisdiction over an offender on the basis that the offence was prejudicial to the vital interests of the State concerned.
- The last base was universal jurisdiction or what the study termed the universality principle. Here a State exercises jurisdiction over an offender irrespective of any question of nationality or place of commission of the offence, or of any link between the prosecuting State and the offender. The study also made the distinction between universal jurisdiction and the less wide and extreme *subsidiary universality* principle. Where the last-mentioned principle is applied a State may only exercise universal jurisdiction after the State entitled to exercise jurisdiction in terms of one of the other bases of jurisdiction has refused to accept the proffered extradition of the offender.

¹³ M. Cherif Bassiouni 'The History of Universal Jurisdiction' in Stephen Macedo (ed.) 'Universal Jurisdiction' (2004) University of Pennsylvania Press, Philadelphia, 40

¹⁴ Harvard Research in International Law, 'Jurisdiction with respect to Crime' 29 *American Journal of International Law* (1935) Special Supplement (Part 2) 445

Thus a distinction between different forms of universal jurisdiction was already made in 1935. There was a difference between what the study calls extreme universal jurisdiction and universal jurisdiction exercised by a State after that State had offered to extradite an offender to a State with a more acceptable or stronger link to either the offence or offender and that offer of extradition had been declined. Recently this distinction has been called the distinction between ‘absolute’ or ‘pure’ universal jurisdiction (the last mentioned also known as universal jurisdiction *in absentia*) and ‘conditional’ universal jurisdiction, (sometimes known as ‘universal jurisdiction with presence’).¹⁵ Universal jurisdiction *in absentia* arises when a State seeks to assert jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) even when the suspect is not present in the territory of the investigating State. Under this version States may, at least theoretically, investigate and/or prosecute suspects for certain serious international crimes. They do not need any of the usual territoriality, nationality or other jurisdictional links to the offence. On this view, the suspect need not even be in the forum state for a case to be initiated. But it is usually only after he enters the territory of the forum state that he is arrested and prosecuted. This is when the form becomes conditional universal jurisdiction or universal jurisdiction exercised when the suspect is already present in the State asserting jurisdiction.¹⁶

It should be stated immediately that territorial jurisdiction has traditionally been the most accepted and least contentious base of jurisdiction.¹⁷ Universal jurisdiction, exercised by a State over any offence without regard to any connection to that State, or the interests of other States does not sit well with the classical State-centered view of public international law.¹⁸ This is because a feature and founding principle of

¹⁵ Robert Cryer *et al* ‘An Introduction to International Criminal Law and Procedure’ (2nd ed.) (2010) Cambridge University Press, Cambridge, 52; Antonio Cassese ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ 1 *Journal of International Criminal Justice* (2003) 592-3; Georges Abi-Saab ‘The proper Role of Universal Jurisdiction’ 1 *Journal of International Criminal Justice* (2003) 596, 601

¹⁶ Robert Cryer *et al* (Introduction to International Criminal Law) (*supra*) 52; Charles C Jalloh ‘Universal Jurisdiction, Universal Prescription?’ A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’ (2010) 21 (1) *Criminal Law Forum* 7-8 and Roger O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice* 735-760

¹⁷ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 40 ‘Throughout the course of legal history, jurisdictional powers have primarily been exercised in accordance with the principle of territorial jurisdiction.’

¹⁸ Cedric Ryngaert (Jurisdiction in International Law) (*supra*) 106

international law is the sovereign equality of States.¹⁹ And under international law criminal jurisdiction²⁰ is a prerogative of sovereign States²¹. States have territorial jurisdiction over crimes committed within their territory, for having control over a territory is essentially what it means to be sovereign. This means that one nation's attempt to exercise jurisdiction over persons that traditionally fall under the jurisdiction of another nation could be perceived as the undermining of the second nation's sovereignty.²² Universal jurisdiction is not based on notions of sovereignty and State consent²³ and this is exactly what makes it so tricky and controversial.²⁴

1.2 Rationale for universal jurisdiction

After possessing a basic definition for, and a demarcation of, the concept of universal jurisdiction it will help to understand the arguments often presented to justify its use. The diverse arguments defending the use of universal jurisdiction vary among the numerous writers on the subject. This thesis attempts to distinguish the main arguments and critically examine their validity. In so doing it is hoped that clarity and simplicity will be brought, in practice, to what is often a mystifying concept.

Many writers argue that it is solely in the heinous nature of certain crimes that the motivation for the exercise of universal jurisdiction must be sought and that it is the heinous nature of these crimes that make their suppression the concern of the international community.²⁵ This is why it is stated that the theory of universal jurisdiction transcends national sovereignty. According to MC Bassiouni the reasoning goes that certain core values are shared by the international community and they are deemed important enough to justify overriding the usual territorial limitations

¹⁹ John Dugard 'International Law: A South African Perspective' (4th ed.) (2011) Juta, Cape Town, 146

²⁰ Jurisdiction can refer to the power to make laws, the power to adjudicate a matter and the power to punish. In this thesis it means all three of these.

²¹ Ian Brownlie 'Principles of Public International Law' (5th ed.) (1998) Clarendon Press, Oxford, 303

²² Eugene Kontorovich 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' 45 *Harvard Journal of International Law* (2004) 189

²³ Henry Kissinger 'The Pitfalls of Universal Jurisdiction' *Foreign Affairs* (July/August 2001) 86

²⁴ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 39 'If used in a politically motivated manner or simply to vex and harass leaders of other states, universal jurisdiction could disrupt world order and deprive individuals of their basic rights. Even with the best of intentions, universal jurisdiction could be used imprudently, creating unnecessary frictions between states and abuses of legal processes.'

²⁵ CF (Neels) Swanepoel 'Universal jurisdiction as procedural tool to institute prosecutions for international core crimes' *Journal for Juridical Science* 32(1) (2007) 119; Matthew Garrod 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' 12 *Criminal Law Review* (2012) 764; *Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, ICJ Reports 2000, per Dissenting Opinion of Judge Ad Hoc van den Wyngaert, p. 167, www.icj-cij.org/ last visited on 23 September 2013

to the exercise of jurisdiction. This is known as the normative universalist position.²⁶ Gerhard Werle describes this position by stating that: '[c]rimes under international law are directed against the interests of the international community as a whole. It follows from this universal nature of international crimes that the international community is empowered to prosecute and punish these crimes, regardless of who committed them or against whom they were committed. Therefore, the international community may defend itself with criminal sanctions against attacks on its elementary values'.²⁷ Underlying this discourse is the idea that States may even if not obliged, at least be authorized, to exercise universal jurisdiction over heinous offences that shock the conscience of mankind.²⁸ Cedric Ryngaert defines this position well when he writes that '[a]ny State would have the right, or even the obligation, to prosecute core international crimes without the consent of the territorial or national State. In so doing, such a 'bystander' State would not exercise its own sovereignty, but act as an agent of the international community enforcing international law in the absence of a centralized enforcer of the core values of that community'.²⁹ Luc Reydams calls this the 'unilateral limited universality principle' in terms whereof any State may unilaterally exercise its jurisdiction over certain offences with an international character, even *in absentia*.³⁰ This is in essence a moral justification for universal jurisdiction. It is thus argued that States have the authority to exercise universal jurisdiction over core crimes on the basis of the *jus cogens* character of the prohibition of 'core crimes'.³¹ Ryngaert writes that this moral justification has become the 'dominating legitimizing discourse of universal jurisdiction over core crimes against international law'.³² This means that proponents are, in a sense, not even trying to justify the use of universal jurisdiction by reference to its historical significance or acceptance anymore. Because it is morally wrong to leave reprehensible offences unpunished universal jurisdiction is justified.

Bassiouni, however, also mentions a pragmatic policy oriented approach founded on the recognition that sometimes there exists certain shared international interests that

²⁶ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 42

²⁷ Gerhard Werle *Principles of International Criminal Law* (2nd ed.) (2009) TMC Asser Press, The Hague, 64

²⁸ Cedric Ryngaert (Jurisdiction) (*supra*) 113

²⁹ Cedric Ryngaert (Jurisdiction) (*supra*) 114

³⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 38-42

³¹ Cedric Ryngaert (Jurisdiction) (*supra*) 112

³² Cedric Ryngaert (Jurisdiction) (*supra*) 113

require an enforcement mechanism not limited to national sovereignty.³³ The main distinctions between the two approaches are that they differ in the nature and the sources of the values/interests that give rise to an international crime. They also differ in their definition of the international community and the nature and extent of the legal rights and obligations upon States in terms thereof.³⁴ Bassiouni points out that the universalist normative position can be traced back to early Christian concepts of natural law. But as he points out contemporary authors mistakenly assume that early jurists and philosophers intended to extend their universalist views of certain wrongs to include universal criminal jurisdiction, when that was never their intention.³⁵ In other words although there was a measure of agreement as to certain crimes being universally condemned this did not necessarily translate into everyone being entitled to punish these offences. Or put differently still, universal offences does not automatically mean universal jurisdiction over those offences. Bassiouni further argues that many legal scholars have advocated the theory of universality without clarifying the philosophical foundation of that theory. He argues that the universal jurisdiction exercised over pirates on the high seas has become the foundation for the modern theory of universal jurisdiction for certain international crimes.³⁶ Most scholars, however, have gone further in an attempt to validate the exercise of universal jurisdiction over war criminals, and other serious offenders, by comparing it to the ancient exercise of universal jurisdiction by States over pirates. This likening of serious crimes with piracy is the first argument this thesis examines.

A note concerning the moral discourse and justification surrounding universal jurisdiction, before we turn to the piracy analogy as its philosophical foundation. Studying universal jurisdiction has been an enlightening and exhilarating endeavor because it proves to be a compressed study of the theory, and practical implications, of international criminal law taken to its logical end.

The moral argument is a strong one. Of course someone may ask how an argument could be made against a morally commendable effort to bring atrocious criminals to book? It might help to state that the very reason this I chose universal jurisdiction as

³³ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 42

³⁴ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 42

³⁵ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 43

³⁶ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 43

topic was due to my excitement and pride at a South African Judge taking a bold stand against a Zimbabwean government who seem to think that they are invincible. I still feel this way. But after thorough studies it seems clear that feelings and moral justification alone is no guarantee that something will work. Such a viewpoint will not necessarily prove popular but it is submitted that it is essential to bring balance and perspective to an often one-sided debate.

1.3 Universal jurisdiction and the piracy analogy

According to Article 102 of the UN Convention on the Law of the Sea, 1982 (UNCLOS) piracy is subjected to universal jurisdiction.³⁷ The Princeton Principles on Universal Jurisdiction³⁸ call piracy the paradigmatic universal jurisdiction crime. And further claim that the piracy analogy is ‘crucial to the origins of universal jurisdiction’.³⁹ Advocates of universal jurisdiction have relied on piracy as support, precedent and inspiration for universal jurisdiction over other crimes. They have used the piracy analogy to show that history is on their side, that it is an old and settled doctrine and that therefore there is no cause for concern.⁴⁰ Scharf and Fischer⁴¹ describe it as follows:

‘Most scholars point to piracy as the first crime of universal jurisdiction recognized by the international community, and liken other crimes to piracy in order to justify, by analogy, the application of universal jurisdiction to those crimes.’

Eugene Kontorovich⁴² explains as the piracy analogy as follows:

‘According to the piracy analogy, international law created piracy as universally cognizable because of its extraordinary heinousness. Universal jurisdiction was never about piracy *per se*, the argument goes, but about allowing any nation to punish the world’s worst and most

³⁷ See also American Law Institute (1965) ‘*Restatement of the Law (Second) of Foreign Relations Law of the United States*’

³⁸ The Princeton Principles (*supra*)

³⁹ Princeton Principles (*supra*) 45; See Eugene Kontorovich (The Piracy Analogy) (*supra*) 185; Vanni E Treves ‘Jurisdictional Aspects of the Eichmann Case’ (1963) 47 *Minnesota Law Review* 571 ‘Whether universal jurisdiction over war crimes may be lawfully asserted will be seen to depend on large part on whether this view of piracy, and the analogies drawn from it, can be sustained.’

⁴⁰ Eugene Kontorovich (The Piracy Analogy) 208 and the authorities and quotes in the footnote he mentions there

⁴¹ Michael P Scharf & Thomas C Fischer (2001) ‘Foreword’ 35 *New England Law Review* (2001) 227-8

⁴² Eugene Kontorovich (The Piracy Analogy) (*supra*) 185

heinous crimes. Thus universal jurisdiction over human rights violations is simply an application of the well settled principle that the most heinous offences are universally cognizable and not, as critics contend, a radical and dangerous encroachment on nations' sovereignty.'

The piracy analogy can basically be described as follows: Universal jurisdiction was traditionally exercised over piracy. The primary motive for this was piracy's particularly heinous nature. This led to pirates earning the title of *hostis humanis generis* (or the enemies of all mankind). Modern human rights offences, including war crimes, genocide and crimes against humanity are equally heinous offences and those who commit them are similarly deemed enemies of all mankind. It is thus permissible for any State to prosecute them, just as they may pirates, using universal jurisdiction and in so doing act as an agent of the international community.⁴³

But in 1935 Harvard Research in the American Journal of International Law⁴⁴ determined that universal jurisdiction had not expanded beyond piracy because there was no agreement on the "basis" for treating crimes similarly to piracy. However this "basis" has subsequently, at least for the supporters of universal jurisdiction, become the heinousness inherent in piracy and the new international crimes.⁴⁵ Under the heinousness argument, it was the substantive nature of pirates' acts that made them susceptible to universal jurisdiction.⁴⁶ KC Randall⁴⁷, for example, argues that:

'A more accurate rationale for not limiting jurisdiction over pirates to their state of nationality relies on the fundamental nature of piratical offences. Piracy may comprise particularly heinous and wicked acts of violence or depredation.'

⁴³ Different Courts have similarly depicted the particular heinousness of piracy to justify the exercise of universal jurisdiction over war criminals and torturers and etc.; See *Eichmann Case* (*supra*) 291 and 292 and *Filartiga v. Pena-Irala* 630 F 2d 876 (2nd Cir 1980) where the court declared at 890 that "for purposes of civil liability, the torturer has become-like the pirate ... before him *hostis humani generis*, an enemy of all mankind."

⁴⁴ Harvard Research in International Law: Jurisdiction with Respect to Crime (Universality-Piracy) 29 American Journal of International Law (Supplement 1935) 569

⁴⁵ See footnote 16 (*supra*) for authority and also The Princeton Principles (*supra*) 48

⁴⁶ Eugene Kontorovich (The Piracy Analogy) (*supra*) 205 and also the *Arrest Warrant Case* (*supra*) *Joint Separate Opinion* of Judges Higgins, Kooijmans and Buergenthal who at 61 described piracy 'as the classical example of a crime regarded as the most heinous by the international community.'

⁴⁷ Kenneth Randall (Universal Jurisdiction) (*supra*) 795; See also Willard B Cowles 'Universality of Jurisdiction over War Crimes' 33 *California Law Review* (1945) 217-8 (arguing that universal jurisdiction should be extended to war crimes because, like piracy, they are morally heinous); See also M Cherif Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' 42 *Virginia Journal of International Law* (2001) 157

But this analogy of piracy to other international crimes, based on their inherent heinousness, seems to the writer to have been made uncritically. In fact many writers on the subject of universal jurisdiction simply assume the piracy analogy as a fact and move swiftly on to discuss how universal jurisdiction subsequently applies in modern international criminal law.⁴⁸ But considering the analogy and the resultant arguments, one only has to ask a few simple questions of it, and as you do severe doubts arise. Ask for instance: Was the reason for subjecting piracy to universal jurisdiction really because of its heinous nature? Was it not rather because pirates committed their crime on the high seas, which was outside any particular nations jurisdiction? And therefore it was practically wise and expedient to allow any and all nations to capture and punish them? Ask also if piracy was particularly heinous? Was it considered worse than normal murder, rape or robbery? And were there times when acts of piracy were condoned and even encouraged by States albeit under the name of privateering? Before answering these questions it would be useful to briefly show why such an exercise is indispensable and relevant.

1.3.1 Necessity of questioning the validity of the piracy analogy as the basis of universal jurisdiction

Asking and answering the questions mentioned above is no mere theoretical exercise. It goes straight to the heart of the difficulty inherent in universal jurisdiction, namely that it is a radical and dangerous encroachment of another nation's sovereignty. State actors most often commit the core crimes of war crimes, genocide and crimes against humanity. These State actors belong to sovereign states that will not take kindly to other States exercising universal jurisdiction over their leaders and nationals. This is elementary. Yet someone like KC Randall,⁴⁹ in his often-quoted article on universal jurisdiction, curtly dismisses this concern by stating that in practice it will almost never happen and it will not prove a problem. But Luc Reydams⁵⁰ maintains the exact opposite. He describes the problem forcefully as follows:

‘To constitute an act of piracy *iure gentium* subject to universal jurisdiction the *locus delicti* must be the high sea or a place outside the jurisdiction of any State. Furthermore, only acts of

⁴⁸ Kenneth Randall (Universal Jurisdiction) (*supra*) and also Johan D van der Vyver ‘Universal Jurisdiction in International Criminal Law’ 24 *South African Yearbook of International Law* (1999) 117

⁴⁹ Kenneth Randall (Universal Jurisdiction) (*supra*) 821

⁵⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 58

violence committed for private ends by crews or passengers of private craft can constitute piracy *iure gentium*. State agents, State craft, and official acts are excluded from the purview of the definition, ...These two particular constitutive elements, the *locus delicti* and the private act(or) requirement, explain why universal jurisdiction over piracy is undisputed. Such jurisdiction cannot possibly infringe on another State's sovereignty. They also make piracy inappropriate for analogies, yet some jurists bracket together pirates, war criminals, criminals against humanity, and torturers as *hostis humanis generis*, ie enemies of all mankind.⁷

In addition a group of African States has recently complained about what they perceive to be the selective use and abuse of universal jurisdiction in its exercise mainly over African officials by a handful of European States. The result has been a heated debate raging before the U.N General Assembly and Sixth Committee on the scope and applicability of universal jurisdiction⁵¹ As Matthew Garrod points out:

‘The essence of this debate is the perceived conflict between two values of international law, namely preventing the impunity of perpetrators of international crimes on the basis of universality, on the one hand, and protecting the principles of sovereignty, sovereign equality and political independence and the immunities of incumbent State officials, on the other. The comments and statements made by governments illustrate the controversial, political nature of the concept of universality, and the lack of clear agreement as to its scope and application. More importantly, they also reveal great confusion as to the validity of this concept, and indeed, its very foundation, under international law.’⁵²

Matthew Garrod goes on to point out that most States have taken as their starting point the assumption that the validity of universal jurisdiction under international law is beyond doubt.⁵³ Thus, the African Union, in its request for the inclusion of universal jurisdiction in the agenda of the General Assembly, having undertaken “a thorough study”, declared that:

‘[u]niversal jurisdiction is a well-established principle of international law the purpose of which is to ensure that individuals who commit grave offences, such as piracy, slavery, torture, genocide, war crimes and crimes against humanity, do not do so with impunity.’⁵⁴

⁵¹Report of the Secretary-General on The Scope and Application of the Principle of Universal Jurisdiction (29 July 2010) (U.N. Doc. A/65/181); Matthew Garrod (The Protective Principle) (*Supra*) 764; Sienho Yee, ‘Universal Jurisdiction: Concept, Logic, and Reality’, 10 *Chinese Journal of International Law* (2011) 504

⁵² Matthew Garrod (The Protective Principle) (*supra*) 821; Secretary-General Report on Scope of Universal Jurisdiction (*supra*) paragraphs 108-111

⁵³ Matthew Garrod (The Protective Principle) (*supra*) 821

⁵⁴ Cited in Matthew Garrod (The Protective Principle) (*supra*) 821

But one year later before the Sixth Committee, the Group of African States retreated from their earlier position and asserted that:

[t]here was as yet no generally accepted definition of universal jurisdiction and no agreement on which crimes, other than piracy and slavery ... it would apply ... [and that] the principle hardly existed in most domestic jurisdictions.⁵⁵

It is therefore submitted that South African authorities will have to critically reconsider the validity and very foundation of universal jurisdiction. It is not too far sought to imagine a challenge being brought against an attempt on the part of South Africa to exercise universal jurisdiction over another African State based on the stance taken above by the group of African States. As matters currently stand it is not at all certain what the outcome of such a challenge will be. It is submitted that if universal jurisdiction is to be used then attempting to support it, by using broad unsubstantiated assumptions and popular rhetoric won't do. Only a critical examination that verifies or refutes the legitimacy of the historical basis of universal jurisdiction, as a starting point, and among other things will and should convince a court.

1.3.2 Contesting the legitimacy of the piracy analogy

The questions asked of the piracy analogy above will now be considered. Because piracy is not the theme of this research the areas of concern will not be studied in any great detail but will only be mentioned and briefly touched upon as far as they relate to the origin of universal jurisdiction.

1.3.2.1 Jurisdiction on the high seas: no threat to sovereignty

The first point has already been alluded to above and is so obvious that it might easily be overlooked. This concerns the high seas where piracy was normally committed. The high seas were not regarded as belonging to any one nation but instead belonging to all States. For purely practical reasons, the high seas were, for purposes of jurisdiction, regarded not as *res nullius* but as *res omnium communes*.⁵⁶ As pointed

⁵⁵ Cited in Sienho Yee (Concept, Logic and Reality) (*supra*) 524

⁵⁶ Johan van der Vyver (Universal Jurisdiction) (*supra*) 117

out above the popular belief today among scholars is that universal jurisdiction developed over piracy because it was a particularly heinous crime. But very few consider whether it did not in fact develop because of the lack of effective jurisdiction of States over the high seas.⁵⁷ It would then simply have developed as a matter of expediency and pragmatism allowing any nation to punish pirates they captured on the high seas to avoid the pirates going unpunished.⁵⁸ Harvard Research in a draft convention on jurisdiction found that universal jurisdiction over piracy was justified ‘upon the ground that the punishable acts are committed upon the sea where all have an interest in the safety of commerce and no State has territorial jurisdiction.’⁵⁹ Thus for piracy to be considered subject to universal jurisdiction it had to be committed where no State had territorial jurisdiction. Therefore piracy could not possibly infringe on another nation’s sovereignty. It simply did not pose the complicated challenges that universal jurisdiction over core crimes poses today. It is this difference that fundamentally distinguishes universal jurisdiction over piracy from universal jurisdiction over modern core crimes and which make analogies between them inappropriate.⁶⁰ It is also a much more apparent and logical reason for the development of universal jurisdiction over the crime than trying to show that it was regarded as particularly heinous. This writer entirely agrees with Judge Moore, who in his dissenting opinion in the *Lotus Case*, stated that ‘piracy by law of nations, in its jurisdictional aspects, is *sui generis*.’⁶¹ Even if writers argue that the exercise of universal jurisdiction over piracy was not so much based on the heinous nature of the offences but purely for pragmatic reasons so as to enable States to cooperate in curbing a common threat, it undermines the foundation for a unilateral exercise of universal jurisdiction. Ryngaert calls this argument the ‘common interest rationale’, which acknowledges that the conduct of those who perpetrate serious international crimes in one State has an impact on other States and as such it poses a potential

⁵⁷ Mitsue Inazumi ‘*Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*’ Intersentia, Antwerp (2005) 50

⁵⁸ Martins Paparinskis ‘*Piracy*’ in Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* Oxford University Press, Oxford (2009) 454

⁵⁹ Harvard Research in International Law: Jurisdiction with Respect to Crime (supra) 566

⁶⁰ Luc Reydamas (Universal Jurisdiction) (supra) 58; Madeline Morris (A Divided World) (supra) 345 ‘Because no specific precedent existed prior to WWII for subjecting war crimes and crimes against humanity to universal jurisdiction, it is unsurprising that that the extension of universal jurisdiction to those crimes would have relied in part on analogies to the law of piracy. There was however one important flaw in that analogy...Universal jurisdiction over war crimes and crimes against humanity, therefore, can become a source and an instrument of interstate conflict, in a way that universal jurisdiction over piracy was designed to avoid... The significant implications of the flaw in the analogy went unaddressed’

⁶¹ *Lotus Case (France v Turkey)* 1927 PCIJ Reports, Series A, no 10 (Moore, J., dissenting) 69

threat to all States. All States thus have an interest in prosecuting the wrongdoer.⁶² This is especially the case with crimes like piracy, drug offences, hijacking, hostage-taking, and other terrorist acts, which lends itself to justification under the common interest rationale.⁶³ But as Ryngaert aptly points out, the common interest rationale is not very helpful to justify the exercise of universal jurisdiction over crimes against international humanitarian law (war crimes, genocide and crimes against humanity). When States work together there is usually no controversy. Alfred Rubin, arguably the authority on piracy, after extensive research and writing on the subject, reaches the conclusion that in practice universal jurisdiction was only exercised over piracy when no State was in a position to object. He States that at the time territoriality was the dominant rule in Europe regarding the reach of prescriptive and enforcement jurisdiction and piracy was limited to acts on the high seas, beyond territorial claims to jurisdiction. He further writes that even then it was not truly “universal” as it was only exercised when the State asserting jurisdiction had jurisdiction to adjudicate in the form of a particular legally protected interest, like, for instance, the protection of its nationals as victims of the piracy.⁶⁴

1.3.2.2 State sponsored piracy?

Piracy could not be considered particularly heinous if States sometimes condoned it and often relied on it. Yet this is exactly what would happen. Antonio Cassese argues that piracy is not an international crime because during the heyday of its enforcement, universal jurisdiction over piracy was suspended when piracy was committed on behalf of a State. The name given to such State sponsored piracy was privateering.⁶⁵ Eugene Kontorovich has done extensive research on this aspect and convincingly shows that privateering was nothing but piracy done when sponsored by a State.⁶⁶ Alfred Rubin mentions that the “crime” of “piracy” was reduced to acts done (the taking of another’s property) by persons who did not submit to a legal order “recognized” by whatever officials of whatever legal order had the question before it.⁶⁷ The conduct of pirates and privateers was similar; they seized merchant ships

⁶² Cedric Ryngaert (Jurisdiction) (*supra*) 106

⁶³ Cedric Ryngaert (Jurisdiction) (*supra*) 107

⁶⁴ Alfred, P Rubin ‘*Ethics and Authority in International Law*’ (1997) Cambridge University Press, Cambridge, 109 & 164

⁶⁵ Antonio Cassese *International Criminal Law* Oxford University Press, New York (2001) 23-25

⁶⁶ Eugene Kontorovich (The Piracy Analogy) (*supra*) 210 - 223

⁶⁷ Alfred Rubin (Ethics and Authority) (*supra*) 164

through threat of lethal force. Yet privateers were not subject to universal jurisdiction and were not even considered criminals.⁶⁸ All a privateer needed in order to stop and seize cargo and ships on the high seas, and to avoid being treated like a pirate for his efforts was a letter of marque and reprisal from a nation.⁶⁹ International law recognized this licensed plunder and all nations recognized the right of other sovereigns to authorize privateering.⁷⁰ A nation would always authorize these letters of marque against their adversaries and this saved them the expense of maintaining large standing navies.⁷¹ Although pirates had a fearsome reputation as murderers and torturers, murder and torture were not necessary elements of the international crime of piracy. And even pirates who never mistreated their victims were still fully subject to universal jurisdiction.⁷² On the other hand privateers would often engage in piratical conduct and they would still not be subject to universal jurisdiction.⁷³ It is worth quoting Kontorovich where he says the following:

‘The heinousness premise of the piracy analogy holds that certain actions by their very nature make the perpetrators amenable to any nation’s jurisdiction. Torture and genocide evoke a visceral repugnance. The repugnance would not be diminished if the torture or genocide had the blessing of nations, generals or religious authorities. Yet clearly this is not how piracy was regarded by the nations of the world, for a document signed by a third-tier official of a second-rate province could transform a universally punishable pirate into an innocent privateer.’⁷⁴

Matthew Garrod points out that during the peak of piracy in the sixteenth and seventeenth centuries colonial trade produced wealth, that led to power and gave rise to competition and war between Spain, England, France and the Netherlands. Trade was in fact so important that its disruption on the high seas was treated, and often described, as violating the law of nations. Pirates were the enemy and had to be suppressed because they undermined trade and wealth. In a *de facto* war between

⁶⁸ Eugene Kontorovich (The Piracy Analogy) (*supra*) 210

⁶⁹ Eugene Kontorovich (The Piracy Analogy) (*supra*) 211, 220 ‘The fact that nations authorized plunder at sea greatly offended the sensibilities of some contemporary observers. If, as some people thought, the privateer was morally no better than the pirate, then the letter of marque amounted to governmental involvement in a rather dirty business.’

⁷⁰ Eugene Kontorovich (The Piracy Analogy) (*supra*) 211

⁷¹ Eugene Kontorovich (The Piracy Analogy) (*supra*) 213

⁷² Eugene Kontorovich (The Piracy Analogy) (*supra*) 215

⁷³ Eugene Kontorovich (The Piracy Analogy) (*supra*) 216 ‘Indeed excesses by privateers were recognized to be inevitable. Pirates and privateers drew their crews from the same rough and destitute labor pool. Pirates were often laid-off privateers. Piracy thus encouraged privateering. As Daniel Defoe wrote in 1724 ‘Privateers in Time of War are a Nursery for Pirates against a Peace.’”

⁷⁴ Eugene Kontorovich (The Piracy Analogy) (*supra*) 211

many of these States on the seas in the New World privateers were used very effectively by one State against another. Privateers proved so effective in warfare that Spain was eventually forced to negotiate a peaceful settlement. This agreement made many privateers superfluous who almost automatically resorted to piracy. It was during this time and because of the threat that they posed to trade that pirates started being called names like the ‘enemy’ and ‘*hostes humani generis*’ with their acts described as heinous. Garrod explains that at a time when one nation’s privateer was another’s pirate it was a lack of sovereign authority that led to pirates being given these condemnatory labels. He wonders whether such labels did not develop in an attempt to distinguish pirates from privateers? He says: ‘[a]s the two practices are distinguishable only *in nomine* and with regard to State sanction, it is illogical to say that as a matter of international law, one of them gave rise to universal jurisdiction because it is ‘heinous’, while the other was lawful and honourable.’⁷⁵

1.3.2.3 Piracy more heinous than murder, rape or robbery?

If universal jurisdiction was exercised over pirates because piracy by its very nature was regarded as a particularly heinous crime, one may immediately ask why, at the same time, other heinous crimes like murder and rape were not also subject to universal jurisdiction? According to Kontorovich piracy was simply a subspecies of robbery and was often defined by reference to robbery on land.⁷⁶ Piracy was also no more heinous than ordinary robbery and less so than murder.⁷⁷ Kontorovich refers to the case of *United States v Palmer*⁷⁸ where the Supreme Court had to decide what to do with the defendants who stood accused only of stealing goods from a ship. If the Court decided to endorse a broad interpretation by government of the offence the defendants would hang, and if on a narrow one, they would not be punished at all. To make his point Kontorovich quotes Justice Johnson, who in his dissenting judgment, argued that government’s proposed interpretation created an unfair inconsistency between the punishment of robbery on land and sea. Accordingly Justice Johnson held:

⁷⁵ Matthew Garrod ‘Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law’ (2014) 25:2 *Diplomacy and Statecraft* 195-200

⁷⁶ Eugene Kontorovich (The Piracy Analogy) (*supra*) 223

⁷⁷ Eugene Kontorovich (The Piracy Analogy) (*supra*) 225

⁷⁸ 16 U.S. (3 Wheat.) 610, 626-31.

'It is literally true, that under [the majority's interpretation] a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been punishable beyond whipping or confinement.'⁷⁹

1.3.3 Concluding remarks on the piracy analogy

If piracy could sometimes mean robbing a vessel of a single chicken, and if all seafaring nations, in the common interest of nations to exploit others for wealth, legalized piracy whenever it suited them by merely calling it privateering, it would be very hard to argue that piracy was regarded as inherently or extraordinarily heinous. And if universal jurisdiction did not apply to piracy because of its heinous nature then it cannot simply be argued that now it must *a fortiori* apply to the inherently heinous acts of war crimes, crimes against humanity and genocide.⁸⁰

1.4 Historical roots

As pointed out above⁸¹ the proponents of universal jurisdiction have relied heavily on piracy as historical support for universal jurisdiction. But they didn't stop there. They have also invoked the writings of the eminent jurists Hugo Grotius and Emerich de Vattel in their quest to show that universal jurisdiction is nothing new but the wisdom of the ages.⁸² We will therefore have to determine if such a position is justifiable by considering the original texts.

⁷⁹ United States v Palmer (*supra*) 639

⁸⁰ Even staunch supporters of universal jurisdiction have abandoned the piracy analogy, see Claus Kreß 'Universal Jurisdiction Over International Crimes and the Institut de Droit International' (2006) 4 *Journal of International Criminal Justice* 569 'It should go without saying that piracy does not even come close to match the 'heinousness' of genocide or crimes against humanity, the former crime, in terms of gravity being comparable rather to ordinary robbery. It also remains open to doubt whether piracy constitutes a crime under international law... The *sui generis* characterization of piracy on the high seas as a crime of customary universal jurisdiction would seem to rest upon a combination of the absence of a territorial sovereign and the typical difficulty of establishing one of the traditional bases for alternative forms of jurisdiction such as, in particular, the nationality of the alleged offender.'

⁸¹ Paragraph 1.2 (*supra*)

⁸² Diane F Orentlicher 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1990-1991) 100 *Yale Law Journal* 2556; Louis René Beres 'On International Law and Nuclear Terrorism' (1994) 24 *Georgia Journal of International and Comparative Law* 20, note 40; Darren Hawkins 'Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality' (2003) 9 *Global Governance* 347-65

1.4.1 Hugo de Groot (Hugo Grotius) (1583 – 1645)

We can start by considering Grotius' views on the matter. His views may be particularly important because not only is he widely acclaimed as the father of international law⁸³ but also in South Africa we are so privileged as to have him as one of our 'own' Roman-Dutch jurists. The passages often relied on read as follows:

'The matter that necessarily comes next under consideration is the case of those, who screen delinquents from punishment. It was before observed that, according to the law of nature, no one could inflict punishment, but a person entirely free from the guilt of the crime which he was going to punish. But since established governments were formed, it has been a settled rule, to leave the offences of individuals, which affect their own community, to those states themselves, or to their rulers, to punish or pardon them at their discretion. But they have not the same plenary authority, or discretion, respecting offences, which affect society at large, and which other independent states or their rulers have a right to punish, in the same manner, as in every country popular actions are allowed for certain misdemeanors. Much less is any state at liberty to pass over in any of its subjects crimes affecting other independent states or sovereigns, On which account any sovereign state or prince has a right to require another power to punish any of its subjects offending in the above named respect: a right essential to the dignity and security of all governments.

[...]

But as it is not usual for one state to allow the armed force of another to enter her territories under the pretext of inflicting punishment upon an offender, it is necessary that the power, in whose kingdom an offender resides, should – upon the complaint of the aggrieved party – either punish him itself, or deliver him up to the discretion of that party. Innumerable instances of such demands to deliver up offenders occur both in sacred and profane history.

[...]

Yet all these instances are to be understood not as strictly binding a people or Sovereign Prince to the actual surrender of offenders, but allowing them the alternative of either punishing or delivering them up.

[...]

What has been said of punishing or giving up aggressors, applies not only to those, who always have been subjects of the sovereign, in whose dominions they are now found, but to those also, who, after the commission of a crime, have fled to some place for refuge.'⁸⁴

83 John Dugard 'Grotius, the jurist and international lawyer: Four hundred years on' (1983) 100 *South African Law Journal* 214

84 Hugo Grotius '*The Rights of War and Peace, Including the Law of Nature and of Nations*' translated from the original Latin by A.C. Campbell, with an Introduction by D. J. Hill, New York: M. Walter Dunne (1901) Available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=553&Itemid=28. Book II, Chapter XXI & IV. Last visited on 14 October 2013

And also:

‘It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects.

[...]

It was the theme of praise bestowed upon the heroes of antiquity, that in their most arduous undertakings they avenged the wrongs of others rather than their own.’⁸⁵

Taken only at face value it is easy to see how scholars can employ these passages in support of a natural law justification for foreign intervention through universal jurisdiction.⁸⁶ But on closer scrutiny this argument seems to be wrong and not only textually but also contextually indefensible.

Considering the first passage mentioned above, Grotius is arguing that delinquents should not be shielded from punishment. He declares that it is a settled rule that offences that affect a certain community should be left to that State responsible to punish or pardon such offenders at their discretion. But that discretion is limited where these offence affect society at large and other States also have a right to punish such offences. He then likens the interest these other states have to the *actio popularis* available in, as he says, all countries for certain misdemeanors. He then says that a State may even less pass over offences that affect other independent States. This places the emphasis squarely on his mention of the State acting in terms of the *actio popularis* because he contradistinguishes it from a case where a state was in fact *directly* [own emphasis] affected by an offence. He was thus in favor of States acting on behalf of other States or their subjects even where they were not directly affected by an offence.⁸⁷ This is further proved by the last quoted paragraph above, that the heroes of antiquity were praised for avenging the wrongs of others rather than their own. The *actio popularis* has been defined in South Africa as ‘championing the cause

⁸⁵ Hugo Grotius (The Rights of War and Peace) (*supra*) Book II, Chapter XL

⁸⁶ See for example Cedric Ryngaert (Jurisdiction) (*supra*) 108; who does not quote the entire section but only certain parts, which make it seem that Grotius was in favor of universal jurisdiction, ie. ‘(arguing that States have a right ‘to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Person whatsoever, grievous Violations of the Law of Nature or Nations’ and that ‘any State would have the moral imperative to punish the perpetrators of *delicta juris gentium*’, [f]or [...]it is so much more honorable, to revenge other Peoples Injuries rather than their own [...] Kings, beside the Charge of their particular Dominions, have upon them the care of human society in general’).

⁸⁷ For example Luc Reydam's ‘The Rise and Fall of Universal Jurisdiction’ in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law* Routledge, London (2010) 339 also argues along similar lines against using Grotius as support for universal jurisdiction.

of the people'.⁸⁸ It describes an action brought on behalf of someone else when the one bringing the action was not *per se* affected by what happened. Grotius supports this action and applies it to States taking up matters that do not directly affect them, but on behalf of other States and not against them. Did Grotius thus believe any state might exercise universal jurisdiction over offences affecting 'society at large'?

The answer is no. And one may know this by considering the quoted paragraphs in textual context of *De Jure Belli ac Pacis*, the perspective and context from which Grotius wrote and the modern definition of universal jurisdiction. To be sure, in taking these aspects into consideration, the present writer believes that Grotius never even imagined or considered the concept of universal jurisdiction.

To start with context in the text itself, regard can instantly be had to the name of the book. *De Jure Belli ac Pacis* means 'On the law of war and peace'. This is important to remember because a large section, and maybe even the most of the book, is devoted to the concept of a just war. Keeping this in mind it is important to note what Grotius states immediately prior to the much cited paragraph about kings having a right to punish not only injuries affecting themselves, or their subjects but also for gross violations of law and nature done to other states and subjects. Just before this passage Grotius states, as a fact, that wars are undertaken as forms of punishment.⁸⁹ If understood in the immediate context of punishment defined as war, the paragraph takes on a completely different meaning to what is often propagated. This interpretation fits in with the title, theme and context of the book and must be preferred. Seen in this way he was saying that kings or sovereigns have a right to wage war not only when they are injured but also when other states and subjects are treated in gross violation of the law of nature or nations. Obviously waging war and exercising universal jurisdiction are two different things. As Matthew Garrod points out it is also very important to remember that the law of nature or nations referred to here must be read in the light of other works by Grotius which he wrote to defend the waging of war by the Dutch East India Company against Portugal and Spain in the East Indies to have access to the lucrative trade in the area. Grotius wrote that

⁸⁸ *Wood v Odangwa Tribal Authority* 1975 2 SA 294 (A); See also Alfred, P Rubin 'Actio Popularis, Jus Cogens and Offenses Erga Omnes' (2001) 35 *New England Law Review* 265-280; Egon Schwelb 'The Actio Popularis and International Law' (1972) 2 *Israel Yearbook of International Law* 46-56

⁸⁹ Hugo Grotius (The Rights of War and Peace) (*supra*) Book II, Chapter XX at XXXVIII

humanity is united by trade, is a necessity for the human race and preventing trade is an offence against nature herself. Hence sovereigns, and specifically the Dutch, had permission to punish foreign nationals and even use military force in a 'just war' to protect their trade under the authority and in the interest of the law of nations.⁹⁰

The next aspect to consider is that Grotius wrote from a state sovereign perspective and respect of states and their sovereignty was key to his teaching.⁹¹ The first four paragraphs by Grotius quoted above mention that a sovereign cannot shield from punishment someone who has aggrieved another sovereign. The underlying idea is that there should be no safe havens for fugitives. It is further an arrangement between sovereigns. The offender here discussed is an individual/ or maybe even a group of criminals but certainly not another sovereign or its agents. The next paragraph mentions the fact that it is not usual for one state to enter the territory of another with its armed force in order to exact punishment on an offender. That is why extradition of such an offender should be allowed or else the state should punish him itself. This is a practical arrangement to prevent war because one state entering another with its armed force sounds a lot like war. This interpretation again fits in with the context and the argument set out above. Hence it would mean that should a sovereign consider itself sufficiently injured by a fugitive, and the harboring state refuses to extradite or try the fugitive then a sovereign would be justified in attacking the fugitive and the state that seeks to shelter him. It seems likely that Grotius meant that in such a case war would be the remedy available to a state.⁹² Not an elaborate attempt to exercise jurisdiction over the state leaders who are indirectly offending an aggrieved state. It seems that even the passage about the nobility of avenging the wrongs of another means that States should be allowed to act on behalf of other States to punish those who had harmed the other State. He does not say that States should act against other States on behalf of the subjects of the other State for wrongs done to those subjects. Grotius respected governments and envisioned a system of cooperation between them. Why would he then be used as authority for universal jurisdiction,

⁹⁰ Matthew Garrod (Piracy and the False Foundations of Universal Jurisdiction) (*supra*) 198 & 203

⁹¹ Hugo Grotius (The Rights of War and Peace) (*supra*) Book II, Chapter XX at XXX where he states that 'sovereign princes, magistrates, and rulers of every description'[s] authority is the keystone of the fabric of society.'

⁹² John Dugard (Grotius) (*supra*) 219 'Grotius recognizes the right of humanitarian intervention, that is, the right of states to intervene forcibly on behalf of persons oppressed by their own sovereign.'

which is often described as diametrically opposed to notions of sovereignty?⁹³ Using Grotius to support universal jurisdiction seems wrong if one considers that State actors often commit core⁹⁴ crimes. Yet some argue very convincingly that the only logical justification for exercising universal jurisdiction over core crimes is precisely because state actors commit them.⁹⁵ How can these two divergent views of respect of sovereignty on the one hand and its total disregard on the other be reconciled? It is very difficult. But it is impossible to attempt to do so by invoking the writings of Grotius. He would probably cringe at the contemporary interpretation of his words.

Lastly it is submitted that those who rely on Grotius as support for universal jurisdiction will have to prove that he envisioned or even contemplated this concept. Yet there is no attempt on their part to do so, instead they attempt to use him to verify their claims. The context of sovereign states that he found himself in at the time, combined with the immediate context of his own substantial works, testify against their fanciful interpretation of one or two passages. It is submitted that weighed against the overwhelming evidence against such an interpretation that mere conjecture, speculation and wishful thinking will certainly not shift this burden. If Grotius did not emphatically stipulate that he envisioned universal jurisdiction there is nothing to do but accept that he didn't mean to and probably never even considered it. John Dugard, citing Sir Hersch Lauterpacht said that the enduring appeal of *De Jure Belli ac Pacis* stems, above other things, 'from its rejection of *raison d'état* as the basic premise of international relations and from its attempt to inject morality, justice and idealism into the international legal order.'⁹⁶ It is true; Grotius was indeed ahead of his time in striving for a just and decent world order world where states cooperated with and helped each other. Yet, for all the idealist and visionary that he was, not even he imagined a concept as unorthodox as universal jurisdiction.

⁹³ Robert Cryer 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16(5) *European Journal of International Law* 979 'When sovereignty appears in international criminal law scholarship, it commonly comes clothed in hat and cape. A whiff of sulphur permeates the air. Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of *realpolitik*, thwarting international criminal justice at every turn.'

⁹⁴ War crimes, genocide and crimes against humanity

⁹⁵ Win-chiat Lee 'International Crimes and Universal Jurisdiction' in Larry May and Zachary Hoskins (eds.) *International Criminal Law and Philosophy* (2010) Cambridge University Press, New York 15-38 Lee's entire argument is based on the fact that universal jurisdiction can only logically apply, and is only justified, when core crimes are committed by government officials or on their behalf.'

⁹⁶ John Dugard (Grotius) (*supra*) 215

1.4.2 Emerich de Vattel (1714 – 1767)

As noted above many scholars also invoke the writings of the influential Swiss philosopher Emerich de Vattel in support of universal jurisdiction.⁹⁷ These supporters point to a passage from Vattel's *Law of Nations* as support of their claims. This passage reads as follows:

‘Although the justice of each nation ought in general to be confined to the punishment of crimes committed in it's own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.’⁹⁸

Eugene Kontorovich has already argued, both compellingly and comprehensively so, that Vattel did not support universal jurisdiction.⁹⁹ A brief comment to show that Vattel should also not be quoted as support for universal jurisdiction should suffice here. It is important to remember that Vattel was a close reader of Grotius. By looking at Vattel's views it will further assist us to see whether the interpretation given of Grotius' paragraphs quoted above is accurate. Firstly the offenders Vattel mentions in this passage are those who offend against nations, not the government agents themselves. This is borne out by the argument below. Kontorovich points out that Vattel's use of the *hostis humanis generis* phrase meant that he considered them the enemy in the military sense, with the emphasis placed on the ‘*hostis*’ part.¹⁰⁰ That is why Vattel says that enemies of all mankind may be exterminated wherever they are

⁹⁷ Eugene Kontorovich (The Piracy Analogy) (*supra*) 230

⁹⁸ Emer de Vattel *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (2008) edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund) Available at <http://oll.libertyfund.org/title/2246/212414>. Last visited on 21 October 2013

⁹⁹ Eugene Kontorovich (The Piracy Analogy) (*supra*) 230-236

¹⁰⁰ Eugene Kontorovich (The Piracy Analogy) (*supra*) 232 “*Hostis*” means enemy in the military sense. Its application to pirates stemmed from the theory that a nation's vessels could attack pirates as if they were military enemies, even absent a declaration of war or any formal hostilities. The terms provenance has long been forgotten by all but a few scholars of piracy and the law of war, but it was certainly understood by Vattel, a close reader of Grotius. By calling the broader category of wrongdoer “*hostis*” Vattel situates this passage in the context of military operations (which remain a primary focus throughout the book), and in the context of adjudication. See also Grotius himself, immediately after, and in the context of his passage quoted earlier, about ancient heroes avenging the wrongs of others and not themselves. He says: ‘Upon this principle there can be no hesitation in pronouncing all wars to be just, that are made upon pirates, robbers, and enemies of the human race.’ Hugo Grotius (The Rights of War and Peace) (*supra*) Book II, Chapter XL

seized. As Kontorovich points out immediate extermination and trial are different things.¹⁰¹

The often-quoted passage by Vattel can thus not be used as support for universal jurisdiction. In another section Vattel considers universal jurisdiction only to reject it. To quote Kontorovich on this aspect:

‘He (Vattel) writes that if a State itself is not directly harmed by a violation of the law of nations, it has no business attempting to punish that violation... *The Law of Nations* is a defense of a robust notion of national sovereignty, one that trumps notions of universal justice. “It does not, then, belong to any sovereign, to set himself up for a judge of his conduct, and so to oblige him to alter it,” Vattel wrote in a passage that would be quoted by Alexander Hamilton.’¹⁰²

1.4.3 Concluding remarks

A brief contemplation of Grotius’ and Vattel’s views on universal jurisdiction has shown that Grotius probably never even considered it and Vattel considered it, only to reject the idea. It is submitted that the fanciful interpretation of a handful of passages from their writings, as support of universal jurisdiction, should not confuse us. Universal jurisdiction over heinous offences does not have the backing of history in the practice of piracy or the endorsement of the old writers. In the next chapter we consider the *Lotus Case* of 1927, which is forever cited in arguing that universal jurisdiction may be exercised, simply because there is no rule against it. And immediately after this we will consider the effect WWII and subsequent happenings, including the *Eichmann* trial, have had on universal jurisdiction.

¹⁰¹ Eugene Kontorovich (The Piracy Analogy) (*supra*) 231-232 “This point is important because a serious objection to universal jurisdiction, particularly in a constitutional system of separated governmental powers, is that it gives courts too great a role in matters affecting foreign relations at the expense of the political branches.”

¹⁰² Eugene Kontorovich (The Piracy Analogy) (*supra*) 233 quoting Vattel: ““The Spaniards violated all rules when they set themselves up as judges of the Inca Achaulpa. If that prince had violated the law of nations with respect to *them*, they would have a right to punish him. But they accused him of having put some of *his subjects* to death... for which he was not at all answerable to them.” (Emphasis added)’

Chapter 2

The *Lotus Case*, The Aftermath of WWII and the Eichmann Trial

2.1 The *Lotus Case*

2.1.1 Facts of the *Lotus Case*

A discussion of the *Lotus Case* is essential to a proper understanding of jurisdiction.¹⁰³ In this case a French ship, the *Lotus*, collided with a Turkish ship the *Boz-Court*, on the high seas. The latter ship sank and a number of crewmembers and passengers lost their lives. The *Lotus* picked up the survivors and put into port in Turkey. Here, the officer of the watch on board the *Lotus* at the time of the collision was arrested, tried and convicted of culpable homicide. France objected to Turkey's exercise of jurisdiction and the dispute was referred to the Permanent Court of International Justice. France contended that the Turkish courts, in order to have jurisdiction, should be able to point to some specific entitlement to jurisdiction recognized by international law in favor of Turkey. Turkey, on the other hand, asserted that it had jurisdiction unless it was forbidden by international law. The Court, by the President's casting vote, ruled in favor of Turkey. It held:

'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed by conventions or by usages generally accepted as expressing principles of law and established in order to regulate between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot be presumed.

Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense 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.

¹⁰³ *Lotus Case (France v Turkey) 1927 (supra)*; John Dugard (International Law: A South African Perspective)(*supra*) 147 'The starting point for any discussion of jurisdiction is the *Lotus Case*.'

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. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws or the jurisdiction of their courts to persons, property, and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. 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 courts to persons, property and acts outside their territory, it 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.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.¹⁰⁴

The controversy surrounding this case focuses more on the *dicta* than the actual decision. The decision was simple enough in that the Court found that because the effects were felt on the Turkish vessel, which is considered an extension of the territorial State, a prosecution might be justified from the point of view of the territorial principle.¹⁰⁵ Important however for purposes of our discussion is the dictum that '[r]estrictions upon the independence of States cannot...be presumed', which has since been taken to proclaim a presumptive freedom of States in general. And this is whence originates the expression '*Lotus* principle' for the view that States have a right to do whatever is not prohibited by an international law or custom. Supporters of

¹⁰⁴ *Lotus* (*supra*) paragraphs 18-19

¹⁰⁵ *Lotus* (*supra*) page 23

universal jurisdiction consistently use the ‘*Lotus* principle’ to justify the exercise of universal jurisdiction.¹⁰⁶

2.1.2 Burden of proof

It seems to the present writer that for the lack of historical precedent and authority for universal jurisdiction the next best thing is claiming that it should still be exercised because nothing prohibits it. Surely this is not an argument or justification for the exercise of universal jurisdiction? It is not an argument at all.¹⁰⁷ Yet this is often the best argument there is. In fact by their very reliance on this argument adherents of universal jurisdiction free themselves of any need to show precedent for their exercise of jurisdiction. Should it happen that anyone objects, they would immediately point out that the burden is on the objector, because that is what was stated in *Lotus*. This seems not only wrong but also unfair.

The fundamental problem with the *Lotus Principle* line of reasoning is that universal jurisdiction, especially when exercised over State leaders and high-ranking government officials, is an unusual and almost unprecedented procedure. This is proved by the lack of a sound historical basis for, and the few prosecutions of this kind that have actually been based on, this principle (Although this is exactly the opposite of what human rights activists and scores of writers on the subject hold.) But let us just for argument’s sake and for the moment assume that it is in fact a largely unprecedented procedure. Should a State then decide to prosecute the leaders of another State by means of universal jurisdiction for one of the core crimes they are forging ahead where few have gone before. And if they are honest enough to admit that they find themselves, by so doing, in uncharted territory perhaps they will be less confident in applying universal jurisdiction and so glibly declaring the burden to

¹⁰⁶ Willard Cowles (Universality of Jurisdiction Over War Crimes) (*supra*) 177-218 in 1945 was the first person to employ this form of reasoning with reference to *Lotus* and the exercise of universal jurisdiction. In his article Cowles claimed to examine the right of ‘every State’ to exercise universal jurisdiction over war crimes. But all his examples, and his entire argument, deal only with the right of a ‘belligerent State’ to prosecute war crimes ‘by an enemy’ against the nationals of an Allied belligerent in one and the same war. But then he goes on to conclude, in reliance upon *Lotus* that ‘The States of the world have jurisdiction to try and punish any war criminals unless prohibited from so doing by international law.’ Cowles thus makes a quantum leap from belligerent nations being able to punish war criminals that fought against them to all nations having jurisdiction simply by invoking *Lotus*.

¹⁰⁷ See the Separate opinion of President of the ICJ Guillaume in the *Arrest Warrant Case* at paragraph 14 where he labeled a similar argument by Belgium, in reliance upon the ‘*Lotus* principle’, as ‘hardly persuasive’.

be on anyone who challenges their exercise of universal jurisdiction. It then moves closer to a situation where a burden rests on the party wishing to change a settled system to show why doing things in a radically new way is a good idea.¹⁰⁸ Luc Reydam's proposes solving this problem as follows:

'In litigation the onus of proof lies on the plaintiff. In a dispute between States involving extraterritorial jurisdiction it is up to the State of nationality of the defendant to show that the criminal proceedings in the forum State are contrary to international law. The burden of proof in the *Lotus* case was accordingly cast on France, the challenger of jurisdiction. Turkey, the defendant State, had nothing to prove. It is important to remember, however, that the entire process complained of - the assumption of jurisdiction over a French national in respect of something done by him on the high seas - occurred in Turkish territory, ie in a Turkish court, in respect of a vessel and a person voluntarily present in Turkey. How does the issue of the burden of proof present itself when the dispute relates to an offence committed within the plaintiff State's own territory? The onus of proof still lies on the on the plaintiff State but it would not be too difficult for the plaintiff State to cause the burden of proof to shift if the following analysis is correct. The sovereign equality of States constitutes the basic constitutional doctrine of the law of nations. A corollary of sovereign equality is the right of each State freely to choose and develop its political, social, economic and cultural systems, including its criminal justice policy, without interference in any form by another State. Couched in terms of international relations: a State may not interfere with another State's internal or domestic affairs. An exercise of jurisdiction by any State other than the territorial State violates *prima facie* the non-interference principle, which functions as an important limit on jurisdiction over crime. The defendant State must then be prepared to show that it is pursuing its own legitimate interests or that the offence transcends the domestic affairs of the territorial State and falls in the sphere of international concern, and above all of international law.'¹⁰⁹

It is submitted that the two proposals are almost similar and will in practice have similar effects. The only difference is that, on the version proposed by Reydam's, the burden starts on the plaintiff but as soon as proceedings commence it moves to the defendant. Reydam's thus also contends that the exercise of jurisdiction by any State other than the territorial State is the exception and not the norm.

¹⁰⁸ See Claus Kieß (Institut de Droit International) (*supra*) 571 'The classic *Lotus* presumption in favour of state's jurisdiction title in the absence of a rule to the contrary no longer applies or does, at least, not apply to universal jurisdiction.' See also JL Brierly '*The Lotus Case*' (1928) 44 *Law Quarterly Review* 156 'International law did not start as the law of a society of States each of omniscient jurisdiction, but of States possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over resident non-nationals. If it is alleged that they have now acquired a measure of jurisdiction over non-resident non-nationals, a valid international custom to that effect should surely be established by those who allege it.'

¹⁰⁹ Luc Reydam's (Universal Jurisdiction) (*supra*) 20-21

2.1.3 Presumption of freedom

Because of the dictum in *Lotus* that restrictions on the freedom of States cannot be presumed, many argue that there is a presumption of freedom in favor of States wishing to extend their jurisdiction extra-territorially. But Reydams holds that this presumption of freedom should not be taken literally because in the same breath the judgment also refers to limits which international law places on jurisdiction and to principles that influence jurisdiction.¹¹⁰ Reydams explains that none of the extreme views often taken in the past applies any longer. Thus States don't have an absolute discretion because then extraterritorial jurisdiction would simply not be an issue. On the other hand States are not forbidden from extending their criminal law and the jurisdiction of their courts to persons and acts outside their territory or else universal jurisdiction would be illegal and that would end the discussion.¹¹¹ As Reydams points out:

“The reality is that a co-operative international law based on a community of interests has developed in the field of crime prevention and punishment. States have developed elaborate multilateral treaties on many specific crimes. Almost all States have pledged to co-operate in suppression of all serious crimes by adopting bilateral and multilateral extradition treaties and treaties providing for mutual legal assistance in criminal matters.”¹¹²

In discussing principles Reydams states the following:

“The question will not be posed in terms of whether a State's claim to jurisdiction is illegal *per se*, but whether it is a proper exercise of jurisdiction, given the conflicting interests of two or more States as well as the consequences for the individual defendant.”¹¹³

This means that one will miss the point if you only seek to determine if universal jurisdiction is illegal or not. The answer to that question will only tell you what you *may* do but not what you *should* do. Would it not be better to shift the focus to a balancing of State interests and justice requirements rather than a rigid application of

¹¹⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 15

¹¹¹ In the *Arrest Warrant Case* (*supra*) at paragraphs 44-45 Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion found no basis for universal jurisdiction *in absentia*. But they continued by stating that ‘there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such jurisdiction. In short, national legislation and case law, - that is, State practice is neutral as to the exercise of universal jurisdiction.’

¹¹² Luc Reydams (Universal Jurisdiction) (*supra*) 17

¹¹³ Luc Reydams (Universal Jurisdiction) (*supra*) 24

a specific principle? Applying a rigid legal principle runs the risk of paying no attention to the conflicting interests of different States.

2.1.4 Prescriptive and Enforcement Jurisdiction

In theory a distinction is often made between jurisdiction to prescribe and jurisdiction to enforce.¹¹⁴ Simply put jurisdiction to prescribe is the measure to which a State's criminal law applies, or is asserted to apply, over certain conduct whether this conduct occurs within or outside of its territory under the acceptable heads of jurisdiction under international law.¹¹⁵ Jurisdiction to enforce is by way of contrast strictly territorial. A State may not enforce its criminal law in the territory of another State without that State's consent.¹¹⁶ A State would enforce its jurisdiction by for instance arresting a suspect and trying him in its courts. O' Keefe points out that a State's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand.¹¹⁷ It can thus be seen and agreed that international law allows States nearly unlimited latitude in prescribing its criminal law over certain conduct. But merely declaring certain acts to be unlawful or prescribing jurisdiction over certain acts will almost never excite an adverse reaction from other States. It is only when a State attempts to enforce this legislation over foreigners, or acts occurring in foreign territories that problems arise. These are the limits which international law places on the exercise of jurisdiction.

2.1.5 Universal jurisdiction fundamentally a political problem?

This distinction between prescription and enforcement seems very rigid and is usually of very little practical relevance because one would 'hope' that States wouldn't prescribe rules without the expectation of future enforcement. I say 'hope' because it is not always the case. The distinction is at least helpful in understanding what States refer to when they celebrate their freedom to implement universal jurisdiction provisions. It usually means that they have implemented legislation making provision

¹¹⁴ Roger O'Keefe (Clarifying the Basic Concept) (*supra*) 735-760; Derek, W Bowett 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources' (1982) 53 *British Yearbook of International Law* 1

¹¹⁵ Paragraph 1.1 (*supra*)

¹¹⁶ Roger O'Keefe (Clarifying the Basic Concept) (*supra*) 740

¹¹⁷ Roger O'Keefe 'Clarifying the Basic Concept' (*supra*) 740; It might be added that this is a very light way of putting it.

for universal jurisdiction over certain offences. Whether they have actually tried to enforce the legislation over nationals of other countries for acts committed abroad is another question and whether they actually intend to is yet another question. Implementing universal jurisdiction over core offences currently seems the fashionable thing to do and helps States to keep up international appearances.¹¹⁸ But as soon as the ideological heat subsides the political will to enforce such legislation often dwindles. To be fair, States are under considerable pressure from international and national human rights groups to implement this type of legislation making provision for universal jurisdiction.¹¹⁹ But it is important to realize that universal jurisdiction cannot be treated as an abstract legal question because it is by its nature a fundamentally political question.¹²⁰ The fact that politics play such a large part in universal jurisdiction and that it places limits on the exercise of jurisdiction seems to be something lamented by many theorists on the subject and something other writers mention almost as an afterthought.¹²¹ Reydams attributes this phenomenon of a tension between legal theory and political reality to successful issue framing and lobbying on the part of transnational activists. He states the following:

‘In the long history of transnational activism, the international criminal justice campaign stands out for its extraordinary successful issue framing. There are countless victims of gross human rights violations and impunity has been the norm. The juxtaposition of these facts suggests a causal relation; hence, fighting impunity through universal jurisdiction or an international criminal court becomes a moral imperative. While creating a legitimate international criminal court requires a substantial number of states, universal jurisdiction can be exercised by *any* state with the necessary courage and will, right *now*. The idea was so obvious, so simple, and so readily available that it appeared brilliant. What was demanded was a leap of faith, and if things did not work out as hoped, the flaws would be in the world

¹¹⁸ See David Scheffer Ambassador at Large for War Crimes Issues of the USA ‘Opening Address Symposium on Universal Jurisdiction’ (2001) 35 *New England Law Review* 233 where he says: ‘Everyone talks about universal jurisdiction, but almost no one practices it.’

¹¹⁹ See Luc Reydams (Rise and Fall) (*supra*) 336 where, with reference to an increase in international human rights NGO’S and their influence on universal jurisdiction development, he states: ‘AI and Human Rights Watch achieved superpower status with global reach. Like Greenpeace and *Médecins Sans Frontières* they grew into professional, media savvy organizations capable of waging strategic campaigns.’

¹²⁰ Luc Reydams ‘The Rise and Fall of Universal Jurisdiction’, *Leuven Centre for Global Governance Studies*, Working Paper No. 37 (2010) at 2 ‘I reject the tendency of legal scholars to reduce universal jurisdiction to an abstract legal question. On the contrary, it is hard to think of a more *political* question.’

¹²¹ Maximo Langer (The Diplomacy of Universal Jurisdiction) (*supra*) 4 ‘Within the universal jurisdiction debate and literature, the role of the political branches have received little to no attention. Supporters of universal jurisdiction have tended to dismiss political considerations as improper obstacles in the fight against impunity.’

(self-interest, indifference, parochialism) and not in the doctrine. Once framed in such simple moral and practical terms it became politically difficult to question universal jurisdiction...'¹²²

In the *Arrest Warrant Case*¹²³ Judge *ad hoc* Van Den Wyngaert speaking of universal jurisdiction *in absentia* remarked that:

'It may be politically inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.'

But only focusing on legality and writing off problematic international relations with other States, caused by universal jurisdiction, as a mere "political inconvenience" is, with respect, not a conducive or realistic approach to the problem. This approach tells you only what you *may* do, but not what you *should* do.¹²⁴ While a practical answer as to what should be done is sorely needed most spend all their time theorizing about their "freedom" to implement universal jurisdiction. But to be sure a "political inconvenience" may very quickly develop into a "diplomatic catastrophe" or worse. A relevant and recent incident comes to mind showing the stark difference between prescribing universal jurisdiction and actually enforcing it. In 2013 US President Barack Obama paid an official visit to South Africa. Two South African groups tried to obtain arrest warrants for him for war crimes and crimes against humanity allegedly committed against Pakistan and Syria. The Muslim Lawyers' Association even made an urgent application to the North Gauteng High Court for Obama's arrest but the application was dismissed.¹²⁵ The application was based on South Africa's Implementation of the Rome Statute of the International Criminal Court Act¹²⁶ ('the ICC Act'). South Africa implemented this act in support of, and in an attempt, to give effect to the provisions of the Rome Statute of the International Criminal Court which affords the International Criminal Court (ICC) jurisdiction over acts of genocide, war

¹²² Luc Reydams (Rise and Fall) (*supra*) 336

¹²³ (*supra*) 172

¹²⁴ Derek Bowett (Jurisdiction: Changing Patterns of Authority) (*supra*) 15 'It is suggested, therefore, that rather than rely on the established principles or rules of jurisdiction, one has to go back to far more basic principles of law which govern relations between States.'

¹²⁵ "Obama: SA groups want arrest warrants" *City Press* (2013/06/26) available at <http://www.citpress.co.za/politics/obama-sa-groups-want-arrest-warrants/> (accessed 2013/11/06)

¹²⁶ Act 27 of 2002 and also see Jeanne-Marié Versluis "Obama wel in Soweto, maar hulle kla" *Beeld* (2013/06/22) available at <http://www.beeld.com/nuus/2013-06-22-obama-wel-in-soweto-maar-hlle-kl> (accessed 2013/11/06)

crimes, and crimes against humanity ('the core crimes')¹²⁷ The ICC Act provides for universal jurisdiction for South Africa in Section 4(3).¹²⁸ It was thus because Obama would be present (as the legitimizing link in terms of the act) in South Africa that his arrest was sought for the alleged commission of core crimes. The ICC Act will still be discussed in greater detail later on but this incident clearly shows what potential hazards and grave consequences its enforcement might entail. It is almost inconceivable that South African authorities would even try and lay hands on President Obama. Yet this did not deter the groups in question from ignoring the NPA's discretion in the matter and asking a court to make a potentially devastating order.¹²⁹ The United States of America is not a member of the ICC and is in fact its fiercest opponent.¹³⁰ Just how fiercely it is opposed to the ICC can be seen by its implementation of the American Service Members' Protection Act of August 2002.¹³¹ This act authorizes the *President* of the United States of America to use all necessary and appropriate (even military) means to free United States or allied personnel detained by or on behalf of the ICC. If the President of the US may authorize any means to free his personnel; what would happen to South Africa if it held the *President* of the US is a thought too ghastly to contemplate. It will certainly not be a mere "political inconvenience." The words of Georg Schwarzenberger, spoken long ago, but particularly apt in this situation come to mind: 'In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be war under another name.'¹³²

¹²⁷ Max du Plessis 'Bringing the International Criminal Court home - The implementation of the Rome Statute of the International Criminal Court Act 2002' 16 *South African Journal of Criminal Justice* 1

¹²⁸ 'That person, after the commission of the crime, is present in the territory of the Republic'

¹²⁹ See Max Du Plessis (Bringing the ICC home) (*supra*) at 5 points out that the question of immunity of a Head of State is one of the most interesting and difficult questions in international law. The ICC provides in article 27 that 'official capacity as a Head of State or Government...shall in no case exempt a person from criminal responsibility under this Statute.' Yet as Du Plessis points out the position before national courts is less clear and international jurisprudence leans toward recognizing immunity for sitting Heads of State. The ICC Act however boldly declares that South Africa also does not recognize immunity for sitting heads of State suspected of a core crime. This must have been an additional incentive for these groups to bring such an application for the arrest of President Obama and technically they were within their rights to bring such an application and the Court was wrong to dismiss it for lack of urgency. Of course it was urgent, the potential consequences were so devastating that the Court took the easy way out.

¹³⁰ Sascha-Dominik Bachmann 'The quest for international criminal justice - the long road ahead' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 731

¹³¹ Official title is the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States P L 107-206; 2 Aug 2002

¹³² Georg Schwarzenberger 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 295

2.1.6 Concluding remarks

In summary one may say that the ‘*Lotus* principle’ so often employed by supporters of universal jurisdiction means nothing more than that States are allowed by international law to prescribe laws prohibiting both internal and extraterritorial offences. But at the same time it must be kept in mind that a State may not enforce its criminal law in the territory of another State without that State’s consent. And when it tries to enforce its laws over foreigners for acts committed abroad, without another State’s consent, serious problems may be awaited which calls for wisdom, caution and restraint. The presumption of freedom to exercise universal jurisdiction so often proclaimed is neither an argument supporting universal jurisdiction nor a literal freedom to be gullibly accepted without considering political realities.

The greatest war the world has ever known started not long after the *Lotus* case was decided. And at the end of WWII the victorious Allies set out to prosecute the Nazi war criminals. Many see in these prosecutions an exercise of universal jurisdiction.

2.2 Universal jurisdiction in the aftermath of WWII

2.2.1 Cowles, Lord Wright and the United Nations War Crimes Commission

Many believe that universal jurisdiction over crimes under international law developed and gained acceptance through the prosecution of Nazi war criminals in the aftermath of WWII.¹³³ This prosecution by the Allies of war criminals and the creation of the International Military Tribunals at Nuremberg and Tokyo is widely considered as a landmark in the development of international criminal law. The piracy analogy, explained above,¹³⁴ is used by commentators to argue that the Allies extended universal jurisdiction over war crimes based on war crimes’ inherently ‘heinous’ nature. The analogy between war crimes and piracy, which is so often relied upon, was first made formally by the UNWCC. As Matthew Garrod, who has done persuasive, and in-depth research on the origins of universal jurisdiction points out, the head of the UNWCC; Lord Wright ‘endorsed the principle of universal jurisdiction over war crimes, by invoking a supposedly analogous right of universality

¹³³ See footnote 16 (*supra*) and the authorities quoted there.

¹³⁴ Paragraph 1.2 (*supra*)

over piracy as justification.’¹³⁵ But as authority for this ‘generally recognized doctrine’ Lord Wright relied on no State practice but exclusively on academic commentary by Cowles.¹³⁶ Cowles was a Lieutenant Colonel of the Judge Advocate General’s Department for the US and he is regarded as having coined the term ‘universal jurisdiction’.¹³⁷ Cowles admitted the influence he had on the UNWCC with regards to universal jurisdiction in a separate article published three years later:

‘It was put forward first in the form of a memorandum made available to the United Nations War Crimes Commission in the autumn of 1944. At the suggestion and with the personal encouragement of Sir Cecil Hurst, then Chairman of the United Nations War Crimes Commission, that paper was expanded in London and Washington during the winter of 1944-1945. The following spring, the ribbon copy of this larger paper was turned over to Mr Justice Jackson’s staff, and a carbon copy used for its publication in the June issue of the California Law Review.’¹³⁸

As Garrod points out it seems that the argument made by Cowles was accepted by the UNWCC, including its US representatives, as well as by the US prosecution department. Cowles’ argument, however, was not based on State practice and was not the official US government position. His argument rather proposed universal jurisdiction *de lege ferenda* as an attempt to justify the trial of war criminals in the aftermath of WWII.¹³⁹

Garrod severely criticizes Cowles’ argument calling it tenuous at best and at worst flawed.¹⁴⁰ The most glaring problem with Cowles’ argument is that he claims to examine the right of ‘every’ State to exercise universal jurisdiction over war crimes. But in reality all his examples, and his entire argument, only concerns the question of whether ‘under international law, a belligerent State has jurisdiction to punish an

¹³⁵ Matthew Garrod (The Protective Principle) (*supra*) at 768 quoting Lord Wright: ‘According to generally recognized doctrine [...] the right to punish war crimes is not confined to the State whose nationals have suffered or on whose territory the act took place but is possessed by any independent State whatever, just as is the right to punish the offence of piracy...[E]very Independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed ... from *Law Reports of the Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission*, vols. I-XV (HMSO, London, 1947-1949) (hereafter Law Reports).

¹³⁶ Matthew Garrod (The Protective Principle) (*supra*) 768; Law Reports (*supra*) Vol. XV, p. 26; Willard Cowles (Universality of Jurisdiction Over War Crimes) (*supra*) 177

¹³⁷ Matthew Garrod (The Protective Principle) (*supra*) 768

¹³⁸ Willard B Cowles ‘Trials of War Criminals (Non-Nuremberg)’ (1948) 42 *American Journal of International Law* 312

¹³⁹ Matthew Garrod (The Protective Principle) (*supra*) 769

¹⁴⁰ Matthew Garrod (The Protective Principle) (*supra*) 769

enemy war criminal in its custody when the victim of the war crime was a national of another State and the offense took place outside of territory under control of the punishing State.¹⁴¹ Garrod points out that the right under international law referred to by Cowles was that of a “belligerent State” to prosecute war crimes ‘by an enemy’ against the nationals of an Allied belligerent in the same war and that ‘this is not universal jurisdiction at all.’¹⁴²

As already alluded to above¹⁴³ Cowles in his argument in support of universal jurisdiction over war crimes relied uncritically on the *Lotus* case in arguing that international law does not impose any limitation upon a State from exercising jurisdiction over foreigners abroad. Cowles further argued that war crimes are analogous to piracy on the high seas because, like the case was with piracy, during hostilities ordinary law enforcement is difficult and universal jurisdiction must be relied upon to prevent impunity.¹⁴⁴ As Garrod points out Cowles’ entire argument hinges upon the assumption that universal jurisdiction, in the form that it historically developed over piracy, should similarly be applied over war crimes.¹⁴⁵ But as has already been shown above; the comparing of piracy to war crimes is highly dubious and should not have been so readily relied upon by Cowles and subsequently by Lord Wright and the UNWCC.¹⁴⁶ Garrod argues that the reliance by Lord Wright on the article by Cowles led him to misinterpret the basis of jurisdiction over war crimes. Lord Wright further sought to justify universal jurisdiction over war crimes by asserting that it had received the support of the UNWCC.¹⁴⁷

Allied military courts and tribunals involved in the prosecution of enemy war criminals however did not, as a rule, deliver reasoned judgments or specify the basis of their jurisdiction over the accused.¹⁴⁸ The task of reporting on the cases was left to

¹⁴¹ Willard Cowles (Universality of Jurisdiction Over War Crimes) (*supra*) 178

¹⁴² Matthew Garrod (The Protective Principle) (*supra*) 769

¹⁴³ Paragraph 2.1.1 and footnote 80 (*supra*)

¹⁴⁴ Willard Cowles (Universality of Jurisdiction Over War Crimes) (*supra*) 177-218

¹⁴⁵ Matthew Garrod (The Protective Principle) (*supra*) 770.

¹⁴⁶ Paragraph 1.2 (*supra*) and see also Matthew Garrod (The Protective Principle) (*supra*) 770-771 ‘Piracy was described as being ‘heinous’ because it constituted the waging of unlawful warfare against the colonial trade of sovereigns, which has nothing at all to do with the way in which war crimes, crimes against humanity and other human rights offences are described as being heinous by courts and commentators seeking to expand universality to include crimes other than piracy. Secondly, piracy could historically be committed by persons who were not sanctioned by any State; it is precisely for this reason that universal jurisdiction developed over piracy...’

¹⁴⁷ Matthew Garrod (The Protective Principle) (*supra*) 771 and Lord Wright (Law Reports) (*supra*) vol. XV at 26

¹⁴⁸ Lord Wright (Law Reports) (*supra*) vol. XV at 20

the UNWCC. What is very interesting to note is that ‘in the handful of cases where universality is referred to as one of the possible bases of jurisdiction over war crimes, it is stated not in the actual judgments of these cases, but, rather, in the reports of these cases by the UNWCC.’¹⁴⁹ But Garrod aptly points out that the reasoning of the UNWCC for interpreting these cases as based on universality is not persuasive either.¹⁵⁰ As an example regard can be had to the *Almelo Trial*. In that case, a British military court sitting in the Netherlands convicted German defendants for the murder of a British soldier and a Dutch civilian in the Netherlands. As regards the former crime, the report of the UNWCC stated that jurisdiction was based on the victim being a member of the “British Armed Forces”. As regards the latter crime, it was suggested in the subsequent reporting of the case:

‘That under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed.’¹⁵¹

UNWCC’s report of the case does not provide any evidence of this “general doctrine called Universality of Jurisdiction over War Crimes”; nor does it explain the relationship between war crimes and piracy. And there is nothing in the reasoning of the court to even suggest that it recognized the existence of universality.¹⁵² Importantly it seems that, in the absence of State practice in support of universality, even the UNWCC was not wholly convinced that jurisdiction was based on universality. In all the cases reported by the UNWCC where universality was listed as one of the possible bases of jurisdiction over war crimes and crimes against humanity, the UNWCC also suggested the alternative ground that a State ‘has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in

¹⁴⁹ Matthew Garrod (The Protective Principle) (*supra*) 771 and Lord Wright (Law Reports) (*supra*) vol. I at IX

¹⁵⁰ Matthew Garrod (The Protective Principle) (*supra*) 771

¹⁵¹ (Law Reports) (*supra*) vol. I at 42

¹⁵² Matthew Garrod (The Protective Principle) (*supra*) 772 ‘Moreover, the defendants in the *Almelo Trial* were tried under the British Royal Warrant ... which does not provide for universal jurisdiction. Of importance to the exercise of jurisdiction over war crimes in *The Almelo Trial* was the status of the victims as ‘Allied’ nationals and of the accused as belonging to the ‘enemy’; also see for exactly the same reasoning as well as wording as *The Almelo Trial*; *The Hadamar Trial* (Law Reports) (*supra*) vol. I at 53 and *The Zyklon B Case* (Law Reports) (*supra*) vol. I at 103

a common struggle against a common enemy'.¹⁵³ So it was not actually the courts in these matters that expressly based their jurisdiction on universality or even voiced an opinion in support of it. It was only construed as a “possible” base of jurisdiction by the UNWCC in its subsequent reporting of the cases.

Garrod argues that the UNWCC and Lord Wright accepted, uncritically and without any evidence, that universal jurisdiction applies over war crimes, by relying wholly upon the article by Cowles.¹⁵⁴ There are important implications that follow; particularly because the UNWCC’s work was declared to have ‘great influence upon the moulding of international criminal law and the basis of jurisdictions over war crimes.’¹⁵⁵ The result has been that courts and commentators have ever since, without further reflection, accepted that the reports and conclusions of the UNWCC provide precedent for the exercise of universal jurisdiction over war crimes and other crimes under international law.¹⁵⁶ Garrod uses, as example of this, the often-quoted case on universal jurisdiction, of *Demjanjuk v. Petrovsky*¹⁵⁷ where the court did not undertake primary research but merely cited the Restatement (Third) in its support of universal jurisdiction.¹⁵⁸ But the Restatement also simply found, without giving evidence: ‘that genocide and war crimes were subject to universal jurisdiction was accepted after the Second World War, although apparently no state has exercised such jurisdiction in circumstances where no other basis of jurisdiction...was present.’

2.2.2 Prosecution of war criminals in the Tribunals and under Control Council Law No. 10 and the limiting of jurisdiction

Proponents of universal jurisdiction often rely in support of the concept on a passage from the Nuremberg trial that ‘the Signatory powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. *In*

¹⁵³ Matthew Garrod (The Protective Principle) (*supra*) 797; The Almelo Trial (Law Reports) (*supra*) vol. I at 42; *The Hadamar Trial* (Law Reports) (*supra*) vol. I at 53; *The Zyklon B Case* (Law Reports) (*supra*) vol. I at 103

¹⁵⁴ Matthew Garrod (The Protective Principle) (*supra*) 772 where he points out that Willard Cowles admitted as much in his article (Trials of War Criminals) (*supra*) 312

¹⁵⁵ Matthew Garrod (The Protective Principle) (*supra*) 772; (Law Reports) (*supra*) vol. XV at 22

¹⁵⁶ Matthew Garrod (The Protective Principle) (*supra*) 773, 797 “But the alternative interpretation of jurisdiction, (that it ‘has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy’) has generally been overlooked by subsequent courts and commentators.”

¹⁵⁷ 776 F. 2d 571 (6th Cir. 1985) (*supra*) 177

¹⁵⁸ Matthew Garrod (The Protective Principle) (*supra*) 796; ‘*Restatement of the Law (Third) of Foreign Relations Law of the United States*’ (*supra*) par 404

*doing so, they have done together what any of them might have done singly.*¹⁵⁹ It has, however, always been doubtful whether this statement supports universal jurisdiction at all.¹⁶⁰ But what is more important to realize is that the vast majority of war crimes trials at the end of WWII, which also happen to be cited most often by supporters of universal jurisdiction, were not undertaken by the Tribunals, but rather by domestic military tribunals set up by the Great Powers within their respective zones of occupied Germany, acting under Law No. 10 of the Allied Control Council for Germany.¹⁶¹ Law No.10 was restricted to the punishment of persons belonging to the ‘enemy’ within delegated zones of authority and limited to the duration of WWII.¹⁶² Britain for instance was reluctant to expand jurisdiction over war crimes committed by foreign nationals outside of British territory, even where a crime was committed against a British subject and they accordingly construed jurisdiction of its military courts in narrow terms. The jurisdiction of British military courts was therefore not universal but was limited to “the trial and punishment of violations of the laws and usages of war” either in Britain or ‘any other place’, which are ‘committed during any war in which [Britain] may be engaged.’ The British military courts would thus not have jurisdiction over crimes arising out of a war in which Britain was not engaged.¹⁶³ The practice of the other Great Powers in their respective zones of occupied Germany was substantially similar and restricted their jurisdiction to the punishment of crimes by persons belonging to the enemy.¹⁶⁴

¹⁵⁹ Luc Reydam's (Rise and Fall) (*supra*) 340; International Military Tribunal (Nuremberg), Judgment and Sentences (1947) 41 *American Journal of International Law* 172, 216; Kenneth Randall (Universal Jurisdiction) (*supra*) 806 ‘The IMT’s judgment includes only one vague reference to the universality principle.’

¹⁶⁰ Madeline Morris (A Divided World) (*supra*) 344 ‘The Nuremberg tribunal, then, was likely not an instance of the exercise of universal jurisdiction in the post-war trials.’

¹⁶¹ Law relating to the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity, enacted at Berlin on 20 December 1945. Matthew Garrod (The Protective Principle) (*supra*) 773 ‘Law No. 10 had as its purpose, according to its Preamble, first to “give effect” to the Moscow Declaration and the London Agreement, and, second, “to establish a uniform legal basis in German for the prosecution of war criminals ... other than those dealt with by the International Military Tribunal.” As regards the scope of Law No. 10, Article III provided that “Each occupying authority, within its zone of occupation, shall have the right to cause such zone suspected of having committed a crime, including those charged with a crime by one of the United Nations, to be arrested.’

¹⁶² Matthew Garrod (The Protective Principle) (*supra*) 774

¹⁶³ Matthew Garrod (The Protective Principle) (*supra*) 775

¹⁶⁴ Matthew Garrod (The Protective Principle) (*supra*) 775, 777 ‘The Soviet Union prosecuted war crimes under a Decree of the Presidium of the Supreme Soviet of 19 April 1943, which provided courts martial with jurisdiction over “German-Fascist criminals guilty of great crimes against Soviet citizens”; The jurisdiction of Military Government Tribunals in the French zone was provided for by French Ordinance and applied to “all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after the 1st September, 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy.” Ordinance No.7 was passed providing for the establishment in the American zone of Military Tribunals with jurisdiction to “try and punish persons charged with offences recognized as crimes in ... Law No. 10”.’

In light of the preceding Matthew Garrod argues as follows:

‘Law. No. 10 and the municipal provisions of the Great Powers did not provide for universal jurisdiction. Instead the Great Powers, as the other Allied nations, were concerned first and foremost with the prosecution of war crimes committed by the ‘enemy’ in their own territories, where they had experienced firsthand enemy occupation, and against their own nationals. It is important to remember that, although the Great Powers declared to act “in the interests of the United Nations”, the trial of war criminals would not have occurred had their own nationals and national interests not been threatened or injured. There was even reluctance in some cases to prosecute war crimes which did not involve their own “direct interest”. Where the victims of the war crimes in German concentration camps belonged to more than one of the Allies, it was agreed that prosecutions would be undertaken by the Power which occupied the zone in which the camp was situated, and the “representatives of all Allied countries whose nationals were victims would be taken into consultation”. Allied commanders were also instructed to forward all evidence in their own zones “to the United Nations Government against whose national or nationals the crime was committed. In this regard, Law No. 10 provided for the exchange of accused war criminals among the four occupied zones and to other Allied nations, so that injured States could undertake their own prosecutions, although each zone had ultimate power to decide whether, and, if so, which, alleged war criminals would be handed over.’¹⁶⁵ (Footnotes omitted)

It seems that the Allies were only concerned with the punishment of crimes under international law committed by a common enemy and as part of a State policy of aggressive war, in which they were engaged.¹⁶⁶ Jurisdiction was thus limited by various factors including being exercised over a common enemy, during the period of a war and when it had harmed the interests of the prosecuting States, such as crimes against their own or Allied nationals. In this regard even nationals of former enemy occupied countries could be “treated” as ‘Allied’ and jurisdiction could be exercised over war crimes, which had been committed against them by the enemy.¹⁶⁷ One only has to consider the way Lord Wright defined universal jurisdiction in the *Almelo Trial* to understand how limited jurisdiction really was:

‘Under the doctrine of the Universality of jurisdiction over war crimes, international law takes account of the crime itself rather than (a) the nationality of the victim (*provided that he can be regarded as an Allied national or treated as such*), or (b) the nationality of the accused

¹⁶⁵ Matthew Garrod (The Protective Principle) (*supra*) 777-779

¹⁶⁶ Matthew Garrod (The Protective Principle) (*supra*) 780

¹⁶⁷ Matthew Garrod (The Protective Principle) (*supra*) 781

(provided that he can be regarded as having identified himself with the enemy), or (c) the place of the offence.¹⁶⁸

Garrod aptly points out that despite Lord Wright's nomenclature this is not universal jurisdiction at all.¹⁶⁹ This is apparent when the definition of universal jurisdiction given by Lord Wright is compared with the modern definition that it applies when 'a State, without seeking to protect its security or credit, seeks to punish conduct irrespective of the place where it occurs, the nationality of the perpetrator, and the nationality of the victim.'¹⁷⁰

2.2.3 Crimes Against Humanity

One may well then ask but what of the crimes against humanity committed by German authorities against German Jews on German territory? This was a very difficult issue faced by the Allies. These did not constitute war crimes under international law and the victims of these crimes could not be treated, for the purpose of jurisdiction as Allied nationals.¹⁷¹ The Allies did not exercise universal jurisdiction over these crimes either.¹⁷² The Nuremberg Charter provided that crimes against humanity had to be committed in the "interests of the European Axis countries" and, moreover, "in execution with any crime within the jurisdiction of the Tribunal", namely crimes against peace or war crimes.¹⁷³ Law No. 10 restricted jurisdiction over

¹⁶⁸ Lord Wright (Law Reports) (*supra*) vol. XV at 43 (brackets original but emphasis added)

¹⁶⁹ Matthew Garrod (The Protective Principle) (*supra*) 779; Richard Baxter 'The Municipal and International Law Basis of Jurisdiction over War Crimes' (1951) 28 *British Yearbook of International Law* 391-392 'It must be conceded that true universality has not been attained by those countries which apply international law to enemy war criminals, for the victims of conventional war crimes were, almost without exception, nationals of states allied with the prosecuting state or of the prosecuting state itself and the accused were either enemy nationals or persons who had voluntarily associated themselves with the enemy forces or administration...What is referred to as universality of jurisdiction over war crimes falls considerably short of that goal as long as the jurisdiction is exercised by a belligerent only over persons associated with its enemies.'

¹⁷⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 5

¹⁷¹ Matthew Garrod (The Protective Principle) (*supra*) 778

¹⁷² Arie, J Kochavi 'The Response to Nazi Germany's Crimes Against Axis Nationals: The American and British Positions' (1994) 5(2) *Diplomacy and Statecraft* 352 'Germany's crimes against German Jews and non-Jews were considered acts of violence, not war crimes, and therefore did not fall within the jurisdiction of these tribunals. The authority to try such cases was given by the British to German courts'; Priscilla D Jones 'British Policy towards German Crimes Against German Jews, 1939-1945 (1991) 36 *Leo Baeck Institute Year Book* 364; Henry Friedlander 'The Deportation of the German Jews Post-War German Trials of the Nazi Criminals (1984) 29 *Leo Baeck Institute Year Book* 201-202

¹⁷³ The Nuremberg Charter Article 6, Preamble and Article 2(c); 'International Military Tribunal (Nuremberg), Judgment and Sentences', (1947) 41 *American Journal of International Law* 249 'With regard to Crimes against Humanity...The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War

crimes against humanity even further to crimes committed within Germany “by persons of German citizenship or nationality, or stateless persons”.¹⁷⁴ So again care was taken to restrict jurisdiction. It is not an easy fact to accept, but the Allies seem on the whole to not have been interested in the prosecution of crimes against humanity beyond, or unconnected to, the immediate wars in which they were engaged and during which they had been injured themselves by a common enemy.¹⁷⁵ And by so restricting jurisdiction the Allies were trying to protect rather than to override sovereignty.¹⁷⁶ This means that we have to consider that not even the biggest tragedy of modern history could persuade States to disregard traditional jurisdictional rules and act in terms of universal jurisdiction. Kochavi explains that crimes perpetrated by the Axis against their own nationals were treated as domestic acts by a sovereign state and remarks as follows:

‘Both London and Washington wanted to avoid engaging in enormous numbers of war-crime trials after the war. The failure to punish German war criminals which followed the First World War acted as a constant warning against accepting far-reaching obligations.

[...]

The restriction deliberately imposed on the UNWCC’s jurisdiction, limiting it to the investigation of those crimes perpetrated against Allied nationals, clearly showed that both the Foreign Office and the State Department intended to limit as far as possible the cases with which their countries would have to deal. The objective of these government ministries was to entrust each Allied government with conducting the trial, and meting out the punishment, in all cases involving offences committed on its own territory or against their own nationals. Crimes perpetrated by the enemy against their own nationals, whether for political, racial or

Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.’ See also M. Cherif Bassiouni ‘From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court’ (1997) 10 *Harvard Human Rights Journal* 36 ‘Unlike proceedings in Germany under CCL 10, the Allied Military Prosecutions in the Far East were only for war crimes; they did not include “crimes against humanity.”

¹⁷⁴ Law No. 10 (supra) Article 3(1)(d)

¹⁷⁵ Matthew Garrod (The Protective Principle) (supra) 783; See also Kevin, Jon Heller ‘*The Nuremberg Tribunals and the Origins of International Criminal Law*’ (2011) Oxford University Press, New York 136-138 ‘The protective principle, by contrast, provides a more satisfying justification for the NMTs’ jurisdiction over the second category of crimes against humanity... no defendant was ever convicted of a crime against humanity that was not connected to war crimes or crimes against peace.’

¹⁷⁶ Beth Van Schaak ‘The definition of Crimes Against Humanity: Resolving the Incoherence’ (1998-1999) 37 *Columbia Journal of Transnational Law* 791 ‘[T]he definition of crimes against humanity in the Charter of the International Military Tribunal contained a curious limiting principle: the Nuremberg Tribunal could assert jurisdiction only over those crimes against humanity committed “before or during the war” and “in execution of or in connection with any crimes within the jurisdiction of the Tribunal,” i.e., war crimes and crimes against the peace. This formulation became known as the “war nexus,” and it is apparent that the Charter’s drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic jurisdiction of a state. The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty.’

religious reasons, were to be tried by the successor governments of the ex-enemy countries, Germany included.¹⁷⁷

The question of what to do with crimes against humanity committed by Germans against Germans and German Jews was a contentious question that generated severe debate. But it is wrong to say that the Allies prosecuted these crimes because they were so horrible that they could not go unpunished. That sentiment was certainly felt and strongly expressed, but respect for sovereignty, reluctance of getting involved in another country's issues and a fear of setting a dangerous precedent prevailed in the end.¹⁷⁸ There is still no specialized convention for crimes against humanity. Bassiouni argues that jurisprudence, regarding crimes against humanity, emanating from States like Canada, Israel, Germany, France, Belgium and Switzerland does not reflect the theory of universality but have rather been based on territorial, passive and active personality theories of jurisdiction.¹⁷⁹

2.2.4 Universal jurisdiction versus the protective principle

Matthew Garrod argues throughout his article that what is often assumed to be universality was in fact an expanded principle of protection between Allies in one and

¹⁷⁷ Arieh Kochavi (The Response to Nazi Germany's Crimes Against Axis Nationals) (*supra*) 352-353 and also Arieh J Kochavi 'The British Foreign Office versus the United Nations War Crimes Commission during the Second World War' Spring (1994) 8(1) *Holocaust and Genocide Studies* 43-44 'Both foreign ministries had indeed striven to limit the number of cases with which their countries would have to deal. The objective was to entrust each Allied government with conducting trials against defendants who had perpetrated offences against its own nationals or on its own territory, whereas crimes committed by the enemy against its won nationals were to be tried by the successor governments of the respective ex-enemy territories. London and Washington based their legal position on the then-prevailing international law, which regarded such crimes as the domestic acts of a sovereign state...The goal, as the Foreign Office saw it, was that each Allied government would be entrusted with the trial of cases involving offenses that had been committed on its own territory or against its own nationals. In such a procedure, Britain would have to deal only with a small number of war criminals.'

¹⁷⁸ Arieh Kochavi (The Response to Nazi Germany's Crimes Against Axis Nationals) (*supra*) 334-357; Priscilla Jones 'British Policy towards German Crimes' (*supra*) 339-366 and also William A Schabas *An Introduction to the International Criminal Court* 4th edition (2011) Cambridge University Press, Cambridge, 108 'Yet, when Allied lawyers met in 1943 and 1944 to prepare the post-war prosecutions, many of them considered it legally unsound to hold the Nazis responsible for crimes committed against Germans within the borders of Germany. Not without considerable pressure from Jewish non-governmental organizations, there was an important change in thinking and it was agreed to extend the criminal responsibility of the Nazis to internal atrocities under the rubric 'crimes against humanity'. But the Allies were uncomfortable with the ramifications that this might have with respect to the treatment of minorities within their own countries, not to mention their colonies. For this reason, they insisted that crimes against humanity could only be committed if they were associated with one of the other crimes within the Nuremberg Tribunal's jurisdiction, that is, war crimes and crimes against peace. In effect, they had imposed a requirement or nexus, as it is known, between crimes against humanity and international armed conflict.'

¹⁷⁹ M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 52

the same war.¹⁸⁰ He contends that protection is an old and established principle born of the right to self-defence under international law and that this principle is built-in to the law of war.¹⁸¹ Garrod points out that the fact that the injured belligerent traditionally had the right to punish individuals belonging to its enemy is simply because international law had always recognized the right of a State to protect its sovereignty, security and certain vital interests.¹⁸² His argument is persuasive and supported by solid research. Significantly, for purposes of this thesis it casts severe doubt on the widely held belief that universal jurisdiction developed and gained acceptance as a result of the prosecution of war criminals in the aftermath of WWII. KC Randall's interpretation of the *List Case*¹⁸³ provides a good illustration of this contemporary distortion of facts. Randall construes the exercise by the American Tribunal in the *List Case* of jurisdiction over German war criminals accused of killing civilians in Greece, Yugoslavia and Albania as an exercise of universal jurisdiction. The tribunal stated that:

‘An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen...Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminal has fallen, the jurisdiction being concurrent’

Randall, in his influential article on universal jurisdiction, places the emphasis on *universal crimes* and casually replaces ‘belligerent’ with ‘state’ and so argues that any ‘state’ is entitled to exercise jurisdiction once it captures a war criminal. But this is not what the tribunal said. Obviously the tribunal differentiated between any random State and a belligerent when it comes to punishing a war criminal. This vividly

¹⁸⁰ See also Roger O’Keefe ‘The Grave Breaches Regime and Universal Jurisdiction’ (2009) 7 *Journal of International Criminal Justice* 822 and also ED Dickinson, EA Finch & CC Hyde ‘Report of the Subcommittee [of the International and Comparative Law section of the American Bar Association] on the Trial and Punishment of War Criminals’ (1943) 37 *American Journal of International Law* 665 ‘It has long been an accepted principle of international law that a belligerent may punish with appropriate penalties members of the enemy forces within its custody who have violated the laws and customs of war.’

¹⁸¹ Matthew Garrod (The Protective Principle) (*supra*) 799, 802, 783 & 785-786 ‘The right to try and punish persons for violating the laws of war has long been accepted as a principle under international law and in customary practice to belong to a belligerent over its enemy, wherever such individual should fall into its power.’ Garrod *inter alia* quotes Vittoria, Grotius and De Vattel to support his argument that ‘The sovereign has a right under the law of nations to wage war in order to avenge injury done by the enemy and to teach the enemy a lesson by punishing them for the damage they have done.’

¹⁸² Matthew Garrod (The Protective Principle) (*supra*) 785

¹⁸³ Also known as the *Hostages Trial* (Law Reports) (*supra*) vol. VIII at 54

illustrates how the subtle supplanting of even one word with another can have extensive effects and cause widespread confusion. Others have also quoted this decision, out of context, as an instance of universal jurisdiction.¹⁸⁴ The ‘valid reason that war crimes could not be left within the exclusive territory of Germany was because it could not be trusted to fulfill its duties under international law.’¹⁸⁵ The mistake these commentators make is to assume that because the tribunal asserted that war crimes, as violations of international law, are “universally recognized as criminal” this meant that anyone could punish their perpetrators.¹⁸⁶ But they miss the fact that the tribunal was careful to point out that although war crimes were universally recognized as criminal the right to punish such crimes was restricted to the ‘belligerent into whose hands the accused has fallen’.¹⁸⁷ In the trial of *Josef Altstötter* this distinction, so often overlooked, by subsequent commentators, was eloquently explained:

‘At this point, in connection with cherished notions of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other.’¹⁸⁸

There is thus a distinction to be made between crimes under international law, which are applicable to all States, and the right to punish its violations by the injured State under the protective principle.¹⁸⁹ It thus seems that for the Allies the primary consideration lied in protecting their sovereignty and in so doing prevent impunity, so that threats and injuries to their vital state interests did not go unpunished. This is however at odds with the proponents of universal jurisdiction, who maintain that universality is based solely on preventing the impunity of perpetrators of international

¹⁸⁴ AR Carnegie ‘Jurisdiction over Violations of the Laws and Customs of War’ (1963) 39 *British Yearbook of International Law* 421; Claus Krefß (Institut de Droit International) (*supra*) 575; Kevin, Jon Heller (The Nuremberg Tribunals) (*supra*) 136-138 also quotes this decision as an instance of universal jurisdiction but seems to have missed the reference to ‘the belligerent into whose hands the criminal has fallen’ and that this does not mean into any State’s hands.

¹⁸⁵ Matthew Garrod (The Protective Principle) (*supra*) 804

¹⁸⁶ Matthew Garrod (The Protective Principle) (*supra*) 804; See also Derek Bowett (Jurisdiction: Changing Patterns of Authority) (*supra*) 12 ‘War crimes are certainly crimes against international law, but it is by no means clear that they are subject to universal jurisdiction. The jurisdiction has traditionally been that of a belligerent Power,’ In addition one may as well argue that serious offenses like murder or rape of a baby are recognized as criminal by all nations (or universally) and therefore any nation may punish a person who commits such an offense, but we know that this is not the law.

¹⁸⁷ Matthew Garrod (The Protective Principle) (*supra*) 804

¹⁸⁸ (Law Reports) (*supra*) vol. VI at 38

¹⁸⁹ Matthew Garrod (The Protective Principle) (*supra*) 801

crimes because of these crimes' 'heinous' nature.¹⁹⁰ The result of this misinterpretation is further that the prevention of impunity, as an end in itself, is elevated to a position of superior consideration in international criminal law.¹⁹¹

We can thus agree that if jurisdiction over WWII war crimes was in fact based on the protective principle, then there is no substance to the popular argument that universality emerged in the aftermath of WWII, so as to prevent impunity, and for the lack of any other accepted base of jurisdiction.¹⁹² One could see this same principle of protection applied in the *Eichmann* trial¹⁹³ of 1961, which was the first case after WWII to consider universal jurisdiction over war crimes.

2.3 Universal jurisdiction and the *Eichmann* case

Adolf Eichmann was born in Germany in 1906. In 1933 he joined the Nazi Socialist Party. At the peak of his career in the Gestapo he was head of 'Jewish Affairs' responsible for the 'final solution' or the mass deportation of Jews to concentration camps, which led to their subsequent mistreatment and almost inevitable death. He hid in Germany after the war and later found refuge in Argentina. In May 1960 he was abducted by Israeli agents and flown to Israel. Then Israeli Prime Minister David

¹⁹⁰ Matthew Garrod (The Protective Principle) (*supra*) 798 & 806 'However, war crimes trials do not give rise to any indication that the prevention of impunity had anything to do with crimes under international law as being 'heinous', or that jurisdiction was exercised over such crimes solely on the basis that they were 'heinous'. Accordingly, the prevention of impunity of the perpetrators of 'heinous' crimes is incapable of providing a theoretical basis for universality over war crimes...The prevention of impunity for perpetrators of crimes under international law was undoubtedly important but only by reason that States were also punishing injuries to their own, or that of their Allies, sovereignty and security and certain other vital interests by persons belonging to the 'enemy'.'

¹⁹¹ Chris C Joyner 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law and Contemporary Problems* 153-172; and Christopher K Hall 'The Role of Universal Jurisdiction in the International Criminal Court Complementarity System' in Morten Bergsmo (ed.) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* Forum for International Criminal and Humanitarian Law (2010) Torkel Opsahl Academic E Publisher, Oslo at 220 'National courts exercising universal jurisdiction can help to fill a small part of the current enormous global impunity gap, or, rather abyss.'

¹⁹² AR Carnegie (Laws and Customs of War) (*supra*) 422 'The view has been expressed that the passive personality principle justifies the trial by a belligerent of enemy nationals for war crimes committed against nationals of a belligerent's ally. If this extension is accepted-and there does not seem to be any convincing reason why it should not be-the doctrine of universality of jurisdiction would be superfluous as an explanation of most of the reported cases.' Kenneth Randall (Universal Jurisdiction) (*supra*) 807 'While many sources view the IMT's proceedings as being partly based in the universality principle, the IMT's judgment and records actually evidence little or no explicit reliance on universal jurisdiction.' See also Matthew Garrod (The Protective Principle) (*supra*) 802 'once it is realized that war crimes are injurious in and of themselves...the passive personality principle of jurisdiction over war crimes immediately becomes unsatisfactory and irrelevant.'

¹⁹³ *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) (*supra*) 277, 304

Ben-Gurion announced the capture of the ‘greatest war criminal of all times’. Thus began the *Eichmann* trial.¹⁹⁴

The defence argued *inter alia* that the exercise of extra-territorial jurisdiction by Israel, a State with no connection to the victims, is a violation of the territoriality principle. The Supreme Court rejected this argument on various grounds. The first ground relied upon by the Supreme Court agreed with, and upheld, the view expressed in the District Court¹⁹⁵ where it found jurisdiction to be valid under the protective principle; as crimes against the Jewish people ‘very deeply concerns the “vital interests” of the State of Israel.’¹⁹⁶ Despite the Supreme Court giving as justification this valid ground of jurisdiction¹⁹⁷ it went further in a manner reminiscent of the procedure followed by the UNWCC to also mention universal jurisdiction as a possible extra base of jurisdiction. In a passage, frequently relied upon by proponents of universal jurisdiction, the Supreme Court found that:

Not only do all the crimes attributed to the Appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the Appellant.

Matthew Garrod argues that the Supreme Court erred by finding that because the crimes were of “universal character” they were logically subject to universal jurisdiction. He also wonders whether this additional justification of jurisdiction and the claim to act on behalf of the international community by the Supreme Court was not influenced mainly by the way in which Israel had abducted *Eichmann* from

¹⁹⁴ Adapted from Orna Ben-Naftali ‘Eichmann’ in (Cassese, *The Oxford Companion*) (*supra*) 653

¹⁹⁵ Attorney General for Israel v Eichmann 36 ILR 5 (District Court) 49-57

¹⁹⁶ Orna Ben-Naftali (Eichmann) (*supra*) 654 ‘Assertion of the link between the Jewish people and Israel, the legitimate heir and representative of the victims; the state the very establishment of which was internationally recognized as manifesting its historical nexus with the Jewish people and the latter’s natural right to be the masters of their own fate like all other nations. This nexus provides a legal basis of jurisdiction (the protective and passive personality principles).’ See also Ilias Bantekas and Susan Nash *‘International Criminal Law’* 3rd edition, Routledge & Cavendish, Abingdon, 84 who under their discussion of the protective principle mention that: ‘the District Court of Jerusalem upheld, *inter alia*, protective jurisdiction in the Eichmann case...[this] was subsequently affirmed by the Israeli Supreme Court [when it] held that a country whose ‘vital interests’ and ultimately its existence are threatened, such as in the case of the extermination of the Jewish people, has a right to assume jurisdiction to try the offenders.’

¹⁹⁷ See Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant Case* (*supra*) 167 ‘Although there are many examples of States exercising extraterritorial jurisdiction for international crimes such as war crimes and crimes against humanity and torture, it may often be on other jurisdictional grounds such as the nationality of the victim. A prominent example was the Eichmann case which was in fact based, not on universal jurisdiction but on passive personality.’

Argentina and the resultant scrutiny of the trial by the international community.¹⁹⁸ Most important is the fact that Israel was representing Jews who had been the hardest hit of all victims by Nazi atrocities and that this provided a tangible and vivid link between Israel and *Eichmann*. The Nazi and Nazi Collaborators (Punishment Act) of 1951, which conferred upon Israeli municipal courts extraterritorial jurisdiction over war crimes, crimes against the Jewish people and crimes against humanity also restricted jurisdiction. This legislation did not provide for universal jurisdiction but provided that war crimes had to be “done, during the period of the Second World War, in an enemy country”, while the other crimes listed within the act had to be “done, during the period of the Nazi regime, in an enemy country”. The national law of Israel was thus subject to the same limitations as that of the other Allies.¹⁹⁹

Cassese²⁰⁰ makes much of the fact that no State protested at the time against the principle enunciated by the Supreme Court of Israel whereby ‘the peculiarly universal character of these crimes [against humanity] vests in every state the authority to try and punish anyone who participated in their commission’. Garrod however argues that the reason that no State questioned Israel’s right to assert jurisdiction was because the accused had belonged to a ‘common enemy’, also that his name had been added in a list of war criminals sought by the UNWCC and that he was even mentioned in the judgment of the Nuremberg Tribunal.²⁰¹ It might be added that as much as no State protested against Israel’s exercise of jurisdiction, neither did any other State attempt to arrest nor prosecute *Eichmann* for his horrible crimes against humanity. Does the fact that his main crime was against Jews and the only State willing to prosecute him was Israel not undermine a claim to universality in this case? Is it any wonder that it is still very unclear whether *Eichmann* provides precedent for crimes against Jews or crimes against everyone?²⁰² What does seem clear though is that, despite, the Supreme Court’s proclamation that they were trying *Eichmann* in their capacity as the agent of the international community; the reality was that it was in Israel’s own interest to punish him because he was their enemy and he tried to destroy the Jews.

¹⁹⁸ Matthew Garrod (The Protective Principle) (*supra*) 810

¹⁹⁹ Matthew Garrod (The Protective Principle) (*supra*) 809

²⁰⁰ Antonio Cassese ‘*International Criminal Law*’ Oxford University Press, Oxford (2003) 293

²⁰¹ Matthew Garrod (The Protective Principle) (*supra*) 810

²⁰² Orna Ben-Naftali (*Eichmann*) (*supra*) 656 ‘The question that remains a bone of contention is whether that story is a particular story decreeing that Jews should never allow that to happen to Jews again, or a universal story enjoining that this should never happen to any people again. This tension between the unique and the universal can be detected already in the judicial texts of the *Eichmann* trial.’

Lastly Reydam's²⁰³ argues that the 'State practice' so often referred to by NGO's and supporters of universal jurisdiction is more of a reference to obligatory lofty declarations in multi-lateral conventions than to actual 'deeds'. He says that NGO's tend to 'cherry-pick' evidence and leave out critical context. Yet Reydam's maintains that upon closer examination, in nearly all 'hard' cases, also known as actual trials, there appear to be significant links between offender and forum. Reydam's mentions how the cases of *Eichmann* and *Demjanjuk*²⁰⁴ are used in such a way as precedents for universal jurisdiction. Yet in the process supporters of universal jurisdiction ignore the fact that neither Israel nor the US currently would, even for a moment, accept the use of universal jurisdiction against their own officials.

2.4 Synopsis and predictions

None of the tribunals after WWII endorsed universal jurisdiction or the analogy of war crimes with piracy.²⁰⁵ This was done by the UNWCC relying only on Cowles and not on any State practice. And even in all the cases reported by the UNWCC where universality was listed as one of the possible bases of jurisdiction the alternative ground of protective jurisdiction was given, namely that a State 'has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy'. This alternate basis of jurisdiction has been almost completely ignored by subsequent writers.²⁰⁶ It might simply be that writers don't find the protective principle nearly as exciting and sensational a topic for theorizing and speculating over as they do universal jurisdiction.

If piracy does not provide a basis for analogy over modern human rights offences and universal jurisdiction did not develop over war crimes and crimes against humanity in the aftermath of WWII, then history provides no backing for the concept and this robs it of much of its rhetorical appeal. In the absence of a solid historical and theoretical basis it is futile to invoke the *Lotus Principle* to argue that nothing prevents States

²⁰³ Luc Reydam's (Rise and Fall) (*supra*) 345

²⁰⁴ *Demjanjuk v Petrovsky* 776 F 2d 571 (6th Cir 1985) at 544 Where the US Federal Court stated; 'Israel's assertion of jurisdiction over the respondent based on the Nazi statute conforms with the international law principle of 'universal jurisdiction'. [...] The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent State, not from the State's relationship with the perpetrator, victim or act.

²⁰⁵ Matthew Garrod (The Protective Principle) (*supra*) 790 'At the Tokyo Tribunal the right to try Japanese war criminals was expressly restricted to any of the nations with which Japan had been at war.'

²⁰⁶ Matthew Garrod (The Protective Principle) (*supra*) 797

from exercising universal jurisdiction. Supporters might still show why universal jurisdiction is a good idea today but they can no longer say that it has always been considered a good idea. Saying that something *is* a certain way when, in actual fact, you only believe that it *ought* to be can only take you so far and it doesn't change a thing. This is not simply a realist argument for the sake of it, or even for the sake of being correct. The staggering amount of literature available on the topic makes it very hard to separate fact from fiction. A responsible official, for example, a prosecutor who is required to apply universal jurisdiction, may read as much as he is able to about it and set out enthusiastically to enforce it, but end up severely disillusioned, and in serious trouble, if he does not know how deeply the international system has actually been wired against it. A realistic understanding and approach from the outset is vital.

The mistaken idea that universal jurisdiction has developed over war crimes and other crimes under international law in the aftermath of WWII not only ignores the protective principle but also blurs the distinction between the values shared by the international community and who may enforce these values. It has led to the idea that States act as “agents of the international community” to protect the “values” of the international community.²⁰⁷ But in reality the prosecutions of Nazi War Criminals in the aftermath of WWII were much more selective and were based on a limited protective jurisdiction involving State interests that had been threatened by a common enemy. The *Eichmann* case, so heavily relied upon by proponents of universal jurisdiction, was similarly not based on universal jurisdiction and came about because of the determination of the State of Israel to avenge the horrible wrongs done against the Jews during WWII.

Because the protective principle provides a much more cogent justification for the prosecution of war criminals in the aftermath of WWII, Garrod contends for a reconceptualization of jurisdiction over war crimes where the crucial distinction between the protection of vital State interests, which are shared by the international community, and universality, is maintained.²⁰⁸ Garrod mentions that very soon after the Nuremberg proceedings the error of conflating the protective principle by States of their own interests and the right of any State to protect certain interests crept in and

²⁰⁷ Matthew Garrod (The Protective Principle) (*supra*) 807-808

²⁰⁸ Matthew Garrod (The Protective Principle) (*supra*) 808

the distinction was even overlooked by the General Assembly in its unanimous “affirmation” of the principles of international law recognized by the Nuremberg Charter and Judgment.²⁰⁹ However “correct” Garrod’s argument is in pointing out the error, his plea for a reconceptualization of international criminal law sounds a bit like a nostalgic desire for things of old. If Garrod meant that history is condemned to repeat itself and we can do nothing but accept it, I cannot agree. But if he meant that we should learn from history and better anticipate the challenges universal jurisdiction will face in future I agree. If things have changed and moved on, even as a result of a serious error, it will be futile to only point out the mistake and then hope it disappears. An accurate view of history should not merely be used as a blue print for the future but rather to gain a deeper understanding of the challenges that modern international criminal law faces. In so doing we have our best chance of finding workable solutions for the future, but these solutions might very well include abandoning the idea of universal jurisdiction as it is often propagated if we realize that the effort, never has and simply will never match the results.

Luc Reydamas quotes Travers, who wrote in 1920 that: ‘The [theory] that the right to punish does not belong to a particular country but to all nations whose positive laws criminalize the conduct...has to be rejected. It goes against the nature of the penal law and against the very conception of State. Every State has, in principle, no other mission than to defend its own interests.’²¹⁰ This is politics.²¹¹ But although this is an honest description of politics it is certainly no longer such a popular one. There is immense pressure on nations today to not simply be concerned with their own interests but also with human rights and a broader concept of humanity. It might even be said that the notion of interests has been widened to the extent that a State actually protects its own interests by concerning itself with the interests of other States. One thinks here of UN and EU sanctions and incentives, Security Council mandated interventions and duties on members States of the ICC. If Garrod is right and the protective principle is mostly the main consideration for a nation when it comes to extra-territorial jurisdiction then it will also be the main consideration when it comes

²⁰⁹ Matthew Garrod (The Protective Principle) (*supra*) 808

²¹⁰ Luc Reydamas (Universal Jurisdiction) (*supra*) 32 quoting M Travers *Le droit pénal international et sa mise en oeuvre en temps de paix et en temps de guerre. Tome I. Principes.-Règles généraux de compétence des lois répressives* (1920) 130.

²¹¹ Hans J Morgenthau ‘*Politics Among Nations: The Struggle for Power and Peace*’ (4th edition) Alfred A Knopf Publisher, New York (1967) 5 ‘We assume that statesmen think and act in terms of interest defined as power, and the evidence of history bears that assumption out.’

to exercising universal jurisdiction or not. We might expect that exercising universal jurisdiction will sometimes be the politically expedient thing to do. This does nothing for legal certainty on the principled exercise of universal jurisdiction but at least it doesn't fool us into believing that universal jurisdiction is purely a legal concept free from political considerations and complications.

To understand what moves or discourages countries to exercise universal jurisdiction it is helpful to consider the study Maximo Langer did of every single universal jurisdiction complaint ever lodged.²¹² His conclusion was that by simply comparing the political benefits to the costs it would be possible to predict when a State will exercise universal jurisdiction. He found that the main incentive for political branches of States to enact universal jurisdiction laws, and use these to prosecute is provided by domestic and international human rights groups, the media and domestic constituencies that value foreign human rights. Should the media and human rights groups' efforts resonate with the sentiments of constituencies the politicians take action. At the same time politicians don't take action because it is often State officials who commit international crimes and this other State's diplomats then lobby and threaten reprisals against the prosecuting State. Other disincentives include substantial economic costs, difficulties in proving guilt beyond a reasonable doubt in these cases and constituencies being averse to using their funds to prosecute foreigners without a link to their State. One may thus predict that universal jurisdiction prosecutions would only happen if the expected benefits were higher than the expected costs. He then argues that there usually are very few benefits to acting on the incentives because even when a State's domestic constituency values human rights in other countries, they are not likely to consider these interests before their own. The disincentives may also be immense and include pressures or sanctions from powerful nations like China, Russia and the US. Even less powerful States may lever considerable pressure through companies investing in the prosecuting State or by joining forces with other like-minded States. Langer predicts that the incentives for the political branches

²¹² Maximo Langer (The Diplomacy of Universal Jurisdiction) (*supra*) 7-9 'This survey has identified 1051 complaints or cases considered by public authorities on their own motion...the largest group of complaints are against Nazi, former Yugoslav, Argentine, Rwandan, U.S., Chinese and Israeli possible defendants... Of the 32 defendants who have been brought to trial, 24 - have been Rwandans, former Yugoslavs and Nazis. These are defendants about whom the international community has broadly agreed that they may be prosecuted and punished, and whose state of nationality has not defended them. This broad agreement creates incentives for political branches to concentrate on this type of defendants... The data on the universal jurisdiction cases that were actually tried thus conform with the results one would expect from the posited incentive structure for political branches.'

would only outweigh the disincentives when low-ranking, low-cost defendants are brought to trial and especially those on whom there is broad agreement in the international community.²¹³

It seems that one may then expect that lower ranking government officials will increasingly be prosecuted for international crimes in terms of universal jurisdiction. It is not that simple however. Luc Reydam's mentions, what he calls, a 'small fry – big fish' dimension evident in universal jurisdiction discourse. To explain this he makes the distinction between virtual and hard cases. Virtual cases he classifies as high profile matters mostly against State leaders like Pinochet or of powerful countries like the United States, Israel or China also known as the 'big fish'. According to Reydam's these cases usually generate an immense amount of hype but go nowhere. The hard cases, on the other hand, usually consist of 'small fry swept ashore in Europe'. The problem is that NGO's judges and countries are usually not willing to spend their 'time, resources and political capital on virtual case[s] against minor player[s].'²¹⁴ If Reydam's is right it is likely that we might not even expect many universal jurisdiction cases against low ranking defendants in future.

After WWII and the prosecutions of the main war criminals States drafted important international conventions from which we can also establish their intention as regards universal jurisdiction. In the next chapter we will look at three of the most important ones especially as these pertain to the core crimes. The first one to follow the war was the Genocide Convention, a year later the Geneva Conventions came into being and quite a bit later the Torture Convention.

²¹³ Maximo Langer (The Diplomacy of Universal Jurisdiction) (*supra*) 6-7 & 41.

²¹⁴ Luc Reydam's (Rise and Fall) (*supra*) 348 'Also worthy of note is that none of the countries jostling for indicting inaccessible foreign 'war criminals' was willing to try a dozen ragtag Somali pirates captured by the Dutch navy. No one seemed to be outraged by the release of these *hostis humanis generum*.'

Chapter 3

The Genocide, Geneva and Torture Conventions

3.1 The Genocide Convention²¹⁵

Genocide is referred to as the ‘crime of crimes.’²¹⁶ Genocide involves the intentional mass destruction of entire groups, or members of a group.²¹⁷ But through history genocide has almost always escaped prosecution because it was virtually always committed at the behest and with the complicity of those in power.²¹⁸ The Convention on the Prevention and Punishment of the Crime of Genocide²¹⁹ was the first human rights convention adopted by the United Nations and was an immediate response to Nuremberg, which had dealt with genocide not as a separate crime but as a crime against humanity and in connection with war.²²⁰ If there ever was a crime so heinous that everyone should be able to prosecute those who commit it, it must be genocide. Yet the genocide convention does *not* provide for universal jurisdiction. South Africa became a party to the Genocide Convention on 10 December 1998. Following its affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal²²¹ the UN General Assembly adopted on 11 December 1946 resolution 96(1) on the crime of genocide.²²² The resolution affirms that genocide is a crime under international law, invites member States to enact the necessary legislation for the prevention and punishment of genocide, recommends international co-operation with a view to facilitate the prevention and punishment of the crime, and requests the Economic and Social Council to undertake studies with a view to

²¹⁵ This section draws heavily from the books by William A Schabas ‘*Genocide in International Law*’ Cambridge University Press, Cambridge (2000); William A Schabas ‘*Genocide in International Law*’ 2nd edition, Cambridge University Press, Cambridge (2009) and on the book by Luc Reydams ‘*Universal Jurisdiction, International and Municipal Legal Perspectives*’ (Oxford, New York: Oxford University Press) (2003) and their respective discussions of this aspect

²¹⁶ William A Schabas ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’ (2003) 1 *Journal of International Criminal Justice* 39-63

²¹⁷ John Dugard (International Law: A South African Perspective) (*supra*) 175 ‘The crime of genocide has been committed throughout history, the pre-eminent example being the mass killings of Jews by the Nazis during World War II, and more recently, the slaughter of Tutsis by Hutus in Rwanda. The term ‘genocide’ is a combination of the Latin word *genus* (kind, type, race) and *cide* (to kill),’

²¹⁸ William A Schabas ‘*Genocide in International Law*’ Cambridge University Press, Cambridge (2000) 14-15 & 20-22: ‘The wartime atrocities committed against the Armenian population in the Ottoman Empire and the failure to prosecute any of the offenders serves as a sad example’

²¹⁹ New York, 9 December 1948; 78 UNTS 277

²²⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 47

²²¹ UNGA Res 95(1) (1946); 188 UN Doc A/64/Add.1(1946)

²²² The resolution can be found reprinted in William Schabas (Genocide)(*supra*) 45

drawing up a draft convention on the crime of genocide. The drafting was completed within two years. Three principal drafts (including the final text) were produced during this process, each with a different jurisdictional clause.²²³ The first draft by the Secretariat²²⁴ set out the rule of universal punishment in article VII: ‘The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.’ In Article IX States also agreed to commit persons suspected of genocide for trial by an international court in cases where they were themselves unwilling to try the offenders or grant extradition, or where the acts were committed by individuals acting as organs of the State or with its support or tolerance. It was the opinion of the Secretary-General and the experts involved that inasmuch as genocide is by its nature an offence under international law the Convention would fail its purpose if acts of genocide could not be prosecuted outside of the territories of the Parties of the Convention.²²⁵ They also noted that universality of repression seemed to have been the intention of General-Assembly resolution 96(1).²²⁶ Of the twelve countries that replied to the Secretary-General’s appeal for comments four commented on article VII specifically.²²⁷ The United States of America was the first dissenting voice and proposed prosecution for crimes committed outside the territory of a State only with the consent of the States upon whose territory genocide was committed.²²⁸ The Soviet Union was equally negative about universal jurisdiction.²²⁹ Views in support of confining the Convention to territorial jurisdiction were also expressed by the Netherlands.²³⁰ In comments on the Secretariat draft only Siam (Thailand) endorsed universal jurisdiction.²³¹ The Secretariat’s draft, together with the comments, was submitted to an Ad Hoc drafting committee composed of China, France, Lebanon, Poland, the Soviet Union, the United States of America, and Venezuela.

²²³ Luc Reydam (Universal Jurisdiction) (*supra*) 48

²²⁴ See Luc Reydam (Universal Jurisdiction) (*supra*) 48 footnote 19 Draft prepared by the Secretariat’s Human Rights Division with the expert advice of Raphael Lemkin, author of *Axis Rule in Occupied Europe* (1944) who coined the phrase ‘genocide’, and Professors H Donnedieu de Vabres and V Pella. See also the Draft reprinted in William Schabas (Genocide) (*supra*) 552-559

²²⁵ Luc Reydam (Universal Jurisdiction) (*supra*) 48

²²⁶ Luc Reydam (Universal Jurisdiction) (*supra*) 48 and footnote 21 where Reydam refers to William Schabas (Genocide) (*supra*) 355 who points out that this is an exaggerated reading. The initial draft of the resolution recommended universal jurisdiction, but any reference to it was eliminated in the final version.

²²⁷ William Schabas (Genocide) (*supra*) 56-57

²²⁸ William Schabas (Genocide) (*supra*) 355

²²⁹ William Schabas (Genocide) (*supra*) 355

²³⁰ William Schabas (Genocide) (*supra*) 355

²³¹ William Schabas (Genocide) (*supra*) 355

The Ad Hoc Committee abandoned the principle of universal repression. The new draft held that: Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.²³² The discussion²³³ of the members of the Ad Hoc Committee showed that those in favor of universal repression held that State authorities would mostly commit genocide themselves and that national courts of that State would not enforce repression of genocide. These supporters held that, since genocide was a crime under international law, it was natural to apply the principle of universal repression. They quoted conventions on the repression of international offences such as traffic in women and children, counterfeiting currency, etc. The opposite view held that universal jurisdiction was against the principles of international law and that permitting the courts of one State to punish crimes committed abroad by foreigners was against the sovereignty of the State. They also added that, as genocide generally implied the responsibility of the State, on the territory of which it was committed, the principle of universal repression would lead national courts to judge the acts of foreign governments. Dangerous international tension might result. Another member of the Committee was also concerned about different standards exercised by different courts in different nationalities. He was afraid that national courts might exercise a biased and arbitrary authority over foreigners. The member suggested that jurisdiction should be given to an international court.

The Ad Hoc Committee draft was then referred to the Sixth Committee of the General Assembly for an article-by-article consideration.²³⁴ Iran proposed incorporating the concept of universal jurisdiction in article VI by adding the following paragraph: 'They [persons charged with genocide or one of the other acts enumerated in Article IV] may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition'.²³⁵ The sponsor

²³² The draft has been reprinted in William Schabas (Genocide) (*supra*) 559-564

²³³ See for a summary of this discussion the Study on the Question of the Prevention and Punishment of the Crime of Genocide, MR N Ruhashyankiko, Special Rapporteur, UN Doc E/CN.4/sub.2/416 (1978); also printed in Luc Reydam's (Universal Jurisdiction) (*supra*) 49

²³⁴ Official Records of the General Assembly, Third Session, Sixth Committee, Part 1, 97th, 98th and 100th Meetings. The discussion of the jurisdiction clause can be found at 360-407; See also William Schabas (Genocide) (*supra*) 357-360 and Luc Reydam's (Universal Jurisdiction) (*supra*) 50

²³⁵ Luc Reydam's (Universal Jurisdiction) (*supra*) 50

stressed that the application of universal jurisdiction was envisaged only as a subsidiary measure, according to the principle of *aut dedere aut punire*.²³⁶ The premise was that any offence against international law involves subsidiary universal punishment. Subsidiary universal jurisdiction, according to the delegate, had to be distinguished from primary universal jurisdiction, which applies to offences such as piracy and allows the State of arrest to try an offender whether or not a request for extradition from the territorial State has been received. By contrast, under the principle of subsidiary universal jurisdiction, the State was bound to extradite offenders and not to put them on trial unless extradition was not requested or was impossible.²³⁷ Australia, Brazil, Denmark, Haiti, India, the Philippines, and Venezuela endorsed the premise and the substance of the Iranian amendment.²³⁸ India however noted that analogies with other universal jurisdiction crimes, such as piracy, were not helpful.²³⁹ The countries in support of Iran's proposal argued that the amendment would make it possible to ensure the punishment of the guilty party when he took refuge in a country other than that in which he committed the offence.²⁴⁰ They further argued that the application of the principle of universal punishment was not inconsistent with the sovereignty of States because if the State on whose territory the offence had been committed wished to try the offender itself, it would request his extradition; but if it expressed no such desire, it thereby tacitly renounced its right to try him.²⁴¹ With six in favor, twenty-nine against and ten abstentions Iran's proposal was decisively defeated.²⁴² The great Powers were the main opponents. The delegate from the United States called the principle of universal punishment 'one of the most dangerous and unacceptable of principles', adding that the United States government, which had also wished to limit the jurisdiction of the proposed international tribunal, 'would *a fortiori* vigorously oppose the adoption of the principle of universal repression'.²⁴³ The representative of the Soviet Union argued that 'the principle of universal punishment was even more incompatible with the sovereignty of States than international punishment'.²⁴⁴ France was hardly keener about universal jurisdiction.²⁴⁵

²³⁶ Study on the on the Question of Genocide (*supra*) 194

²³⁷ Luc Reydams (Universal Jurisdiction) (*supra*) 50

²³⁸ Luc Reydams (Universal Jurisdiction) (*supra*) 50

²³⁹ William Schabas (Genocide) (*supra*) 357

²⁴⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 50

²⁴¹ Luc Reydams (Universal Jurisdiction) (*supra*) 50

²⁴² William Schabas (Genocide) (*supra*) 357

²⁴³ Luc Reydams (Universal Jurisdiction) (*supra*) 51

²⁴⁴ Luc Reydams (Universal Jurisdiction) (*supra*) 51

²⁴⁵ William Schabas (Genocide) (*supra*) 356

The representative of the United Kingdom cited municipal law reasons against universal jurisdiction noting that British criminal courts did not punish British citizens for crimes committed abroad. And except in time of war, those courts could not punish aliens for crimes which they had committed outside of the territory of the United Kingdom.²⁴⁶

The Convention was adopted unanimously and without abstention by the General Assembly on 9 December 1948. Article VI provides that '[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. To give effect to the second option provided for in article VI the General Assembly, immediately after the adoption of the Convention invited the International Law Commission to study the desirability of establishing an international judicial organ for the trial of persons charged with genocide and other crimes.²⁴⁷ This happened on 1 July 2002 when the ICC statute²⁴⁸ entered into force. But Schabas argues that it is difficult to contend that a customary legal norm already existed in 1948, recognizing universal jurisdiction over genocide, given the widespread opposition to the concept in the Sixth Committee. And he states further that while the situation may have evolved since then he points to the equivalent debate that took place fifty years later, in June 1998, at the Rome Diplomatic Conference on the International Criminal Court. At the conference States again argued that universal jurisdiction for genocide already existed in customary law, and that they were entitled to delegate this universal jurisdiction to the new international court. But the idea was resisted by many delegations and the result was a compromise recognizing only territorial and active personal jurisdiction.²⁴⁹

The Eichmann case was discussed above.²⁵⁰ Eichmann relied on the Sixth Committee debate and on the text of article VI of the Convention when he challenged the Jerusalem court's jurisdiction: 'If the United Nations had failed to support universal

²⁴⁶ Luc Reydam's (Universal Jurisdiction) (*supra*) 51

²⁴⁷ Luc Reydam's (Universal Jurisdiction) (*supra*) 51

²⁴⁸ Rome Statute of the International Criminal Court (Rome, 17 July 1998; UN Doc A/Conf.183/10)

²⁴⁹ Rome Statute of the International Criminal Court, UN Doc, A/CONF.183/9. Article 12(2) and William Schabas (Genocide) (*supra*) 362

²⁵⁰ Paragraph 2.3 (*supra*)

jurisdiction for each country to try the crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by a competent tribunal of the State in the territory of which the act was committed', how, it is asked, may Israel try the accused for a crime that constitutes "genocide"?'²⁵¹ The District Court attempted to demonstrate that article VI's drafters did not intend to confine prosecution of genocide to the territorial State.²⁵² The Court said that territorial jurisdiction was nothing more than a 'compulsory minimum', a conservative compromise that could be contrasted with the more exigent provisions of the Geneva Conventions, which imposed a rule of compulsory universal jurisdiction.²⁵³ This interpretation of article VI of the Genocide Convention has been called flimsy and this writer must agree that it appears quite strained.²⁵⁴

The issue was also addressed, before the International Court of Justice, by the two *ad hoc* judges in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.²⁵⁵ Judge Kreca recalled that the Convention 'does not contain the principle of universal repression. It has firmly opted for the territorial principle of the obligation of prevention.'²⁵⁶ His colleague Judge Lauterpacht took a diametrically opposed view; the purpose of article 1 of the Convention, which states that genocide is a crime under international law, is 'to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide.'²⁵⁷

Christopher Joyner, citing General Assembly Resolution 96(I), has written that:

'Every state has a customary legal right to exercise universal jurisdiction to exercise universal jurisdiction to prosecute offenders for committing genocide, wherever and by whomever committed. The Genocide Convention does not derogate from that obligation. Parties to the anti-genocide instrument have merely obligated themselves to prosecute offences specifically committed within their territory.'²⁵⁸

²⁵¹ Attorney General for Israel v Eichmann 36 ILR 5 (District Court) (*supra*) at paragraph 20

²⁵² William Schabas (Genocide) (*supra*) 360

²⁵³ Attorney General for Israel v Eichmann 36 ILR 5 (District Court) (*supra*) at paragraphs 24-25

²⁵⁴ William Schabas (Genocide) (*supra*) 367; Luc Reydams (Universal Jurisdiction) (*supra*) 162

²⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports 1993, 325

²⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*supra*) 464

²⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*supra*) 443

²⁵⁸ Joyner, Chris C 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law and Contemporary Problems* 159-160

But in the 1996 version of its draft Code of Crimes, the International Law Commission endorsed universal jurisdiction for the crime of genocide. Article 8 of the draft Code says a state party 'shall take such measures as may be necessary to establish its jurisdiction' over the crime of genocide, irrespective of where and by whom the crime was committed.²⁵⁹ Schabas points out that according to the commentary this 'extension' was justified because universal jurisdiction obtained on the basis of customary law 'for those States that were not parties to the Convention and therefore not subject to the restrictions contained therein'.²⁶⁰ Schabas points out that the Commission has admitted that universal jurisdiction cannot be read into the Convention, contrary to what many have suggested. Moreover the commission seems to suggest that universal jurisdiction exists for States that are not party to the Genocide Convention, but not for those that are. This Schabas rightly calls a 'bizarre conclusion'.²⁶¹ This is in effect the same conclusion at which the District Court in *Eichmann* arrived at. Schabas asks whether it can really be argued that 'States may reduce their international human rights obligations that exist at customary law by means of multilateral conventions that impose less stringent norms?' Schabas suggests that a more logical result would be that 'widely ratified multilateral treaties tend to confirm the real content of customary international law, which will inevitably be less expansive than conventional obligations.'²⁶²

Schabas points out that the view that universal jurisdiction exists in the case of genocide is widely held within United Nations human rights institutions but that the case law of domestic courts is inconsistent.²⁶³ Schabas in his later edition on Genocide however mentions that there has been an increasing number of prosecutions for genocide by States using universal jurisdiction but that the 'largest number by far have taken place in Rwanda'.²⁶⁴ A much smaller number have taken place in the

²⁵⁹ Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. A/51/10, 42

²⁶⁰ William Schabas (Genocide) (*supra*) 365

²⁶¹ William Schabas (Genocide) (*supra*) 365

²⁶² William Schabas (Genocide) (*supra*) 365; Luc Reydams (Rise and Fall) (*supra*) 342 'Despite the unambiguous phrasing of the Genocide Convention, some argue that the Convention, much like the ICC Statute, does not exclude universal jurisdiction. States parties to these conventions somehow reserved themselves the right to act unilaterally.'

²⁶³ William Schabas (Genocide) (*supra*) 365; Luc Reydams (Universal Jurisdiction) (*supra*) 52 'The controversy over universal jurisdiction continues today...domestic courts also remain divided'; and also William Schabas (National Courts Finally Begin to Prosecute Genocide) (*supra*) 60 'Universal jurisdiction has been held out as the answer to the alleged shortcomings of Article VI. But despite all the attention it has received in academic writing, universal jurisdiction has given off more heat than light in terms of genocide prosecutions.'

²⁶⁴ William Schabas (Genocide 2nd edition) (*supra*) 416-417

former Yugoslavia.²⁶⁵ The International Criminal Tribunal for Rwanda has stated that universal jurisdiction exists for the crime of genocide.²⁶⁶ Schabas remarks that ‘where there was political will, prosecutions on this basis have proceeded. Indeed, the main explanation for the relatively small number of universal jurisdiction prosecution trails for genocide is political rather than legal’.²⁶⁷ Schabas has changed his view from skepticism in his first edition on genocide to stating nine years later that ‘there is simply too much State practice and judicial authority to support a credible challenge to the principle of universal jurisdiction where genocide is concerned’.²⁶⁸ Most of the examples provided in support of this conclusion are however cases stemming from the atrocities committed in Rwanda and the former Yugoslavia.²⁶⁹ There were several efforts to hold trials for genocide with respect to the former Yugoslavia and Rwanda in European States, including Austria, Germany, Denmark, France, Belgium and Switzerland.²⁷⁰ In the opinion of this writer the situation has not significantly changed and it is suggested that it might be that these States, with the backing of the ICTY and ICTR, were more willing to exercise universal jurisdiction because there was no controversy as to whether genocide was committed and there was no prospect of a negative political backlash. It is a good example of States working together with each other and international institutions in the fight against genocide. It must also be kept in mind that in some of these examples States, although providing for universal jurisdiction, have only extended it to certain times and certain places. France for example geographically limited their universal jurisdiction over genocide and crimes against humanity. Articles 211(1) and 212(1) of the French Penal Code of 1994 prohibit genocide and crimes against humanity but neither provision provides for universal jurisdiction over these crimes. Universal jurisdiction only exists over genocide and crimes against humanity if the crimes were committed in Rwanda or the former Yugoslavia. Hays Butler mentions that extreme limitations like these mean that these statutes ‘contribute very little to the international effort to deter and prosecute international crimes’.²⁷¹ It seems that the main reason for Schabas’ change of mind is that States’ enacting legislation catering for universal jurisdiction in their

²⁶⁵ William Schabas (Genocide 2nd edition) (*supra*) 417

²⁶⁶ *Prosecutor v. Ntuyahaga* (Case No. ICTR-90-40-T), Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999.

²⁶⁷ William Schabas (Genocide 2nd edition) (*supra*) 426

²⁶⁸ William Schabas (Genocide 2nd edition) (*supra*) 435

²⁶⁹ William Schabas (Genocide 2nd edition) (*supra*) 435-443.

²⁷⁰ William Schabas (Genocide) (*supra*) 367

²⁷¹ A. Hays Butler (Growing Support for Universal Jurisdiction) (*supra*) 74

national systems and the conducting of such trials did not meet with ‘apparent opposition or challenge’.²⁷² But this is easily ascribable to the fact that the States involved that might have raised an objection, namely Rwanda and the former Yugoslavia, were in no position politically to protest. Malcolm Shaw mentions that the ICC, unlike the two international tribunals (for the former Yugoslavia and Rwanda) was not founded by a binding Security Council resolution but by an international treaty. The reason he gives for this is that ‘States, while being prepared to accept geographically limited and temporally constrained (in Rwanda’s case) tribunals by Security Council action, were not willing to be so bound by the establishment of a permanent international criminal court with much more extensive jurisdiction without express consent’.²⁷³ It is submitted that opposition may still be expected from most nations should others attempt to exercise universal jurisdiction over their nationals even if it is for genocide. States will also not go out of their way to implement it over others without the existence of some sort of link between them and the offence or the offender. What may be expected is, like we have seen in the cases of Rwanda and the former Yugoslavia, that States will be increasingly willing to work together with each other (not against each other) and with the backing of international courts and institutions, to exercise universal jurisdiction. But this will only happen if it suits them and the political repercussions will be minimal.

We can conclude that universal jurisdiction is firmly rejected by the Genocide Convention.²⁷⁴ Reydams attributes this rejection to the fact that genocide usually implies the responsibility of the territorial State. The Convention obliges parties to punish all persons having committed genocide, ‘whether they are constitutionally responsible rulers, public officials or private individuals (article VI).’²⁷⁵ Reydams believes that: ‘Exclusion of State immunity-a novelty-and universal jurisdiction in one and the same instrument probably went too far.’²⁷⁶ Inazumi attributes this dismissal of universal jurisdiction to a ‘deep-rooted mistrust of the judicial systems and proceedings within other States.’²⁷⁷ I agree with Reydams that the main reason

²⁷² William Schabas (Genocide 2nd edition) (*supra*) 434-435

²⁷³ Malcolm, N Shaw *‘International Law’* 6th edition (2008) Cambridge University Press, Cambridge, 411

²⁷⁴ William Schabas (Genocide) (*supra*) 367; See also the *Joint Separate Opinion* of Judges Higgins, Kooijmans and Buerghenthal (*supra*) 71 ‘In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. This is doubtful.’

²⁷⁵ Luc Reydams (Universal Jurisdiction) (*supra*) 53

²⁷⁶ Luc Reydams (Universal Jurisdiction) (*supra*) 53

²⁷⁷ Mitsue Inazumi (Universal Jurisdiction in Modern International Law) (*supra*) 62

was probably that the great Powers were simply not interested in universal jurisdiction.²⁷⁸

South Africa became a party to the Genocide Convention on 10 December 1998. No prosecutions for genocide have since occurred in South Africa. South Africa also did not enact specific implementing legislation in order to enforce the Convention nationally. The first step in this direction was the implementation of the ICC Act (as discussed above) to give effect to the provisions of the Rome Statute of the International Criminal Court, which affords the ICC jurisdiction over acts of genocide, war crimes, and crimes against humanity. We will discuss the ICC Act in more detail below but first we turn to a Convention adopted just after the Genocide Convention.

3.2 The Geneva Conventions

Less than a year after the Genocide Convention four other important post-Nuremberg instruments came into being: The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,²⁷⁹ the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea,²⁸⁰ the Convention Relative to the Treatment of Prisoners of War,²⁸¹ the Convention Relative to the Protection of Civilian Persons in Time of War²⁸² (hereinafter referred to as the Geneva Conventions). Two Additional Protocols supplemented the Conventions in 1977.²⁸³ Together they make up the core of international humanitarian law.²⁸⁴ But for the exception of Additional Protocol II, the Conventions deal with international armed conflict.²⁸⁵ Articles 49, 50, 129 and 146 of the four Geneva Conventions contain the obligation to prosecute certain war

²⁷⁸ Luc Reydams (Universal Jurisdiction) (*supra*) 53

²⁷⁹ Geneva, 12 August 1949; 75 UNTS 970 ('Geneva Convention I')

²⁸⁰ Geneva, 12 August 1949; 75 UNTS 971 ('Geneva Convention II')

²⁸¹ Geneva, 12 August 1949; 75 UNTS 972 ('Geneva Convention III')

²⁸² Geneva, 12 August 1949; 75 UNTS 973 ('Geneva Convention IV')

²⁸³ Additional Protocol Relating to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977; 1125 UNTS) (Additional Protocol I') and Additional Protocol Relating to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Geneva (Geneva, 8 June 1977; 1125 UNTS 17513) ('Additional Protocol II').

²⁸⁴ Luc Reydams (Universal Jurisdiction) (*supra*) 53

²⁸⁵ Luc Reydams (Universal Jurisdiction) (*supra*) 53

crimes.²⁸⁶ A jurisdiction clause common to the Conventions and Additional Protocol I reads, in part, as follows:

‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under an 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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.’

But for a few exceptions the general consensus is that this common jurisdiction clause provides an example of universal jurisdiction.²⁸⁷ Pictet’s authoritative commentary on the Geneva Conventions refers to the ‘universality of jurisdiction for grave breaches.’²⁸⁸ Hersch Lauterpacht stated in this regard that ‘no more emphatic affirmation of the principle of universality of jurisdiction with regard to the punishment of war crimes could be desired.’²⁸⁹ The Geneva Conventions indeed provide for universal jurisdiction. *But* as many as hail, endlessly theorize over and continuously prove this fact simultaneously rue how States just never seem to use this “promising opportunity” in practice.²⁹⁰ Reydams and Garrod cannot accept that the same States that rejected universal jurisdiction over genocide could, less than a year

²⁸⁶ See Richard van Elst ‘Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions’ (2000) 13 *Leiden Journal of International Law* 818 ‘The obligation to prosecute does not extend to all war crimes but is limited to a certain category referred to as grave breaches. The precise content of this category varies somewhat in the four conventions, but in every case involves willful killing, torture or inhuman treatment, including biological experiments, and willfully causing great suffering or serious injury to body or health.’

²⁸⁷ See Luc Reydams (Universal Jurisdiction) (*supra*) 55, Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 819-820; AR Carnegie (Laws and Customs of War) (*supra*) 408; Roger O’Keefe (The Grave Breaches Regime) (*supra*) 811; *Contra* Matthew Garrod (The Protective Principle) (*supra*) 811; Alfred Rubin (Actio Popularis) (*supra*) 265, 269-71; Derek Bowett (Jurisdiction: Changing Patterns of Authority) (*supra*) 12

²⁸⁸ Jean, S Pictet ‘*The Geneva Conventions of 12 August 1949*. Commentary. IV. Geneva Convention relative to the Protection of Civilian People in Time of War’ (1958) 587

²⁸⁹ Hersch Lauterpacht ‘The Problem of the Revision of War’ 29 *British Yearbook of International Law* (1952) 362

²⁹⁰ See for example Richard van Elst (Implementing Universal Jurisdiction over Grave Breaches) (*supra*) 850, 853 ‘The Geneva Conventions contain an obligation to prosecute which is unmatched in any other Convention relating to crimes against international law...Notwithstanding this lofty encouragement, hardly any prosecutions have been brought based on universal jurisdiction over grave breaches’; See also Ward Ferdinandusse ‘The Prosecution of Grave breaches in National Courts’ 7 *Journal of International Criminal Justice* (2009) 741 ‘It appears that there are many more grave breaches left unprosecuted than actual prosecutions’

later, have a complete change of heart and implement it over grave breaches.²⁹¹ We must ask why there is still uncertainty over the matter.

Röling, the Dutch Professor and former judge of the International Military Tribunal for the Far East emphatically argued that the right to try non-nationals in the Geneva Conventions was limited to belligerent States and did not extend to neutral States parties.²⁹² Mouton²⁹³, himself involved in the drafting of the Conventions, showed that Röling's interpretation was wrong by pointing to the *travaux préparatoires* in which he himself played an instrumental part. When the final draft provision to either prosecute or extradite was under discussion, at the Diplomatic Conference, an Italian delegate proposed to impose this obligation only on the "Parties to the Conflict" instead of "Each Contracting Party". It was however Mouton himself, as the Dutch Delegate, who rejected this proposal.²⁹⁴ One must agree with Mouton, because he was there, as to what transpired during the drafting and that universal jurisdiction was in fact provided for. It is however very interesting to ponder why a distinguished jurist like Röling would argue for a narrow reading of the jurisdiction clause when the opposite reading is so obvious.

It is not too hard to understand where Röling was coming from if one remembers that universality had no foundation in State practice at the time and that the right to try war criminals had up to then belonged only to belligerents. O'Keefe, for instance, admits as much when he says 'in terms of historical influence, the existence of the grave breaches provisions catalyzed a re-conceptualization of the basis under customary international law for national jurisdiction over the laws and customs of war, as well as over crimes against humanity and genocide'.²⁹⁵ Röling, I believe, pointed us in the right direction when he explained the extraordinary jurisdiction clause with reference to the peculiar circumstances prevalent after WWII.²⁹⁶ And this

²⁹¹ Luc Reydam's (Rise and Fall) (*supra*) 16; Matthew Garrod (The Protective Principle) (*supra*) 811

²⁹² B.V.A Röling 'Enkele Volkenrechtelijke Aantekeningen bij De Wet Oorlogsstrafrecht (1959) *Nederlands Tijdschrift voor Internationaal Recht* (special issue) 263,268-270

²⁹³ MW Mouton 'De Wet Oorlogsstrafrecht en het Internationale Recht' (1960) *Nederlands Tijdschrift voor Internationaal Recht* 59,61-64

²⁹⁴ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 821

²⁹⁵ See Roger O'Keefe (The Grave Breaches Regime) (*supra*) 811 and also Chapter 2.2.4 (*supra*) and the quote from the trial of *Josef Altstötter* mentioned there: 'At this point, in connection with cherished notions of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other.'

²⁹⁶ B.V.A Röling 'Enkele Aantekeningen' (*supra*) 265-266 'Het gaat inderdaad ver, maar dat berust nu eenmaal op de bijzondere omstandigheden, waarop dit ontwerp doelt, natuurlijk met de bedoeling, dat een

also explains why even Mouton said at the Diplomatic Conference that: ‘But if, what God forbid, these Conventions should ever have to be applied, they must be obeyed.’²⁹⁷ This writer is not persuaded that States intended a ‘re-conceptualization of jurisdiction over the laws and customs of war.’ The crucial question seems to be whether the fact that jurisdiction was not limited to belligerents was because States intended do away with the traditional system by ridding it of all restraint over jurisdiction and replacing it by a ‘free-for-all’ or whether they wanted to find a way to improve the existing system to meet the challenges presented by WWII and make it as easy as possible for those injured to punish those who harmed them? I believe the latter position is true.

To my mind the intention of the drafters, because of the circumstances they found themselves in at the time, seems vital and will indicate what may be expected when universal jurisdiction over grave breaches is attempted. This is in any case the most important consideration as it involves not simply a textual reading but actually considers what the States Parties intended to achieve. If they meant something different to the current interpretation it will benefit nothing to point unwilling States to the text and tell them what they actually committed to. They, I dare to say, will still do what they want to and what they always intended to. Indeed, we may ask, what were these States thinking by implementing universal jurisdiction for grave breaches only a year after rejecting it for genocide? They were definitely not thinking that they might one day be the war criminals. They were also not thinking that war criminals were such heinous criminals that every State should be allowed to punish them.²⁹⁸ They were most probably only thinking of how to find an effective way to prevent the war criminals, that had only recently harmed them, from fleeing to neutral countries and escape their just desert.²⁹⁹

The provision for *aut dedere aut judicare* was meant to function as a mechanism for ensuring that a State injured by an offence would be able to have the offender sent

misdadiger zo min mogelijk zijn verdiende straf zal ontgaan, waar ter wereld hij zich ook bevinden zou...In de Tweede Wereldoorlog waren zoveel staten bij het conflict betrokken, dat men gemakkelijk bereid werd en universaliteits-beginsel voor oorlogsmisdrijven te aanvaarden’

²⁹⁷ Quoted by Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 815

²⁹⁸ Pictet’s commentary and writers on the topic mention nothing of this.

²⁹⁹ This is what happened after WWI when the German Kaiser found safe haven in the neutral Netherlands and it might not have been coincidence that it was the Dutch Delegate who made sure history does not repeat itself.

back for trial, or have the offender tried on its behalf.³⁰⁰ Garrod argues that ‘the use of this principle in the Geneva Conventions has to be read in the light of the quickly deteriorating political alliances in the aftermath of the war, in particular, between Western Allies and the Soviet bloc with the emergence of the Cold War, and the resultant practical difficulties faced by injured States in obtaining custody of accused ‘enemy’ war criminals seeking refuge “in the territories of certain States”’.³⁰¹ A statement of the time, namely the UN General Assembly 3(I) of 13 February 1946 “Extradition and Punishment of War Criminals” clearly confirms this reading and provides crucial context. It recommended as follows:

That Members of the United Nations forthwith take all the necessary measures to cause the arrest of [...] war criminals [...], and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries; *and calls upon* the governments of States which are not Members of the United Nations also to take all the necessary measures for the apprehension of such criminal in their respective territories with a view to their immediate removal to the countries where the crimes were committed for the purpose of trial and punishment according to the laws of those countries’.

Luc Reydamas argues that ‘the obligation for all countries, including neutral ones, to search for persons suspected of grave breaches of the Conventions ‘regardless of their nationality’ is a reference to displacement and migration of millions and the redrawing of national borders at the end of World War II’.³⁰² Reydamas points out that the alternative to the obligation to prosecute a suspect found within one’s own territory is handing him over to another High Contracting Party *concerned*, which has made out a *prima facie* case. This undergirds the idea of States intending to create a system where they could cooperate in bringing those offenders who had harmed them to justice. The fact that here was a war that involved numerous nations spanning the

³⁰⁰ Matthew Garrod (The Protective Principle) (*supra*) 812 ‘It is for this reason that Grotius first developed the principle; thus, he argued that the unwillingness of Portugal to punish its own nationals for crimes committed against the Dutch justified the waging of war by the Dutch against Portugal in order to punish the offenders.’

³⁰¹ Matthew Garrod (The Protective Principle) (*supra*) 812; LC Green ‘Canadian Law, War Crimes and Crimes Against Humanity’ 59 *British Yearbook of International Law* 218

³⁰² Luc Reydamas (Rise and Fall) (*supra*) 17

globe makes it illogical to read into this secondary sentence an unqualified right for neutral countries to prosecute grave breaches.³⁰³

The Pictet commentary confirms this interpretation and explains that prior to the Geneva Conventions ‘States were left completely free to punish, or not, acts committed by their own troops against the enemy, or, again, acts committed by enemy troops, in violation of the laws and customs of war.’³⁰⁴ ‘It was thought necessary to establish what these grave breaches were to ensure universality of treatment in their repression.’³⁰⁵ Hence, there was ‘the obligation to enact special legislation on the subject’ in order to create a ‘certain uniformity of legislation.’³⁰⁶ The second obligation was to ‘search for any person accused of violation of the Convention’ and lastly ‘to try such person or if the Contracting Party prefers, to hand them over for trial to another State concerned.’³⁰⁷ Reading the commentary on this aspect as a whole, and in context, one can see that prior to WWII there was no uniformity of practice among States in punishing acts committed by their *own* troops or committed by the enemy against *them*. The ‘very numerous violations committed during’ WWII created a problem of punishing war criminals.³⁰⁸ The main goal was to ‘be able to rely on already existing rules without having been obliged to have recourse to special measures.’³⁰⁹ The idea was that from then on Parties to the Convention would have to punish their own troops for grave breaches committed and punish their enemies for grave breaches committed against them. This was nothing new or revolutionary.³¹⁰ What was new was that everyone would now be under a duty to implement legislation ‘within two years’ and this legislation, that all Parties should implement, was what was meant when it was stated that the ‘universality of jurisdiction for grave breaches is some basis for the hope that that they will not remain unpunished and the obligation to extradite ensures the universality of punishment’³¹¹ There would, in other words,

³⁰³ Luc Reydam's (Rise and Fall) (*supra*) 17-18; Jean Pictet Geneva Conventions IV (*supra*) 585 note an earlier draft Article 40 that did not contain the requirements that it must be another High Contracting Party *concerned* that had made out a *prima facie* case and also Alfred Rubin (Ethics and Authority) (*supra*) 172

³⁰⁴ Jean S Pictet ‘*The Geneva Conventions of 12 August 1949*. Commentary. I. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field’ 352

³⁰⁵ Jean Pictet (Commentary I) (*supra*) 370

³⁰⁶ Jean Pictet (Commentary IV) (*supra*) 591

³⁰⁷ Jean Pictet (Commentary I) (*supra*) 370

³⁰⁸ Jean Pictet (Commentary IV) (*supra*) 584

³⁰⁹ Jean Pictet (Commentary IV) (*supra*) 584

³¹⁰ See paragraph 2.2.4 (*supra*) and also Jean Pictet (Commentary IV) (*supra*) 584 ‘The absence of any international regulation of this matter and the small number of national laws concerned with it led most States to pass special legislation to punish the war crimes committed by the enemy against their people and troops.’

³¹¹ Jean Pictet (Commentary IV) (*supra*) 587

hopefully be more States ready and willing to comply with this obligation. States would now have to punish their own troops for grave breaches and also be able to ensure punishment of those who injured them by asking for their extradition or having them punished on their behalf. This is not the same as the contemporary meaning of universality and there was never any discussion of theories of universal jurisdiction to adjudicate based on moral reprehension of war crimes. It is not fair for writers to latch onto the phrase ‘universality of punishment’ such a contemporary meaning of universal jurisdiction.³¹² It is submitted that the solution sought was merely practical because it was simply not feasible to limit the duty to prosecute or extradite to the belligerents alone considering the logistical nightmare that WWII had created.

Alfred Rubin provides a similar view and points out that the Geneva Conventions take a dualist view of the international legal order by obliging parties to the conflict to take action against individual violators of the substantive rules but leaving open the possibility that an international tribunal might yet be established to exercise adjudicatory functions. Rubin explains that the positive law of armed conflict provided for in the Geneva Conventions solves potential problems without the need to have recourse to complicated and unfounded natural law concepts such as universal jurisdiction. He argues that because the four Conventions are very widely ratified and are usually regarded as substantive law binding as a matter of general practice accepted as law even if a State has not expressly accepted them through ratification. He explains that the Conventions require Parties to search for and try or hand over war criminals to another party concerned in the struggle if the other Party has established a *prima facie* case. Should no Party to the Convention have made out a *prima facie* case then an absolute obligation to seek out those who had committed a grave breach would obviously have no result and only lead to embarrassment. Rubin makes an excellent point. When will a State ever search for an alleged war criminal if there is no *concerned* State that considers him a war criminal and can actually make out a *prima facie case* against him? If there is no such State *concerned* how will the territorial State even know that someone is a war criminal and where would they find the proof for this? International relations are sensitive issues and States will be very

³¹² See for confirmation in this regard Derek Bowett (Jurisdiction: Changing Patterns of Authority) (*supra*) 12 ‘the obligation imposed on all contracting Parties to enact municipal legislation so as to make grave breaches of the Convention punishable is *not* the assertion of a universal jurisdiction but merely the provision of the legislative basis for jurisdiction in the event that the contracting Party is involved in the hostilities as a belligerent.’

loath to launch out on rumors and unfounded allegations. Rubin further points out that the problem of the reluctance to cooperate of a Party having legal control over the evidence of the crime can be overcome by use of the positive legal order. There would be no need for a third party, lacking the necessary jurisdiction to adjudicate or access the evidence to intervene. The accused may simply be handed over to his own command with a public commitment to apply the rules to which that Party was bound by treaty. And if not by treaty then ‘by general international law developed by the practice of States accepted as law in diplomatic correspondence and other actions, and codified by the Conventions. If that “solution” is not trusted...the accused could properly be handed over to the opposing side for trial and punishment under international safeguards set out in the Conventions...’³¹³

It is submitted that such a reading is also the most logical explanation for third States’ apparent current lack of enthusiasm for applying universal jurisdiction over grave breaches. Yet someone like Van Elst, chooses to rather believe that States Parties intended an unrestricted jurisdiction over everybody.³¹⁴ But his own interpretation forces him to then label America’s process of negotiation that led to their refusal to establish universal jurisdiction over grave breaches as “self-interest-centered arguments”.³¹⁵ And Canada he calls “the archetype of a State which shirks its responsibility on this basis under false pretenses.”³¹⁶ Are these States really self-interested fraudsters or is it possible that Van Elst misconstrued the Geneva Conventions? But even more alarming is that by this sort of reasoning he is led to call the rescheduling of flights abroad by erstwhile U.K Prime Minister Margaret Thatcher, for fear of being arrested, as a result of the Falklands war, a “promising development”.³¹⁷ If we pause for a moment we may ask why exactly this is a promising development? And who decides? This seems to me the clearest indication that States Parties to the Geneva Convention could never have had the intention Van Elst and others presently ascribe to them. Would the U.K. at the time of drafting the Geneva Conventions have agreed to an unqualified right for neutral countries to prosecute grave breaches if it meant that one of their most accomplished Prime Ministers would someday become the random target of such prosecutions, and that

³¹³ Alfred Rubin (Ethics and Authority) (*supra*) 171-172

³¹⁴ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 821

³¹⁵ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 837

³¹⁶ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 851

³¹⁷ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 852

only because she had won a war?³¹⁸ Obviously the answer is no. States Parties wanted all the help they could get to make sure that war criminals that had harmed them would not escape. They didn't want to make it as hard as possible for their own leaders to conduct their duties. Israel, for example, constantly complains of this 'lawfare' waged against them.³¹⁹ In South Africa the so-called 'Gaza Docket' have presented prosecutors with similar problems. In this case activists have asked South African authorities to investigate a dual Israeli/South African citizen for his part in alleged war crimes committed during what was known as *Operation Cast Lead*.³²⁰ The reference to lawfare is basically a complaint that some groups attempt to use law, and specifically universal jurisdiction, as a tool or a weapon to interfere in intricate political problems. The point is simply that States Parties to the drafting of the Geneva Conventions most likely never imagined a scenario where their well-respected leaders can scarcely travel anymore and national prosecutors get involved in international political problems. No, they only intended to provide for an effective mechanism that allowed for war criminals that had injured them to be punished or sent back to them for punishment. This is as much a sturdy argument that any neutral and *unconcerned* State may not ask for the extradition of any war criminal as it is that this will almost never happen in practice because it was never intended to.

Almost never, yet it has happened before. Van Elst points to the Belgian 1993 Act Relative to the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977 as a model example of unlimited universal jurisdiction over grave breaches.³²¹ But Van Elst wrote this in 2000 and with the benefit of hindsight we can see what happened to his example. Steven Ratner's summary is superb:

'The life and death of Belgium's universal jurisdiction law is a textbook case of the intersection of law and power in the international arena. A government, its consciousness

³¹⁸ The same may be asked of others like Tony Blair, of George Bush Senior and Junior and Ariel Sharon.

³¹⁹ Diane Morrison and Justus Reid Weiner 'Curbing Enthusiasm for Universal Jurisdiction' (2010) 4 Berkeley Journal of International Law Publicist 1 'Advocates of the Jewish State have coined the term "lawfare" to describe this situation-"a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."

³²⁰ Gevers C "Gaza docket: SA must tighten policies on international criminal justice" *Business Day* (2009/08/20), available at <http://www.businessday.co.za/Articles/Content.aspx?id=79073> (accessed 2014/01/25).

³²¹ Richard van Elst (Universal Jurisdiction over Grave Breaches) (*supra*) 826; Article 7 of this Act states the following: 'The Belgian Courts shall be competent to deal with the breaches provided for in the present Act, irrespective of where they were committed...'

raised by the increased global attention to individual responsibility for human rights atrocities, enacts a broad statute opening its courts to prosecutions of suspected murderers, torturers and war criminals around the world. Stung by its peacekeeper's failure to prevent genocide in Rwanda, a former colony, Belgium eventually utilizes the law to try and convict a handful of accomplices to those atrocities. But, politically troublesome cases trickle in, as opposing sides in the Middle East seek to have their day in Brussels; and another State, the Democratic Republic of the Congo (DRC), successfully brings an action in the World Court challenging arrest warrants against a former DRC official. The United States government eventually signals opposition to the statute, leading to its nearly instantaneous modification; when the United States says it is still too broad, the government guts the idea entirely.³²²

3.2.1 The Arrest Warrant Case

Relevant to this particular discussion is the ICJ *Arrest Warrant Case*.³²³ The facts were as follows. An examining magistrate in Brussels, seized by the public prosecutor and private parties, issued an arrest warrant on 11 April 2000 against the then acting Congolese minister of Foreign Affairs, Abdulaye Yerodia Ndombasi (Yerodia). The basis of the warrant was the Belgian Act on Grave Breaches (mentioned above). There were no links between Belgium and the alleged crime or suspect. The proceedings were thus an exercise of universal jurisdiction *in absentia*. The DRC, in its application, relied on two legal grounds:

- (i) The universal jurisdiction that Belgium attributes to itself under Article 7 of the Belgian Statute constituted a violation of the DRC's sovereignty and the principle of sovereign equality provided for in Article 2(1) of the United Nations Charter. No State may exercise its authority on the territory of another State.
- (ii) The non-recognition by the Belgian Statute of the immunity of a Minister for Foreign Affairs in office constituted a violation of the diplomatic

³²² Steven, R Ratner 'Belgium's War Crimes Statute: A Postmortem' 97 *American Journal of International Law* (2003) 888-889; also see Max Du Plessis & Shannon Bosch 'Immunities and universal jurisdiction – the World Court steps in (or on?)' (2003) 28 *South African Yearbook of International Law* 246 'The controversy regarding the legislation has reached a crescendo after the war on Iraq. A case was brought recently against General Tommy Franks, the US Commander in Iraq, by a left wing lawyer representing 19 Iraqis. The complaint was lodged on 14 May 2003 and dismissed a week later (under the latest amendment to the law which allows for the disposal of politically motivated or 'propaganda' cases). Nonetheless, the case caused a 'major crisis' in relations between the US and Belgium, and nearly led to a boycott by the US of Nato's Brussels headquarters. At the time of writing Belgium seems to have capitulated under US pressure to limit the scope of the controversial law, and the latest limitations make the law applicable only to cases where Belgians or Belgian residents are directly involved'

³²³ Democratic Republic of Congo v. Belgium (*supra*)

immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the ICJ and following from Article 14(2) of the Vienna Convention of 1961 on Diplomatic Relations.

Belgium, in its defense to the first claim, relied essentially on international customary law. A subsidiary argument was that in the absence of any treaty or custom prohibiting universal jurisdiction *in absentia* it was free to act as it deemed fit.³²⁴ This was of course a reliance on the ‘*Lotus* principle’ that States have a right to do whatever is not prohibited by international convention or custom.³²⁵ In their final submissions the DRC, for some reason, proceeded only on the issue of immunity and abandoned the excessive universal jurisdiction argument. Belgium approved and asked the Court to rule only on the immunity issue. The Court agreed but reserved itself the right to deal with certain aspects of the universal jurisdiction question if it deemed it necessary or desirable. It never did and completely sidestepped the issue by only deciding the immunity question, several judges, however, addressed the issue in separate opinions or declarations.³²⁶

President Guillaume found that universal jurisdiction *in absentia* is unknown to international conventional law.³²⁷ He also found that international customary law does not allow for universal jurisdiction *in absentia*.³²⁸ He was not impressed by Belgium’s subsidiary argument based on the ‘*Lotus* principle’ because he noted that the situation was ‘totally different’ today.³²⁹ It was different because ‘[t]he adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle.’³³⁰ He then found as follows:

‘But at no time has it been envisaged that jurisdiction should be conferred upon courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would moreover risk judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful,

³²⁴ Luc Reydam's (Universal Jurisdiction) (*supra*) 228

³²⁵ Luc Reydam's (Universal Jurisdiction) (*supra*) 228 and discussion in Chapter 2 (*supra*)

³²⁶ Not all these opinions and declarations will be discussed here, and only those relevant to universal jurisdiction, but for a neat summary of the various opinions and declarations see Luc Reydam's (Universal Jurisdiction) (*supra*) 228-230

³²⁷ Separate opinion of Judge Guillaume paragraph 9

³²⁸ Separate opinion of Judge Guillaume paragraph 13

³²⁹ Separate opinion of Judge Guillaume paragraph 15

³³⁰ Separate opinion of Judge Guillaume paragraph 15

purportedly acting as agents for an ill-defined “international community”. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.³³¹

On the other end of the spectrum, appearing for Belgium as Judge *Ad Hoc* was the well-known and respected international law Professor Christine Van den Wyngaert. She wrote a detailed dissenting opinion dealing first with immunity and then universal jurisdiction. She found that examples of ‘extraterritorial jurisdiction for international crimes such as war crimes, crimes against humanity and torture...may often be on other jurisdictional grounds such as the nationality of the victim.’³³² The examples she gave were those of *Eichmann*, which she said was in fact not based on universal jurisdiction, but on passive personality, and *Pinochet* where the link was the Spanish nationality of the victims. She found that the *raison d’être* for universal jurisdiction is the prevention of impunity.³³³ With reference to the *Lotus* case she found that it leaves States a wide measure of discretion and she made the distinction between *prescriptive* and *enforcement jurisdiction*. She explained that with regard to *prescriptive jurisdiction* States are free to investigate and prosecute crimes committed abroad on their own territory. But, without permission, a State would have no enforcement jurisdiction to exercise its power on the territory of another State.³³⁴ She found that in the absence of a prohibition international law ‘clearly permits States to provide extraterritorial jurisdiction’.³³⁵ She also found that ‘[t]here is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited.’³³⁶ As an example that it is not prohibited she uses the jurisdictional provisions of the Geneva Conventions. She then says that ‘[i]t may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.’³³⁷

³³¹ Separate opinion of Judge Guillaume paragraph 15; See also Separate opinion of Judge Rezek at paragraph 10 ‘[if] the application of the universality principle would not presuppose the presence of the accused person on the territory of the forum State, all co-ordination becomes impossible and the very international system of co-operation in the repression of crime would collapse’. He also wonders ‘how certain European countries would react if a judge from Congo had indicted their officials for crimes supposedly committed on their orders in Africa’.

³³² Dissenting opinion of Judge Van den Wyngaert paragraph 44

³³³ Dissenting opinion of Judge Van den Wyngaert paragraph 46

³³⁴ Dissenting opinion of Judge Van den Wyngaert paragraph 49

³³⁵ Dissenting opinion of Judge Van den Wyngaert paragraph 51

³³⁶ Dissenting opinion of Judge Van den Wyngaert paragraph 54

³³⁷ Dissenting opinion of Judge Van den Wyngaert paragraph 56

In between these two divergent views we find the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal. They conceded that neither international conventional law nor international customary law provides a basis for universal jurisdiction *in absentia* and that the writings of publicists although ‘suggesting profound differences of opinion...cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm’.³³⁸ The opinion found it undeniable ‘[t]hat there is no established practice in which States exercise universal jurisdiction, properly so called...[v]irtually all national legislation envisages links of some sort to the forum State, and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful.’ But, the opinion continues, ‘Moreover, while none of the national case law to which we have been referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such jurisdiction. In short, national legislation and case law - that is, State practice - is neutral as to the exercise of universal jurisdiction.’³³⁹ About the *Lotus* case, as relied upon by Belgium, the opinion found that it leaves States with ‘a wide measure of discretion which is only limited in certain cases by prohibitive rules’. The opinion agrees in this regard that certain States may act unilaterally as ‘agents for the international community’ to assert a universal jurisdiction over international crimes. This finding, the opinion attributes to a ‘vertical notion of authority’, which, they believe, was significantly different from ‘the horizontal system of international law envisaged in the “*Lotus*” case.’³⁴⁰ As to the question whether the presence of the accused is a precondition for the assertion of universal jurisdiction, the opinion states that the treaty obligation to extradite or try a suspect who is present, although ‘*definitionally envisage[ing] presence on the territory*’, ‘cannot be interpreted *a contrario so as to exclude* a voluntary exercise of universal jurisdiction.’³⁴¹ Their conclusion was that ‘[i]f the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut*

³³⁸ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraph 44

³³⁹ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraph 45, 50, 51, 57, 58

³⁴⁰ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraphs 50-51

³⁴¹ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraph 57

dedere principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction'.³⁴²

It is clear, from these opinions and the sharp divisions between them, that universal jurisdiction when exercised unilaterally *in absentia* as Belgium tried to do in this case is controversial. It is interesting to note that out of those Judges that actually discussed the Geneva Conventions Judges Higgins, Kooijmans and Buergenthal only found that the Geneva Conventions might '*perhaps*' provide for a treaty-based universal jurisdiction but that it presupposed per definition the presence of an offender on their territory. They were not sure, and asked if 'the obligation to search impl[ied] a permission to prosecute *in absentia*, if the search had no results?'³⁴³ President Guillaume unequivocally stated that 'universal jurisdiction *in absentia* is unknown to international conventional law' and that 'the Geneva Conventions...do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found universal jurisdiction *in absentia*'.³⁴⁴ Judge Van den Wyngaert for Belgium argued that '[r]eading into Article 146 of the IV Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions.' She found that the purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law.³⁴⁵ Judge Van den Wyngaert was the only one interpreting the Geneva Conventions in view of the purpose they were meant to serve when they were created.³⁴⁶ Yet, as was pointed out above, States Parties to the Geneva Conventions most probably did not intend to open the floodgates of jurisdiction. It is thus not a matter of saying that they obviously were not intended to restrict jurisdiction, of course they were not intended to restrict jurisdiction, but rather of understanding that, because of the extraordinary circumstances prevalent at the time, they were intended

³⁴² Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraph 58 also see Separate opinion of Judge Koroma paragraph 8 who found without giving reasons that 'Belgium is entitled to invoke its criminal jurisdiction against anyone, save for a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.'

³⁴³ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraphs 61, 57, 72 & 31

³⁴⁴ Separate opinion of Judge Guillaume paragraphs 9 and 17; See also the declaration of Judge Ranjeva along similar lines at paragraph 7

³⁴⁵ Dissenting opinion of Judge Van den Wyngaert paragraph 54; See also Judge *ad hoc* Bula-Bula who agreed with her at paragraph 65

³⁴⁶ The definition of teleology in '*The Concise Oxford English Dictionary*' (10th ed.) Oxford University Press, Oxford (2002) 'the explanation of phenomena by the purpose they serve rather than by postulated causes'

to regulate jurisdiction in very specific way. The circumstances were the vast scale, and the changing world in the aftermath, of WWII. The goal was to make it as easy as possible for injured nations to exact punishment, or cooperate with other States to have it exacted on their behalf, on the war criminals that had so recently harmed their interests. Luc Reydams, after his thorough study of State practice disagrees with Judges Higgins, Kooijmans and Buergenthal and says that State practice on universal jurisdiction *in absentia* is not as neutral as they claim it to be.³⁴⁷ He points out that in the few precedents there are of *Sharon*, *Yerodia* and *Pinochet* the States of nationality of the suspects ‘protested vigorously, and not merely on immunity grounds.’³⁴⁸ Reydams also doesn’t agree with their contention that the *aut dedere aut judicare* clauses in treaties cannot be interpreted *a contrario* so as to exclude a voluntary exercise of universal jurisdiction in cases where a suspect is not present. Reydams says that the three Judges ‘suggestion that the parties to the numerous *aut dedere aut judicare* treaties and to the ICC Statute silently reserved themselves a supposed right to exercise universal jurisdiction *in absentia* is unpersuasive, especially with regard to the ICC.’ Reydams did not discuss the dissenting opinion of Judge Van den Wyngaert but she makes the same point and it may thus be criticized for the same reason. Reydams agrees with President Guillaume that such an approach would ‘encourage the arbitrary for the benefit of the powerful.’ Reydams concludes his study by remarking that what the conclusion of Judges Higgins, Kooijmans and Buergenthal does not rule out is a co-operative exercise of universal jurisdiction *in absentia*. But that this ‘implies the consent of the State(s) involved, on a case-by-case basis. Without such consent any exercise of universal jurisdiction *in absentia* is doomed to be unilateral and risks weakening the very international order that it pretends to guard.’³⁴⁹ This writer agrees that universal jurisdiction can be a function of a treaty provision but that cooperation between States has been the foundation of, and the rationale behind, the Geneva Conventions and should be in the future.

Du Plessis and Bosch believe that if the court had actually decided the universal jurisdiction issue, the moderate approach of Judges Higgins *et al* would have prevailed over the ‘stilted’ approach of President Guillaume.³⁵⁰ But the very opposite

³⁴⁷ Luc Reydams (Universal Jurisdiction) (*supra*) 230

³⁴⁸ Luc Reydams (Universal Jurisdiction) (*supra*) 230

³⁴⁹ Luc Reydams (Universal Jurisdiction) (*supra*) 230

³⁵⁰ Max du Plessis and Shannon Bosch (The World Court steps in (or on?)) (*supra*) 254

seems, to this writer, to be true. For a start, as this study has pointed out, President Guillaume's finding that 'at no time has it been envisaged that jurisdiction should be conferred upon courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found' is absolutely correct. In their article Du Plessis and Bosch start their discussion of universal jurisdiction off by saying that it 'is a concept firmly rooted in the minds of international lawyers'³⁵¹ But it is not enough for the concept to be accepted by international lawyers. Judges Higgins *et al* made this point when they found that neither international conventional law nor international customary law provides a basis for universal jurisdiction *in absentia* and that the writings of publicists 'cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm'.³⁵² Proponents of universal jurisdiction advocate it as the evidence of a deep-rooted and age-old tradition of international abhorrence of impunity for perpetrators of certain serious crimes.³⁵³ It seems from so many writings on the subject to be the most obvious concept in the world. But the fact that the majority did not even deal with universal jurisdiction seems to indicate that they don't hold the view that it forms such an indispensable and self-evident part of international criminal law.³⁵⁴ If they held the same view, and it was such an important matter to them, surely they would have mentioned it? They could easily have done so, put it beyond dispute, and still have reached the same conclusion that Yerodia possessed immunity from this jurisdiction. If nothing else, their complete silence on the issue seems to indicate, not that they were in favor of it, but that universal jurisdiction was not as obvious and important a consideration for the majority of Judges as it is for many international lawyers.³⁵⁵

³⁵¹ Max du Plessis and Shannon Bosch (The World Court steps in (or on?) (*supra*) 251 They continue as follows 'As a jurisdictional basis, the idea of universal jurisdiction exemplifies a concern regarding crimes, so egregious in their nature, that they warrant the attention of all nations, irrespective of where the offence was committed, or the nationality of the offender or victim.'

³⁵² Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal paragraph 44

³⁵³ See Du Plessis and Bosch (The World Court steps in (or on?) (*supra*) 252

³⁵⁴ Assuming of course, what is not hard to believe, that they, being distinguished international judges, were not blind to the logic of considering jurisdiction before immunity

³⁵⁵ Max du Plessis and Shannon Bosch (The World Court steps in (or on?) (*supra*) 262 'The International Court of Justice appears to have set in place a presumption in favour of immunity, and in the process the exercise of universal jurisdiction by national courts has come off second best. This is an unfortunate reversal of a trend towards greater accountability of individuals, whatever their status, who are responsible for the worst crimes.' See also Antonio Cassese (Is the Bell Tolling for Universality?) (*supra*) 589 'It would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes. The International Court of Justice (ICJ) delivered the first blow to universality in 2002 in its judgment in the *Arrest Warrant* case.' And Sascha-Dominik Bachmann (The quest for international criminal justice) (*supra*) 733 'With the *DRC v Belgium* decision of the international court of justice, the evolving attempts to prosecute international crimes before domestic criminal courts have been severely impaired for the sake of upholding an outdated principle of state sovereignty.'

3.2.2 The Belgian example

We may now consider the Belgian War Crimes Act mentioned briefly earlier. The first thing Belgium did after the *Arrest Warrant Case* was to rescind the illegal arrest warrant. Soon after this the whole matter received an odd twist when a pre-trial appeals court in Brussels ruled that the proceedings against Yerodia were inadmissible from the beginning because the accused was not present in Belgium as required by their law.³⁵⁶ The history of the Act was that in 1993 the Belgian Government, in response to a proposal by military judges and academics, amended the penal code to include certain violations of the 1949 Geneva Conventions and 1977 Additional Protocols, regardless of where such crimes were committed. In 1999 upon the request of various human rights NGO's, the law was amended to include genocide and crimes against humanity as defined in the Statute of the International Criminal Court. The official immunity of a person would also not prevent the application of the law. It was at the time the world's broadest domestic statute on universal jurisdiction for human rights abuses. It required no link between the suspect, victim or events, on the one hand, and Belgium on the other.³⁵⁷ The new legislation thus provided Belgium courts with comprehensive and unconditional universal jurisdiction over war crimes, genocide and crimes against humanity.³⁵⁸ Belgium's criminal procedure allows for a system of plaintiff prosecutors, whereby victims may initiate cases before an investigating judge. It was not long before Palestinians, survivors from the 1982 massacre of Palestinian refugees, brought charges against Ariel Sharon, the then Prime Minister of Israel who was also their former Defense Minister and Amos Yaron who had been the Israeli general in charge of the Beirut section in 1982.³⁵⁹ In addition the court also faced complaints from Israelis against Yasir Arafat and others against Fidel Castro, Saddam Hussein and Yerodia Ndombasi.³⁶⁰ The matter against Sharon and Yaron led to vehement protest by Israel and they withdrew their ambassador to Belgium.³⁶¹ In March 2003, seven Iraqi families requested an investigation of former US President George Bush Snr, Vice President (and former Secretary of Defense) Dick Cheney, Secretary of State (and former chairman of the Joint Chiefs of Staff)

³⁵⁶ Luc Reydam's (Universal Jurisdiction) (*supra*) 116

³⁵⁷ This is a summary adapted from Steven Ratner (Postmortem) (*supra*) 889

³⁵⁸ A Hays Butler 'The Growing Support for Universal Jurisdiction' in Stephen Macedo (Universal Jurisdiction) (*supra*) 69

³⁵⁹ Steven Ratner (Postmortem) (*supra*) 890

³⁶⁰ Steven Ratner (Postmortem) (*supra*) 890

³⁶¹ Steven Ratner (Postmortem) (*supra*) 890

Colin Powell and retired general Norman Schwarzkopf for allegedly committing war crimes during the 1991 Gulf war.³⁶² In response, Secretary Powell warned the Belgium Government that it was risking its status as a diplomatic capital and host State of NATO by allowing investigations of those who might visit Belgium.³⁶³ The Belgian Prime Minister Guy Verhofstadt quickly proposed amendments to the statute to limit its scope.³⁶⁴ In April 2003 parliament amended the law so that only the federal prosecutor could initiate cases if the violation was overseas, the offender was not Belgian or located in Belgium, and the victim was not Belgian or had not lived in Belgium for three years. The prosecutor could also refuse to proceed if the complaint was manifestly unfounded or it was in the interest of administration of justice that the case be heard before international tribunals, or before a tribunal where the offence was committed or the tribunal of a State in which the offender is a national or where he is found as long as this tribunal is competent, independent, impartial and fair.³⁶⁵ After the amendments Israel sent back its ambassador to Belgium.³⁶⁶ But the US Secretary of Defense Donald Rumsfeld still announced that the United States would refuse to fund a new NATO headquarters building in Belgium and would consider barring its officials from travelling to meetings there unless Belgium rescinded its law because it disregards the sovereignty of other nations. Once more the law was promptly amended and now stated that Belgian courts can hear cases regarding the three sets of crimes when committed outside Belgium only if the defendants or victim is a citizen or resident of Belgium.³⁶⁷ The law also precludes cases against chiefs of state, heads of government, and foreign ministers while they are in office, others whose immunity is recognized by international law and persons whose immunity is recognized by a treaty to which Belgium is a party.³⁶⁸

³⁶² Steven Ratner (Postmortem) (*supra*) 890

³⁶³ Steven Ratner (Postmortem) (*supra*) 890

³⁶⁴ Steven Ratner (Postmortem) (*supra*) 890

³⁶⁵ Steven Ratner (Postmortem) (*supra*) 891 and law of 23 April 2003, published in *Moniteur Belge*, 7 May 2003, at 24846-24853. Available online at www.moniteur.be

³⁶⁶ Steven Ratner (Postmortem) (*supra*) 891

³⁶⁷ Steven Ratner (Postmortem) (*supra*) 891

³⁶⁸ Steven Ratner (Postmortem) (*supra*) 891 and law of 5 August 2003, published in *Moniteur Belge*, 7 August 2003, at 40506-40515, Articles 13-16. Online at www.moniteur.be

3.2.3 The Spanish example

Spain had similarly wide ranging legislation³⁶⁹ that established jurisdiction over acts committed abroad by Spaniards and foreigners for genocide; terrorism; sea or air piracy; counterfeiting; offences in connection with prostitution and corruption of minors and incompetents; drug trafficking or any other offence that Spain is obliged to prosecute under an international treaty or convention.³⁷⁰ ‘All the listed offences are the subject of an international convention but in the case of genocide, terrorism, and offences in connection with prostitution, the Spanish legislature...has gone further than is required by the terms of the relevant convention. LOPJ article 23.4 does not expressly require the presence of the foreign offender for the initiation of proceedings.’³⁷¹ Like in Belgium the investigation of extraterritorial offences is the responsibility of a central examining magistrate who can be seized by the public prosecutor, the victim or by any private citizen or organization exercising the *acción popular*.³⁷² Despite this wide jurisdiction provided for, the Spanish High Court (*Tribunal Supremo*) in the *Guatemalan Generals*³⁷³ case placed a restrictive interpretation on universality. It found that universal jurisdiction may only be exercised as a subsidiary principle, namely if another relevant State fails to act upon an offence and could not operate where ‘no point of connection exists between national interests.’ The requirement was thus for a link between the foreign offence and Spain. The Court in deciding if it should intervene in Guatemala by prosecuting certain offences found that ‘basing such a decision on either real or apparent inactivity on the part of the courts of another sovereign State implies judgment by one sovereign State on the judicial capacity of similar judicial bodies in another sovereign State.’³⁷⁴

³⁶⁹ Because of this act Spanish Tribunals have had to deal with cases involving allegations of international crimes committed in Afghanistan, Argentina, Austria, Chile, China, Colombia, Cuba, Equatorial Guinea, El Salvador, Gaza, Germany, Guatemala, Iraq, Israel, Mexico, Morocco, Myanmar, Pakistan, Peru, Rwanda, Spain, Tibet, Venezuela, Western Sahara and international waters close to Israel, Kenya and Somalia. – See Enrique C Rojo ‘National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain’ 9 *Journal of International Criminal Justice* (2011) 709

³⁷⁰ Luc Reydam (Universal jurisdiction) (*supra*) 183 ‘The scope of Spanish criminal law follows from the jurisdiction of the courts as spelled out in Book I, Title I (‘De la extensión y límites de la jurisdicción’) of the 1985 Organic Law of the Judicial Power (Ley Orgánica del Poder Judicial, or LOPJ)’ in force since 1 July 1985, see LOPJ article 23.4

³⁷¹ Luc Reydam (Universal jurisdiction) (*supra*) 184

³⁷² Luc Reydam (Universal Jurisdiction) (*supra*) 184

³⁷³ This case involved acts of Genocide committed between 1981 and 1983 against Mayan people by the State of Guatemala under the leadership of General Ríos Montt

³⁷⁴ Incidentally Ríos Montt has since ceased to hold public office in Guatemala and has been prosecuted and after conviction in a lower court the Constitutional Court threw out the charges, as there were problems between Judges before a certain date. The matter is however still pending and active and is set to continue in 2015; ‘Guatemala Ríos Montt genocide trial to resume in 2015’ *BBC News* (2013/11/06) available at <http://www.bbc.co.uk/news/world-latin-america-24833642> (accessed 2014/02/06)

The Supreme Court further found that ‘today there is significant support in doctrine for the idea that no State may unilaterally establish order through criminal law, against everyone and the entire world.’³⁷⁵ The Spanish Constitutional Court differed and interpreted Article 23(4) as providing for universal jurisdiction over a range of international crimes, including war crimes, to protect the interests that ‘affect the international community as a whole.’³⁷⁶ Matthew Garrod however points out that the Spanish Constitutional Court’s interpretation of universal jurisdiction was really based on the protective principle, ‘given that the relevant case involved crimes against Spanish civilians and an attack against a Spanish embassy and its employees and a Spanish ambassador.’³⁷⁷ Spanish law³⁷⁸ however backtracked and subsequently codified the interpretation given by the Supreme Court so that it is now required that Spaniards be the victims, the suspect be in Spain or there be a link of relevant connection with Spain before extra-territorial jurisdiction for international crimes committed abroad may be exercised.³⁷⁹

Luc Reydamas calls headline-making NGO-driven cases against senior officials, including, Fidel Castro, Yerodia Ndombasi, George Bush Snr, Ariel Sharon, Amos Yaron and others ‘virtual’ cases. This is because, he says, ‘with the exception of Pinochet, they produced little more than headlines and diplomatic headaches as well as fame for a Spanish Judge.’³⁸⁰ This famous Spanish Judge is examining magistrate Baltazar Garzón, responsible for the initiation of the *Pinochet* case and who has since become rather infamous after being acquitted in Spain of charges of abuse of power³⁸¹ but convicted of wire-tapping.³⁸² Yee argues that Spain dismantled its own strong

³⁷⁵ *Guatemalan Generals* case, S.T.C. No. 327/2003 Judgment of 25 February 2003, available online at www.derechos.org/nizkor/guatemala/doc/gtmsent.html and also see, for a brief discussion, Antonio Cassese (Is the Bell Tolling for Universal Jurisdiction) (*supra*) 590

³⁷⁶ *Guatemalan Generals* case, No.237/2005 Judgment of 26 September 2005

³⁷⁷ Matthew Garrod (The Protective Principle) (*supra*) 814

³⁷⁸ Organic Law 1/2009 of 3 November 2009

³⁷⁹ See Matthew Garrod (The Protective Principle) (*supra*) 814 and also Enrique Rojo (Prosecution and Punishment of International Crimes in Spain) (*supra*) 710 ‘While these approaches were overruled by the Spanish Constitutional Tribunal in 2005 and 2007, the re-establishment of ‘absolute universal jurisdiction’ in Spain was short-lived. Eventually, the economic and diplomatic impact of the extraterritorial investigation, prosecution and adjudication of international crimes led to a limitation in the universal jurisdiction of Spanish courts.’

³⁸⁰ Luc Reydamas (Rise and Fall) (*supra*) 347

³⁸¹ Fiona Govan ‘Spanish Judge Baltasar Garzon acquitted in Franco-era crime probe’ *The Telegraph* (2012/02/27) available at www.telegraph.co.uk/news/worldnews/europe/spain/9108427/Spanish-judge-Baltasar-Garzon-acquitted-in-Franco-era-crime-probe.html ‘But the verdict of not guilty, passed by 6-1 on the seven judge panel, appeared to be based on a technicality of the law – that the judge had committed an error when he opened the investigation but that it did not constitute a crime.’ (accessed 2014/02/06)

³⁸² ‘Spanish Judge Baltasar Garzón found guilty in wiretapping case’ *The Guardian* (2012/02/09) available at <http://www.theguardian.com/world/2012/feb/09/baltasar-garzon-guilty-wiretapping-spain> ‘The Spanish

universal jurisdiction authorization because Judge Garzón had begun to dig into Spain's old dirty laundry stemming from the Spanish Civil War.³⁸³

Essays, like the one by A. Hays Butler in the book by Macedo called '*Universal Jurisdiction*' hails the legislative reforms in countries like Belgium and Spain to show support for universal jurisdiction. But it was not long after the implementation of this legislation, and the publication of the book, that these same countries drastically narrowed the scope of their legislation. This must cause one to seriously question the hype surrounding universal jurisdiction and whether it is really the solution to problems in international criminal law that it professes to be.³⁸⁴ Reydams after his national case studies, on universal jurisdiction over war crimes, concludes that:

'All in all some two dozen individuals have been tried by courts in Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for "war crimes" committed abroad. Without exception the defendants had taken up permanent residence in the forum state – as refugee, exile, fugitive, or immigrant – and resisted being 'sent back to the countries in which their abominable deeds were done'. In most cases the other states concerned acquiesced in or even supported prosecution. Not to overlook also is the fact that the majority of these cases concerned atrocities committed in the former Yugoslavia and in Rwanda; the prosecutor of the *ad hoc* international criminal tribunals for these countries and the UN Security Council had encouraged all states to search for and try suspects on their territory (cf. the obligations under the Geneva Conventions). Finally, extradition often was impossible, if not legally then practically.'³⁸⁵

We may now turn to the position in South Africa and the approach followed here.

3.2.4 South Africa's Geneva Conventions Act³⁸⁶

Despite the benefit of the two examples discussed above, South Africa has implemented a similarly wide form of universal jurisdiction in its Geneva

judge celebrated for pursuing international human rights cases was convicted of overstepping his jurisdiction in a domestic corruption investigation on Thursday, the culmination of a spectacular fall from grace... Garzón enjoyed rock-star status among human rights groups but had made a lot of enemies at home, in particular among judicial colleagues uncomfortable with his celebrity.' (accessed 2014/02/06)

³⁸³ Sienho Yee (Concept, Logic and Reality) (*supra*) 511

³⁸⁴ A Hays Butler '*The Growing Support for Universal Jurisdiction*' in Stephen Macedo (Universal Jurisdiction) (*supra*) 69-73

³⁸⁵ Luc Reydams (Rise and Fall) (*supra*) 22

³⁸⁶ The Implementation of the Geneva Conventions Act 8 of 2012 (24 July 2012)

Conventions Act. Article 7 of the Geneva Conventions Act deals with jurisdiction and section 1 reads as follows: ‘Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.’ Section 4 reads that ‘Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.’ This Act does not require the presence of a suspect and introduces ‘for the first time in South Africa, the principle of unlimited universal jurisdiction.’³⁸⁷ The Act ends by stating that ‘the provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.’ As discussed above³⁸⁸ South Africa’s Implementation of the Rome Statute of the International Criminal Court Act provides South Africa with universal jurisdiction over acts of genocide, war crimes, and crimes against humanity. But in terms of Section 4(3) of the ICC Act only if ‘that person, after the commission of the crime, is present in the territory of the Republic’. It is thus clear that the Geneva Conventions Act goes further even than the ICC Act in its purported “obligation” for South Africa to exercise universal jurisdiction. It is submitted that this is a serious mistake and calls for urgent reassessment. Considering the large amount of cases and complainants that flooded the systems in Belgium and Spain we might well have cause for concern. The system in South Africa does not provide for plaintiff complainants to approach an investigating magistrate in order to launch investigations. The decision rests with special units in the South African Police Services and the National Prosecuting Authority. Their decision not to investigate is however not the end of the matter. The complainants may approach a Court to review their decisions. This immediately turns into a full-scale intricate trial that might very well go all the way to appeal and even the Constitutional Court. The *SALC* case is an example. The problem is obvious. The Geneva Conventions Act requires investigation into grave breaches irrespective of

³⁸⁷ ICRC International Committee of the Red Cross ‘South Africa: law against war crimes adopted’ *ICRC Website* available at <http://www.icrc.org/eng/resources/documents/news-release/2012/south-africa-news-2> (accessed 2014/01/23)

³⁸⁸ Paragraph 2.1.5 (*supra*)

where or by whom they were committed. It is submitted that even acts committed before the Act came into being might come to be considered because of the provisions of Section 7(4) that provides for breaches under customary international law to be investigated. The vast scope of potential requests for investigations created by the Act is staggering. The SAPS or the NPA may have very good reasons for not launching such investigations. Experience shows however that complainants and particularly activists are not so easily dissuaded. Inevitably this burdens an already overburdened³⁸⁹ criminal justice system. A more serious problem is that prosecutors are by definition called to enforce the law, and to enforce it on a principled basis. What the Act however asks of them might simply not be within their ability to enforce consistently or at all.³⁹⁰ It is submitted that this is not a good thing and that the wide jurisdiction in the Act goes too far and creates more problems than it solves. It is further submitted that it is based on a deep misunderstanding of universal jurisdiction over war crimes. In the next Chapter we will discuss South Africa's duties as far as exercising jurisdiction with regards to the International Criminal Court are concerned. We will then make certain recommendations for a viable way forward that will limit jurisdiction without detracting from (and probably even enhancing) South Africa's duty to fulfill its international obligations.

3.2.5 Concluding remarks

In summary it may be stated the main reason universality is mentioned in the Geneva Conventions in 1949 when it was omitted in the Genocide Convention in 1948 seems to be that in question in the Geneva Conventions, were recent war crimes committed by a common enemy against many of the States Party to the Geneva Conventions. The war crimes were committed *against* them. A constitutive element of a grave breach is that there is a diversity of nationality between the offender and the victim.³⁹¹

³⁸⁹ A leading author calls it 'dysfunctional' – See Chris R Snyman '*Criminal Law*' (5th ed.) (2008) Lexis Nexis, Interpak Books Pietermaritzburg 21-29 'The South African criminal justice system, with the best will in the world, cannot be described as other than dysfunctional.'

³⁹⁰ See for just one example of many the way Jann Kleffner phrases the 'problem' of prosecutorial discretion in his book under the heading of 'Obstacles during Criminal Proceedings' in Jann, K Kleffner '*Complementarity in the Rome Statute and National Criminal Jurisdictions*' (2008) Oxford University Press, Oxford, 50 'Another obstacle hampering domestic criminal proceedings emanates from the exercise of *prosecutorial discretion*. All criminal justice systems establish various degrees of such discretion, which allows national authorities to decline to conduct or to discontinue proceedings on a number of grounds. Prosecutorial discretion can be (ab)used in order to abstain from bringing charges or to enforce the prohibitions of the core crimes selectively.'

³⁹¹ Luc Reydamas (Universal Jurisdiction) (*supra*) 56

Nations wanted to *cooperate* with each other to create an effective system to ensure the punishment of enemy war criminals that had harmed them. This is a far cry from jointly deciding that war criminals are particularly heinous offenders and that all States would henceforth be agents of the international community to ensure that war criminals are punished.³⁹² Genocide, on the other hand, as we have said, nearly always presupposes State sanction and is committed against a State's own nationals. States simply were not willing to allow other States to exercise jurisdiction over them and become involved in their internal affairs and this position remains largely the same today.³⁹³

3.3 The Torture Convention³⁹⁴

The Torture Convention outlaws the intentional infliction of severe pain and suffering 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'³⁹⁵ Because no international element is required the Convention in effect protects the right of citizens to be free from torture by their own officials.³⁹⁶ 'From a sovereignty perspective the situation differs totally from piracy and 'law and order' conventions. Nonetheless, the UN Torture Convention copies with minor differences the *aut dedere aut judicare* formula as it

³⁹² The failed attempts of Belgium and Spain in this regard prove this argument and the original intent of the drafters of the Geneva Conventions; See also M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 51 'Customary international law as reflected by the practice of states does not, in the judgment of this writer, mean that universal jurisdiction has been applied in national prosecutions. There are a few cases that are relied upon by some scholars to assert the opposite, but such cases are so few and far between that it would be incorrect to conclude that they constitute customary law practice the recognition of universal jurisdiction for war crimes is essentially driven by academics and experts' writings. These confuse the universal reach of war crimes with the universality of jurisdiction over such crimes.'

³⁹³ Luc Reydams (Rise and Fall) (*supra*) 17 says it well: 'two important post-Nuremberg instruments [meaning the Genocide and Geneva Conventions] shows that states were far less enthusiastic than scholars about universal jurisdiction over "human rights offences".' brackets inserted my own; See also M. Cherif Bassiouni (History of Universal Jurisdiction) (*supra*) 40 '[W]hile universal jurisdiction is attaining an important place in international law, it is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be. These organizations have listed countries, which they claim rely on universal jurisdiction; in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented.'

³⁹⁴ The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment New York, 10 December 1984; 1465 UNTS 85. My comments are based on Manfred Nowak and Elizabeth McArthur's *Oxford Commentaries on International Law, The United Nations Convention Against Torture: A Commentary* (2008); J. Herman Burgers and Hans Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (1998) and Luc Reydams (Universal Jurisdiction) (*supra*) 64-68

³⁹⁵ See Article 1

³⁹⁶ Luc Reydams (Universal Jurisdiction) (*supra*) 65

appeared in The Hague Hijacking Convention.³⁹⁷ The relevant provisions read as follows:

Article 5 [Obligation to establish jurisdiction]

1. Each State Party shall take such measure as may be necessary to establish its jurisdiction over the offences referred to in Art. 4 in the following cases:
 1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 2. When the alleged offender is a national of that State;
 3. When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where that alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Art. 8 to any of the States mentioned in Paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 7 [Obligation to extradite or prosecute]

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in Art. 4 is found, shall in cases contemplated in Art. 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in Art. 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Art. 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Art.4 shall be guaranteed at all stages of the proceedings.

Article 8 [Extradition]

1. The offences referred to in Art. F shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other condition provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between

³⁹⁷ Luc Reydam's (Universal Jurisdiction) (*supra*) 65

themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Art. 5, paragraph 1.

These provisions constitute ‘a cornerstone of the Convention’.³⁹⁸ Nowak and McArthur, in their comprehensive commentary, describe the Torture Convention, with the exception of the Apartheid Convention, as the ‘first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer’.³⁹⁹ They contrast the provision on jurisdiction with that of the Genocide Convention, which does not explicitly authorize or oblige States to exercise universal jurisdiction.⁴⁰⁰ They point out that universal jurisdiction gradually developed in the context of international humanitarian law over ‘truly international crimes’ like piracy, hijacking, hostage taking and similar terrorist crimes.⁴⁰¹ But they point out that these treaties differ from human rights treaties (including the Torture and Genocide Conventions) because ‘the perpetrators of terrorist crimes usually are non-nationals and combating terrorism is clearly in the national security interests of States. Torture, on the other hand, is according to its definition in Article 1 primarily committed by State officials, and the respective governments usually have no interest in bringing their own officials to justice’.⁴⁰² This is so markedly different from the position States had taken before and currently take in practice that Luc Reydam's concludes that it must have been an ‘accident’.⁴⁰³ As with grave breaches the dirge of the writers is repeated in the case of torture. ‘In practice, *States parties are extremely reluctant to exercise universal jurisdiction in torture cases*’.⁴⁰⁴ Perhaps Reydam's is right and it was simply an accident? It would benefit us to see exactly what transpired during the drafting process.

³⁹⁸JH Burgers & H Danelius (Handbook on the Convention against Torture) (*supra*) 131

³⁹⁹ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴⁰⁰ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴⁰¹ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴⁰² Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴⁰³ Luc Reydam's (Rise and Fall) (*supra*) 344

⁴⁰⁴ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 256 Emphasis original

Sweden proposed the insertion of an *aut dedere aut judicare* formula.⁴⁰⁵ Severe opposition came, unsurprisingly, from Argentina and Uruguay who were under military dictatorship at the time and systematically practiced torture.⁴⁰⁶ These two countries eventually found themselves isolated in their stance and eventually even Argentina lent its support to universal jurisdiction as it was by then under a new government.⁴⁰⁷ The United Kingdom however argued that ‘such exceptionally wide extraterritorial jurisdiction in respect of torture, which was different to piracy, hijacking of aircrafts and similar offences with a more obvious international character went beyond what is practicable’.⁴⁰⁸ France with the support of the Netherlands and other countries wanted the entire paragraph 5(2) deleted.⁴⁰⁹ The USSR was also skeptic ‘notwithstanding the fact that they had already agreed on universal jurisdiction in another human rights convention, namely Article V of the Apartheid Convention of 1973’.⁴¹⁰ Nowak and McArthur note that there were such strong objections to universal jurisdiction from countries in all regions of the world that it ‘seems almost a miracle’ that universal jurisdiction was accepted.⁴¹¹

What drove the acceptance of universal jurisdiction over torture in this instance was the strong US support of it. This was ‘remarkable in view of the opposition of the US Government to the inclusion of universal jurisdiction in the Genocide Convention’.⁴¹² Reydam's comments that it also astonishing in the ‘light of allegations of torture against the United States in the prosecution of its war on terror after 11 September 2001’.⁴¹³ What then happened in-between 1948 and 1984? During the drafting process the US remarked that ‘torture is an offence of special international concern which means that it should have a broad jurisdictional basis in the same way as the international community had agreed upon in earlier conventions against hijacking, sabotage and the protection of diplomats’.⁴¹⁴ The US delegation even considered ‘torture, like piracy, as an offence against the law of nations, for which the exception of universal jurisdiction was appropriate’.⁴¹⁵ In reply to an objection by Argentina the

⁴⁰⁵ JH Burgers & H Danelius (Handbook on the Convention against Torture) (*supra*) 57-58

⁴⁰⁶ JH Burgers & H Danelius (Handbook on the Convention against Torture) (*supra*) 78

⁴⁰⁷ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 315

⁴⁰⁸ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314 & 262

⁴⁰⁹ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

⁴¹⁰ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

⁴¹¹ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

⁴¹² Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

⁴¹³ Luc Reydam's (Rise and Fall) (*supra*) 344

⁴¹⁴ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

⁴¹⁵ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 314

US delegate stated that; ‘such jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials for torture. For the international community to leave enforcement of the convention to such a State would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against torture which could be brought to bear. It could be utilized against official torturers who travel to other States, a situation that was not at all hypothetical. It could also be used against torturers fleeing from a change in government in their States if, for legal or other reasons, extradition was not possible’.⁴¹⁶

It is interesting to note that the US delegate even likened torture to piracy in its zeal to implement universal jurisdiction in the Torture Convention. This analogy was not mentioned during the drafting of the Genocide or Geneva Conventions. Nobody else mentioned it during the drafting of the Torture Convention. The UK, as we have seen, was at pains to point out the fundamental difference between torture and piracy. Yet the US delegate argued for torture to have a broad jurisdictional basis because it was a crime of special international concern. This thesis has attempted to show how mistaken these views of the American delegate in this matter was. It seems so out of place, and sounds so very similar to current NGO-created and driven rhetorical arguments in favor of universal jurisdiction, that one wonders where the influence came from. The fact that the US was opposed to universal jurisdiction in the years before the Torture Convention and again in the years after it forces one to wonder whether this was not just simply a fluke? Nowak and McArthur suggest that it was the US President of the time, Jimmy Carter, a supporter of universal jurisdiction, who was responsible for this drastic change in foreign policy.⁴¹⁷ Jimmy Carter only served one term as President of the US and is well known for his human rights activism. He is also still vocal about his opposition to torture.⁴¹⁸ It is submitted that his stance on the matter was the exception and not the rule and had a massive influence on the jurisdiction clause in the Torture Convention. And that this explains why the Torture

⁴¹⁶ JH Burgers & H Danelius (Handbook on the Convention against Torture) (*supra*) 78-79

⁴¹⁷ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴¹⁸ See Jimmy Carter available at: http://en.wikipedia.org/wiki/Jimmy_Carter (accessed 2014/02/13) ‘In a 2008 interview with Amnesty International, Carter criticized the alleged use of torture at Guantanamo Bay, saying that it contravenes the basic principles in which this nation was founded. He stated that the next President should publicly apologize upon his inauguration, and state that the United States will never again torture prisoners.’

Convention differs so markedly from other human rights conventions as far as its jurisdictional provisions go.

It is also not hard to imagine that once the US had put its weight behind a proposal for implementing universal jurisdiction over torture, using high moral sounding arguments, it would be nigh impossible for a State like the UK, or others for that matter, to maintain its opposition to it. Even if the UK's intention were simply not to widen their jurisdiction, as they said, beyond what was practicable, the perception created would forever be that they care less about, and in reality, condone torture. It seems further to have been a case of 'someone else's problem' because the focus at the time was on Argentina and Uruguay. It was easy to single them out, as the American delegate did, and thus harder to consider whether the situation might boomerang on them one day, as it recently has.

Reydams emphasizes this selectivity by countries when it comes to implementing universal jurisdiction by reference to the Apartheid Convention.⁴¹⁹ It was mainly the Soviet Union that had proposed a convention to deal with the suppression and punishment of apartheid.⁴²⁰ The Convention provides for universal jurisdiction in Article 5.⁴²¹ Reydams points out that universal jurisdiction was acceptable for a majority over apartheid but not for genocide because, among other reasons, it was aimed only at the white minority regimes of South Africa, Namibia and Rhodesia. There was therefore little reason for States Parties to fear reciprocity.⁴²² Reydams considers it telling that none of the countries now at the forefront of universal jurisdiction signed the Apartheid Convention or even ratified it and they, among other things, took issue with the jurisdiction clause contained therein.⁴²³ Nowak and McArthur also provide another reason for the change in attitude of States Parties to the Torture Convention being the fact that the prospects for an International Criminal Court to be established in the near future seemed much smaller in the 1980's than in

⁴¹⁹ International Convention for the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973; 1015 UNTS 243.

⁴²⁰ Luc Reydams (Rise and Fall) (*supra*) 343

⁴²¹ 'Persons charged with the acts enumerated in Article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.'

⁴²² Luc Reydams (Rise and Fall) (*supra*) 343

⁴²³ Luc Reydams (Rise and Fall) (*supra*) 343-344

1948 when the Genocide Convention was adopted. 'In the absence of an International Criminal Court, universal jurisdiction appeared the second best option.'⁴²⁴

The jurisdictional provisions over torture seem truly to have been an exception. It must be quite an embarrassing exception for the US given their current stance on the matter.⁴²⁵ It would however at present probably take more than intense lobbying to get the US to honor the universal jurisdiction they brought about in the Torture Convention. The point is not that torture should ever be allowed, it is evil and of course it should not, but that States are not thrilled by the thought of policing all the worlds' torturers. They are even less thrilled about being policed by other States accusing them of torture. This explains why States '*are extremely reluctant to exercise universal jurisdiction in torture cases*'. The Torture Convention did not and cannot change this fact no matter how innovative or revolutionary it is often proclaimed to be. It was a rare exception. It would therefore be totally wrong to use this Convention to argue that other human rights conventions should be similarly interpreted as encouraging universal jurisdiction because such an approach reflects the true intention, and a growing support, of most States.

It is submitted that this is also why Reydams argues that the extradite or try principle has been incorporated into the Torture and Geneva Conventions but not the more 'radical' view that any State may request arrest and extradition in cases involving serious crimes under international law. This position was also confirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Prosecutor v Furundzija* where the prohibition against torture was held to have acquired the status of *jus cogens* and that this meant, amongst other things, 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' (emphasis added).⁴²⁶ One must agree with Reydams that '[h]uman rights and 'law and order' treaties alike require a meaningful link for the exercise of jurisdiction.'⁴²⁷

⁴²⁴ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 316

⁴²⁵ William A Schabas (Introduction to the ICC) (*supra*) 186 'In 2004, the United States found itself dreadfully embarrassed by reports of torture carried out in its prisons in Iraq and its base in Guantanamo Bay, Cuba.'

⁴²⁶ *Prosecutor v Furundzija* (IT-95-17/1-T) 10 December 1998, paragraphs 153 and 156. The decision has been reprinted in 38 ILM (1999) 317.

⁴²⁷ Luc Reydams (The Rise and Fall) in William Schabas and Nadia Bernaz *Routledge Handbook of International Criminal Law* 345

But even in the absence of universal jurisdiction *in absentia*, the Torture Convention still leaves States with more than enough work to do in combatting torture. Article 5(2) constrains States Parties to establish their jurisdiction over a suspected torturer when he is present in any territory under its jurisdiction and where it does not extradite him. We will therefore now consider, as example, how the UK has sought to exercise this duty. We start with a brief discussion of the famous *Pinochet* case because it dealt with torture and because it is so often referred in relation to universal jurisdiction. After this we will look at the more recent *Zardad* Case. We then consider the position in Senegal and an interesting decision of the International Court of Justice in this regard.

3.3.1 *Pinochet*⁴²⁸

These cases arose in the context of extradition proceedings in the UK upon a request from Spain. Pinochet was the well known as the leader of the Chilean *junta* that overthrew Salvador Allende on 11 September 1973 and then became President of Chile until 1990. Pinochet remained head of the armed forces after 1990 and was made a senator for life in 1998 and so remained active in the political and legislative life of Chile. In 1998 Pinochet travelled to the UK for medical treatment. News of his presence led to a Spanish arrest warrant, issued by Judge Baltasar Garzón, which was circulated in the UK. The warrant related to charges of hostage taking, torture and genocide committed during an operation of repression aimed against opponents of the Pinochet regime where loss of life exceeded 3000 people. Judge Garzón had declared himself competent to examine the charges regardless of the nationality of the victims. The chief public prosecutor appealed this decision to the *Audiencia Nacional* whose panel of eleven judges upheld universal jurisdiction.⁴²⁹ The *Audiencia* also stated that ‘Spain has jurisdiction to hear the facts, derived from the principle of universal prosecution of certain offences-categorized in international law-which has been incorporated into our domestic law. Moreover, Spain has a legitimate interest in the

⁴²⁸ *R v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* [1999] 4 All ER 897; *R v. Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No.2)* [1999] 1 All ER 577; *R v. Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No.3)* [1999] 2; All ER 97, UK House of Lords, applying the law of England and Wales, and international law. The decisions are reproduced in 38 *ILM* (1998) 1302; 38 *ILM* (1999) 430; and 38 *ILM* (1999) 581. For an excellent summary of the case see Robert Cryer ‘Pinochet’ in (Cassese, *The Oxford Companion*) (*supra*) 872-875

⁴²⁹ Luc Reydamas (Universal Jurisdiction) (*supra*) 185

exercise of jurisdiction, as more than fifty Spaniards were killed or disappeared in Chile, victims of the repression denounced in the record.⁴³⁰ All the victims were originally Spanish. It was only later when non-Spanish citizens were added that the issue moved onto the terrain of universal jurisdiction.⁴³¹

In the UK Magistrate Ronald Bartle issued an arrest warrant. Pinochet was arrested and this led to this matter eventually being appealed to the House of Lords. This was a highly complex case that only ended after the third decision by the House of Lords. The General claimed immunity from arrest and extradition proceedings as a former head of State in respect of acts committed when he was head of State. Second, he argued that the warrants disclosed no ‘extradition crimes’ as required by the Extradition Act 1989 and the relevant international agreement, the European Convention on Extradition.⁴³² The majority of Lords found against Pinochet and agreed upon his extradition to Spain for torture. A week after the judgment it was determined by a team of Doctors that General Pinochet was too ill to be extradited and he was subsequently returned to Chile and a warm welcome from his many supporters.⁴³³ The main question in the case was whether Pinochet, who was no longer head of State (and no longer had personal immunity), still retained material immunity for the crimes contained in the warrant. Could torture be considered ‘official’ for the purposes of immunity before foreign domestic courts and the determination of this issue formed the substance of the Court’s decision?⁴³⁴ The determination of this issue is not the theme of this study, but various Lords commented in passing on universal jurisdiction. We will therefore consider some of these comments and what may be learnt from them as far as universal jurisdiction over torture is concerned. Lord Browne-Wilkinson, speaking for the majority, stated that ‘the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any State because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”’⁴³⁵ The quote was from the *Demjanjuk* case.⁴³⁶ The

⁴³⁰ Quoted in Luc Reydam's (Universal Jurisdiction) (*supra*) 186

⁴³¹ Luc Reydam's (Universal Jurisdiction) (*supra*) 185

⁴³² Paris, 13 December 1957; ETS No 24; and Luc Reydam's (Universal Jurisdiction) (*supra*) 207

⁴³³ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 294

⁴³⁴ Robert Cryer ‘Pinochet’ in (Cassese, *The Oxford Companion*) (*supra*) 875

⁴³⁵ *R v. Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No.3)* [1999] at 38 *ILM* (1999) (*supra*) at 589

only other authority for this view was, predictably, the case of *Eichmann*. On the other end of the spectrum was the dissenting opinion by Lord Slynn. Although he recognized that there had been developments in relation to international crimes, he found that ‘at this stage of the development of international law...it does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction.’⁴³⁷ Apart from these *obiter* references to universal jurisdiction it is held by authoritative commentators that many of the Law Lords had incorrectly analyzed the universal jurisdiction provisions of the Torture Convention.⁴³⁸ As Reydams points out the Convention provides for the jurisdiction of the territorial State, the State of nationality of the offender, the State of nationality of the victim and as a last resort the custodial State.⁴³⁹ Reydams argues that jurisdiction is universal in terms of the Torture Convention as far as any custodial State may prosecute a suspect, but that there can be only one custodial State.⁴⁴⁰ Reydams argues that because Pinochet was in London only the UK could base its jurisdiction on article 5(2) and that Spain’s claim was therefore *ultra vires* under the Torture Convention.⁴⁴¹ The UK was therefore entitled to accede to the extradition request but Spain could not legally enforce Pinochet’s extradition under the Convention.⁴⁴² This view, it is submitted, is correct and best corresponds to the intention of State Parties to the Convention and to current State practice on the issue. Lastly it is also interesting to note that Lord Slynn in his dissenting opinion mentions that Spain had a ‘legitimate interest in the exercise of such jurisdiction’ because more than 50 Spanish nationals had been among the victims.⁴⁴³ Garrod refers to this as an example of States proclaiming an ‘all-encompassing and expansive right’ of universal jurisdiction when there is actually a

⁴³⁶ *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985) (*supra*)

⁴³⁷ *R v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* [1999] 4 All ER 897 available at 38 *ILM* (1998) (*supra*) at 1312

⁴³⁸ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 294; Luc Reydams (Universal Jurisdiction) (*supra*) 209; MC Bassiouni (Universal Jurisdiction for International Crimes) (*supra*) 83 ‘there is a misconception that the Pinochet case was predicated on universal jurisdiction, when, in fact, the decision of the House of Lords was based upon the construction of English Law and the torture Convention, which the United Kingdom had ratified.’

⁴³⁹ Luc Reydams (Universal Jurisdiction) (*supra*) 209

⁴⁴⁰ Luc Reydams (Universal Jurisdiction) (*supra*) 209

⁴⁴¹ Luc Reydams (Universal Jurisdiction) (*supra*) 209

⁴⁴² Luc Reydams (Universal Jurisdiction) (*supra*) 209

⁴⁴³ *R v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* [1999] 4 All ER 897 available at 38 *ILM* (1998) (*supra*) at 1305

strong link with the prosecuting State.⁴⁴⁴ We can learn from *Pinochet* how the UK seeks to exercise its extradition obligations under the Torture Convention but we don't find it to support universal jurisdiction.⁴⁴⁵

3.3.2 The Zardad Case⁴⁴⁶

On 18 July 2005, *Faryadi Sarwar Zardad*, an Afghan National, living in Britain as an asylum seeker, was convicted in the *London Central Criminal Court (Old Bailey)* for conspiring to torture, and take hostages, in Afghanistan between 1991 and 1996. Zardad had been a warlord in Afghanistan, running a checkpoint between Jalalabad and Kabul, at which travelers were frequently abducted and subjected to torture. After his crimes came to light in the British media he was prosecuted. Zardad's crimes, which took place between 1991 and 1996, were found to be within the temporal jurisdiction of the Criminal Justice Act 1998.⁴⁴⁷ Afghanistan and the United Kingdom, both being parties to the Torture Convention, were bound by the obligations that flow from it. Given that the UK had an obligation under the Torture Convention either to 'extradite or prosecute', and given that no request for extradition had been received from the Afghan authorities, it fell to the UK to investigate and, if the test for prosecution was met, to prosecute Zardad. He was prosecuted, convicted and sentenced to 20 years' imprisonment.⁴⁴⁸

Nowak and McArthur cite this case as 'a *best practice example of a State willing to overcome the jurisdictional challenges involved in a universal jurisdiction prosecution*'.⁴⁴⁹ It however also shows the enormous amount of commitment, money and logistical arrangements necessary to prosecute just *one* torturer. Investigators within the Anti-Terrorism branch of the Metropolitan Police had to coordinate the

⁴⁴⁴ Matthew Garrod (The Protective Principle) (*supra*) 818; See also Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant Case* (*supra*) 165 'In the Spanish *Pinochet* case, an important connecting factor was the Spanish nationality of some of the victims.'

⁴⁴⁵ Also see MC Bassiouni (Universal Jurisdiction for International Crimes) (*supra*) 125 'Thus the *Pinochet* case, in the opinion of this writer, does not stand for universal jurisdiction, nor for that matter is the extradition request from Spain for torture based on universal jurisdiction.'

⁴⁴⁶ *R v. Zardad*, High Court Judgment of 19 July 2005, no written judgment could be obtained but for a thorough summary of the facts of the case, on which this discussion relies, see Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 305-308.

⁴⁴⁷ Criminal Justice Act 1988, Section 134 which states that 'a public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he or she intentionally inflicts severe pain or suffering on another person in the performance of purported performance of official duties'.

⁴⁴⁸ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 307

⁴⁴⁹ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 307 (emphasis original)

investigation from London while sending delegates from the Branch to Afghanistan. The responsibility for prosecution lay with two prosecutors within the Counter-Terrorism Department of the Crown Prosecution Service. British officials had to go to Afghanistan on nine occasions. The prosecution went to Afghanistan together with the police on three occasions to ensure that statements taken from the witnesses were sufficiently detailed. The prosecution also travelled with the investigators to gain an understanding of the living circumstances of the witnesses and victims in Afghanistan to better understand challenges witnesses might face in court. To overcome logistical and security challenges in locating witnesses, television and radio broadcasts were used to encourage witnesses to come forward. In the UK, cooperation between the police, Crown Prosecutors and the Home Office was necessary to facilitate the bringing of witnesses to testify. The Foreign and Commonwealth Office referred the investigators' initial request for assistance to relevant authorities in the Afghan Government, which subsequently contacted the British embassy in Kabul. From that time, all further requests for assistance were dealt with by the British embassy directly. In addition, British authorities cooperated with US military personnel because of the need to conduct investigations in an area of Afghanistan under the effective control of US military forces. Prior to the investigation, the permission of armed forces was obtained, and during the investigation in these areas US military personnel provided protection. The police relied on Interpol contact points from the Netherlands and Denmark because of their experience in dealing with international crimes committed in Afghanistan. In total, the trial was estimated to have cost over £3 million.

A few observations are in order and might prove insightful. Firstly, Zardad was present in the UK. This seems obvious, but it is essential to note that the UK did not ask for his extradition from somewhere else in order to found its jurisdiction over him. His presence was further not just for a fleeting moment. He had actually been living in the UK since 1998. This makes it much easier to institute proceedings against him and also vastly reduces the potential number of cases over which Britain needs concern itself. In the UK jurisdiction has always been and is overwhelmingly territorial.⁴⁵⁰ The UK's preference for territorial prosecutions means that they will

⁴⁵⁰ Luc Reydam's (Universal Jurisdiction) (*supra*) 202 "The territorial extent of English criminal jurisdiction is a subject that has evoked more attention from international lawyers than from domestic lawyers. Territoriality of criminal jurisdiction is so self-evident for British jurists (and by extension for most other

extradite anyone, including its own nationals, to stand trial abroad for an extraterritorial offence, even where there is no extradition treaty.⁴⁵¹ In the UK's War Crimes Act of 1991⁴⁵² and the International Criminal Court Act of 2001⁴⁵³ universal jurisdiction over (genocide, crimes against humanity and war crimes) is limited to foreigners who are either resident at the time of the offence or who become resident at the time of the offence or who become resident after the crime and still reside in the UK when the proceedings are brought.⁴⁵⁴ The Zardad situation was unique because Britain had at the time been involved in a war effort against the Taliban in Afghanistan as a result of the 11 September 2001 attacks. It was relatively easy for them to make use of TV and radio to find witnesses as they had the facilities, resources and troops at hand. Problems of evidence collection were not what they usually are, especially when the territorial State objects to and obstructs the investigations. There was obviously no opposition to their efforts by Afghanistan and no threat of a political backlash. US forces also protected and supported the prosecutors and investigators. Numerous trips were already undertaken between the two countries and that probably further reduced costs so that no additional flights had to be arranged. It is obvious that this was no small task the prosecutors undertook. It is however submitted that these were peculiar circumstances, which will almost never be repeated elsewhere. The UK is a very wealthy and powerful country in comparison to most countries in the world. Yet even they would probably not have been able to succeed in this prosecution and arrange the required logistics if they were not already active in Afghanistan and didn't have the support of US troops. Aside from their ability to launch investigations their will to do so is another matter. It is submitted, that if circumstances were not what they were, the media had not become involved, and Britain didn't have to consider public opinion regarding the war effort they would most probably never even have considered prosecution. These few comments show

common law jurists) that the subject hardly draws scholarly attention and codification is not deemed necessary.' Also see John Dugard and Christine Van den Wyngaert 'Reconciling Extradition With Human Rights' (1998) 92 *American Journal of International Law* 209

⁴⁵¹ Luc Reydams (Universal Jurisdiction) (*supra*) 202

⁴⁵² War Crimes Act of 1991, Section 1(2) 'No proceedings shall by virtue of this section be brought against any person unless he was on 8 March 1990, or has subsequently become, a British citizen or resident in the United Kingdom...'

⁴⁵³ International Criminal Court Act of 2001, Section 51(2)(b) 'This section applies to acts committed outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and Section 68(1) 'This section applies in relation to a person who commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom.'

⁴⁵⁴ Luc Reydams (Universal Jurisdiction) (*supra*) 206 'It would still be possible though to extradite non-residents or hand them over to the ICC.'

clearly why States are, in practice, ‘extremely reluctant to prosecute in terms of universal jurisdiction’. Any argument that States have a *duty* to exercise universal jurisdiction as an agent of the international community or even in terms of multi-lateral treaty provisions must also take into account how many States are actually financially and practically able to do so. If it does not, it is a superficial argument and out of touch with reality. And if *Zardad* is a rare exception then its purpose of serving as a ‘best practice example’ is defeated because most other States simply cannot follow suit.

3.3.3 Senegal and Hissène Habré

Senegal was quite vocal in its support of universal jurisdiction during the drafting of the Torture Convention.⁴⁵⁵ Thanks to Belgium they were recently reminded of their erstwhile support in the ICJ in the *Case of Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.⁴⁵⁶

The background of the matter was that Hissène Habré was the President of the Republic of Chad for eight years after taking power through a rebellion on 7 June 1982. It was alleged that during these years large-scale violations of human rights were committed, which included arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. After being overthrown on 1 December 1990 by his former defence and security adviser, Idriss Déby, Habré stayed briefly in Cameroon before being granted political asylum in Senegal. He then settled in Dakar where he is still currently living.

In 2000 seven Chadian nationals, residing in Chad, filed a complaint with a senior investigating judge in Dakar, for crimes allegedly committed during Habré’s presidency. What followed was a series of delays and start-stop proceedings which led to Belgium becoming involved, when a Belgian national of Chadian origin and other complainants filed a complaint with a Belgian investigating judge. The

⁴⁵⁵ Manfred Nowak and Elizabeth McArthur (Torture Commentary) (*supra*) 269

⁴⁵⁶ International Court of Justice 20 July 2012 (hereinafter referred to as *ICJ Belgium v. Senegal*); See for a summary of the protracted proceedings: Reed Brody ‘The Prosecution of Hissène Habré – “An African Pinochet”’ 35 *New England Law Review* (2000-2001) 321-335; Naomi Roht-Arriaza ‘Universal Jurisdiction Steps Forward, Steps Back’ 17(2) *Leiden Journal of International Law* (2004) 375-389

complaint was based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999, and the Convention against torture. The Convention was ratified by Senegal on 21 August 1986, without reservation, and became binding on it on 26 June 1987, the date of its entry into force. Belgium ratified the Convention on 25 June 1999, without reservation, and became bound by it on 25 July 1999.

A series of diplomatic interchanges occurred between Belgium and Senegal in which Belgium repeatedly asked Senegal to extradite or judge Habré, and eventually on 19 February 2009 Belgium filed proceedings before the ICJ. Belgium's final submissions to the Court were that the Court should find Senegal to have breached its obligations under Article 5(2) of the Torture Convention, and that, by failing to take action in relation to Habré's alleged crimes, Senegal has breached and continues to breach its obligations under Article 6(2) and Article 7(1) of that instrument and under certain other rules of international law. Belgium asked the Court to adjudge and declare that the Republic of Senegal is obliged to bring criminal proceedings against Habré for acts including torture and crimes against humanity and that, failing to prosecute, Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before Belgian courts.⁴⁵⁷ In a nutshell Belgium argued that Senegal did not enact national legislation "in a timely manner", enabling its judicial authorities to exercise jurisdiction over acts of torture allegedly committed abroad by a foreign national who is present in its territory.⁴⁵⁸ It also did not immediately hold a preliminary enquiry and when it didn't extradite him, it didn't submit the case to its competent authorities for the purpose of prosecution, as it should have done.⁴⁵⁹ Senegal for its part maintained that there is no dispute between the Parties and that it was fulfilling its duties in terms of the Torture Convention taking financial constraints into consideration, although not necessarily at the pace, and in the way, that Belgium preferred it.

Interestingly, Belgium also asked the ICJ to find that Senegal had breached its duty under customary international law to bring criminal proceedings against Habré for

⁴⁵⁷ *ICJ Belgium v. Senegal* paragraph 44

⁴⁵⁸ *ICJ Belgium v. Senegal* paragraph 47 and Article 5(2) of the Torture Convention

⁴⁵⁹ *ICJ Belgium v. Senegal* paragraph 49 and Article 6(2) and 7(1) of the Torture Convention

crimes against humanity, war crimes and genocide allegedly committed by him. Again Senegal contended that no dispute existed and the Court did not have jurisdiction to hear the matter.⁴⁶⁰

The Court made a distinction between the legal questions and problems of whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad, and whether there was compliance with a State's obligation under the Torture Convention. The Court found that at the time of the filing of the application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it had no jurisdiction to decide the issue. It thus conveniently limited itself to deciding the easier and less controversial questions concerning only the Torture Convention.⁴⁶¹

Senegal contended that Belgium could not invoke its international responsibility because none of the alleged victims were of Belgian nationality at the time when the acts were committed.⁴⁶² Belgium argued that it was entitled to exercise a passive personal jurisdiction after it received a complaint from a Belgian national of Chadian origin. Belgium further argued that under the Torture Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform.⁴⁶³ Interestingly, but not surprisingly, Belgium also claimed a special interest giving it a specific entitlement in this case.⁴⁶⁴ Again the Court neatly sidestepped the difficult question of special interest and only limited itself to finding on the interest that belongs to a party to a convention. The Court found that Belgium had standing as a State party to the Convention against Torture because:

‘The object and purpose of the Convention is “to make more effective the struggle against torture...throughout the world”. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity, the obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for

⁴⁶⁰ *ICJ Belgium v. Senegal* paragraph 53

⁴⁶¹ *ICJ Belgium v. Senegal* paragraphs 54 & 55

⁴⁶² *ICJ Belgium v. Senegal* paragraph 64

⁴⁶³ *ICJ Belgium v. Senegal* paragraph 65

⁴⁶⁴ *ICJ Belgium v. Senegal* paragraph 66

prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest: in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited Judgment, I.C.J. Reports* 1970, p. 32, para. 33). These obligation may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports* 1951, p. 23.) The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State Party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.⁴⁶⁵

Andenas and Weatherall argue that the Court actually meant to endorse Belgium’s special interest in the matter because of its comment that the prohibition of torture is of a *jus cogens* nature. But that it didn’t have to in the end because the ‘common interest of States parties to obligations arising under the Torture Convention-as obligations *erga omnes partes*-was sufficient to establish the standing of Belgium before the ICJ’.⁴⁶⁶ Their argument is, with respect, rather farfetched because it is not

⁴⁶⁵ *ICJ Belgium v. Senegal* paragraphs 68 & 69

⁴⁶⁶ Mads Andenas & Thomas Weatherall ‘International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012’ (2013) 62(3) *International and Comparative Law Quarterly* 760-764 ‘[O]bligations in the Torture Convention which parallel obligations *erga omnes*, have, at a minimum, a legal effect commensurate to the obligations *erga omnes* they codify, which for present purposes permit any State to which the obligation is owed to invoke the international responsibility of the State in breach. To maintain otherwise would be to suggest that obligations to prevent and punish articulated by instruments codifying preemptory norms, such as the Torture Convention, do not go so far as the *erga omnes* obligations to which they give expression. The perverse effect of such reasoning in this instance would be to deny Belgium standing to invoke Senegal’s responsibility for breaching an obligation *erga omnes* because the specific obligation invoked, to punish violations of the prohibition against torture, is articulated in a convention

what the Court said. If the Court meant to find that Belgium would always have a special interest as an injured State because the prohibition of torture is of a *jus cogens* nature then it would have said so. And, what is more, it would then not have found that '[i]f a special interest were required for that purpose, in many cases no State would be in a position to make such a claim'.⁴⁶⁷ It is submitted that the Court didn't pronounce a view on the matter because it is a controversial question with an answer that is anything but settled under international law.

Belgium argued that *aut dedere aut judicare* under the Torture Convention means that if a State does not opt for extradition, its obligation to prosecute remains unaffected. It would thus, according to Belgium, only be, if for one reason or another, a State concerned does not prosecute, and it had received a request for extradition, that it has to extradite if it is to avoid being in breach of its obligation.⁴⁶⁸ Senegal agreed that the Convention required it to prosecute Habré, and they submitted that they had followed the required legal procedure, but that they had no obligation to Belgium under the Convention to extradite him.⁴⁶⁹ The Court found that '[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.'⁴⁷⁰

The Court also voiced the opinion that the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). The Court mentioned as support for this view widespread international practice, the *opinio juris* of States, international instruments of universal application, the fact that most States had introduced domestic law to that effect and that acts of torture are regularly denounced.⁴⁷¹

The Court found that Senegal's failure to adopt, until 2007, the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the

established to remove barriers to the performance of the obligation in question. The ICJ was right to reject such a regressive understanding of the conventional expression of obligations arising from a peremptory norm in this instance'.

⁴⁶⁷ ICJ *Belgium v. Senegal* paragraph 69

⁴⁶⁸ ICJ *Belgium v. Senegal* paragraph 92

⁴⁶⁹ ICJ *Belgium v. Senegal* paragraph 93

⁴⁷⁰ ICJ *Belgium v. Senegal* paragraph 95

⁴⁷¹ ICJ *Belgium v. Senegal* paragraph 99

implementation of its other obligations under the Convention. The Court further found that Senegal was in breach of its obligation under Article 6(2) of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Habré, as well as of the obligation under Article 7(1) to submit the case to its competent authorities for the purpose of prosecution.⁴⁷² The Court found that Senegal had to cease its continuing wrongful act and without further delay take the necessary measures to submit the case to its competent authorities for the purpose of prosecution.⁴⁷³ The Court also found that:

‘The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State Party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.’⁴⁷⁴

This paragraph was a snub of most all of what Belgium was hoping to achieve in this matter.⁴⁷⁵ Belgium had repeatedly said that Senegal should prosecute Habré and that if it didn’t want to it should extradite him to them so they could prosecute him. Obviously Belgium was trying to achieve more than simply bring Habré to book for his crimes. They were trying to create international precedent through this matter that would enable any State, like them, who took their “human rights responsibilities” seriously, to request extradition of human rights offenders where they were living comfortably in States that were protecting them from prosecution. The Court, however, without saying so directly, found that Belgium was not entitled to request extradition in this matter. Otherwise it would clearly have said that Belgium may request extradition or would even have ordered such extradition based on Senegal’s procrastination and Belgium’s eagerness to prosecute. There is after all no guarantee that Senegal will now stop delaying and prosecute Habré. Instead the Court found that the only country that may request extradition is ‘a State which has *jurisdiction in some capacity* (emphasis mine), pursuant to Article 5 of the Convention, to prosecute and try him’. Article 5, we may recall, only allows for jurisdiction to be exercised by

⁴⁷² *ICJ Belgium v. Senegal* paragraph 119

⁴⁷³ *ICJ Belgium v. Senegal* paragraph 121

⁴⁷⁴ *ICJ Belgium v. Senegal* paragraph 120 and paragraph 3.3 above

⁴⁷⁵ This also corresponds with the argument set out in Paragraph 3.1 above

a State when the offence was committed on its territory, or where the offender or victim is a national of that State, or when the offender is present on its territory and it does not extradite him. If an offender is present in the territory of a State it would not need to request extradition. This leaves only States where the offence was committed or where the offender or victim is a national of that State with the option of requesting extradition. It is submitted that if anyone was still uncertain as to the Court's sentiments regarding Belgium's argument as to its sharing with the international community a special interest in this matter and Senegal's duties in terms of international customary law, that by this comment the Court made the position clear. That is why the finding that Belgium's only standing to insist on Senegal's performance of its duties, was based on its being a party to the Torture Convention. Not because it was an injured party with a special interest, and not because Senegal had duties under international customary law to prosecute or extradite Habré. According to the Court, Belgium, or other countries in future, would not be able to ask for extradition unless it had a real link to the crimes as envisaged in Article 5.⁴⁷⁶

Judge Abraham dealt with the issue raised by Belgium of whether Senegal was required in terms of customary international law to prosecute Habré before its courts, if it did not extradite him, for acts that could be characterized as war crimes, crimes against humanity and genocide. He found that a dispute clearly existed between the parties regarding the application of customary international law and the Court should

⁴⁷⁶ For a similar observation see Claire Nielsen 'Prosecution or Bust: The Obligation to Prosecute Under the Convention Against Torture' (July 2013) 72:2 *The Cambridge Law Journal* 243 'The outcome of the Courts analysis of these obligations is not, however, as encouraging. In holding that only submission for prosecution, and not extradition, is an obligation under CAT, the court could not enquire Senegal to extradite Habré to Belgium. Extradition was merely a way for a state party to relieve itself of its obligation to prosecute. So while a non-injured state party like Belgium has the right to enforce these important obligations, it is left in the same position as before. It must wait for an unwilling state to take action. This is a very limited reading of the obligation to prosecute by the Court and means that, even after many years of failure to prosecute, no obligation to extradite arises. Given the widespread inclusion of the obligation to extradite or prosecute in international law treaties, this has significant implications for the prosecution of international crimes.'; See in a similar vein the *Declaration* of Judge Owada at paragraphs 18, 21, 22 and 23 'In addressing the question of Belgium's standing in the present case in this way, the Judgment avoids squarely addressing the primary, though more contentious, claim of Belgium on the issue of its standing under the Convention-the claim that: "Belgium is not only a 'State other than an injured State', but has also the right to invoke the responsibility of Senegal as an 'injured State'... The reluctance to face the issue, however, will, in my view, inherently have legal repercussions...Belgium is entitled in its capacity as a State party to the Convention...only to insist on compliance by Senegal with the obligations under the Convention. It can go no further...Belgium is in a legal position neither to claim the extradition of Mr. Habré under Article 5, paragraph 2...[E]xtradition is nothing more than an option open to the States on whose territory an offender is present in relation to the States parties referred to in Article 5, paragraph 1, of the Convention, and not an obligation to carry out in relation to any other States parties to the Convention, including those within the category of States referred to in Article 5, paragraph 1 of the Convention'.

have ruled on this issue.⁴⁷⁷ In a convincing argument he found the Courts' failure to rule on this issue to be 'surprising', 'extremely formalistic' and 'without any weight'.⁴⁷⁸ He thus felt impelled to answer the question. He went on to find that 'there is no rule of customary international law requiring Senegal to prosecute Mr. Habré before its courts, whether for acts of torture, or complicity in torture, that are alleged against him - in that connection, there is indeed an obligation, but it is purely conventional - or for war crimes, crimes against humanity and the crime of genocide, which do not come within the scope *ratione materiae* of the convention against Torture - in that regard there is, at present, no obligation under international law'.⁴⁷⁹ His reasons for so finding are insightful for the purposes of this thesis especially on the issue of universal jurisdiction. He refers to Judge Greenwood having asked Belgium to demonstrate: '(i) that there is State practice in respect of the jurisdiction of domestic courts over war crimes and crimes against humanity when the alleged offence occurred outside the territory of the State in question and when neither the alleged offender nor the victims were nationals of that State; and (ii) that States consider that they are required, in such cases, to prosecute the alleged perpetrator of the offence before their own courts, or to extradite him'.⁴⁸⁰

Judge Abraham mentioned that the response given by Belgium did not 'come close to establishing the existence of a general practice and an *opinio juris* which might give rise to a customary obligation upon a country such as Senegal to prosecute a former leader before its courts for crimes such as those of Mr. Hissène Habré stands accused, unless it extradites him'.⁴⁸¹ He mentioned that the Courts' remark that the prohibition on torture is a part of customary international law that has even become a peremptory norm (*jus cogens*) was clearly 'a mere *obiter dictum*'.⁴⁸² He found that the Court in this case was not directly called upon to rule on the 'controversial issue of the legality of universal jurisdiction in international law'. Thus '[o]nly if the Court had found that

⁴⁷⁷ *Separate Opinion* of Judge Abraham at paragraph 12

⁴⁷⁸ *Separate Opinion* of Judge Abraham at paragraph 19 and paragraph 22 'As these are rules which, if they existed, would have universal scope, it stands to reason that it is not sufficient for the two parties before the Court to agree on the existence of those rules, and, where appropriate, their scope, for the Court to register that agreement and to apply the alleged rules in question, it is for the Court alone to say what the law is and to do so, if necessary, *ex officio* - even if it is, in fact, somewhat unusual for it to find itself in such a situation.'

⁴⁷⁹ *Separate Opinion* of Judge Abraham at paragraph 21

⁴⁸⁰ *Separate Opinion* of Judge Abraham at paragraph 24

⁴⁸¹ *Separate Opinion* of Judge Abraham at paragraph 25

⁴⁸² *Separate Opinion* of Judge Abraham at paragraph 27 and see also *Dissenting Opinion* of Judge *ad hoc* Sur at paragraph 4 '[T]he reference to *jus cogens*...a reference which is entirely superfluous and does not contribute to the settlement of the dispute...The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance is yet to be established.'

international law required States to establish universal criminal jurisdiction over the categories of offences in question would it have ruled, *a fortiori*, in respect of the legality of such jurisdiction'.⁴⁸³ He reasoned as follows:

'The question which the Court could not have avoided answering directly, had it accepted jurisdiction as I believe it should have done, is therefore the following: is there sufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity (which presupposes that they have provided their courts with the necessary jurisdiction), when there is no connecting link between the alleged offence and the forum State, that is to say, when the offence and the forum State, that is to say, when the offence was committed outside the territory of that State and neither the offender nor the victim were nationals of that State?

In my opinion, the answer to that question is very clearly and indisputably no, regardless of whether or not the suspect is present in the territory of the State in question.

Belgium in response to the question put by the Court, did indeed endeavor to demonstrate that such an obligation exists. However, it fell far short of doing so.

In a written document produced in reply to the above-mentioned question, Belgium supplied a list of States having incorporated into their domestic law provisions giving their courts "universal jurisdiction" to try war crimes committed in the course of a non-international conflict, which is the case of crimes of which Mr. Habré is accused, and crimes against humanity (or certain of those crimes). It found a total of 51. Among those States, some of them make the exercise of such jurisdiction subject to the presence of the suspect in their territory, while others do not, but the list draws no distinction between these two cases.

Nevertheless, the information thus provided is quite insufficient to establish the existence of a customary obligation to prosecute the perpetrators of such crimes on the basis of universal jurisdiction, even when limited to the case where the suspect is present in the territory of the State concerned. And this is for three reasons.

In the first place, the States in question represent only a minority within the international community, which is in any event insufficient to establish the existence of a universal customary rule.

Secondly, some of those States may have adopted such legislation on the basis of a particular interpretation of their conventional obligations, for example those under conventions of international humanitarian law regarding war crimes. Apart from the fact that such an interpretation is not universally shared, since other States parties to the same conventions have not taken similar action, such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation to establish "universal jurisdiction" outside of any conventional obligations.

⁴⁸³ *Separate Opinion* of Judge Abraham at paragraph 30

Thirdly and finally, certain States among the 51 – and probably many of them – may have decided to extend the jurisdiction of their courts over the crimes in question on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary – but solely in the belief that international law entitled them to do so. Here again the “*opinio juris*” is lacking.

Let me take France, for example, which is included in the “List of 51”, and with which I am well acquainted. In the area which interests us here, France has only given its courts “universal” jurisdiction, that is to say, without any link to where the crime was committed or the nationality of the perpetrator or the victim, in three instances: (1) for acts of torture; (2) for crimes covered by the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY); and (3) for crimes within the jurisdiction of the International Criminal Court (ICC) if the alleged offender usually resides in France. In the first case, France acted in accordance with its conventional obligations deriving from its status as party to the Convention against Torture. In the other two cases it adopted those provisions of its own free and sovereign choice, without considering as far as it was itself concerned – or asserting in relation to others – that States were required to do so. The presence of France on the list prepared by Belgium, while not erroneous, is thus not an argument for the recognition of a customary international obligation, and doubtless the same could be said for many of the other States on the list.

Belgium itself at present no longer claims that it exercises universal jurisdiction, as a general rule, over “international crimes”. Since the provisions of its Code of Criminal Procedure relating to the jurisdiction of its courts were radically modified by the Law of 5 August 2003, Belgium no longer provides those courts with jurisdiction over war crimes and crimes against humanity, except in those cases where it is required to do so under an international legal obligation; in principle, it requires a territorial or personal connection between the alleged crime and itself. A link which must normally exist on the date of the crime or, at the very least, that the suspect should have his principal residence in the territory of the Kingdom. The reason why the Belgian courts continue to investigate the complaints against Mr. Hissène Habré regarding acts other than those which could be characterized as acts of torture is that those complaints were made at a time when Belgian legislation did provide for universal jurisdiction, and because of the transitional provisions of the Law of 5 August 2003; while withdrawing universal jurisdiction almost completely for the future, the latter provided that certain pending proceedings which had been instituted on the basis of the previous legislation would not be affected by that withdrawal.⁴⁸⁴

Belgium was acting on the basis of legislation that they had themselves subsequently repealed and it is unlikely that they will in future bring another application asking the ICJ to force another State to apply universal jurisdiction. It is also only Belgium that

⁴⁸⁴ *Separate Opinion* of Judge Abraham paragraphs 31-40

has brought this kind of an application before.⁴⁸⁵ It is clear that Senegal has been extremely reluctant to comply with its obligations in terms of the Torture Convention. If it was not for Belgium forcing them to take action it is very likely that Habré would have happily lived out his days in Senegal. At the time of writing the prosecution had still not started in Senegal but has been scheduled to start in 2015 and Habré has since been arrested.⁴⁸⁶ The Court did not refer to any other States that have actually prosecuted torturers in terms of universal jurisdiction and in a sense Senegal might feel aggrieved that they were the one State singled out to be made an example of. The Senegalese example confirms the interpretation provided of States' general and often extreme reluctance to apply the universal jurisdiction provisions contained in the Torture Convention. In light of the decision we see that the duties are for States in terms of universal jurisdiction to implement legislation that enables it to investigate and prosecute foreign torturers when they are present in any territory under its jurisdiction. It however doesn't go so far as to allow States with no link to the offence to ask for extradition of the offender in order to prosecute him. After considering the approach to universal jurisdiction over torture in the United Kingdom and Senegal we may now determine the position in South Africa.

3.3.4 South Africa

South Africa became a party to the Torture Convention on 10 December 1998. On 29 July 2013 South Africa enacted the Prevention of Combating and Torture of Persons Act.⁴⁸⁷ This is an attempt to implement effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction' as a State Party to the United Nations Convention against Torture.⁴⁸⁸ Article 6(1)(c) provides for extra-territorial jurisdiction and provides the Republic with jurisdiction for acts committed outside the Republic if the accused person is 'after the commission of the offence, present in the territory of the Republic...and that person is not extradited pursuant to Article 8 of the Convention'.

⁴⁸⁵ See Sienho Yee (Concept, Logic and Reality) (*supra*) 522 describing Belgium as the captain of universal jurisdiction that has since abandoned ship.

⁴⁸⁶ 'Habré lawyers say war crimes trial 'political' *News24* (2014/04/11) available at <http://www.news24.com/Africa/News/Habre-lawyers-say-war-crimes-trial-political-20140410> (accessed 2014/04/11)

⁴⁸⁷ Act No. 13 of 2013

⁴⁸⁸ Prevention of Torture Act (*supra*) Preamble

South Africa has thus positioned itself, by implementing this legislation, to be able to fulfill its duties to exercise universal jurisdiction in terms of the Torture Convention should the need arise. We have however also seen by studying the drafting process that the Torture Convention differs from other “human rights” conventions and almost seems an accident and a definite exception to the rule as regards the duty to exercise universal jurisdiction. As such, it is submitted, that it may not be argued that the Torture Convention proves that States somehow accepted the use of universal jurisdiction over the other core crimes of genocide, war crimes and crimes against humanity. South Africa will do well to remember that States will often be reluctant to have their nationals, especially their government officials investigated and prosecuted by other countries. Prosecutors must bear in mind that internal political opposition and interference is also likely should an attempt be made to enforce the universal jurisdiction provided for in the Act. It will, as we have seen in the *Zardad* case, often be a very intricate and expensive process to exercise universal jurisdiction. This is a very relevant considering the strain on, and challenges faced by, the South African criminal justice system. All these factors must be kept in mind and a balance should be sought between them when considering a possible prosecution based on universal jurisdiction for torture. Prosecutions of this kind to date have been the rare exception internationally.

The approach here is to bring a measure of balance to popular and prevalent arguments that there is a duty on States to exercise universal jurisdiction as many other States are already doing. It is humbly submitted that this is simply not true; almost no States are doing it, and when they do it is in highly exceptional circumstances. If, in the face of strong moral arguments, critical questions are at least asked and various options in possible situations are thoughtfully considered this thesis would have served a useful purpose.

It will be discussed in detail under the discussion of the *SALC* case⁴⁸⁹, but it is submitted, that suspects in that matter should have been investigated for torture instead of for crimes against humanity. It is so that torture is often, correctly, classified under crimes against humanity. Yet it is difficult, if not impossible at this point in time, to prove a duty to prosecute crimes against humanity in terms of

⁴⁸⁹ See paragraph 5.3 *infra*

universal jurisdiction. If there is a provable duty, that may actually be enforced, to use universal jurisdiction it is for torture. This is because the Torture Convention incorporates the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer.

Chapter 4

The International Criminal Court

4.1 Introduction to the International Criminal Court

The desire by States to establish an international criminal tribunal is no new thing.⁴⁹⁰ The move gathered momentum with the establishment of the Nuremberg and Tokyo Tribunals and the subsequent trial of Nazi and Japanese war criminals. Soon after this in 1948 Article VI of the Genocide Convention stipulated that trials for genocide would take place before ‘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’. On the same day a General Assembly Resolution called upon the International Law Commission to prepare the statute of the court promised by Article VI.⁴⁹¹ Alongside the International Law Commission the General Assembly also established a committee tasked with drafting the statute of an international criminal court, and this committee submitted its report and draft statute in 1952.⁴⁹² The whole matter was postponed until a definition for aggression could be found and was then halted because of the political difficulties involving the cold war. No progress was made, especially in regard to international jurisdiction, until Trinidad and Tobago proposed the creation of an international criminal court to deal with drug trafficking in 1989 (which was also the year that the Berlin wall fell).⁴⁹³ Given the additional urgency by the worsening Yugoslav situation the International Law Commission adopted a draft statute for an international criminal court in 1994.⁴⁹⁴ In 1996 the International Law Commission adopted the final draft of its “Code of Crimes Against the Peace and

⁴⁹⁰ For an enlightening summary of the long history in this regard see William Schabas (Introduction to the ICC) (*supra*) 1-22. The discussion on the creation and provisions of the International Court relies heavily on the book on the subject mentioned (*supra*) by William Schabas.

⁴⁹¹ Study by the International Law Commission of the Questions of an International Criminal Jurisdiction, GA Res. 216 B (III)

⁴⁹² Report of the Committee on International Criminal Jurisdiction, UN Doc A/2135 (1952)

⁴⁹³ Malcolm Shaw (International Law) (*supra*) 410 and William Schabas (Introduction to the ICC) (*supra*) (10)

⁴⁹⁴ See Malcolm Shaw (International Law) (*supra*) 410 and Report of the International Law Commission on the work of its 46th session A/49/10, chapter II, paragraphs 23-41

Security of Mankind”.⁴⁹⁵ The draft statute of 1994 and the draft code of 1996 played a pivotal role in the preparation of the Rome Statute of the International Criminal Court.⁴⁹⁶ The International Law Commission draft envisioned a court with ‘primacy’ to correspond with the *ad hoc* tribunals for Yugoslavia and Rwanda, which would mean that the prosecutor would decide which matters to proceed with, with States not having any say if they wished to do a matter themselves. But it subsequently seemed that the preferred model would be one of ‘complementarity’ by which the court would only exercise jurisdiction if domestic courts were unwilling or unable to prosecute.⁴⁹⁷

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome. More than 160 States sent delegates to the Conference, in addition to many international organizations and hundreds of non-governmental organizations. Schabas mentions that the enthusiasm was astonishing with essentially all the delegations expressing their support for the concept.⁴⁹⁸ The key and difficult issues that were to be decided were contained in a draft statute and included the role of the Security Council, the list of ‘core crimes’ over which the court would have inherent jurisdiction and the scope of its jurisdiction over persons who were not nationals of States Parties. This draft was held back and only discussed on the last day. The whole matter was almost derailed when the United States insisted on a vote to decide on the acceptance of this draft. The result was 120 in favor, with twenty-one abstentions and seven votes against.⁴⁹⁹ The Statute required sixty ratifications for entry into force. The pace of ratifications was faster and more dramatic than anyone expected.⁵⁰⁰ Delays in ratification occurred mostly because States needed to undertake significant legislative changes in order to comply with the concept of ‘complementarity’ imposed by the Statute. Certain States thus first enacted the offences of genocide, crimes against humanity and war crimes, as defined in the Statute, and made provision for universal

⁴⁹⁵ Timothy L.H. McCormack and G.J. Simpson ‘The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions’ (1994) 5 *Criminal Law Forum* 1

⁴⁹⁶ William Schabas (Introduction to the ICC) (*supra*) 11

⁴⁹⁷ William Schabas (Introduction to the ICC) (*supra*) 16

⁴⁹⁸ William Schabas (Introduction to the ICC) (*supra*) 16

⁴⁹⁹ William Schabas (Introduction to the ICC) (*supra*) 21 ‘The United States, Israel and China stated that they had opposed adoption of the statute.’

⁵⁰⁰ William Schabas (Introduction to the ICC) (*supra*) 23 & 24 ‘The magic number of sixty ratifications was reached on 11 April 2002.’

jurisdiction over these crimes before ratification.⁵⁰¹ The Statute entered into force on 1 July 2002.

As an example of this amending of legislation on the part of States we may consider South Africa, who incorporated the Rome Statute into its domestic law by means of the Implementation of the Rome Statute of the International Criminal Act 27 of 2002 (the ICC Act) to give effect to its complementarity obligation under the Rome Statute.⁵⁰² Prior to the ICC Act, South Africa had not implemented any legislation on the subject of war crimes or crimes against humanity and there had also been no domestic prosecutions of international crimes in South Africa. Du Plessis points out that although customary international law forms part of South African law a court would not easily convict an accused for the commission of an international crime because of the *nullum crimen sine lege* principle.⁵⁰³ Du Plessis advances the same argument in respect of prosecutions of grave breaches of the Geneva Conventions of 1949 because South Africa had also not incorporated the Geneva Conventions into its municipal law prior to the implementation of the ICC Act. This position was challenged before the South African Constitutional Court in the *Basson* matter but the court found it unnecessary ‘to consider whether customary international law could be used...as the basis in itself for a prosecution under the common law’.⁵⁰⁴ The ICC Act takes seriously the ‘complementarity’ obligation on South Africa to investigate and prosecute the ICC offences of crimes against humanity, war crimes and genocide.⁵⁰⁵ The Preamble mentions South Africa’s commitment to bring ‘persons who commit such atrocities to justice...in a court of law of the Republic in terms of its domestic law where possible’. Section 3 of the Act further defines as one of its objects to enable, ‘as far as possible and in accordance with the principle of complementarity...the national prosecuting authority of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances’. The Rome

⁵⁰¹ William Schabas (Introduction to the ICC) (*supra*) 24 & 25

⁵⁰² Max du Plessis ‘*International Criminal Courts, the International Criminal Court, and South Africa’s Implementation of the Rome Statute*’ (Chapter 10) in John Dugard (International Law: A South African Perspective) (*supra*) 200-201

⁵⁰³ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 201 ‘Like the Rome Statute, the ICC Act does not reach back into the past. The Act provides expressly that ‘[n]o prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute.’ And Section 5(2) of the ICC Act

⁵⁰⁴ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 201 and *S v Basson* 2005 (12) BCLR 1192 (CC) paragraph 172 at footnote 147

⁵⁰⁵ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 201

Statute codified the elements of genocide, war crimes and crimes against humanity and the definitions of these crimes were incorporated directly into the South African ICC Act through a schedule appended to the Act. These crimes now form a part of South African law through the Act.⁵⁰⁶

Before we consider the grounds of jurisdiction provided for in the ICC Act for a South African court over ICC crimes we need to consider what the Rome Statute itself prescribes in this regard.

4.2 The Jurisdictional Requirements of the International Criminal Court

4.2.1 Complementarity

Under the principle of ‘complementarity’ defined in Article 17 of the Rome Statute, the Court may only proceed with a case when the State responsible for prosecution is either ‘unwilling or unable’ to proceed. What is also known as the ‘subsidiarity’ principle is sometimes discussed, in conjunction with complementarity, and applies when States have to decide whether to exercise jurisdiction or not. Should a State with a closer link to the crime be unwilling or unable to proceed jurisdiction may be considered by the third State. The first ICC prosecutor, Luis Moreno-Ocampo, explained this position by writing that the strategy would be to encourage States to initiate their own proceedings before national institutions and that the Office of the Prosecutor would only investigate where there is a clear case of failure to act by the State or States concerned.⁵⁰⁷ He said that the ‘exercise of national criminal jurisdiction is not only a right but also a duty of States.’⁵⁰⁸ He further wrote that:

‘The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of

⁵⁰⁶ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 201-202 ‘Part 1 of the Schedule to the ICC Act follows the wording of article 6 of the ICC Statute in relation to genocide; Part 2 of the Schedule mirrors article 7 of the Statute in respect of crimes against humanity; and Part 3 does the same for war crimes, as set out in article 8 of the ICC Statute.’

⁵⁰⁷ Draft Paper on Some Policy Issues before the Office of the Prosecutor, for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003 and a discussion of these concepts by William Schabas (Introduction to the ICC) (*supra*) 35-36

⁵⁰⁸ (Policy Issues before the Prosecutor) (*supra*) 4

efficiency and effectiveness since States will generally have the best access to evidence and witnesses.⁵⁰⁹

The report acknowledged that there would be instances in which national jurisdictions would not be able or willing to fulfill their primary duty of investigation and prosecution and the ICC would have to step in to close this gap.⁵¹⁰ The ICC would however not be able to deal with all matters and therefore cooperation with the ICC by States would be important.⁵¹¹ It was stated that in this way ‘complementarity should be understood as a system that concurrently protects national sovereignty and promotes State action’.⁵¹² The targets for prosecution would be ‘the leaders who bear the most responsibility for their crimes’, such as the leaders of a State. The Prosecutor would encourage national prosecutions for lower-ranking perpetrators as far as possible and that ICC jurisdiction over crimes should be limited to ‘the most serious crimes of concern to the international community as a whole’.⁵¹³

It is thus clear that in terms of ‘complementarity’ the primary duty for the prosecution of international crimes lies with the States Parties to the ICC, with the Prosecutor only stepping in where States are unwilling or unable to deal with situations and when the situations are of sufficient gravity. As William Schabas says: ‘[t]he influence of the Rome Statute will extend deep into the domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to display greater zeal in the repression of serious violations of human rights’.⁵¹⁴

Jann Kleffner, in his book on complementarity, explains that it means that national courts ‘retain primary competence to exercise jurisdiction over core crimes’ and ‘take pride of place and constitute the first line of defence in the fight against impunity’.⁵¹⁵ But in the same breath he sketches a very bleak picture of States’ attitude thus far in

⁵⁰⁹ (Policy Issues before the Prosecutor) (*supra*) 5

⁵¹⁰ (Policy Issues before the Prosecutor) (*supra*) 5

⁵¹¹ (Policy Issues before the Prosecutor) (*supra*) 4

⁵¹² (Policy Issues before the Prosecutor) (*supra*) 5

⁵¹³ (Policy Issues before the Prosecutor) (*supra*) 6

⁵¹⁴ William Schabas (Introduction to the ICC) (*supra*) 58 & 61 ‘The International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty...From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, we have now reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish.’

⁵¹⁵ Jann Kleffner (Complementarity)(*supra*) 4

practice to this responsibility.⁵¹⁶ He proceeds from the popular presumption that in suppressing the core crimes of genocide, war crimes and crimes against humanity States act not only in the interest of their immediate constituency but also on behalf of the international community as a whole.⁵¹⁷ He admits the absence of permanent, genuine enforcement mechanisms at the international level and uses this fact to argue that this is why national jurisdictions *must* fill the void and act in a national and international capacity.⁵¹⁸ His argument is not logically convincing because he, in effect, seems to argue that because we know there is such a thing as international crimes and because there are, or has been, no genuine enforcement mechanisms at the international level it can only be that national jurisdictions have to combat these crimes. But then he admits that national courts don't actually do this:

‘These expectations have only occasionally been met...Overall, however, the record of success of national criminal jurisdictions to fulfill the central task that international law assigns to them has been modest...More importantly, however, even when States have an adequate legislative framework at their disposal, they often prove unwilling or unable to enforce it...States remain completely inactive...What is more, third States have never adequately filled these deficiencies in the national suppression of core crimes by States with a direct nexus to the crime. The adjudication of core crimes on the basis of universal jurisdiction has for a long time proved a dormant concept, and its reinvigoration in recent years has been at least as cumbersome and piecemeal as the prosecution of core crimes by States more directly involved, Exclusive reliance on national suppression of core crimes, in short, has proved deficient in the fight against impunity.’⁵¹⁹

⁵¹⁶ Other authors mention the same dichotomy, see for example Harmen van der Wilt ‘Equal Standards? On the dialectics between National Jurisdictions and the International Criminal Court’ *International Criminal Law Review* 8 (2008) 230 ‘The Rome Statute is crystal clear: national jurisdictions are supposed to have precedence in the prosecution of perpetrators of international crimes. The International Criminal Court is only allowed to step in if states are either ‘unwilling’ or ‘unable’ to do the job properly. In order to accomplish this important task, states will have to improve their record in this respect, because their performance has not been impressive’.

⁵¹⁷ The authority he provides for this ‘big’ assumption is a quotation from the *Eichmann Case* and a reference to the *Guatemalan Generals Case*, Jann Kleffner (Complementarity) (*supra*) 1 & 26-27, but for a realistic and succinct declaration of exactly the opposite see Harmen van der Wilt ‘Universal jurisdiction under attack: an assessment of the African misgivings of international criminal justice, as administered by Western states’ (2011) 9 *Journal of International Criminal Justice* 1061 ‘Moreover, and despite all rhetoric about the international community being aggrieved by international crimes, the legal order of the *forum deprehensionis* is not directly affected by the crimes.’

⁵¹⁸ Jann Kleffner (Complementarity) (*supra*) 1

⁵¹⁹ Jann Kleffner (Complementarity) (*supra*) 1-2 and 42 ‘States have also frequently not established *extraterritorial jurisdiction*, especially universal jurisdiction, over (some) core crimes. This is even the case with regard to those crimes for which international law imposes a clear obligation to do so...Even when extraterritorial jurisdiction is established, its applicability has at times been limited to crimes committed in certain periods or places’

It is thus not easy to see how this situation is suddenly going to change despite all the current enthusiasm about complementarity. It seems to be the widely held hope that a new era of respect for human rights has been signaled by the creation of the ICC and this era will be ushered in and led by individual States acting in terms of complementarity. It will be discussed in more detail below but as an introduction we may briefly mention in a simplistic way that, barring a Security Council referral, for States Parties to actually be able to prosecute a matter or cooperate with an ICC request to hand an offender over to the ICC the offence would have had to occur on the territory of the State Party or one of its nationals would have had to be the offender. Thus provision is made for the principles of territoriality and active nationality but not the more drastic passive nationality or universal jurisdiction. This system from the outset does not introduce any radical formula into the equation that might lead to unprecedented or new results. What happens is only that States who have already showed their support for the ICC by becoming members may now be “forced” to deal with international crimes that happened on their territory or were committed by their nationals. If they don’t the Prosecutor might embarrass (or help them) by finding them either unwilling or unable to comply with their duties. This still does not solve or even address the problem of third States who care nothing for the ICC or for human rights.⁵²⁰ The ICC at this stage can only preach to the converted and is only able to hold those already committed to their promises. This undercuts the hope of universal jurisdiction serving its very purpose of being used as a tool to prosecute those who would otherwise never be prosecuted.

It is predicted that complementarity and the ICC will not impact on the increase of the exercise by States of universal jurisdiction. The ICC and its Prosecutor also were not given the authority to act in terms of universal jurisdiction to investigate any matter. This is again not considering a Security Council referral or the temporal and other restrictions on the ICC, which will be discussed *infra*. It is submitted that States were simply not prepared to give the Court such wide investigating powers because States (especially powerful third States who participated in the drafting process but eventually didn’t become members) were not sure they would happily abide by and tolerate this power being used against them by a Court they might later be obliged to

⁵²⁰ The Rome Statute is a treaty and only binds States Parties to it. This accords with the rule of international law set out in Article 34 of the Vienna Convention on the Law of Treaties, which reads that ‘[a] treaty does not create either obligations of rights for a third State without its consent’.

support. It is submitted that States also didn't like the prospect that they might be forced by the ICC in terms of complementarity to exercise universal jurisdiction over a situation or offender where they might not necessarily have wanted to. States in other words did not want any rules made or precedents set regarding the compulsory use of universal jurisdiction and they were willing (and this is an optimistic view for why universal jurisdiction was rejected) to reserve themselves a right to exercise universal jurisdiction if and when it suited them but not give others or the Court the right to invoke it against them. These are elementary and introductory remarks based on what has been said above but these aspects will now be considered and tested in more detail. As a start we may determine when jurisdiction is 'triggered' in terms of the Rome Statute.

4.2.2 Jurisdictional Triggers

The International Military Tribunal at Nuremberg and the international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone and Lebanon had no need for their jurisdiction to be "triggered" or activated and the prosecutors were given free rein to identify their targets as limited by the jurisdiction of the Court itself. The situation regarding the ICC is very different.⁵²¹ The Rome Statute provides three ways of 'triggering' the jurisdiction. First, a State Party may refer a situation to the Court provided this concerns the nationals or the territory of a State Party or, in the case of a non-party State, there is acceptance of the jurisdiction of the Court pursuant to Article 12(3). Secondly there is referral of a situation by the Security Council. 'Finally – and this is the great innovation – the Prosecutor may initiate charges acting *proprio motu*, that is on his or her own initiative. Here, he or she may select any situation as long as it is within the jurisdiction of the Court. In other words, he or she may choose from crimes committed on the territory of any of the more than 110 States Parties to the Statute as well as crimes committed by nationals of any of those States Parties anywhere else in the world.'⁵²² Article 13, entitled 'Exercise of jurisdiction', states:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

⁵²¹ William Schabas (Introduction to the ICC) (*supra*) 158

⁵²² William Schabas (Introduction to the ICC) (*supra*) 158

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

4.2.2.1 State Party Referral

When the Rome Statute was being drafted the provision for State Parties to refer matters was intended primarily to cater for States referring matters against other States.⁵²³ But there was not much hope for such a system resulting in many cases for the Court because it was well known, and often pointed out, that States weren't altruists and almost never referred cases against other States for committing international crimes on a bilateral basis unless they had vital interests at stake.⁵²⁴ It was therefore a tremendous surprise when the State Party referral mechanism brought the first three situations before the Court. But these were not inter-State complaints, as intended, at all. They were rather a case of States referring situations occurring within their own borders. They became known as 'self-referrals' although the States in question did not intend prosecution to be directed against themselves.⁵²⁵ The first referral, and the only one we will consider here, was by Uganda referring the situation concerning the "Lord's Resistance Army" in northern and western Uganda.⁵²⁶ Although many commentators seem to be excited that self-referrals mean that the ICC has work to do, Schabas is not enthusiastic about the concept and calls it 'superfluous' because every State that ratified the Rome Statute have already accepted the authority of the Prosecutor to investigate cases on its territory.⁵²⁷ He points out that the Ugandan referral originated in the Hague and not in Kampala, and along with this plan of the Prosecutor it meant that he had to reassure Uganda in the process that such

⁵²³ Willam Schabas (Introduction to the ICC) (*supra*) 161 'The language employed suggests that what was contemplated was a 'complainant State' 'lodg[ing] a complaint' against *another* State.'

⁵²⁴ Willam Schabas (Introduction to the ICC) (*supra*) 159

⁵²⁵ Willam Schabas (Introduction to the ICC) (*supra*) 159-160

⁵²⁶ Willam Schabas (Introduction to the ICC) (*supra*) 160-161 The second and third referrals respectively were by the DRC and the CAR each for situations brought about by rebel activities in their countries.

⁵²⁷ Willam Schabas (Introduction to the ICC) (*supra*) 165

a referral held no danger for ‘their own’ State agents.⁵²⁸ Schabas argues that if the Prosecutor intends to successfully keep encouraging self-referrals he will have to show a consistent track record of one-sided investigations directed only against anti-government forces and entities.⁵²⁹ Schabas argues convincingly that the great flaw with ‘self-referrals’ is that it results in States not shouldering their own responsibilities and simply shifting the burden to the ICC.⁵³⁰ But as we have seen this undermines complementarity with its stated purpose of assigning to States the main responsibility for preventing and punishing atrocities committed in their own territories with the ICC only stepping in when such States fail to conduct investigations or are unwilling or unable to do so. Schabas argues the Prosecutor is sending out a ‘troubling message that States may decline to assume their duty to prosecute, despite the terms of the preamble to the Statute, not to mention obligations imposed by international human rights law, by invoking the provisions of Article 14 and referring the ‘situation’ to The Hague. If the prosecutor is sincere about his desire to stimulate national systems, he might do better to send the case back, and give the State in question a lecture about its responsibilities in addressing impunity’.⁵³¹ Thus we can see that State Parties have not yet referred matters against each other to the ICC and that it is not necessarily a good thing that the ICC is currently mostly dealing with self-referrals. As we will see under the next two headings of referrals by the Security Council and the *proprio motu* powers to investigate of the Prosecutor that these have so far led to serious complications.

4.2.2.2 Security Council Referral

The jurisdiction of the Court can also be triggered through a Security Council referral. Article 13(b) authorizes the Court to exercise its jurisdiction over crimes within its jurisdiction in accordance with article 5 if ‘[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’. The Security Council is one of the principal organs of the United Nations, and it has ‘primary responsibility for the maintenance of international peace and security’.⁵³² Chapter VII

⁵²⁸ Willam Schabas (Introduction to the ICC) (*supra*) 166

⁵²⁹ Willam Schabas (Introduction to the ICC) (*supra*) 166

⁵³⁰ Willam Schabas (Introduction to the ICC) (*supra*) 166

⁵³¹ Willam Schabas (Introduction to the ICC) (*supra*) 167

⁵³² Article 24 of the Charter of the United Nations

of the Charter declares that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. In accordance with Article 23 of the Charter of the United Nations, the Security Council consists of five permanent members being China, France, Russia, the United Kingdom and the United States, and ten non-permanent members who are elected by the General Assembly from among the membership of the organization to two-year terms. Nine votes are required to adopt a resolution, but any permanent member may exercise a veto. The Relationship Agreement between the United Nations and the Court makes specific provision for cooperation where there is a Security Council referral.⁵³³ The Security Council may thus refer any situation that they consider to be a threat to international peace and security to the Prosecutor. And in turn the Court may inform the Security Council of the failure by a State to cooperate for the Security Council to consider taking appropriate action. This arrangement obviously provides for the Security Council to use universal jurisdiction to refer situations to the Court even where these situations involve States not Party to the Rome Statute.

The first example of this cooperation was when the Security Council referred the situation in Darfur, in western Sudan to the ICC.⁵³⁴ On 4 March 2009, Pre-Trial Chamber 1 issued a warrant of arrest against Sudanese President Omar al-Bashir for his alleged responsibility under article 25(3)(a) of the Statute for the crimes against humanity and war crimes (but not genocide) alleged by the Prosecution.⁵³⁵ Even the United States didn't veto the decision but only abstained in the vote. This was however only after the United States made sure that they would not be entangled

⁵³³ William Schabas (Introduction to the ICC) (*supra*) 168 and Article 17 of the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations: '1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General...

3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.'

⁵³⁴ William Schabas (Introduction to the ICC) (*supra*) 170

⁵³⁵ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 197

before the ICC in the peace process in Sudan, when in Resolution 1593 they restated the obvious in Paragraph 2 by ‘recognizing that States not party to the Rome Statute have no obligation under the Statute, [but] urges all States and concerned regional and other international organizations to cooperate fully’. Paragraph 6 similarly ‘[d]ecides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State’.⁵³⁶

It can be said that the Resolution is an attempt to define the ‘situation’ as being that in Darfur minus peacekeepers from non-party States.⁵³⁷ Schabas points out that these provisions are completely contrary to treaty provisions binding upon almost all United Nations Member States, including the United States. As he shows the four Geneva Conventions oblige a State Party ‘to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their own nationality, before its own courts’ and that the Torture Convention imposes similar duties, yet Resolution 1593 tells them to ignore these provisions.⁵³⁸ The problem is that the Security Council acts as if it has the prerogative to mandate a limit of the jurisdiction of the ICC.⁵³⁹ To determine if the Security Council is entitled to act in this way Schabas refers to Article 103 of the Charter of the United Nations that stipulates that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ Schabas argues that if this is indeed the case ‘then the ability of the Security Council to, in effect, neutralize the grave breaches provisions of the Geneva

⁵³⁶ For a discussion of how the United States always does this see Johan D van der Vyver ‘American foreign policy: Prejudices and responsibilities of the sole surviving superpower in the world’ (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 436 ‘The United States always takes an active part in the drafting of multinational treaties. It almost invariably adopts an extremely conservative position regarding the substance of those treaties, prompting other countries in a spirit of compromise to abide by less than desired arrangements and lukewarm implementation procedures. But even then, when the time for ratification comes, the United States simply refuses to play ball.’

⁵³⁷ Olympia Bekou and Robert Cryer ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’ (2007) 56 *International and Comparative Law Quarterly* 59

⁵³⁸ William Schabas (Introduction to the ICC) (*supra*) 172-173 and discussions of these Conventions in Chapter 3 (*supra*)

⁵³⁹ William Schabas (Introduction to the ICC) (*supra*) 173

Conventions puts in doubt the claims of many writers that these are norms of *jus cogens*.⁵⁴⁰ Schabas argues that paragraph 6 is certainly in conflict with the Rome Statute and when Uganda tried to refer their matter to the ICC, so as to exclude jurisdiction over certain individuals, the Prosecutor would have none of it. But when the Security Council does the same not a word is said.⁵⁴¹

Such selectivity and double standards have certainly led in part to the discontent that many African States have felt with the Security Council referral of the situation in the Sudan to the ICC and the arrest warrant against Omar al-Bashir. African States have complained that the ICC only focuses on Africa while ignoring similar violations on other continents, that is a 'hegemonic tool of western powers which is targeting or discriminating against Africans' and that it is merely an agent of neocolonialism or neo-imperialism.⁵⁴² The Sudan referral has emphasized many of the most controversial issues in international law such as it being the first time that a sitting president has been investigated for international crimes before at the ICC as provided for in article 27(1) of the Rome Statute, which provides that 'functional immunity does not apply to any individual before the ICC'.⁵⁴³

Charles Jalloh points out that African States, rightly or wrongly, conflate the ICC with powerful European States and their concern is that African officials, through tools like universal jurisdiction, are being subjected to the jurisdiction of European Courts, while they feel this to be contrary to the principle that one State may not exercise its authority on the territory of another equal sovereign and independent State under Article 2(1) of the UN Charter.⁵⁴⁴ The concerns are so serious that the African Union called on the Security Council to defer the ICC's investigation into al-Bashir in terms of article 16 of the Rome Statute asking for a suspension of prosecution or investigation for a period of up to 12 months.⁵⁴⁵ The AU went so far as to take a

⁵⁴⁰ William Schabas (Introduction to the ICC) (*supra*) 173

⁵⁴¹ William Schabas (Introduction to the ICC) (*supra*) 174

⁵⁴² Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 199 and also Charles Jalloh (AU Perspective on Universal Jurisdiction) (*supra*) 4 'In fact, recent AU statements suggest that the Hague-based criminal court is already feeling the chilling effect of the growing view among African states that universal jurisdiction and ICC jurisdiction are the same. And, worse, that the two jurisdictional devices are the new weapons of choice of former colonial powers targeting weaker African nations.'

⁵⁴³ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 198 '[S]ince Sudan is not party to the Rome Statute this has given rise to questions about 'head of state immunity under customary international law and the extent to which the Rome Statute's provisions which strip that immunity can be applied to President al-Bashir'.

⁵⁴⁴ Charles Jalloh (AU Perspective on Universal Jurisdiction) (*supra*) 29

⁵⁴⁵ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 200

resolution at a meeting in Sirte, Libya on 3 July 2009 where it called upon its members to defy the international arrest warrant issued by the ICC for al-Bashir.⁵⁴⁶ Although there is an arrest warrant in circulation for al-Bashir he has not been arrested yet and there have been reports that States like Kenya, Chad and Djibouti have failed to enforce the warrant after inviting al-Bashir to visit their territory.⁵⁴⁷

Although we have seen that the Security Council has the power to refer just about any situation to the ICC, we have seen that the first time they tried to do so it has resulted in serious tensions and allegations leveled against the Security Council, some of which, it is submitted, are not wholly unjustified. The sad thing is that it is hard to think of a more horrific example of the abuse of human rights than that currently occurring in Sudan⁵⁴⁸, but even in this clear cut case African States prefer to rather make use of the rhetoric of colonialism and ICC discrimination against African States instead of cooperating with the ICC to end the abuse. It might well be asked that if the situation in Sudan does not evoke the sympathy of neighboring States and their acceptance of duties voluntarily assumed under the Rome Statute, will there ever be any situation that will? Jalloh mentions a noticeable recent push back by African governments against notions of universality, which has inevitably resulted in the same resistance to international justice and to the ICC.⁵⁴⁹ Whatever one's personal views as to the justifiability of such action by African States it can certainly not be ignored. Jalloh, while believing universal jurisdiction to be a good thing raises pertinent concerns which should be heeded along with his warning that 'seemingly well-meaning European jurisdictions...should show sensitivity to context to avoid, or at least minimize, charges that universal jurisdiction is the new imperialism masquerading as international rule of law'.⁵⁵⁰

⁵⁴⁶ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 200; Dire Tladi 'The African Union and the International Criminal Court: the battle for the soul of international law' (2009) 34 *South African Yearbook of International Law* 57 and for South Africa's involvement see Max du Plessis and Christopher Gevers 'Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010' (2009) 34 *South African Yearbook of International Law* 4 'Thereafter, in what was undoubtedly the low-point in ICC-Africa relations, South Africa joined ranks with others at an AU meeting in Sirte, Libya in July 2009, to support an AU resolution (apparently driven by President Gadaffi) calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir.'

⁵⁴⁷ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 200

⁵⁴⁸ 'Briefing: The humanitarian situation in Darfur' *IRIN Humanitarian News and Analysis* (2013/08/15) available at <http://www.irinnews.org/report/98580/briefing-the-humanitarian-situation-in-darfur> (accessed 2014/04/28)

⁵⁴⁹ Charles Jalloh (AU Perspective on Universal Jurisdiction) (*supra*) 2-4

⁵⁵⁰ Charles Jalloh (AU Perspective on Universal Jurisdiction) (*supra*) 5 and see also Harmen van der Wilt (Universal jurisdiction under attack) (*supra*) 1088 '[T]he present author would like to end on a more somber and modest note: courts of formal colonial powers should be extremely careful in taking the lead in

All the difficulties contemplated, it is still submitted that if there is any ‘safe’, relatively uncontroversial and feasible way for States to exercise universal jurisdiction over core crimes it is when the Security Council has referred a situation to the ICC and requests UN member States to assist the Court with prosecuting suspects or delivering suspects to the Court. This is what happened with the ICTY and ICTR and in those circumstances States seemed willing to assist.⁵⁵¹ It must not be forgotten however that the former Yugoslavia and Rwanda weren’t in a position to protest and that States at the receiving end of a Security Council referral will probably still protest, but at least the prosecuting State will have some form of international legitimacy, political backing and protection for its endeavor and the inevitable backlash. Obviously this does not assist at all with an attempt to prosecute citizens of nations like China and the United States but it is the only system and solution available at the moment.

4.2.2.3 *Proprio motu* authority of the Prosecutor

During the drafting process of the Rome Statute it was felt that the Prosecutor would need to have *proprio motu* powers to independently initiate investigations or else the Court would not have much work to do. This was opposed by the United States and some other powerful States but supported by the caucus of ‘like-minded’ States and the non-governmental organizations, with the latter winning the argument.⁵⁵² Article 15 makes provision for the *proprio motu* prosecutor.⁵⁵³ But certain safeguards, such

prosecution and trial of suspects of atrocities in armed conflicts which are the legacy of their own states’ gloomy machinations’.

⁵⁵¹ The *ad hoc* Tribunals were formed under the auspices of the UN Security Council and article 25 of the Charter of the United Nations imposes a duty on all Member States ‘to accept and carry out the decisions of the Security Council in accordance with the Charter’.

⁵⁵² William Schabas (Introduction to the ICC) (*supra*) 177

⁵⁵³ Article 15 reads as follows:

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of

as a degree of oversight by the Pre-Trial Chamber and a robust version of complementarity were put in place to placate concerned opponents.⁵⁵⁴ These measures were, however, not enough for the United States and their main problem was that the territorial State might refer a matter to the ICC when an offence was committed in its territory and the offender was the national of another State and the consent of the State of nationality was not obtained.⁵⁵⁵ The Prosecutor will proceed to investigate ‘on the basis of information’ received if ‘there is a reasonable basis to believe’ that a crime falling within the jurisdiction of the Court has been or is being committed and will always consider the ‘interests of justice’. Cases are selected according to their gravity and the Prosecutor will only focus on the most serious crimes and those who bear the greatest responsibility for these crimes and will rely on national efforts in terms of the principle of complementarity for matters against other offenders.⁵⁵⁶ It was further the most foreseeable of the three triggers that the Prosecutor would receive information from individuals or organizations, rather than referrals from States.⁵⁵⁷

The first instance of the Prosecutor using his *proprio motu* powers was in 2009 when an investigation was launched into the crimes allegedly committed during the 2007-2008 post-election violence in Kenya. On 8 March 2011 ICC Pre-Trial Chamber II issued summons for six suspects on both sides of the election violence, including for the current President Uhuru Muigai Kenyatta.⁵⁵⁸ These efforts could probably not have gotten off to a worse start than it has with Kenya’s political elite responding aggressively to the ICC indictments and its Parliament passing a resolution on 22 December 2010 calling for Kenya’s withdrawal from the Rome Statute.⁵⁵⁹ ICC Prosecutors have recently admitted that they have no realistic chance of successfully prosecuting President Kenyatta in the face of the Nairobi Government’s “pure obstructionism.”⁵⁶⁰ These trends are disturbing, albeit not surprising, and show that

a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

⁵⁵⁴ William Schabas (Introduction to the ICC) (*supra*) 179-180

⁵⁵⁵ Jo Stigen ‘*The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*’ (2008) Martinus Nijhoff Publishers, Leiden, 85

⁵⁵⁶ William Schabas (Introduction to the ICC) (*supra*) 181-182 and the Report on Prosecutorial Strategy published by the Office of the Prosecutor in The Hague on 14 September 2006

⁵⁵⁷ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 55

⁵⁵⁸ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 196

⁵⁵⁹ Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 197

⁵⁶⁰ Thomas Escritt ‘Kenyatta trial doomed unless Kenya helps: ICC Prosecutors’ *Reuters* (2014/02/05) available: <http://www.reuters.com/article/2014/02/05/us-kenya-icc-hearing> (last accessed 2014/04/28)

the ICC and its first attempts at a Security Council referral and a *proprio motu* investigation by the Prosecutor are on the verge of foundering on the rocks of political opposition.⁵⁶¹

Without trying to sound pessimistic it doesn't seem unreasonable to predict that the reaction by Kenya to its leaders being prosecuted is what may be expected in the overwhelming majority of similar cases in future. It probably is too much to expect of a State Party to abide by its previous declaration of solidarity with the ICC when *they* have since become the target and this means they might very well, as a result, lose the power they hold as leaders of that country.⁵⁶² This is true especially if means of escaping such a prosecution (like a claim to notions of sovereignty or discrimination from the Courts' side) is readily at hand. It is really no more fanciful than expecting an accused, in a domestic criminal matter, to do the prosecutors work and prove himself guilty. As we see when the current leaders of a State like Kenya are prosecuted they suddenly become unwilling to cooperate with the Prosecutor and this renders him or her powerless.⁵⁶³ There is really no enforcement mechanism except a referral by the Court of the matter to the Security Council. But the Security Council will in all likelihood not act, as they by then had not seen the matter as so affecting the issues of peace and security (or their own interests to be more accurate) that they referred it in the first place.

and also BBC News 'Kenyatta appears at ICC in Hague for landmark hearing' *BBC News Africa* (2014/10/08) available: <http://www.bbc.com/news/world-africa-29530638> (last accessed 2014/10/11) 'But the trial has reached a deadlock. The prosecution accuse the Kenyan Government of withholding vital evidence, the defence say without evidence there should be no trial...Mr. Kenyatta has accused the court of being biased against African leaders...Analysts say he turned the prosecution to his advantage, portraying it as foreign intervention in Kenya's domestic affairs.'

⁵⁶¹ The phrase 'foundered on the rocks of fact' is borrowed and adapted from Alfred, P Rubin (*Actio Popularis, Jus Cogens and Offenses Erga Omnes*) (*supra*) 267

⁵⁶² Frédéric Mégret 'Why would States want to join the ICC? A theoretical exploration based on the legal nature of complementarity' in Jann K Kleffner & Gerben Korr (eds) '*Complementary Views on Complementarity*' (2006) TMC Asser Press, The Hague 3 'My realism is not of the unwavering dogmatic kind. But, conversely, my impression is that international lawyers are too quick to take for granted that States join the ICC for the grand reasons for which they claim to join the ICC. I am deeply skeptical of a certain triumphalist international law discourse which seems to assume that States should – or worse do – join the ICC just because such is the moral imperative of the times. What I want even less than being dogmatically realist, as will become apparent, is to assume uncritically that States behave spontaneously in ways designed to maximize the global common good.'

⁵⁶³ In Antonio Cassese 'On the Current Trends towards Criminal Prosecution and punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* it was said by the ICTY's first president, Antonio Cassese that 'The ICTY is very much like a giant without arms and legs-it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfill their functions.' 13. And this remains true for the ICC today.

The issue of the veto will also bedevil such an endeavor even further. We may take the civil war in Syria as an example. Should a prosecution by the ICC be contemplated at some stage in future and the Security Council is asked to intervene because of a possible lack of cooperation it is very likely that Russia, a close ally of Syria, will obstruct and veto any such efforts. From the example of Sudan we also see that not even a Security Council sanctioned investigation is any guarantee of cooperation by the State under investigation. If Kenya can rely on its sovereignty, obstructing techniques, or anything else, to avoid its leader being tried before the ICC and if Sudan and other sympathetic States can blame the ICC of being a discriminatory tool in Western hands to avoid prosecution they will do so.⁵⁶⁴ As much as commentators and other States condemn this, each such observer must contemplate how he would react if found in a similar situation. It is submitted that it can almost not be conceived of a State Party meekly accepting ICC jurisdiction if the ICC intends prosecuting its own leaders, and even less so a third State, whether there is a Security Council referral or not. The implications for the possible exercise of universal jurisdiction are not hard to see. If a 'model' State like Kenya who is actually a member of the ICC suddenly opposes the ICC to the extent that it does, how can success be expected where the prosecution of a third State, who has never pretended to swear allegiance to the ICC, is attempted?

4.3 No Universal Jurisdiction for the ICC

Against the above background we may now consider whether the ICC Prosecutor was given the power to act in terms of universal jurisdiction in prosecuting international crimes. But just before we do so we need to briefly look at the ways jurisdiction is limited in terms of the Rome Statute. We have already seen that in terms of Article 17 the Court will defer to national justice systems unless the State having jurisdiction over the specific offence is unwilling or unable genuinely to investigate and prosecute. In addition to this the Court possesses a temporal jurisdiction (*ratione temporis*), which means it cannot deal with crimes committed before the entry into

⁵⁶⁴ Johan van der Vyver (Universal jurisdiction) (*supra*) 132 describes this phenomenon well when he says: '[w]hile a particular regime feels politically secure, the persons in authority can afford to abide by the rules of good government, but once the maintenance of political control is under threat, one can never tell!'

force of the Statute, which date is 1 July 2002.⁵⁶⁵ Then there is personal (*ratione personae*) jurisdiction whereby the ICC exercises jurisdiction over nationals of a State Party who are accused of a crime, regardless of where the crime was committed.⁵⁶⁶ Territorial (*ratione loci*) jurisdiction applies and means that the Court has jurisdiction over crimes committed on the territory of States Parties, regardless of the nationality of the offender.⁵⁶⁷ Lastly as far as subject-matter (*ratione materiae*) jurisdiction goes the ICC has jurisdiction over four categories of international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. These crimes are described as ‘the most serious crimes of concern to the international community as a whole’ and the Statute calls them ‘unimaginable atrocities that deeply shock the conscience of humanity’.⁵⁶⁸

Schabas says that the four crimes subject to the jurisdiction of the ICC are international crimes because they are not usually prosecuted in ordinary criminal justice systems, but unlike earlier treaty crimes like for example piracy, the slave trade and terrorism they are not prosecuted, not because they are territorially inaccessible or have a transnational element but because they are usually left unpunished by the very State where the crime was committed. Thus the explanation is political as the State of territorial jurisdiction is unwilling to prosecute because of its own complicity in the criminal behavior.⁵⁶⁹

The ICC was created with the consent of those who are themselves subject to its jurisdiction and they have agreed that crimes committed on their territory, or by their nationals may be prosecuted.⁵⁷⁰ These two primary grounds of jurisdiction are set out in Article 12.⁵⁷¹ When jurisdiction was discussed in Rome it was an extremely

⁵⁶⁵ See in this regard Articles 24 and 11 dealing respectively with temporal jurisdiction and non-retroactivity and the exception providing for a State not Party to the Rome Statute to make an *ad hoc* declaration accepting the Court’s jurisdiction over specific crimes in accordance with Article 12(3).

⁵⁶⁶ Article 12(2)(b) and William Schabas (Introduction to the ICC) (*supra*) 76 ‘Creating jurisdiction based on the nationality of the offender is the least controversial form of jurisdiction and was the absolute minimum proposed by some States at the Rome Conference.’

⁵⁶⁷ Article 12(2)(a) and William Schabas (Introduction to the ICC) (*supra*) 81 ‘It also has jurisdiction over crimes committed on the territory of States that accept its jurisdiction on an *ad hoc* basis, in accordance with Article 12(3), as well as where jurisdiction is conferred by the Security Council, pursuant to Article 13(b) but also acting in accordance with Chapter VII of the Charter of the United Nations’.

⁵⁶⁸ See Article 5 together with the preamble to the Statute and William Schabas (Introduction to the ICC) (*supra*) 89

⁵⁶⁹ William Schabas (Introduction to the ICC) (*supra*) 89

⁵⁷⁰ William Schabas (Introduction to the ICC) (*supra*) 64

⁵⁷¹ (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

difficult and controversial issue, the issue that led to a break in the consensus.⁵⁷² During the drafting there were some who argued that what States could do on their own in their national justice systems they should also be able to do collectively in the ICC.⁵⁷³ The basis on which the ICC operates is delegated authority obtained from its State Parties.⁵⁷⁴ Schabas argues that the jurisdiction accepted by the international community for the ICC is narrower than the jurisdiction that individual States are entitled to exercise over the same crimes.⁵⁷⁵ It is narrower, for instance, because it does not provide for universal jurisdiction. Bekou and Cryer argue that it need not necessarily have been this way as States are ‘entitled to assert universal jurisdiction over international crimes’.⁵⁷⁶ Schabas is a bit more cautious and elaborates by mentioning that under customary international law universal jurisdiction could be exercised over piracy, the slave trade and traffic in women and children. Then he mentions that recent multilateral treaties provide for universal jurisdiction over hijacking, piracy, attacks upon diplomats, nuclear safety, terrorism, apartheid, torture and enforced disappearances. When he gets to genocide, war crimes and crimes against humanity he mentions that universal jurisdiction ‘is also widely accepted’ but that recent developments have left the matter not only ‘unresolved but also still in some doubt’.⁵⁷⁷

Some States during drafting argued that since they are delegating their jurisdiction to the ICC which includes their ability to exercise universal jurisdiction over the core crimes the ICC should obviously also be able to do so.⁵⁷⁸ Germany proposed a ‘pure’ form of universal jurisdiction, which would have given the ICC ‘jurisdiction over any offence committed anywhere, irrespective of whether the suspect was present in the territory of a State Party to the Statute’. Another, more moderate proposal came from South Korea. This would have seen the ICC have jurisdiction when States with territorial, nationality or passive personality jurisdiction, or the State with custody of the accused delegated their jurisdiction to the ICC. The last mentioned ground would

⁵⁷² Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 50

⁵⁷³ William Schabas (Introduction to the ICC) (*supra*) 65

⁵⁷⁴ Dapo Akande ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *Journal of International Criminal Justice* 621

⁵⁷⁵ William Schabas (Introduction to the ICC) (*supra*) 64

⁵⁷⁶ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 50

⁵⁷⁷ William Schabas (Introduction to the ICC) (*supra*) 64-65

⁵⁷⁸ William Schabas (Introduction to the ICC) (*supra*) 66

have been universal jurisdiction with presence or what is sometimes known as a conditional form of universal jurisdiction.⁵⁷⁹

There were two objections to universal jurisdiction in any of its forms and as a result neither were adopted. One objection came about because China and the United States quarreled with the legality of an international court that could exercise universal jurisdiction.⁵⁸⁰ The United States argued unconvincingly⁵⁸¹ that there was no rationale in law for such a court and insisted that the only legal basis for jurisdiction could be active personal jurisdiction, meaning that the court would only be entitled to try nationals of a State Party. This would mean that a State could protect its nationals from prosecution simply by withholding ratification.⁵⁸² The United States were not successful in this endeavor and is still not happy with the solution regarding territoriality reached at the Rome Conference because it means that the ICC can exercise jurisdiction over Americans in certain circumstances without its consent.⁵⁸³

Many others were critical of the compromise embodied by Article 12 and its failure to provide for universal jurisdiction, as they believed this would doom the Court to impotence. It was feared that the States that never faced problems would join the Court including the Scandinavians, Canada, Ireland, the Netherlands, and so on. But States facing war and internal strife, especially those in the South, would never join and thereby protect themselves from its reach, at least with regard to crimes committed in their territories. Others took the middle path and believed that the provision wasn't perfect but was all that was possible at the time.⁵⁸⁴ Bekou and Cryer mention that the criticism of the jurisdictional provisions of the ICC persists with authors contending that most of the perpetrators of egregious crimes will never be prosecuted by anyone and that the phenomenon of 'travelling tyrants' cannot be dealt with.⁵⁸⁵ What happened however was that along with a very rapid pace of acceleration the very States expected to steer clear of the ICC, because of their obvious vulnerability to prosecution, were the ones ratifying the Statute. This included States

⁵⁷⁹ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 51

⁵⁸⁰ William Schabas (Introduction to the ICC) (*supra*) 66

⁵⁸¹ See for a convincing and comprehensive rebuttal of their argument Dapo Akande (Jurisdiction over Nationals of Non-Parties) (*supra*) 622-625

⁵⁸² William Schabas (Introduction to the ICC) (*supra*) 66

⁵⁸³ William Schabas (Introduction to the ICC) (*supra*) 66

⁵⁸⁴ William Schabas (Introduction to the ICC) (*supra*) 67

⁵⁸⁵ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 52

with troubled pasts like Fiji, Sierra Leone, Cambodia, the DRC, Bosnia and Herzegovina, Croatia, Afghanistan and Burundi. Obviously this was totally unexpected and disproved the arguments of those critical of the compromise on jurisdiction in Article 12.⁵⁸⁶

Schabas wonders whether the rapid rate and number of ratifications would have happened had broad universal jurisdiction been adopted because it would have left very little initiative for States to join the Court. He argues that if universal jurisdiction applied crimes committed on the territory of States would have been subject to the Court's jurisdiction one way or another. Schabas thus argues that far from dooming the Court to impotence the limited jurisdictional scheme of Article 12 has actually helped and contributed to the high rate of ratification.⁵⁸⁷ This writer tends to agree with Schabas on this aspect and believes that a very positive result of so many States with troubled pasts becoming members of the ICC is that these States have indicated that they will not tolerate such offences again. They are making it clear that on their territories, and for their nationals, justice will in future be done. Although it will not be easy to measure, this action should have a strong deterrent effect on would be offenders residing in these countries, and if this happens, it is more than many probably could have hoped for.

Bekou and Cryer note that if the ICC had been granted universal jurisdiction it might have provided support for and helped bring about the ideal of universal justice. It could have assisted in encouraging prosecutions throughout the world with States taking a more active role in prosecuting core offences domestically.⁵⁸⁸ Yet these authors, although firmly supportive of universal jurisdiction, feel that the decision not to grant the ICC universal jurisdiction was the best one. Their reasons are enlightening. They argue firstly that because the United States was particularly hostile to any form of universal jurisdiction and promised to actively oppose the Court if it were given such jurisdiction that this would have allowed the United States and others to set their aim on this 'slightly more vulnerable target'. They point out that the *ICJ Congo v Belgium* matter placed universal jurisdiction 'a little on the back foot' and the concept is 'beleaguered enough without being further critiqued.' They advise a

⁵⁸⁶ William Schabas (Introduction to the ICC) (*supra*) 68

⁵⁸⁷ William Schabas (Introduction to the ICC) (*supra*) 68

⁵⁸⁸ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 52

period of retrenchment, which would not be available if ‘those critiques of universal jurisdiction were also apt to be employed as an anti-ICC measure’.⁵⁸⁹ They also point out that China, India and Russia have been content so far with having the United States take the lead in the fight against the ICC but they would actively join the United States very quickly if there were any risk of the ICC attempting to assert non-consensual jurisdiction over their nationals. The ICC would then find itself in a very difficult position facing the ire of three permanent members of the Security Council and one other powerful State. This would have made cooperation or even cordiality between the ICC and the Security Council very hard and might have incapacitated the ICC before it even started.⁵⁹⁰

The next reason they provide is what they term the ‘Belgium’ problem⁵⁹¹ and how the wide jurisdiction there ‘led to a plethora of politically sensitive claims being brought before the Belgian courts...which caused huge consternation internationally’. The authors predict a ‘similar furor’ had the ICC been given universal jurisdiction and the ICC Prosecutor attempted to exercise it. Thus if Belgium ‘was unable to withstand the international heat, it would be a great deal to ask the ICC to do so’.⁵⁹²

In line with this concern they mention the very practical aspect of costs involved in investigations and prosecution of crimes under universal jurisdiction. The Prosecutor has to set priorities taking into account limited resources for which he is answerable to the Assembly of States Parties. It would be difficult to defend, and speculative to launch, an investigation in situations where the nationality or territoriality State is not obliged to cooperate, hoping that a perpetrator will turn up in a State which is under obligation to transfer him to the ICC.⁵⁹³ They also mention that the use of ‘situation’ in the Rome Statute was adopted specifically to prevent one-sided trials but that universal jurisdiction, even where there was custody of a suspect, would not be able to avoid appearing to be biased as in all likelihood only a small group of one side’s suspects will be available for trial.⁵⁹⁴

⁵⁸⁹ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 54

⁵⁹⁰ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 55

⁵⁹¹ See the discussion of this aspect in detail under paragraph 3.2.2 *supra*

⁵⁹² Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 55-57

⁵⁹³ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 56-57

⁵⁹⁴ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 58-59

Bekou and Cryer also mention that the ‘ICC will not be effective unless States circumvent the lack of any real supranational enforcement system by cooperating with the ICC’. A strong cooperation system is necessary for there to be trials and convictions and for this to happen States need to assist by delivering up defendants, collecting evidence, serving documents, etc.⁵⁹⁵ They mention that for universal jurisdiction in the ICC to work cooperation by non-parties States with the ICC would have been indispensable but these third States would not take ownership and cooperation would be very unlikely.⁵⁹⁶ Cooperation with the ICC is entirely consensual and in the absence of any enforcement measures there is nothing to do about even recalcitrant States Parties, who refuse the ICC’s request for assistance.⁵⁹⁷ Lastly we may consider what the authors term the ‘complementarity paradox’, which simply means that the very same unwilling and unable States would also be the ones required to cooperate with the ICC so that there may be effective prosecutions and trials. But this is obviously an unrealistic expectation, unlikely to happen and as the authors point out there is currently no solution for this serious problem.⁵⁹⁸

Hence we see that universal jurisdiction was not conferred on the ICC. Some might say that this was mainly due to the political resistance to the concept by powerful States like the United States and China and this is very likely. But like Bekou and Cryer point out there were also practical considerations of concern to everyone and whatever the motivation for this decision was it was probably the right one.

4.4 Universal Jurisdiction for States Parties to the ICC?

It was concluded that universal jurisdiction was not conferred upon the ICC, but we must still consider where this leaves States Parties to the ICC. Does the ICC provide any incentive for them to exercise universal jurisdiction? Jann Kleffner says that the Statute does not include any express reference to universal jurisdiction and appears ‘agnostic’ in this regard, which leaves the pre-existing jurisdictional regime with

⁵⁹⁵ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 60-61 and the general obligation to cooperate contained in Article 86 of the Rome Statute: ‘States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’

⁵⁹⁶ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 66

⁵⁹⁷ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 61-63

⁵⁹⁸ Olympia Bekou and Robert Cryer (The ICC and Universal Jurisdiction: A Close Encounter?) (*supra*) 63

regard to core crimes unaltered.⁵⁹⁹ States themselves hold contrasting views with some limiting their jurisdiction to that underlying the ICC namely territoriality and nationality,⁶⁰⁰ while others have enacted universal jurisdiction.⁶⁰¹ Some believe that the establishment of universal jurisdiction over ICC crimes would be contrary to the Rome Statute and others believe that such establishment amounts to a legal duty imposed on them by the Statute.⁶⁰² Luc Reydamas finds it unbelievable that some attempt to argue that any particular State has broader jurisdiction than the ICC, because as he points out, an early justification of universal jurisdiction was precisely the absence of an international court.⁶⁰³ Kleffner argues along similar lines but then immediately contends that because the ICC cannot possibly deal with all matters universal jurisdiction might still have a role to play in preventing gaps through which perpetrators could escape.⁶⁰⁴ Based on its track record it is humbly submitted that universal jurisdiction has not played much of such a role so far. Be that as it may however, Kleffner's argument is not new, it is simply a repeat of the same timeworn argument that still doesn't tell us whether the ICC promotes universal jurisdiction or not.

Louise Arbour⁶⁰⁵, a former prosecutor at the ICTY, remarks that there is no express provision in the Rome Statute that 'requires' States to exercise their universal jurisdiction, but that the Preamble in Paragraph 6 '[r]ecalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. She believes that the Rome Statute calls for, and relies upon, the fullest exercise by States of their own international criminal jurisdiction, which includes their permissive and compulsory universal jurisdiction. But she also admits that her observations are based on speculation and that end game may depend on the Prosecutor and the ICC making the deliberate policy choice of encouraging an

⁵⁹⁹ Jann K Kleffner 'The Impact of Complementarity on National Implementation of Substantive International Law' (2004) 1 *Journal of International Criminal Justice* 106

⁶⁰⁰ Jann Kleffner (Impact of Complementarity on National Implementation) (*supra*) 107 and Section 51 of the UK International Criminal Court Act 2001

⁶⁰¹ Section 1 of Germany's Code of Crimes Against International Law of 26 June 2002, section 8(b) of Canada's Crimes Against Humanity and War Crimes Act of 29 June 2000, section 8(1)(c) of New Zealand's International Crimes and International Criminal Court Act (2000), section 268-117 of Australia's International Criminal Court (Consequential Amendments) Act 2002 in conjunction with Article 15(4) of the Criminal Code Act 1995

⁶⁰² Jann Kleffner (Impact of Complementarity on National Implementation) (*supra*) 108

⁶⁰³ Luc Reydamas (Rise and Fall) (*supra*) 7

⁶⁰⁴ Jann Kleffner (Impact of Complementarity on National Implementation) (*supra*) 108-109

⁶⁰⁵ Louise Arbour 'Will the ICC have an Impact on Universal Jurisdiction?' (2003) 1 *Journal of International Criminal Justice* 585-588

expansion of the existing universal jurisdiction of member States. She also believes that such a choice may come from a more political source namely that the States Parties may decide that it is cheaper to encourage widespread universal jurisdiction by themselves rather than fund the default jurisdiction of the ICC. She thus predicts that the express preference in the Rome Statute for domestic prosecutions may lead to States increasing their use of universal jurisdiction. One cannot be sure however and this is probably why she is so cautious in her predictions. It is submitted that it is not very likely that the ICC or the Prosecutor will openly encourage the exercise of universal jurisdiction by member States as Arbour hopes they will. If it does it is likely to exceed its own jurisdictional mandate, because it only has jurisdiction when an offence was committed by the national or on the territory of a State Party, except of course in the case of a Security Council referral. Thus if a State Party were to respond to such a call, where the ICC doesn't have jurisdiction, and it later became unable to conduct the prosecution the ICC wouldn't be able to take the matter over and the ICC would find itself on dangerous political ground even if it tried to assist such a State in other more subtle and indirect ways. The political embarrassment for a State that arrests a suspect only to realize later that it has no authority to either prosecute him or transfer the proceedings to the ICC would be also immense.

The scenario sketched by Max du Plessis provides a good example of this problem.⁶⁰⁶ He asks what happens when South Africa for instance tries to prosecute Robert Mugabe and in this regard he refers to Article 98(1) of the ICC Statute, which provides that:

The [International Criminal] Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Du Plessis goes on to argue that the South African ICC Act in Section 4(2)(a), by providing South African courts with jurisdiction over high-ranking officials, tries to cut across a major problem in international criminal law in attempting to scrap the

⁶⁰⁶ Max du Plessis 'South Africa's Implementation of the ICC Statute – An African Example' (2007) 5 *Journal of International Criminal Justice* 472-477

defence of immunity for a head of State, a Member of Parliament or a government official. Yet there is serious controversy in international law as to immunity for heads of state and other senior government members. Thus according to Du Plessis ‘a South African court faced with a claim of immunity from a serving head of state, and in light of the prevailing international and foreign case law that indicate binding customary international law, might be inclined to uphold the personal immunity of a head of state notwithstanding the provisions of Section 4(2)(a) of the ICC Act’.⁶⁰⁷ Du Plessis concludes that

‘[I]f one accepts that under international law personal immunity attaches to incumbent senior cabinet officials such as heads of state, then not only would any prosecution by South Africa under the ICC Act of a current leader of a country that is not party to the ICC Statute be possibly inconsistent with its (South Africa’s) obligations under customary international law, but the ICC would also be prevented from requesting the surrender of that person. This may in fact mean the proceedings against such a person are effectively precluded.’⁶⁰⁸

Moreover it is also very likely that such a call by the ICC for States to exercise universal jurisdiction would also very quickly turn the indifference of sleeping giants like Russia and China to open antagonism towards the ICC. The scenario envisioned by Bekou and Cryer would not be far-fetched and the ICC might lose any prospect of cooperation or even cordiality with the Security Council and three of its powerful members. Louise Arbour says that the likelihood of an ICC prosecution of a US citizen, against the wishes of the US Government, or even a Canadian or a EU citizen is ‘remote in the extreme’ and this is why national jurisdictions should fulfill this task.⁶⁰⁹ But we may well ask what will happen to the poor State so brave as to try? If there were such a State it would find itself isolated and buckle under the pressure just as Belgium has. It is my prediction that the ICC will not come out in open support of such a State for prudent and (mainly political) reasons.

We have seen that the Rome Statute contains no express reference to universal jurisdiction. Yet some writers contend that universal jurisdiction is implied in the Preamble of the Statute to the extent that it would thwart and undermine the very

⁶⁰⁷ Max du Plessis (South Africa’s Implementation of the ICC Act) (*supra*) 475

⁶⁰⁸ Max du Plessis (South Africa’s Implementation of the ICC Act) (*supra*) 476-477

⁶⁰⁹ Louise Arbour (Will the ICC have an Impact on Universal Jurisdiction?) (*supra*) 588

purpose for which the ICC was created if it were not read in such a way.⁶¹⁰ The reference is usually to sections in the Preamble that: ‘affirm 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’; determine ‘to put an end to impunity of perpetrators of these crimes’; and recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’ It seems however that inherent, even in these purposes heralded by supporters of universal jurisdiction, are also clear limits to jurisdiction. Cooperation for instance denotes the working together of States, which is the opposite of a unilateral exercise of an unlimited universal jurisdiction. One may also ask what the duty on a State to exercise *its* criminal jurisdiction means? Traditionally this would mean its territorial and maybe active nationality jurisdiction. Passive nationality is questionable and even more so is universal jurisdiction.⁶¹¹ It is highly unlikely that States would consider themselves bound or obliged to exercise universal jurisdiction as part of *its* jurisdiction in terms of the Rome Statute. Logically States would only agree to be bound to something for which they are responsible and over which they had actual control. In other words they can only be responsible for themselves and what they do, not what others do. For arguments sake let us assume that there were measures or sanctions available to the ICC to use against recalcitrant States Parties. Would States bind themselves and in so doing invite possible sanctions for failing to prosecute a crime with which they have no link and over which they probably have no control, including the suspect? I think not. It is submitted that the same applies even where the suspect is present in the State Party even for a short while. Among a myriad of possibilities, a suspect might receive a tip-off enabling him to leave before the authorities have a chance to obtain a warrant. Were a State bound in terms of the ICC to arrest the suspect it would run such a great risk of sanctions that they would probably contact the suspect themselves and kindly request him not to visit. Where would the line be drawn and when may the ICC find that a State has violated its duty in such a scenario?

⁶¹⁰ Jordan J Paust ‘The Reach of ICC Jurisdiction Over Non-Signatory Nationals’ (January 2000) 33(1) *Vanderbilt Journal of Transnational Law* 7-8

⁶¹¹ Ward Ferdinandusse ‘The Interaction of National and International Approaches in the Repression of International Crimes’ (2004) 15(5) *European Journal of International Law* 1046 ‘it is obvious that territorial jurisdiction would top that hierarchy, as it is widely seen as the strongest foundation for prosecution and the basis of criminal law. At the other end of the scale, universal jurisdiction is undoubtedly the weakest foundation’.

These are practical questions that those who argue that the ICC imposes a duty on States to exercise universal jurisdiction don't start to consider. This does not even deal with the fact that there is no proof that there is a duty on States under international law to exercise universal jurisdiction. The farthest some have gone is to try and show that even though there is no duty, there is at least a right for States to do so. But even this argument based on a fanciful construction of the *Lotus* case is far from convincing in the light of what States actually do. How then can the ICC be said to impose such a duty? The ICC only imposes a duty on its States Parties to exercise their jurisdiction over crimes committed on their territory or by their nationals. Lastly, it is not often mentioned that the Preamble also emphasizes that 'nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.' This is another express limit to the powers of the ICC and its State Parties and echoes the main protest against universal jurisdiction namely that it intervenes in the internal affairs, by undermining, the sovereignty of another State.⁶¹² This provision reads almost the same as Article 2(7) of the Charter of the United Nations that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...' No State may thus take it upon itself to interfere in the internal affairs of another State if it intends using the Rome Statute as its authority for doing so. Considering all these aspects it seems clear that it cannot be argued that the ICC imposes a duty on States Parties to exercise universal jurisdiction. As to whether it permits States Parties to exercise universal jurisdiction we also see that it contains no explicit instruction and one must agree with Kleffner that it leaves the pre-existing jurisdictional regime with regard to core crimes intact and it neither promotes nor discourages universal jurisdiction. This said the time has come to consider the position in South Africa and apply what we have learnt so far to the situation here.

⁶¹² Antonio Cassese (Current Trends) (*supra*) 11 'the reluctance of states regarding international penal enforcement is hardly surprising given that international criminal tribunals intrude on one of the most sacred areas of state sovereignty: criminal jurisdiction...international law is an edifice built on a volcano-state sovereignty.'

Chapter 5

South Africa, The ICC and Universal Jurisdiction

5.1 International law in South Africa

5.1.1 Monism and Dualism

The interaction between international and national law centers on the debate between monism and dualism. Monists contend that there is but a single system of law, with international law forming a part of it alongside the other branches of domestic law. Dualists hold that there are two essentially different systems of law, existing side by side each within its own sphere of either international or domestic law.⁶¹³ Monists thus contend that municipal courts are obliged to apply rules of international law directly and there is no need for an act of adoption or transformation. No contextual or formal change is needed for international law to be applied at a domestic level. Some traditional and extreme monists contend that international law is supreme to municipal law and that municipal law which conflicts with international law will be regarded as void. Dualists on the other hand believe that domestic courts may apply international law only if it has been ‘adopted’ by such courts, or it has been transformed into local law by legislation and the philosophy behind this approach is that international law applies primarily between States.⁶¹⁴ Dugard holds that the absolute monist position has since been qualified to ensure harmony between international and domestic law. It is called the ‘harmonization theory’ by which means customary international law is applied directly as forming part of the common law, but conflicting statutory rules and acts of State might still prevail over international law.⁶¹⁵ Scholtz argues that the monism/ dualism debate is no longer relevant and that in terms of harmonization no conflict regarding primacy arises, as each law is supreme in its own sphere. There may still however be conflicts between obligations where a State for instance has obligations in terms of the international

⁶¹³ See for a discussion of this relationship, Rosalyn Higgins ‘Problems and Process – International law and how we use it’ (1994) Clarendon Press, Oxford 205-218

⁶¹⁴ John Dugard (International Law: A South African Perspective) (*supra*) 42 and Werner Scholtz ‘A few thoughts on section 231 of the South African Constitution, Act 108 of 1996’ (2004) 29 *South African Yearbook of International Law* 204-205

⁶¹⁵ John Dugard (International Law: A South African Perspective) (*supra*) 43

sphere but does not act on these at the domestic level, the State would then breach its international duties but not violate any municipal law. Scholtz argues that a State cannot escape its international responsibilities by hiding behind deficiencies in its municipal law and it has a duty to bring its municipal law into line with its international obligations.⁶¹⁶

5.1.2 The South African legal tradition

South Africa has a Roman-Dutch and English law heritage. Roman-Dutch writers like Grotius and those after him saw international law and municipal law as components of a universal legal order founded on natural law. Grotius did not regard international law as a foreign legal system and did not draw any sharp distinction between international and municipal law. Thus Dugard argues that in South Africa under Roman-Dutch law international law formed part of municipal law.⁶¹⁷ This position did not change after British occupation and because Roman-Dutch law was retained as the common law and international law remained part of the common law it was applied directly by the courts without any statutory incorporation.⁶¹⁸ Until 1994 English law was an important part of South African public law, which included public international law and the recourse to English law confirmed the common law position regarding the relationship between international and municipal law.⁶¹⁹ The position in South Africa has thus always been much more monist than dualist.⁶²⁰ As customary international law falls under common law it forms part of South African domestic law.⁶²¹ Section 232 of the Constitution of South Africa confirms the common law position by stating that: ‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’⁶²² Section 233 provides that: ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’ Dugard argues that the common law and judicial decisions ‘are now subordinate to customary

⁶¹⁶ Werner Scholtz (A few thoughts on section 231) (*supra*) 205

⁶¹⁷ John Dugard (International Law: A South African Perspective) (*supra*) 43-44

⁶¹⁸ John Dugard (International Law: A South African Perspective) (*supra*) 44

⁶¹⁹ Gerhard, P Kemp ‘*Individual Criminal Liability for the International Crime of Aggression*’ (2010) Intersentia, Antwerp, 176

⁶²⁰ John Dugard (International Law: A South African Perspective) (*supra*) 47

⁶²¹ Gerhard Kemp (Individual Criminal Liability) (*supra*) 176

⁶²² Act 108 of 1996

international law as it is only the Constitution and Acts of Parliament that enjoy greater legal weight'.⁶²³ Kemp points out that this view corresponds to the position under English law where customary rules are considered part of the law of the land and enforced as such except insofar as they are inconsistent with Acts of Parliament or prior judicial decisions.⁶²⁴

On proving customary international law Dugard writes that regard must not only be had to Section 232 but also to judicial precedent to determine which rules of customary international law are to be applied and how they should be proved. Because international law is not seen as foreign law but as part of the common law courts may take judicial notice thereof. In practice this means that courts have regard to the judicial decisions of international tribunals and to South African and foreign domestic courts as well as to writings on international law as to 'whether or not a particular rule is accepted as a rule of customary international law on the ground that it meets the twin qualifications of *usus* (settled State practice) and *opinio juris* (practice backed by a sense of obligation that the rule is binding).⁶²⁵

5.1.3 Incorporation and transformation of treaties

It is not only customary international law, but also treaties, that form a source of international law. There are broadly speaking two methods of implementing international law, and these are incorporation and transformation. Ward Ferdinandusse describe these two positions as follows:

'Incorporation' takes place when an international rule is integrated in the national legal order, so that the judiciary can directly apply that rule. This method of incorporation promotes complete implementation of the international rule, as it cannot be modified. **Transformation** denotes the enactment of a national law that mirrors the content of the international rule, thus transforming a rule of international law in a national one. This method of transformation gives the legislature the opportunity to tailor, or even modify, the international rule to fit the peculiarities of the national legal system. Technically speaking, international law is applied

⁶²³ John Dugard (International Law: A South African Perspective) (*supra*) 50

⁶²⁴ Gerhard Kemp (Individual Criminal Liability) (*supra*) 177

⁶²⁵ John Dugard (International Law: a South African perspective) (*supra*) 52

not at all after transformation. In these cases, national courts apply national law that reproduces the content of the original international norm.⁶²⁶

As Gerhard Kemp points out is not always easy to determine which approach is followed by national systems and that one domestic system may contain elements of both incorporation and transformation that are often used interchangeably.⁶²⁷ Werner Scholtz mentions that it ‘is clear from the wording of section 231(4) of the 1996 Constitution that international agreements must be enacted before they can find municipal application in South Africa’.⁶²⁸ This position corresponds to the dictum set out by Chief Justice Steyn in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*⁶²⁹ when he stated that it was:

‘trite law...that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process...In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot effect the rights of the subject.’

Scholtz further clarifies the difference between what he calls ‘international ratification’ and ‘constitutional ratification’ as follows:

‘International ratification refers to the international process that brings the agreement into operation on the international plane through confirmation by the necessary state authority. Constitutional ratification refers to the procedure whereby the agreement receives approval of parliament and achieves municipal application. Constitutional ratification depends solely on

⁶²⁶ Ward, N Ferdinandusse ‘*Direct Application of International Criminal Law in National Courts*’ (2006) TMC Asser Press, The Hague 7 [Emphasis in the original]

⁶²⁷ Gerhard Kemp (Individual Criminal Liability) (*supra*) 179

⁶²⁸ Werner Scholtz (A few thoughts on section 231) (*supra*) 209 and Section 231 of the Constitution 108 of 1996: (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution of an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

⁶²⁹ 1965 (3) SA 150 (A) at 161C-D and this dictum was confirmed in *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 688 paragraph 26

the constitutional provisions of a state, while international ratification is an act in terms of international law where a deposit of the instrument of ratification takes place.’⁶³⁰

Treaties in South Africa are thus ‘enacted’ or ‘incorporated’ into national law and this process involves three broad stages. First, the Cabinet consents to the submission of the treaty to Parliament. A legal technical process follows where the department drafts legislation, which is then submitted to the State law advisors to ensure it complies with domestic law. The draft legislation is done by the Department of Justice. The Department of Foreign Affairs also have to make sure that the draft legislation is in line with international law and the Republic’s international relations and other obligations. The last stage happens when the legislation has to pass through Parliament in compliance with Chapter 4 of the Constitution and its provisions for the national legislative process.⁶³¹ The position is very different to the pre-1994 position where the executive had all control over the incorporation of treaties. To improve transparency and accountability the executive now retains the power to negotiate and sign treaties but Parliament has to agree to the ratification of and accession of treaties.⁶³² A ratified agreement does not automatically lead to the incorporation of international law into domestic law, but should the Republic fail to comply with the agreement it might still incur an international obligation towards the other signatory States.⁶³³ The legislature transforms treaties into domestic law in three ways:

‘In the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; and thirdly, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette.’⁶³⁴

⁶³⁰ Werner Scholtz (A few thoughts on section 231) (*supra*) 206

⁶³¹ The discussion of these stages is based on the discussion of them by Gerhard Kemp (Individual Criminal Liability) (*supra*) 179

⁶³² Hermanus, J van der Merwe ‘*The Transformative Value of International Criminal Law*’ (2012) Thesis submitted in fulfillment of the requirements for the degree of *Legum Doctor* (LLD) in the Faculty of Law at Stellenbosch University 252

⁶³³ Werner Scholtz (A few thoughts on section 231) (*supra*) 213

⁶³⁴ John Dugard (International Law: A South African Perspective) (*supra*) 55 and see also the minority judgment of Chief Justice Ngcobo at 374 paragraph 92 in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ‘An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.’

5.2 South Africa and the International Criminal Court

At the Rome Conference in 1998 South Africa was among those nations campaigning for a strong and independent ICC. South Africa signed and ratified the Rome Statute on 17 July 1998.⁶³⁵ South Africa enacted the ICC Act soon hereafter and was the first African State Party to pass legislation implementing the law of the Rome Statute⁶³⁶. According to Gerhard Kemp '[t]he Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('ICC Act, 2002') thus 'incorporated' the Rome Statute of the ICC, 1998 (a multilateral treaty to which South Africa is state party) into South African law.'⁶³⁷ The ICC Act incorporates the definitions of war crimes, crimes against humanity and genocide into South African domestic law for the first time and in order to give effect to its complementarity obligations under the Rome Statute.⁶³⁸ Before this Act, conduct consisting of genocide, crimes against humanity and war crimes may have been punished as the ordinary crimes of murder, rape and robbery for example. But because the specific new crimes were not common law or statutory crimes an act by Parliament was necessary to make such conduct a crime in South Africa and to specify the conduct constituting these crimes.⁶³⁹ Anton Katz calls the ICC Act an act of transformation.⁶⁴⁰ Gerhard Kemp agrees and points out that this is so because the drafters of the ICC Act 'have chosen to tailor the Act for South African purposes'.⁶⁴¹ Kemp mentions in this regard that although definitions of the crimes were not modified and taken directly from the Rome Statute the ICC Act also omits certain parts of the Rome Statute. The parts omitted were Article 9 (the Rome Statute on Elements of Crimes) and Part 3 of the Rome Statute on general principles of liability and defences.⁶⁴² Definitions of the core crimes were

⁶³⁵ HJ van der Merwe (Transformative value of International Criminal Law) (*supra*) 275-276 and Jessberger and Powell (Prosecuting Pinochet's) (*supra*) 345

⁶³⁶ HJ van der Merwe (Transformative value of International Criminal Law) (*supra*) 276

⁶³⁷ Gerhard Kemp (Individual Criminal Liability) (*supra*) 178-179

⁶³⁸ Gerhard Kemp (Individual Criminal Liability) (*supra*) 180; Max du Plessis (South Africa's Implementation of the ICC Statute) (*supra*) 461 and Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 200

⁶³⁹ Anton Katz 'An Act of transformation - The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) 12(4) *African Security Review* 27

⁶⁴⁰ Anton Katz (Act of transformation) (*supra*) 26

⁶⁴¹ Gerhard Kemp (Individual Criminal Liability) (*supra*) 180

⁶⁴² Gerhard Kemp (Individual Criminal Liability) (*supra*) 180; Max du Plessis (South Africa's Implementation of the ICC Statute) (*supra*) 464 and Max du Plessis in John Dugard (International Law: A South African Perspective) (*supra*) 202 'While the Act usefully incorporates the definitions of these crimes into South African domestic law; neither the ICC Act nor Schedule 1 refers specifically to article 9 of the Rome Statute on Elements of Crimes. There is nothing, however, that prevents a South African court from having regard to the Elements of Crimes, were it to be involved in the domestic prosecution of an ICC offence. However, in the interests of clarity and completeness, it is suggested that South Africa follow the example of other states parties and incorporate, by regulation, the elements of crimes.'

attached through a schedule appended to the ICC Act. Part 1 of Schedule 1 follows the wording of article 6 of the ICC Statute in relation to genocide; Part 2 of the Schedule mirrors article 7 of the Statute in respect of crimes against humanity; and Part 3 does the same for war crimes, as set out in article 8 of the ICC Statute.⁶⁴³ The preamble to the ICC Act describes South Africa as ‘an integral and accepted member of the community of nations’ and requires the Republic to honor its international obligations by ‘bringing persons who commit such atrocities to justice...in a court of law of the Republic in terms of its domestic law where possible’.

5.2.1 Co-operation with the ICC

We have seen that the ICC has no enforcement mechanisms at its disposal and it is primarily dependent on national law enforcement mechanisms. South Africa has recognized this responsibility. In conformance with the requirements of complementarity the ICC Act in Section 5 sets out the procedures for the institution of a prosecution in South African courts. At the outset the permission of the National Director of Prosecutions is required for a potential prosecution. The Cabinet member responsible for the administration of justice must then in writing, after consultation with the Chief Justice of South Africa and the National Director, designate a specialized High Court for such purpose. As Max du Plessis points out the expectation in the Act is that ‘a prosecution will take place within the Republic’.⁶⁴⁴ The Act further stipulates that should the National Director decline to prosecute a person under the Act he must provide the Director-General for Justice and Constitutional Development with full reasons for his decision. The Director-General is in turn obliged to forward this decision, together with reasons, to the Registrar of the ICC in The Hague.

As far as arrest and surrender go there are two possible kinds of warrants envisaged by the Act. Section 8 provides for a warrant issued by the ICC itself and South Africa subsequently receives a request by the ICC for the arrest and surrender of a suspect. The procedure is that the request is referred to the Director-General, with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of a person to The Hague. The Director-General then forwards this

⁶⁴³ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 201

⁶⁴⁴ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 204

request and supporting documents to a Magistrate who must endorse the ICC's warrant of arrest for execution in any part of the Republic. Section 9 deals with a request received by the Director-General from the ICC for the provisional arrest of a suspect. The Director-General then forwards this request to the National Director who applies for a warrant before a Magistrate. In both cases after arrest the person must be brought to court within 48 hours. The Magistrate must be satisfied that the person before the court is indeed the person mentioned in the warrant⁶⁴⁵, that the arrest was in accordance with local law and procedures⁶⁴⁶ and that the person's rights (in accordance with the Bill of Rights) have been respected.⁶⁴⁷

Article 93 of the Rome Statute also requires States Parties to assist the ICC by cooperating with regards to investigations and prosecutions. Part 2 of the ICC Act and Section 14 of the act set out some of these measures such as the questioning of suspects, the identification of and determination of whereabouts of persons or items, the taking of evidence, inspections *in loco* and the execution of searches and seizures are a few examples of the many contained in the Act.⁶⁴⁸

A Priority Crimes Litigation Unit (PCLU) has been established within the National Prosecuting Authority so that South Africa may fulfill its duties under the ICC Act. A Special Director of Public Prosecutions heads the PCLU. The Special Director has the tasks to head the unit and 'manage and direct the prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act.'⁶⁴⁹ As Max du Plessis points out the PCLU depends on the cooperation of the South African Police Services for the investigation of matters against alleged perpetrators.⁶⁵⁰ A Directorate for Priority Crimes Investigation (DPCI) has now also been established within the police with the powers to investigate the crimes mentioned in the ICC Act.⁶⁵¹ These two units will in practice work together to investigate and prosecute core crimes.

⁶⁴⁵ Section 10(1)(a)

⁶⁴⁶ Section 10(1)(b)

⁶⁴⁷ Section 10(1)(c)

⁶⁴⁸ See Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 206-207 for a detailed discussion of these measures of cooperation.

⁶⁴⁹ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 208

⁶⁵⁰ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 208

⁶⁵¹ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 208

5.2.2 Grounds of Jurisdiction

Under the common law South African Courts do not normally exercise extra-territorial jurisdiction for crimes that were committed outside South Africa.⁶⁵² It may even be said that there is a presumption against the extra-territorial operation of criminal law. Treason and conspiracy committed in more than one country but with a link to South Africa serve as examples of exceptions to this rule.⁶⁵³ Parliament may also provide explicitly that a Statute is to operate extra-territorially and it is doing so increasingly.⁶⁵⁴ The Torture and the Rome Statute Acts, which both provide for universal jurisdiction if the accused person is in the territory of the Republic; The Geneva Conventions Act, which provides for unlimited universal jurisdiction and lastly the Protection against Terrorism Act, which provides for limited universal jurisdiction if the person is found in the Republic are all examples.

We will now consider the jurisdictional provisions of the ICC Act in more detail. Section 4(1) creates jurisdiction for a South African court over ICC crimes by providing that '[d]espite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime is guilty of an offence and liable on conviction to a fine or imprisonment'. Section 4(3) provides for jurisdiction of a South African court, as if a crime had been committed in the Republic, where a person commits a core crime outside the territory of the Republic if:

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or

⁶⁵² Gerhard Erasmus & Gerhard Kemp (International criminal law before domestic courts) (*supra*) 76; Florian Jessberger & Cathleen Powell 'Prosecuting Pinochets in South Africa – Implementing the Rome Statute of the International Criminal Court' (2001) *South African Journal of Criminal Justice* 351

⁶⁵³ Etienne du Toit *et al* 'Commentary on the Criminal Procedure Act' (2013) 5 Juta, Cape Town, S 110 16-2A, 16-13 and Jonathan Burchell and John Milton 'Principles of Criminal Law' (2nd ed.) (1997) Juta, Cape Town 681

⁶⁵⁴ Section 128(5) of the Correctional Services Act 111 of 1998; Section 90 of the Electronic Communications and Transactions Act 25 of 2002; Sections 1, 4(1) and 4(3) of The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; Section 35 of The Prevention and Combating of Corrupt Activities Act 12 of 2004; Section 15 of The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004; Section 61 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Section 7 of The Implementation of the Geneva Conventions Act 8 of 2012 and Section 6 of The South African Prevention of Combating and Torture of Persons Act 13 of 2013.

- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

The jurisdiction of Section 4(1) is based on the principle of territoriality whereby, as we will recall, a State has jurisdiction in respect of all acts committed within its territory. Section 4(3) in providing for extra-territorial jurisdiction starts with Section 4(3)(a) providing for jurisdiction based on nationality. It is also well accepted in international law that States may extend their jurisdiction to cover their nationals for crimes committed anywhere in the world. 4(3)(b) extends jurisdiction ‘over South African residents on the basis that they have a close and substantial connection with South Africa at the time of the offence.’⁶⁵⁵ Max du Plessis points out ‘the jurisdiction in trigger (c) is grounded on the idea of universal jurisdiction’ and he goes on to describe this as:

‘jurisdiction which exists for all states in respect of certain crimes which attract universal jurisdiction by their egregious nature, and consequently over the perpetrators of such crimes on the basis that they are common enemies of mankind.’

We will recall that this is the form of universal jurisdiction referred to as ‘limited’ or ‘conditional’ universal jurisdiction. HJ van der Merwe mentions that this form of jurisdiction ‘recognizes the territorial limits of South Africa’s enforcement jurisdiction, namely the general rule that a state may not enforce its criminal laws in the territory of another state...accordingly, any state may prosecute individuals for certain crimes provided that the individual is present in the state at the time.’⁶⁵⁶

Trigger (b) of the ICC Act is superfluous because trigger (c) is automatically activated if a suspect of core crimes is simply present in South Africa. There was thus no need to require a suspect to additionally have close ties with South Africa. Considering this oversight one wonders whether providing for trigger (c) and its incumbent universal jurisdiction was completely thought through and its implications considered and understood at the time of the drafting of the ICC Act. It is admittedly a small oversight but might possibly point at a conglomeration of divergent approaches to jurisdiction put together in haste. Be that as it may, it will be argued later that only

⁶⁵⁵ Max du Plessis in John Dugard (International Law: a South African Perspective) (*supra*) 203

⁶⁵⁶ HJ van der Merwe (Transformative value of International Criminal Law) (*supra*) 278-279

providing for trigger (b) and not for trigger (c), or for trigger (c) but with certain qualifications would have been a far better choice and would still have provided for universal jurisdiction albeit in a less controversial, viable and more sustainable way.

Section 4(3)(d) provides for passive personality jurisdiction whereby a State in International law has jurisdiction over an individual who causes harm to one of its nationals overseas.

The ICC Act also imitates the Rome Statute and limits jurisdiction *ratione temporis* by not allowing for retrospective prosecutions. This also follows the rule laid down in Section 35(3)(1) of the South African Constitution which guarantees that all persons the right ‘not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed’.⁶⁵⁷

5.3 The SALC Case

5.3.1 Introduction and background to the case

On 29 October 2014 the Constitutional Court confirmed the Supreme Court of Appeal and the North Gauteng High Court in Pretoria’s rulings that ordered the South African National Prosecuting Authority and the South African Police Service to investigate the arrest and torture of political opponents of the ZANU-PF that occurred during 2007 in Zimbabwe. This was after an application was brought for the review of a decision of the Acting National Director of Public Prosecutions (the NDPP), its Head of the Priority Crimes Litigation Unit (the HPCLU) and the Acting National Commissioner of the South African Police Service (the Commissioner) not to institute an investigation into alleged crimes against humanity of torture committed by Zimbabwean police and officials against Zimbabweans in Zimbabwe, in favor of the two applicants, the South African Human Rights Litigation Centre (SALC) and the Zimbabwe Exiles Forum (the ZEF). The applicants in the matter were acting in the interest of the Zimbabwean torture victims. The SALC is an initiative of the International Bar Association and the Open Society Initiative for Southern Africa. Its aim is to provide support to human rights and public interest initiatives undertaken by

⁶⁵⁷ HJ van der Merwe (Transformative value of International Criminal Law) (*supra*) 281

domestic lawyers within the Southern African region. The ZEF aims to ‘combat impunity and achieve justice and dignity for victims of human rights violations occurring in Zimbabwe with particular emphasis on the exiled victims’.⁶⁵⁸

On 16 March 2008 the SALC sent a detailed memorandum to the HPCLU containing allegations of crimes against humanity involving mainly torture that were made against Zimbabwean officials. The memorandum alleged that named members of ‘the law and order unit’ engaged in acts of torture against members of the official opposition political party in Zimbabwe, the Movement for Democratic Change (the MDC). It was alleged that this torture occurred after a raid on Harvest House, the headquarters of the MDC, allegedly in the aftermath of a bombing incident. Other instances of abuse were also mentioned and Amnesty International and Human Rights Watch indicated that this was all part of an orchestrated attempt by the ruling party to clamp down on and punish dissidents and opposition members. The memorandum alleged that the acts of torture carried out by lower level State officials implicated senior officers, six government Ministers and Heads of Department through the doctrine of command responsibility. The memorandum suggested that the supporting affidavits contained evidence, which on a prima facie basis implicated superior officers in the Law and Order Unit. This evidence allegedly contains the testimony of doctors, lawyers and family members and they describe severe physical assaults, which included the use of truncheons, baseball bats, fan-belts and booted feet. There are accounts of victims being suspended by a metal rod between two tables; of being subjected to water boarding; and of electrical shocks being applied to the genitals of some of them. That is the background of this matter.

The Supreme Court of Appeal summarized the main issue succinctly when it said:

‘To those unfamiliar with International Criminal Law, the following instinctive question arises: What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal. Put simply, and hopefully concisely, this appeal concerns the investigative powers and obligations of the NPA and the South African Police Service in relation to alleged crimes against humanity perpetrated by Zimbabweans in

⁶⁵⁸ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168; 2014 (2) SA 42 (SCA); [2014] 1 All SA 435 (SCA) (27 November 2013) paragraph 6

Zimbabwe. It involves a consideration of the implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). Put jurisprudentially, this appeal concerns the exercise of jurisdiction by a domestic court (and the logically antecedent exercise of investigative powers by the relevant authorities) over allegation of crimes against humanity – in particular, the crime of torture – committed in another country.⁶⁵⁹

The judgment ordering the investigations into the torture was the first to apply the ICC Act in South Africa. The focus of the decision was the scope of the police and prosecution's rights and duties to investigate crimes in terms of universal jurisdiction. The judgment relied heavily on the ICC Act, which provides for universal jurisdiction in cases where a person suspected of a crime under international law committed abroad is present in South Africa. This decision was appealed to the SCA in Bloemfontein, which in essence upheld the decision and the Constitutional Court in Johannesburg has finally confirmed this ruling. The High Court case focused mainly on three aspects, namely the applicants' standing, the reviewability of the decision not to investigate, and the duty of South African authorities to investigate allegations of crimes against humanity committed in Zimbabwe. The focus will mostly be on the third of these aspects because this formed the gist of the SCA and CC judgments and it is most important for purposes of the present study.

5.3.2 The duty to investigate and the duty to prosecute

The High Court was asked to overrule the decision not to investigate and to order the respondents to initiate an investigation. The Court found that the respondents had not considered the applicable law in making their decision not to prosecute. The acting NDPP had for instance conceded that he had not even considered the provisions of the ICC Act even though he believed that a reasonable suspicion of crimes against humanity having been committed existed.⁶⁶⁰ According to the Court the police and prosecution had paid an inordinate amount of attention to politics and as a result ignored legal considerations. The Court found that such behavior would render the ICC Act virtually ineffective and completely undermine the purpose of international criminal law.⁶⁶¹ The Court found that there was a refusal to investigate, that the

⁶⁵⁹ *SALC v. National Director of Public Prosecutions* paragraph 5

⁶⁶⁰ *SALC v. National Director of Public Prosecutions* paragraphs 39 and 88-89

⁶⁶¹ *SALC v. National Director of Public Prosecutions* paragraphs 86-89

respondents discretion was misguided and was therefore liable to be set aside.⁶⁶² The Court found that there was a duty to prosecute crimes against humanity and that if this were so there must also be a duty to investigate reasonable allegations of such crimes.⁶⁶³ The Court further found that such a duty existed even when the suspects were not present in the country. Although Section 4(3)(c) of the ICC Act did require the presence of the accused before jurisdiction could be exercised this only applied to the trial and not to the preceding investigation. The Court found that if this were not so South African authorities would only be able to investigate a matter when a suspect was present in the country and would then have to suspend investigations again as soon as the suspect left the country and this would be absurd and result in an ineffective system.⁶⁶⁴

As already mentioned the High Court judgment was appealed to the Supreme Court of Appeal in Bloemfontein where the SCA upheld the findings of the High Court. On 29 October 2014 the Constitutional Court agreed in substance with the two Courts below and dismissed the appeal by the SAPS. Because a Constitutional Court ruling on a matter is more authoritative than that of the High Court or the SCA the focus of this discussion will focus more on the Constitutional Court judgment. Before the matter was heard in Bloemfontein the respondents submitted heads of argument to the Supreme Court of Appeal.⁶⁶⁵ It is insightful to consider their arguments because the SCA and the Constitutional Court in substance agreed with their line of reasoning and dismissed the appeal. As such a discussion of the respondent's heads of argument almost completely captures a discussion of the SCA and CC judgment. A critical analysis of respondent's argument, interwoven with a discussion of a few elements of the judgment not covered by the heads of argument, follows next.⁶⁶⁶

⁶⁶² *SALC v. National Director of Public Prosecutions* paragraph 84

⁶⁶³ *SALC v. National Director of Public Prosecutions* paragraphs 80-82

⁶⁶⁴ *SALC v. National Director of Public Prosecutions* paragraphs 90-91

⁶⁶⁵ Respondents' Heads of Argument available at

Error! Hyperlink reference not valid. 2FSubmissions - SALC-SCA-ZimbabweTortureCase.pdf&ei=HKeSU8aUJuGV7AauzoHoCg&usg=AFQjCNHb-s-EH5YbdMNEWlzc9CyB0zeBg&sig2=6a635L4-_b6ccxNriuZbMg&bvm=bv.68445247,d.ZGU

⁶⁶⁶ The discussion is based on the Constitutional Court Case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30 and personal notes made by the author during the judgment.

5.3.3 Respondent's Heads of Argument

The respondents had set out by narrowing the issue in dispute to the question of whether the SAPS and the NPA have the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time. According to respondents the applicant's case was that they derive their power from Section 4(3) of the ICC act and that they are only allowed to investigate such a crime if and when the suspects are present in South Africa. The respondents in turn submitted that the SAPS and NPA don't derive their power to investigate crimes against humanity from Section 4(3) of the ICC Act but rather from Section 4(1), which makes a crime against humanity a crime under South African domestic law. Hence the SAPS and NPA have constitutional and statutory powers to investigate all crimes alleged to have been committed under South African law. The second is that the SAPS and NPA have a range of statutory powers, which specifically permit and require them to investigate crimes against humanity. The respondents accepted that the SAPS and NPA may not exercise these powers of investigation on foreign territory beyond the borders of South Africa without the consent of the foreign State involved. They however argued that they may undertake an investigation within South Africa of crimes against humanity wherever they might have been committed.⁶⁶⁷

Respondents argued that the Rome Statute and the ICC 'exemplify a common understanding that certain conduct offends all humanity and hence the prosecution and prevention of such conduct is the shared responsibility of the international community'.⁶⁶⁸ They then pointed to the complementarity principle and to the preamble of the Rome Statute, which reads that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' to argue that States are obliged to not only provide assistance to the ICC, but also to undertake domestic prosecution of international crimes where they have the jurisdiction to do so.⁶⁶⁹

⁶⁶⁷ Respondents' Heads of Argument (*supra*) paragraphs 2-7

⁶⁶⁸ Respondents' Heads of Argument (*supra*) paragraph 20

⁶⁶⁹ Respondents' Heads of Argument (*supra*) paragraph 21

The argument continued that the ICC Act was enacted by Parliament to give effect to South Africa's complementarity obligations under the Rome Statute, which requires South Africa to investigate and prosecute international crimes even when committed abroad. Thus '[t]he Rome Statute obliges South Africa under international law to investigate and prosecute crimes against humanity and the ICC Act recognizes and informs this duty.'⁶⁷⁰ They then argued that 'on the basis of a variety of domestic statutory provisions the SAPS may undertake an investigation within South Africa of any crime against humanity regardless of where and by whom it is alleged to have been committed, including if it is committed outside South Africa'.⁶⁷¹ This, the respondents contended is 'compatible with customary international law, a fact confirmed by a comparative assessment of state practice'.⁶⁷²

The respondents placed much emphasis on the fact that the application did not concern South Africa's obligation to *prosecute* international crimes in South Africa, but only with the competence of the applicants to *investigate* international crimes. The respondents argued that the applicants misunderstood international law on the issue and even more fundamentally misconstrued the domestic law in this regard. They then proceeded to attempt to show how the Constitution and various other domestic acts sanction the investigation of international crimes, even extra-territorially, and equips special units in the SAPS and the NPA to do so.⁶⁷³

Respondents then quoted the applicants who argued that the court a quo's interpretation of Section 4(1) 'amounted to finding that absolute universal jurisdiction had been adopted for the investigation of the crimes created in the ICC Act' and that this finding is 'unequivocally wrong and inconsistent with the ordinary principles regulating the interpretation of statutes, domestic law and International Criminal Law'. The applicants further argued that Section 4(3) dictates the investigative power of the NPA and the SAPS and they relied on international law and universal jurisdiction to argue that international law prohibits investigations *in absentia*.⁶⁷⁴

⁶⁷⁰ Respondents' Heads of Argument (*supra*) paragraph 23

⁶⁷¹ Respondents' Heads of Argument (*supra*) paragraph 24

⁶⁷² *Ibid*

⁶⁷³ Respondents' Heads of Argument (*supra*) paragraphs 33-42

⁶⁷⁴ Respondent's Heads of Argument (*supra*) paragraphs 43-44

The respondents called the applicant's contention a red herring because they argued that the applicants 'never engage with the reality that the exercise of their investigative jurisdiction in relation to crimes committed within South Africa's borders and extraterritorially is permitted-indeed required-under our domestic law'. They argued that the domestic law on the aspect is clear and that the question is not whether section 4(3) empowers the SAPS and NPA to investigate crimes against humanity, but whether it restricts their powers of investigation. So they argued that the only purpose of Section 4(3) is 'to secure the jurisdiction of a South African court' and places no restriction on investigative powers and thus permits investigations *in absentia*. They then echo the court *a quo* in pointing out the absurdity of investigations only being allowed when a suspect is present and then being suspended as soon as he leaves. They argued that, were the entire investigation to be subject to having established the presence of an accused, there is a risk that no prosecution would ever be undertaken. They concluded on this aspect by arguing that the applicants may commence investigation on the basis of anticipated presence and that this was also what South Africa had done in the case of Omar al-Bashir when it issued a warrant for him under the ICC Act.⁶⁷⁵

The respondents then turned to a 'short discussion of international law'. They argued that the applicants were not only wrong in their interpretation of domestic law but also of international law. They attempted to make this point by referring to the distinction between jurisdiction to prescribe, enforce and adjudicate. They quoted a small section of the *Lotus Case* and argued that 'States have a wide discretion to apply their laws and exercise jurisdiction in respect of crimes beyond their borders under international law'.⁶⁷⁶ They suggest that the only question is what limitations there are on the exercise of that jurisdiction.⁶⁷⁷

With reference to the *ICJ* case of *DRC v Belgium* that 'the only prohibitive rule (repeated by the Permanent Court in the "Lotus" case) is that criminal jurisdiction should not be exercised, without permission within the territory of another State.'⁶⁷⁸ They also refer to the Constitutional Court ruling in *Kaunda* where it was stated that

⁶⁷⁵ Respondent's Heads of Argument (*supra*) paragraphs 48-49

⁶⁷⁶ *Lotus Case* (*supra*) 9

⁶⁷⁷ Respondent's Heads of Argument (*supra*) paragraphs 57-66

⁶⁷⁸ Joint Separate Opinion (*supra*) paragraphs 54-56

‘It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law.’⁶⁷⁹ Thus respondents argued that as long as enforcement jurisdiction does not occur in a foreign State, without that State’s permission, jurisdiction may be exercised lawfully. It would, according to respondents, follow that the accused does not have to be physically present in South Africa for the enforcement step of investigations to be taken. It was only adjudicative jurisdiction that would be expressly conditioned on the accused’s presence because failure by him to appear at his own trial would violate his fair trial rights.⁶⁸⁰

The discussion on international law was concluded with reference to the *Belgium v Congo* Case. They contended that the applicants omitted the *ICJ*’s key final conclusions as to the practice of universal jurisdiction. They pointed out that the Judges had stated that the lack of established practice of absolute universal jurisdiction ‘does not necessarily indicate, however, that such an exercise would be unlawful...State practice – is neutral as to the exercise of universal jurisdiction’⁶⁸¹ Respondents contended that the *ICJ* in considering State practice did not outlaw absolute universal jurisdiction but purposefully left States’ discretion on this aspect intact and that the judgment found that there is a movement toward domestic jurisdictions exercising universal jurisdiction over international crimes. According to respondents the ICC Act is a lawful part of this trend. ‘The Rome Statute **obliges** South Africa under international law to investigate and prosecute crimes against humanity and the ICC Act recognizes and gives effect to this **duty**.’ (emphasis mine)⁶⁸²

Lastly the respondents countered the applicants’ attempt to use comparative international law to show a presence requirement for prosecutions and hence arguing that it is equally applicable to investigations. In so doing respondents referred to:

- The *Institute of International Law*, which observed that ‘[a]part from acts of investigation and requests for extradition the exercise of universal jurisdiction

⁶⁷⁹ *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 at paragraph 39

⁶⁸⁰ Respondent’s Heads of Argument (*supra*) paragraphs 67-69

⁶⁸¹ *Joint Separate Opinion* paragraph 45

⁶⁸² Respondent’s Heads of Argument (*supra*) paragraphs 70-74

requires the presence of the alleged offender in the territory of the prosecuting State...'⁶⁸³

- *The Princeton Principles on Universal Jurisdiction*, which state that a judicial body may try accused persons on the basis of universal jurisdiction. 'provided the person is present before such judicial body'. But that 'does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present.'⁶⁸⁴
- *The Third Restatement of Foreign Relations Law of the United States* which proclaims that 'a state may enforce its law – whether through courts or otherwise – only if it has jurisdiction to prescribe the law sought to be enforced. It may enforce its law through the courts only if it also has jurisdiction to adjudicate, but it may take non-judicial enforcement measures...whether or not it has jurisdiction to adjudicate.'⁶⁸⁵ And so respondents argue that 'as but one example, United States law clearly recognizes States' authority to conduct investigations on domestic soil in respect of crimes committed abroad, within the confines of proper enforcement jurisdiction.'⁶⁸⁶
- With reference to *European States* respondents relied on a report by *Human Rights Watch* indicating among other things that displaced victims can act as witnesses and NGO reports and other tools will assist countries to investigate international crimes domestically without the presence of the offender and that this often happens in Europe.⁶⁸⁷ In *Norway* presence is required at the time of the indictment but not upon initiation of an investigation.⁶⁸⁸ In *Germany* it was pointed out that adjudicative jurisdiction exists where a potential defendant is present in the country or if his presence is anticipated and that presence is not necessary to commence an investigation.⁶⁸⁹ *Greek* and *Italian* universal jurisdiction cases do not require presence.⁶⁹⁰ Britain requires presence for trial

⁶⁸³ M. Christian Tomuschat, Institute of International Law 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005) paragraph 3(b) available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf

⁶⁸⁴ *The Princeton Principles (supra)* 32

⁶⁸⁵ *Third Restatement (supra)* 401 and 432

⁶⁸⁶ Respondent's Heads of Argument (*supra*) paragraph 86

⁶⁸⁷ Respondent's Heads of Argument (*supra*) paragraph 87 and Human Rights Watch '*Universal Jurisdiction in Europe: The State of the Art*' (2006) 18, No. 5(D) 13 (Human Rights Watch), available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf> (last accessed 2014/06/07)

⁶⁸⁸ Human Rights Watch Report (*supra*) 81

⁶⁸⁹ Human Rights Watch Report (*supra*) 64 and 67

⁶⁹⁰ Respondents' Heads of Argument (*supra*) paragraphs 92-93

but allow police to carry out an investigation regardless of the location of the accused.⁶⁹¹

- *The 2012 draft African Union Model National Law on Universal Jurisdiction over International Crimes* notes that a prosecution requires the presence of the accused but does not insist upon a similar requirement in the context of investigations.⁶⁹²

Respondents then pointed out how applicants had cited various reforms in European legal systems in support of the proposition that absolute universal jurisdiction is disfavored. They argued that these reforms indeed suggest a global trend against absolute universal jurisdiction in the context of adjudicative jurisdiction, but that ‘there is no single approach adopted by States with regard to a presence requirement in the context of non-judicial enforcement jurisdiction, which includes police investigations. The exact timing of when presence is required – at the stages of investigation, issuance of an arrest warrant, or trial – belongs to domestic law and policy’.⁶⁹³ Respondents argued that South Africa’s legislature made it clear that physical presence is only required for the exercise of adjudicative jurisdiction in respect of international crimes.⁶⁹⁴

Respondents’ heads concluded with the statement that ‘rigid presence requirements in law or prosecutorial policy “greatly diminish the effectiveness of universal jurisdiction laws as an ‘important reserve tool in the international community’s struggle against impunity.’”’ (emphasis original)⁶⁹⁵

5.3.4 Critical assessment of Respondents’ argument

In a sense, this entire thesis has turned out to be a critical assessment of the claims the respondents make. By the time the matter was heard on appeal in both the SCA and the CC the issues had been narrowed down to the question of whether the SAPS and

⁶⁹¹ Human Rights Watch Report (*supra*) paragraph 94

⁶⁹² Respondents’ Heads of Argument (*supra*) paragraph 96 and African Union, Meeting of Government Experts and Ministers of Justice/ Attorneys General on Legal Matters, Addis Ababa, Ethiopia “African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes” (7-15 May 2012), available at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf>. Last visited on (2014/06/10)

⁶⁹³ Respondents’ Heads of Argument (*supra*) paragraph 103

⁶⁹⁴ Respondents’ Heads of Argument (*supra*) paragraph 104

⁶⁹⁵ Respondents’ Heads of Argument (*supra*) paragraph 107

NPA have the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time. In making this the only issue it is humbly submitted that both sides missed the most important aspect of the entire matter. The result is that the SCA and the CC have only ruled on the narrow issue of the legality of investigations based on universal jurisdiction *in absentia*. The plausibility, practical effects and desirability of the ICC Act were never critically analyzed. The applicants for their part took the ICC Act at face value and from there tried to contrive an argument that the Act only makes mention of prosecutions and not investigations, a flimsy argument that ended up not convincing anyone, least of all the court. The respondents on the other hand probably breathed a sigh of relief and gladly kept the focus on the domestic implications of the ICC Act while dealing as little as possible with the controversial question of the status of prosecutions based on universal jurisdiction under international law. This completely overlooks the gaping gap between prescriptive and enforcement jurisdiction in practice.⁶⁹⁶ The respondents repeatedly labeled investigations as an enforcement step. This is however confusing because laws can be prescribed and investigations undertaken which have no chance of ever seeing the inside of a court. The line between enforcement and adjudicative jurisdiction, drawn by the respondents in this case is artificial because the goal with universal jurisdiction is obviously that the suspect be tried in a domestic court. It is because of this aspect that it really is quite hard to understand exactly what the respondents were trying to accomplish through this case. Admittedly they had little choice but to proceed in the way that they did as there had until then not been any investigation by the SAPS, nor any prospect of such investigations. But it still seems that the most that could be achieved in this way was that the SAPS and NPA would now have to domestically investigate these alleged crimes against humanity committed in Zimbabwe. It seems that political complications involved in such a step have simply been postponed to another time or situation. It would also be extraordinary if any of the suspects ever set foot in South Africa again given all the media attention that the case has evoked. The problem is that the focus has only been on the legality of prescriptive jurisdiction and in this sense seems to be little more than academic. The respondents only asked the courts to rule on what may be done but what should be done was not considered. Legal theory

⁶⁹⁶ See paragraph 2.1.4 and 2.1.5 (*supra*) and Roger O'Keefe (Clarifying the Basic Concept) (*supra*) 735-760 which discusses the distinction between prescription and enforcement

won the day and realistic political and workable considerations have all but been ignored.

It is submitted that the applicants made the mistake of trying to argue that they are not allowed to investigate these crimes. They might however have had more success by showing how difficult their position is made if they have to investigate any and all crimes against humanity brought to their attention by sometimes overeager, and sometimes blatantly biased, human rights groups. They could have argued that this is not practically possible and is not expected of any State anywhere in terms of international law. They could have argued that the ICC Act is illogical and impractical on this aspect and based on a fundamental misunderstanding of international law and even more-so on the jurisdictional regime of the ICC. This might have led to the Act being revisited, and perhaps even amended, which would have provided more clarity and certainty on the SAPS and NPA's role instead of a simple finding that it is not illegal for them to conduct such investigations.

5.3.4.1 Assumption that certain conduct offends all humanity and prosecution becomes a shared responsibility

Respondents argued, rather predictably, that the Rome Statute and the ICC 'exemplify a common understanding that certain conduct offends all humanity and hence the prosecution and prevention of such conduct is the shared responsibility of the international community'.⁶⁹⁷ To realize that this is incorrect one only has to ask that if this were so, why the Rome Statute does not provide for universal jurisdiction? The respondents were trying to show that at some stage, or more specifically when the Rome Statute was drafted, most nations had agreed that certain conduct offends all humanity and everyone now regards it as their responsibility to prosecute these crimes simply because of the serious nature of such offences. This thesis has however shown that there was never such a stage or such a decision, not even during the drafting of the ICC Statute. In this regard it is submitted that since the logical precursor of universal jurisdiction *in absentia* is a belief of shared responsibility for the prosecution of core crimes, the well-known fact that universal jurisdiction *in absentia* has never been exercised, or accepted, proves that the notion of shared responsibility

⁶⁹⁷ Respondent's Heads of Argument (*supra*) paragraph 20

for the prosecution of core crimes is a fiction. The respondents thus skipped quite a few steps in trying to show that universal jurisdiction is an acceptable base of international jurisdiction. They simply asserted that it *is* well founded and point to the Rome Statute and the creation of the ICC as proof of this fact.

5.3.4.2 Complementarity

The respondents then made the briefest mention of complementarity and argued that the ICC Act was enacted by Parliament to give effect to South Africa's complementarity obligations under the Rome Statute, which requires South Africa to investigate and prosecute international crimes even when committed abroad. They also said that '[t]he Rome Statute obliges South Africa under international law to investigate and prosecute crimes against humanity and the ICC Act recognizes and informs this duty.'⁶⁹⁸

One must be alert and careful to notice that respondents didn't say that the Rome Statute and complementarity *requires* and *obliges* South Africa to perform its *duty* to exercise *universal jurisdiction* over crimes against humanity. They couldn't have said that there is such a duty because it simply would not have been true.⁶⁹⁹ But the impression is nonetheless cleverly created that there is such an international duty on South Africa. The impression is further reinforced by the respondent's immediate jump to, and subsequent focus on, the domestic law that requires South Africa to exercise universal jurisdiction. The result is that it appears as if the reference to universal jurisdiction in the ICC Act was somehow derived from an international obligation to provide for universal jurisdiction. Of course there is no such obligation.⁷⁰⁰

⁶⁹⁸ Respondents' Heads of Argument (*supra*) paragraph 23

⁶⁹⁹ See paragraph 4.2.1 (*supra*) where it was stated that barring a Security Council referral, for States Parties to actually be able to prosecute a matter or cooperate with an ICC request to hand an offender over to the ICC the offence would have had to occur on the *territory* of the State Party or one of *its nationals* would have had to be the offender. Thus provision is made for the principles of territoriality and active nationality but not the more drastic passive nationality or universal jurisdiction.

⁷⁰⁰ Gerhard Werle and Christoph Bornkamm 'Torture in Zimbabwe under Scrutiny in South Africa - The Judgment of the North Gauteng High Court in *SALC v. National Director of Public Prosecutions*' *Journal of International Criminal Justice* 11 (2013) 668-669 '[w]hen it comes to crimes against humanity, as alleged in the present case, this duty is generally regarded as being incumbent only on the state where the crime was committed. **Third states exercising universal jurisdiction do not have a duty to prosecute; they merely have a right to do so...** Thus under this general rule, South Africa was not obliged to proceed against the alleged perpetrators of crimes committed in Zimbabwe in the present case. It is therefore quite surprising that the Court relied on South Africa's 'international obligation to ... prosecute' crimes against

The impression obviously stuck because, without further ado, and under the rubric of ‘complementarity’ the CC focused on the ‘*duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes’ (emphasis original) mentioned in the preamble to the ICC Statute. The CC also found that it would go further than the SCA and not only find that the SAPS had a power but also a duty to investigate the allegations of torture.⁷⁰¹ Despite the fact that the ICC does not possess universal jurisdiction the CC then found that this duty is most pressing where crimes are committed on the territory of countries that are not party to the Rome Statute or else impunity would prevail. Accordingly such offenders could only be brought to book by means of universal jurisdiction.⁷⁰² The Court managed to place its finger squarely on the most serious problem with an international criminal law, one that even the ICC is unable to solve due to its lack of jurisdiction. Whether universal jurisdiction is the solution is however doubtful. This thesis has also shown that it is, with respect, not cogently convincing to argue that simply because impunity is a problem this suddenly translates to a duty on all States to exercise universal jurisdiction.

5.3.4.3 Presence as requirement for investigations

The respondents dealt next with the contention by the applicants that it could never have been intended that investigations be based on universal jurisdiction *in absentia*. They could not be expected to investigate matters regardless of where, against whom and by whom they are committed. Applicants argued that presence should be a requirement before an investigation could be conducted. It is very likely that political interference played a part in the reluctance of the SAPS to conduct an investigation. Hennie Strydom wonders whether one should ‘in the circumstances surmise that the potential or anticipated political ramifications of an investigation weighed too heavily against compliance with a legally circumscribed investigation duty, and that putting a lid on the matter was the politically expedient way out of the dilemma?’⁷⁰³ It seems in

humanity in order to justify its conclusion that South African authorities had to initiate an investigation. Unfortunately, the Court did not specify the legal foundation of this ‘international [!] obligation’.

⁷⁰¹ *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraph 55

⁷⁰² *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraphs 30-32

⁷⁰³ Hennie Strydom ‘The vicissitudes of the Rome statute in the hands of South Africa’s law enforcement agencies’ *Tydskrif vir die Suid-Afrikaanse Reg* (2012) 822

this case that a certain stance was taken during the drafting of this legislation. Yet, the moment that the Act was to be applied, there seemed to be another political influence trying to undermine the entire process. The interference started at the first possible level, in this case the police. Yet politics were always going to play a decisive influence in matters of this kind. But even when one does not consider the political pressure involved you still have to appreciate the predicament the applicants face in potentially having to conduct investigations against suspects in no way linked to South Africa. It is fair to say that the SAPS should police South Africa effectively before it tries to police the world. The respondents seemed unconcerned with this practical problem and argued instead that it would be illogical if investigations were only allowed when a suspect was present in South Africa and halted again when he left.

It is submitted that the formulation of the ICC Act is to blame for the illogical situation in this regard. What will be better for legal certainty, and a sensible allocation of scarce resources, will be a presence requirement based on a measure of relative permanence, instead of a fleeting presence, or worse – no presence - before investigations are considered and a prosecution instituted. Good examples will be the situations, already discussed above, of Habré living in Senegal and Zardad living in the UK. The problem with the *SALC* case and the Zimbabwean suspects is that after lengthy and expensive court cases it is still almost certain, and probably even more certain after the publicity created by the cases, that none of the suspects will ever see the inside of a South African court.

The respondents referred to the arrest warrant for Omar al-Bashir that has been issued in South Africa to provide an example of how investigative steps could be conducted *in absentia*. But this is an exception to the rule and there has only been one such a request issued yet by the UN Security Council. The point is that such requests will not be issued often. To assist the UN South Africa can easily justify the allocation of scarce resources towards this purpose as an international duty and a sensible diplomatic step based on international cooperation. This is different to receiving frequent requests and then, *mero motu*, launching out against another country.

Werle and Bornkamm point out that ‘South African law permits judicial review of

decisions not to prosecute to an extent that is quite extraordinary compared to other legal systems' and that 'this finding would have been impossible under many other legal systems where prosecutorial discretion is exempt from judicial control.'⁷⁰⁴ The difference in most other countries that provide for universal jurisdiction is that there are various "safe-guards" in the system including that the prosecuting authorities have much more autonomy in their decisions on whether to investigate or not.⁷⁰⁵ This is simply not the case in South Africa. It will be very hard for a court dealing with specific facts and situations to give more than broad guidelines that apply generally. The respondents however asked for precisely this when they asked the Court to rule that 'when an investigation is to be initiated, irrespective of whether it is an international or national crime, each case should be decided on its own merits, within a workable practicable legislative framework.'⁷⁰⁶ The problem is that the current legislative framework is too wide. Every refusal by the police or prosecution will become reviewable. A determined complainant will then simply argue that the prosecutor did not exercise his discretion properly. Thus should the facts differ in the next case, as they inevitably will, the *SALC* case will simply be the first in a long line of cases.⁷⁰⁷

This prediction is confirmed by the CC finding that before South Africa assumes an investigation into an international crime using universal jurisdiction it must determine whether it is reasonable and practicable in the circumstances of each particular case. The authorities must determine, amongst other things, whether a prosecution is likely and whether the perpetrators would likely be present in South Africa on their own or through an extradition request. The enquiry would finally be whether the SAPS acted

⁷⁰⁴ Werle and Bornkamm (Torture in Zimbabwe under Scrutiny in South Africa) (*supra*) 673

⁷⁰⁵ In this regard it is insightful to consider some of the items on the list of Amnesty International's so-called "obstacles to universal jurisdiction", which, it is submitted, may as well be translated "safeguards in national legal systems", See: Amnesty International *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* available at <https://www.amnesty.org/fr/library/asset/IOR53/004/2011/en/d997366e-65bf-4d809022fcb8fe284c9d/ior530042011en.pdf> (last visited on 2014/08/09); some of these include: - presence requirements in order to open an investigation or to seek extradition; - limiting universal jurisdiction to persons who are residents or who subsequently become residents or nationals; - statutes of limitations; political control over decisions to investigate, prosecute or extradite.

⁷⁰⁶ Respondent's Heads of Argument (*supra*) paragraph 100

⁷⁰⁷ Werle and Bornkamm (Torture in Zimbabwe under Scrutiny in South Africa) (*supra*) 671 'The present case could have been an opportunity for the Court to spell out how South Africa's commitment to international criminal law should translate into prosecutorial practice. After all, South African authorities cannot realistically be expected to open up criminal proceedings whenever a crime envisaged in the ICC Act is committed anywhere in the world, just because the suspects might one day enter South African territory. There must be additional elements justifying the conclusion that the prosecution and the police are obliged to investigate. In particular, there must be a reasonable prospect that proceedings will be successful, meaning that they may lead to the prosecution of the suspects in South Africa or support prosecutions elsewhere by securing evidence.'

reasonably in declining to investigate crimes against humanity committed in another country.⁷⁰⁸ A side note is that the Court's mention of extradition as a possible means to exercise universal jurisdiction is, with respect, unfortunate and dangerous. This potentially opens the door to a plethora of cases and seems to indicate that the Court took no notice of even the respondents' admission that universal jurisdiction *in absentia* is not supported in international law. This remark is also utterly wrong and makes no mention of the *ICJ* case of Habré that made an international ruling against such an interpretation, specifically in the case of torture.⁷⁰⁹ But back to when investigations are called for, we can see that the Court effectively took this decision, and all future decisions of this nature, from the hands of the investigative authorities. Who will determine whether the SAPS acted reasonably by declining to investigate, but the Courts? And which complainant or human rights group will ever agree that the SAPS's ruling declining to prosecute is 'reasonable'?

As a practical solution it is submitted that the ICC Act can easily, and should, be amended to provide as an exception for a requirement of preliminary investigations to be conducted whenever the Security Council issues such a request to member UN States. This position would be no different to a request for extradition or for mutual legal assistance from another nation where South Africa takes steps to investigate, arrest and extradite the suspect. As such South Africa will still be able to fulfill its international duties. At home we will however have more certainty, we will be able to allocate scarce resources more predictably, and we will be able to have more success in prosecuting international crimes. As far as foreigners go, it is submitted that the most sensible solution would be to require a link or a measure of permanence to the stay of a suspect in South Africa before investigations or a prosecution is considered. This approach will still ensure that South Africa will not become a safe haven for international criminals.

5.3.4.4 The position in international law

Respondents referred in their argument to the *Lotus* as well as to the *DRC v Belgium* cases to argue that international law does not outlaw investigations based on universal jurisdiction *in absentia*. They pointed out that international law leaves these types of

⁷⁰⁸ *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraphs 63-64

⁷⁰⁹ See paragraph 3.3.3 (*supra*)

arrangements to domestic law and that the only prohibitive rule is that criminal jurisdiction should not be exercised, without permission within the territory of another State. This interpretation of these two cases has already been discussed and criticized and it is not necessary to do so again. It was obviously a response to the argument by the appellants that they are not allowed to investigate matters in terms of universal jurisdiction. But it does not help to argue that there is no rule in international law against universal jurisdiction and leave it there. The reality is that the State whose officials are the subjects of such investigations and prosecutions will usually feel that their sovereignty is undermined.⁷¹⁰ This immediately brings diplomatic considerations, complications and inevitably interference into the picture. It is easy to theorize about this and declare that in terms of international law such a State is not entitled to feel aggrieved or to take steps to protect its citizens. It is to be doubted however that the aggrieved State will share these sentiments. Luc Reydamas says that while universal jurisdiction *in absentia* does not violate the non-interference principle it does contravene the more fundamental principle of sovereign equality of States of which non-interference forms only one aspect.⁷¹¹ It is true that these considerations should not have been the concern of the SAPS at that stage in the *SALC* matter. Yet one feels that this was only the start of the complications and interference, which would continue to intensify as the matter proceeded. It just seems that invoking the *Lotus* case, in the manner that the respondents did, merely postponed these very real problems to a later date.

Respondent quoted as authority for the permissibility of investigations based on universal jurisdiction *in absentia* the *Institute of International Law*, the *Third Restatement of Foreign Relations Law of the United States* as well as the *Princeton Principles on Universal Jurisdiction*. Respondents described the *Institute of International Law* as an organization dedicated to the development of international law. It is submitted that what Luc Reydamas says about the *Third Restatement* applies as well to the statement by the *Institute of International Law*: '[i]ts Restatements of the Law purport to be unofficial codifications of United States law, but in reality contain a healthy dose of attempts to influence the development of the law'.⁷¹² This

⁷¹⁰ Luc Reydamas (Universal Jurisdiction) (*supra*) 223 'it is difficult to determine whether a government has repeatedly objected to, or acquiesced in, another government's practice. The relevant material may consist of confidential diplomatic notes or classified internal memoranda.'

⁷¹¹ Luc Reydamas (Universal Jurisdiction) (*supra*) 224

⁷¹² Luc Reydamas (Universal Jurisdiction) (*supra*) 213

also applies to the *Princeton Principles*. Luc Reydams groups this project along with other ‘policy oriented’ law schools for whom international law is not a fixed set of rules but rather something that must be developed to address issues of concern to the international community. Yet the problem is that courts easily read these statements attempting to influence the law, as the law. Reydams says that although the *Principles* acknowledge that they ‘are of a mixture of *lex lata* and *lex desiderata*, the text itself reads like a confident statement of the law.’ Reydams continues and says that ‘[t]hrough endless recycling of reports like these, universal jurisdiction – however radical and counter-intuitive - became dogma in no time.’⁷¹³ This is true and this is exactly what happened in the *SALC* case. The respondent’s confidently quoted the *Principles* as law and so the Courts accepted it. The troubling part is that this is such an important issue with such potentially far-reaching effects that much more caution is called for.

5.3.4.5 Comparative State Practice

In referring to the approach taken by different countries the respondents argued that an investigation, even in the absence of a suspect ‘would be compatible with customary international law.’⁷¹⁴ As to the countries mentioned in support by the respondents, only the most influential ones will briefly be discussed. It will be useful to refer again to Luc Reydams, who did an in-depth study of state practice on universal jurisdiction. After his study of 14 countries, representative of the major legal systems, he concludes that ‘the primary criterion for including a State in this study was merely that of its having some record of legislative or judicial practice in relation to universal jurisdiction, the resulting number of States is only a small fraction of the world’s total. It therefore follows that in the great majority of States relevant practice is negligible or non-existent.’⁷¹⁵

Respondents used Germany as an example, and as a leading nation, we may well consider how they approach universal jurisdiction. As indicated above the position changed in Germany when the German Code of Crimes against International Law was

⁷¹³ Luc Reydams (Rise and Fall) (*supra*) 337-338

⁷¹⁴ Respondent’s Heads of Argument (*supra*) paragraph 24

⁷¹⁵ Luc Reydams (Universal Jurisdiction) (*supra*) 223

implemented.⁷¹⁶ Before this a legitimizing link with Germany was required and yet quite a lot of war criminals fleeing from the conflict in the Balkans and trying to hide in Germany were prosecuted in the 90's. It was hoped that the new Code would make it even easier to prosecute international criminals. This was however not the case and the report relied upon by respondent mentions, in a section omitted by respondents, that '[i]n light of the considerable experience of German practitioners obtained in the investigation of international crimes...the current commitment does not seem to correspond to that once shown on a practical level by German authorities.'⁷¹⁷ In fact, as far as could be ascertained, there have been no significant universal jurisdiction prosecutions since the implementation of the new Code. This was however not for lack of opportunity or attempts by various groups. Attempts to have investigations and prosecutions launched against Donald Rumsfeld (before and after he left office), Jiang Zemin and the Uzbek Minister of Interior Zokirjon Almatov have all failed.⁷¹⁸ The decision by the federal prosecutor to not investigate charges against Rumsfeld was further upheld by the Higher Regional Court in Stuttgart. The result of this case was that complainants no longer 'have the right to appeal to the courts against the decision of the federal prosecutor not to investigate according to 153f of the Code of Criminal Procedure. Instead complainants must direct their complaint to the Ministry of Justice in a purely administrative procedure'.⁷¹⁹ Several other safeguards have been inserted into the Code including a wide discretion vested in the prosecutor. In terms of the subsidiarity principle the prosecutor has to consider whether another State or the ICC is not already investigating a matter and also the practical ability of the German authorities to investigate a matter. The prosecutor may also refuse to investigate a matter if the likelihood of a successful prosecution is non-existent.⁷²⁰ Seeing that the Zimbabwean officials in this case will probably never be prosecuted in South Africa this might have been a good guideline for South Africa to follow.

⁷¹⁶ Paragraph 4.4 (*supra*)

⁷¹⁷ Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 68

⁷¹⁸ Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 67-68 and also see Sascha-Dominik Bachmann 'The German criminal charges against Donald Rumsfeld the long road to implement criminal justice at the domestic level' *Tydskrif vir die Suid-Afrikaanse Reg* (2008) 265 '[T]he *Rumsfeld* case seems to demonstrate to what extent *Realpolitik* may affect the quest for justice...[it] could have provided the opportunity to test the practical value of the Code of Crimes against International Law...to miss such a chance is unfortunate, considering the fact that the prosecution of international crimes before domestic courts has faced some stagnation since the outcomes in the *Pinochet* and *Yerodia* cases.'

⁷¹⁹ Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 68

⁷²⁰ Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 67 and Section 153(f) of the Code that provides *inter alia* that prosecutor's may in particular decide not to prosecute if (a) no German is suspected of having committed the crime; (b) the offence has not been committed against a German; (c) the accused is not present in Germany or a presence is not to be expected;

The respondents also cited the United Kingdom as example and The *Human Rights Watch* report relied on the *Zardad* case to prove support for universal jurisdiction. It was already argued that this case was unique in its circumstances, which allowed for a rare occurrence of investigations continuing and a prosecution succeeding.⁷²¹ This conclusion is confirmed by even the NGO report mentioning that '[s]everal other reports have been filed under the UK's universal jurisdiction laws but none have yet proceeded to trial.'⁷²² The report also mentions that 'charges of crimes against humanity and genocide can be prosecuted only where a suspect was a UK resident at the time at which the crime was committed.'⁷²³ That a suspect should be a resident before an investigation is initiated was suggested earlier as a feasible solution for universal jurisdiction in South Africa.

Respondents finally mentioned the 2012 draft African Union Model National Law on Universal Jurisdiction⁷²⁴ to show that this document also does not contain a strict presence requirement. With regard to all the mentioned examples the respondent's argued that to read 'a strict presence requirement will not facilitate the purpose and use of the ICC Act in the manner that Parliament intended, and will frustrate compliance by South Africa with its obligations under the Rome Statute'.⁷²⁵ Having argued that the Rome Statute does *not* oblige any country to exercise universal jurisdiction it is disputed that a strict presence requirement would frustrate South Africa in its performance of obligations under the Rome Statute. It seems however that respondents again try to end their argument by focusing more on the domestic law and the legislature's intention than on the position internationally.

It has been contended that Parliament's intentions as contained in the ICC Act are not necessarily in line with the approach taken by the majority of other nations. The respondent's admit that 'there is indeed a global trend against absolute universal jurisdiction in the context of adjudicative jurisdiction, but that there is no single approach adopted by States with regard to a presence requirement in the context of

⁷²¹ Paragraph 3.3.2 (*supra*)

⁷²² Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 93

⁷²³ Human Rights Watch (Universal Jurisdiction in Europe) (*supra*) 94

⁷²⁴ African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia "African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes" (7-15 May 2012), available at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf>. (last visited on 2014/06/10)

⁷²⁵ Respondent's Heads of Argument (*supra*) paragraph 99

non-judicial enforcement jurisdiction, which includes police investigations'.⁷²⁶ One has to ask what the point of such investigations is especially where prosecution is highly unlikely. Obviously the trend against absolute universal jurisdiction is not because the world wants to avoid something like trials *in absentia*, but that they prefer not to exercise universal jurisdiction at all! As stated earlier Belgium and Spain had legislation providing for a very wide form of investigation and prosecution of international crimes in terms of universal jurisdiction. When they changed the legislation they didn't only tighten regulations regarding prosecution but also those regarding investigation. It is submitted that their reconsideration was largely due to the excessively wide range of investigations they were required to conduct, especially when there was very little chance of a successful prosecution.

Countries are mentioned in respondent's argument and reference is made to their requirements regarding presence before investigations are considered but little is said of the actual practice in these countries.⁷²⁷ As the examples of Germany and the United Kingdom showed potential cases are filtered and even blocked by various measures such as the wide discretion bestowed on the prosecutor even though their legislation provides for investigations in the absence of offenders.⁷²⁸ The result is that there have been almost no prosecutions, and probably as few investigations, based on universal jurisdiction in recent years. It is in light of what States actually do that the respondent's final resort to '*the international community's struggle against impunity*' rings rather hollow.

⁷²⁶ Respondent's Heads of Argument (*supra*) paragraph 103

⁷²⁷ France was not mentioned by the respondents but the same situation applies there, see for example: Maximo Langer (The Diplomacy of Universal Jurisdiction) (*supra*) 25 'France ratified the Rome Statute of the ICC in June 2000...This article includes a very narrow universal jurisdiction provision regarding these crimes, establishing four limitations to the exercise of universal jurisdiction by French courts. First, the alleged perpetrator must become a resident of France after the crime. Second, the crimes have to be established by the state where they took place or the state in question must be a party to the ICC Statute. Third, only the prosecutor - not the victim or NGO's as civil parties - may launch formal criminal proceedings. Fourth, the prosecutor may initiate such proceedings only if no other international or national jurisdiction requests the rendition or extradition of the alleged offender.'

⁷²⁸ Maximo Langer (The Diplomacy of Universal Jurisdiction) (*supra*) 10- 41 'These states [Germany, England(and Wales), France, Belgium and Spain] were chosen because, while each has enacted universal jurisdiction statutes and has received universal jurisdiction complaints, they accord varying degrees of control to the executive branch over the resulting prosecutions and trials.'

5.3.5 The exercise of universal jurisdiction as customary international law?

In continuing with the study of contemporary State practice it is necessary to investigate the claim of the respondents that investigations based on universal jurisdiction *in absentia* is compatible with customary international law.⁷²⁹ Customary international law is one of the sources of international law as stipulated by Article 38(1) of the Statute of the International Court of Justice.⁷³⁰ Brierly⁷³¹ describes custom as meaning ‘something more than mere habit or usage; it is a usage felt by those who follow it as obligatory. There must be a feeling that if the usage is not followed some sort of adverse consequence will probably, or at any rate ought to, fall on the transgressor...Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states.’ The first leg of the test is State practice. The second leg is called *opinio juris*. In this regard Brierly says that what we would be looking for is the ‘general recognition among states of a certain practice as obligatory.’

In the *SALC* matter the respondent’s seemed to argue that customary international law has formed on the issue because many States believe that they are allowed to provide for universal jurisdiction. But the test, in this instance, would be whether they regard such practice as obligatory. Being allowed and feeling obliged are incompatible concepts. Respondent’s reference to customary international law, to show that many States believe they are allowed to provide for universal jurisdiction to investigate crimes *in absentia*, does, with respect, not make sense.⁷³²

Claus Kreß, develops this line of reasoning, and argues for a relevant principle of universal jurisdiction based on ‘verbal’ state practice following a ‘modern positivist’ approach. With reference to the preamble of the ICC he argues that States have

⁷²⁹ Respondent’s Heads of Argument (*supra*) paragraph 24

⁷³⁰ The sources as set out are (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁷³¹ Andrew Clapham ‘Brierly’s *Law of Nations*’ (7th ed) 2012 Oxford University Press, Oxford, 57-63

⁷³² Judge Abraham’s separate judgment in the *ICJ Belgium v. Senegal* matter makes this point, quoted in paragraph 3.3.3 (*supra*) ‘Thirdly and finally, certain States among the 51 – and probably many of them – may have decided to extend the jurisdiction of their courts over the crimes in question on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary – but solely in the belief that international law entitled them to do so. Here again the “*opinio juris*” is lacking.’

elevated genocide, crimes against humanity and war crimes to the level of crimes under international law and have solemnly declared that such crimes ‘must not go unpunished’ and that ‘their effective prosecution must be ensured by taking measures at the national level’. Universal jurisdiction is thus seen as an additional effective means to prevent impunity for international crimes. Accordingly Kreß asserts that when States categorize conduct as a crime under international law, this already firmly points toward a customary State competence to exercise universal jurisdiction.⁷³³

In this way much more weight is placed on “verbal State practice”, rather than “hard” State practice. The first problem is, with so little “hard” practice available, the traditional test for *opinio juris* becomes almost useless. The second, but related, problem is that ‘claims may be lofty, inconsistent and even based on misinterpretations and erroneous assumptions as to what the concept of universal jurisdiction is.’⁷³⁴ For example even a “hard” case as significant as *Eichmann* does not necessarily support universal jurisdiction.⁷³⁵ Similarly reports may proclaim that universal jurisdiction was exercised in a case when in actual fact suspects had taken up permanent residence in the forum State and had resisted being sent back to the countries in which their deeds had been done. Or the affected State had consented to, or even supported the prosecution. Or the offences had taken place in the former Yugoslavia or Rwanda and the prosecutor of those tribunals and the UN Security Council had encouraged all States to search for and try suspects on their territory. As Reydams points out in almost all these cases, used as “examples” of universal jurisdiction, extradition was impossible, either legally or practically. Reydams refers to various examples to make his point and then says that in these cases prosecutions were reasonable to everyone and ‘unfolded in a sphere of mutual legal assistance and international law was used to *solve* problems, as it should...Yet media and NGO reports lump together these uncontroversial cases of judicial cooperation and highly contentious cases of judicial intervention under the single rubric of ‘universal jurisdiction’...this is unhelpful and distortive.’⁷³⁶ Relying mostly on “verbal State practice”, as Kreß, proposes tends to sketch a distorted picture of reality.

⁷³³ Claus Kreß (Institut de Droit International) (*supra*) 573-576

⁷³⁴ Matthew Garrod (The Protective Principle) (*supra*) 818

⁷³⁵ See paragraph 2.3 (*supra*)

⁷³⁶ Luc Reydams (Rise and Fall) (*supra*) 345-346

More generally, authors often attempt to prove that States feel obliged to provide for universal jurisdiction over international crimes, by linking the concept to those of *jus cogens* and obligations *erga omnes*.⁷³⁷ These crimes are then usually framed as an attack on the fundamental values of the international community as a whole. Hence, the argument goes that these crimes are of universal concern so that every State in the world has an obligation *erga omnes* to punish such offenders. Should a State thus fail to prosecute such crimes on its own territory or by its nationals, this would be a breach of obligations *erga omnes*, hence qualifying any other State to protect the international community's "fundamental values", using universal jurisdiction.⁷³⁸

The notion of *jus cogens* first appeared in article 53 of the 1969 *Vienna Convention on the Law of Treaties* and provides that '[a] treaty is void if...it conflicts with a peremptory norm of general international law...accepted and recognized by the international community of states as a whole.' The *ICJ* has identified as *jus cogens* the prohibition of inter-State force⁷³⁹, known as one of the fundamental principles of international law, as well as war crimes and crimes against humanity.⁷⁴⁰

The notion of *erga omnes* was introduced in the *ICJ Barcelona Traction* case, where it was stated that:

'...an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State...By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligations *erga omnes*.'⁷⁴¹

According to the *ICJ* these obligations derived from the outlawing of acts of aggression, genocide and the protection of individuals from slavery and racial

⁷³⁷ Harmen van der Wilt (Universal jurisdiction under attack) (*supra*) 1045-1046 and Kenneth Randall (Universal Jurisdiction) (*supra*) 831-832

⁷³⁸ Matthew Garrod (The Protective Principle) (*supra*) 815; Sienho Yee (Concept, Logic and Reality) (*supra*) 505 and Luis Benavides 'The Universal Jurisdiction Principle: Nature and Scope' (2001) 1 *Anuario Mexicano de Derecho Internacional* 32

⁷³⁹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits) *ICJ Reports* 1986, paragraph 190.

⁷⁴⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *ICJ Reports* 2012 at paragraph 95

⁷⁴¹ *Case concerning the Barcelona Traction, Light and Power Company Limited*, *ICJ Reports*, 1970 (Second Phase) paragraph 33

discrimination.⁷⁴² This case should however not be quoted as support for universal jurisdiction. Higgins says that this case is often quoted incorrectly as authority for more than it can sustain and as support for contemporary universal jurisdiction. She explains, however, that the Court was doing nothing of the sort. The matter was a civil case, involving diplomatic protection, and did not involve *erga omnes* obligations.⁷⁴³ It might be because these issues were only dealt with in the abstract that the court provided no reasons as to why it regarded these specific crimes as *erga omnes*.

Since *Barcelona Traction*, the ICJ has not recognized that an act in breach of an obligation *erga omnes* and of a *jus cogens* nature is capable of giving rise to universal jurisdiction.⁷⁴⁴ Later, in the *ICJ Belgium v. Senegal* matter, we saw how Belgium claimed to have a special interest, as an injured party, because of the nature of the crime of torture. The ICJ, in that case however, would not go so far and only found, with reference to the *Barcelona Traction Case*, that the obligations applied *erga omnes partes*.⁷⁴⁵ It is interesting to note that in the *ICJ Belgium v. Senegal* matter the Court added the word “*partes*” to the original phrase *erga omnes* as found in the *Barcelona Traction Case*. It is submitted that while it might still have been possible to use the *obiter* reference to *erga omnes* in *Barcelona Traction* to argue that all nations have a legal interest in the prevention of certain offences the speculation was ended by the *ICJ Belgium v. Senegal* judgment. It was a, not-so-subtle, way of ending random references to *erga omnes* whenever it suited a particular party’s case.⁷⁴⁶

⁷⁴² *Barcelona Traction Case* paragraph 34

⁷⁴³ Rosalyn, Higgins (Problems and Process) (*supra*) 57 ‘Its dictum was made in the context not of the assertion of jurisdiction but of an examination of the law relating to diplomatic protection. Usually, it is necessary for a state, before bringing an international claim, to show that the defendant state has broken an obligation towards the claimant state in respect of its nationals. Only the party to whom the international obligation is due can bring a claim in respect of its breach. The Court was suggesting that, in respect of these offences, the restrictive requirements of the nationality-of-claims rule concerns diplomatic representation in civil claims. This is true of the stated exception to the rule, where obligations are owed *erga omnes*. The universality principle, by contrast, is concerned with the application of criminal jurisdiction.’

⁷⁴⁴ Matthew Garrod (The Protective Principle) (*supra*) 816

⁷⁴⁵ Paragraph 3.3.3(*supra*) and paragraphs 68 and 69 of that judgment

⁷⁴⁶ Alfred Rubin (*Actio Popularis, Jus Cogens and Offenses Erga Omnes*) (*supra*) 271-272 ‘The phrase “*jus cogens*” first appeared in modern positive international law in the 1969 Vienna Convention on the Law of Treaties article 53...No specification was given...as to the substance of any such “peremptory norm.” While some scholars doubted that there was any substance to the set of rules from which treaties could not derogate others began putting their favorite substantive rules into the category and an apparent consensus soon emerged that “human rights” were not only “rights” in the legal order as distinguished from the moral or other normative orders, but were rights from which no derogation by treaty could be permitted: *jus cogens*.’ See also Matthew Garrod (The Protective Principle) (*supra*) ‘The interpretation of the concepts *erga omnes* and *jus cogens* has developed almost entirely, if not exclusively, out of legal scholarship *de lege ferenda*.’

Matthew Garrod says that while ‘[i]t may be one thing to proclaim that crimes under international law are *erga omnes* and *jus cogens*, it is a great conceptual leap to suggest that these concepts permit and give legitimacy to universal jurisdiction under customary international law.’⁷⁴⁷ He points out that just as forceful an argument can be made that other values held by the international community, such as sovereignty, sovereign equality and independence, non-interference in internal affairs and the inviolability of incumbent State officials, possess the status of *erga omnes* and *jus cogens*. Garrod, rightly it is submitted, asks whether it is credible to invoke these concepts to justify universal jurisdiction, while at the same time overriding other principles of international law that probably have an equal status and character. Garrod warns that stretching these; ‘controversial, contested and equivocal,’ concepts beyond their reasonable interpretation will weaken their validity in international law.

Whenever customary international law is used to justify universal jurisdiction it must be remembered that this is not a straightforward issue and is far from settled. The respondent’s brief reference to this effect does not do justice to the complexity, confusion and controversy surrounding this issue in international law.

Yet we see that the Constitutional Court, relying on only one author, ruled that States, even in the absence of binding international treaty law were required to suppress torture, piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid because “all states have an interest” in suppressing these crimes that violate the values constituting the foundation of the world public order.⁷⁴⁸ The Court further attempted to bolster its argument and found that the ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted. Based on the absolute ban on torture the Court then used the piracy analogy to describe the torturer as an enemy of mankind. It is however submitted, in the light of the research done in this thesis, that the Court went much too far. It is the contention of this thesis that these findings are based on assumptions driven mostly by academic writers, without sufficient State practice to support it, and seemingly oblivious to realities inherent in the international system of inter-State politics.

⁷⁴⁷ Matthew Garrod (The Protective Principle) (*supra*) 817

⁷⁴⁸ *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraph 37

5.3.6 Charging the suspects with torture instead of crimes against humanity

The respondents would perhaps have been wiser if it asked the appellants to investigate the suspects for torture instead of crimes against humanity. The Constitutional Court however came to their assistance, and moved onto safer ground, when it, of its own accord, invoked the Torture Convention as justification of a duty to exercise universal jurisdiction.⁷⁴⁹ The Torture Convention indeed provides for a duty to exercise universal jurisdiction over torturers. On the other hand, a duty to prosecute crimes against humanity is generally regarded as incumbent only on the State on whose territory the crime was committed. Third States exercising universal jurisdiction don't have a duty to prosecute, they only have a right to do so.⁷⁵⁰ Werle and Bornkamm⁷⁵¹ argue for a duty to prosecute under customary law on the basis that the acts alleged in the present case amount to torture, whether or not they qualify as crimes against humanity. They point out that while Zimbabwe is not a party to the Convention, South Africa, together with 153 other countries, is. They point out that treaties that enjoy such near universal jurisdiction may give rise to rules of customary international law, provided that there is consistent State practice. They are however skeptical about this issue when they consider the 'highly inconsistent' State practice. According to them 'international support for the Convention is not quite as large as the number of state parties suggest'. They however believe that Article 7(1) of the Torture Convention should apply directly even with respect to torture committed on the territory of a non-State party. Their contention relies on two bases, namely that States Parties to the Torture Convention have entered into the commitment to the prosecution of torture regardless of where it was committed. Secondly, that applying *aut dedere aut judicare* to torture committed on the territory of a non-State party would not interfere in that State's rights. I don't believe their resort to the fact that the obligations arising from the Torture Convention arise from the *jus cogens* prohibition on torture and are owed *erga omnes* was even necessary.⁷⁵² Without going so far, it seems clear that it would not be compatible with South Africa's clear commitment to the provisions of the Torture Convention which unlike the Rome Statute actually provides for universal jurisdiction, if it refrained from taking any measures against

⁷⁴⁹ *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraph 38

⁷⁵⁰ Robert Cryer *et al* (Introduction to International Criminal Law) (*supra*) 73

⁷⁵¹ Werle and Bornkamm (Torture in Zimbabwe under Scrutiny in South Africa) (*supra*) 670-671

⁷⁵² I also do not agree with them, see paragraph 3.3.3 (*supra*) for ICJ Judge Abraham's view that there is no such duty under international customary law to prosecute torture, but only a conventional duty.

alleged torturers present on its territory. The only problem might have been that up until then South Africa had not implemented the Torture Convention in national legislation. If it came to that, they would still have been able, with reference to duties accepted in terms of the Torture Convention, to charge the suspects with similar common law crimes such as assault with intent to do grievous bodily harm. But for crimes committed since the implementation of the domestic Torture Act this will no longer be a problem.

Next, Werle and Bornkamm admit that the exercise of foreign jurisdiction over acts on Zimbabwean territory may constitute interference with Zimbabwe's sovereignty. They are quick to point out, however, that because international law permits such an exercise of universal jurisdiction, Zimbabwe is obliged to tolerate this interference. If South Africa did exercise such a jurisdiction they will certainly hope that Zimbabwe sees the logic of such an argument. But they probably won't. Still, it will ultimately be up to South African authorities (prosecutors *and* politicians) to decide whether they will take this approach. At least their decision will be based on, and backed up by, a sound interpretation of international criminal law. The Constitutional Court, for its part showed little deference to other branches of Government and ventured onto executive and delicate diplomatic terrain when it found it 'very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high profile personalities to be investigated.'⁷⁵³ If, as the Constitutional Court found, merely investigating Zimbabwean officials for torture does not impinge on their sovereignty one cannot help but wonder if this will still be the case if a high ranking Zimbabwean official is actually arrested in South Africa.

Conclusion

The usual justification for universal jurisdiction, namely that any State may act as an agent of humanity to punish its common enemies, is fatally flawed. If this were indeed the position it would follow logically that universal jurisdiction *in absentia* would be a valid concept, steadily gaining traction internationally. The fact that it has

⁷⁵³ *SAPS v. SALC* [2014] ZACC 30 (*supra*) paragraph 62

never formed the basis of jurisdiction, and that it is still losing ground, is a sure sign that a serious mistake is being made.

Relying on the jurisdiction exercised over pirates to find support for universal jurisdiction in antiquity is not valid and even staunch supporters of universal jurisdiction have abandoned a reliance on this analogy. The old writers were in support of State sovereignty; cooperation between them and the protection of State interests and never promoted an elaborate attempt to undermine this system.

Jurisdiction exercised over German war criminals in the aftermath of WWII was based primarily on the protective principle and not universal jurisdiction. This right had always belonged to belligerents for crimes committed against themselves or their allies by a common enemy. Respect for sovereignty and a concern for their own interests weighed more with the Allies than punishing war criminals for atrocious crimes committed against humanity. This same protective principle was confirmed in, the often quoted, case of *Eichmann* when Israel punished him for crimes committed against Jews.

Universal jurisdiction, without recourse to piracy, old authorities and jurisdiction exercised over war criminals after WWII, becomes a concept void of historical support and rhetorical appeal. Small wonder then that proponents grasp at the *Lotus Case* to argue that States may still exercise universal jurisdiction because they are not prohibited from doing so. This is where the gaping gap between prescriptive and enforcement jurisdiction appears. Theorists celebrate their freedom to implement universal jurisdiction and criticize those responsible for applying these laws, but seem to forget that the last-mentioned will be responsible the mess that might follow if they do. This is why it is often said that everyone talks about universal jurisdiction, but no one does anything about it.

After studying the drafting process and jurisdictional provisions of the Genocide, Geneva and Torture Conventions we are able to understand why so few States rely on them to exercise universal jurisdiction. The failed attempts of Belgium and Spain to provide for far reaching universal jurisdiction serve as warnings of what happens when law and power intersect in the international arena.

We found that the International Criminal Court makes no provision for universal jurisdiction except in the unique case of a Security Council referral. And although it relies on member States to exercise primary jurisdiction in terms of complementarity this does not result in a call on these States to exercise universal jurisdiction.

South African legislation provides for universal jurisdiction over a wide range of offences with its ICC Act providing for universal jurisdiction over genocide, war crimes and crimes against humanity being a prime example. The *SALC* case brought the questions raised in this thesis into the spotlight. Almost all the arguments considered, and rejected, above were used by the lawyers arguing for universal jurisdiction to be exercised in South Africa over Zimbabwean officials accused of torture. The application was successful primarily because the lawyers succeeded in convincing the Courts that torturers, like pirates, are *hostes humanis generis*; that South Africa should act as an agent of humanity against a common enemy and that nothing in international law prevents South Africa from exercising universal jurisdiction. The tactic was to sketch a picture of a world increasingly in favor of universal jurisdiction with the logical outcome being that South Africa has followed suit by implementing universal jurisdiction legislation. The result was that the Constitutional Court went even further than they were asked to go by declaring there to be a duty on South Africa to investigate allegations of torture in terms of universal jurisdiction.

It is concerning that the lack of historical, or current, support for universal jurisdiction internationally was not considered. Because this was not done the challenges, potential perils, and a consequent need for caution, were not appreciated. Almost no guidance was given as to when exactly investigations against foreigners should be conducted. It was said that there must be a reasonable prospect of a successful prosecution, which implies a measure of discretion, but should the parties not agree it would unfortunately be the Courts who make a ruling, which involves costs and hassle. It is ironic that it might very well be the Court rulings, and the associated attention drawn to the issue, that result in there no longer being a reasonable prospect of a successful prosecution, because the suspects should never visit South Africa again. By ruling in favor of universal jurisdiction, South Africa has boldly gone where others fear to tread.

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